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COMMENTS

THE IMPACT OF CITIZEN APPORTIONMENT
Prepared for the U.S. House Committee on Government Reform

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The following comments relate to the bill calling for a constitutional amendment relating to apportionment[2]. Specifically, the proposed amendment would require the exclusion of non-citizens from the numbers used for the apportionment of the U.S. House of Representatives. My comments focus on the impact such a proposal could have on the results of apportionment and on the operations of the U.S. Bureau of the Census.

The bill is sponsored by the member from Michigan, Representative Miller, who represents a state in a region of the nation that has consistently lost population, and hence, political power over the past few decades. In fact, the 2000 Census was the culmination of a decades-long shift of political power from the East and Midwest to the South and West. Following the 1940 Census the East and Midwest were apportioned a combined 251 members with the South and West apportioned a combined 184 members. Following the 2000 Census the combined number of members for the East and Midwest dropped to 183 and the combined number of members for the South and West rose to 252[3].

I will address two areas of concern.

1) Impact on Apportionment. If such a proposal were to be adopted as a constitutional amendment, there are several phases of the apportionment process in our political system that would see an impact. First is the obvious shift of a few seats among the states. Second is the impact that this shift would have on the presidential elections held under the Electoral College. Third is the redistricting phase of the apportionment process.

2) Impact on the Census Bureau. The Bureau does a good job at attempting to physically count every person who is resident in the United States on Census Day. However, an enumeration for an apportionment based upon citizenship raises some different issues.

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[2] "Representatives shall be apportioned among the several States according to their respective numbers, which shall be determined by counting the number of persons in each State who are citizens of the United States." H. J. RES. 53, 109th Congress, 1st Session.

[3] This situation of political turnover is nothing new. Even French writer and political observer Alexis de Tocqueville recognized the impact of political shifts during his tour of the country in the 1830s. See DEMOCRACY IN AMERICA, Library of America, New York (2004), volume no. 147, at 441-442.

Impact on Apportionment of the House. First, let me review the impact on the apportionment of seats for the U.S. House. I have reviewed the apportionments for the past three decades and projections for the 2010 census as well.

The rate of non-citizens counted in the census has risen dramatically in the past few decades. The 1980 Census counted a total of nearly 7 million non-citizens out of the 226.5 million persons counted in that census; this represents a non-citizen rate of 3.1%. The 1990 Census counted a total of nearly 12 million non-citizens out of the 248.8 million persons counted; this represents a non-citizen rate of 4.7%. The 2000 Census counted a total of just over 18 million non-citizens out of the 281.4 million persons counted; this represents a non-citizen rate of 6.6%. The overall population increased in this time period 24% yet the non-citizens increased by 166%.

To assess the impact for each apportionment, I used the apportionment population and deducted the non-citizens to determine a modified apportionment number for each state[4]. I then applied each state's modified population to the method of equal proportions, the method used for the apportionment of the U.S. House since the 1940 apportionment. The seat shifts I list below are a comparison of an apportionment based upon non-citizen exclusion with the apportionment for that decade.

1980. Had the non-citizens been excluded from the 1980 apportionment, there would have been a shift of 6 seats affecting 9 states. The three states losing seats would have been California with a loss of 3 seats; New York with a loss of 2 seats; and Florida with a loss of 1 seat. The six states gaining, all gaining one seat each, would have been Alabama; Arkansas; Georgia; Indiana; Missouri; and North Carolina[5].

1990. Had the non-citizens been excluded from the 1990 apportionment, there would have been a shift of 8 seats affecting 12 states. The four states losing seats would have been California with a loss of 5 seats; with Florida, New York and Texas losing 1 seat each. The eight states gaining, all gaining one seat each, would have been Georgia; Kansas; Kentucky; Louisiana; Michigan; Montana; Ohio; and Pennsylvania[6].

2000. Had the non-citizens been excluded from the 2000 apportionment, there would have been a shift of 9 seats affecting 13 states. The four states losing seats would have been the same as in 1990 with California losing 6 seats; and Florida, New York and Texas losing 1 seat each. The nine states gaining, all gaining one seat each, would have been Indiana; Kentucky; Michigan; Mississippi; Montana; Oklahoma; Pennsylvania; Utah and Wisconsin[7].

2010. For the 2010 apportionment, there were several methodological considerations. These involved the determination as to the projections for the population base, the timing of these projections, the addition of military or overseas personnel and the rate of non-citizens to apply to the population base.

The Bureau does infrequently release population projections and did release some information earlier in 2005 which projected state populations out several decades. The record date for the

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[4] For the 1990 and 2000 apportionments, military and overseas personnel were included in the apportionment numbers. There were no such additions to the 1980 apportionment. I left them out of the equation for the 2010 projections.

[5] Of course, some seats were close to the cutoff point, for 1980: Arkansas, North Carolina and New York for its second seat loss.

[6] Of course, some seats were close to the cutoff point, for 1990: Kansas, Massachusetts and Maryland.

[7] Of course, some seats were close to the cutoff point, for 2000: Utah, South Carolina and New Jersey.

projections is generally as of July 1 in each year and the census record date is April. As this was just a projection several years out, I did not consider the date difference in the population base.

For a similar reason I did not include any military or overseas personnel in the population base. I have no way of estimating what the overseas posture of the United States might be five years from now and it seemed more equitable to leave it out than to use the results from the 2000 census administrative records approach.

The estimate of the rate of non-citizens could be determined in several fashions. Basically, use the same rate as reported for the 2000 Census or consider some way to consider the increase over time. The easiest way to undertake the latter would be to use the increase in the rate between censuses. For example, the non-citizen percentage in California was 15% in 1990 and 16% in 2000 so a small increase might be expected for 2010. However, in many states, the increase from 1990 to 2000 was a large increase as a percentage. For example, Alabama went from 0.55% non-citizen to 1.25% in 2000. This is a huge percentage increase which would undoubtedly skew the results in the states that had a small percentage in 1990. For a similar reason that was applied to the other considerations, I chose to stick with the rate of non-citizens reported for the 2000 Census.

Applying these factors to the projected apportionment for 2010, if the non-citizens were to be excluded from the apportionment, the result would be a shift of 10 seats affecting 15 states. The five states losing include the four from the previous decade shifts and a new one: New Jersey. California would lose 6 seats and Florida, New Jersey, New York and Texas would lose one seat each. The ten states gaining over the projected apportionment would all gain one seat each: Alabama; Indiana; Missouri; Montana; North Carolina; Ohio; Pennsylvania; South Carolina; Virginia; and Wisconsin[8].

All of these shifts are estimates based upon the non-citizen data reported for each census. Of course, these are sample data collected from the long-form and are subject to some error.

Impact on the Electoral College. The primary indirect political effect of the apportionment of the House is on the Electoral College. Aside from the two electoral votes for each United States Senator, each state receives electoral votes based upon the counts from the actual enumeration. This means two things for this discussion. First, under the current census methodology of counting all inhabitants, non-citizens already have an impact on the presidential election. While they can not register to vote, let alone show up at the polls and cast a ballot, the winner of the state does get some extra seats by the fact that they were found by the Census Bureau during the census. Second, any shifts of seats due to non-citizen exclusion could affect, to some degree, the outcome of the presidential election.

A review of the six previous elections held under the apportionments of 1980, 1990 and 2000 indicates that the shift of seats, detailed above, would have affected the margin of the electoral votes in five of the last six presidential elections. Even though California would be the biggest loser with an apportionment based upon non-citizen exclusion, the effect is minimized to some degree by the distribution of the other states that gain or lose. For both the 2004 and 2000 elections, the Bush column would have been increased by 4 Electoral College votes. For 2004, this would have meant a Bush margin of 42 votes versus 34; for 2000 this would have meant a Bush margin of 12 votes versus 4 votes[9].

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[8] Congresswoman Miller's home state of Michigan would see an increase in its priority for a 16th seat but it would still fail to gain one based upon these numbers. Indiana and Wisconsin would be just barely above the cutoff and several states would be just below the cutoff (Florida, California, Iowa and Mississippi).

[9] These calculations ascribe the unfaithful electors to the Democrats and disregard any changes in strategy.

The previous elections indicate a smaller shift of seats due to non-citizen exclusion. For 1996, the Clinton column would have lost 2 Electoral College votes. For 1992, the Clinton column would have gained 1 vote. For 1988, the George H.W. Bush column would have increased by 2 votes. There would have been no change in the 1984 Electoral College vote totals.

Impact on the Redistricting Phase of the Apportionment Process. First, the question presents itself as to whether the non-citizens would automatically be excluded from being assigned to a congressional district. Second, a similar question is presented with respect to apportionment and districting for state legislatures and local political bodies. Third, the question arises as to the relative inequality of all the votes cast at the ballot box.

If non-citizens are to be excluded from the census counts for apportionment, they must be excluded at the level of the census block. The current citizenship data we now have is based upon sampling from the long-form information[10]. As we learned from the Supreme Court decisions of the past decade[11], sampling is not an option for the purposes of apportionment. In order to implement apportionment based upon non-citizen exclusion the question will need to be on the short form.

The implementation of the American Community Survey (ACS) for the 2010 Census means that the short form will be the only census form distributed. Given the perceptual disincentive for the respondent to indicate that they are not a citizen, there is an increased likelihood that two things will occur. First, the accuracy of the citizenship status is likely to be suspect and the numbers are likely to overstate the number of citizens. Second, the likelihood of non-response increases for the entire form. In the past, such a missing question could be filled-in by imputation.

As to the overstatement of citizens, respondents frequently respond in the most favorable light to questions that imply some minimal concept of social or political mores. For example, the Current Population Survey (CPS) generally reports on registration and voting behavior of Americans each election. Survey sampling error aside, the number of respondents reporting that they registered or voted is usually a bit higher than the official numbers indicate. So too, given the perception that being a citizen is a preferred status, respondents are more likely to overstate their true status. Moreover, it is not the role of the Bureau to verify this information, even if they could.

As for those respondents who skip over the question, if an apportionment based upon non-citizen exclusion takes place, the importance of the missing question, or missing form, becomes more of a problem. Non-response follow-up is an expensive operation for the Bureau. Any increased expenditure on the part of the Census Bureau to track down non-respondents detracts the Bureau from other critical operations, e.g., coverage improvement, or post-census local review, that enable the Bureau to make the best count possible.

As to the block level requirement, first, there is a distinction between the count of inhabitants and the military in comparison to the count of non-citizens for exclusion. While the result of the actual enumeration my be that some persons are missed and some persons are double counted, the Bureau makes its best effort to physically count each person and then makes it best effort to

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[10] "The data on citizenship were derived from answers to long-form questionnaire Item 13 which was asked of a sample of the population. On the stateside questionnaire, respondents were asked to select one of five categories: (1) born in the United States, (2) born in Puerto Rico or a U.S. Island Area (such as Guam), (3) born abroad of American parent(s), (4) naturalized citizen, (5) not a citizen."

[11] See *Department of Commerce v. U. S. House of Representatives* and *Clinton v. Glavin* 525 U.S. 316 (1999); and *Utah v. Evans,* 2001 U.S. 714 (2003).

accurately process the records for each person to assign them to a census block. For the military and federal personnel, these are based largely upon administrative records from agencies that have a high incentive to know the general whereabouts of their staff posted overseas but have little incentive to accurately assign these persons to a census block stateside. In either case, for the actual count or for the military, there is little room for subjective assessment or inaccurate response. The person is either found or not. On the other hand, for the non-citizen exclusion, there is a high degree of subjectivity involved in the response. It seems highly unlikely that all non-citizens will accurately report their non-citizenship status.

Moreover, the military personnel are not included in the redistricting phase of apportionment because the geographic precision that is required (i.e., assignment to a census block) is often unavailable. However, it would be required for the exclusion of non-citizens[12] even if non-citizens were to be excluded only at the state level.

Redistricting stakeholders are a small subset of all users of census data. However, they are the largest user of the census information distributed at the level of census geography known as the census block. The census block is the building block for the entire census. If problems exist with data at the census block, problems exist at every other level of census geography, be it census tract, city, state or nation. If non-response becomes a problem it must be addressed by the scarce resources available to the Bureau. These data are the cornerstone for the drafting of not only the districts in the U.S. House but for approximately seven thousand state legislative districts and countless thousands of districts for local governmental bodies around the nation.

Impact of Non-citizens on Districts. As mentioned above, non-citizens, though they can not register to vote, still play a role in the political process of districting. Since the Reapportionment Revolution of the 1960s, all political districts are to be drawn with equality of population as the touchstone. While in some cases this has been deliberately ignored[13], the general goal is to minimize the differences in overall population amongst all districts in the political body, e.g., the state legislature or the state delegation to the U.S. House. This concept is frequently encapsulated in the phrase "one-person, one-vote".

However, census persons are not necessarily voters. Even with equipopulous districting, there may be a wide disparity in the potential number of voters amongst districts. This is largely due to demographic factors of the various subsets of American residents.

One of the projects that Polidata undertakes after each Presidential Election is the determination of the presidential vote in each congressional district. Using this value for each district provides a more meaningful representation of the voter turnout as it tends to minimize the effect that the congressional races had on turnout, especially in uncontested or non-competitive districts. A review of these results for several districts within a few selected states points out the inequality of the voting weight.

For example, in California, the average for all districts was 233,971 total votes cast for President. In the five districts with the smallest vote totals for President, the average was 121,304 total votes. However, in the five districts with the highest overall vote totals for President, the average was 324,147. Each district had the same number of persons in 2000, (639,087 or 639,088), yet the percentage of these persons casting ballots varied greatly. To no small degree, this is due to the presence of non-citizens who are assigned to the district but are ineligible to vote. For example,

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[12] This also raises some issues relating to privacy concerns. Many census blocks have only a few persons. Identification as to the citizenship status of some persons may be possible.

[13] See *Mahan v. Howell*, 410 U.S. 315 (1973) and *Larios v. Cox*, 542 U.S. ___ (2004) for differing viewpoints.

three of the five districts with the smallest vote totals have non-citizenship rates estimated at over 33%. Yet, each district elects one member of the U.S. House. Each person is represented equally across all districts in the state. However, the weight of one citizen's vote in some districts is worth much more than the vote of another citizen in another district. If the real goal of districting is to enable the equality of voting[14] then some balancing of the population to reflect voters would seem to be a critical consideration. Based upon the total votes cast in the 2004 election for President, 50% of the U.S. House was elected by only 42% of the voters.

The question that needs to be addressed here is the extent to which voting weights can be equalized across all districts. Merely using the voting age population as a secondary consideration in drafting districts could go along way to reduce this inequality. Even so, the inclusion of non-citizens in the population base will inevitably alter the equality to some degree.

Summary. I believe I understand some of the frustration that persons from the East and Midwest sense as their impact on national politics is weakened bit-by-bit as a result of the decennial apportionment. However, even if the country decides, by adoption of the amendment, that non-citizens should be excluded from the count for apportionment, I still see operational problems such that the end result is likely to be a prolonged period of litigation following the census that sees the first implementation. The result of litigation, of course, could be a new apportionment which would, quite obviously, result in a complete upheaval of the political structure of the U.S. House at the time.

1) I believe it is not possible that the data collected will meet the high threshold of accuracy that is required for the apportionment process. Bear in mind that the apportionment formula is very sensitive to small shifts in population. Citizenship data as we now have it is based upon sampling from the long-form information. Even what we 'know' is based upon some degree of uncertainty. The likelihood that the information collected from every census respondent would be accurate is small. For non-citizens there will be a perceptual disincentive for the respondent to indicate that they are not a citizen. The numbers are quite likely to overstate the number of citizens.

2) Moreover, the citizenship question would need to be on the short form. Confusion, hesitation, or fear about answering the question will result not in just another question left empty (and subject to imputation in the pre-ACS censuses) but another census form becoming a non-response subject to follow-up by the Bureau. Follow-up for non-response is a very expensive factor in increased costs of the census.

3) Largely due to the inability of getting an accurate count of citizens, I believe the implementation of this amendment would be putting the Census Bureau into a position where the most likely result is failure. Counting every inhabitant is difficult enough without adding any extra burdens. Adding a factor which is inherently subject to inaccurate responses may leave the entire count in question and subject the Bureau to a degradation of the overall reputation it has earned so diligently over the decades.

I hope these comments provide some useful information to the Committee in its deliberations. Additional supporting material may be found via the internet at www.polidata.org/comments.

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[14] This "means that as nearly as is practicable one person's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1 (1964) at 7-8, 18. See also: *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990).