

July 23, 2019

The Honorable Elijah E. Cummings, Chairman
The Honorable Jim Jordan, Ranking Member
U.S. House Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Cummings and Ranking Member Jordan:

We write to you regarding President Trump's Executive Order that will require federal agencies to transfer personal data to the Department of Commerce to determine the number of non-citizens in the United States.¹ EPIC is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues.² We litigated *EPIC v. Department of Commerce*³ to block the Census Bureau from collecting personal data about citizenship status because the agency had failed to complete required privacy impact assessments. And we previously successfully blocked the efforts of the Presidential Advisory Commission on Election Integrity to obtain state vote data.⁴

We write to draw your attention to the many ways in which the Executive Order could undermine Privacy Act safeguards and we urge the Committee to continue its oversight of the collection and use of data concerning citizenship so as to ensure privacy protections for all Americans. Although President Trump has abandoned his quest to seek citizenship information in the 2020 Census, the plan to aggregate data from other agencies in the Commerce Department is also problematic. The Privacy Act imposes limits on the ability of federal agencies to transfer personal data to other agencies specifically to prevent determination about individuals without adequate due process safeguards. The E-Government is intended to assess risks of data collection "prior" to the collection of personal information.

Because the Executive Order contemplates both the collection of statistical data and the use of citizenship data for determinations about individuals, we urge you to scrutinize closely the Executive Order. As the Supreme Court recently made clear in the census decision, the Commerce

¹ *Executive Order on Collecting Information about Citizenship Status in Connection with the Decennial Census* (Jul. 11, 2019), <https://www.whitehouse.gov/presidential-actions/executive-order-collecting-information-citizenship-status-connection-decennial-census/> [hereinafter Citizenship Executive Order].

² *About EPIC*, EPIC (2019), <https://www.epic.org/epic/about.html>.

³ *EPIC v. Dep't of Commerce*, No. 19-5031 (D.C. Cir. Jun. 28, 2019).

⁴ *EPIC v. Presidential Election Commission*, EPIC (2019), <https://www.epic.org/privacy/litigation/voter/epic-v-commission/>; Allison Kite, *Data collected by Trump's Kobach-led voter fraud commission is 'entirely deleted'*, Kan. City Star (Aug. 31, 2018) <https://www.kansascity.com/news/politics-government/article217593970.html>.

Department's stated purpose for collecting the data was "contrived."⁵ We believe there is a similar problem with the President's Executive Order.

Summary of the Executive Order on Collecting Information About Citizenship Status in Connection with the Decennial Census

In the Executive Order, the President stated that he is "ordering all agencies to share information requested by the Department [of Commerce] to the maximum extent permissible under law."⁶ The President further stated that he is establishing "an interagency working group with a goal of *making available to the Department administrative records showing citizenship data for 100 percent of the population.*" *Id.* (emphasis added).

The President said further that he is "ordering the Secretary of Commerce to consider mechanisms for ensuring that the Department's existing data-gathering efforts expand the collection of citizenship data in the future."⁷ And he stated that he is "directing the Department to strengthen its efforts, consistent with law, to obtain State administrative records concerning citizenship."⁸

The President then sets out several arguments to ensure that "the Department has available the best data on citizenship that administrative records can provide, consistent with law, . . ." Among those interests identified is the identification of those who are eligible for public benefits.

The Executive Order continues, "data identifying citizens will help the Federal Government generate a more reliable count of the unauthorized alien population in the country." A subsequent statement describes a recent "massive influx of illegal immigrants at our southern border," states that "hundreds of thousands of aliens who entered the country illegally have been released into the interior of the United States pending the outcome of their removal proceeding," and warns that "more than 1 million illegal aliens who have been issued final removal orders from immigration judges and yet remain at-large in the United States."⁹ The Executive Order also cites a need to "inform debate about legislative proposals to enhance enforcement of immigration laws and effectuate duly issued removal orders."¹⁰ The Executive Order aims to enhance the provision of granular local citizenship data to the States for the purpose of redistricting based on "voter-eligible citizens."

The Executive Order does plainly state, "generating accurate data concerning the total number of citizens, non-citizens, and illegal aliens in the country has nothing to do with enforcing immigration laws against particular individuals. It is important, instead, for making broad policy determinations. . . . Administration, the data confidentiality protections in Title 13 shall be fully respected."¹¹

⁵ *Dep't of Commerce v. New York*, ---U.S. ---, 139 S.Ct. 2551, 2579 (2019).

⁶ Citizenship Executive Order, *supra* note 1 at Sec. 1.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

The Order then states that “all agencies shall promptly provide the Department the maximum assistance permissible, consistent with law, in determining the number of citizens, non-citizens, and illegal aliens in the country, including by providing any access that the Department may request to administrative records that may be useful in accomplishing that objective.”¹² This section sets out in more detail the mandate to “establish citizenship status for 100 percent of the population:”

The Secretary of Commerce shall instruct the Director of the Census Bureau to establish an interagency working group to coordinate efforts, consistent with law, to maximize the availability of administrative records in connection with the census, with the goal of obtaining administrative records that can help *establish citizenship status for 100 percent of the population*.¹³

Evaluation of the Executive order on the Collection of Citizenship Data

It is clear from the text of the Executive Order that there are two distinct aims: (1) to produce data on the number of non-citizens in the United States, and (2) to identify non-citizens in the United States. While the first goal contemplates the creation of statistical records that could be useful for public policy determinations, the latter implicates fundamental due process rights and will impact both citizens and non-citizens.

Determining “Citizenship Status”

The repeated use of the phrase “citizenship status” in the Executive Order – it appears also in the title – is a clear warning that the Executive Order is intended to fulfill a dual purpose: not only does the President intend to count the number of citizens for statistical purposes, but he also intends to individually identify *who* is a citizen. If the aim were solely to obtain data concerning citizenship, then it would not be necessary to use the term “status,” which reflects an individual legal determination. The intent to aggregate individually identifying citizenship data is underscored by the President’s stated desire to pinpoint “data identifying citizens.”

Access to State Records

The Executive Order also contemplates a massive collection of personal data maintained by the states,¹⁴ not unlike the efforts of the Presidential Advisory Commission on Election Integrity to obtain state voter records. That data collection effort was later suspended and the Commission disbanded¹⁵ after state officials, privacy experts, and members of Congress objected.

This data collection program raises many similar concerns and it should be expected that state officials, privacy experts, and members of Congress will also object. Cybersecurity attacks

¹² *Id.* at Sec. 3.

¹³ *Id.* (emphasis added)

¹⁴ Executive Order at 4 (“I am directing the Department to strengthen its efforts, consistent with law, to obtain State administrative records concerning citizenship.”).

¹⁵ *Executive Order on Termination of the Presidential Advisory Commission on Election Integrity* (Jan. 3, 2018), <https://epic.org/privacy/litigation/voter/epic-v-commission/EPIC-v-Commission-termination-exec-order-010318.pdf>.

have increasingly targeted state agencies.¹⁶ As a result, the governments of 29 states have enacted laws requiring increased security measures to protect sensitive information about its residents.¹⁷ The National Conference of State Legislatures (NCSL) has highlighted that because “governments hold a vast amount of data about citizens, including personally identifiable information such as Social Security numbers, driver’s license information, and tax and financial information . . . protecting that information and maintaining the public’s trust is critically important.”¹⁸

Arkansas chief privacy officer Jennifer Davis has advocated for controls on government data that “may mean [state agencies] cannot use the data beyond its intended purpose.”¹⁹ In response to the Administration’s initial attempt to obtain citizenship data using the 2020 census, a coalition of state attorneys general wrote a letter to the Census Bureau emphasizing immigrant populations’ increasing “concerns about confidentiality and data sharing.”²⁰ For the same reason, state attorneys general will also object to the administration’s plans to collect state data. Kristen Clarke, president of Lawyers Committee for Civil Rights, has already voiced “grave concerns about the administration’s continued dogged pursuit of citizenship information for what appear to be improper, discriminatory and unconstitutional uses.”²¹

Current Administration Practices Concerning Non-Citizens

To interpret the intent of the July 11, 2017 Executive Order, it is appropriate to consider related Administration practices that could shed light on the motive. On the same day that the President issued the Executive Order, the New York Times reported that Immigration and Customs Enforcement would renew “[n]ationwide raids to arrest thousands of members of undocumented families.”²² According to the Times, the “operation, backed by President Trump, had been postponed, partly because of resistance among officials at his own immigration agency.”

The President’s decision to renew enforcement actions against non-citizens on the same day that he announces new efforts to gather data on non-citizens is prima facie evidence that the data the President seeks to obtain will not be used for purely statistical purposes.

¹⁶ National Conference of State Legislatures, *Data Security Laws: State Gov’t* (2019), <http://www.ncsl.org/research/telecommunications-and-information-technology/data-security-laws-state-government.aspx>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Adam Stone, *As Privacy Concerns Grow, States Create Bold Policies*, *Government Technology* (Aug. 2019), <https://www.govtech.com/policy/As-Privacy-Concerns-Grow-States-Creat-Bold-Policies.html>.

²⁰ Letter from State Att’ys General to Wilbur Ross, Sec’y of Commerce at 2 (Feb 12, 2018), https://oag.ca.gov/system/files/attachments/press_releases/multi-state_letter_2020_census.pdf.

²¹ Bob Egelko, *Trump Drops Census Citizenship Question, Will Draw Data From Federal Agencies*, *San Francisco Chronicle* (July 11, 2019), <https://www.sfchronicle.com/nation/article/Trump-plans-announcement-on-census-citizenship-14088783.php>.

²² Caitlin Dickerson and Zolan Kanno-Youngs, *Thousands Are Targeted as ICE Prepares to Raid Undocumented Migrant Families*, *N.Y. Times*, July 11, 2019, <https://www.nytimes.com/2019/07/11/us/politics/ice-families-deport.html>.

The Privacy Act of 1974

Congress has long been aware of the risks that arise from the consolidation of personal data across the federal government. With passage of the Privacy Act in 1974, Congress sought to establish safeguards for personal data collected by the federal government, limit the transfer of personal information between federal agencies, and establish procedural safeguards for determinations that might result from a computer match.²³

Additionally, Section 208 of the E-Government Act sets out requirements for comprehensive Privacy Impact Assessments prior to initiating a new collection of personal information.²⁴ The aim of Section 208 is to “ensure sufficient protections for the privacy of personal information” before agencies launch a new data collection program.²⁵

The Executive Order notes the intent to comply with law and specifically cites the Title 13 obligations of the Census Bureau. But there is no consideration of how the Privacy Act or the Section 208 requirements might constrain the proposed data collection.

Compromised Accuracy and Completeness of Administrative Records

The President states six times in his Executive Order that he wants to use administrative records for the purpose of obtaining “accurate and complete” data on the number of noncitizens. Yet, the U.S. Census Bureau’s own evidence demonstrates that gaps in administrative records will form an incomplete and biased citizenship count.

The U.S. Census labeled the use of administrative records as “Alternative C” in its decisionmaking process.²⁶ It identified seven “gaps” in administrative records:

- (1) U.S. citizens from birth with no SSN or U.S. passport;
- (2) U.S. citizens from birth born outside the United States without a passport who applied for an SSN before they were required to provide proof of their citizenship to do so;
- (3) U.S. citizens naturalized before 2001 who did not inform the SSA of their naturalization;
- (4) U.S. citizens who were automatically naturalized if they were under eighteen when their parents were naturalized after 1999, but did not inform USCIS or receive a U.S. passport;
- (5) lawful permanent residents (“LPRs”) who obtained that status before 2001, but lack an SSN or received an SSN before the SSA asked about citizenship;
- (6) noncitizen, non-LPR residents who do not have an SSN (or other taxpayer identification number) and who have not applied for a visa extension; and
- (7) persons for whom citizenship does appear in administrative records, but for whom it is not possible to link those records with decennial census data.²⁷

If the implementation of the Executive Order follows Alternative C projections, then these gaps will not be filled and the citizenship count will remain incomplete. Judge Furman explained,

²³ Pub. Law 93-579, *codified at* 5 U.S.C. §552a.

²⁴ E-Government Act of 2002, H.R. 2548, 107th Cong. § 208(b)(1)(A).

²⁵ *Id* at § 208(a).

²⁶ *New York v. U.S. Dep’t of Commerce*, 351 F.Supp.3d 502, 537 (S.D.N.Y. 2019).

²⁷ *Id* at 536.

“Under Alternative C, the Census Bureau expected to link 295 million people — 89.4% of the population — to high-quality citizenship data... It would be unable to identify the citizenship status of 35 million people through linking, leaving those to be modeled.”²⁸ Crucially, “the quality of administrative record data varies for different groups,” which can result in a systemic bias.²⁹ Thus, as Judge Furman explained, using administrative records “will actually differentially undercount Hispanics and people who live in noncitizen households.”³⁰

If used by states to draw districts based on voter-eligible population, as the President encourages in his Executive Order, this biased undercount could disenfranchise Hispanics.

The President’s Executive Order does not eliminate the risk of a biased undercount previously identified by legal challenges to the President’s proposed citizenship question on the U.S. Census. Judge Furman acknowledged: “Thus, although in a simple one-to-one comparison, the administrative records available to the Census Bureau are a more reliable source of accurate answers to questions about a person’s citizenship status than survey questions, *see* AR 1285, *the administrative records proposed to be used for this purpose would still tend to undercount people who live in noncitizen households.*”³¹

Alternative Strategies to Determine the Number of Non-Citizens in the United States

There are less intrusive ways to determine the number of non-citizens in the United States. Since 2005, the Census Bureau has inquired about citizenship on the American Community Survey — a questionnaire sent annually to about 2.5 percent of households. A simple and inexpensive solution is to extrapolate from the ACS to determine the number of non-US citizens in the United States. Similar extrapolations with even smaller data sets are performed routinely by the federal government. This strategy would not expose American’s personal data to privacy risks or generate a comprehensive list of non-citizens.

Use of Privacy Preserving Techniques

There are techniques that make it possible to combine elements from large data sets while safeguarding privacy. The National Academies of Sciences, Engineering, and Medicine recently completed two studies on this topic, noting:

Threats from data breaches and the growing availability of other sources of data that might be used to re-identify individuals or entities require statistical agencies to reconsider how they can maintain data confidentiality. The publication of statistics covering various groups and subgroups requires careful consideration of how to safely release statistical products and of the potential privacy losses that might occur.³²

²⁸ *Id.* at 537.

²⁹ *Id.* at 588.

³⁰ *Id.* at 578.

³¹ *Id.* at 588.

³² Nat’l Acad. of Sciences, Engineering, and Medicine, *Innovations in Federal Statistics: Combining Data Sources While Protecting Privacy* 82 (2017); *see also* Nat’l Acad. of Sciences, Engineering, and Medicine, *Federal Statistics, Multiple Data Sources, and Privacy Protection: Next Steps* (2017).

In addition to privacy concerns related to security and encryption, the studies discuss “threats to privacy that come from the desired outputs of statistical data analysis systems”: “there are fundamental mathematical limits on ‘how much’ can be computed while maintaining any reasonable notation of privacy: extremely detailed estimates of too many statistics can effectively result in a complete loss of privacy.”³³ The Executive Order contemplates exactly this kind of excessive use of data and statistics, “ordering *all* agencies to share information requested by the Department to the *maximum* extent permissible under law.” The massive data collection proposed also creates a heightened risk of data breach.

Proposed techniques to address these privacy concerns include “minimizing the personal data that are collected, minimizing disclosure risk by restricting the data that are released, controlling access to and use of the data, encrypting data, and using differential privacy techniques to measure and control cumulative privacy loss.”³⁴ However, there is no indication in the Executive Order that such techniques will be adopted.

Citizenship Data Collection as Implemented with FOIA Requesters

In addition to its work on privacy protection, EPIC is also an open government litigator and works with FOIA experts on a wide range of open government matters. It has recently come to our attention that federal agencies are now asking those who are seeking information from the federal government under the Freedom of Information Act to reveal their citizenship status.³⁵ However, there is no basis in the federal law for this request for personal information, and the collection of this data implicates statutory and constitutional rights. The question appears intended to chill the exercise of a right established by Congress that draws no distinction between citizens and non-citizens.

Viewed against the backdrop of the Executive Order the collection of this data is another warning sign that the administration intends a far more intrusive data collection program for citizenship information than was originally considered for the 2020 Census.

We urge the Committee to investigate this matter promptly.

Sincerely,

/s/ Marc Rotenberg
Marc Rotenberg, President, EPIC

John Davisson, EPIC Counsel
Caitriona Fitzgerald, EPIC Policy Director
Enid Zhou, EPIC Open Government Counsel
Jess Hui, 2019 EPIC IPIOP Clerk

Lauren O'Brien, 2019 EPIC IPIOP Clerk
Sarah Parker, 2019 EPIC IPIOP Clerk
Sonali Seth, 2019 EPIC IPIOP Clerk
Jacob Daniel Wiener, 2019 EPIC IPIOP Clerk

³³ *Innovations in Federal Statistics* at 92.

³⁴ *Id.* at 82.

³⁵ Anne L. Weisman, *Re: Freedom of Information Act Request No. 4329146*, Citizens for Responsible Ethics in Washington (Apr. 23, 2019) <https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2019/04/23161049/FINAL-TSA-letter.pdf>