

July 21, 2020

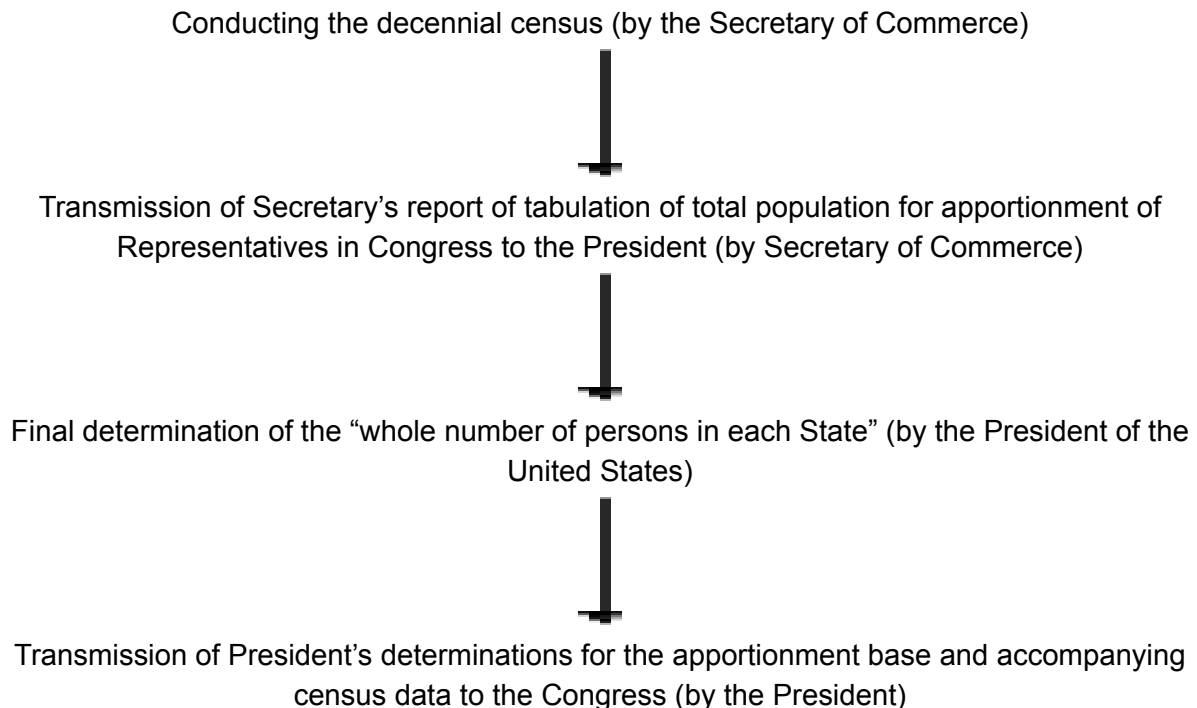
Re: July 21 The President's Memo Excluding Undocumented Immigrants from the Apportionment Base

On July 21, President Trump issued a "[Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census](#)." Reuters [had reported](#) that this was in development at least as early as last Friday.

Summary of Memo and Breakdown of the Trump Administration's Argument

As the title suggests, this memo would exclude undocumented immigrants from the apportionment base used to determine apportionment for Congressional districts.

In today's presidential memo, the White House separates the enumeration from the apportionment, by stressing the importance of interim steps undertaken by the President. The apportionment process is described as follows:



Focusing on the last two steps above, the presidential memo suggests that the president has discretionary authority to modify the apportionment count. Hence, this memo may not affect Bureau operations directly, although that is not beyond the realm of possibility (see the "Impact on the Census" section below).

The objective of the presidential memo is stated as follows: "I have accordingly determined that respect for the law and protection of the integrity of the democratic process warrant **the**

exclusion of illegal aliens from the apportionment base, to the extent feasible and to the maximum extent of the President's discretion under the law" (emphasis added).

The core argument seems to run as follows:

1. The Constitution does not define exactly who should be counted in the Census.
2. The language in the Constitution regarding who is counted on the Census (enumeration of "persons in the State") has been interpreted to mean only "the 'inhabitants' of each State."
3. In the past, certain groups have been excluded from the census count, including some foreign diplomats, and some aliens temporarily in the U.S. on business or tourist visas.
4. To abide by representative democracy, illegal aliens should not be counted. Additionally, counting illegal aliens on the census would incentivize more illegal aliens to enter the country.
5. The President has discretionary authority on who is included for the apportionment base that determines Congressional districting. Congress has provided that it is the "the President's personal transmittal of the report to Congress" that "settles the apportionment" of Representatives among the States, and the President's discretion to settle the apportionment is more than "ceremonial or ministerial" and is essential "to the integrity of the process" (*Franklin v. Massachusetts*, 505 U.S. 788, 799, and 800 (1992)).
6. Hence, to protect the democratic process, President Trump has decided to exclude illegal aliens from the count.

Tenuous Legal Ground

Legal experts have already criticized several aspects of this argument. The House Committee on Oversight and Reform has already issued a [detailed repudiation](#). Chairs Maloney and Raskin identify clear Constitutional grounds by which the memo's directives are illegal. They also trace recent history, with the Secretary of Commerce, the Director of the Census Bureau, and the Department of Justice all having asserted under oath that they intend to conduct a complete and accurate census. As a practical matter, this latest action undermines their statements and past reassurances. Moreover, it bolsters the case that members of the Trump Administration have committed perjury, including testimony before the House Oversight Committee and possibly before the courts during *Dep. of Commerce v. New York*.

Several other legal scholars have also challenged premises 2 and 5 that the "inhabitants" counted for enumeration purposes is still open to interpretation, and particularly that it is interpretable by the Executive Branch:

- "The Constitution says count 'persons' not citizens." (U of Alabama Law Professor [Joyce Alene](#))
- "J. Ginsburg in 2016 for a unanimous Court: '[T]he basis of representation in the House was to include ALL inhabitants—although slaves were counted as only 3/5 of a person.'

“Section 2 of the 14th Amendment ... retained TOTAL POPULATION as the congressional apportionment base.’

“Compare that Supreme Court language with this sentence from Trump's new census memo:

“The Constitution does not specifically define which persons must be included in the apportionment base.’

This is LAWLESS: saying the Constitution doesn't say what the Court said it does!”
(Georgetown Law Professor [Joshua A. Geltzer](#)).

Other aspects of the argument can also be challenged. For instance, if the goal is truly to respect the democratic process, it's unclear why the Executive Branch only issued the memo now. With regard to the census, the same legal authority applies now as it did last summer, when the resolution of *Dep. of Commerce v. New York* prevented the administration's attempt to place a citizenship question on the 2020 census.

With the Census Bureau's Non-Response Follow-Up operations set to resume across the country, during which field operations will reach many of those who are historically undercounted, the timing of this presidential memo is suspicious. In turn, this undermines premise 4 above about the Trump Administration's concern for democracy. Relatedly, similar to the Supreme Court's reasoning in *Dep. of Commerce*, the administration's stated explanation and underlying motivation do not appear to match.

Memo vs. Executive Order

The fact that this was issued as a “presidential memo” rather than an “executive order” bears some significance:

- Publication in the Federal Register gives an executive document [“general applicability and legal effect.”](#) Executive Orders must be published in the Federal Register, whereas a Presidential Memorandum may or may not be published. Today's memo has not yet been published in the Register, and it usually takes a few days for that to occur. If unpublished, then presumably this memo is meant to deter participation in the census and stoke fear among immigrants, rather than to actually change policy.
- Unlike an executive order, a presidential memo is [not required to cite the legal authority](#) for the actions taken. To justify its argument, this memo does cite a number of laws and judicial decisions including 2 U.S.C. 2a(a), *Franklin v. Massachusetts*, and the Immigration and Nationality Act (8 U.S.C. 1101 et seq.). However, as noted above, these appear to be tenuous ground, with clear and powerful legal challenges available.

Impact on the Census

Today's presidential memo argues that undocumented immigrants should not be counted on the census.

From the explanation and legal authorities cited, it appears that President Trump's tactic could impact the count in one or more of the following ways:

- Depressing response rates among the immigrant community by stoking fear. For instance, continued focus on this executive order, even if it is not published in the Federal Register, would be expected to raise alarm. ***This is particularly significant given that Non-Response Follow-Up is about to begin, where Bureau operatives will enumerate those who have not yet been counted. The Bureau's response rate data and information from partners suggest that many of those uncounted at the moment are from Hard to Count communities, including undocumented immigrants.***
- Depressing response rates among the undocumented community by stifling Census Bureau operations. ***Even if a lawsuit were to occur, the Bureau is operating on a tight timeline, despite its extension of self-response and field operations to October 31. Already, coronavirus has had a significant impact on the count. The further away that field operations occur from April 1, the more difficult it will be to achieve an accurate count for undocumented immigrants and for the United States population overall.***

Additional Resources:

- Text of the Presidential Memo:
<https://www.whitehouse.gov/presidential-actions/memorandum-excluding-illegal-aliens-a-proportionment-base-following-2020-census/>
- House Committee on Oversight and Reform Hearing:
<https://oversight.house.gov/news/press-releases/chairwoman-maloney-announces-hearing-on-president-trump-s-unconstitutional>
- NPR Article:
<https://www.npr.org/2020/07/21/892340508/with-no-final-say-trump-wants-to-change-who-counts-for-dividing-up-congress-seat>
- Reuters Article:
<https://www.reuters.com/article/us-usa-trump-migrants-census/trump-aims-to-stop-counting-of-illegal-migrants-in-redrawing-of-us-voting-maps-idUSKCN24M26U>
- USA Today Article on the difference between Presidential Memos and Executive Orders:
<https://www.usatoday.com/story/news/politics/onpolitics/2017/01/24/executive-order-vs-presidential-memorandum-whats-difference/96979014/>
- [Block-Level Citizenship File](#) explanatory Memo, July 15, 2020.
- [HEROES Act](#) explanatory Memo, May 29, 2020.