# Does the census actually count everyone and should it?

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**By Lyle Denniston**

The high-stakes fight now unfolding in the Supreme Court over the 2020 census, testing whether everyone in America should be asked about their citizenship, is now intensifying into a major constitutional controversy. And that part of the controversy is so fundamental to constitutional history that it can be traced all the way back to the Philadelphia Convention 232 years ago – specifically, to a vote of the delegates on July 14, 1787.

At the core of the controversy is the question that the early history has now made a constitutional question for the Court to answer: Does the census actually count everyone, and should it?

In the background of that question is another inquiry: Did America's founding generation intend to assure that each state would have national representatives in government, with each state's share determined by each state's total population based upon the most accurate count?

Until Monday, the Supreme Court was committed to pondering both questions only as a matter of federal laws – that is, the Census Act that governs how the 10-year count actually works and the Administrative Procedure Act that governs court review of actions taken by federal agencies. The most important of the two is the Census Act, and the Justices are going to explore whether that Act permits the Secretary of Commerce (who oversees the Census Bureau) to add a question about citizenship to the questionnaire that will go to every household in the country next year.

But yesterday, the Trump Administration's top lawyer for Supreme Court cases urged the Justices to expand their review to include this purely constitutional question: Does adding an inquiry about citizenship violate the "Enumeration Clause" of Article I, Section 2?

That was not an issue that the Administration had asked to be answered when it took the census case to the Supreme Court this term, after a federal judge in New York City barred the citizenship question based upon federal laws (rejecting a constitutional challenge by those protesting that question).

But, the letter to the Justices argued that the issue is now present in the controversy because a different federal judge, in California, recently ruled that the citizenship question probably would violate the Enumeration Clause, so it cannot be included on the questionnaire. That is now lurking in the controversy, and should be addressed, the new letter said.

The choice of whether to enlarge the review to include the constitutional question is for the Justices to decide. They do not have to take up that issue, but the Administration lawyer urged them to do so in the interest of a complete review.

So it is now a key issue: What is the Enumeration Clause and what does it mean? Paraphrased, it says that the number of seats in the House of Representatives must be divided up among the states according to the total population of each state, and those figures are to be determined by an "actual enumeration," with that count to be done first in 1790 and occurring again every 10 years. No state, however small, would be denied a seat; a minimum of one each was guaranteed.

(One must pause briefly to note that, in the original Article I, each slave living in America was to be counted in the census, but only as 3/5ths of a person. That gave the slaveholding states a significant advantage in the House. That clause stayed in the Constitution until 1868, when it was deleted by the Fourteenth Amendment guaranteeing legal equality, at least as an aspiration.)

What is some of the early history that the Supreme Court probably will now have to confront?

Beginning in May 1787, the founders at Philadelphia debated how to assure the American people that they would be represented by elected members of the new Congress. America was to be a republic, with the people governed by representatives that they elected, rather than govern themselves as in New England town meetings. After weeks of meandering debate over representation, the delegates took a crucial vote on July 14.

By a close-as-possible tally – five states to four states – the delegates decided that, while each state would get at least one Representative in the national House, all other states would be assured of seats reflecting the total population of each. That would be determined by the "actual enumeration" of each state's population by a regularly-recurring census. This approach was mandated also for any new state that joined the Union in the future.

That vote, in fact, rejected the idea – pressed by some delegates from the original colonies along the Atlantic seaboard – that those colonies as states should be guaranteed that they would never lose their dominant position in the House. Those who argued that way contended that Representatives chosen in new states formed in "the West" would not have the qualities of statesmanship and leadership supposedly characteristic of those chosen from the original 13.

In modern times – and, indeed, at the center of the case now before the Supreme Court – this debate over what constitutes an "actual enumeration" has been significantly affected by the interaction of realities. First, it has always been understood (though frequently debated all over again from time to time) that the census should not only count every citizen, but every resident – including non-citizens who live in the country, whether or not they entered legally, and, second, the count thus will include between 10

and 11 million undocumented immigrants now living in the United States, many of them living with uncertainty about their right to remain.

When the Trump Administration came into office, there were some officials in the White House and some advisers to the White House who wanted to add a citizenship question to the 2020 census. Their reason for doing so is hotly debated. In any event, that idea apparently was passed on to Commerce Secretary Wilbur Ross, who agreed to add the question and who went looking within the government for a reason to justify it.

He apparently found that in a letter from a Justice Department official that the citizenship data would help that department in enforcing voting rights law; that letter has since been repudiated by the official who supervised its preparation, but in an oddity of how this dispute has unfolded in lower courts, the Supreme Court may not be told of the repudiation.

Three federal judges who have now weighed the legality of the citizenship question – the New York judge whose ruling is now directly before the Court, the California judge whose recent ruling prompted the Administration's letter to the Supreme Court yesterday, and a judge in Maryland in a preliminary ruling before a trial – have concluded that Ross did not have a valid reason for adding the question. That probably undermined the legality of asking the question, each said.

Moreover, each of those judges concluded, at least temporarily, that including the question would cause the final census count to be inaccurate – in other words, there would be a serious under-count. Each of the judges relied upon evidence that, if the question were asked, it could frighten the occupants of households where non-citizen immigrants were living, and would frighten relatives of those immigrants, resulting in refusals—perhaps numbering in the millions – to fill out the questionnaire.

Since, under the founders' version of an "actual enumeration," representation in the House depends upon state populations, scaring off a large number of households from responding would hit hardest in states with larger concentrations of non-citizens and Hispanic citizens. California, for example, might lose one to three of its present 53 House seats.

Moreover, the division of seats in the House of Representatives after the 2020 census – no doubt reflecting some shifts of people from state to state—would affect the population totals on which redistricting of seats is done for the House, for state legislatures, and for at least some multi-member governing bodies at the local level. And, in addition, the under-count would mean that some states and local government would receive lesser shares of the total of some $700 billion in federal money that is now distributed on the basis of state populations.

Those very important prospects enhance the importance of census accuracy. In reality, though, the census has never been exactly accurate mathematically, since its inception in 1790. However hard the Census Bureau tries to get an actual count, and however sophisticated its techniques have become, there is always a final count that falls below the actual total number of people living in the country at the time the census is taken.

But that kind of raw statistical under-count is not what counts, legally or constitutionally. And it is not what the founders were debating about in Philadelphia. The problem, then and now, is what specialists define as one of two statistical problems, which essentially mean the same thing: “differential under-count” or “distributive inaccuracy.”

Both are defined as the inaccuracy that results when the nation’s total population is divided up by the number of states, but the under-count results in a distribution that strays from what a given state would get if the national total were accurate. In other words, the resulting total national count is distributed incorrectly, affecting the states where the under-count is heaviest.

That is, if the national total does not count everyone, and the ones not counted are those who do not return their census forms, then the distribution of the remaining total short-changes the states that actually are home to most of those not counted.

In a 1996 decision, the Supreme Court ruled unanimously that this is the kind of inaccuracy that counts under the Enumeration Clause, when a lawsuit is filed claiming a violation of that Clause.

It declared that “the primary purpose” of the Clause is to provide “a basis for apportioning political representation among the states.”

Thus, it said, “distributive accuracy” is more important, constitutionally, than “numerical accuracy,” and it added that the task of the Census Bureau is to try to come as close as it technically can to achieving the former.

Of course, Article I’s Enumeration Clause already has a built-in “distributive inaccuracy.” Seven states now have such low populations, in comparison, that they would not get a seat in the House if the 435 seats were allotted based on comparisons of state populations, but the Clause nevertheless promises each such state a seat in the House. That leaves 428 to be divided among states with populations that exceed those smaller states’ totals.

California, the largest state, has a population of 39.8 million and now has 53 seats; Wyoming, the smallest state, has a population of about 574,000 but still gets one seat. Each California Representative has a district of about 75l,000 people (if evenly distributed), considerably more than the constituency of Wyoming’s single Representative.

But those challenging the inclusion of the citizenship question in next year’s census are not complaining of that kind of inequality. Like the founders, they are worried about the differing treatment among the states – a potential difference that would result if representation were not based on the census-produced population totals, hopefully as accurate as possible.

Aside from complaining that the under-count, as based upon the lower response rate likely from households occupied by Hispanic citizens and undocumented immigrants, violates the Enumeration Clause, they are also asserting that the effect of including the

citizenship question will result in discrimination based on ethnic identity – a form of race bias. That is based upon a claim of violation of legal equality as guaranteed by the Fifth Amendment's Due Process Clause.

So far, the Administration's appeal to the Supreme Court does not raise that separate constitutional question, but yesterday's letter implied that it, too, is looming in the background and might become another issue.

To prove that there was ethnic discrimination, the challengers would have to show that Commerce Secretary Ross sought to inquire about citizenship with the specific purpose of reducing the count of minority residents across the nation, based on ethnicity. The judge in New York found that the challengers had not offered evidence to prove that convincingly, but the judge in Maryland has tentatively suggested that there probably is such evidence.

The census case is now in the brief-filing stage at the Court, with the Administration's brief already submitted and with the challengers' brief due April 1. The Court has set April 23 for a hearing. As of now, that hearing is scheduled for one hour, but the challengers opposing the citizenship question have asked the Court to increase the time. It is the only case set for the more session that day, so the Justices could allot more time.

A final decision is expected before the Court finishes its current term, probably in late June. Because the Census Bureau has said that it must complete the questionnaire by the end of June, or not much later, the Justices are weighing the case on an expedited schedule.

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