



Counting Illegal Aliens in the Census: Constitutional Considerations

The idea, close to the heart of the Democratic Party, to count illegal aliens for the purpose of apportioning representation in the U.S. House of Representatives raises substantial constitutional, political, and practical concerns. The matter came to a vote in the House on May 9 when a measure favored by Republicans that would prevent apportionment manipulation via incorporation of the illegal migrant population was opposed by every single Democrat. In addition, 11 Republicans and 11 Democrats abstained from voting on H.R. 7109, the Equal Representation Act. This analysis explores the concerns about counting illegal aliens for apportioning representation from a constitutional law standpoint, emphasizing the arguments against including illegal immigrants in apportionment counts.



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Constitutional Framework

The U.S. Constitution mandates a census every 10 years to determine the apportionment of representatives among the states, based on “the whole number of persons in each state” (Article I, Section 2). We argue that the term “persons” in this context was intended to refer to inhabitants maintaining lawful residency, implicitly excluding those who reside in the country illegally. This interpretation aligns with the principle that political representation should be tied to lawful citizenry or at least legal residents, reflecting a community’s legitimate constituents. This principle, in turn, supports the only logical inference from the concept of “consent of the governed,” namely, that such consent is the *sine qua non* of legitimate government and those who knowingly flout the law and enter the country illegally prove themselves unwilling to adhere to law, thus identifying themselves as, in fact, ungovernable.

Historical Context and Intent

When the framers included the phrase “whole number of persons” and when the 14th Amendment was ratified, there was no legal distinction akin to modern illegal immigration, as immigration was less regulated than today. Therefore, it can be inferred that the framers did not intend to include individuals who explicitly violate U.S. law as part of the population basis for political representation. As U.S. immigration laws have evolved to define legal and illegal residency, so too should our interpretation of these constitutional provisions.

Legal Precedents and Interpretations



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The Supreme Court has not definitively ruled that illegal aliens must be counted for the purposes of congressional apportionment. In *Evenwel v. Abbott* (2016), while the Court upheld the counting of all persons for state legislative districts, it left open the question for congressional apportionment. This ambiguity provides a constitutional basis for revisiting and potentially revising the understanding of “persons” in the apportionment context.

In *Department of Commerce v. New York* (2019), although the Court questioned the secretary of commerce’s motives in including a question on citizenship, the secretary may once again include such a question, though such a decision would undoubtedly meet with legal challenges and the concomitant delay that would prevent the citizenship question from inclusion in the 2030 census.

Policy Implications

Counting illegal aliens in apportionment calculations grants additional political power to states with larger illegal populations at the expense of those with fewer illegal residents. This can skew political representation away from citizens and legal residents, whose interests would then be underrepresented. Furthermore, it could incentivize states to harbor larger illegal populations to gain more political influence, thereby undermining federal immigration laws, as well as diverting federal funds away from citizens and legal residents and toward those who have entered the country in contravention of the law. State legislatures would be forced to accept increasingly larger populations of illegal immigrants in order to avoid dilution of their constitutionally protected proportional representation in Congress, and the subsequent secondary status that would result from a state’s failure to accommodate the administration’s philosophical and financial support of invasion across the southern border.

Practical Considerations

Overestimations of the number of illegal immigrants might occur in localities that encourage participation as a political strategy to increase their representation, distorting the allocation of federal resources and electoral power.

Conclusion

Constitutionally, historically, and practically, counting illegal aliens for the purpose of apportioning representation in the House of Representatives is problematic. It contravenes the original intent of the Constitution’s framers and raises significant legal questions that the Supreme Court has yet to resolve definitively. Politically, it undermines the representational rights of legal residents and citizens.

By opposing the inclusion of illegal aliens in apportionment calculations, we advocate for a reassessment of current practices to align them more closely with both the letter and the spirit of the Constitution, ensuring fair and legal representation for all citizens and legal residents. This stance supports the broader integrity of the Constitution, and upholds the principle that representation should directly correspond to legal and verifiable residency within each state, as is circumscribed within the principle of republicanism that is the foundation of the Constitution and the union.

Bullet Point Analysis of H.R 7109:

Upon analyzing the text of H.R. 7109, titled the “Equal Representation Act,” several constitutional justifications can be provided to support its provisions, which aim to require a citizenship question on the decennial census and to modify apportionment of representatives to be based only on U.S. citizens rather than all persons. Here are four key points in support of the bill:



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1. Constitutional Adaptability and Interpretation: The Constitution’s requirement to count the “whole number of persons” for apportionment purposes can be interpreted in the context of evolving societal and legal standards. The Constitution has been amended many times in response to changing conditions and understandings. Modifying apportionment to count only citizens reflects a modern understanding of political community and state representation responsibilities. Furthermore, Article I, Section 2 of the U.S. Constitution grants to Congress the authority to conduct the decennial census “in such manner as they by law direct.” Such considerable grant of authority reveals the Founders’ appreciation of the necessity of altering the census — thus the apportionment of representatives — as the Congress would deem necessary in order to maintain a House of Representatives that genuinely represented the people of the several states.

2. Enhancing State Sovereignty: Allowing states to have representation based solely on their citizen population could reinforce state sovereignty. It aligns representatives’ accountability more directly with those who have full legal and political rights under state and federal law, ensuring that elected officials are primarily responsive to the needs and preferences of citizens. To place states in the position of being denied equal footing with other states based on whether or not illegal immigrants were afforded quasi-citizenship by the state legislatures would effectively force states to subsidize illegal immigration and establish themselves, unwillingly, as sanctuaries for those who crossed the border in contravention of the law. This, in turn, could cause a balkanization of the union, subordinating states based on their acceptance of a president’s preference for an increased illegal population.

3. Ensuring Equal Political Representation: By apportioning representatives based on citizen numbers, the bill seeks to ensure that political power is equitably distributed among those who legally participate in the political process. This can be seen as enhancing the principle of “one person, one vote” by ensuring that each vote has equal weight without being diluted by populations who do not have the legal right to vote. Such dilution would damage — perhaps irreparably — the foundation of representation of the people upon which the legitimacy of republican government depends. Additionally, the reduction in relative power of people in states without large illegal immigrant populations would not only disenfranchise citizens and other lawful residents, but it would possibly violate Article IV, Section 4 of the U.S. Constitution guaranteeing a “republican form of government” to every state in the union. Should illegal immigrants be counted for purposes of apportionment of representatives in the House of Representatives, citizens and legal residents could argue that they are not being represented as the definition of that word has been understood for centuries.

4. Legal Precedent and Flexibility: The U.S. Supreme Court has upheld significant flexibility in how states can design their apportionment and representation strategies, as long as they adhere to equal-protection principles. The bill’s aim to only include citizens in apportionment calculations can be viewed as a lawful exercise of legislative power reflecting the timeless principles of representation upon which a republican form of government is established and from which it derives its legitimacy.

History of Citizenship Question on U.S. Census Forms

The history of including a citizenship question on the U.S. Census form traces back to the early decades of the United States and has evolved over time in response to shifting political and social conditions. Here’s a brief overview:

Early Inclusions (19th century)

The first instance of a question regarding citizenship appearing on the U.S. Census was in the year



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1820. The census form during this period included a question asking for the number of “Foreigners not naturalized.” This reflected early America’s interest in monitoring the size and assimilation of its immigrant population. Throughout the 19th century, various iterations of the citizenship question were included in the census, particularly as immigration rates fluctuated and the nation grappled with the policies around immigrants and their role in American society.

20th-century Adjustments

In the 20th century, the citizenship question continued to appear in different forms. It was included on every decennial census from 1890 to 1950. The context in which these questions were asked varied, sometimes focusing on the place of birth, parents’ place of birth, and whether individuals were naturalized U.S. citizens. This period marked a heightened focus on the demographic and social characteristics of the U.S. population, influenced by large waves of immigration and the changing dynamics of a modernizing society.

Shift to the Long Form

Starting in 1960, the Census Bureau moved the citizenship question to the long form of the census. This long form was sent to a smaller, sample population instead of the entire country. It gathered more detailed demographic, economic, and housing characteristics. The citizenship question remained a part of this long form until 2000, after which the long form was replaced by the American Community Survey (ACS) in 2005.

American Community Survey

The ACS, which collects detailed data annually, includes a question about citizenship. This survey is sent to approximately 3.5 million households each year, providing ongoing and current demographic data that helps determine how more than \$675 billion in federal and state funding is distributed annually.

21st-century Controversies

The debate over including a citizenship question on the 2020 Census form brought this issue back into the national spotlight. The Trump administration proposed adding a citizenship question to the decennial census, arguing that it was necessary to enforce the Voting Rights Act of 1965 effectively. Critics argued that its inclusion could lead to an undercount of illegal-immigrant populations, potentially affecting federal funding for cities and states with substantial numbers of such populations.

In June 2019, the U.S. Supreme Court’s opinion in the case of *Department of Commerce v. New York* blocked the addition of the question, stating that the administration’s stated rationale was not its true purpose and that it violated administrative law procedures. In coming to this opinion, the Court relied upon outside evidence to evaluate the Secretary’s justification for inclusion of the citizenship question. Reliance on such extra-record materials historically has been permissible solely after a showing of bad faith on the part of the agency. No such evidence was presented in this case that would meet that well-established standard.

In a dissent by Justice Clarence Thomas, joined by Justices Neil Gorsuch and Brett Kavanaugh, Justice Thomas criticized the majority’s opinion, calling it “the first time the Court has ever invalidated an agency action as ‘pretextual,’” and added that the Court had “departed from traditional principles of administrative law,” and “opened a Pandora’s box of pretext-based challenges in administrative law.”



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