

# Improving the Census

Legal and Policy Reforms for a More Accurate,  
Equitable, and Legitimate Count

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# Introduction

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**T**he census is a cornerstone of American democracy. The results of this constitutionally required, once-a-decade count of every person living in the United States dictate how seats in the House of Representatives are divided among the states, how state and local governments draw electoral districts, and how more than \$1.5 trillion annually in federal funds is distributed for essential services such as health care, food assistance, and education. At its best, the census offers an authentic picture of who we are as a diverse and growing nation.

The 2020 census struggled. It faced a barrage of obstacles, from executive interference to chronic underfunding to the Covid-19 pandemic. In the face of these challenges, it ultimately failed to reach 18.8 million people — more than 5 percent of the country’s population.<sup>1</sup> What’s more, the census once again disproportionately undercounted people of color, with the Latino undercount rate more than tripling from the prior decade.<sup>2</sup> And multiple states were undercounted by significant margins. These inaccuracies compromise the census’s ability to fairly distribute political power and federal funding both across states and across communities, undercutting the democratic promise of our political system. Meanwhile, overall census response rates remain stuck in a rut, costs are rising, and the bureau’s reliance on labor-intensive door-to-door outreach is showing its limits. The census is too critical to continue in this precarious state.

The bureaucracy and law that govern the census have not been systemically altered in decades. The U.S. Census Bureau, a part of the Department of Commerce, has overseen the census since the start of the twentieth century.<sup>3</sup> The bureau’s ambit is broad, covering not just the decennial head count but also important economic and demographic surveys that produce additional statistics about the nation in the years between censuses.<sup>4</sup> That ambit requires a staff of several thousand employees, which expands to incorporate hundreds of thousands of temporary employees during census time. The census alone now costs more than \$14 billion over its life cycle.<sup>5</sup> The primary law that governs the bureau is the Census Act, or Title 13, which Congress codified in 1954. Congress has amended Title 13 several times in response to discrete issues over the years, but it has never comprehensively overhauled the law.

This paper sets forth a blueprint for reforming the law and policy of the decennial population count. Our goal is to make future censuses more accurate, equitable, and legitimate. An accurate census correctly captures the number and demographic characteristics of all people residing in the country. An equitable census is designed, funded, and run to count all groups precisely and to distribute political power and economic support commensurate with each community’s fair share. A legitimate census — one that is scientifically rigorous and democratically

accountable and boasts universal participation — warrants and inspires widespread trust. Legitimacy and accuracy require equity; an equitable census is free from the long-running tendency to undercount Black, Latino, and Native American communities in comparison with white ones, inspiring confidence in its fundamental fairness.

## 2020 Census Results and Problems

The 2020 census results announced in April 2021 reported a national population of 331,449,281 and produced a shift of 7 House seats among 13 states. Subsequently released redistricting data sets showed that the country is more racially and ethnically diverse and that significantly more people identify as Latino, Asian, Black, and multiracial than ever before.

These results, however, contain crucial problems. The Post-Enumeration Survey (PES), the bureau’s primary quality check, shows substantial differential undercounts in the 2020 census — with people identifying as Black, American Indian or Alaska Native, Latino, or some other race being counted at lower rates than non-Hispanic whites. In certain cases, the undercounts have gotten even more pronounced: for example, the undercount rate for the nation’s Latino inhabitants worsened from roughly 1.5 percent in 2010 to nearly 5 percent this decade.<sup>6</sup> The PES results also show that the census likely overcounted eight states and undercounted six.<sup>7</sup> And, as noted above, the census omitted more than 5 percent of the total population.

Future censuses are vulnerable to similar or worse outcomes. Executive interference and Covid-19 during the 2020 count both exposed and exacerbated the census’s systemic problems. Existing law leaves too much room for political actors to override the best statistical science and manipulate the census. The Trump administration’s attempts to exclude communities of color from the count went far beyond the much-scrutinized push to add a citizenship question to the census form, extending to — among other things — efforts to severely truncate

the bureau's data collection and data processing operations. Political appointees repeatedly rejected the scientific judgments of career Census Bureau officials about the best methods for conducting an accurate and inclusive count, echoing past instances of executive interference in the census. The pandemic further jeopardized the door-to-door operations that the bureau designed to enumerate the many communities it has historically undercounted.

Civil rights groups, grassroots organizations, state and local governments, litigators, and others doggedly worked to protect the count. But their efforts required hundreds of millions of public and private dollars to support get-out-the-count campaigns, innumerable hours from countless organizers, and more than a dozen lawsuits. Litigation offered an imperfect remedy; even legal victories brought with them some rulings that weakened the legal and policy protections surrounding the census. And the bureau's reputation for rigor and impartiality suffered a severe blow.

Executive interference and the Covid-19 pandemic gravely amplified long-standing problems. The census has perennially struggled to collect accurate, equitable, and legitimate data. Undercounts of communities of color have persisted for decades. The bureau must also contend with depressed response rates across the board, escalating costs, hindrances due to natural disasters, and outmoded questionnaire formats, among other problems. Historical data and more recent quality checks suggest that major overhauls to census design and operations are in order.

## Census Solutions

These problems must be tackled in tandem. The country needs a bureau that is empowered and equipped to follow the best science — free from executive interference but subject to meaningful democratic accountability — in pursuit of counts that are accurate, equitable, and legitimate for all their many uses.

To lay the foundations for improving future censuses, this report proposes reforms to limit executive interference in the count, enhance congressional oversight of the census, and improve and protect the bureau's data collection methods, among other objectives. We target fixes available to Congress because, under the Constitution, it is Congress's responsibility to ensure that everyone in the country is counted. The Census Act is our main focus, but we also recommend that Congress amend other laws and create new ones. Congress must also exercise its oversight authority, authorization powers, and policy-setting influence to guide the Census Bureau and use its appropriations power to ensure reliable funding.

But many other actors have both a stake and a hand in the census: the executive branch, the bureau, civil society, data users, and, most importantly, the people themselves. We identify matters on which Congress should be the prime mover as well as those where it can facilitate these other stakeholders' work, contributions, and participation. Taken together, these reforms will free the bureau from recurrent problems that it has never squarely addressed and set it up to respond to future problems more flexibly, proactively, and effectively. They will help achieve the census that American democracy both deserves and demands.

# I. Limiting Executive Interference in the Count

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**T**he past four decades have seen several concerning episodes of executive branch interference in the census. This interference reached new heights under the Trump administration, whose attempts to suppress the count of immigrant communities and communities of color for partisan gain touched many aspects of the census, from the questionnaire to the bureau’s processes for collecting, processing, and publishing census data.

Although Trump’s interference was extreme, it was not the first time that a presidential administration meddled in the count. Thirty years prior, the Commerce Department overrode the bureau’s preparations to statistically adjust the 1990 census, a decision that laid the groundwork for significant, racially differential undercounts. The institutional structure governing the count needs a thorough reorganization to protect future censuses from undue executive influence.

## The Citizenship Question

The Trump administration made several attempts to manipulate the 2020 count. It first sought to add an untested and unprecedented question to the census questionnaire: “Is this person a citizen of the United States?”<sup>8</sup> Commerce Secretary Wilbur Ross claimed that the question was necessary to help enforce Voting Rights Act protections for racial and language minorities.<sup>9</sup> But that explanation has since been revealed to be a pretext for two plans — one to generate data that could be used to remove noncitizens from the congressional apportionment numbers, and one originated by a Republican redistricting consultant to enable map drawers to exclude noncitizens from congressional and legislative redistricting processes.<sup>10</sup> In addition to being obviously discriminatory, these plans would have violated the constitutional mandate that apportionment and redistricting be based on each state’s total population, among other legal requirements.

In advancing the citizenship question, Ross conferred with political appointees at the White House and other federal agencies, some of whom subsequently helped construct the pretense for adding the question.<sup>11</sup> Career bureau officials strenuously (albeit unsuccessfully) opposed the plan, which they had demonstrated would reduce response rates from noncitizen households by 5.8 percent and, in turn, increase census-taking costs by at least \$82.5 million.<sup>12</sup> A district court condemned Ross’s decision-making process as “a veritable smorgasbord

of classic, clear-cut [Administrative Procedure Act] violations” and concluded that he had “violated the public trust.”<sup>13</sup> The U.S. Supreme Court ultimately invalidated the proposed citizenship question, but it did so on procedural rather than substantive grounds — holding, for example, that the Constitution permitted it.<sup>14</sup>

## Other Attempts to Generate Citizenship Data

The administration took a second pass, issuing an executive order that directed the bureau to use state and federal administrative records to determine the number and distribution of noncitizens in the country for redistricting, among other purposes.<sup>15</sup> The administration also announced that it would remove undocumented people from the congressional apportionment numbers. The move ignored not only the Constitution but also clear statutory commands to use the total U.S. resident population for apportionment. It also broke with long-running historical practice.<sup>16</sup>

Bureau professionals raised concerns that the administration was placing politics ahead of science by involving itself in the methodologies used to produce citizenship data.<sup>17</sup> These warnings echoed more general concerns that political appointees deployed to the bureau very late in the census process were demonstrating “unprecedented” involvement in technical matters usually reserved for statistical experts at the agency.<sup>18</sup> The Commerce Department’s inspector general launched an investigation into reports that the administration was urging bureau experts to produce a “technical report” relating to citizenship data for the apportionment in January 2021, shortly before the end of Trump’s term.<sup>19</sup> Only a few days after this news broke, the federal government agreed in concurrent litigation that it would not release any such data prior to the change in administrations.<sup>20</sup> The bureau subsequently disowned all of its citizenship data products as “statistically unfit for use.”<sup>21</sup>

# Interference in Census Timelines

As part of its attempts to manufacture citizenship data and manipulate the final count, the Trump administration also interfered in the processes for collecting and processing census data, ordering the bureau to accelerate its operations in the middle of the Covid-19 pandemic to deliver final counts to the president before he left office.<sup>22</sup> Senior census officials expressed strong concerns that the acceleration was politically motivated.<sup>23</sup> The Government Accountability Office and four former Census Bureau directors, moreover, warned that the rushed timeline would severely endanger the accuracy and equity of the count.<sup>24</sup> The administration proceeded with its plans regardless, stopped only by intense litigation efforts that compelled the bureau to continue its counting operations for several weeks longer than the administration sought and secured four additional months for its data processing operations.<sup>25</sup>

## Interference with Sampling

The 2020 census was not the first in which political actors overrode career experts for partisan ends. As mentioned above, in the lead-up to the 1990 census, political leaders at the Commerce Department stymied the bureau's preparations to employ statistical adjustment, a process using alternative demographic data to correct census figures, to eliminate persistent undercounts.<sup>26</sup> Vincent Barabba, who directed the Census Bureau during the 1980 census, condemned this break with precedent, asserting that the bureau's scientists — not the Commerce Department — should make any decision about adjustments to ensure that the public understands it as “an objective decision that was made for statistical reasons, not political reasons.”<sup>27</sup> To avoid protracted litigation, the Commerce Department committed to reconsider its decision.<sup>28</sup> But the commerce secretary ultimately sided with the undersecretary, who advised against adjustment, over the majority vote of the bureau's own Undercount Steering Committee and the bureau director.<sup>29</sup> Census stakeholders again condemned the decision for overstepping the Commerce Department's bounds.<sup>30</sup> The consequences of the decision were severe: the 1990 census omitted more than 5 million people — disproportionately among them Black and Latino people along with residents of cities and southern states.<sup>31</sup>

To limit the potential for future malfeasance, Congress should reestablish the Census Bureau as an executive agency in its own right, led by a strong director who has final decision-making authority over the census and who

is supported by a limited number of political appointees. Congress should also increase the accountability and transparency of the count, limit the president's ability to manipulate the numbers, and protect the census questionnaire from meddling.

### >> Establish the Census Bureau as its own executive agency.

Currently, the Census Bureau is housed within the Commerce Department.<sup>32</sup> Federal law allocates final decision-making authority over the census to the commerce secretary, rendering the bureau effectively an advisory body for many important decisions.<sup>33</sup> This structure has allowed political appointees like the commerce secretary to override the judgment of career scientists on the president's behalf. To fix this problem, Congress must bolster the bureau's structural independence. Pulling the Census Bureau out from under the Commerce Department would be a major first step toward insulating the bureau against executive interference.

Recent Supreme Court rulings have likely foreclosed adopting the traditional independent agency leadership structure (namely, a single director with for-cause removal protections) or assigning an independent agency census-taking responsibilities, given that the census has historically been conducted by executive branch officials.<sup>34</sup> Group-based leadership models remain legally valid for independent agencies but would be poor fits for the bureau, which requires a strong, central decision-maker. We therefore recommend that Congress reestablish the Census Bureau as its own executive agency completely free from the Commerce Department. Congress should reallocate the Commerce Department's existing statutory powers over the census to the bureau director and make the director the final decision-maker for all important census-related issues.<sup>35</sup> This proposal adapts components of the Restoring the Integrity of American Statistics Act, introduced by Rep. Carolyn Maloney in 2008, to accommodate the aforementioned intervening Supreme Court precedent on agency independence.<sup>36</sup> In the process of pursuing this reform, Congress should also consider appointing a congressional commission to weigh the potential benefits and drawbacks to consolidating additional federal statistical agencies with the bureau.

Under this new structure, the president would not have a free hand to dictate the bureau's activity; the conventional view is that the president cannot override the decision-making of an agency head.<sup>37</sup> Moreover, although the director would not be protected from being removed without cause, the president would face political costs for doing so, including needing to provide a written, public justification for any firing and having to endure public scrutiny and a confirmation process for a new director with a potentially recalcitrant Congress.<sup>38</sup> These considerations could dissuade a president from removing

a director over political disagreements and hamper attempts to supersede the bureau's professional judgment. Lastly, vesting final decision-making power in the director would send a strong message that the director possesses both the authority and the obligation to resist presidential directives that are illegal, improper, or unwise, thereby strengthening the director's resolve to withstand political pressure.

### **>> Limit the number of political appointees.**

Congress should also statutorily cap the number of political appointees within the Census Bureau at a fixed number, closing off another vector of political interference. These caps should restrict noncareer Senior Executive Service (SES) positions, confidential or policymaking roles that are excepted from the SES or competitive service (known as Schedule C positions), and other so-called excepted service positions. While statutory limits generally apply to certain agency positions, Congress has imposed stricter limitations on other agencies before.<sup>39</sup>

Caps should respect the need for some politically appointed personnel. Appointees and other special advisers are often tasked, for example, with implementing congressional programs or policies, whereas career officials are relied on for their technical expertise as to how best to collect requested data.<sup>40</sup> If the bureau is reestablished as its own executive agency, it will likely have increased staffing needs, particularly in its senior ranks. Congress should determine caps in consultation with current and former bureau officials.

### **>> Require political appointees to publicly disclose communications with the White House.**

The bureau's contacts with White House officials can be a conduit for improper political directives. Currently, Census Bureau officials have no legal responsibility to log those communications. To deter future misconduct, Congress should codify a requirement that the bureau's political appointees log their contacts with political appointees from the White House, including the Office of Management and Budget (OMB), that implicate the collection, processing, or dissemination of census data.<sup>41</sup> These logs can be limited to contacts relating to the apportionment data and the population files used for redistricting. They should be regularly submitted to the relevant congressional oversight committees.

### **>> Remove the president from the congressional apportionment process.**

Current federal statutes require the commerce secretary to report the state population totals calculated by the Census Bureau to the president by December 31 of each census year, and the president to then put those numbers into a mathematical formula and report the resulting apportionment to Congress within one week of its opening session.<sup>42</sup> Each

state is automatically entitled to the number of representatives in the president's report.<sup>43</sup> When Congress enacted this statutory scheme in 1929 to limit political fights over apportionment, it considered the president's role in the process to be purely ministerial and perfunctory.<sup>44</sup>

A 1992 Supreme Court decision, however, has been misread to give the president unilateral authority under the automatic apportionment scheme to change the population totals for apportionment and to calculate apportionment based on other numbers.<sup>45</sup> The Trump administration invoked this case, *Franklin v. Massachusetts*, in its attempt to exclude undocumented persons from the count.<sup>46</sup> Several justices appeared to agree with the administration's interpretation of *Franklin*.<sup>47</sup> But allowing one individual to change the numbers at will after the bureau has finalized them would defeat the purpose of the whole census process — which involves years of research, design, and testing, as well as the contributions of hundreds of thousands of federal employees.

Such an allowance would also clash with the way the apportionment has historically been made available to the public and to Congress. Since 1950, the Census Bureau and the Commerce Department have announced both the population numbers used for apportionment and each state's allocation of House seats at a public press briefing, often only a few hours after sending them to the president.<sup>48</sup> The press conference gives Congress access to that information, even if the new apportionment does not take legal effect until the president has transmitted the results to the House. This custom, known as simultaneous submission, reflects an underlying faith in the Census Bureau's expertise and a tacit acknowledgment that the census's results should not be changed. Accordingly, no president has ever changed the apportionment numbers. There is no appropriate reason for a president to do so.

Congress should codify what has been the practice for decades by requiring the director of the Census Bureau to deliver the state population totals and congressional apportionment numbers to the public and the House at the same time. The president's go-between role would thus be rendered superfluous, and it should be removed from the statutory framework.

### **>> Bar untimely and untested additions to the census questionnaire.**

The controversy surrounding the citizenship question in 2020 demonstrated how abrupt additions to the census questionnaire can sow public distrust and jeopardize the accuracy and equity of the count. Congress can shore up trust and prevent political malfeasance by requiring the Census Bureau to engage in early, transparent decision-making about the decennial questionnaire.

Under current law, the bureau must present Congress with the questions that it will ask on the census two years before the day the count begins.<sup>49</sup> Congress should

strengthen this requirement by amending the Census Act to require the bureau to satisfy a series of prerequisites before introducing a question that did not appear on the previous census. These parameters should be more robust than the Administrative Procedure Act currently requires.<sup>50</sup> Congress should require the bureau to follow a multistep notice-and-comment process. In the initial step, the bureau would publish all relevant studies, propose testing, and provide the public with an opportunity to shape the question. Once the bureau receives feedback and undertakes testing, it would then prepare a preliminary recommendation subject to a shorter notice-and-comment period. During this second period, the bureau would again publish all relevant studies, as well as the methods and results of any testing, and explain how it made its preliminary recommendation considering its research and community input. Congress should also require the bureau to make a finding that the new question would not degrade overall census response rates. If, after considering the second round of comments, the bureau decides to proceed with a question that is likely to degrade response rates, it must share its policy justification and explain how it would compensate for the decreased response.

If the bureau does not meet these prerequisites, then it should be barred from adding the new question to the census form.

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The preceding recommendations specifically relate to the Census Bureau, but recommendations proposed by federal policy experts and good government groups to protect scientific agencies more broadly would also limit executive interference in the count. For example, the bipartisan National Task Force on Rule of Law and Democracy, which was convened by the Brennan Center, recommends that Congress require agencies to publish policies to ensure that senior political officials with supervisory authority do not exert improper political influence on the research and analysis of career scientists and other subject-matter experts at agencies.<sup>51</sup> Moreover, the task force and other groups recommend that Congress strengthen protections for whistleblowers in federal agencies so that government employees with concerns about undue executive interference can report them without fear of retaliation.<sup>52</sup>



## II. Enhancing Congressional Oversight of the Census Bureau

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While it is important to limit executive interference in census operations, the bureau still needs oversight. Indeed, the census is a basic constitutional requirement and a prerequisite for a democratic form of government in which all people are represented. The president can provide some of the needed oversight by setting broad policy objectives — like gathering new or better data on race and ethnicity or sexual orientation and gender identity — and by removing agency leaders who fail to uphold their duties. But the Constitution charges Congress with executing the enumeration. Accordingly, Congress should strengthen its oversight role.

### >> Restructure congressional oversight of the census.

Each congressional chamber should form a permanent committee or subcommittee on the census to lead a revamped approach to oversight that is sustained at a high level throughout every decade. Currently, the Committee on Oversight and Reform leads the House’s oversight of the bureau and all census activities.<sup>53</sup> The committee’s sweeping jurisdiction also includes the federal civil service, Washington, DC’s municipal affairs, the postal service, the National Archives, and federal procurement processes.<sup>54</sup> Its Senate counterpart, the Committee on Homeland Security and Governmental Affairs, covers the Census Bureau as well as the Department of Homeland Security, the postal service, government contracting, and more.<sup>55</sup>

These committees’ broad portfolios limit the time that members can dedicate to census matters, especially early in each census’s life cycle. For example, in the lead-up to 2020, most oversight letters and hearings focused on the citizenship question, leaving little room to address other politicized attempts to gather citizenship data, operational challenges, cybersecurity, and potential inequities raised by new internet-based census-taking methods, among other pressing concerns.<sup>56</sup>

Congress should establish permanent committees or subcommittees to assume jurisdiction over all Census Bureau programs and activities. The census is a monumental undertaking that requires the entire decade preceding it to plan, fund, study, and implement. Permanent committees with dedicated staff and resources would strengthen Congress’s capacity to master this complex subject matter, consult with experts, and devote consistent attention to census planning, contracting, research, content, and operations. There is strong precedent for such committees, including the House Standing Committee on the Census (1901–1946) and the Senate Standing Committee on the Census (1887–1921).<sup>57</sup>

### >> Rigorously pursue oversight.

The restructuring we propose will allow Congress to perform more extensive and consistent oversight of the census and the bureau, which in turn should help democratize the census process. In addition to concerns detailed in subsequent chapters, Congress should pay particular attention to the following:

- **Reviews of 2020 operations to inform future censuses.** Congress should press the bureau for a thorough analysis of the ways executive interference, the pandemic, and other factors influenced the count’s quality and public legitimacy, and for detailed plans to address similar challenges in future censuses.<sup>58</sup>
- **Operational planning for the 2030 census.** The bureau must continue to research and improve its operations to ensure quality counts going forward. Congress should ask the bureau to refine its enumeration strategies for communities that it has historically struggled to count; reduce the expenses associated with enumeration; and improve its communications approaches, including messaging and outreach. It should also ensure that the bureau increases the number of languages available for the census; consults with stakeholders earlier in its operational planning process; and effectively uses advisory committees.<sup>59</sup>
- **Research and testing to improve data quality.** The bureau must also continue to evaluate other methods for improving the quality of census data. Congress should keep close tabs on the bureau’s efforts to identify differential undercounts and overcounts and their causes; improve the quality of data from institutional settings where large groups of people live, like college dormitories; address missing data issues; and improve its use of administrative records in enumeration and data processing.<sup>60</sup>

### III. Improving and Protecting the Bureau’s Data Collection Methods

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**E**ven without executive interference in the 2020 count, the Census Bureau would have faced serious challenges to collecting accurate, equitable, and legitimate data. It has long struggled with racially discriminatory differential undercounts. It also faces stagnating response rates, spiraling costs, significant risks due to natural disasters, and outmoded questionnaire formats, among other problems. These difficulties are not just technical problems but democratic ones: a representative democracy requires representative data.

The bureau must do better. Congress can help by loosening restrictions on census-taking methods, eliminating statutory data-sharing limitations that undercut attempts to count college students, urging the bureau to resolve long-standing issues with its questionnaire design and data collection practices, and facilitating expert work to transform census operations for future decades.

#### Long-Running Differential Undercounts

The census has long failed to count communities of color — especially Black, Latino, and Native American communities — as accurately as it counts white communities. These undercounts have been substantial. In 2020, for example, the non-Hispanic Black undercount rate (3.30 percent) was 3.96 percentage points worse than the non-Hispanic white *overcount* rate (0.66 percent); the Latino undercount rate (4.99 percent) was 5.65 percentage points worse; and the American Indian or Alaska Native on reservation undercount rate (5.64 percent) was 6.3 percentage points worse.<sup>61</sup> These disparities render millions of people invisible in the apportionment and redistricting processes and redirect critical resources away from their communities. And they have persisted for decades.<sup>62</sup> In some instances, they have gotten worse over time, with the Latino undercount rate more than tripling between 2010 and 2020.<sup>63</sup>

Myriad factors contribute to undercounts, including differential access to technology, language barriers, and housing inequities. And the census’s struggles perpetuate systemic discrimination against and disenfranchisement of communities of color. Undercounts deprive groups of equal political representation and their fair share of crucial public services like education, medical care, and food assistance.<sup>64</sup> The differential access that white communities and communities of color have to political power and resources, in turn, lays the foundations for future undercounts.

These enduring inequities extend a legacy of racist and xenophobic policies that have shaped the country since its founding. The framers codified inequity in the count through the Constitution’s Three-Fifths Clause, which required the census to count enslaved persons as three-fifths of a person.<sup>65</sup> The Fourteenth Amendment ultimately erased the *de jure* undercounts of the so-called Three-Fifths Compromise, but *de facto* undercounts continued.<sup>66</sup> Studies in the wake of World War II showed the Census Bureau repeatedly counting Black people at significantly lower rates than whites.<sup>67</sup> Despite the bureau’s long awareness of these problems, they persist today, coupled with undercounts of Latino, Native American, and other communities.

#### Limits to the Modern Census-Taking Approach

The modern approach to census-taking has failed to eliminate racially differential undercounts — or to reach an acceptable percentage of the overall population. The bureau’s current approach involves two major phases: a self-response period, in which people fill out and return the census questionnaire themselves, and a nonresponse follow-up (NRFU) period, in which hundreds of thousands of workers collect answers from the tens of millions of households that have not responded. This model has been in place for several decades.<sup>68</sup> Historical trends suggest that approximately one-third to one-quarter of the population will not self-respond to the census,<sup>69</sup> which means that the bureau must inevitably count tens of millions of people through the follow-up process. And the people in this follow-up universe are not a representative cross section of the national population: communities of color and immigrant communities, among other groups, are heavily overrepresented.<sup>70</sup>

Follow-up is extremely costly and only getting costlier, even setting aside the additional needs the pandemic

created. As of March 2021, the bureau reported spending nearly \$1.43 billion on follow-up efforts for the 2020 census.<sup>71</sup> But even that spending was inadequate. To cover the gap, civil society groups and state and local governments invested staggering additional sums into organizing, outreach, and related activities — including \$117 million from 102 national philanthropies and \$340 million from state governments.<sup>72</sup> This additional funding was not evenly spread, however. For example, the state of California invested \$187 million, while the state of Texas invested nothing.<sup>73</sup>

This paradigm loads the risks of omissions disproportionately on communities of color. (By the bureau's own admission, NRFU is “entirely about hard-to-count populations.”<sup>74</sup>) And, while the bureau does provide considerable support to get-out-the-count efforts, communities of color ultimately bear disproportionate costs and responsibilities to mitigate continued undercounts.

## Exposure to Natural Disasters and Civil Unrest

The field-intensive approach to census-taking is not just expensive and complicated but also risky, as the bureau's attempts to collect data in 2020 amid natural disasters and civil unrest demonstrate. The pandemic induced significant displacement — especially among college students, many of whom were sent home just before the bureau was to begin counting them where they went to school — and required the bureau to delay and rethink its plan for follow-up.<sup>75</sup> Operations became even more fraught when the worst hurricane season in recent history and rampant wildfires late in the summer of 2020 destroyed homes and displaced a total of 1.7 million people.<sup>76</sup> In the wake of the police killings of several unarmed Black people, including George Floyd and Breonna Taylor, trust in the government declined, and civil unrest may have made it harder for bureau workers to complete the enumeration.<sup>77</sup>

The Census Bureau asked Congress for 120 additional days to deliver final apportionment counts and redistricting data files — to no avail.<sup>78</sup> The Trump administration then reversed the bureau's extended operational plan. Advocates for a fair count ultimately restored most of the bureau's extended plan, but not without a nearly nine-month court fight that created serious uncertainty about census timelines until virtually the moment the apportionment numbers were released in April 2021.<sup>79</sup>

## Limits of the Census Questionnaire

The decennial questionnaire itself also poses obstacles to an accurate and equitable count. Its current configuration does not allow people to describe their identities as they understand them. That limitation results in certain groups going undercounted and others becoming statistically invisible.<sup>80</sup>

In the first instance, the bureau's options for reporting racial and ethnic identity do not sufficiently reflect the country's demographic realities. The bureau uses two separate questions to determine race and Hispanic or Latino origin, following OMB's 1997 standards for the collection of federal data on race and ethnicity. The bureau uses six categories to collect information on race: white, Black or African American, American Indian or Alaska Native, Asian, Native Hawaiian or other Pacific Islander, and some other race. The bureau asks a separate question to allow people to identify as “Hispanic, Latino, or Spanish origin.”<sup>81</sup>

Census respondents have experienced difficulties with the separate race and ethnicity questions, as well as the lack of options for certain racial or ethnic groups.<sup>82</sup> For example, the existing racial and ethnic checkboxes do not provide respondents who identify as Middle Eastern or North African (MENA) with clear options to identify themselves, leading to decennial numbers that do not capture their communities.<sup>83</sup> And the census has seen a dramatic increase in the number of people who self-identify as “some other race” or refuse to fill out either question. This change is especially prominent among Latino respondents: in the 2010 census, Latinos made up 97 percent of all those who identified as “some other race” alone.<sup>84</sup> The growth in people identifying as “some other race” complicates the federal government's ability to send federal dollars into ethnic communities and enforce antidiscrimination laws, many of which rely on people identifying with one of the other five OMB race categories or as Latino.

Similarly, demographic information about LGBTQ+ Americans is lacking. Advocates seeking such data have turned to other federal data collections, academic research, and information collected by LGBTQ+ communities themselves. Nonetheless, substantial data gaps exist, in part because the nation's largest population surveys — the census and the American Community Survey (ACS) — do not include sexual orientation and gender identity (SOGI) questions.<sup>85</sup> This omission prevents federal, state, and local governments, as well as advocates, from knowing the full size of the LGBTQ+ population, much less its funding and policy needs.

Under the Obama administration, at least four federal agencies requested that the Census Bureau add a SOGI

question to the ACS.<sup>86</sup> But the Trump administration halted these efforts, just as it stopped progress on combining the race and ethnicity questions.<sup>87</sup>

### >> **Revoke statutory limits on data collection methods.**

The bureau must continue to update its census-taking techniques to resolve its persistent undercount problem and insulate the count against natural disasters. Experts both inside and outside the bureau are exploring methods that may be more accurate and equitable.<sup>88</sup> Congress should restore the bureau's methodological flexibility by freeing it from statutory controls on data collection techniques. Specifically, it should take the following steps:

- **Eliminate the statutory bar on sampling for apportionment.** Federal law broadly permits sampling — and indeed requires it when feasible — but it has barred the bureau from doing so to calculate the congressional apportionment since 1957.<sup>89</sup> Because the apportionment numbers form the basis for subsequent data sets, including for redistricting, this statutory bar functionally extends beyond apportionment,<sup>90</sup> constraining the bureau's ability to address undercounts. The National Academy of Sciences, for example, had concluded that sampling was the only way to reduce differential undercounts “to acceptable levels at acceptable costs” in the 2000 census.<sup>91</sup> Eliminating this statutory bar would permit the bureau to use sampling for apportionment purposes if justified by reliable research.
- **Eliminate the private cause of action for persons seeking to challenge statistical methods.** The Census Act currently provides a private cause of action for certain “aggrieved” persons to challenge the bureau's use of particular statistical methods.<sup>92</sup> Congress enacted this provision in 1997 specifically to allow challenges to sampling and statistical adjustment.<sup>93</sup> But it has become an open invitation for challenges to any of the bureau's advanced counting and reporting methods. For example, it was used in at least one lawsuit brought by the state of Alabama seeking to challenge differential privacy — the bureau's chosen 2020 privacy protection method, not a counting method.<sup>94</sup>

Importantly, eliminating these statutory constraints would not leave the bureau legally unfettered. Its methodological decisions would still be subject to review under the Constitution and the Administrative Procedure Act, which protects against arbitrary and capricious agency actions.<sup>95</sup> Moreover, enhanced congressional oversight and more participatory and inclusive planning processes at the bureau would help make its decision-making about methods more informed and transparent.

### >> **Permit the director to extend the reporting deadlines for apportionment and redistricting data in emergencies.**

Congress should amend Title 13 to permit the bureau director to extend the timeline for reporting census results based on a showing that the extension is necessary to ensure accuracy. To reduce complications for states' redistricting timelines, Congress can limit any extensions to three months total. There is no constitutional bar to later delivery times. For many early censuses, Congress extended relevant reporting deadlines after enumerators were unable to meet their original timelines.<sup>96</sup>

### >> **Allow the bureau more freedom to collect data from educational institutions.**

The Census Bureau faced significant difficulties enumerating college students in 2020. The bureau counts college and university students living away from home while attending school at their on- or off-campus housing.<sup>97</sup> To assist with the 2020 count, many schools provided student records directly to the bureau instead of asking students to self-respond.<sup>98</sup> When doing so, however, many schools withheld demographic information about their students in accordance with Department of Education guidance that the federal Family Educational Rights and Privacy Act (FERPA) bars such disclosure without students' consent.<sup>99</sup>

Congress should amend FERPA to allow higher education institutions to disclose to the bureau any student information that is asked on the census form, including sex, race, and ethnicity, without requiring students' consent. Such information would still be protected from public disclosure by Title 13's strict confidentiality provisions.

### >> **Facilitate changes to the census's race and ethnicity questions.**

Congress should pass a resolution urging OMB to approve — and the Census Bureau to implement — a combined race and ethnicity question for the 2030 census. The question should include expanded racial and ethnic categories to account for various population groups and subgroups.

For instance, the question should include a category to identify as “Hispanic, Latino, or Spanish,” with checkboxes that further identify specific national origins or subgroups. The question should also include a new “Middle Eastern or North African” category with examples representing different regions and further checkboxes for national origin.<sup>100</sup> Recent bureau studies have found that combining the race and ethnicity questions and including a MENA category would yield more accurate data than the current approach of separating race and ethnicity.<sup>101</sup> OMB appeared ready to approve this change in 2017. But in 2018, the bureau postponed its efforts to revise the questionnaire, promising only to continue to research how to collect race and ethnicity data.<sup>102</sup>

The bureau should also modify the questionnaire to align with contemporary demographic realities, including changes to help American Indian and Alaskan Native, Black or African American, and Asian American, Native Hawaiian, and Pacific Islander communities self-report their identities with greater granularity, such as providing detailed checkboxes for national origin and ethnic subgroups.<sup>103</sup>

Crucially, when it comes to issues of question wording and formatting, OMB and the bureau are the prime movers. But Congress can still shepherd change through its oversight role. Specifically, Congress should ensure that the bureau resolves remaining research questions and testing in a timely manner; that OMB and the bureau undertake any necessary outreach and consultation with stakeholder communities to ensure that the new race and ethnicity question is properly designed and publicly accepted; and that OMB approves any necessary changes to its standards for the collection of data on race and ethnicity to permit the new question.

#### **>> Facilitate a sexual orientation and gender identity question.**

Congress should also use its policy-setting and oversight powers to press for the census and the ACS to include SOGI questions. This proposal builds off recent successes in the bureau's Household Pulse Survey, a national sample survey designed to measure the impact of Covid-19 that in later phases allowed respondents to identify their sexual orientation, gender identity, and sex assigned at birth.<sup>104</sup> The Pulse data has enabled the bureau for the first time in its history to shed light on the deep inequities that the LGBTQ+ community faces in housing, employment, and public health.<sup>105</sup> The survey, however, is sent to only a small subset of the population and may be discontinued

once the pandemic subsides. Adding a question to the census and the ACS would allow the bureau to collect more — and more powerful — SOGI data.

As with reformatting the race and ethnicity question, OMB and the Census Bureau are the prime movers here. Congress, however, can ensure that those actors take all necessary steps, including continued research and testing of question formats and enumeration methods, consultation with stakeholders, and, finally, the promulgation of new federal statistical directives. This process would mirror the steps previously taken to revise directives on race and ethnicity data and will be crucial to perfecting the question format and ensuring its broad acceptance.

#### **>> Convene a National Academies panel to evaluate additional operational changes.**

Advocates who represent communities of color, including the National Urban League, are seeking a new federal advisory commission to examine the causes of and potential solutions for differential undercounts.<sup>106</sup> If the bureau does not move forward with such a commission — or if it creates one whose ambit proves too narrow — Congress should authorize and fund a panel under the banner of the National Academies of Sciences, Engineering, and Medicine to study and recommend ways to improve the bureau's enumeration techniques, with a particular emphasis on eliminating persistent differential undercounts of communities of color. For decades, the bureau has worked with the National Academies to evaluate the quality of its data and identify ways to obtain more accurate counts. The National Academies have already announced that they will convene an ad hoc committee to evaluate the data quality of the 2020 census and make recommendations for the 2030 census.<sup>107</sup> This proposal would build on that process.

## IV. Supporting State Efforts to End Prison Gerrymandering

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The bureau's traditional data collection and publication practices have contributed to another problem: prison gerrymandering. This unjust practice counts incarcerated people where they are imprisoned rather than at their homes when electoral districts are drawn. In the absence of a federal ban, states have the prerogative to decide where to allocate people, and campaigns to end the practice have gained traction in states throughout the country.<sup>108</sup> But efforts to end prison gerrymandering will only go as far as the bureau's data will allow. Congress can support state reforms by prompting improvements in the bureau's redistricting data products and fostering needed cross-agency cooperation.

Prison gerrymandering deprives communities of color, which are disproportionately represented in correctional facilities, of a significant share of their population for redistricting and funding purposes. The political representation and federal resources they should receive are instead shifted to the predominantly white, rural areas where prisons are overwhelmingly located. This practice continues despite its racially discriminatory repercussions and notwithstanding that the average time a person will serve in state prison is roughly 25 percent of the 10-year period covered by each census.<sup>109</sup>

In recent censuses, the bureau produced redistricting data sets that counted incarcerated people in the correctional facilities where they were detained. It also produced data about prison populations, but only after the states' redistricting cycles ended. This practice complicated map drawers' attempts to reallocate incarcerated people to their home communities.

In the 2020 census, however, the bureau published prison population data in the same files that states and localities used for redistricting, allowing map drawers to remove prison populations from census blocks.<sup>110</sup> But because the data sets still did not provide demographic information or places of previous residence for incarcerated people, states continue to face challenges reallocating people.<sup>111</sup> They must rely on state and local administrative records to identify prisoners' pre-incarceration addresses and infer their demographic characteristics. The contents and quality of such records vary across jurisdictions, making it difficult for states to reallocate prison populations consistently and accurately.<sup>112</sup>

Bureau representatives, for their part, have identified problems with collecting the home address information necessary to reallocate people, including difficulties

acquiring that information directly from incarcerated people, the low quality of correctional facilities' administrative records, and prison officials' lack of cooperation with their efforts.<sup>113</sup>

Congress can combine its lawmaking authority with its policy-setting and oversight powers to force faster change on this issue.

### >> **Change the residence rule.**

The residence rule — a set of administrative guidelines that govern how census-takers record addresses — should be updated in time for the 2030 census to count incarcerated people (including juveniles) at their pre-incarceration addresses. Congress can mandate this change itself through legislation similar to a current bill introduced by Rep. Deborah Ross.<sup>114</sup> Updating the residence rule for the purpose of apportionment and redistricting would not eliminate crucial information on incarcerated people from other federal surveys and agencies, such as the ACS and the Bureau of Justice Statistics, which would continue to collect data on group quarters facilities and prisons.<sup>115</sup>

### >> **Hold the Census Bureau and other agencies accountable for collecting home address data.**

Congress should closely oversee the Census Bureau's efforts to create protocols for collecting home residence addresses and other demographic data from incarcerated people, for inclusion in the redistricting data files. Congress can likewise use its oversight authority to ensure that authorities that administer prison facilities and maintain records on incarcerated people support the bureau's testing and data collection efforts. Congress is well positioned to ensure cooperation from all federal agencies, as well as state agencies that receive federal funding.

## V. Shoring Up Data Confidentiality

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**E**nsuring the confidentiality of census responses is vital for maximizing census participation.<sup>116</sup> Without assurances that the Census Bureau will keep the census information that people provide confidential, would-be census participants might not self-respond or open their doors to enumerators, particularly in communities that have reason to distrust the government and that have historically gone undercounted.<sup>117</sup> It is equally important, however, that the bureau produce data that is accurate enough for such functions as redistricting and research.

In 2020, long-running discussions about the best ways to protect the confidentiality of census data hit a flash point as the bureau unveiled a new disclosure-avoidance technology called differential privacy. The bureau designed it to prevent the potential reidentification of census respondents by users employing increasingly sophisticated data aggregation techniques — a threat it asserts that the Census Act requires it to mitigate. But stakeholders worried that the technique might erode the accuracy of 2020 census data sets to the point that they would no longer be fit for many of their uses.<sup>118</sup>

As technology advances and threats to data confidentiality mount, the bureau will need to determine how best to balance its legal duty to protect the confidentiality of census responses with legitimate and widespread concerns about the accuracy of its data. This topic is a complex one factually, legally, and policy-wise; it will require the careful attention of the full range of census stakeholders both inside and outside the government. Congress should not preempt ongoing conversations and research intended to produce future recommendations regarding the proper nature and scope of federal law’s confidentiality guarantees. Still, it can take some modest steps to shore up the bureau’s approach to data stewardship by codifying salutary aspects of the status quo.

### **>> Clarify the superseding effect of Title 13’s confidentiality provisions.**

Title 13 makes clear that individual census records may not leave the four walls of the Census Bureau.<sup>119</sup> The Justice Department’s Office of Legal Counsel has repeatedly concluded that Title 13 supersedes other federal laws that otherwise permit disclosure of personal information.<sup>120</sup> Despite this precedent, the Justice Department in 2018 still suggested that the USA Patriot Act could provide a legal workaround to compel the Census Bureau to

release confidential census data to other executive agencies for law enforcement activities.<sup>121</sup>

To prevent future attempts to circumvent the Census Act’s guarantees, Congress should amend the act to expressly state that its confidentiality provisions protecting individual identifying information override all other federal statutes. This measure would solidify current protections and be consistent with the Supreme Court’s conclusion that strict confidentiality is necessary for the census to succeed.<sup>122</sup>

### **>> Codify bureau policy requiring specialized review of aggregate data on sensitive populations.**

Rumors that the Trump administration was exploring ways to override Title 13’s confidentiality protections and preparing data sets on citizenship raised specters of the Census Bureau’s release of aggregated data on Arab Americans to the Department of Homeland Security after the September 11 attacks.<sup>123</sup> Once this earlier abuse came to light, the bureau created an internal policy requiring every request for aggregated data on “sensitive topics or sensitive populations, topics that have policy implications, or topics that may negatively impact the bureau’s reputation” to be specially approved by the bureau’s Policy Coordination Office, working with its Data Stewardship Executive Policy Committee. When the bureau publishes a custom data set, it must disclose the name of the requesting agency, a description of the request, the source of the information, and the date it provided the information.<sup>124</sup>

Congress should codify this policy to ensure that executive agencies do not abuse aggregated data releases. This policy would also allow the media, community groups, and other census stakeholders to keep track of such disclosures and subject them to public scrutiny.

## VI. Ensuring Adequate Funding for the Census

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The census is called the country’s “largest peacetime mobilization” because it requires sophisticated logistics and massive amounts of person power.<sup>125</sup> As the number of housing units has increased and people’s willingness to respond to surveys has decreased, the bureau has had to put more resources into its field operations and develop new technologies to count everyone. These adaptations have come with sharply increased costs from 1960 onward.<sup>126</sup> Congress should adopt a more flexible and collaborative approach to census budgeting to mitigate this challenge.

Throughout the 2020 census cycle, the bureau was short on funds. Early last decade, Congress urged the bureau not to spend more than the \$12.1 billion that it had spent on the 2010 census, making no adjustment for inflation.<sup>127</sup> This limit on appropriations, combined with untimely disbursements, required the bureau to do more work than it did for 2010 with less money: the 2010 census had to count 313.9 million people in 133.5 million housing units, while the 2020 census had to count 331.4 million people in 140.5 million housing units.<sup>128</sup> Without adequate and reliable funding, the bureau canceled or modified 40 contracts, delayed critical tests, and reduced its workforce.<sup>129</sup> In the second half of the decade, additional budget cuts and funding delays forced the bureau to cancel all but one of its 2018 end-to-end census tests — its only dress rehearsals for the first internet-based census — and accompanying advertising programs in historically undercounted communities.<sup>130</sup> These cuts prompted the Government Accountability Office to place the 2020 census on its list of high-risk programs.<sup>131</sup>

### **>> Make the Census Bureau’s discretionary spending limits flexible.**

Congress should modify its approach to census budgeting to ensure that the bureau receives adequate funding to fully research, test, and execute all operations for the 2030 census and carry out all other priorities identified in this report.

Any sound budget policy for the census must acknowledge the bureau’s cyclical needs, which increase rapidly as each decade progresses. In its 2017 fiscal year budget, the Obama administration proposed a reasonable approach: amending the Balanced Budget and Emergency Deficit Control Act to include a flexible cap adjustment to the bureau’s discretionary spending limits. The adjustments would kick in at least four years prior to the census year (i.e., year six), and the amount would be determined by the year’s estimated costs minus a base funding level (determined by appropriations received in year five and adjusted for inflation).<sup>132</sup> Essentially, this proposal would allow Congress to depart from the discretionary spending caps and authorize additional funding for decennial operations in the second half of every decade based on the bureau’s updated budget estimates.

Congress should adopt and extend this framework and maintain an active dialogue regarding funding with the Census Bureau over the course of every decade.



## VII. Eliminating Antiquated Provisions of the Census Act

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**T**he Census Act is overladen with outdated and unnecessary provisions, including a section exclusively about leases for the 1980 census and requirements that the bureau collect and publish monthly statistics on vegetable oil and animal fats.<sup>133</sup>

The act also contains derogatory language and entrenches inequality by authorizing the collection of statistics on “the defective, dependent, and delinquent classes.”<sup>134</sup> Nor is the act’s language consistently gender-neutral.<sup>135</sup> Finally, numerous blank chapters and repealed provisions are scattered throughout. These problems render the act largely unreadable and do not clearly communicate the baseline rules and norms that should govern a contemporary statistical agency of such critical importance to our nation’s workings.

### **>> Remove obsolete portions of the Census Act.**

Congress should remove outdated provisions from the statutes governing the census and reorganize what remains. As part of this reform, Congress should also add to Title 13 a clear statement that the Census Bureau is bound to pursue the collection and dissemination of accurate, equitable, and legitimate data. The articulation of such a mission may further empower the bureau to push back against executive interference by setting strong agency norms and cultural values.

# Conclusion

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**C**onducting the census is one of the federal government’s foundational constitutional duties. The results of the census determine who counts in our democracy and our broader society. The law and policy surrounding it must adapt to enable the count to truly reflect our ever more diverse nation.

Congress must exercise the full array of its powers — from legislating to appropriating funds to overseeing the work of federal agencies and setting their policy priorities — to make the count more accurate, equitable, and legitimate. Congress has a responsibility to put long-overdue changes in place as well as to set the expectations that will guide the Census Bureau toward improved counts in the future.

The threats to the 2020 census demonstrate that the need for reform is greater than ever. While civil rights groups, litigators, and others managed to protect the count from absolute disaster, future census efforts may not be so fortunate. With planning for 2030 already under way, Congress must act now to ensure that the census will continue to be a reliable cornerstone of our democracy.

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**33** 13 U.S.C. §§ 5, 141.

**34** *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2192 (2020) (holding on separation of powers grounds that the Consumer Financial Protection Bureau could not be run by a single director with for-cause removal protection); *Collins v. Yellen*, 141 S. Ct. 1761, 1787 (2021) (holding the same for the Federal Housing Finance Agency); *Collins*, 141 S. Ct. at 1801 (Kagan, J. concurring) (“Any ‘agency led by a single Director,’ no matter how much executive power it wields, now becomes subject to the requirement of at-will removal.”); and Wolf and Cea, “Critical History,” 18.

**35** 13 U.S.C. § 2 (Commerce Department jurisdiction over the Census Bureau); 13 U.S.C. § 4 (issuing rules and regulations and authorizing delegation of functions); 13 U.S.C. § 5 (preparing census questionnaires); 13 U.S.C. § 6 (acquiring information for the bureau’s work); 13 U.S.C. § 7 (making requisition upon the Government Publishing Office); 13 U.S.C. § 8 (disclosing non-personally identifying information); 13 U.S.C. § 16 (defining content and structure of address information); 13 U.S.C. § 23 (establishing temporary staff); 13 U.S.C. § 24 (staffing the bureau); 13 U.S.C. § 26 (contracting transportation); 13 U.S.C. § 91 (collecting and publishing business statistics); 13 U.S.C. § 141(a) (taking a decennial census of the population); 13 U.S.C. § 141(b) (reporting the apportionment populations to the president); 13 U.S.C. § 181 (producing annual population data); 13 U.S.C. § 182 (conducting various surveys); 13 U.S.C. § 193 (collecting preliminary and supplementary statistics); and 13 U.S.C. § 196 (conducting special censuses).

**36** Restoring the Integrity of American Statistics Act of 2008, H.R. 7069, 110th Cong. (2008), <https://www.congress.gov/bill/110th-congress/house-bill/7069?s=1&r=19>.

**37** Elena Kagan, “Presidential Administration,” *Harvard Law Review* 114 (2001): 2250, [https://harvardlawreview.org/wp-content/uploads/pdfs/vol114\\_kagan.pdf](https://harvardlawreview.org/wp-content/uploads/pdfs/vol114_kagan.pdf).

**38** 13 U.S.C. § 21(b)(3).

**39** 5 U.S.C. §§ 3134(b), 3134(d) (establishing limits on the total number of noncareer appointees in all agencies government-wide and the number of noncareer appointees in an individual agency); 38 U.S.C. §§ 709(a)(1), 709(b) (capping the number of noncareer SES and Schedule C positions in the Department of Veterans Affairs); and 42 U.S.C. § 904(c) (capping the total number of Social Security Administration positions that are held by noncareer SES appointees or are excepted from competitive service).

**40** *La Unión del Pueblo Entero v. Ross*, 353 F. Supp. 3d 381 (D. Md. 2018), expert declaration of Terri Ann Lowenthal, at 13, 21, [https://www.brennancenter.org/sites/default/files/2022-08/2019.01.14\\_Lowenthal\\_Expert\\_Declaration.pdf](https://www.brennancenter.org/sites/default/files/2022-08/2019.01.14_Lowenthal_Expert_Declaration.pdf).

**41** Were Congress to maintain the Census Bureau as a subdivision of the Commerce Department, this logging requirement should also apply to communications between political appointees in Commerce and the Census Bureau.

**42** 13 U.S.C. § 141(b) (requiring the secretary submit to the president a report of the “tabulation of total population of States [as determined by the decennial census] as required for the apportionment of Representatives in Congress”); and 2 U.S.C. § 2a(a) (requiring the president to transmit to Congress “a statement showing the whole number of persons in each State . . . as ascertained under the . . . decennial census of the population” and “the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member”).

**43** 2 U.S.C. § 2a(b).

**44** See Reapportionment and Census Act of 1929, S312, 71st Cong. (1929), [https://www.census.gov/history/pdf/1929\\_census\\_act.pdf](https://www.census.gov/history/pdf/1929_census_act.pdf); Cong. Rec. 71 (1929), at 1858 (statement of Senator Vandenberg, primary Senate sponsor of the automatic reapportionment bill, stating, “I believe as a matter of indisputable fact, that function served by the President is as purely and completely a ministerial function as any function on earth could be.”); and Cong. Rec. 71 (1929), at 1611 (“[T]he President is making a ministerial report. He is making it in December 1930. He is reporting the arithmetic of a census plus the application of a mathematical formula to this census arithmetic. That is all he is doing. He sends these findings to Congress, and he is through.”).

**45** *Franklin v. Massachusetts*, 505 U.S. 788, 797–800 (1992).

**46** Presidential Memorandum, 85 Fed. Reg. 44,679 (relying on *Franklin* to claim the president’s authority to remove undocumented persons from the state population totals reported by the commerce secretary).

**47** *Trump*, 141 S. Ct. 530, transcript of oral argument, at 9 (Justice John Roberts asking which subsets of the population Trump would try to exclude); at 13 (Justice Clarence Thomas asking the same); and at 19 (Justice Samuel Alito discussing different subsets of immigrant populations).

**48** Taylor Savell et al., “Apportionment in the United States — Count and Increase: 1790–1920; Announce and Transmit: 1929–Present,” accessed July 24, 2022, <https://usapportionment.org/announceAndTransmit.html>.

**49** 13 U.S.C. § 141(f)(2).

**50** For an example of federal statutes that impose notice and comment requirements with additional parameters beyond those imposed by the Administrative Procedure Act, see 16 U.S.C. § 7913(b) (covering closures of federal land to hunting, fishing, and recreational shooting).

**51** National Task Force on Rule of Law & Democracy, *Proposals for Reform: Volume II*, October 3, 2019, 8–9, <https://www.brennancenter.org/our-work/policy-solutions/proposals-reform-volume-ii-national-task-force-rule-law-democracy>.

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protections. For example, see Climate Science Legal Defense Fund et al., *Protecting Science at Federal Agencies: How Congress Can Help*, November 2018, 26–30, <https://www.environmentalprotectionnetwork.org/wp-content/uploads/2018/11/Protecting-Science-at-Federal-Agencies-Report.pdf>.

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**55** U.S. Senate Committee on Homeland Security and Governmental Affairs, "Census," accessed July 24, 2022, <https://www.hsgac.senate.gov/issues/census>; and U.S. Senate Committee on Homeland Security and Governmental Affairs, "Jurisdiction and Rules," accessed July 24, 2022, <https://www.hsgac.senate.gov/about/jurisdiction>.

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**135** While some provisions of the Census Act include gender-neutral language, others do not. See 13 U.S.C. § 21(b)(1) ("The term of office of the Director shall be 5 years, and shall begin on January 1, 2012, and every fifth year thereafter. An individual may not serve more than 2 full terms as Director."); and 13 U.S.C. § 141 ("The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the 'decennial census date,' in such form and content as *he* may determine, including the use of sampling procedures and special surveys" [emphasis added].)



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