

April 29, 2019

The Honorable José Serrano, Chair
The Honorable Robert Aderholt, Ranking Member
U.S. House Committee on Appropriations
Subcommittee on Commerce, Justice, Science, and Related Agencies
H-307 The Capitol
Washington, DC 20515

Dear Chairman Serrano and Ranking Member Aderholt:

We write to you regarding the Oversight Hearing on 2020 Census Preparation.¹ EPIC is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues.² We are currently litigating *EPIC v. Department of Commerce*³ to block the Census Bureau from collecting personal data about citizenship status.

EPIC's central claim is that Commerce Department failed to conduct required Privacy Impact Assessments prior to the decisions to collect personal data about citizenship. The Commerce Department does not dispute that it must complete revised Privacy Impact Assessments before adding the question, but a lower court surprisingly held that the agency could wait until the census forms are put in the mailbox to assess the privacy risks.⁴ That view is entirely at odds with Section 208 of the E-Government Act, which anticipates a careful consideration of privacy risks before a federal agency collects personal data, as well as the possibility that a thorough Privacy Impact Assessment may lead an agency to modify or suspend a proposed collection of personal data.⁵

EPIC has appealed the lower court decision, and we will argue the appeal before the D.C. Circuit on May 8.⁶

The citizenship question poses a unique threat to privacy. If the question is included on the 2020 Census, millions will be expected to provide sensitive personal information to the federal government that could expose individuals and their family members to investigation, sanction, and

¹ *Oversight Hearing: 2020 Census Preparation*, 116th Cong. (2019), H. Comm. on Appropriations, Subcomm. on Commerce, Justice, Science, and Related Agencies (April 30, 2019), <https://appropriations.house.gov/events/hearings/oversight-hearing-2020-census-preparation>.

² *About EPIC*, EPIC (2019), <https://www.epic.org/epic/about.html>.

³ *EPIC v. Dep't of Commerce*, No. 19-5031 (D.C. Cir. appeal docketed Feb. 21, 2019).

⁴ *EPIC v. Dep't of Commerce*, 356 F. Supp. 3d 85 (D.D.C. 2019).

⁵ Pub. L. No. 107-347, 116 Stat. 2899 (Dec. 17, 2002) (codified at 44 U.S.C. § 3501 note).

⁶ Order, *EPIC v. Dep't Commerce*, No. 19-5031 (Mar. 12, 2019), <https://epic.org/privacy/litigation/pia/epic-v-commerce/EPIC-v-Commerce-19-5301-EPIC-order-scheduling-argument-050819.pdf>.

even deportation. The Census Bureau has already said it would transfer block-level citizenship data to the Department of Justice⁷—data that could subject targeted communities to prosecution.

Despite these extraordinary privacy risks, the Census Bureau has failed to complete required Privacy Impact Assessments as mandated by Congress.⁸ The E-Government Act of 2002 requires federal agencies to conduct and publish an impact assessment *before* initiating a new collection of personally identifiable information.⁹ Yet as *EPIC v. Commerce* reveals, the Bureau ignored this legal mandate and abruptly added the citizenship question with no informed understanding of the privacy risks involved.

Privacy Impact Assessments are a necessary step in an agency’s decision whether to collect personal data. In Section 208, Congress made clear that data collection simply could not occur without the completion and review of these assessments.¹⁰ Conducting and publishing an impact assessment forces an agency “to demonstrate that the agency fully considered privacy and incorporated appropriate privacy protections from the earliest stages of the agency activity[.]”¹¹ When carrying out a Privacy Impact Assessment, an agency may decide to modify or abandon a proposed collection of personal data because it poses a substantial threat to privacy.

Nowhere is the duty of a federal agency to assess privacy risks more important than the decennial census, a “unique” and compulsory collection of data that “reaches every population group, from America’s long-time residents to its most recent immigrants.”¹² Even the Census Bureau admits that it must complete new privacy impact assessments before it can collect citizenship data.¹³ Yet contrary to the E-Government Act, the Bureau claims that it can postpone these assessments until next year, long after the census questionnaire has been finalized and printed.

The Census Bureau’s disregard for Section 208 and its unlawful refusal to address the privacy risks of the citizenship question are already spawning troubling consequences. The most recent Privacy Impact Assessment for the decennial census simply ignores the citizenship question, leaving the public to guess about the intended uses of the citizenship data collected by the Bureau.¹⁴ Remarkably, the same agency document claims that census response data—which could include

⁷ Letter from Wilbur Ross, Secretary of Commerce, to Karen Dunn Kelley, Under Secretary for Economic Affairs, at 1 (Mar. 26, 2018), <https://epic.org/privacy/litigation/pia/epic-v-commerce/EPIC-v-Commerce-PI-Motion-Exhibit-1.pdf>.

⁸ *EPIC v. Dep’t of Commerce*, *supra* note 3.

⁹ E-Government Act, Pub. L. No. 107-347, § 208(b), 116 Stat. 2899, 2921–22 (Dec. 17, 2002) (codified at 44 U.S.C. § 3501 note).

¹⁰ *Id.* at § 208(b).

¹¹ Office of Mgmt. & Budget, OMB Circular A-130: Managing Information as a Strategic Resource (2016), app. II at 10, <https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/OMB/circulars/a130/a130revised.pdf>.

¹² Presidential Proclamation No. 7,286, 65 Fed. Reg. 17,985, 17,985 (Apr. 1, 2000).

¹³ *EPIC v. Dep’t of Commerce*, 356 F. Supp. 3d 85 (D.D.C. 2019) (noting “defendants’ conce[ssion]” that they must “prepare PIAs that adequately address the collection of citizenship data in the 2020 Census”).

¹⁴ See generally U.S. Dep’t of Commerce, *Privacy Impact Assessment for the CEN08 Decennial Information Technology Division (DITD)* (approved Sep. 28, 2018), <https://epic.org/privacy/litigation/pia/epic-v-commerce/EPIC-v-Commerce-PI-Motion-Exhibit-6.pdf>.

individuals’ citizenship status—may be transferred in “[b]ulk” to other federal agencies “[f]or criminal law enforcement activities.”¹⁵

The Committee should require the Census Bureau to remove the citizenship question pending completion of the required Privacy Impact Assessments.

We ask that this letter be submitted into the hearing record. EPIC looks forward to working with the Subcommittee on Commerce, Justice, Science, and Related Agencies on this issue.

Sincerely,

/s/ Marc Rotenberg

Marc Rotenberg
EPIC President

/s/ Caitriona Fitzgerald

Caitriona Fitzgerald
EPIC Policy Director

/s/ John Davisson

John Davisson
EPIC Counsel

Attachments

EPIC v. Commerce (opening brief)

¹⁵ *Id.* at 5, 7, 9.