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March 21, 2012

Via E-mail and U.S. Mail

Robert M. Groves, Director
U.S. Census Bureau
Washington, D.C. 20233-0001

Re: *Legal Concerns Regarding the "American Community Survey" (ACS)*

Dear Dr. Groves:

While I appreciate your taking the time to respond to my letter to Secretary of Commerce John Bryson (dated January 26, 2012) about the legal authority of and justification for the American Community Survey (ACS), I do not believe your justification of the ACS as providing information "that can be useful to private industry, and private entities" will pacify the countless individuals who have voiced their objections to the contents of the survey, as well as the harassing tactics of Census Bureau workers. Moreover, your responses failed to alleviate my concerns that this intrusive questionnaire constitutes an unconstitutional overreach by your agency.

The Census Bureau lacks the legal authority to carry out the American Community Survey (ACS)

In your letter (dated February 24, 2012), you take great pains to point out that the Census Bureau has the statutory authority to carry out the ACS because (1) the ACS is part of the decennial census program, rather than being an interim census and (2) the Secretary is authorized by Congress to carry out a decennial census "in such form and content as he [the Secretary] may determine"¹ and to "obtain such other census information as necessary."² You also cite Title 13 which provides for "mak[ing] surveys and collect[ing]

¹ 13 U.S.C. § 141.

² 13 U.S.C. § 141.

such preliminary statistics related to the main topic of the census” as providing additional authority for the ACS’s scope and magnitude.³

Your deliberate misreading and obfuscation of these laws amounts to nothing short of a breach of your agency’s legal authority to carry out these surveys. By its own terms, and as quoted in your letter, § 193 grants authority for surveys “related to the *main topic of the census*,” and only insofar as they are “necessary to the initiation, taking or completion thereof.”

In no way can the multifarious lines of questioning contained within the ACS be seen as relating to the main topic of the Census, which is a head count of the populace for the purpose of congressional redistricting. Nor can one legitimately argue that each ACS question is “necessary to the initiation, taking or completion” of the Census. To conclude otherwise would be to stretch the plain meaning of the terms “related to” and “necessary” so far as to eliminate their existence in the governing statute entirely. Yet this is just what your interpretation does. Furthermore, your letter does not even attempt to demonstrate any relationship between the 2010 Census questions and those contained on the ACS. Nor have you made the case that the ACS questions are “necessary to the initiation, taking or completion” of the Census.

The ACS far exceeds the frequency and limited range of questions authorized by the Constitution, Congress or the courts

While the Census Bureau has been granted the legal authority to take a head count of the populace for the purpose of congressional redistricting, the ACS, taken every year at a cost of hundreds of millions of dollars, falls well outside the scope of a decennial census. At 28 pages (with an additional 16-page instruction packet), the ACS, which contains some of the most detailed and intrusive questions ever put forth in a census questionnaire, far exceeds the limited range of actions that legal precedents authorize.⁴

Furthermore, the judicial decisions that you cite in support of the collection of ACS data do not, in fact, authorize the detailed line of questions contained within the ACS. For example, you cite the Supreme Court’s ruling from 1870 in which the Court “characterized as unquestionable the power of Congress to require both an enumeration and the collection of statistics in the census,” as well as a 1901 district court ruling that broadly interprets the census clause in such a way as to allow for “the gathering of other statistics, if ‘necessary and proper,’ for the intelligent exercise of other powers

³ 13 U.S.C. § 193.

⁴ *Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 341 (1999) (noting that “the decennial census” “serves as ‘a linchpin of the federal statistical system . . .’” (emphasis added)); *United States v. Moriarity*, 106 F. 886, 891 (S.D.N.Y. 1901) (indicating that Congress is only permitted to authorize a census “at stated periods”).

enumerated in the constitution, and in such case there could be no objection to acquiring this information through the same machinery by which the population is enumerated.”

First, the judiciary of more than 100 years ago could not have envisioned a questionnaire as invasive as the ACS and beyond the scope of what is reasonable. Clearly, a more contemporary judicial review of your agency’s authority in wielding the ACS and its constitutionality is necessary. I can assure you that if you persist in inflicting this survey on the American people, we will not hesitate to take the matter before the courts. Second, the judicial decisions you cite do not pertain to a “continuous data collection and data dissemination” activity, as represented by the ACS.⁵ Third, they do not address a pure “privacy” challenge.⁶ Indeed, courts have noted that privacy concerns are heightened where a single file stores a summary of private information about a person.⁷ And finally, while Congress may have the authority to require an enumeration of the population, its power to compel citizens to respond under penalty of law to such invasive questions as those found on the ACS is far from unquestionable.

The ACS contains some of the most detailed and intrusive questions ever put forth in a census questionnaire and requires Americans to inform and spy on family and friends

There is no way that those who founded this country would have authorized the federal government to incessantly or perpetually demand, under penalty of law, such detailed information from the American people. These questions concern matters that the government simply has no business knowing, including a person’s job, income, physical and emotional health, family status, place of residence and intimate personal and private habits.

For example, the survey asks how many persons live in one’s home, along with their names and detailed information about them such as their relationship to the survey recipient, marital status, race and their physical, mental and emotional problems, etc. The survey also asks how many bedrooms and bathrooms one has in the house, along with the kind of fuel used to heat the home, the cost of electricity, what type of mortgage one has, the amount of one’s monthly mortgage payments, property taxes and so on. This questionnaire also requires individuals to detail how many days they were sick over the course of a year, how many automobiles they own, whether they have trouble getting up

⁵U.S. Gov’t Accountability Office, B-289852, Legal Authority for American Community Survey (2002), <http://www.gao.gov/decisions/other/289852.htm>.

⁶*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).

⁷*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); *see also Whalen v. Roe*, 429 U.S. 589, 605 (1977).

the stairs and, amazingly, what time they leave for work every morning and how long it takes them to get there.

As if the survey's highly detailed inquiries into one's financial affairs weren't bad enough, individuals are also expected to violate the privacy of others by supplying the names and addresses of their friends, relatives and employers. The questionnaire stipulates that individuals provide such information on the people in their home as their educational levels, how many years of schooling they completed, what languages they speak and when they last worked at a job, among other things.

The government has no right to require American citizens to complete highly intrusive questionnaires whose data will be shared with and used by private industry and entities

In your letter, you insist that the "ACS provides important statistical information that promotes legitimate governmental interests. It also provides information that can be useful to *private industry, and private entities*." You go on to note that "information from the ACS documents how we live as a nation, including our education, housing, jobs, and many other issues. For instance, the ACS provides marriage and divorce statistics often used for the analysis and advocacy of public policies."

Whether or not the information gleaned from the ACS is helpful to the government in advancing its agenda is beside the point.⁸ Surely it cannot be maintained that it is a proper use of governmental authority to compel citizens to provide information that assists commercial enterprises in producing profits. Should the government need such information, there are other avenues by which it can attain it. However, to use the ACS as the vehicle for *requiring Americans under penalty of a fine* to respond to highly personal questions that will be shared with private corporations is a clear violation of Article I of the U.S. Constitution, which requires only that the census be taken every ten years for the sole purpose of congressional redistricting. Clearly, this wedding of governmental and corporate interests—a merger that feeds an already over-reaching federal government and a profit-motivated corporate sector—is not what those who founded this country intended.

Part of the problem with the detailed information collected on the ACS rests in not knowing exactly *how* the government plans to use this vast amount of highly personal information. For instance, if the financial information one provides on the survey does not jive with one's tax returns, whether such a discrepancy was intentional or not, could someone be flagged for an IRS audit? Given the increasing amount of collusion taking place between government agencies in recent years, this is not a far-fetched scenario.

⁸ See, e.g., <http://www.census.gov/acs/www/Downloads/QbyQfact/grandparents.pdf>, describing how daycare centers and "other businesses" use ACS information about grandparents as caregivers.

ACS recipients continue to file complaints with The Rutherford Institute about the harassing, unprofessional behavior exhibited by ACS field representatives

Finally, you note in your letter that your agency trains its field representatives “to behave in a courteous and professional manner.” However, the growing number of complaints we receive from individuals targeted by your field representatives suggests this is far from the case. Indeed, 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, and calling workplaces. One woman reported that a particularly aggressive ACS field rep called her husband’s work phone, called their son who lives in another city, climbed the back stairs of her home and looked in their windows to see whether any lights were on. We have documentation of these reports of stalking and harassment.

The ACS infringes upon Americans’ right to a “zone of privacy”

We also wish to emphasize our concerns that the ACS, when presented as “mandatory,” poses a serious threat to citizens’ informational privacy. The right to be left alone has been characterized as “the right most valued by civilized men.”⁹ 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 Supreme Court has recognized as being protected by the Bill of Rights.¹⁰

Conclusion

In short, the significant expansion of the survey questions in scope, length, frequency and invasiveness, may well signal 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. Rest assured that 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.

Thus, for the aforementioned reasons and on behalf of the growing number of individuals who have asked The Rutherford Institute to intercede in safeguarding their right to privacy, I reiterate my earlier request that the Census Bureau immediately cease

⁹ *Olmstead v. United States*, 277 U.S. 438, 478 (Brandeis, J., dissenting).

¹⁰ *See, e.g., Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

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distribution of the ACS until it has been substantially revised to include only questions on subjects covered by the census itself and that all Census Bureau employees be instructed to cease any behavior toward ACS recipients perceived as stalking or harassing. Barring that, this matter could also be simply resolved by making the ACS an optional survey rather than one that is mandatory and punishable by a fine.

Sincerely yours,



John W. Whitehead
President

cc: John Bryson, Secretary
United States Department of Commerce

Mr. James B. Treat, Chief
American Community Survey Office

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

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

The Honorable Ted Poe
United States House of Representatives