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INTRODUCTION TO THE HEADCOUNT

The 2020 Decennial Census has become a lightning rod for litigious civil rights organizations, state attorneys general, and even members of Congress. At stake is the apportionment of representatives in the House of Representatives and the Electoral College divided amongst the several states.[1] Furthermore, the "headcount" determines the allotment of $1.5 trillion in nondiscretionary federal dollars to be distributed to the various states based on the persons who are counted in each.[2] The headcount is also used in redistricting of congressional districts.[3] Make no mistake, litigation surrounds the manner in which the census arrives at its headcount after every census. The 2020 installment will be no different, but the stakes are as high as they have ever been.

The primary issue in the 2020 Decennial Census will be the composition of the headcount. Who must be counted? Who may be counted? How is the headcount done lawfully if some individuals are excluded, especially in the

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1 *See* 2 U.S.C. § 2a(a) ("[T]he President shall transmit to the 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 . . . ."); U.S. CONST. art. II, § 1, cl. 3 ("Each State shall appoint, . . . a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . .").

2 *See* Christi Zamarripa, *Report: Census Data Key to $1.5 Trillion in Federal Spending*, NCSL BLOG (Nov. 22, 2019), https://www.ncsl.org/blog/2019/11/22/report-census-data-key-to-15-trillion-in-federal-spending.aspx.

3 *See* 2 U.S.C. § 2c ("[T]here shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled . . . .").

context of illegal immigrants?[4] How will the headcount be contested? These are all questions examined here, but all these questions will become justiciable questions soon, if not already being considered by the courts.

Before providing any legal analysis to the census, the constitutional framework and statutory requirements upon which the government conducts the decennial census require fulsome comprehension. One must examine well beyond the shallows of quoting the Fourteenth Amendment, which simply seeks to "count[] the whole number of persons in each State," prior to abridging the constitutional requirements of conducting the census.[5] As discussed here, the legal architecture that supports a lawful census is a steady cascade of delegation from the Constitution to Congress to the Department of Commerce to the Census Bureau to the President. This flow of delegation cannot be reduced to an obscure clause in the Constitution but deserves historical context and caselaw examination. In the end, excluding noncitizens from the decennial census is lawful if there is a desire by the President to do so. The challenge for the President is doing so lawfully and genuinely.

I. THE CONSTITUTIONAL PURPOSE OF THE CENSUS

The constitutional purpose of the census is to guarantee equal representation in the Congress, determine Electoral College participation, and levy direct taxes.[6] Article I, Section 2, Clause 3 of the Constitution requires that "[r]epresentatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers."[7] The Fourteenth Amendment then mandates that "[r]epresentatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State"[8] as Congress "shall by Law direct."[9] The Fourteenth Amendment conjoined with the original Enumeration Clause would then read:

> Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers, [counting] the whole Number of free *Persons* [in each state], excluding Indians not taxed. But when the right to vote [in federal elections] . . . is denied to any of the male

4 Much discussion continues on the verbiage used to describe an individual who is "not a citizen or national of the United States." *See* 8 U.S.C. § 1101(a)(3); *see also* 8 U.S.C. § 1325 (describing unlawful entry by a noncitizen). The terms *noncitizen*, *illegal alien*, and *illegal immigrant* are used interchangeably in this Essay without comment or preference as to the language designations which span decades of caselaw, the United States Code, and various agency policies and directives. The term "non-inhabitant" is a term of recent vintage and likely to emerge more prominently as this debate ensues.

5 U.S. CONST. amend. XIV, § 2, cl. 1.

6 *See id.* art. I, § 2, cl. 3; *id.* art. II, § 1; *id.* amend. XIV, § 2.

7 *See id.* art. I, § 2, cl. 3.

8 *Id.* amend. XIV, § 2, cl. 1.

9 *See id.* art. I, § 2, cl. 3.

> inhabitants of such State, being twenty-one years of age, and citizens of the United States . . . the basis of representation therein shall be reduced [proportionally]. *The actual Enumeration shall be made . . . in such Manner as [the Congress] shall by Law direct.*[10]

Without oversimplifying the complexity of these Clauses within the Constitution, when taken together these Clauses permit the interpretation that the number of members in the House of Representatives in each state will depend on the number of "persons" within those states *and* that the headcount method shall be directed through legislation by the Congress.

A. The Direction of the Headcount by Congress

Congress has "directed" how the "actual enumeration shall be made" under the Census Act, which delegates the responsibility of the decennial census to the Secretary of Commerce.[11] The Census Act is relatively thin on details and guidance to the Department of Commerce, which is the agency responsible for the conduct of the decennial census.[12] The Census Act delegates to the Secretary of Commerce the headcount "in such form and content as he may determine" and authorizes the Secretary of Commerce to utilize "sampling procedures and special surveys" and "obtain such other census information as necessary."[13] This authority is vast and wide and hardly the exacting language we normally expect from statutory provisions as important as this one. While other statutes restrict the activities of the Commerce Secretary, those laws do not produce an austere requirement regarding the count.[14] Perhaps most importantly, the President is instructed to report the enumeration to Congress "[o]n the first day, or within one week thereafter," of the seating of the new Congress.[15]

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10 *See id.* (emphasis added); *id.* amend. XIV, § 2.

11 *See* 13 U.S.C. § 141. The Census Bureau, which is an agency within the Department of Commerce, conducts the census.

12 *See* 2 U.S.C. § 2a (providing the time and manner of the census).

13 13 U.S.C. § 141(a).

14 In *Franklin v. Massachusetts,* 505 U.S. 788 (1992), the Court did impose a duty on the Commerce Secretary "to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment." *Id.* at 818–20. But this still is not a requirement stemming from "*such [a] Manner as [the Congress] shall by Law direct*," but instead a requirement fashioned by the courts under the principles of equity. U.S. CONST. art. I, § 2, cl. 3 (emphasis added).

15 2 U.S.C. § 2a(a). This is significant every twenty years, 2020 being no exception, because the President reports prior to an inauguration if the Administration has changed hands. Thus, the President whose Commerce Department oversaw the census has the responsibility to report the enumeration—and thus establish apportionment—potentially just days before the inauguration of a new President of the United States.

Congress has placed some requirements indirectly by its strictures under the Administrative Procedure Act (APA).[16] Also, the APA has recently been the subject of interpretation by the Supreme Court as it relates to the Census, specifically as to how the APA requires certain levels of transparency by Department heads.[17] In *Department of Commerce v. New York*, the high court examined the Commerce Department's intention to include a question about citizenship on the 2020 Decennial Census.[18] In this case, Secretary of Commerce Wilbur Ross issued a memorandum in March 2018 declaring that a question regarding citizen status would be added to the census.[19] The Supreme Court did not block the inclusion of this question on the census because of some Equal Protection argument, or a violation of privacy or Due Process.[20] The citizenship question was ordered removed from the 2020 Decennial Census due to a technicality arising under the Administrative Procedure Act which requires transparency in agency decisionmaking.[21] The plain reading of this opinion was that the majority of the Supreme Court did not believe Secretary of Commerce Wilbur Ross's explanation for adding the citizenship question but did not rule that such a question was at all unconstitutional.[22]

B. The Discretion of the Secretary of Commerce and President

While not unbounded and still subject to judicial review and legislative direction, the Secretary of Commerce does have great discretion and authority under the Census Act to conduct the census.[23] "The Enumeration

16 *See* 5 U.S.C. § 552. The Permanent Apportionment Act of 1929 also limits the Secretary's ability to apportion representatives by affixing the number of representatives at 435. *See* Act of June 18, 1929, ch. 28, § 22, 46 Stat. 21 (current version at 2 U.S.C. § 2a). Since Article I, Section 2 requires each state to have a least one House member, there are really 385 outstanding seats in the House to be apportioned. This has traditionally been done by giving each state a "proportion" of the remaining 385 seats based on the decennial census population count—the headcount—or enumeration.

17 *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2567 (2019).

18 *Id.* at 2561.

19 Memorandum from Wilbur Ross, Sec'y of Com., to Karen Dunn Kelley, Under Sec'y for Econ. Affairs, Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire (Mar. 26, 2018).

20 *See generally Dep't of Com.*, 139 S. Ct. 2551.

21 *See* 5 U.S.C. § 706. While not examined here, the Roberts opinion in *Department of Commerce v. New York* sustained the lower court's bar of the citizenship question because of the "significant mismatch between the decision the Secretary made and the rationale he provided" and the "explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process." 139 S. Ct. at 2575.

22 The 2020 Decennial Census will be the twenty-fourth installment of the census. In fact, Justice Roberts's opinion in *Department of Commerce v. New York* noted that every census between 1820 and 2000 (with the exception of 1840) asked some version of the citizenship question and was only recently removed in the 2010 census. 139 S. Ct. at 2561.

23 The basis of the Secretary of Commerce's actions must be reported to Congress under the Census Act. 13 U.S.C. § 141(f). Also, it is important to note that the Secretary

Clause of the Constitution does not provide a basis to set aside the Secretary's decision. The text of that clause 'vests Congress with virtually unlimited discretion in conducting the decennial "actual Enumeration," and Congress "has delegated its broad authority over the census to the Secretary."'"[24] The Secretary's decisions as to how to conduct the census, or otherwise enumerate, must bear a "reasonable relationship to the accomplishment of an actual enumeration."[25] Moreover, the President has the constitutional authority to direct the policy decisions of the Secretary of Commerce to include the adjustment of the census enumeration.[26] The Supreme Court in *Franklin* stated the Census Act "does not curtail the President's authority to direct the Secretary in making policy judgments that result in 'the decennial census'; he is not expressly required to adhere to the policy decisions reflected in the Secretary's report."[27] The Supreme Court has ruled that the President is not constitutionally required to follow the Secretary's tabulation; therefore, "the action that creates an entitlement to a particular number of Representatives . . . is the President's statement to Congress, not the Secretary's report to the President."[28]

Also, the Secretary of Commerce is directed by Congress, by way of the Necessary and Proper Clause in Article I, to "take a decennial census of population . . . in such form and content as he may determine, including the use of sampling procedures and special surveys . . . [and] obtain such other census information as necessary"[29] and shall report to the President "[t]he tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress."[30] The cascade of delegation falls from the Fourteenth Amendment to the Congress to the Secretary of Commerce for determination of the appropriate manner in which to conduct a decennial census. The President reports the final enumeration to the Congress.[31]

It is an incredibly important point, given the holding in *Department of Commerce v. New York*, that the President's reporting to Congress of the apportionment cannot be challenged under the Administrative Procedure

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must inform Congress of any changes to the manner in which the Census is conducted pursuant to § 141(f) of the Census Act.

24 *See Dep't of Com.*, 139 S. Ct. at 2566 (quoting Wisconsin v. City of New York, 517 U.S. 1, 19 (1996)).

25 *Wisconsin*, 517 U.S. at 20. This language is very broad and seems to suggest that any reasonable counting mechanism is lawful.

26 *See* U.S. CONST. art. II, § 1, cl. 1; art. II, § 2, cl. 2.

27 Franklin v. Massachusetts, 505 U.S. 788, 799 (1992).

28 *Id.* at 797. It is important to reiterate that, unlike the Secretary of Commerce, the President is not subject to the APA and would not have to defend against allegations of "arbitrary and capricious" reapportionment.

29 *See* 13 U.S.C. § 141(a).

30 *See id.* § 141(b).

31 2 U.S.C. § 2a(a). This apportionment requirement of the President cannot suffer suit under the Administrative Procedure Act.

Act. In other words, the method the President uses to arrive at the apportionment number would have to be an unconstitutional method in and of itself in order for the apportionment declaration to be challenged successfully.[32]

C. Other Uses of the Decennial Census

Census data is also used for a number of statutory and policy purposes, including the allocation of federal funds and the forming of electoral districts within the states.[33] This means hundreds of millions of dollars in federal funds for the individual states. Census data is further utilized by various federal departments for planning, distribution of resources, and allocation of agency assets.[34] "The census additionally serves as a means of collecting demographic information, which 'is used for such varied purposes as computing federal grant-in-aid benefits, drafting of legislation, urban and regional planning, business planning, and academic and social studies.'"[35] Therefore, census data not only has a direct impact on representation in the Congress and the Electoral College, but also impacts the amount of federal funds a state will receive from the federal government. Obviously if a seat is gained or lost by a state, redistricting would have to occur in those states as well. The greater the headcount for your state the greater the number of congressional seats, electoral votes, and federal funds. Of course, the converse is also true. It is no wonder that states on the cusp of gaining or losing a congressional seat have media campaigns encouraging maximum census participation within those states.[36]

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32 A legal challenge would unlikely be sustained simply because the President adjusted the headcount provided by the Secretary of Commerce. The Secretary's subordinate relationship to the President clearly and logically would inhibit such an argument in the absence of further congressional direction to do so, which would further complicate matters under separation of powers arguments. Therefore, challenges to the final enumeration might best arrive in the form of due process and equal protection attacks. It is important to note that the Supreme Court has not extended Equal Protection Clause protections to the census for illegal immigrants and has actually gone out of its way to avoid doing so.

33 Wisconsin v. City of New York, 517 U.S. 1, 5–6 (1996).

34 Baldrige v. Shapiro, 455 U.S. 345, 353 n.9 (1982).

35 Dep't of Com. v. New York, 139 S. Ct. 2551, 2561 (2019) (quoting *Baldrige*, 455 U.S. at 353 n.9).

36 *See, e.g.*, Caroline Champlin, *California Could Lose a Seat In Congress. Here's What That Would Mean*, KQED (May 31, 2020) https://www.kqed.org/news/11821752/california-could-lose-a-seat-in-congress-heres-what-that-would-mean (describing California's $187 million census campaign).

II. THE CENSUS BUREAU AND ADJUSTING THE HEADCOUNT

The Census Bureau has been adjusting the headcount for decades using a variety of methods employed by the Secretary of Commerce.[37] The adjustment of the "headcount" must be done with lawful purpose and, in the instance of using data for the adjustment, proof that such data is reasonably reliable.[38] The litigation that has transpired after most censuses is instructive as to how headcount adjustments are constitutionally permissible.

A. Census Caselaw

The census final apportionment is almost always litigated, for one reason or another, and typically by states that believe the apportionment or apportionment method was disadvantageous. For instance, in *Utah v. Evans*, the State of Utah challenged a 2000 Census counting practice that caused it to lose one congressional representative to North Carolina.[39] The Court upheld the "hot deck" imputation method of adjusting the headcount to arrive at an actual enumeration by stating that "the breadth of congressional methodological authority" to arrive at a census number is in the discretion of Congress and its delegate, the Census Bureau.[40]

In *Young v. Klutznick*, the Sixth Circuit acknowledged that an undercount of the population in one geographical area necessarily tends to advantage, by virtue of an increase in voting strength, those populations that are least undercounted in other geographical areas.[41] The Sixth Circuit went on to

37 *See Developing Sampling Techniques*, U.S. CENSUS BUREAU (Dec. 17, 2020), https://www.census.gov/history/www/innovations/data_collection/developing_sampling_techniques.html; *Imputation of Unreported Data Items*, U.S. CENSUS BUREAU (May 3, 2016), https://www.census.gov/programs-surveys/cps/technical-documentation/methodology/imputation-of-unreported-data-items.html.

38 There are many resources which can inform the census, or the Secretary, to enumerate for the purposes of apportionment. For example, 13 U.S.C. § 6 permits the Secretary of Commerce to "call upon any other department, agency, or establishment of the Federal Government, or of the government of the District of Columbia, for information pertinent to the [census]," 13 U.S.C. § 6(a), "acquire, by purchase or otherwise, from States, counties, cities, or other units of government, or their instrumentalities, or from private persons and agencies, such copies of records, reports, and other material as may be required for the efficient and economical conduct of the censuses and surveys," *id.* § 6(b), and "[t]o the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required, the Secretary shall acquire and use information available from any source referred to in subsection (a) or (b) of this section instead of conducting direct inquiries." *Id.* § 6(c). The President or the Secretary could, and recently have, directed the compilation of other available and reliable data to inform the reapportionment.

39 *See* Utah v. Evans, 536 U.S. 452, 458–59 (2002).

40 *Id.* at 474. The "hot deck" method imputes data that is omitted or unanswered in the actual census and does so from other closely related data. *See id.* at 458.

41 *See* Young v. Klutznick, 652 F.2d 617, 622–23 (6th Cir. 1981). The "synthetic method" (pro rata distribution of numbers to presumably undercounted areas based on the age, race, sex, et. al. of those areas) of adjusting the 1980 Census was the remedy

criticize any census scheme that would advantage or disadvantage the "voting strength" of the voting population or would introduce "*serious distortions* . . . in any legislative apportionment based on the census."[42] *Klutznick* continued that Article I, Section 2 of the Constitution requires that "'as nearly as is practicable' one person's vote is to be worth as much as another's vote in apportioning congressional representation."[43] *Klutznick* is an important case when analyzing who is to be counted and how certain counts could "distort" the census and debase voter representation in the Congress.

In *Franklin*, the Supreme Court upheld the adjustment of the headcount in the 1990 Census by use of Department of Defense administrative data despite the possible existence of more accurate data.[44] The Court conducted a brief analysis of the "[u]sual residence" requirement saying that it means not just where you live, but where you have allegiance.[45] Further, the Court, in discussing when the agency action is "final," conceded that the President could direct a different actual enumeration to be reported by the Secretary.[46] "Unlike other statutes that expressly require the President to transmit an agency's report directly to Congress, § 2a does not."[47] An agency action is not final if it is only "the ruling of a subordinate official."[48] Therefore, very little prevents the President from amending the headcount after the Secretary submits the report to the President or even directing the Secretary to do so prior to submission. For potential litigants, the decennial census still presents a moving target, even after the Secretary reports to the President.[49] The law

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imposed by the District Court. *Id.* at 622. The appellate court essentially ruled that the synthetic method would result in distortions or overcounts in those areas that have the aforementioned qualities yet participated fully in the census. *See id.* at 622–23.

42 *Id.* at 622 (emphasis added).

43 *Id.* at 624 (quoting Kirkpatrick v. Preisler, 394 U.S. 526, 527–28 (1969)).

44 *See* Franklin v. Massachusetts, 505 U.S. 788, 802 (1992). Note that the data used in the apportionment adjustment in *Franklin* was not Commerce Department data, but Department of Defense data, and was deemed appropriate. *Id.*

45 *Id.* at 804.

46 *See id.* at 799. It is again important to note that the President is unlikely to be subject to the Administrative Procedure Act because he is not, himself, an "agency." *Id.* at 796. This would preclude any "arbitrary and capricious" statutory attacks on the President's adjustment of the enumeration and would, perhaps, leave only constitutional challenges (most likely equal protection arguments) by plaintiffs that may struggle with standing issues. *See* 5 U.S.C. § 706(2)(A) to (B).

47 *Franklin*, 505 U.S. at 797 (listing statutes that require the President to transmit an agency report directly to Congress).

48 *Id.* at 797 (citing Abbott Lab'ys v. Gardner, 387 U.S. 136, 151 (1967)).

49 *See id.* Because the Secretary's report to the President carries no direct consequences for the reapportionment, it serves more like a tentative recommendation than a final and binding determination. "It is, like 'the ruling of a subordinate official,' . . . not final and therefore not subject to review." *Id.* at 798 (citing *Abbott Lab'ys*, 387 U.S. at 151); *cf.* Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 109 (1948) (explaining how agency action serves as only a recommendation to the President); United States v. George S. Bush & Co., 310 U.S. 371, 379 (1940) (discussing how determinations by the President in regard to agency recommendations are not subject to judicial review).

requires the President to use the census data, but no law suggests the President is beholden to the original headcount, proscribed completely from adjustment.[50] In other words, the census number reported to the President is "still subject to correction" by the President before he reports the reapportionment number to Congress.[51] It would be illogical to assume that a subordinate to the President of the United States, even if cabinet-level, could "direct" the President to do anything without some legislative or legal constraint.

The most significant recent litigation involving the decennial census pertained to the insertion of a question on the census questionnaire regarding citizenship.[52] "There have been [twenty-three] decennial censuses from the first census in 1790 to the most recent in 2010" and "[e]very census between 1820 and 2000 (with the exception of 1840) asked at least some of the population about their citizenship."[53] In *Department of Commerce v. New York*, the Supreme Court gave standing to the plaintiffs in part because of the likely injuries New York would suffer (New York would lose a seat in the House of Representatives if illegal immigrants were excluded from the census) under the Secretary's proposed questions for the 2020 Census.[54] The Court did acknowledge its fundamental concerns with the "sufficiently concrete and imminent" injuries of the "diminishment of political representation, loss of federal funds, degradation of census data, and diversion of resources" resulting from the proposed census.[55] While Chief Justice Roberts's opinion was based in large part on Administrative Procedure Act technicalities, the Court illustrated the significance of "genuine justifications" for steps taken in any census and reaffirmed that the Secretary of Commerce has enormous discretion in taking those steps.[56]

The United States Supreme Court's recent decision in *Trump v. New York* is instructive, to limited degree, as to the direction of future decennial census litigation.[57] In *Trump v. New York*, Plaintiffs attacked President Trump's

50 *Franklin*, 505 U.S. at 799.

51 *Id.* at 797.

52 *See* Dep't of Com. v. New York, 139 S. Ct. 2551 (2019).

53 *Id.* at 2561. Ironically, the justification for the removal of the "citizen question" on the 2010 Decennial Census was that increasingly accurate data had already been accumulated by American Community Surveys (a sort of mini-census conducted every two to three years to a much smaller group of households) and agency data that had been accumulated in various Departments. *Id.* at 2562.

54 *Id.* at 2565.

55 *Id.*

56 *Id.* at 2575; *see also id.* at 2577 (Thomas, J., concurring in part and dissenting in part). While many Supreme Court observers viewed this decision as a loss for the Trump Administration, the language of the opinion is instructive to any Administration navigating the deep waters of the census. *See* Amy Howe, *Trump Administration Ends Effort to Include Citizenship Question on 2020 Census*, SCOTUSBLOG (July 11, 2019, 6:56 PM), https://www.scotusblog.com/2019/07/trump-administration-ends-effort-to-include-citizenship-question-on-2020-census/.

57 Trump v. New York, 141 S. Ct. 530 (2020) (per curiam).

memorandum[58] suggesting that illegal immigrants would not be counted—for the purposes of apportionment of representation only—in the 2020 Decennial Census.[59] The opinion was published on December 18, 2020, or around three weeks prior to the President's reporting of enumeration to Congress.[60] In *Trump v. New York*, the Court "express[ed] no view on the merits of the constitutional and related statutory claims presented" but instead concluded that the claims themselves were "premature."[61]

There was, however, some interesting language that might perhaps forecast the fate of future challenges to the decennial census. For instance, the President's memorandum calls for the use of administrative data to enable the exclusion of illegal immigrants from the decennial census "to the extent feasible."[62] The Supreme Court countered in its opinion by professing that "[e]veryone agrees by now that the Government cannot feasibly implement the memorandum by excluding the estimated 10.5 million aliens without lawful status."[63] This seems to signal that the quality of the administrative data used to exclude illegal immigrants from decennial census apportionment will face intense scrutiny. Conversely, the Government conceded that "the [Census] Bureau already possesses the administrative records necessary to exclude at least four to five million aliens."[64] The majority did not consider the threat of this exclusion—"figures . . . certainly large enough to affect apportionment"[65]—significant enough to deem it a justiciable threat that would muster standing or ripeness. This could potentially be viewed as a signal from the high court that using administrative data to impact apportionment, while surely to be heavily scrutinized, may be constitutionally permissible in this case.

The Supreme Court has parsed together a tapestry of constitutional decisions that collectively propose that there are certain restrictions on the conduct of the census, but the final apportionment number—and who is included—is not one of them when the justification for adjustments is genuine.

III. THE ENUMERATION OF "PERSONS"

Regarding the conduct of the decennial census, both the Department of Justice (DOJ) and Census Bureau have chosen to rely upon an arguably misconstrued interpretation of Article I, Section 2, Clause 3 and the

58 Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44,679 (July 23, 2020).

59 *See Trump*, 141 S. Ct. at 534.

60 *See id.* at 530.

61 *Id.* at 536–37.

62 Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, 85 Fed. Reg. at 44,680.

63 *Trump*, 141 S. Ct. at 536.

64 *Id.* at 540 (Breyer, J., dissenting).

65 *Id.*

Fourteenth Amendment requirement to "count all persons." Both the DOJ and Census Bureau's strained analysis has lacked textual and historical legal support and simply—almost lackadaisically—applied the contemporary definition of the term. Candidly, the DOJ instigated this misinterpretation. Since DOJ opinions are often persuasive, the adoption of this precedent is dangerous when incorrect or inaccurate.

A. The Boyd Letter

It should come as no surprise that the DOJ has weighed in on the decennial census reporting requirements from time to time. The oft cited "Boyd Letter" was drafted by the DOJ's Office of Legislative Affairs Assistant Attorney General Thomas Boyd in order to allow him the ability to accurately respond to Congress's interest just prior to the 1990 Decennial Census in drafting two bills that would "exclude illegal aliens from the census for purposes of apportionment."[66] Often times Congress will ask DOJ whether or not a certain legislative action has constitutional authority. Boyd drafted the letter which was promptly forwarded to Congress with an analysis suggesting that the legislative action Congress was seeking to take—namely to exclude illegal immigrants from the next decennial census—was unconstitutional. Unfortunately, this imprudent analysis is flawed.

The Boyd Letter primarily concerned counting only for the purpose of apportionment.[67] It properly interpreted the text of the Constitution to mean that "the whole number of persons" did not mean voting citizens, and subsequent caselaw has agreed.[68] It would be ridiculous if the census did not count American children, for instance. However, the Boyd Letter incorrectly stated the 39th Congress (1865–67), in order to pass the Fourteenth Amendment, "rejected arguments that representation should be based on people with permanent ties to the country."[69] Confusingly, the Boyd Letter then effectively admitted this mistake by stating that "the Reconstruction Congress did not discuss the issue of illegal aliens when it debated the

66 *See* Letter from Thomas M. Boyd, Acting Assistant Att'y Gen., to Representative William D. Ford (June 29, 1988), *in* U.S. GOV'T PRINTING OFFICE, 1990 CENSUS PROCEDURES AND DEMOGRAPHIC IMPACT ON THE STATE OF MICHIGAN 240–44 (1988) [hereinafter Boyd Letter]. The Boyd Letter was cited by several amici in the conglomerate of litigation surrounding this issue before the Supreme Court. *See, e.g.*, Brief of the United States House of Representatives as *Amicus Curiae* in Support of Appellees at 24 n.8, *Trump*, 141 S. Ct. 530 (2020) (No. 20-366).

67 Boyd Letter, *supra* note 66, at 240 (referencing H.R. 3814).

68 *Id.* at 241. Note the distinction between "voters" or "voting population" and "constituents."

69 *Id.* at 242.

Fourteenth Amendment."[70] The letter also conflated "aliens" with "unnaturalized persons."[71]

Most notably, the Boyd Letter relied heavily on the Supreme Court's brief analysis of the word "persons" in *Plyler v. Doe*, a 1982 case.[72] The *Plyler* Court recognized that the term "persons" in Section 1 of the Fourteenth Amendment applies to "illegal aliens"—in this instance, for the purposes of the Due Process Clause.[73] The Boyd Letter inexplicably leapt to the conclusion that surely the "persons" referred to in the Section 2 "Enumeration Clause" of the same Amendment must apply to illegal immigrants as well.[74] Of course, apportionment was not at all an issue in *Plyler*, which was about Texas funding K–12 education for noncitizen children.[75] The letter then hastily concluded that "[illegal] aliens must be included within the census for purposes of apportioning congressional Representatives."[76] The Boyd Letter has been the flawed "law of the land" in terms of the decennial census ever since.[77] The undeniable problem is that the Boyd Letter relied in large part upon faulty logic and a misconstrued reading of *Plyler*, as discussed herein. This analysis has unfortunately permeated census-related litigation and policy discussions ever since.

B. Plyler *vs. The Boyd Letter*

A textual analysis of the term "persons" requires more than the analysis provided in the Boyd Letter. As the Boyd Letter admits, "illegal alien" was not a term in the lexicons of the Framers or the 39th Congress.[78] The discussion of "unnaturalized aliens," as cited in the Boyd Letter, imprecisely conflates "aliens" and "unnaturalized aliens" with modern day "illegal immigrants"—arguably three different categories of people.[79] The Boyd Letter noted that the Fourteenth Amendment naturalized "[a]ll persons born . . . in the United States," including all black Americans.[80] However,

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70 *Id.* at 243.

71 *Id.* at 241–42 n.4. I do not suggest criticism here to harangue the Department of Justice or Acting Assistant Attorney General Boyd himself. I am simply pointing out the false comparisons made openly in the letter that have gone unquestioned for decades.

72 *See id.* at 242–43.

73 *Id.* (discussing Plyler v. Doe, 457 U.S. 202, 210 (1982)).

74 *Id.* at 243.

75 *Plyler*, 457 U.S. at 205.

76 Boyd Letter, *supra* note 66, at 243–44.

77 Over the past thirty years, the Boyd Letter is often cited by plaintiffs, appellees, and amici in litigation evolving from a given decennial census, most recently cited by Appellees in *Trump v. New York*, discussed above.

78 *See* Boyd Letter, *supra* note 66, at 243. The 39th Congress (1865–67) passed the Fourteenth Amendment, which was later ratified in 1868.

79 *Id.* at 241–43, 241–42 n.4.

80 *See* U.S. CONST. amend. XIV, § 1. It is important to note that the Civil Rights Act of 1866 thankfully gave citizenship rights to blacks and former slaves. The 39th Congress did talk about unnaturalized aliens during the passage of the Fourteenth Amendment. Boyd

expressly applying the term "persons" in a modern legal analysis to include "illegal aliens" requires too broad an assumption of definitions not contemplated at the time of the passage of the Fourteenth Amendment, which are the definitions that matter most.[81]

Also, the Boyd Letter offers extraordinarily strained comparisons to the language in *Plyler* and the lexicons of the Framers or the 39th Congress. The primary rationale offered by the Boyd Letter is that if the term "persons" in Section 1 of the Fourteenth Amendment applied to illegal alien children, as it did in *Plyler*, then surely the term "persons" in Section 2 of the same Fourteenth Amendment applied to *all* illegal aliens for the purposes of apportionment.[82] In other words, if the Supreme Court says Texas has to let illegal immigrant "persons" attend their schools, then surely the Supreme Court would agree that all illegal immigrant persons must be counted, enumerated, and apportioned accordingly by the decennial census.

But the Supreme Court in *Plyler* offered no such textual or historical context for its holding. In fact, the *Plyler* Court admitted that it applied the term "person" in the "*ordinary sense of [the] term*," not according to some textual or historical analysis rooted in Fourteenth Amendment jurisprudence.[83] This is a critical failing of the Boyd Letter—and the cornerstone of the Boyd Letter's arguments for inclusion—because its legal analysis of *Plyler* and the term "persons" is postured falsely in a historical context ostensibly relying upon dicta from *Plyler*, while the Supreme Court in *Plyler* confesses that this very dicta, and its analysis of the term "persons," was only offered in the "ordinary sense" circa 1982. This distinction is significant since the linchpin of the Boyd Letter's rationale hinges almost entirely on this faulty analysis of *Plyer* and the flawed historic analysis of the term "person."

C. The Headcount Memo

To confuse matters further, DOJ's Office of Legal Counsel ("OLC") generated a memo in 1994 that contradicts the Boyd Letter in how it

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Letter, *supra* note 66, at 241–42 n.4. However, this was in the context of their naturalization upon ratification of the Fourteenth Amendment. There was no context for a significant remainder of unnaturalized aliens after ratification, as is the case today. Nothing dictates that unnaturalized aliens are the same as illegal aliens in any legal context or framework. By extreme example, if the virtue of being "here" offered the same constitutional protections (e.g., Due Process Clause, Equal Protection Clause, Privileges and Immunities, etc.) as being "legally here" then 8 U.S.C. § 1325 would be unconstitutional. *See infra* note 124. It is also not insignificant that legal aliens and citizens pay "direct taxes," which are also part of the census statutory rubric. *See infra* notes 126–27.

81 Even if one is not an originalist or textualist, it is intellectually dishonest to apply a current definition to an original or historic definition when it is clear, with very little research, that the terms have changed over the past fifteen decades. The Boyd Letter takes a contemporary approach to constitutional interpretation under the guise of textual arguments, which makes it impossible to arrive at the conclusions the Boyd Letter did.

82 *See* Boyd Letter, *supra* note 66, at 242–43; U.S. CONST. amend. XIV, § 2.

83 Plyler v. Doe, 457 U.S. 202, 210 (1982) (emphasis added).

addressed the manner in which all persons are counted. In other words, the "Headcount Memo" addressed whether data could augment, supplement, or substitute a physical headcount.

The Headcount Memo specifically addressed headcount enumeration adjustment census issues.[84] Unlike the issues raised in the Boyd Letter, the Headcount Memo discussed only how to count, not necessarily who to count. OLC Assistant Attorney General Walter Dellinger conducted a thorough analysis as to the permissibility of "statistically adjusted census figures" and whether the administration of a census including such adjustments was constitutional and legal under the Census Act.[85] The memo stated boldly, in stark contrast to the Boyd Letter, that "[t]he Constitution 'provides the basis for the decennial censuses, but does not specify the details of their administration.'"[86]

The memo admitted that the primary constitutional purpose of the census "is to provide the basis for Congress's apportionment" and the Electoral College, while also noting that the censuses are often used to develop other demographic data and statistics for myriad purposes, such as federal funding and redistricting.[87] In further analysis, the memo stated that the first Census Act in 1790 directed the counting of "[i]nhabitants."[88] Most notably, the Headcount Memo suggested that nearly every census, including the first census in 1790, involved the overcounting or undercounting of one group or another and that adjusting the enumeration with data can correct this disadvantage.[89]

Citing *Klutznick* and the Census Act, the Headcount Memo directly disagreed with previous opinions by the Census Bureau; the memo contradicted the Bureau's prior position that the use of data was constitutionally and statutorily impermissible since the census was to be "a headcount[] and nothing but a headcount" and resisted interpreting the tenet that "count all persons" to mean a literal accounting of all humans in the United States each decade.[90] The Headcount Memo noted the Great Compromise of the Constitutional Convention designed a census that was

84 Memorandum from Assistant Att'y Gen. Walter Dellinger, Off. of Legal Couns., to Solic. Gen. Drew Days (Oct. 7, 1994), *in* 18 OPINIONS OF THE OFFICE OF LEGAL COUNSEL OF THE UNITED STATES DEPARTMENT OF JUSTICE CONSISTING OF SELECTED MEMORANDUM OPINIONS ADVISING THE PRESIDENT OF THE UNITED STATES, THE ATTORNEY GENERAL AND OTHER EXECUTIVE OFFICERS OF THE FEDERAL GOVERNMENT IN RELATION TO THEIR OFFICIAL DUTIES 1994, at 184–98 (1999) [hereinafter Headcount Memo].

85 *Id.* at 184. The Secretary aimed to use "sampling" to adjust the enumeration. *Id.*

86 *Id.* (citing J. Howard McGrath, Seventeenth Decennial Census, 41 Op. Att'y Gen. 31, 32 (1949)).

87 *Id.* at 185.

88 *Id.* at 185 n.3.

89 *See id.* at 184–85.

90 *Id.* at 188 (citing Young v. Klutznick, 497 F. Supp. 1318, 1332 (E.D. Mich. 1980), *rev'd*, 652 F.2d 617 (6th Cir. 1981)). Despite the Bureau's insistence, censuses have been adjusted by data for decades.

based on numbers—actual enumeration—not some negotiated number by politicians or outright conjecture.[91] The memo further points out that the method of arrival at an enumeration was left to Congress to decide as they deem fit by way of the Necessary and Proper Clause of Article I, Section 8, Clause 18.[92] And "[i]t would be strange indeed to suppose that Congress—or its delegate, the [Census] Bureau—lacked the power to authorize a statistical adjustment" to right some sort of perceived wrong resulting from the initial decennial census.[93] Citing *Franklin*, and undergoing an Administrative Procedure Act analysis as to whether such changes would be impermissibly arbitrary or capricious, the Headcount Memo said "the validity of the policy change [to use data to adjust the headcount] would turn largely on the evidentiary showing that the use of statistical adjustments" will reasonably advance correcting the wrong that is cited for the purpose of the change.[94] The constitutional goal of the census is to determine representation, and that determination can be arrived upon by any means where the decennial census, in the judgment of the Secretary of Commerce or the President, is "rendered more accurate by feasible adjustments."[95] "Neither the Constitution nor the Census Act precludes the Bureau from making . . . statistical adjustments of 'headcount' data in the decennial census . . . ."[96] "Moreover, a 'complete enumeration' or 'full census' may affirmatively *require* statistical adjustments of 'headcount' data to be made," especially in those instances where suffrage is impacted negatively.[97] The memo concludes by stating that the Census Bureau can adjust the way it counts to arrive at the "actual Enumeration."[98]

Unfortunately, the Headcount Memo has gained little traction in legal circles since it described how to count rather than who to count, and administrations have relied heavily on the Boyd Letter instead.

D. "Persons"—Inhabitants vs. Illegal Aliens

The textual or historical meaning of "persons" is then critical to understanding the apportionment requirements of not just Section 2 of the Fourteenth Amendment but the original apportionment tenets of Article I, Section 2, Clause 3 of the Constitution as well. Ample evidence supports the conclusion that the Framers' definition of "persons" was consistent with "inhabitants." This would exclude illegal aliens under historic or modern

91 *See id.* at 188–89.

92 *Id.* at 190.

93 *Id.* at 191 (citing Strauder v. West Virginia, 100 U.S. 303, 306 (1880)).

94 *Id.* at 192; *see also id.* at 191 nn.14–15. An "evidentiary showing" is a basic term of art suggesting the data used to adjust the headcount must be reliable and accurate. Obviously, this only becomes relevant when the apportionment is litigated after the enumeration is reported to Congress by the President.

95 *Id.* at 196–97 (citing Franklin v. Massachusetts, 505 U.S. 788, 806 (1992)).

96 *Id.* at 198.

97 *Id.* at 194.

98 *Id.* at 188, 191–92 (citing *Franklin*, 505 U.S. at 806; U.S. CONST. art. I, § 2, cl. 3).

interpretations in the context of the census. Because the Census Clause[99] itself is somewhat ambiguous, the process of interpreting its meaning should include an effort to determine how the Framers themselves understood the language they adopted. The Framers' understanding of the original provision was that apportionment would be based on the relative number of *inhabitants* of the states and initial drafts of the Apportionment Clause even used the term *inhabitants* rather than "persons."[100] The Constitutional Convention (or Federal Convention) of 1787 is shrouded in language regarding representation in the Congress being based on the proportional number of *inhabitants* in each state.[101] It is reasonable to conclude that at the time of the Framing of the Constitution the word "inhabitant" was to mean a person with principal and continuing residency in a state, which necessarily includes citizens, in the context of a census.[102]

The *Federalist Papers* are also particularly instructive on the use and meaning of the term "inhabitants" in the context of apportionment. For instance, *Federalist No. 42* discussed the value of citizenship and residence when defining "inhabitants."[103] *Federalist No. 43* discussed inhabitants having "their voice in the election of the government.[104] *Federalist No. 54* argued that "[it] is a principle of the proposed Constitution, that . . . the aggregate number of representatives allotted to the several States is to be determined by a federal rule founded on the aggregate number of inhabitants."[105] Also, *Federalist No. 55* stated that "[w]ithin three years a census is to be taken, when the number may be augmented to one for every thirty thousand inhabitants."[106] The terms "constituents" and "inhabitants" were used interchangeably[107] and a "census of inhabitants" was the vernacular when

99 U.S. CONST. art. I, § 2, cl. 3.

100 Charles Wood, *Losing Control of America's Future—The Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J.L. & PUB. POL'Y 465, 476 (1999) (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 590, 595 (Max Farrand ed., rev. ed. 1937)). There seems to be at least some evidence that the term "inhabitant" was meant to be considered a stronger term than "resident."

101 *Id.* at 477. There is no language that suggests that "persons" and "inhabitants" were intended to mean something different. In fact, they seem to have been used interchangeably. The Committee on Style, which was like the modern-day legislative reference service, "replaced the phrase 'citizens and inhabitants, of every age, sex and condition' with the single word 'persons' in the description of how the states' 'numbers' were to be counted." *Id.* at 476–77 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 100, at 585, 590, 641).

102 *Id.* at 479.

103 *See* THE FEDERALIST NO. 42, at 266–67 (James Madison) (Clinton Rossiter ed., 1961). This article was addressing, among other things, the privileges and immunities of citizens versus aliens among the several states. The word "inhabitant" apparently connoted a more stable and permanent connection than "resident," continually defined as being situated as a bona fide member of a state having stability and longevity within that state.

104 THE FEDERALIST NO. 43, *supra* note 103, at 269 (James Madison).

105 THE FEDERALIST NO. 54, *supra* note 103, at 335 (James Madison).

106 THE FEDERALIST NO. 55, *supra* note 103, at 340 (James Madison).

107 *See* THE FEDERALIST NO. 56 (James Madison).

discussing apportionment.[108] Moreover, the original Census Act of 1790 was entitled "[a]n act providing for the enumeration of the Inhabitants of the United States," despite the original Apportionment Clause referring to the count of "persons."[109]

This historical analysis is consistent with the Supreme Court's 1964 decision in *Wesberry v. Sanders* in that apportionment was to be based on the relative number of "inhabitants" of the various states:

> The debates at the Convention make at least one fact abundantly clear: that when the delegates agreed that the House should represent "people" they intended that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants. The Constitution embodied Edmund Randolph's proposal for a periodic census to ensure "fair representation of the people," an idea endorsed by Mason as assuring that "numbers of inhabitants" should always be the measure of representation in the House of Representatives.[110]

Understanding the Framers' meaning of the word "inhabitant" then becomes significant. "The debate at the Constitutional Convention over the provisions relating to qualifications of members of Congress shows that an 'inhabitant' was understood to have a longer-term connection to a state than a mere 'resident.'"[111] The contemporary dictionaries of the time understood "inhabitants" to require in its definition some minimum degree of longevity. Samuel Johnson's 1785 Dictionary defined "inhabitant" as a dweller or one who resides in a place and defined an "abode" as a "habitation" or a "place of residence" that is continual.[112] Webster's American Dictionary of 1828 defines "inhabitant" as a dweller who resides permanently.[113] "Dweller" was defined as "a resident of some continuance in a place."[114] The definition to this day is "one that occupies a particular place regularly."[115] Also, it seems

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108 THE FEDERALIST NO. 58 *supra* note 103, at 354 (James Madison).

109 *See* An Act Providing for the Enumeration of Inhabitants of the United States, § 1, 1 Stat. 101, 101 (1790). This is just more evidence of the contextual interchange at the time between "persons" and "inhabitants."

110 Wesberry v. Sanders, 376 U.S. 1, 13–14 (1964) (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed. 1911) (footnotes omitted)).

111 Wood, *supra* note 100, at 478.

112 *Inhabitant*, 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785); *Abode*, JOHNSON, *supra*.

113 *Inhabitant*, NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

114 *Dweller*, WEBSTER, *supra* note 113. This analysis seems to conflict with the current "Residence Rule" and "usual residence" primer. *See 2020 Census Residence Criteria and Residence Situations*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/decennial-census/2020-census/about/residence-rule.html (Feb. 25, 2020) (noting that a person's "[u]sual residence" is "where a person lives and sleeps most of the time" and "is not necessarily the same as the person's voting residence or legal residence").

115 *Inhabitant*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/inhabitant (last visited Mar. 14, 2021).

logical that representatives would be designed to represent a "constituency," which is defined commonly as the "group or body that patronizes . . . or offers representation" or "a body of citizens entitled to elect a representative."[116] This is significant because only citizens can vote and the group represented, even if unable to vote, patronizes the representation.

Moreover, there is no evidence suggesting the definition of "inhabitants" has changed, nor that the word "persons" was meant to include individuals beyond those with the attributes of inhabitants, between 1790 and 1868.[117] Without question, "person" and "inhabitant"—or constituents—were used interchangeably in Article I, Section 2, Clause 2, the clause just before the Enumeration and Apportionment Clauses, further suggesting inhabitant and person had similar legal meanings.[118] A person that is a "representative" must be an "inhabitant" and shall be "apportioned" according to their respective numbers by adding the "whole Number of free Persons."[119] This is important because illegal immigrants cannot vote in federal elections much less serve as members of Congress.[120] Just three years removed from the drafting of Article I, in 1790, the first Census Act required "enumeration of the Inhabitants."[121] It is reasonable to conclude that the same Congress that just approved Article I, Section 2, Clause 3, the Enumeration Clause, in 1787, which refers to "whole number of free persons" and "three fifths of all other persons," interchanged "inhabitants" when they passed the Census Act of 1790 three years later. It is also rational to conclude that the construction of those constitutional provisions, along with the definitions of those words, are similar or even identical. The language clearly suggests that certain types of persons make up the sum of inhabitants.[122] When considered in its proper historical context, it is evident that more than *presence* is required to be included in the enumeration of inhabitants. Substantial, if not permanent, ties to a residence were understood to be included in the meaning of *inhabitant* at the time of the ratification of both Article I of the Constitution and the Fourteenth Amendment.[123] These

116 *See Constituency*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/constituency (last visited Mar. 14, 2021).

117 Wood, *supra* note 100, at 477.

118 *See* U.S. CONST. art. I, § 2, cl. 2.

119 U.S. CONST. art I, § 2, *amended by* U.S. CONST. amend XIV, § 2.

120 U.S. CONST. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.").

121 *See* Census Act of 1790, § 1, 1 Stat. 101, 101.

122 Other Supreme Court cases, such as *Evenwel v. Abbott*, 136 S. Ct. 1120, 1127 (2016), and *District of Columbia v. Heller*, 554 U.S. 570, 579–80 (2008), offer some further analysis in the modern context of the Framers' intent as it related to "persons" and the "body politic."

123 The 1860 Census Schedule 1 and Schedule 2 forms counted "Free Inhabitants" and "Slave Inhabitants," respectively. NAT'L ARCHIVES AND RECS. ADMIN., 1860 CENSUS SCHEDULE 1; NAT'L ARCHIVES AND RECS. ADMIN., 1860 CENSUS SCHEDULE 2. Much like in 1790, compliance with the original Enumeration Clause required the count of inhabitants.

definitions are meaningful when distinguishing between who *must* be counted and who *may* be counted.

E. "Persons" and Adjustment of the Residence Rule

If "persons" or "inhabitants" are properly taken in the historic vernacular, then a lawful justification would permit excluding illegal aliens from apportionment because they are not inhabitants under the original text. Illegal immigrants could be considered outside the population that constitutes the body politic in the context of the census. Under the historic definitions, most, if not all, illegal immigrants today lack the sufficient nexus to a residence such that it could be deemed "permanent" or "substantial." It is reasonable to conclude that illegal aliens, who have refused to conform to our nation's laws and norms of American society,[124] enjoy limited constitutional rights or protections,[125] do not pay[126] the full spectrum of federal direct taxes,[127] and thus cannot all be said to be considered

124 The term "illegal immigrant," by its very nature, suggests a failure to comply with the immigration laws of the United States, of which there are many. For instance, 8 U.S.C. § 1325, offers criminal and civil penalties for failure to abide by American immigration laws. Moreover, as a result of unlawful immigration, the United States expends hundreds of billions of dollars investigating, policing, detaining, imprisoning, and deporting noncitizens. *See The Cost of Immigration Enforcement and Border Security*, AM. IMMIGR. COUNCIL (Jan. 20, 2021), https://www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security.

125 For instance, it is a federal crime when an illegal immigrant possesses a firearm despite the guarantees under the Second Amendment. *See* 18 U.S.C. § 922(g)(5). Also, noncitizens may not vote in a federal election, despite the assurances of such a protected right enjoyed by citizens under the Fourteenth, Fifteenth, and Nineteenth Amendments. *See* 18 U.S.C. § 611. This is not to imply that illegal immigrants have no rights under the U.S. Constitution. They clearly do. *See* Plyler v. Doe, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."); *see also* Reno v. Flores, 507 U.S. 292 (1993).

126 It is a misnomer that illegal immigrants pay no federal taxes. Any employed illegal immigrant earning a wage in the normal course within a legitimate employer relationship (not cash or "under the table" wages) will have federal payroll taxes involuntarily deducted directly by their employer and paid to the IRS. A 2014 report from the Internal Revenue Service approximates that illegal immigrants paid $9 billion in payroll taxes the previous calendar year. *See* INTERNAL REVENUE SERVICE, IMMIGRATION AND TAXATION (2014), https://www.irs.gov/pub/irs-utl/20-Immigration%20and%20Taxation.pdf. However, the overall tax revenue to the IRS for personal taxes in 2013 was over $2.4 trillion. *See* INTERNAL REVENUE SERVICE, 2013 DATA BOOK 12 (2013), https://www.irs.gov/pub/irs-soi/13databk.pdf.

127 It is not insignificant that the Constitution includes in the Apportionment Clause specific language regarding direct taxes. Article I, Section 2, Clause 3 states that "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers." U.S. CONST. art I, § 2, cl. 3. Article I, Section 9 prohibits Congress from levying direct taxes or "capitation" unless in proportion to the census or enumeration. U.S. CONST. art. I, § 9. These Clauses may not be entirely dispositive, but they certainly are significant in distinguishing between

"inhabitants" with sufficient connections to a state. Because the Constitution and the Congress are both silent as to how to define "persons" or "inhabitants," a textual analysis is necessary until such time as there is a constitutional or statutory effort to address this issue. And until such time as Congress chooses to act on the status of certain individuals as it relates to the headcount, those original, textual definitions will remain in the discretion of the Secretary of Commerce and the President.

IV. GENUINE JUSTIFICATIONS TO ADJUST THE HEADCOUNT

Genuine justifications[128] must accompany any adjustment to the census headcount and any steps taken in, or changes to, the census must bear a "reasonable relationship" to achieve the constitutional and statutory purposes of the census.[129] The "injury" anticipated by the Secretary of Commerce must be honest, legitimate, and reasonably related to the protection of those who would be injured. Not wanting to count illegal immigrants out of some negative racial bias would be a violation of the Equal Protection Clause, and likely other federal statutes, and therefore not survive constitutional scrutiny. However, if desirable in the discretion of the Secretary and ultimately the President, there are several legitimate, genuine purposes to adjust the headcount in the decennial census.

A. Vote Dilution

The right to vote and be represented in the Congress is both a constitutional right and privilege uniquely limited to United States citizens, the diminishment of which is a violation of the Equal Protection Clause.[130]

"illegal aliens" and "legal aliens." In addition to enjoying rights approaching citizenship, legal aliens pay direct taxes (see *Hylton v. United States*, 3 U.S. 171 (1796), for a fulsome discussion on direct taxes.). Much of the caselaw regarding direct taxes arose after the first census and remains instructive in the contemporary context.

128 It is important to note that the likely judicial review in a matter like this one would be intermediate scrutiny, which requires an important government interest (e.g., getting apportionment right) and that such government action does so by means that are substantially related to that interest. *See* Craig v. Boren, 429 U.S. 190, 197 (1976). Moreover, it is also important to give separate analysis as to whether an aggrieved party in this case would have standing to sue. An illegal alien, or group representing the same, might lack the redressability and standing necessary to pursue an action against the Secretary or the President.

129 *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2566 (2019) (citing Wisconsin v. City of New York, 517 U.S. 1, 20 (1996)).

130 The "Right to Vote" exists in the U.S. Constitution in the Fourteenth, Fifteenth, and Nineteenth Amendments. The Apportionment Clause provides the framework for the Electoral College. U.S. CONST. art. I, § 2, cl. 3. The Privileges and Immunities Clause also grants rights fundamental to citizenship, which includes the franchise of suffrage. U.S. CONST. art. IV, § 2. Also, the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments guard against disenfranchisement. U.S. CONST. amends. V, XIV. There is no functional or political difference between diluting the value of a citizen's vote

The Fifth and Fourteenth Amendments,[131] along with the Comity Clause, provide constitutional equal protection to citizens from overreaching (or underwhelming) state action, to include disenfranchisement. These constitutional provisions, taken together in the context of the decennial census, allow the Secretary of Commerce to appropriately apportion electors and seats in the lower chamber using a count that does not disenfranchise, debase, diminish, or distort the voting rights of all inhabitants of the several states.[132]

Moreover, any identification of legislative action by a state, or permissive defiance or discrete inaction by one of the several states, could be deemed to impact the franchise or suffrage of constituents by diluting the votes of persons living in otherwise law-abiding states. Generally, myriad federal courts have held that "[t]he right to vote is one of the badges of citizenship" and that "[t]he dignity and very concept of citizenship are diluted if noncitizens [impact suffrage]."[133] The notion of diluted or distorted apportionment was addressed obliquely in *Colegrove*, wherein Justice Black opined in his dissent that "[t]he purpose of [Section 2 of the 14th Amendment] is obvious: It is to make the votes of the citizens of the several States equally effective in the selection of members of Congress."[134] "[T]he

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and reducing, by distorted means, the number of a citizen's representatives or that citizen's collective appraisal in the Electoral College.

131 The Privileges or Immunities Clause of the Fourteenth Amendment protects only those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws." McDonald v. City of Chicago, 561 U.S. 742, 754 (2010) (citing Slaughter-House Cases, 83 U.S. 36, 79 (1873)).

132 Vote dilution is a cognizable injury and Northern District of Alabama District Judge David Proctor, in ongoing census litigation, has cited at least three cases in support of that contention. Alabama v. U.S. Dep't of Com., 396 F. Supp. 3d 1044, 1050–51 (N.D. Ala. 2019) (citing Franklin v. Massachusetts, 505 U.S. 788, 801–03, 824 (1992); Dep't of Com. v. U.S. House of Representatives, 525 U.S. 316, 331 (1999); Utah v. Evans, 536 U.S. 452, 458–64 (2002)). Alabama going from 700,000 citizens per congressman to 810,000 citizens per congressman is "vote dilution." *Id.* at 1050. There is no real issue that the vote of an Alabama citizen will be diluted. The dispute will be whether or not the Census Bureau's application of the Residence Rule is the cause of that dilution, and thus a redressable, impermissible practice under the U.S. Constitution or the APA.

133 Barnett v. City of Chicago, 141 F.3d 699, 704 (7th Cir. 1998); *see also, e.g.*, Reyes v. City of Farmers Branch, 586 F.3d 1019, 1023–24 (5th Cir. 2009); Negrn v. City of Miami Beach, 113 F.3d 1563, 1567–69 (11th Cir. 1997); Romero v. City of Pomona, 883 F.2d 1418, 1425 (9th Cir. 1989), *overruled in part on other grounds by* Townsend v. Holman Consulting Corp., 914 F.2d 1136, 1141 (9th Cir. 1990).

134 Colegrove v. Green, 328 U.S. 549, 570 (1946) (Black, J., dissenting). The *Colegrove* case was a state districting case, not involving the apportionment values of the several states, and was decided on the narrow grounds that there is no requirement in the Constitution that state congressional districts be apportioned equally. *Id.* at 553–54 (plurality opinion). Illinois had passed a law, and carved out congressional districts, where in some cases a congressional district would have one-ninth the size of the larger districts, thereby diminishing or watering down the votes and representation of citizens in those larger districts. *Id.* at 557 app. I. Justice Black continued by arguing that "[t]he probable effect of the 1901 State Apportionment Act in the coming election will be that certain citizens,

right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote" as if the citizen was denied the right to vote altogether.[135] Additionally, the stated goal in *City of New York* explained that the census cannot "relieve the federal government of the obligation to make a good-faith effort to achieve voting-power equality."[136]

The injury genuinely justified to be redressed by the Secretary's potential discretion in the present context is to avoid the vote dilution and debasement of the legal resident, persons, constituents, and inhabitants of the several states that do not defy federal immigration laws or otherwise have an inordinate amount of illegal aliens present. In other words, the Secretary would be making a *good faith effort* to ensure that every state, and those voting in it, had voting-power equality amongst and between all of the states. Eliminating some or all illegal immigrants from the "actual enumeration," and thus final apportionment, may be the only way, considering current demographics, to genuinely accomplish this good faith effort of achieving "voting-power equality."[137]

B. Voter and Representative Debasement

The Supreme Court, on a number of occasions, has determined that having a relative number of equal constituents in a single congressional district is a constitutional requirement.[138] When states draw congressional districts that are not relatively equal in numerical constituency, the Supreme

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and among them the appellants, will in some instances have votes only one-ninth as effective in choosing representatives to Congress as the votes of other citizens. Such discriminatory legislation seems to me exactly the kind that the equal protection clause was intended to prohibit." *Id.* at 569 (Black, J., dissenting). It is important to note that while this was a dissenting opinion, the Supreme Court, in *McDonald v. City of Chicago*, noted that constitutional jurisprudence "eventually moved in [the] direction" of Justice Black's theory. 561 U.S. at 763.

135 Reynolds v. Sims, 377 U.S. 533, 555 (1964).

136 City of New York v. U.S. Dep't of Com., 34 F.3d 1114, 1129 (2d Cir. 1994).

137 This is especially true given that many states and cities have policies in place which attract illegal immigrants despite knowledge of the Department's previous willingness to count and apportion based off of the count of all human beings present, as opposed to "all persons" or "all inhabitants." It may be necessary to carve out segments of the full number of illegal aliens, versus simply all illegal aliens. While it may be a legitimate interest to carve out all, it is at least worthy of an analysis to determine if any segments of the illegal alien population might be counted. For instance, the group of children identified in *Plyler* may apply. Other groups (e.g., overstayed visas, aliens with orders of final deportation, etc.) may be worthy of examination to determine "permanent" ties to residency. Conversely, it is also worth considering that an equal protection argument may exist should such distinctions among illegal aliens be made, thus resulting in the ultimate conclusion that all noncitizens should be subtracted from the apportionment enumeration. These considerations should be made when narrowly tailoring any reapportionment policy.

138 *See* Evenwel v. Abbott, 136 S. Ct. 1120, 1123–24 (2016); Baker v. Carr, 369 U.S. 186 (1962); *Reynolds*, 377 U.S. at 577; Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964).

Court has declared such state action a justiciable debasement of suffrage.[139] There is little difference in the analysis between unequal congressional districts drawn within one state or the lot of congressional apportionment drawn amongst the several states.

When a congressional district in a law-abiding state has more legal residents, more citizens, and more constituents, such demographic realities should not disadvantage that district over another with fewer constituents. This would be an unequal distortion of democracy.[140] Representatives who represent a greater number of constituents theoretically have more contact with constituents and legal residents. More issues. More mail. More calls. More visits. More demands for legislative services. More competition.[141] Conversely, those with fewer legal residents in their district would have fewer representative duties to fulfill. Less mail. Fewer issues. Fewer calls. Less competition for reelection. Less threat of their district disappearing. In fact, while untenable, the current "Residence Rule" makes it possible for an entire district to be comprised of only a single voting resident: the congressman.[142] This logical extreme would be an entirely "hollow district." This recognizes the legal and logical incongruity of rewarding states that actively undertake to defy federal immigration laws with additional representation in Congress while those states in obedience of federal law lose or merely maintain seats. It would be reasonable to conclude that apportionment that rewards lawlessness—by the illegal aliens and the local, county, and state entities that harbor them—is not in the democratic interests of the republic.

By way of example, imagine that each congressional district in the United States has roughly the same number of human beings living there, say 750,000. Those 435 districts are apportioned accordingly. If each of the 435

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139 *See generally Baker*, 369 U.S. 186.

140 While not discussed here, it is a reasonable goal of the census to encourage lawful naturalization as well. This goal might be accomplished, at least incentivized, by the exclusion of illegal aliens from the census, thereby encouraging the states that harbor illegal aliens to encourage or otherwise support naturalization.

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> In the 2018 election in the five congressional districts where the largest share of the voting-age population were not citizens, only 132,000 votes were cast on average. In the five districts with the smallest non-citizen shares, 232,000 votes were cast on average. If nothing else, it means it takes far fewer votes to win a House seat in a district where a large share of adults is made up of non-citizens . . . [and] has created a situation in which the votes of American citizens living in low-immigration districts count much less than those of citizens is living in high-immigration districts.

STEVEN A. CAMAROTA & KAREN ZIEGLER, CENTER FOR IMMIGRATION STUDIES, THE IMPACT OF LEGAL AND ILLEGAL IMMIGRATION ON THE APPORTIONMENT OF SEATS IN THE U.S. HOUSE OF REPRESENTATIVES IN 2020 (2019). This is a clear illustration of both voter debasement and dilution.

142 *See* U.S. CENSUS BUREAU, *supra* note 114 (explaining how a person's "[u]sual residence . . . . is not necessarily the same as the person's voting residence or legal residence").

districts were comprised of nothing but U.S. citizens, then there could be no debasement argument because the districts are represented evenly and similarly. Now imagine that only 400 districts are comprised of nothing but U.S. citizens, and the remaining thirty-five districts are each comprised of 50% illegal immigrants. Those illegal immigrants often do not pay direct taxes,[143] cannot vote in a congressional race,[144] and are, by definition, living inside the United States without lawful permission.[145] Is it fair to the districts full of 100% citizens to have incongruent access to their congressmen as compared to the districts comprised of only 50% citizens? Is it fair that an equal share of federal funding be allotted to those districts? Is it fair that a vote cast in a "half-full district" is twice as powerful as a vote cast in a "full district"? What if instead of 50% illegal immigrant composition in a district, it was 80%? 90%? What if there were so many illegal immigrants that a new district needed to be created altogether to accommodate the apportionment requirement? What if the "full district" was lost to that new district? Is it fair that a state now loses a seat in Congress and an electoral vote because of an accumulation of illegal immigrants in another state? Fewer congressmen may mean a diminished ability to direct needed funds and programs to your state, its citizens, and its constituency. Is that penalizing citizenship?

These are the realities of the census. If even one of these examples seems unfair, then that is the debasement argument. Accordingly, the Secretary of Commerce, the President, or the courts through litigation would be genuinely justified in redressing this inequity in a given census framework, and adjusting the headcount would therefore bear a reasonable relationship to the constitutional purposes of the decennial census.

V. THE USE OF "OTHER DATA" IN THE HEADCOUNT

The census has always been viewed as a physical headcount. However, data has been used to supplement the census for decades with little cacophony.[146] The Headcount Memo certainly offers that conclusion. However, this all seemed to change when, on July 11, 2019, President Donald Trump issued an executive order which noted that "it is imperative that all executive departments and agencies . . . provide the Department [of Commerce] the maximum assistance permissible, consistent with law, in determining the number of citizens and non-citizens in the country."[147] This executive order directly allows the use of administrative records maintained by any federal or state agency for the purpose of ensuring "that accurate

143 *See* discussion *supra* note 126.

144 *See* 18 U.S.C. § 611.

145 *See* 8 U.S.C. § 1101.

146 PATRICK J. CANTWELL, HOWARD HOGAN & KATHLEEN M. STYLES, U.S. BUREAU OF THE CENSUS, IMPUTATION, APPORTIONMENT, AND STATISTICAL METHODS IN THE U.S. CENSUS: ISSUES SURROUNDING UTAH V. EVANS 1–4 (2005).

147 Exec. Order No. 13,880, 3 C.F.R. 339 (2020).

citizenship data is compiled in connection with the census by other means."[148] Section 3 of the executive order lists a number of sources for this data, including Immigration and Customs Enforcement ("ICE"), Department of Homeland Security customs and border arrival data, Department of State passport data, various data collected through federal government health care coverage systems, and even relevant state administrative data.[149] A recent federal lawsuit in Alabama underscores just how prominent "other data" might play in an apportionment analysis.[150]

On January 20, 2021, President Biden issued a competing executive order regarding the headcount.[151] Specifically, this executive order reversed President Trump's executive order regarding census data collection and apportionment and stated that "[t]his policy conflicted with the principle of equal representation enshrined in our Constitution, census statutes, and historical tradition. The policy further required the Census Bureau to inappropriately rely on records related to immigration status that were likely to be incomplete and inaccurate."[152] The Biden executive order states that American laws

> do not permit the exclusion of inhabitants of the United States from the apportionment base [sic] solely on the ground that they lack a lawful immigration status. Reflecting this legal background, and the values of equal representation and respect that the Constitution and laws embody, it is the policy of the United States that reapportionment shall be based on the total number of persons residing in the several States, without regard for immigration status

and that "[i]t is likewise essential that the census count be accurate and based on reliable and high-quality data."[153] The terms "persons" and "inhabitants" seem to be used interchangeably within President Biden's executive order, which may be a significant legal argument for the proponents of apportionment exclusion so long as the data used to do so is "reliable" and of "high quality".

Alabama Attorney General Steve Marshall and U.S. Congressman Mo Brooks (AL-5), both Republicans, filed a lawsuit in federal court in the Northern District of Alabama on May 21, 2018.[154] This lawsuit was at least partially in response to the Final 2020 Census Residence Criteria and Residence Situations Rule put forward by the Census Bureau on February 8, 2018, which provided that illegal aliens[155] would be counted in the 2020

148 *Id.*

149 *Id.* at 343.

150 Alabama v. U.S. Dep't of Com., 396 F. Supp. 3d 1044, 1050 (N.D. Ala. 2019).

151 Exec. Order No. 13,986, 86 Fed. Reg. 7015 (Jan. 25, 2021).

152 *Id.* at 7016.

153 *Id.*

154 Complaint for Declaratory Relief at 1, Alabama v. U.S. Dep't of Com., 396 F. Supp. 3d 1044 (N.D. Ala. 2019) (No. 2:18-cv-00772).

155 Alabama's complaint defines "illegal aliens" as "persons who are present in the United States by virtue of either illegal entry in violation of federal immigration statutes or

Decennial Census and their number will be allocated and apportioned to the state wherein they live.[156] This promulgation by the Census Bureau, referred to commonly as the "Residence Rule," is the focus of the litigation based upon Alabama's belief that it will lose one congressional seat and one electoral vote if the census were to continue per the current Residence Rule rubric.[157]

The general nature of Alabama's suit alleges that the inclusion of illegal aliens in the 2020 Decennial Census is a violation of the U.S. Constitution and the APA.[158] The complaint details how the count of illegal aliens for the purposes of apportionment would cause harm to Alabama in the form of vote dilution, diminished representation, and a redistribution of political power to states with greater concentrations of illegal immigrants.[159] The suit examines the Census Bureau's definition of the Residence Rule and attributes this definition to the prospective harm Alabama would suffer by losing one congressional seat and one electoral vote with those seats being reallocated from Alabama to a state with a larger illegal alien population, thus diluting Alabama's representation in Congress and the Electoral College.[160] The plaintiffs also seek judgment to prevent the inclusion of illegal aliens in the final census, per the current adoption of the Residence Rule, for the purposes of the distribution of federal tax dollars.[161] Essentially, Alabama seeks to avoid the loss of a congressional seat and an electoral vote, regardless of the legal sequence providing that desired outcome.

A. Numbers Matter

To prosecute its case, Alabama has employed a series of experts to provide data and statistics of the imminent harm to the state's representation in the House and the Electoral College. *Reliable* statistical support seems to be readily available for Alabama's contention that including illegal aliens in apportionment harms Alabama and other states with higher proportions of

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who have entered the United States legally but have remained present in the country beyond the period of time permitted by federal law." *Id.* at 1 n.1. The antithesis of this definition, for the purposes of this memorandum, would then be "legal residents."

156 *Id.* at 2.

157 The "Residence Rule," as currently defined by the Census Bureau, would count illegal aliens as part of the census based upon where those illegal aliens "live and sleep most of the time," otherwise known as the "usual residence" definition. *Id.* at 7. Ironically, there does not appear to be any question on the 2020 Census that asks where the "usual residence" of an illegal alien might be, although other questions at least try to determine how long someone has lived in the United States. *See* U.S. CENSUS BUREAU, QUESTIONS PLANNED FOR THE 2020 CENSUS AND AMERICAN COMMUNITY SURVEY: FEDERAL LEGISLATIVE AND PROGRAM USES 59 (2018), https://www2.census.gov/library/publications/decennial/2020/operations/planned-questions-2020-acs.pdf.

158 Complaint for Declaratory Relief, *supra* note 154, at 3.

159 *Id.* at 11–15.

160 *Id.* at 2, 15.

161 *Id.* at 18–20.

citizens while benefitting states with greater numbers of illegal aliens.[162] For instance, the 1980 Census resulted in New York and California gaining congressional seats, and two other states losing one, due to the count of illegal immigrants.[163] A study of the 1990 Census indicates that California and Texas both gained House seats, these two states reflecting the greatest populations of illegal aliens.[164]

Also, Department of Homeland Security data indicated that in 1996 the estimated total of illegal immigrants in the United States was approximately five million people, with approximately forty percent of all illegal immigrants living in California.[165] DHS reported that total number rose 240% by 2014 to a population of over twelve million, ninety-one percent of whom were over the age of eighteen.[166] California and Texas host over forty percent of all illegal aliens and the top five states (add Florida, New York, and Illinois) house nearly half of the twelve million illegal immigrant population in the United States.[167] Of the current number of illegal immigrants, two-thirds have lived in the United States for at least a decade. The Public Policy Institute of California released a study in 1996 wherein it concluded that "undocumented immigration to California was at a relatively low level during the early 1980s,"[168] yet in 2014 California housed an estimated 2.9 million illegal immigrants.[169] Moreover, in 1996, Texas housed approximately 700,000 illegal immigrants,[170] yet DHS estimates that by 2014 there were 1.9 million illegal immigrants residing in Texas, which is a 175% increase.[171] This data

162 It is worth exploring further how the advent of "sanctuary cities" and "sanctuary states" may have induced illegal aliens to travel to, and remain, in those sanctuary polities.

163 Wood, *supra* note 100, at 470 (citing *Hearing on Enumeration of Undocumented Aliens in the Decennial Census Before the Subcomm. on Energy, Nuclear Proliferation, and Gov't Processes of the Sen. Comm. on Governmental Affairs*, 99th Cong. 14–15 (1985) (testimony of John Keane, Director, Bureau of the Census)).

164 *Id.* (citing Steven A. Camarota, Leon F. Bouvier, Hong Dan, Godfrey Jin-Kai Li & Dudley L. Poston, Jr., *Remaking the Political Landscape: How Immigration Redistributes Seats in the House*, CTR. FOR IMMIGR. STUDS. (Oct. 1, 1998), https://cis.org/Report/How-Immigration-Redistributes-Seats-House). Apparently, the Census Bureau did not conduct the same study it conducted after the 1980 Census because of "sensitivit[ies]" to immigration issues. *Id.*

165 DEP'T OF HOMELAND SEC., ILLEGAL ALIEN RESIDENT POPULATION 1 (1996), https://www.dhs.gov/sites/default/files/publications/Unauthorized%20Immigrant%20Population%20Estimates%20in%20the%20US%201996.pdf.

166 BRYAN BAKER, DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2014, at 5–6 (2014), https://www.dhs.gov/sites/default/files/publications/Unauthorized%20Immigrant%20Population%20Estimates%20in%20the%20US%20January%202014_1.pdf.

167 *Id.* This "Top 5" has not changed in terms of rank since the 1980s.

168 HANS P. JOHNSON, PUB. POL'Y INST. CAL., UNDOCUMENTED IMMIGRATION TO CALIFORNIA: 1980–1993 viii (1996), http://www.iicanet.orgwww.ppi.ppic.org/content/pubs/report/R_996HJR.pdf.

169 BAKER, *supra* note 166, at 5.

170 DEP'T OF HOMELAND SEC., *supra* note 165.

171 BAKER, *supra* note 166, at 6.

suggests a direct correlation between in-state illegal alien population and apportionment. Due in part to an influx of illegal immigrants, California has gone from forty-five seats in the U.S. House of Representatives in 1984 to its current number of congressmen at fifty-three and went from forty-seven electoral votes in the 1984 election to fifty-five in 2020.

Because the data is significant, and Alabama has compiled *reliable, high quality* data, the Census Bureau's motion to dismiss was denied, and the case remains active.[172] District Court Judge David Proctor's Memorandum Opinion denying the Census Bureau's motion to dismiss found that Alabama had both standing for redress and also had alleged cognizable injuries such that dismissing the case would be a miscarriage of justice at this point.[173] Much like the Headcount Memo's assertions, the plaintiffs in the Alabama case will rely on data to assert the fundamental unfairness viewed by counting illegal immigrants in the decennial census. If the Secretary of Commerce or the President do not adjust the headcount based on what Alabama would assert is a "genuine justification," the federal court in the Northern District of Alabama might do it for them.[174]

CONCLUSION

The decennial census is altogether a civic ceremony and scientific enterprise. The imputation of data and statistics to aid in the accuracy of the census, or abate against illegitimate state action, has been utilized over the last several censuses. A physical headcount is not the only method in which the decennial census is conducted. Datasets and other aids to determine the population have been widely accepted. In fact, the Supreme Court has said repeatedly that the use of accurate statistical procedures is appropriate.

The Supreme Court has never decided whether the decennial census *must* count illegal immigrants or whether the Secretary of Commerce or President can direct, by constitutional and lawful legitimate governmental purpose, that illegal immigrants be excluded from the final enumeration for

172 Alabama v. U.S. Dep't of Com., 396 F. Supp. 3d 1044 (N.D. Ala. 2019) (denying defendant's motion to dismiss).

173 *Id.* at 1046.

174 I do not contend that any court could force the President of the United States or the Secretary of Commerce to include or exclude certain groups (e.g., illegal immigrants) prior to reporting the decennial census apportionment number to Congress. However, I do believe it is a legitimate cause of action to make voter debasement, voter dilution, and other related constitutional claims once the apportionment number is reported and cognizable injuries are realized. So, to the extent that Alabama is seeking to direct the President to do anything prior to the apportionment report to Congress, I would argue that such is likely not a valid legal exercise of Article III powers by the District Court. However, a district court could find constitutionally valid purpose to "adjust the headcount" based on some or all of the arguments discussed herein after the apportionment number has been reported. There are then really two questions relevant here: (1) can the President exclude illegal immigrants in his/her discretion?; and (2) if the President refuses to do so, are there remedies available to disenfranchised states? I believe the answer to both questions is yes.

the purposes of apportionment. The contention then is simply that the Secretary of Commerce or President may count illegal immigrants for the purposes of apportionment but are not constitutionally required to do so. The cascade of delegation from the U.S. Constitution to the Congress to the Census Act to the Census Bureau to the Secretary of Commerce to the President of the United States makes no such judgments and offers no such requirements. Should illegal immigrants be counted for the purposes of apportionment, and such a count disadvantages, distorts, or debases citizens in other states, then it would be a legitimate cause of action by the disadvantaged state to seek to adjust the apportionment through the courts on these constitutional premises.

It should not be a constitutional reality that the greater proportion of citizens in a state results in fewer congressional seats. It would be a distortion of democratic principles for the number of seats in the Congress or Electoral College to swell in a state where the actual constituency has not. This would offer perverse incentives to bolster the size of a state's congressional delegations—and their impact on presidential elections—by encouraging illegal immigration and encouraging illegal immigrants to domicile in states looking to tip the congressional and electoral scales in their favor. Welcoming those who violate the laws of the land should not have its advantages.

The decision to count illegal immigrants rests with the Secretary of Commerce and ultimately the President. Unless and until such time as there is either a constitutional amendment or Congress directs the Secretary to enumerate specific groups, the Secretary of Commerce or the President will remain constitutionally and statutorily empowered to exclude illegal aliens in reapportionment in order to serve legitimate government interests that include protecting the franchise of suffrage, guarding against vote dilution and representative diminishment, and encouraging lawful naturalization. These legitimate governmental interests are reasonably advanced by omitting illegal immigrants from the final apportionment enumeration reported to Congress by the President. There again, the President is not required to exclude illegal immigrants from the enumeration either. The point is that exclusion is a constitutionally available correction to apportionment.

The core constitutional purpose of the decennial census is to arrive at the "actual enumeration" of the people of each state so that the people of each state are fairly and adequately represented in Congress and the Electoral College. Our system of laws and our Constitution simply cannot support the contention that there may be disadvantages to citizenship when determining headcount advantages for citizens.