

Testimony of Alabama Attorney General Steve Marshall
Before the U.S. House Judiciary Committee
Subcommittee on the Constitution and Civil Justice
“Questions Regarding the U.S. Census”
Friday, June 8, 2018

Chairman King, Ranking Member Cohen, and distinguished Committee members, I am honored to appear before you today and appreciate your invitation to discuss the implementation of the proposed Residence Rule to the 2020 Census.

Last month, the State of Alabama filed a lawsuit in federal court challenging our expected loss of representation in Congress and in the Electoral College as a result of the Census Bureau’s counting of illegal aliens for purposes of apportionment. As stated in our complaint, joined by Congressman Mo Brooks (AL-5), Alabama is set to lose one of its seven congressional seats and one of its nine electoral votes—a seat and vote it would *not* lose if illegal aliens were excluded from the apportionment base. Not only would this skewed result rob the State of Alabama and its legal residents of their rightful share of representation, but it plainly undermines the rule of law. If an individual’s presence in our country is in violation of federal law, why should the states in which they reside benefit from their illegal status?

On February 8, 2018, the U.S. Census Bureau promulgated the Residence Rule governing the implementation of the 2020 Census. To be counted in the census, a person must meet the Census Bureau’s “usual residence” definition—that is, *anyone* who has a U.S. residence where they live and sleep most of the time. The rule explicitly requires that citizens of foreign countries be counted towards the population of their resident state—a population total used to calculate the number of representatives and electoral votes each state receives—regardless of whether they are here legally.

If the rule is implemented, states with lower illegal alien populations risk losing representation in the U.S. House of Representatives and votes in the Electoral College to states with higher illegal alien populations. According to the expert my office has retained, much like Alabama, Ohio is also likely to lose a congressional seat and an electoral vote. Montana will not gain a congressional seat and an electoral vote that it would have otherwise gained. To the contrary, both Arizona and Texas will likely gain one congressional seat and one electoral vote. California is expected to keep one congressional seat and electoral vote that it would have otherwise lost had illegal aliens not been counted for purposes of apportionment.

I should note that 2020 would not be the first time that illegally-present foreign nationals were counted in the decennial census. In previous censuses, the Census Bureau has failed to exclude illegal aliens from the population counts of each state; thus, it is critical that action be taken to resolve this issue. In 2010, for example, Louisiana, Missouri, and Ohio each lost one seat in the House and one vote in the Electoral College. Montana failed to gain a seat and an electoral vote that it would have gained had illegal aliens been excluded from the apportionment base. By contrast, California gained two seats and an electoral vote that it would not have if illegal aliens had been excluded from the apportionment base.

The reapportionment of House seats and electoral votes is a zero-sum proposition: one state's gain is another state's loss. Illegal immigration impacts the distribution of seats in the House of Representatives and the Electoral College because the United States' illegal population is both large and highly concentrated. Thus, the practice of including illegal aliens in the census has repeatedly resulted in the unlawful distribution of additional House seats and electoral votes to states with high numbers of illegal aliens from states with low numbers of illegal aliens, robbing those states and their citizens of their rightful share of representation and political power. Further,

this creates a potential disincentive for states with large illegal alien populations to cooperate with federal immigration authorities seeking to enforce the laws that Congress has enacted.

The irony, of course, is that illegal aliens cannot vote; therefore, they are not the ones who gain from being included in the apportionment base. In a state in which a large share of the population cannot vote, those who *do* vote count more than those who live in states where a larger share of the population is made up of American citizens. In these states, representatives and electors will represent a smaller number of constituents than their counterparts in states with lower numbers of illegal aliens. Large illegal alien populations indisputably redistribute power from Americans living in states comprised mostly of U.S. Citizens and permanent legal residents and give it to others who live in states with large illegal alien populations, compromising the right to equal representation.

We are not without recourse, however, and have chosen to be proactive on this issue. The State of Alabama's lawsuit asks the court to declare the Residence Rule unlawful. We assert that apportionment of the House of Representatives and the Electoral College based on census data that counts illegal aliens in the population figures is unconstitutional because it violates the principle of equal representation.

Moreover, we believe the Residence Rule violates the Administrative Procedures Act because it was promulgated in an arbitrary and capricious manner, not giving proper notice or explanation as required by law. In addition, it is our position that the Department of Commerce and the Census Bureau exceeded their statutory authority in promulgating the Residence Rule because of the substantial constitutional questions it raises.

The State of Alabama has a constitutional entitlement to representation in both the U.S. House of Representatives and the Electoral College—a right that is integral to the state's power

within the federal system. Alabama also has a sovereign interest in preventing its citizens from being deprived of their Fourteenth Amendment right to equal representation. Not to be missed, in filing this suit, Alabama is also seeking to enforce federal immigration law and to assure Alabamians that they will have the full benefit of laws designed to address the problem of illegal immigration and the resulting distortions in the political process.

I will stop here as you have all received a copy of the State of Alabama's complaint which contains a more detailed explanation of our legal theories in this case. In closing, I believe that Alabama's case for excluding illegal aliens from the apportionment population is a compelling one with national implications. We are confident that the Constitution does not permit the dilution of our legal residents' right to equal representation in this manner. That's why we are seeking to redress the problems created by this unlawful rule and are hopeful that a solution can be reached.

Thank you for your time and attention. I am happy to answer any questions you may have.