



SECTION 559 IN FY 2024 CJS APPROPRIATIONS BILL (HOUSE MARK) ON CONGRESSIONAL APPORTIONMENT AND THE CENSUS SHOULD BE REJECTED

Section 559 (under General Provisions), in the form of a “limiting” provision, would require the Census Bureau to exclude persons who are unlawfully in the United States from the state population totals used to apportion seats in the U.S. House of Representatives after each census. The section reads as follows:

Sec. 559. None of the funds made available by this or any other Act may be used to allow the United States Census Bureau to include aliens who are unlawfully present in the United States in rendering apportionment determinations in subsequent decennial censuses.

Congress should reject Section 559 because it seeks to achieve a clearly unconstitutional purpose.

- Throughout the nation’s history, Republican and Democratic administrations alike have concluded that excluding undocumented immigrants and/or non-citizens from the state population totals used for congressional apportionment would be unconstitutional.
 - In September 1989, the Bush I Justice Department wrote, in response to a congressional inquiry, “In the past, the Department of Justice has taken the position that section two of the Fourteenth Amendment which provides for ‘counting the whole number of persons in each State’ and the original Apportionment and Census Clauses of Article I section two of the Constitution require that inhabitants of States who are illegal aliens be included in the census count. In our review of this issue to date, we have found no basis for reversing this position.” (Letter from Carol T. Crawford, AAG to Chairman Jeff Bingaman (D-NM), Senate census authorizing subcommittee, September 22, 1989)
- *The plain meaning of the 14th Amendment to the Constitution could not be clearer:* The 14th Amendment states that apportionment of seats in the House of Representatives is based on a count of “the whole number of persons in each State,” regardless of citizenship or immigration status.
- When asked to weigh in on a related question in *Evenwel v. Abbott* (578 U.S. 54 (2016)), a case about state legislative redistricting, a unanimous Supreme Court noted that the 14th Amendment contemplates that “representatives serve all residents, not just those eligible to vote,” and that seminal cases setting forth the one-person, one-vote principle (e.g., *Wesberry v. Sanders* (376

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U.S. 1); *Reynolds v. Sims* (377 U.S. 533)) confirmed a total-population basis for representational equality in the U.S. House of Representatives.

- The 14th Amendment was enacted, in part, to repeal the provision in Article I that counted enslaved persons as only three-fifths of a person for apportionment purposes. Section 559 evokes this shameful legacy; the inclusion of this provision in an important funding bill is an appeal to anti-immigrant sentiments despite its unconstitutional objectives.

Legal experts agree that the Constitution requires the Census Bureau to include all people living in the United States in the state population totals used for congressional apportionment.

- In January 2010, a Congressional Research Service (CRS) report concluded that “The term ‘whole number of persons’ appears broad enough to include all individuals, regardless of citizenship status, and thus would appear to require the entire population be included in the apportionment calculation. As such, a constitutional amendment ... would likely be necessary in order to exclude any individuals from the census count for the purpose of apportioning House seats.” CRS had reached the same conclusion in a 1988 report for Congress.
- Last year, the American Bar Association (ABA) adopted a resolution to make clear that “the Constitution’s direction that all ‘persons’ be enumerated in the count used to reapportion the seats in the House of Representatives means that the apportionment count must include all persons residing in each state, including those who may lack lawful immigration status.” (*from the report accompanying the resolution, adopted at its midyear meeting on February 14, 2022 by the ABA House of Delegates*)
- In 2020, in an [analysis of *Trump v. New York*](#), the Brennan Center for Justice highlighted the bottom line: “The Constitution requires that seats in the House be apportioned among the states based on ‘the whole number of persons in each state.’ The more people in a state, the more people in Congress to represent them. The fewer people, the fewer congressional seats. For 230 years, every branch of government has understood this requirement to count all persons for apportionment to mean just that: ‘persons’ means people, and ‘people’ means everyone.”

Separate from its constitutional infirmity, Section 559 would sabotage 2030 Census accuracy in every state and every community by creating a climate of fear among all immigrants, as far-right lawmakers try to use a must-pass funding bill to pursue an unconstitutional and, therefore, undemocratic, goal.

- Every census since the first enumeration in 1790 has included all persons residing in the United States, regardless of citizenship and immigration status.
- Asking about immigration status in the census is unnecessarily intrusive and will raise concerns among all respondents — both native-born and immigrant — about the confidentiality and privacy of information provided to the government. This will have a chilling effect and keep many residents from responding, jeopardizing the accuracy of the census in every state and community.

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- Extensive Census Bureau research last decade showed that many residents believe the agency shares personal responses with other federal agencies or that their responses could be used against them — a concern that clearly would prevent people from answering a question about citizenship and/or immigration status or answering the census at all. In fact, the 2018 Census Barriers, Attitudes, and Motivators Survey (CBAMS) also found that residents thought the purpose of a citizenship question was to help the government find undocumented immigrants.
- Based on these findings, asking households about the citizenship and immigration status of every person undoubtedly will cause many households to avoid the census entirely, thereby destroying the accuracy of the census in every state.
- Census data guide the allocation of \$2.8 trillion annually in federal assistance to states, localities, individuals, and families for a range of vital services. An inaccurate census will skew the fair distribution of federal resources for the next decade.

The Census Bureau cannot reliably determine the number of undocumented immigrants in each state without destroying the chance for an accurate census in any and all states.

- Asking citizenship and immigration status questions of every person in the country is unnecessarily intrusive and will raise concerns in all households — native- and foreign-born, citizens and non-citizens, and mixed status households — about the confidentiality of information provided to the government and how that information might be used, thereby depressing participation and increasing census costs significantly without improving accuracy and, in fact, possibly decreasing it.
- There is no precedent for trying to determine whether residents are living in the United States unlawfully through a universal survey. The likelihood of collecting reliable responses is remote, at best.
- There are no reliable administrative record datasets that identify undocumented immigrants and their usual residence as of April 1 of a census year.
- The U.S. Constitution requires an “actual enumeration” to determine the number of people in each state for purposes of congressional apportionment. Therefore, estimates of persons residing in each state in violation of U.S. laws would not be a constitutionally permissible method for implementing Section 559.

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