



February 15, 2018

The Honorable Secretary Wilbur Ross
U.S. Department of Commerce
1401 Constitution Avenue NW
Washington, DC 20230

Dear Secretary Ross:

The Constitutionality Accountability Center is a law firm, think tank, and action center dedicated to the text, history, and values of the Constitution. We write to urge you to reject the Department of Justice’s request that you add a mandatory question to the 2020 Census asking all persons to divulge their citizenship status. The Constitution requires the Census Bureau to count all persons, not merely citizens. Adding a question on citizenship—particularly at this late juncture—threatens to undermine your constitutional duty to ensure that the 2020 Census counts all of the nation’s people.

More than two centuries ago, our Constitution’s Founders established a democracy premised on the idea that all persons—no matter where they are from—deserve equal representation. To ensure a proper count of the nation’s population, the Constitution explicitly requires an “actual Enumeration” of the people.¹ This itself was a revolutionary undertaking. “While other nations had attempted population counts, none had made the count itself an important method of maintaining democracy by mandating it through a founding document.”²

The Constitution’s Framers required a decennial Census directly in the Constitution to prevent partisan manipulation of our representative democracy. The Framers understood that “those who have power in their hands will not give it up while they can retain it. On the [c]ontrary we know they will always when they can rather increase it.”³ Wary that those in power might try to undermine the promise of equal representation for all, the Framers were careful to write into the Constitution a “permanent and precise standard” for the Census—counting all persons—“as essential to ye. fair representation.”⁴ As Hamilton insisted, “[a]n actual census or enumeration of the people must furnish the rule, a circumstance which

¹ U.S. Const., art. I, § 2, cl. 3.

² *Utah v. Evans*, 536 U.S. 452, 510 (2002) (Thomas, J., concurring in part and dissenting in part).

³ 1 *Records of the Federal Convention* 578 (Max Farrand ed., 1911).

⁴ *Id.*

effectively shuts the door to partiality and oppression.”⁵ Thus, the Constitution imposes a clear duty: it requires a count of *all* people living in the United States.

The original Constitution’s promise of equal representation for all persons, however, was marred by the Three-Fifths Clause, which provided that for the purpose of determining representation in Congress, enslaved persons would be counted as three-fifths of a person. This guaranteed to slaveholding states additional representation based on the number of people held in bondage. But, nearly 80 years later, after a bloody civil war fought over slavery, the Fourteenth Amendment fixed this injustice and reaffirmed the need for an accurate count of all persons to apportion representatives among the states.

The Fourteenth Amendment requires apportioning representatives among the states “according to their respective numbers, counting the whole numbers of persons in each state,”⁶ reflecting that representation should be based “on the largest basis of population, counting every man, woman, and child.”⁷ “Numbers, not voters; numbers, not property, this is the theory of the Constitution.”⁸ During the debates over the Fourteenth Amendment, many in Congress sought a drastic change in our constitutional principles of equal representation, arguing that only citizens or voters should be counted in determining representation. The Framers of the Fourteenth Amendment decisively rejected those arguments. They insisted that “the whole immigrant population should be numbered with the people and counted as part of them.”⁹ As history shows, the purpose of the census required by the Constitution has never been to count citizens, but rather to count “the whole body of the people.”¹⁰

Adding a citizenship question to the 2020 Census would break faith with the Constitution’s mandate for a head count of the entire nation. It would also result in bad data, biasing congressional apportionment, redistricting, and funding decisions, for an entire decade. Former directors of the Census Bureau—appointed by Presidents of both parties—have recognized that “[d]irectly inquiring about citizenship status as part of the short form Census . . . would likely exacerbate privacy concerns and lead to inaccurate responses from non-citizens worried about a government record of their immigration status.”¹¹ These concerns are even more pronounced for the 2020 Census. The Census Bureau’s own data demonstrates “an unprecedented groundswell in confidentiality and data sharing concerns, particularly among immigrants or those who live with immigrants.”¹² To add a citizenship question runs directly counter to the constitutional duty on the Census Bureau to ensure a count that includes everyone.

The Department of Justice urges that a citizenship question is necessary to ensure compliance with the Voting Rights Act, but this is transparently false. Since the passage of the Voting Rights Act in 1965, the short form census or the census questionnaire has never asked the

⁵ *The Federalist No. 36*, at 188 (Clinton Rossiter rev. ed. 1999).

⁶ U.S. Const., amend XIV, § 2.

⁷ Cong. Globe, 39th Cong. 1st Sess. 1280 (1866).

⁸ *Id.* at 2767.

⁹ *Id.* at 432.

¹⁰ *Id.* at 385.

¹¹ Brief of Former Directors of the U.S. Census Bureau as *Amici Curiae*, at 23, *Evenwel v. Abbott*, 136 S. Ct. 1220 (2016).

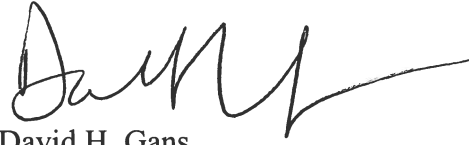
¹² Mikelyn Meyers, U.S. Census Bureau, *Respondent Confidentiality Concerns and Possible Effects on Response Rates and Data Quality for the 2020 Census*, at 15 (Nov. 2, 2017).

American people to report their citizenship. A mandatory question on citizenship has never been necessary to ensure robust protection for the right to vote. This is a specious justification for undercutting what the Constitution mandates: a count of all the people.

Sincerely,



Elizabeth B. Wydra
President
Constitutional Accountability Center



David H. Gans
Director of the Human Rights, Civil Rights
and Citizenship Program

cc: Donald F. McGahn, White House Counsel
Peter Davidson, General Counsel, Department of Commerce
The Honorable Ron Johnson Chairman, Senate Homeland Security and Governmental Affairs Committee
The Honorable Claire McCaskill Ranking Member, Senate Homeland Security and Governmental Affairs Committee
The Honorable Trey Gowdy Chairman, House Committee on Oversight and Government Reform
The Honorable Elijah Cummings Ranking Member, House Committee on Oversight and Government Reform