John,
Sec Ross has reviewed concerns and thinks DOJ would have a legitimate use of data for VRA purposes. Please let me know if you'd like to discuss.

-James

Ps - definitely review little may stand for proposition that sampling insufficient for CVAP data needs.
MEMORANDUM

Re: Citizenship Inquiries on the Decennial Census

SUMMARY

This memorandum considers the historical use of citizenship on census inquiries and the legal bases for including a citizenship question on the 2020 decennial census ("decennial census" or "short form census"). To be clear, the Secretary of Commerce ("Secretary") has broad discretion to add questions to the decennial census, and there is nothing illegal or unconstitutional about adding a citizenship question. Indeed, the question has previously been on the decennial census and other census surveys. However, different analyses and considerations must take place depending on the purpose for asking the question.

There are two potential legal avenues for including a citizenship question: First, if citizenship or legal status questions are constitutionally relevant for apportionment purposes—the allocation of United States Representatives (and thus Presidential electoral votes)—such questions must be included on the decennial census. It is a requirement under section 195 of Title 13, United States Code. Second, the citizenship question may also be included on the decennial census to achieve other necessary data collection purposes those not relevant to apportionment as deemed necessary. However, where census questions are asked for purposes not related to apportionment, the Secretary must believe that such information could not be feasibly collected through sampling. Again, the Secretary enjoys broad discretion in making such determinations.

Today, apportionment is conducted through a count of the entire population, and, based on a review of records identified from prior census surveys, the government has apparently not yet taken the position that citizenship should be an inquiry relevant to apportionment. However,
the language of the Constitution is not entirely clear on this, and the state of Louisiana and some
scholars have argued that illegal aliens must be excluded from the population count used for
apportionment. This memorandum will present a brief history of the Census. Then, it will
describe the two avenues for adding a citizenship question—first considering general data-
collection motivations and then those related to apportionment.

**DISCUSSION**

**I. BACKGROUND**

An “actual Enumeration” of the United States population is required by U.S. Const. art. I, § 2, cl. 3. Pursuant to that requirement, a census has been conducted every ten years since 1790. Congress has since delegated the administration of the census to the Secretary of Commerce, 13 U.S.C. § 1 et seq., who shall conduct the inquires “in such form and content as he may determine.”

1 Subsequently, the Secretary created the Bureau of the Census and tasked it with conducting the census. And the Director of the Census “shall perform such duties as may be imposed upon the Director by law, regulations, or orders of the Secretary.”

Since the first decennial census in 1790, questions have been presented beyond what is constitutionally required to count the population. Such questions have included inquiries about race and gender. Additionally, *questions pertaining to citizenship*, country of origin, and age were also included on multiple decennial census questionnaires in the early 1900s. In the 1940

1 13 U.S.C.A. § 141(a) (West).

2 See, e.g., *Slattery v. Clinton*, No. 96 CIV. 2366 DLC, 1997 WL 148235, at *2 (S.D.N.Y. Mar. 28, 1997) (“Congress has delegated the power over the census to the Secretary of Commerce, who is required to conduct the decennial census ‘in such form and content as he may determine.’ 13 U.S.C. § 141(a). The Secretary of Commerce has subsequently delegated the procedures concerning the census calculation to the Bureau of the Census. 13 U.S.C. §§ 2, 4.”).

3 13 U.S.C.A. § 21(c) (West).

census, sampling techniques were introduced to reduce costs of administering the census and reduce the burdens of collecting responses.\(^5\) Sampling allowed the Bureau to survey a smaller population with supplemental questions and extrapolate the results to the population-at-large.\(^6\) As a result, census data has been collected by two different questionnaires since 1970.\(^7\) The large majority of the population received the “short form” questionnaire, which asks only a handful of questions such as race and sex and is used for apportionment. The remaining population (approximately 16–25%) traditionally received a “long form”\(^8\) questionnaire, which contains both the short form questions and several supplemental questions. The long form has almost always included a citizenship question.

In 2005, the traditional long form was replaced by the American Community Survey (“ACS”).\(^9\) The ACS asks questions similar to the no-longer-used long form—including whether the respondent is a citizen—but it is distributed to a sample of the population monthly rather than every ten years to provide timelier data snapshots of the United States population. The effect is


\(^6\) *See, e.g.*, *City of Los Angeles v. U.S. Dep’t of Commerce*, 307 F.3d 859, 864 (9th Cir. 2002) (“Since 1940, the Bureau has employed sampling techniques to gather supplemental information regarding the population.”); *Accuracy and Coverage Evaluation; Statement on the Feasibility of Using Statistical Methods To Improve the Accuracy of Census 2000*, 65 FR 38374-01. 38382 n. 21 [A.C.E.] (“The Census Bureau first used sampling in a decennial census in 1940, in the program now known as “long form” enumeration, which is used to obtain detailed demographic information. The Census Bureau has used sampling to conduct federal surveys to collect key information, including unemployment and labor force data, etc., for many decades.”).


\(^8\) *See, e.g.*, *United States v. Rickenbacker*, 309 F.2d 462, 463 (2d Cir. 1962) (noting that the supplemental questionnaire was distributed to every fourth household in the 1960 census); *American Community Survey*, U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE (July 3, 2017 4:13 PM), [https://www.census.gov/history/www/programs/demographic/american_community_survey.html](https://www.census.gov/history/www/programs/demographic/american_community_survey.html) (noting that before the ACS, one household in every six received the long form).

that the entire population now receives the same form for the decennial census (the traditional "short form"), and a sample of approximately 3.54 million addresses each year receives the supplemental ACS form.\textsuperscript{10} Currently, the ACS asks not only whether a person is a citizen, but also if they are a citizen (1) born in the United States; (2) born in Puerto Rico, Guam, the U.S. Virgin Islands, or Northern Marianas; (3) born abroad of U.S. citizen parent or parents; or (4) by naturalization.\textsuperscript{11}

Indeed, the citizenship question has been presented to at least a sample population in almost every census since 1820, making it one of the oldest questions asked.\textsuperscript{12} Only four of the last twenty censuses did not ask at least a sample population about their citizenship status.\textsuperscript{13} Of the sixteen censuses requiring designation of citizenship status, at least nine asked the question of everyone on a short form decennial.\textsuperscript{14} The Office of General Counsel is still working to identify old census documents to determine the last date on which the decennial census (not long form or ACS sampling) presented a citizenship question, but it is clear that the inquiry was made into the early- to mid-1900s. And it is still asked on the ACS today. That said, no records have been identified to document that past apportionments of Congressional representatives or direct taxes have been based on citizenship or legal inhabitance.

\begin{thebibliography}{9}

\bibitem{History of Place of Birth, Citizenship, Year of Entry Questions} History of Place of Birth, Citizenship, Year of Entry Questions, U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE (July 3, 2017 3:44 PM) https://www.census.gov/acs/www/about/why-we-ask-each-question/citizenship/.

\bibitem{Id.} Id.


\bibitem{Id.} Id.
\end{thebibliography}
II. THE CITIZENSHIP QUESTION MAY BE ADDED TO THE DECENNIAL CENSUS FOR DATA COLLECTION PURPOSES

A. Citizenship Data is Relevant for Federal Programs and for State Redistricting

Apportionment and direct taxes are not the only purposes for the information collected through the decennial census. The Census Act requires the Secretary take a decennial "census of population," which is defined as "a census of population, housing, and matters relating to population and housing." Pursuant to that mandate, "the Secretary is authorized to obtain such other census information as necessary," "shall prepare questionnaires, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title." The statute's permissive language allows the Secretary to exercise his broad discretion "in connection with any such census," whether the decennial census, a sampling procedure, or a special survey.

15 See, e.g., City of Los Angeles, 307 F.3d at 864 (9th Cir. 2002) ("Although the Constitution mandates only that the census be taken for reapportionment purposes, the census data is used for myriad other purposes."); Klutznick, 486 F. Supp. at 568 ("The census figures are also used for a variety of other purposes. Most relevant to this lawsuit is the fact that many states use the figures as the basis for their own internal apportionment of state and local governmental bodies, and Congress requires the use of the figures as a basis for distribution of federal funds under a number of financial assistance statutes."); see also Legal Tender Cases, 19 U.S. 457, 536 (1870) ("Congress has repeatedly directed an enumeration not only of free persons in the States but of free persons in the Territories, and not only an enumeration of persons but the collection of statistics respecting age, sex, and production. Who questions the power to do this?").

16 13 U.S.C.A. § 141(a) (West).

17 13 U.S.C.A. § 141(g) (West) (emphasis added).

18 13 U.S.C.A. § 141(a) (West).


20 The Census Act only expressly precludes questions asking about respondent's religious affiliations or beliefs. See 13 U.S.C.A. § 221(c) (West) ("Notwithstanding any other provision of this title, no person shall be compelled to disclose information relative to his religious beliefs or to membership in a religious body."). It does not expressly prohibit inquiring about citizenship status. Thus, the textual canon expressio unius est exclusio alterius—the expression of one thing excludes those not expressed—suggests that citizenship status is not a prohibited question.
The Supreme Court has recognized that "census data also have important consequences not delineated in the Constitution."\(^\text{21}\) The federal government, for example, considers census results when distributing federal program funds to states. Additionally, states use census data when drawing political districts.\(^\text{22}\) Indeed, the Census Act specifically contemplates the use of census results when determining eligibility for federal programs or amount of benefits,\(^\text{23}\) and requires redistricting data be sent to states within one year of the decennial census.\(^\text{24}\) The census website currently explains that the ACS asks about place of birth, citizenship, and year of entry "to set and evaluate immigration policies and laws, understand the experience of different immigrant groups, and enforce laws, policies, and regulations against discrimination based on national origin."\(^\text{25}\) For example, such information may determine eligibility for grants under the Elementary and Secondary Education Act of 1965 or financial assistance under the Immigration and Nationality Act.\(^\text{26}\)


\(^{22}\) Id. at 5–6.

\(^{23}\) 13 U.S.C.A. § 141(e)(1); This is in accordance with Congress’s power under the Necessary and Proper Clause. See United States v. Moriarity, 106 F. 886, 891 (C.C.S.D.N.Y. 1901) (“Respecting the suggestion that the power of congress is limited to a census of the population, it should be noticed that at stated periods congress is directed to make an apportionment, and to take a census to furnish the necessary information therefor, and that certain representation and taxation shall be related to that census. This does not prohibit the gathering of other statistics, if ‘necessary and proper,’ for the intelligent exercise of other powers enumerated in the constitution, and in such case there could be no objection to acquiring this information through the same machinery by which the population is enumerated, especially as such course would favor economy as well as the convenience of the government and the citizens.”).

\(^{24}\) 13 U.S.C.A. § 141(e).


\(^{26}\) Id.
An accurate count of citizens is also important for determining potential Voting Rights Act violations in state-drawn legislative districts.\textsuperscript{27} For example, in \textit{League of United American Citizens v. Perry}, the Supreme Court acknowledged the crucial difference between the voting age population and the citizen voting age population when considering potential violations of section 2 of the Voting Rights Act.\textsuperscript{28} Race was used to create a “facade of a Latino district” because even though Latinos were a majority of the voting age population, they did not have a citizen voting age population that could meaningfully elect candidates. Moreover, the Court indicated that states \textit{must} use the data if it is expected that the state has a number of minority persons covered by Section 2 of the Voting Rights Act sufficient to form a district. \textit{Id; see also Pender County v. Barlett}, 361 N.C. 491, 649 S.E.2d 364 (2007) (in review of a Sec. 2 VRA claim the court concluded that a CVAP (citizen voting age population) majority was required). In cases like these, an accurate citizenship count would aid in determining potential violations of the Voting Rights Act.

To be clear, the Census Bureau already provides citizenship estimates based on data it currently collects from the ACS,\textsuperscript{29} and courts have considered the ACS samples reliable for enforcement of the Voting Rights Act.\textsuperscript{30} But, as discussed in the section below, how such estimates are obtained (including sample size) is within the discretion of the Secretary.

\begin{itemize}
\item \textsuperscript{27} A.C.E., 65 FR 38374-01 at 38375 (“State and local governments use census data to draw legislative districts of equal population to comply with the constitutional ‘one-person-one-vote’ mandate and the statutory requirements of the Voting Rights Act.”)
\item \textsuperscript{28} \textit{League of United Latin Am. Citizens v. Perry}, 548 U.S. 399, 429 (2006) (“Latinos, to be sure, are a bare majority of the voting-age population in new District 23, but only in a hollow sense, for the parties agree that the relevant numbers must include citizenship.”)
\item \textsuperscript{29} See, e.g., \url{https://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t}.
\item \textsuperscript{30} See \textit{Benavidez v. City of Irving, Tex.}, 638 F. Supp. 2d 709, 721 (N.D. Tex. 2009) (“The Court takes judicial notice of the Census Bureau’s February 2009 publication ‘A Compass for Understanding and Using American Community Survey Data—What State and Local Governments Need to Know.' The mere issuance of such a publication by the Census Bureau, which provides detailed guidance on how ACS data should be interpreted and utilized by state and
B. The Census Act Requires the Secretary Use Sampling to Collect Citizenship Data “If He Considers It Feasible”

There is a limitation on the Secretary’s authority to add non-apportionment questions to the short form decennial. In 1957, the Secretary of Commerce requested that Congress approve by statute the Bureau’s use of sampling.\(^{31}\) The resulting statute, 13 U.S.C. § 195 (1957), couched in permissive language the Secretary’s authority to use sampling: The Secretary “may, where he deems it appropriate, authorize the use of the statistical method known as ‘sampling’ in carrying out the provisions of this title.”\(^{32}\) But in 1976, Congress amended § 195 to mandate sampling with limited exception:

> Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as “sampling” in carrying out the provisions of this title.\(^ {33}\)

The Secretary must now use sampling for such questions if deemed feasible. The statute does not define “feasible.” This Department has since interpreted sampling’s feasibility to be “within the meaning of Section 195 if (1) the proposed use of sampling is compatible with the other aspects of the census plan, and with any statutory, timing, and funding constraints; and (2) the proposed use of statistical sampling would improve the overall accuracy of the census data.”\(^ {34}\) Courts have

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31 Utah v. Evans, 536 U.S. 452, 469 (2002) (citing Amendment of Title 13, United States Code, Relating to Census: Hearing on H.R. 7911 before the House Committee on the Post Office and Civil Service, 85th Cong., 1st Sess., 7 (1957) (Statement of Purpose and Need) (Secretary of Commerce, describing Bureau's ability to obtain “some ... information ... efficiently through a sample survey ... rather than a complete enumeration basis”)).

32 City of Los Angeles v. U.S. Dep't of Commerce, 307 F.3d 859, 865 (9th Cir. 2002).


34 A.C.E., 65 FR 38374-01 at 38398. See also A.C.E., 65 FR 38374-01 at 38380 (noting that feasibility has two components: operational feasibility and technical feasibility. “Operational feasibility refers to the Census Bureau’s
deferred to the Secretary’s “meaningful discretion” in determining the feasibility of sampling, and have recognized his discretion “both to set the standard for feasibility and to decide whether that standard has been met.”

[T]he choice of language “if he considers it” as a pre-condition of “feasible” demonstrates that Congress intended for the Secretary to make such judgment calls. This phrase indicates that Congress did not intend to limit the Secretary's discretion to a finding of whether a particular use of sampling is capable of being done. Rather, it left the choice to the Secretary as to whether sampling could be used, bringing to bear his expertise on the effectiveness of different statistical methodologies and their compatibility with the other aspects of the census. Thus, unlike other cases in which the agency had “little administrative discretion” in making a feasibility determination, § 195 reflects Congress' intent for the Secretary to strike a balance as to the feasibility of using sampling in any given instance.

The 2010 decennial census, for example, included questions of sex, age, and race, none of which are required for apportionment. Thus, including a citizenship question would be a permissible exercise of the Secretary’s broad discretion “[i]n connection with any such census” for “matters relating to population” namely, the citizenship status of the population.

C. Similar Questions Appeared on Past Censuses and Withstood Legal Challenges

Courts have upheld legal challenges to census inquiries on race and ethnicity that are similar to potential litigation regarding inclusion of the citizenship question on the decennial census. In *Morales v. Daley*, the United States District Court for the Southern District of Texas rejected allegations that compelling respondents to disclose their race and ethnicity on the census

ability to conduct each major component of the census within applicable deadlines and with available resources. . . . Technical feasibility refers to whether the statistical methodology used by the [Accuracy and Coverage Evaluation] will improve accuracy.”

35 *City of Los Angeles*, 307 F.3d at 870 (emphasis in original); *see also Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 345–46 (1999) (Scalia, J., concurring) (“The Secretary is under no command to authorize sampling if he does not consider it feasible.”) (emphasis in original)).

36 *City of Los Angeles*, 307 F.3d at 872.
violated the First, Fourth, Fifth, and Fourteenth Amendments. Although the government did not challenge plaintiffs’ contention that census data was used to identify and detain Japanese citizens in the Second World War, the plaintiffs did not allege or demonstrate that their data would be used to discriminate against them. The court acknowledged the Bureau’s broad authority to conduct the census, and distinguished between self-classification based on individual characteristics and impermissible disparate treatment based on those classifications. In other words, collection of data was deemed permissible and should not be confused with potential misuse of data. Similarly, merely collecting citizenship statistics, without more, should withstand legal challenges alleging potential misuse of the information.

In Morales, the court was also unconvinced by allegations that requirements of race and ethnicity questions amounted to impermissibly compelled speech, even if respondents thought the Census Bureau’s justification was “trivial” or respondents “object[ed] to its use on political or moral grounds.” Fourth Amendment allegations that such inquiries were intrusive also failed. The Court asserted that “asking questions well beyond the constitutionally mandated headcount is far from a novel idea of twentieth century big government bureaucrats,” and in fact has been done for over two hundred years. And “[t]he fact that some public opinion research experts might regard the size of the household questionnaire ‘sample’ as larger than necessary to

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38 Id. at 811.
39 Id. at 813–815.
40 Id. at 816.
41 Id. at 818.
obtain an accurate result does not support a conclusion that the census was arbitrary or in violation of the Fourth Amendment.”

In summary, the Secretary has very broad discretion to include questions on the decennial census for purposes other than apportionment, and there are several legal justifications for inquiring about citizenship (which is why it is on the ACS today). However, to inquire about citizenship on the short form decennial for non-apportionment reasons, the Secretary must determine that sampling is not feasible for the needed data analysis.

III. LIMITED RESTRICTIONS ON USE OF CITIZENSHIP DATA

A. The Apportionment Clauses Do Not Address the Exclusion of Noncitizens or Illegal Aliens From the Population When Apportioning United States Representatives

There are two clauses in the Constitution that address enumeration and apportionment. They are found in Article 1 and the 14th Amendment to the Constitution. The Constitution’s Apportionment Clauses have previously been read to include all persons in the United States for purposes of the population count, except Indians not taxed.

Article I. § 2 cl. 3 expressly provides “[r]epresentatives . . . shall be apportioned among the several states . . . by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.” Unlike the special treatment of slaves and Indians in this original enumeration clause, aliens went unmentioned. The Founders certainly knew of their existence because they addressed naturalization in the Constitution. Their conscious choice not to except aliens from the directive to count the population might suggest that the Founders did not intend to distinguish between

42 Rickenbacker, 309 F.2d at 463–64.

43 See U.S. Const. art. I, § 8, cl. 4.
citizens and non-citizens for the “actual Enumeration” used for apportionment. And records from the Constitutional Convention indicate that the founders hoped to include as many people in the count as possible because the apportionment numbers were also used for the purposes for direct taxation, and they knew the importance of being able to fund the government after the Articles of Confederation.

The 1820 and 1830 censuses, as well as 1910, did ask whether respondents were “foreigners not naturalized” in addition to the principal count. However, there has not been any identified evidence to suggest that the “foreigners not naturalized” were ever subtracted from the total population count for purposes of apportionment. Admittedly, we are unlikely to find such evidence given the state of recordkeeping at the time.

Similarly, the Fourteenth Amendment to the Constitution requires “the whole number of persons in each state” be counted for apportionment of Congressional representatives, regardless of their citizenship status. Subsequent proposals to limit apportionment to voters or citizens were rejected in favor of the more inclusive language. This history strongly suggests a Constitutional requirement to include non-citizens in the apportionment calculations. Moreover, the Supreme Court has held that even illegal aliens are protected “persons” under the Due Process and Equal Protection Clauses of Section 1 of the Fourteenth Amendment; so arguments

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45 See generally Max Farrand, The Records of the Federal Convention of 1787, Volume IV.


47 U.S. Const. amend. XIV, § 2 (emphasis added).

48 Klutznick, 486 F. Supp. at 576; Demography and Distrust at 847–848.

to exclude aliens from being considered "persons" for purposes of the next section of the same Amendment would face significant legal hurdles. Additionally, the Bureau of the Census has previously argued in litigation that it is constitutionally required to include all persons in the apportionment base, including illegal aliens.\textsuperscript{50}

Indeed, nearly a century of Congressional history and proposals to exclude illegal aliens from the apportionment count reveal that Members of Congress have generally concluded that a Constitutional amendment would be required.\textsuperscript{51} For example, a 1929 opinion of the Senate's legislative counsel noted that the "natural and obvious meaning" of the word "persons," along with internal consistency in the text and structure of the Constitution,\textsuperscript{52} and "uniform past Congressional construction of the term" establish that illegal aliens are required to be included in apportionment counts; only a Constitutional amendment can provide otherwise.\textsuperscript{53}

In a 2016 Supreme Court case discussing the Apportionment Clauses, all eight Supreme Court Justices\textsuperscript{54} used "total population," "inhabitants," and "residents" interchangeably.\textsuperscript{55} None of the justices even alluded to separating non-citizens or illegal immigrants from "whole number of persons" used for apportioning representatives. However, that case addressed the ability of

\textsuperscript{50} \textit{Id.} at 568.

\textsuperscript{51} See, e.g., H.J. Res. 11, 111th Cong., 1st Sess. (2009) (proposed constitutional amendment to exclude aliens from the apportionment count); 71 Cong. Rec. 1821-1822 (1929) (Senate Legislative Counsel's opinion that it would be unconstitutional to exclude aliens from the apportionment count); 86 Cong. Rec. 4372 (1940) (statement of Rep. Celler).

\textsuperscript{52} For example, if "persons" did not include noncitizens, the exception of "Indians not taxed" would be superfluous. The inference from that exception is that Indians who are taxed (but are not citizens) would be included in population counts used for apportionment.

\textsuperscript{53} 71 Cong. Rec. 1821-1822 (1929).

\textsuperscript{54} The late Justice Scalia's seat had not yet been filled.

states to use total population counts for their drawing of state Congressional districts and did not address the present question.

Arguments have been made that the population count for apportionment of U.S. Representatives (and electoral votes) should not be based on all people physically present in the United States. In 2011, Louisiana filed suit directly in the Supreme Court alleging that the inclusion of illegal aliens in the 2010 apportionment cost Louisiana at least one United States Representative. The state’s brief argued that only “inhabitants,” or lawful permanent residents, are included in the original meaning of the Apportionment Clauses. Although the Apportionment Clauses use the word “persons,” early drafts of the Constitution and the enacting legislation for the 1790 census referred to “inhabitants,” which require a stronger connection to the state than merely being present. The Supreme Court decided not to hear the case, likely on procedural grounds, and has not ruled on the merits. The direct question has not been raised in lower court.

Another argument in support of limiting the apportionment count to legal inhabitants is that some states unfairly lose out when noncitizens are counted for reapportionment. In the 1964 case of Wesberry v. Sanders, the Supreme Court held, “The House of Representatives, the [Constitutional] Convention agreed, was to represent the people as individuals and on a basis of complete equality for each voter.” It ruled that Georgia had violated the equal-vote principle because House districts within the state did not contain roughly the same number of voting citizens. Justice Hugo Black wrote in his majority opinion that “one man’s vote in a congressional election is to be worth as much as another’s.” It can be argued that the same

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56 Plaintiffs’ Motion for Leave to File a Complaint and Brief in Support of Motion, Louisiana v. Bryson, No. 140. Although the brief alleged that at least four other states would lose representation, none joined in the suit.

principle is currently being violated on a national basis because of the current total population count. Under the total population approach, a lawful voter in California has a greater impact on the governance of the United States than does a voter in Iowa, a state having significantly fewer illegal aliens.

No federal court has held that the census population count used for apportionment should not include non-citizens. However, there are bases for legal arguments that the Founding Fathers intended for the apportionment count to be based on legal inhabitants.

B. Respondents' Answer to Citizenship Question Cannot Be Used in Individualized Proceedings

It is important to note that, if a citizenship question is added to the decennial census, the Bureau's use of census information is explicitly limited to the "statistical purposes for which it is supplied."\textsuperscript{58} Thus the citizenship status of a respondent may not be used against him or her in any legal proceeding. Census reports "shall be immune from legal process" and "shall not . . . be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding."\textsuperscript{59} An individual's response to the census can be used only to prosecute alleged violations of the Census Act, such as providing false information on the census form.\textsuperscript{60} Despite these limitations, census data may be collected and used in the aggregate for a variety of purposes.

\textsuperscript{58} 13 U.S.C.A. § 9(a)(1) (West).

\textsuperscript{59} 13 U.S.C.A. § 9 (West) (emphasis added).

\textsuperscript{60} 13 U.S.C.A. § 8 (West) ("In no case shall information furnished under this section be used to the detriment of any respondent or other person to whom such information relates, except in the prosecution of alleged violations of this title.").
IV. CONCLUSION

In short, a citizenship status question may legally be included on the decennial census, as it has been in the past, so long as the collected information is not used in any individualized proceeding against a respondent, and the Secretary determines that sampling is not feasible.

If the Secretary decides that the question is needed for apportionment purposes, then it must be included on the decennial. However, whether the courts would uphold use of citizenship information for purposes of Congressional apportionment is questionable. Although there are arguments to support use of citizenship in apportionment, past practice and a Supreme Court case analyzing the definition of “persons” for purposes of the 14th Amendment make clear the issue would be litigated and would remain in doubt until the Federal courts have directly resolved the issue.