

Exhibit 13

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER to the

U.S. CENSUS BUREAU

2020 Census

83 FR 26643

August 7, 2018

The Electronic Privacy Information Center (“EPIC”) submits these comments in response to the Census Bureau’s notice¹ on the 2020 decennial census.

EPIC is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues. The Census implicates numerous privacy issues.² We ask you to consider the risks of personal data being used for purposes that may undermine the integrity, reliability, and purpose of the U.S. census. EPIC specifically asks the Census Bureau to suspend the citizenship question from the 2020 census form until a thorough and updated Privacy Impact Assessment is conducted. So far, the Bureau has failed to demonstrate the data gathered from that particular question will not undermine the privacy rights of those who respond to the census.

EPIC has particular expertise with the misuse of census data after 9-11. And documents EPIC obtained under the Freedom of Information Act led to important reforms at the agency. We urge you not to take our comments lightly.

EPIC supports the work of the Census Bureau and the use of statistical analysis in policymaking and other government initiatives.³ The Census is an essential part of understanding the changing demographics in America. The census helps ensure evidence-based policy decisions and census data is the source of much political and economic planning in the United States. However, it is of the utmost importance the individual privacy is respected. Every effort must be taken to ensure that the personal information of individuals and that census data is not used improperly.

¹ U.S. Census Bureau, *Proposed Information Collection; Comment Request; 2020 Census*, Notice, 83 FR 26643 (June 8, 2018), <https://www.federalregister.gov/documents/2018/06/08/2018-12365/proposed-information-collection-comment-request-2020-census>.

² *The Census and Privacy*, EPIC, <https://epic.org/privacy/census/>.

³ EPIC testified before the Commission on Evidence-Based Policymaking and called for the Commission to adopt innovative privacy safeguards to protect personal data and make informed public policy decisions. Marc Rotenberg, Commission on Evidence-Based Policymaking: Privacy Perspectives, before the National Academies of Science, Sep. 9, 2016, <https://epic.org/privacy/wiretap/RotenbergCEBP-9-16.pdf>.

EPIC knows that the Census Bureau takes its confidentiality requirements seriously⁴ and that some of the strictest privacy laws in the U.S. apply to census data.⁵ But the addition of the citizenship question to the 2020 census raises new privacy issues. The Privacy Impact Assessment for the census indicates that the Bureau has not given proper consideration to these issues.

There has been greater concern about the confidentiality of 2020 census data than in previous decennial censuses. The Census Bureau conducted a study in 2017 that found respondents expressing new concerns including the “Muslim ban,” the dissolution of DACA, and Immigration and Customs Enforcement.⁶ The study found that these concerns were most pronounced among immigrant respondents.⁷

Part I discusses prior abuses of census data, to remind the Bureau that fears of 2020 census data being misused are not abstract. Part II explains why census data should never be used for enforcement purposes. Part III addresses the data integrity issues caused by the addition of the untested question. Part IV describes the Bureau’s Privacy Impact Assessment and why it does not address the privacy risks raised by the addition of the citizenship question.

I. Past Misuses of Census Data

Despite strong census privacy laws, the U.S. has a sordid history of misusing census data to target minority groups. The most egregious misuse of census data was the role it played in the internment of Japanese-Americans during World War II.⁸ In 1943 the Census Bureau complied with a request by the Treasury Secretary for the names and locations of all people of Japanese ancestry in the Washington, D.C., area.⁹ The Bureau should remember this human rights abuse every time another agency requests census data.

After 9-11, EPIC pursued a Freedom of Information Act request about the potential misuse of census data. Documents obtained by EPIC revealed that the Census Bureau had provided the

⁴ Ron Jarmin, *The U.S. Census Bureau’s Commitment to Confidentiality*, Census Blog (May 7, 2018) https://census.gov/newsroom/blogs/director/2018/05/the_u_s_census_bure.html.

⁵ 92 Stat. 915; Public Law 95-416. The Census Bureau cannot disclose “personally identifiable information about an individual to any other individual or agency until 72 years after it was collected for the decennial census.”

⁶ Center for Survey Measurement, MEMORANDUM FOR Associate Directorate for Research and Methodology (ADRM) Respondent Confidentiality Concerns (Sept. 20, 2017), <https://www2.census.gov/cac/nac/meetings/2017-11/Memo-Regarding-Respondent-Confidentiality-Concerns.pdf>.

⁷ *Id.* at 1.

⁸ JR Minkel, *Confirmed: The U.S. Census Bureau Gave Up Names of Japanese-Americans in WW II*, *Scientific American* (March 30, 2007), <https://www.scientificamerican.com/article/confirmed-the-us-census-b/>.

⁹ W. Seltzer and M. Anderson, “Census Confidentiality under the Second War Powers Act (1942-1947).” Paper prepared for presentation at the annual meeting of the Population Association of America, New York, March 29-31, 2007, *available at* <http://studylib.net/doc/7742798/census-confidentiality-under-the-second-war-powers>.

Department of Homeland Security (“DHS”) with census data on individuals of Arab ancestry.¹⁰ In 2004 EPIC obtained documents revealing that the Census Bureau provided the DHS statistical data on people who identified themselves on the 2000 census as being of Arab ancestry. The special tabulations were prepared specifically for the law enforcement agency. There is no indication that the Department of Homeland Security requested similar information about any other ethnic groups.

One document,¹¹ obtained by EPIC, shows cities with populations of 10,000 or more and with 1,000 or more people who indicated they are of Arab ancestry. For each city, the tabulation provides total population, population of Arab ancestry, and percent of the total population which is of Arab ancestry. The tabulations were produced using data from the 2000 census long-form questionnaire, which goes to only a sample of the population. A second document¹² shows the number of census responses indicating Arab ancestry in certain zip codes throughout the country. The responses indicating Arab ancestry are subdivided into Egyptian, Iraqi, Jordanian, Lebanese, Moroccan, Palestinian, Syrian, Arab/Arabic, and Other Arab. Although this data was not personally identifiable, its disclosure to a law enforcement agency was unethical.

The reason DHS gave for requesting these tabulations was to determine which languages signs should be in at international airports.¹³ Heavily redacted emails¹⁴ between a Census Bureau analyst and a DHS official show that the Bureau gave the documents before the intended purpose for the data was known and that this explanation was given after the tabulations had already been disclosed. The ex-post-facto reason given by DHS seems pretextual.

As a result of these revelations, resulting from EPIC’s FOIA litigation, the Census Bureau revised its policy on sharing statistical information about “sensitive populations” with law enforcement or intelligence agencies. Customs and Border Protection also changed its policy on requesting “information of a sensitive nature from the Census Bureau.”¹⁵

EPIC’s FOIA efforts led the Census Bureau to implement new procedures regarding the release of “potentially sensitive data to requesting law enforcement agencies and organizations or individuals.”¹⁶ EPIC supported those efforts but recognizes also the ongoing concerns about the

¹⁰ *Department of Homeland Security Obtained Data on Arab Americans From Census Bureau*, EPIC, <https://epic.org/privacy/census/foia/>; Lynette Clemetson, *Homeland Security Given Data on Arab-Americans*, New York Times, Jul. 30, 2004,

<http://www.nytimes.com/2004/07/30/us/homeland-security-given-data-on-arab-americans.html>.

¹¹ EPIC FOIA, Tabulation 1: “Places with 10,000 or More Population and with 1,000 or More Persons of Arab Ancestry: 2000” https://epic.org/privacy/census/foia/tab_1.pdf.

¹² EPIC FOIA, Tabulation 2: “People of Arab Ancestry by ZIP Code Tabulation Area: 2000” https://epic.org/privacy/census/foia/tab_2.pdf.

¹³ EPIC FOIA, https://epic.org/privacy/census/foia/census_emails.pdf.

¹⁴ *Id.*

¹⁵ U.S. Customs and Border Protection, *Policy for Requesting Information of a Sensitive Nature from the Census Bureau*, Memorandum (Aug. 9, 2004), <https://epic.org/privacy/census/foia/policy.pdf>.

¹⁶ Census Bureau News, “U.S. Census Bureau Announces Policy Regarding Sensitive Data,” press release CB04-145, August 30, 2004; Lynette Clemetson, *Census Policy On Providing Sensitive Data Is Revised*, New York Times, Aug. 31, 2004, <http://www.nytimes.com/2004/08/31/us/census-policy-on-providing-sensitive-data-is-revised.html>.

potential misuse of data collected by government agencies. Amid rising fears that some minority groups may be targeted by law enforcement agencies, your committee should ensure that the data collected by the federal government is not misused.

II. Census Data Should Never Be Used for Enforcement Purposes

Using census data to help enforce laws is a corruption of the decennial census's constitutional purpose. The Department of Justice ("DOJ") requested the citizenship question on the census would allow the agency to better enforce Section 2 of the Voting Rights Act, which bars the dilution of voting power of a minority group through redistricting. DOJ wants census-block-level data for locations where they suspect Section 2 violations have occurred.

The decennial census's statistical purpose is frustrated when other agencies ask it to collect data for other purposes. The DOJ's responsibility to enforce the Voting Rights Act is vital to ensuring fair elections. In its request to the Bureau, the DOJ called the decennial census the "most appropriate vehicle" for collecting data on the citizen voting-age population.¹⁷ EPIC disagrees with this assertion. The decennial census was never intended to be a catch-all data collection to assist other federal agencies. In fact, the statutes concerning the privacy of census data are meant to expressly prohibit this.

If the Census Bureau gets into the business of collecting data because it will assist other federal agencies enforce laws, it will be difficult to stay true to its constitutional purpose of conducting impartial statistical analysis. And it will undermine the integrity, accuracy, and reliability of the census. As a former director of the Bureau succinctly put it thirteen years ago: "The Census Bureau cannot become a quasi-investigatory agency and still perform its basic responsibilities as a statistical agency."¹⁸ The Bureau does not serve an investigatory function and the DOJ (or any other agency) should not expect it to.

III. Data Integrity

When a new question is added this late in preparations for the 2020 census, the burden of proof is on those proposing the new question to establish that it will not impact the integrity of the data collected. The fact that the 2020 census will have an additional question—regardless of what the question asks—is likely to yield lower response rates. As Secretary Ross told Congress: "One of the problems with adding questions is reduced response rates. It may seem counterintuitive, but the

¹⁷ *Re: Request to Reinstate Citizenship Question on 2020 Census Questionnaire* (Dec. 12, 2017), <https://www.documentcloud.org/documents/4340651-Text-of-Dec-2017-DOJ-letter-to-Census.html>.

¹⁸ *Counting the Vote: Should Only U.S. Citizens be Included in Apportioning Our Elected Representatives?*, Hearing Before Subcomm. on Federalism and the Census of the H. Comm. on Gov't Reform, 109th Cong. 77 (2005) (statement of former director of U.S. Census Bureau Kenneth Prewitt).

more things you ask in those forms, the less likely you are to get them in.”¹⁹ And the fact that the new question has not been tested will create further problems with the integrity of the 2020 census data.

Six former directors of the Census Bureau—who served under both Republican and Democrat administrations—wrote to Secretary Ross to warn him that adding a new question to the 2020 census without adequate testing “at this late point in the decennial planning process would put the accuracy of the enumeration and success of the census in all communities at grave risk.”²⁰ The typical process for adding new questions takes multiple years and requires extensive testing. Not only did the citizenship question not go through this process, but it was added after the 2018 End—End Census Test was already underway, so it was not even tested in what is meant to be the “dress rehearsal” for the 2020 census.

The former directors said: “even small changes in survey question order, wording, and instructions can have significant, and often unexpected, consequences for the rate, quality, and truthfulness of response.”²¹ But this is a significant change: a new question on a sensitive topic. In addition to a lower response rate, the question would cause an increase in inaccurate responses because “[t]here would be little incentive for non-citizens to offer to the government their actual status.”²²

IV. Insufficiency of Privacy Impact Assessment

The Privacy Impact Assessment (“PIA”) for the 2020 decennial census²³ indicates that the Census Bureau has not undertaken an appropriate analysis of the privacy risks of the citizenship question. “Citizenship” is listed as “other general personal data” that will be collected by the census.²⁴ But, where the Bureau is required to indicate the status of the information system, it selects: “This is an existing information system without changes that create new privacy risks.”²⁵ There is no analysis of the new question.

¹⁹ Rep. Jimmy Gomez Questions Secretary Ross at Oversight Hearing (Oct. 12, 2017), <https://www.c-span.org/video/?c4685802/rep-jimmy-gomez-questions-secretary-ross-oversight-hearing?c4685802/rep-jimmy-gomez-questions-secretary-ross-oversight-hearing/video/>.

²⁰ Letter of Former Directors of U.S. Census Bureau to The Honorable Wilbur L. Ross (Jan. 26, 2018), https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2018/03/27/Editorial-Opinion/Graphics/DOJ_census_ques_request_Former_Directors_ltr_to_Ross.pdf.

²¹ *Id.*

²² Brief of Amici Curiae, *Evenwel v. Abbot*, at 25, <http://www.scotusblog.com/wp-content/uploads/2015/10/Evenwel-FormerCensusBureauDirectorsBrief092515.pdf> (Amici are former directors of the Census Bureau).

²³ U.S. Department of Commerce, U.S. Census Bureau, *Privacy Impact Assessment for the CEN08 Decennial Information Technology Division* (July 28, 2018) http://www.osec.doc.gov/opog/privacy/Census%20PIAs/CEN08_PIA_SAOP_Approved.pdf.

²⁴ *Id.* at 3.

²⁵ *Id.* at 2.

The PIA does not satisfy the Department of Commerce’s own standards.²⁶ A PIA must be updated “where a system change creates new privacy risks.” The Department of Commerce lists nine examples of new privacy risks, and the addition of the citizenship question and the stated purposes for doing so would create at least four of those risks.

The new question would alter the character of the data: “when new information in identifiable form added to a collection raises the risks to personal privacy (for example, the addition of health or financial information).”²⁷ Citizenship data is new information and it is identifiable because it is collected alongside the other information of the person filling out the census form. Immigration status added to the collection of the other demographic data collected by the census undeniably raises the risk to personal privacy. If that privacy were to be violated, that information could be used against the respondent for deportation or other purposes.

The PIA does not acknowledge the privacy risks raised by the new question and the Bureau should conduct a new PIA dealing specifically with the issues raised by the citizenship question.

Conclusion

EPIC recommends that the Census Bureau either remove the citizenship question or conducted a revised Privacy Impact Assessment, taking account of the recently added question, as is required by law. The question raises far-reaching privacy concerns and will also undermine the integrity, reliability and accuracy of the U.S. census.

EPIC has recently pursued related matters concerning the privacy of census data with the Census Bureau that were favorably resolved. We anticipate that will be the outcome here

Sincerely,

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/s/ Christine Bannan
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²⁶ U.S. Department of Commerce, Office of Privacy and Open Government, *Privacy Compliance* <http://www.osec.doc.gov/opog/privacy/compliance.html>.

²⁷ *Id.* “Alteration in Character of Data” is the ninth example in the list of privacy risks.