

# Trump administration seeks to bar undocumented immigrants from a portion of the 2020 Census

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President Trump signed a memorandum Tuesday in support of barring undocumented immigrants from being counted for congressional apportionment next year. Doing so, he said, would represent a “better understanding of the Constitution” than the way apportionment has been implemented for over two centuries.

“For the purpose of the reapportionment of Representatives following the 2020 census, it is the policy of the United States to exclude from the apportionment base aliens who are

not in a lawful immigration status . . . to the maximum extent feasible and consistent with the discretion delegated to the executive branch,” the memo said.

Democratic lawmakers blasted it, and groups that [successfully challenged](#) the administration’s attempt to add a citizenship question to the census said they will sue over it.

“Today’s memorandum will end up in the dustbin of history as yet another exemplar of Donald Trump’s disturbing embrace of white nationalism,” Thomas Saenz, president and general counsel of the Mexican American Legal Defense and Educational Fund (MALDEF), said in a statement.

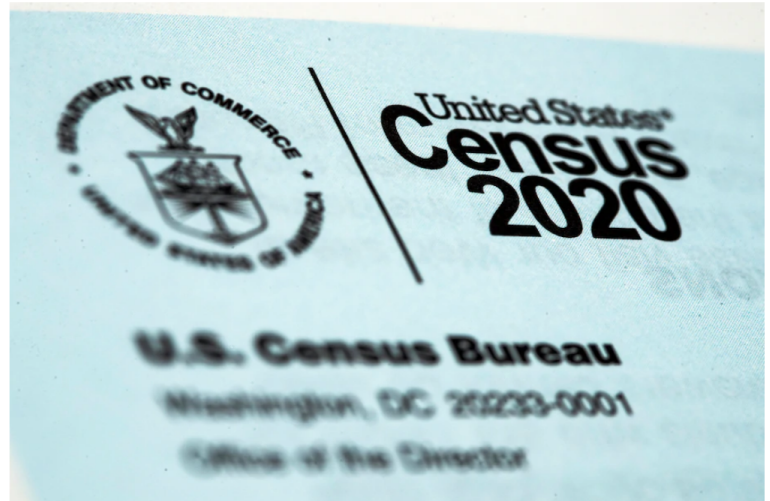
“MALDEF will be in court to stop this latest example of blatantly unconstitutional executive action by a failed presidency.”

Dale Ho, a lawyer for the American Civil Liberties Union, said that Trump’s “latest attempt to weaponize the census for an attack on immigrant communities will be found unconstitutional. We’ll see him in court, and win, again.”

New York Attorney General Letitia James (D), who led a multistate suit against the question, also said she will challenge the memo in court.

Since taking office, the Trump administration has repeatedly tried to change the way the decennial census is carried out and how its data is used.

A draft of an executive order less than two weeks after his inauguration recommended that the census ask about immigration status. The following year, Commerce Secretary Wilbur Ross announced that the question would be added to the survey, sparking multiple lawsuits that revealed a byzantine paper trail of administration officials struggling to justify the move. The litigation also showed that the



(Matt Rourke/AP)

administration had been in contact with a now-deceased Republican strategist who had determined that a citizenship question would give an electoral advantage to Republicans and non-Hispanic whites.

Last summer, after the Supreme Court [struck down](#) the question, saying the administration had presented a “contrived” reason for wanting to add it, Trump ordered federal agencies to share administrative records data on citizenship with the Commerce Department. Civil rights organizations have filed [a lawsuit](#) saying that order is discriminatory and violates the Administrative Procedure Act, the same law that challengers invoked against the citizenship question.

The administration also last month added two high-level [political appointees](#) to the Census Bureau, [eliciting criticism](#) from Democrats in the House and Senate and raising concern that the new hires could attempt to influence the count.

Sen. Brian Schatz (D-Hawaii) called the memo “an illegal and unconstitutional attempt to scare people from participating in the Census and influence congressional representation.”

Rep. Carolyn B. Maloney (D-N.Y.), chairwoman of the Committee on Oversight and Reform, said the committee will hold an emergency hearing on the census next week and is considering additional ways to respond to the memo.

“Taking this step right in the middle of the ongoing Census is particularly egregious and sinister because it appears purposefully designed to depress the count, deter people from filling out their forms, and corrupt the democratic processes on which our nation is founded,” Maloney said in a statement co-signed by Rep. Jamie B. Raskin (D-Md.), chairman of the subcommittee on civil rights and civil liberties. “We fought and defeated the President’s last attempt to scrawl his anti-immigrant graffiti all over the Census, and we’ll stop him again now.”

The memo seeks to overturn a system in place since the decennial count began in 1790. Typically by the end of a census year, the data from the count is delivered to the president, who then presents it to Congress to use for apportionment of representatives, based on the count of people living in each jurisdiction.

In a statement, Trump referred to his order last July for federal agencies to share administrative records.

“Today, I am following through on that commitment by directing the Secretary of Commerce to exclude illegal aliens from the apportionment base following the 2020 census,” he said, adding that the action “reflects a better understanding of the Constitution and is consistent with the principles of our representative democracy.”

But the wording of the memo implies that it is not necessarily actionable. It stipulates that the commerce secretary “shall take all appropriate action, consistent with the Constitution and other applicable law, to provide information permitting the President, to the extent practicable, to exercise the President’s discretion to carry out the policy.”

Legal and census experts said the plan is neither legal nor practicable.

“It’s patently unconstitutional,” said Thomas Wolf, senior counsel and Spitzer Fellow at the Brennan Center for Justice at New York University’s School of Law. For apportionment, Section 2 of the 14th Amendment requires a count of all persons, he said.

“Persons means people. Everyone must be counted . . . regardless of race or ethnicity or citizenship status,” he said, adding that implementing what the president proposes “would be asking every American to disregard the plain text of the Constitution and ignore what their eyes tell them about

what the law and the American Constitution is about. It's another example of the Trump administration putting some ill-conceived notion of ideology or self-interest ahead of the country" A likely outcome is that the Commerce Department's general counsel will tell the secretary that it is not legal to exclude anyone living in the country from being counted for apportionment, said Justin Levitt, an election law professor at Loyola Law School in Los Angeles.

"I think this ends up doing nothing," he said. "It will take somebody to go back [to the president] to say, 'We cannot do this practicably and consistent with applicable law.'"

In addition to congressional apportionment, data from the 2020 Census, which is currently underway, will be used to determine state redistricting and \$1.5 trillion a year in federal funding. The 2020 count has been beset, first by the citizenship question litigation, and now by the pandemic, which has hampered the Census Bureau's ability to collect data on schedule.

In April, the administration [asked Congress](#) to extend the deadline for reporting the data by four months. Census Bureau Associate Director for Decennial Census Programs Albert E. Fontenot Jr. said this month that it is too late for the bureau to deliver an accurate count by its original Dec. 31 deadline.

But a four-month delay could create a roadblock for any plan to exclude undocumented immigrants if Trump is defeated and a new administration takes over in January, before the data becomes available to use for reapportionment.

In its Heroes Act, the House approved the bureau's request for the delay, along with an additional \$400 million to help with the count.

It is unclear whether a pending Senate relief bill will approve a change in the deadline.

Even if the administration found some way to legally exclude undocumented people from the count, it would be impossible to implement, Levitt said, adding that by law, apportionment must be based on the decennial census, which does not ask about respondents' legal status.

"There is no list of citizens, so there's nothing to do the math with," Levitt said, adding that he wouldn't be surprised if the memo spurs lawmakers to draft a bill that clarifies that everybody must be counted.

Litigation over a version of Tuesday's memo is [already playing out](#) in Alabama, which has sued the Commerce Department and the Census Bureau, arguing that immigrants should not be counted for apportionment or federal funding if they are not in the United States legally, even if they do fill out the decennial survey.

The 14th Amendment, enacted after the Civil War, mandates that representatives be apportioned "counting the whole number of persons in each State." (The Constitution originally contained similar language but distinguished between free people and enslaved people, who counted as three-fifths of a person.)

It is unlikely that either Tuesday's memo or the Alabama suit would prevail in court. But some see the administration's repeated rhetoric about excluding undocumented immigrants as a strategy to move the needle on the national debate.

The memo could be a sign of desperation from a president whose popularity is taking a beating in an election year, Levitt said. "Part of the impact of floating the idea is probably the messaging — showing this to his supporters as him fighting for them."

Tuesday's memo comes as the Census Bureau begins outreach to the nation's hardest-to-count groups, including immigrants. If the government is seen as trying to disadvantage them, some might be less likely to respond to the survey, immigrant advocates said.

"This is an order designed to sow fear and mistrust between peoples and becomes a matter of life and death as the US battles a deadly pandemic," said a statement from the **Industrial Areas Foundation**, a group that works with churches and organizers in the West and Southwest to educate and support minority communities.

Wolf said the memo is not only frivolous but potentially dangerous for anyone in an area that gets undercounted, regardless of whether they are in the United States legally.

"Right now we're in a pandemic, and the census is going to be key," he said, noting that census data is used to determine education, food assistance, transportation and health care. "Every community that's suffering from the pandemic is going to need as much help as it can get, and if any community gets undercounted at the end of the day, every American is going to be left holding the bag."

*Arelis R. Hernández contributed to this report.*