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THE IMPOSSIBLE FEAT OF DETERMINING WHO IS AN "ILLEGAL ALIEN" UNDER TRUMP'S UNCONSTITUTIONAL CENSUS EXECUTIVE ORDER

Posted on August 30, 2020 by Cyrus Mehta

In line with other xenophobic actions too numerous to keep tabs on, President Trump issued a Presidential Memorandum dated July 21, 2020 entitled "Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census." From the title itself, it is readily obvious that the Trump administration does not intend to count undocumented or unauthorized immigrations in the 2020 census, which it pejoratively refers to as illegal aliens. Who is legal or illegal defies an easy definition. US immigration law is so paradoxical that even if one has been ordered removed, this individual may still be authorized to remain in the US and obtain work authorization.

Not only is this executive order unlawful and completely unconstitutional, but it boggles the mind regarding how the administration will ever be able to determine who is authorized or not in the US in order to be counted in the 2020 census.

It is vitally important to count population numbers to divide up seats in Congress among the states. Excluding undocumented immigrants will result in less seats in Congress for Democratic states. If unauthorized immigrants are left out of the apportionment count, according to the Pew Research Center, California, Florida and Texas are each likely to end up with one less House seat, while Alabama, Minnesota and Ohio are each likely to hold onto a seat they would have otherwise lost after the 2020 Census. Since the first Census of the United States in 1790, counts that include both citizens and noncitizens have been used to apportion seats in the House of Representatives, with states gaining or losing based on population change over the previous decade.

Lawsuits have been filed - here, here and here, justifiably challenging the exclusion of unauthorized immigrants from the census counts on constitutional and other grounds. The Presidential Memorandum follows the Supreme Court's decision in *New York v. Department of Commerce* , 588 U.S. ___ (2019) that held that the Trump's administration's prior reasoning to include the citizenship question in the Census was "contrived" and thus arbitrary and capricious under the Administrative Procedure Act (see Can the Arbitrary and Capricious Standard under the Administrative Procedure Act Save DACA). Hopefully, the courts will also smack down this Presidential Memorandum for its blatant disregard of the Constitution's mandate under the Fourteenth Amendment to count all residents in a state.

Section 2 of the Presidential Memorandum excludes "aliens who are not in a lawful immigration status under the Immigration and Nationality Act." But this too is broad and vague. One who is in the US in temporary B-2 visitor status for three months is in a lawful immigration status. On the other hand, a person who has resided in the US for a decade and whose status expired a long time ago could be authorized to remain in the US upon filing an I-485 application to adjust status to permanent residence by virtue of a recent marriage to a US citizen. The Presidential Memorandum provides the following false rationale for excluding undocumented immigrants:

> *Excluding these illegal aliens from the apportionment base is more consonant with the principles of representative democracy underpinning our system of Government. Affording congressional representation, and therefore formal political influence, to States on account of the presence within their borders of aliens who have not followed the steps to secure a lawful immigration status under our laws undermines those principles. Many of these aliens entered the country illegally in the first place. Increasing congressional representation based on the presence of aliens who are not in a lawful immigration status would also create perverse incentives encouraging violations of Federal law. States adopting policies that encourage illegal aliens to enter this country and that hobble Federal efforts to enforce the immigration laws passed by the Congress should not be rewarded with greater representation in the House of Representatives. Current estimates suggest that one State is home to more than 2.2 million illegal aliens, constituting more than 6 percent of the State's entire population. Including these illegal aliens in the*

> *population of the State for the purpose of apportionment could result in the allocation of two or three more congressional seats than would otherwise be allocated.*

However, the rationale still does not explain whether one who entered without inspection, but is now authorized to remain in the US through the filing of an I-360 petition under the Violence against Women Act and a concurrent I-485 application will be included or not in the census. It does not appear that whoever drafted this document really had any idea about how "legal" or "illegal" is considered under the INA.

"Lawful immigration status" is specifically defined in the implementing regulations at 8 CFR 245.1(d)(1) rather than in the Immigration and Nationality Act (INA) itself, for purposes of determining who is eligible to adjust status under INA 245(c)(2). It provides for the following categories of persons who are in "lawful immigration status":

> ***(i)*** *In lawful permanent resident status;*
>
> ***(ii)*** *An alien admitted to the United States in nonimmigrant status as defined in section 101(a)(15) of the Act, whose initial period of admission has not expired or whose nonimmigrant status has been extended in accordance with part 214 of this chapter;*
>
> ***(iii)*** *In refugee status under section 207 of the Act, such status not having been revoked;*
>
> ***(iv)*** *In asylee status under section 208 of the Act, such status not having been revoked;*
>
> ***(v)*** *In parole status which has not expired, been revoked or terminated; or*
>
> ***(vi)*** *Eligible for the benefits of Public Law 101-238 (the Immigration Nursing Relief Act of 1989) and files an application for adjustment of status on or before October 17, 1991.*

It is unlikely, however, that this is what the drafters of the Presidential Memorandum within the Trump administration had in mind in deciding who is in lawful status and who isn't. As already explained, there is a large universe of persons who are authorized to remain in the United States but who do not fall

into any of the above categories pursuant to 8 CFR 245.1(d)(1). Perhaps, one is giving the Trump administration too much credit about thinking through this definition and the drafters just assumed, albeit erroneously, that there are discrete classes of those in lawful status and those who are not. Immigration law is far more nuanced. One may not have been granted asylum, and thus qualify as an asylee under 8 CFR 245.1(d)(1)(iii), but an applicant for asylum is nevertheless authorized to remain in the US and can also obtain employment authorization after 365 days of filing the application. Similarly, one who files an I-485 application to adjust status is authorized to remain in the US even if the underlying nonimmigrant status has expired.

Any attempt to define who is unauthorized in order to exclude them in something as crucially vital as the decennial census count will get it wrong. Even Chief Justice Roberts got it wrong in *Chamber of Commerce v. Whiting*, 563 U.S. 582 (2011), when he wrote for the majority that an individual who "had been ordered removed" would establish that individual's lack of authorization to work. In that case, the Supreme Court upheld an Arizona state law suspending business licenses if businesses hired people without work authorization. David Isaacson in his blog, If Even the Chief Justice Can Misunderstand Immigration Law, How Can We Expect States to Enforce It Properly? Removal Orders and Work Authorization, cites many other instances when a person with a removal order is still entitled to work authorization. For example, an asylum applicant who has been ordered removed but has filed a petition for review in circuit court can nevertheless apply for work authorization and is authorized to reside in the US during the pendency of the appeal. 8 C.F.R. § 274a.12(c)(18) also contemplates the issuance of work authorization to one who has been ordered removed if the person cannot be removed or where it is impractical to remove him or her. A DACA recipient who may have been the subject of a removal order at some point is now authorized to reside in the US without fear of removal.

The sheer inability to define who is a so called "illegal alien" further opens up the Presidential Memorandum to challenge in the courts. Persons whom the government may arbitrarily decide are unauthorized may be left out of the count even if they have been in the US for years, paid taxes and been authorized to reside and work under the law. These persons have also been denied their basic humanity by not being treated as persons. This executive action will also deter noncitizens from completing the census as most – unless

they are lawful permanent residents -will not know whether they are documented or not. Four decades ago, the Supreme Court reaffirmed that an undocumented individual living in the United States "is surely 'a person' in any ordinary sense of that term," "hatever his status under the immigration laws." *Plyler v. Doe*, 457 U.S. 202, 210 (1982). It is axiomatic that undocumented individuals are human beings and President Trump cannot change this. Given the sheer impossibility of determining who is and who is not legal, President Trump must be compelled by a court to count all persons for the census regardless of their immigration status. This is also mandated by the Constitution.