

January 8, 2020

The Honorable Carolyn B. Maloney, 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 Chairwoman Maloney and Ranking Member Jordan:

We write to you regarding the hearing on “Reaching Hard-to-Count Communities in the 2020 Census.”¹ There is a related issue of concern to the Committee that we hope you will examine. In a recently published privacy impact assessment, the Department of Homeland Security (“DHS”) has stated that it intends to provide the Census Bureau with vast quantities of personal data from naturalized citizens, immigrants, and foreign nationals admitted to the United States.² EPIC believes that the proposed data transfer violates the Privacy Act of 1974. We urge the Committee to suspend the transfer, pending further review.

EPIC is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues.³ We litigated *EPIC v. Department of Commerce*⁴ 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 blocked the efforts of the Presidential Advisory Commission on Election Integrity to obtain state vote data.⁵ In July, we wrote to this Committee regarding President Trump’s Executive Order requiring federal agencies to transfer personal data to the Department of Commerce to determine the number of non-citizens in the United States.⁶ We warned at the time that “the Executive Order could undermine Privacy Act safeguards” and that “the plan to aggregate data from other agencies in the Commerce Department is also problematic.”⁷

¹ *Reaching Hard-to-Count Communities in the 2020 Census*, 116th Cong. (2020), H. Comm. on Oversight and Reform (Jan. 9, 2020), <https://oversight.house.gov/legislation/hearings/reaching-hard-to-count-communities-in-the-2020-census>.

² Dep’t of Homeland Sec., *Privacy Impact Assessment for the Department of Homeland Security (DHS) Immigration-Related Information Sharing with U.S. Census Bureau* (Dec. 20, 2019) [hereinafter *DHS Privacy Impact Assessment*], <https://www.dhs.gov/sites/default/files/publications/privacy-pia-dhs079-sharingwithcensus-december2019.pdf>.

³ *About EPIC*, EPIC (2019), <https://www.epic.org/epic/about.html>.

⁴ *EPIC v. Dep’t of Commerce*, No. 19-5031 (D.C. Cir. Jun. 28, 2019).

⁵ *EPIC v. Presidential Election Commission*, EPIC (2019), <https://www.epic.org/privacy/litigation/voter/epic-v-commission/>.

⁶ Letter from EPIC to the Honorable Elijah E. Cummings and Jim Jordan, H. Comm. on Oversight and Reform (July 23, 2019), <https://epic.org/privacy/census/EPIC-HCOGR-Census-July2019.pdf>.

⁷ Letter from EPIC, *supra* note 6, at 1.

The planned transfer announced by the DHS would include dozens of highly sensitive data points, such as an individual’s name, address, contact information, citizenship, nationality, immigration status, social security number, alien number, passport and visa information, and arrival and departure dates.⁸ The data transferred would go back nearly half a century to 1973.⁹

The DHS is even seeking to turn over personal data to the Census Bureau from refugees and asylees—data that, by the agency’s own admission, “could subject the claimant to retaliatory measures by government authorities or non-state actors” and “endanger the security of the claimant’s family members of associates who may still be residing in the country of origin.”¹⁰

This unprecedented transfer of personal data would be illegal, irresponsible, and far in excess of what the Census Bureau could possibly need to fulfill its statistical mission. The transfer also appears to serve a dual purpose: not only to generate demographic data on citizenship, but also to individually identify *who* is a citizen.

Significantly, the DHS concedes that the planned transfer of data to the Census Bureau would violate the agency’s statutory and regulatory privacy obligations. Under the Privacy Act,¹¹ the Homeland Security Act of 2002,¹² the E-Government Act of 2002,¹³ and the DHS’s own privacy principles, the agency must protect the privacy of individuals by complying with the Fair Information Practices. Yet in the privacy impact assessment, the DHS acknowledges that transferring personal data to the Bureau would create privacy risks that “cannot be mitigated.”¹⁴

For example, the DHS admits that individuals were likely “not aware at the time of collection that their information would be shared with the Census Bureau” and that there is “no opportunity to consent to sharing or opt out of having an individual’s information shared with the Census Bureau.”¹⁵ The DHS acknowledges that transferring the data “not compatible with the original purpose of collection by DHS.”¹⁶ And the DHS concedes that the Census Bureau may “retain DHS information for longer than necessary.”¹⁷ Each of these is a violation of provisions in the Privacy Act.¹⁸

⁸ *DHS Privacy Impact Assessment* at apps. A–C.

⁹ *DHS Privacy Impact Assessment* at app. A.

¹⁰ *DHS Privacy Impact Assessment* at app. A.

¹¹ Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (codified as amended at 5 U.S.C. § 552a).

¹² Homeland Security Act of 2002, Pub. L. No. 107-296, § 222(a)(5), 116 Stat. 2135, 2115 (codified as amended at 42 U.S.C. § 2000ee-2).

¹³ E-Government Act, Pub. L. No. 107-347, § 208, 116 Stat. 2899, 2921–23 (codified at 44 U.S.C. § 3501 note).

¹⁴ *E.g.*, *DHS Privacy Impact Assessment* at 10.

¹⁵ *DHS Privacy Impact Assessment* at 7.

¹⁶ *DHS Privacy Impact Assessment* at 10.

¹⁷ *DHS Privacy Impact Assessment* at 9, 11.

¹⁸ 5 U.S.C. § 552a(b) (prohibiting disclosure of personal data to other agencies without prior consent); § 552a(e) (requiring an agency to “inform each individual whom it asks to supply information . . . the principal purpose or purposes for which the information is intended to be used); § 552a(e)(1) (requiring an agency to “maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President”); *see also* 42 U.S.C. § 2000ee-2 (requiring the DHS to “assur[e] that personal information contained in Privacy Act

The DHS’s assurances about the planned data transfer are not reassuring. The agency insists that it worked “to ensure that the Department sends the minimum amount of information necessary to support the Census projects,” yet fails to explain how most or all of the data to be transferred— e.g., passport information—could possibly be relevant to the Census Bureau’s statistical mission.¹⁹ And the DHS promises that “[t]here will be no adverse impact to the individual record subject” and that the data “will not be used to make programmatic or administrative enforcement decisions,”²⁰ even though the administration is seeking to generate block-level citizen voting age population data²¹ that could be used by states to dilute the congressional representation of areas with significant non-citizen populations.

Finally, there is no indication that the planned data transfer—even if it were lawful—would materially improve the Census Bureau’s citizenship statistics. As the DHS concedes, “Immigration status and data are notoriously difficult to combine due to its dynamic nature—individuals can have multiple immigration statuses through their lifetime.”²² For this reason, the DHS acknowledges that the Census Bureau may “inaccurately link the DHS data to the Census data received from other sources,” and that this risk “cannot be fully mitigated.”²³

There are 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.

EPIC urges the Committee to block DHS from carrying out this proposed data transfer—and the Census Bureau from accepting any such data from the DHS—pending further review.

Sincerely,

/s/ Marc Rotenberg
Marc Rotenberg
EPIC President

/s/ Caitriona Fitzgerald
Caitriona Fitzgerald
EPIC Policy Director

/s/ John Davisson
John Davisson
EPIC Counsel

systems of records is handled in full compliance with fair information practices as defined in the Privacy Act of 1974”).

¹⁹ *DHS Privacy Impact Assessment* at 8.

²⁰ *DHS Privacy Impact Assessment* at 6, 12.

²¹ *Submission for OMB Review*, 84 Fed. Reg. 3,748, 3,751 (Feb. 13, 2019).

²² *DHS Privacy Impact Assessment* at 15.

²³ *DHS Privacy Impact Assessment* at 11.