



To: Census 2020 Partner Organizations
From: Jonathan Stein and Nandini Ruparel, Voting Rights Program, Asian Americans Advancing Justice – Asian Law Caucus
Re: The Citizenship Question and the 2020 Census
Date: [Revised] August 16, 2018

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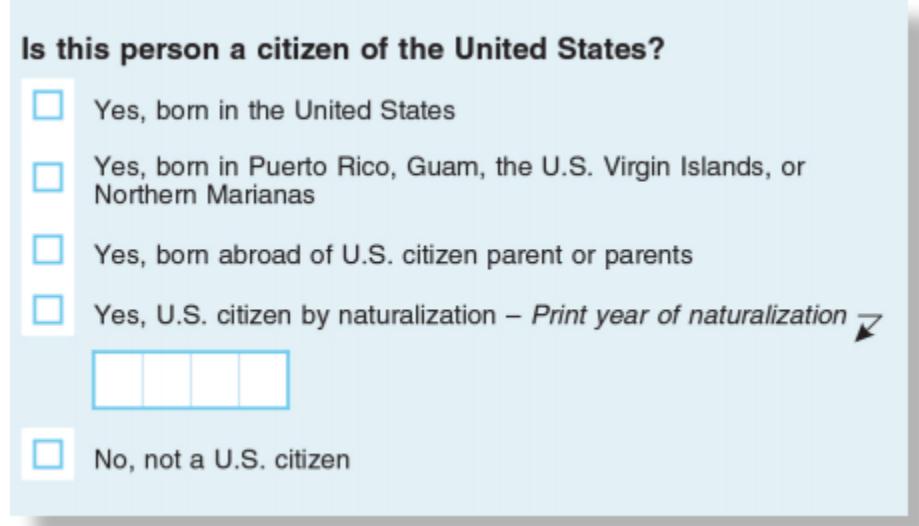
I. Introduction

This memo was prepared in response to repeated questions from community leaders and community-based organizations who are struggling with how to communicate to their community members about the upcoming Census and particularly the new citizenship question, which has generated intense fear and suspicion among community members. We seek to answer many of those questions here. Subsequent research will go deeper, will answer additional questions, and will be paired with strategy and messaging discussions.

II. General Census Information

A. What does the citizenship question on the 2020 Census look like?

The Department of Commerce has elected to add a citizenship question to the Census form for the first time since 1950, a controversial move that has resulted in six separate lawsuits seeking the question's removal.¹ The question, presented below, asks if a respondent is or is not a citizen and, if they are, how they became a citizen. For those respondents who are not citizens, the question does *not* ask for information about immigration status. Despite the presence of multiple legal challenges, this memo assumes the citizenship question will remain on the Census and prepares us to react to that possibility.



The image shows a screenshot of the 2020 Census citizenship question. The question is: "Is this person a citizen of the United States?" Below the question are five options, each with a blue square checkbox. The options are: "Yes, born in the United States", "Yes, born in Puerto Rico, Guam, the U.S. Virgin Islands, or Northern Marianas", "Yes, born abroad of U.S. citizen parent or parents", "Yes, U.S. citizen by naturalization – Print year of naturalization" (with a text input field containing "1985" and a right-pointing arrow), and "No, not a U.S. citizen".

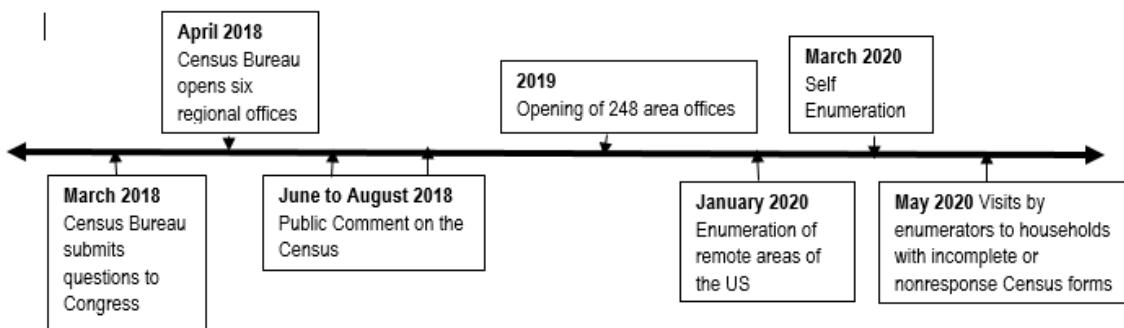
Source: <https://www2.census.gov/library/publications/decennial/2020/operations/planned-questions-2020-ac.pdf>

¹ Hansi Lo Wang, *Multi State Lawsuit Against Citizenship Question to Go Ahead*, WaMu 88.5 American University (Jul. 26, 2018), <https://wamu.org/story/18/07/26/multi-state-lawsuit-against-Census-citizenship-question-to-move-ahead/>.

B. What is the 2020 Census timeline?

The Constitution of the United States requires that a Census be conducted every ten years, counting all people in the country.² Although the enumeration of the population takes place over many months, each decennial Census is officially “taken” on April 1st of the first year of the decade,³ also known as “Census Day.” This cycle, Census Day is April 1st, 2020.

Through 2019, the Census Bureau will open 26 local offices across California.⁴ In January 2020, enumeration will begin in remote areas and in March 2020 the Census Bureau will begin (for the first time in Census history) encouraging the population at large to respond to the Census online.⁵



The Census Bureau plans to use different outreach approaches for those neighborhoods it deems likely have access to Internet and those it deems to have low Internet access.⁶ For those areas with greater Internet access, the Census Bureau will first send to each household a paper mailing with a unique identification code for the Internet survey.⁷ For households that do not go online and respond, the Census Bureau will send two additional mailed reminders. If the household continues to not respond online, the household will get a fourth notice with the identification code but this time will also receive a paper copy of the Census form.⁸

For those households likely to have low Internet connectivity, the first mailing will include both the unique Internet identification code and the paper Census form.⁹

² U.S. Const. art. I, § 2, cl. 3.

³ 13 U.S.C.A. § 141.

⁴ United States Census Bureau, Los Angeles Region, *2020 Census Recruiting Information California* (July 2018).

⁵ *Id.*

⁶ Census Bureau, *Proposed Information Collection; Comment Request; 2020 Census*, Federal Register: The Daily Journal of the United States Government (June 8, 2018), <https://www.federalregister.gov/d/2018-12365/p-69>.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* The Bureau will release its determinations of which communities fall into each category by March 2019.

In May 2020, after time has been given to residents to respond to the Census, the Census will begin sending short-term paid staff known as “enumerators” to those households that have not yet responded or responded incompletely.¹⁰ An enumerator will come to a household up to six times.¹¹ After the third try, enumerators can ask a nearby reliable “proxy” for information, i.e. a landlord, neighbor, etc. Follow up by phone is also possible. If, despite all attempts, the Census Bureau never gets a response from a household, or gets an incomplete response, the Census Bureau will try to use data from other administrative sources to fill in missing information.¹²

III. Consequences of Participation and Non-Participation

A. What are the consequences of an undercount of our communities?

The Census determines both the apportionment of political representation and of federal resources. The population of a state as determined by the Census will determine the number of Congressional representatives that state will have for the next ten years.¹³ Census data are also used to help local, state, and federal jurisdictions redistrict and determine when majority-minority districts are required. If our communities do not participate in the Census, it can impact the total number of representatives California will have in Congress and the total political power our communities have in all levels of government.

Furthermore, more than 70 federal programs that provide benefits and services to Californians use Census data to determine where to put their resources.¹⁴ When our communities do not participate in the Census, they do not get their fair share of more than \$800 billion dollars in federal money.¹⁵

As we all know, the Census already undercounts low-income households, people of color, young children, rural residents, households with limited-English proficient residents, and populations

¹⁰ *Id.* Enumerators will visit areas around colleges and universities earlier, because students may leave campus before May. Census Bureau, *2020 Census Detailed Operational Plan for: 18. Nonresponse Followup Operation (NRFU)*, April 16, 2018.

¹¹ *Id.*

¹² Census Bureau, *Proposed Information Collection; Comment Request; 2020 Census*, Federal Register: The Daily Journal of the United States Government (June 8, 2018), <https://www.federalregister.gov/documents/2018/06/08/2018-12365/proposed-information-collection-comment-request-2020-Census>. Administrative data can be pulled from the IRS, the American Community Survey, the Social Security Administration, prior Censuses, the U.S. Postal Service, and other federal sources or offices.

¹³ U.S. Const. art. I, § 2, cl. 3.

¹⁴ State of California, *Census 2020 Explained*, CA Census 2020 (2018), <https://Census.ca.gov/2020-Census-explained/>.

¹⁵ Andrew Reamer, *Counting For Dollars 2020: The Role of the Decennial Census in the Geographic Distribution of Federal Funds*, George Washington Institute of Public Policy (Mar. 19, 2018).

who mistrust government.¹⁶ The use of a primarily online Census will further undercount these vital populations, because of their disproportionately lower access to internet services.¹⁷ The citizenship question worsens an already difficult problem.

B. What are the consequences for a community member who chooses not to participate?

If a household does not fill out the online Census or the paper Census, the resident(s) will likely receive a visit from an enumerator as part of the Census 2020 Non-Response Follow Up (NRFU) operation.¹⁸ Not responding at all likely guarantees an enumerator visit. Responding but leaving certain questions blank may or may not; this is discussed in greater depth below.

An enumerator will come to the household several times to attempt to fill out the Census with the residents. Despite the fact that a Census enumerator is not a law enforcement or immigration official – in fact, enumerators are often community members hired from the communities in which they canvass – he or she is still a representative of the federal government. That may make an enumerator visit to the home a troubling and fear-inducing possibility for many of our community members.

Legally, if a community member refuses or “willfully neglects” to participate in the Census – whether that be on a single question or the Census as a whole – he or she can be fined up to \$100.¹⁹ However, according to the Census Bureau, no one has been prosecuted since 1970 for failing to fill out the Census.²⁰

C. What are the consequences for a non-citizen who lies on the citizenship question?

We do not know, but the consequences could be serious. Any non-citizen who makes a false claim of citizenship is eligible for deportation.²¹ In fact, falsifying any official form to benefit one’s immigration status is a crime and can make someone eligible for deportation.²² Because of

¹⁶ Census Hard To Count Maps 2020, *What is “HTC”? Other HTC metrics*, CUNY, <https://www.Censushardtocompmaps2020.us/>.

¹⁷ *Id.*

¹⁸ United States Census Bureau, *Memorandum 2018.10: Release of the 2020 Census Nonresponse Followup Operation (NRFU) Detailed Operational Plan*, Census 2020 (Apr. 16, 2018), https://www.Census.gov/programs-surveys/decennial-Census/2020-Census/planning-management/memo-series/2020-memo-2018_10.html.

¹⁹ 13 U.S.C.A. § 221(a).

²⁰ W. Gardner Selby, *Americans must answer U.S. Census Bureau survey by law, though agency hasn't prosecuted since 1970*, PolitiFact (Jan. 9, 2014), <http://www.politifact.com/texas/statements/2014/jan/09/us-Census-bureau/americans-must-answer-us-Census-bureau-survey-law-/>.

²¹ 8 U.S.C.A. § 1227(a)(3)(D)(i).

²² 8 U.S.C.A. § 1324(c). 13 U.S.C.A. § 1227(a)(3)(C)(i).

the very strong Census data privacy protections in federal law (discussed below), a Census form with an inaccuracy on it could only have criminal or immigration consequences if Census data privacy protections are changed (or violated). Nevertheless, it is a fact that lying on the citizenship question comes with the risk, however remote, of deportation. Additionally, any person – U.S. citizen or non-citizen – who lies on the Census can be fined up to \$500.²³

We are aware of no record of criminal prosecution for inaccuracies on Census forms. In fact, the Census Bureau admits that about 30 percent of non-citizens who respond to the citizenship question on the American Community Survey inaccurately mark ‘citizen,’ with no legal consequences for those respondents.²⁴

D. Can a community member submit a partial response (e.g. skip the citizenship question)?

1. Is a partial response possible on the online Census form?

There is no clear answer from the Census Bureau to this question, despite our repeated inquiries. We have heard through one backchannel that the online Census will not permit the skipping of questions, but we need confirmation.

2. If not, what are the consequences of a community member waiting to submit a partial response on the paper form?

There are pros and cons to a community member declining to fill out the online Census, obtaining a paper Census form, and then filling the paper form out while skipping the citizenship question. On one hand, taking this approach means the person is counted and does not contribute to an undercount. The former acting director of the Census Bureau, Ron Jarmin, told lawmakers that skipping a question on the Census would not mean that a person would not be counted in the Census.²⁵

On the other hand, language access declines with this approach. The online Census form is available in 12 non-English languages: Spanish, Chinese (Simplified), Vietnamese, Korean,

²³ 13 U.S.C.A. § 221(b).

²⁴ Memorandum from Commerce Secretary Wilbur Ross to Undersecretary for Economic Affairs Karen Dunn Kelly, *Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire* (Mar. 26, 2018), https://www.commerce.gov/sites/commerce.gov/files/2018-03-26_2.pdf.

²⁵ Hansi Lo Wang, *Skipping to 2020 Census Citizenship Question? You'll Still Be Counted*, National Public Radio (Apr. 19, 2018), <https://www.npr.org/2018/04/19/603629576/skipping-the-2020-census-citizenship-question-youll-still-be-counted>.

Russian, Arabic, Filipino/Tagalog, Polish, French, Haitian Creole, Portuguese, and Japanese.²⁶ In contrast, the paper form is only available in English and Spanish.²⁷

Users of the paper form can access phone support from the Census in the same 12 languages in which the form is available online, and language glossaries will be created in 59 non-English languages.²⁸

3. How many questions can a community member skip before prompting an enumerator visit?

We have no clear answer from the Census Bureau. In some cases, Census officials have said if a community member does not answer four or more questions, they will get a visit from an enumerator. In other instances, Census officials have said that they can't answer this question definitively but each subsequent non-answer makes it more likely that a household will get an enumerator visit. Privately, some individuals around the Census have noted that millions of households don't answer at least one question on the Census form and the Bureau will not have the resources to follow up with all of them.

E. What are the privacy protections for data submitted on the Census?

There are extremely strong protections for Census data, but we cannot be 100% confident these protections will be enough for our vulnerable community members.

Census employees are bound by the law to not reveal data they have gathered through the Census. Wrongful disclosure can result in a fine of up to \$5,000, imprisonment up to five years, or both.²⁹ The government may only release Census data that identifies individuals 72 years after the Census date.³⁰ Further, neither the Census Bureau nor any other federal department is permitted to use Census data for any purpose other than statistical analysis.³¹ However, the Bureau can always release aggregate information about populations and communities: as long as Census tabulations and data sets do not identify specific individuals, they do not violate Census privacy laws.³²

²⁶ Albert E. Fontenot, Jr., *2020 Census Non English Language Support*, 2020 Census Program Memorandum Series: 2018.06, (Feb. 27, 2018), https://www2.Census.gov/programs-surveys/decennial/2020/program-management/memo-series/2020-memo-2018_06.pdf.

²⁷ *Id.*

²⁸ *Id.*

²⁹ 13 U.S.C.A. § 214.

³⁰ 44 U.S.C. §2108(b). Letter from Census Bureau Director, Roy V. Peel to Archivist of the United States, Wayne C. Grover, concerning the 72-year lapse between collection and release of decennial Census records, August 26, 1952. https://www.Census.gov/history/www/genealogy/decennial_Census_records/the_72_year_rule_1.html.

³¹ 13 U.S.C.A. § 9(1)(a).

³² Lynette Clemetson, *Homeland Security Given Data on Arab Americans*, The New York Times (July 30, 2004), <https://www.nytimes.com/2004/07/30/us/homeland-security-given-data-on-arab-americans.html>.

An internal legal research memo from the Office of Legal Counsel at the U.S. Department of Justice (DOJ) states that the PATRIOT Act does not override the legally binding Census privacy protections already in place.³³ This means that Census data cannot be used even if the government believes they are necessary for a terrorism investigation. While the FBI and other divisions of the DOJ reportedly agree with this conclusion, the National Security Division of the DOJ disagrees.³⁴ The ultimate determination may rest upon a court.

Of course, all of these data privacy protections are codified in federal law and federal law can be changed by Congress. And when considering that possibility, it must be noted that there is a history of Census data being misused.

Before laws regarding the privacy of Census data were enacted, Census data was used to send Japanese Americans to internment camps during World War II.³⁵ The Census Bureau gave United States military officials and the Justice Department data on the Japanese American population levels in certain areas of the United States, at times with great detail.³⁶ There is also evidence that the Census Bureau may have provided the names and addresses of Japanese Americans to the government to aid in internment.³⁷

The stringent privacy laws regarding data and Census employees have been enacted since, but the possibility of disclosure still exists if those laws are changed. And sometimes, even the legal release of aggregate data may be a problem. For example, concerns have been raised about lawful disclosures of aggregate data made by the Census Bureau to the Department of Homeland Security about Arab Americans living in certain zip codes after the Sept. 11, 2001 attacks.³⁸

F. Are risks different for community members who have citizenship versus those who do not have citizenship or are undocumented?

³³ Memorandum Opinion for the General Counsel, Department of Commerce on Census Confidentiality and the PATRIOT Act, Jeannie S. Lee, Deputy Assistant Att'y Gen., Office of Legal Counsel (Jan. 4, 2010), <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2016/03/18/2010-01-04-Census-confidentiality.pdf>.

³⁴ *Id.* at 1 n.1.

³⁵ Lori Aratani, *Secret use of Census info helped send Japanese Americans to internment camps in WWII*, Washington Post (Apr. 6, 2018), <https://www.washingtonpost.com/news/retropolis/wp/2018/04/03/secret-use-of-Census-info-helped-send-japanese-americans-to-internment-camps-in-wwii/>.

³⁶ William Seltzer and Margo Anderson, *After Pearl Harbor: The Proper Role of Population Data Systems in Time of War*, Statisticians in History (Mar. 8, 2000) <https://ww2.amstat.org/about/statisticiansinhistory/index.cfm?fuseaction=paperinfo&PaperID=1>.

³⁷ *Id.*

³⁸ Lori Aratani, *Secret use of Census info helped send Japanese Americans to internment camps in WWII*, Washington Post (Apr. 6, 2018).

If Census data are secure and there is no chance that immigration authorities and law enforcement will have access to that data for 72 years, then the risks are the same no matter the citizenship status of the person filling out the form.

However, if the data are not safe, then the risks increase. There may be some minor risk for naturalized citizens; the risks are mostly felt by those who are undocumented or do not have their citizenship.

Even if a person has already secured their citizenship through the naturalization process, their residence in the United States could be at risk due to new Trump Administration policies. If a naturalized citizen (1) did not originally meet the requirements of citizenship to begin with or (2) concealed something “material” about him/herself during the naturalization process, he or she may now be subject to denaturalization.³⁹ If Census data are not secure, theoretically the federal government could use it to find naturalized citizens to whom one of these situations apply. The risk here should not be overstated – denaturalization is very rare (though rising⁴⁰), the federal government likely has other means of finding people to whom denaturalization might be relevant, and federal court decisions limit the federal government’s power to denaturalize citizens in some circumstances.⁴¹

There are higher risks for those who do not have citizenship or are undocumented. If Census data about individual community members are given to ICE or other law enforcement (which there is no precedent for since WWII and would require the rewriting of or violation of federal laws), government officials could target people who identify on the Census as non-citizens. It is not clear how efficient this would be, given that the Census form will not distinguish between non-citizens with different kinds of immigration status and thus the resulting Census data will not single out individuals who are undocumented. It is more likely that ICE or other law enforcement will know exactly who they are looking for and why, and would need Census data only to find an individual’s location. This outcome would mean address data might actually carry more risk than the citizenship question.

If, by contrast, the Census Bureau gives only aggregate Census block-level or Census tract-level data to ICE or other law enforcement, then the inclusion of the citizenship question creates the danger that immigration authorities will target their raids in areas with high percentages of individuals who identified as non-citizens on the Census.

³⁹ Dara Lind, *Denaturalization, explained: how Trump can strip immigrants of their citizenship*, Vox (Jul. 18, 2018), <https://www.vox.com/2018/7/18/17561538/denaturalization-citizenship-task-force-janus>.

⁴⁰ Brittny Mejia, *Under Trump, the rare act of denaturalizing U.S. citizens on the rise*, Los Angeles Times (Aug. 12, 2018), <http://www.latimes.com/local/california/la-me-1n-denaturalization-20180812-story.html>.

⁴¹ *Maslenjak v. United States*, 137 S. Ct. 1918, 1923 (2017); *Gorbach v. Reno*, 219 F.3d 1087, 1091 (9th Cir. 2000).

IV. Legal and Strategic Considerations for Community Groups

A. What are the legal consequences for community groups that advise people to not answer fully or at all?

There could be significant consequences if an organization publicly and obviously encourages an incomplete response to the Census. Legally, any person or entity that purposefully causes an inaccurate count of the Census can be fined up to \$1,000, face up to one year in prison, or both.⁴² Additionally, non-profit organizations who advocate for partial or full non-response could risk scrutiny of their 501(c)(3) status. An organization can lose its 501(c)(3) status if it is responsible for the “conduct of illegal activities to a substantial degree”; even “planning and sponsoring” illegal acts could lead to loss of status.⁴³ Any nonprofit organization that wants to help community members mitigate risk associated with the Census should be cognizant of the potential consequences of being on record as encouraging partial non-response or of putting their support for partial non-response in writing.

B. What are the potential results of a civil disobedience campaign in which all respondents, regardless of citizenship status, do not answer the citizenship question?

If U.S. citizens and non-citizens across the state and country chose to not answer the citizenship question, it would have a number of impacts. First, the Census Bureau, overwhelmed by incomplete forms, would not be able to send enumerators to all households that left the question blank. Second, the high volume of non-responses might make the data from that particular question unusable by law enforcement or immigration authorities, even in the event federal law is changed (or violated) and those entities get access to individualized Census responses. Third, the high volume of non-responses might discourage the Census Bureau from including a citizenship question in the future, as it would be a clear indicator that the entire endeavor results in more reliable data without the citizenship question on the form. Fourth, such a campaign might be viewed by non-citizen members of immigrant communities as a powerful sign of solidarity from their allies, during an era of elevated hostility and immigration enforcement.

It should be noted that, as stated above, every individual who skips the citizenship question as part of a coordinated effort of this kind will have technically committed a federal crime. Perhaps more salient, given the infinitesimal likelihood any individual is criminally prosecuted on those grounds, is the fact that any organization that publicly advocates to its members to not answer the citizenship question could face fines, jail time, and scrutiny of its 501(c)(3) status.

⁴² 13 U.S.C.A. § 222.

⁴³ IRS.gov, *J. Activities that are illegal or contrary to public policy* (1985), <https://www.irs.gov/pub/irs-tege/eotopicj85.pdf>.

Also, such a campaign could potentially hurt voting rights enforcement work done by civil rights advocates. State and federal laws that determine when new voting systems must be used to empower minority communities or when majority-minority districts must be drawn all rely on citizen-voting-age-population (CVAP) data. If the 2020 Census is used as the source of CVAP data going forward, a widespread campaign to not answer the citizenship question could make the CVAP in our communities look smaller than it actually is, making voting rights remedies in some jurisdictions harder to access. Voting rights litigators will be engaged on this topic to learn more.

2020 Census Participation Options

