

# THE RUTHERFORD INSTITUTE

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January 26, 2012

Via E-mail and U.S. Mail

John Bryson, Secretary  
United States Department of Commerce  
1401 Constitution Ave. NW  
Washington, D.C. 20230

**Re: *Legal Concerns About Census Bureau's "American Community Survey" (ACS)***

Dear Secretary Bryson,

In recent years, The Rutherford Institute<sup>1</sup> has received a growing number of requests for help from individuals across the nation who are outraged by the intimate and invasive nature of the questions asked on the American Community Survey (ACS) and want to know whether the United States Constitution and/or federal law truly requires them to respond to each of these intrusive inquiries. In the past year alone, we received complaints from 72 individuals who voiced objections both to the contents of the ACS and the harassing manner in which census workers have carried out their duties. Most recently, we were contacted by Judi Coover, and it is on her behalf that we now write to request your prompt attention and response.

While Congress has authorized your agency to conduct annual surveys,<sup>2</sup> that authority extends only to the collection of data on the "subjects covered by" the census itself.<sup>3</sup> The 2010 Census, lauded for its simplicity and brevity (citizens were encouraged to answer its "10 Questions in 10 Minutes") was appropriately limited to ascertaining the number of persons living in each dwelling, their ages and ethnicities, the ownership of the dwelling, and telephone

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<sup>1</sup> The Rutherford Institute is a non-profit civil liberties organization that provides free legal representation to individuals whose civil rights are threatened or infringed.

<sup>2</sup> 13 U.S.C.A. § 182. See also 13 U.S.C.A. § 193 (requiring that any collection of preliminary or supplementary statistics be "related to the main topic of the census.").

<sup>3</sup> Id.

numbers. By glaring contrast, the ACS purports to demand that citizens reveal under threat of significant monetary penalties such diverse, intimate and personal information as:

- Educational attainment;
- Fertility;
- Grandparents as caregivers;
- Language spoken at home;
- Marital history;
- School enrollment;
- Period of military service;
- Undergraduate field of degree;
- Cost of utilities;
- Condominium fees;
- Home heating fuel;
- Kitchen and plumbing facilities;
- Year dwelling was built;
- Class of worker;
- Vehicles available;
- Journey to work;
- Place of work; and
- Health insurance coverage.<sup>4</sup>

This is only a partial list. However, it cannot be seriously maintained that these multifarious lines of questioning are related to the subjects covered by the census itself.

Moreover, citizens receiving the ACS are informed by the Census Bureau in no uncertain terms that their responses are mandatory and that federal law imposes fines for failure to provide complete responses. In fact, federal law specifically provides that monetary penalties may be imposed for failure to respond to interim surveys *only if* (a) the inquiries on the interim survey are within the scope of the complete census, and (b) the Secretary publishes a determination that the information requested is both needed and not available from other sources.<sup>5</sup>

As we have already indicated, the inquiries on the ACS are clearly not “within the scope of the complete census.” Also, we are not aware of any publication you have released concerning your determination that all of this information is needed and not otherwise available. Indeed, it appears unlikely that you could make the latter determination, inasmuch as many of the ACS inquiries—including, for instance, those addressing military service, property value, citizenship and income—seek information that is certainly available from other sources at the government’s

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<sup>4</sup> For a quick listing of “topics” covered by ACS questions, see [http://www.census.gov/acs/www/about\\_the\\_survey/questions\\_and\\_why\\_we\\_ask/](http://www.census.gov/acs/www/about_the_survey/questions_and_why_we_ask/).

<sup>5</sup> 13 U.S.C.A. § 225(a).

ready disposal. If, however, you have made the requisite publication of such determinations, please be so kind as to provide a record of it to us at this time.

We also wish to emphasize our concerns that the ACS, when presented as “mandatory,” poses a serious threat to citizens’ informational privacy, and thus is subject to constitutional challenge. The right to be left alone has been characterized as “the right most valued by civilized men.”<sup>6</sup> By compelling responses to invasive, personal questions that go far beyond the type of census mandated by the United States Constitution, the federal government is intruding significantly into the “zone of privacy” the United States Supreme Court has recognized as being protected by the Bill of Rights.<sup>7</sup>

It is important to note, in this regard, that the handful of judicial decisions upholding census questions that go beyond the required enumeration of persons have not addressed this type of pure “privacy” challenge.<sup>8</sup> Furthermore, courts have noted that privacy concerns are heightened where a summary of private information about a person is stored in a single file.<sup>9</sup>

In short, the significant expansion of the survey questions in scope, length, frequency and invasiveness signals the potential for a successful privacy-based lawsuit as a means of thwarting the federal government’s plan to obtain this vast store of highly personal information from law-abiding citizens. The Rutherford Institute is prepared to pursue this avenue on behalf of a large number of clients if necessary to ensure that the Census Bureau ceases its current practices.

Finally, please be aware that a significant percentage of clients have reported to us appalling behavior by census workers who make personal “visits” in an attempt to collect responses to the ACS. These behaviors have included peeking into windows, refusing to leave citizens’ homes when requested to do so, blocking driveways, entering closed gates into backyards, contacting neighbors and calling workplaces. We have been carefully documenting this information. We, along with our clients, are uniformly appalled by these forms of stalking and harassment, and some of our clients have even requested our assistance in seeking restraining orders against Census Bureau agents.

The behavior and protocol on the part of the Census Bureau and its workers outlined herein are not reflective of the proper government of a free society. It appears, instead, that the Census Bureau has run amuck while utilizing harassing tactics to manipulate citizens into providing personal information that it does not appear to have proper authority to compel. Therefore, I request that you take the following actions immediately to remedy this unacceptable state of affairs:

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<sup>6</sup> *Olmstead v. United States*, 277 U.S. 438, 478 (Brandeis, J., dissenting).

<sup>7</sup> *See, e.g., Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

<sup>8</sup> *See Morales v. Daley*, 116 F.Supp.2d 801, 818, FN9 (S.D. Tex. 2000)(specifically noting that plaintiffs had not raised “zone of privacy” arguments).

<sup>9</sup> *United States Dept. of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 764 (1989)(noting greater privacy interest in “rap sheet” summaries of criminal history than in the individual bits of the same information that may already be available to the public).

- Instruct the Census Bureau to immediately cease distribution of the ACS until it is substantially revised to include only questions on subjects covered by the census itself;
- Provide documentation of your published determination pursuant to 13 U.S.C.A. § 225 that the information requested on the ACS is both “needed” and not available from other sources;
- Unless you can provide the required documentation of your published determination, instruct Census Bureau officials to cease and desist representing to citizens that they may be fined for failure to respond to ACS questions; and
- Instruct Census Bureau officials to inform all agents and employees that stalking, harassing behavior toward citizens will not be tolerated, and provide citizens with an effective means of reporting such behavior to an appropriate Bureau official with authority to address it.

I request your response by no later than the close of business on Friday, February 10, 2012.

Sincerely yours,

John W. Whitehead  
President

cc: Dr. Robert Groves, Director  
United States Census Bureau

The Honorable Darrell Issa, Chair  
House Committee on Oversight and Government Reform

The Honorable Trey Gowdy, Chair  
House Subcommittee on Health Care, District of Columbia, Census and National  
Archives