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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

CITY OF SAN JOSE, CALIFORNIA, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,

Defendants.

STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,

Defendants.

Case No. 5:20-cv-05167-LHK-RRC-EMC
Case No. 5:20-cv-05169-LHK-RRC-EMC

DECLARATION OF SHANNON D. LANKENAU IN SUPPORT OF PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR PARTIAL SUMMARY JUDGMENT

Date: October 8, 2020, 2020
Time: 1:30 p.m.
Place: Courtroom 8, 4th Floor
Judge: Honorable Richard R. Clifton
Honorable Lucy H. Koh
Honorable Edward M. Chen

I, Shannon D. Lankenau, declare as follows:

1. I am an active member of the State Bar of California, a member in good standing of the Bar of this Court, an associate at Latham & Watkins LLP, and counsel for Plaintiffs in the above-titled action. I make this declaration in support of Plaintiffs' Reply in Support of Motion for Partial Summary Judgment and in Opposition to Defendants' Motion to Dismiss, or in the Alternative, Motion for Partial Summary Judgment. I have personal, first-hand knowledge of the matters set forth below and, if called as a witness, I could and would testify competently thereto.

2. Attached hereto as Exhibit A is a true and correct copy of Defendants' Memorandum of Law in Support of Their Motion for Stay of Judgment Pending Appeal, *State of New York, et al. v. Donald J. Trump, et al.*, Case No. 20-cv-5770 (ECF No. 172), dated September 16, 2020 in the Southern District of New York.

3. Attached hereto as Exhibit B is a true and correct copy of the Order to Produce the Administrative Record, *National Urban League et al. v. Wilbur L. Ross, et al.*, Case No. 20-cv-05799 (ECF No. 96), dated September 10, 2020 in the Southern District of New York.

4. Attached hereto as Exhibit C is a true and correct copy of the Hearing Transcript, *State of New York, et al. v. Donald J. Trump, et al.*, Case No. 20-cv-5770, dated September 3, 2020 in the Southern District of New York.

5. Attached hereto as Exhibit D is a true and correct copy of excerpts of Congressional Globe, 39th Congress, First Session, dated January 22, 1866.

6. Attached hereto as Exhibit E is a true and correct copy of the Declaration of Jennifer Mendelsohn, *State of New York, et al. v. Donald J. Trump, et al.*, Case No. 20-cv-5770 (ECF No. 149-2), dated August 25, 2020 in the Southern District of New York.

7. Attached hereto as Exhibit F is a true and correct copy of excerpts of volume 71 – part 2 of the Congressional Record (pages 2065, 2078-83, 1958, and 1592), dated May 13 to June 3, 1929.

8. Attached hereto as Exhibit G is a true and correct copy of House Joint Resolution 351, 71st Congress, dated February 13, 14, and 18, 1929.

9. Attached hereto as Exhibit H is a true and correct copy of Senate Report No. 2, 71st Congress, First Session, dated April 23, 1929.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: September 21, 2020

LATHAM & WATKINS LLP

By: /s/ Shannon D. Lankenau
Shannon D. Lankenau

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ATTESTATION

I, Gabrielle D. Boutin, am the ECF user whose user ID and password authorized the filing of this document. Under Civil L.R. 5-1(i)(3), I attest that all signatories to this document have concurred in this filing.

DATED: September 21, 2020

/s/ Gabrielle D. Boutin

Gabrielle D. Boutin

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	No. 20 Civ. 5770 (JMF)
NEW YORK IMMIGRATION COALITION, *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	No. 20 Civ. 5781 (JMF)

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR STAY OF JUDGMENT PENDING APPEAL

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INTRODUCTION

The federal governmental defendants (the "Defendants") respectfully move to stay pending appeal the Court's September 10, 2020 Final Judgment and Permanent Injunction order (the "Judgment"), ECF No. 165.[1] That Judgment specifically enjoined (and declared unlawful) the Secretary of Commerce, the Census Bureau, and any employees of the Commerce Department "from including in the Secretary's report to the President pursuant to Section 141(b) any information permitting the President to exercise the President's discretion to carry out the policy set forth in section 2" of the July 21, 2020, Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census (the "Presidential Memorandum")—*i.e.*, to "exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act . . . to the maximum extent feasible and consistent with the discretion delegated to the executive branch." *See* Presidential Memorandum, § 2; *see also* Judgment at 2.

On September 16, 2020, the Defendants filed a Notice of Appeal, which appeals the Judgment to the Supreme Court of the United States. *See* ECF No. 169.[2] This appeal is of right to the Court. 28 U.S.C. § 1253.

The Defendants seek a stay of the Judgment while the Supreme Court considers their appeal, and the well-known stay factors support such relief. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). The Defendants are likely to succeed on the merits because, among other things, the Judgment is not tailored to the purported injury: Even assuming that the Presidential Memorandum is causing some individuals not to participate in the census, preventing the Secretary from providing information to

[1] All citations to the CM/ECF docket are to case 1:20-cv-05770-JMF, which has been consolidated with case 1:20-cv-5770-JMF.

[2] In an abundance of caution, *cf.* Op. 86 n.21, the government also filed a notice of appeal to the Second Circuit. *See* ECF No. 170. The government intends to move to hold that appeal in abeyance.

the President *in December* cannot redress that purported injury occurring *now*. Any "chilling effect" will persist due to the prospect of appellate reversal before December; indeed, as soon as census field operations conclude (which will be well before December), the purported injury will be *moot* and the injunction thus will need to be vacated before it ever actually constrains the actions of Defendants. Accordingly, the Plaintiffs will not be harmed by a stay that would permit Defendants to implement the Memorandum in December—long after the conclusion of census field operations. And finally, the public interest is served when the government is able to pursue its legitimate and preferred policies, especially given the likelihood of success on appeal to the Supreme Court.

ARGUMENT

In considering whether to grant a stay pending appeal, the Court must consider four factors: (1) the applicant's likelihood of success on the merits; (2) whether the applicant will suffer irreparable injury; (3) the balance of hardships to other parties interested in the proceeding; and (4) the public interest. *Nken*, 556 U.S. at 434. Those factors favor a stay here.

I. Defendants are Likely to Succeed on the Merits.

A. The Judgment is Not Tailored to the Purported Injury.

As a predicate to finding Article III standing and granting injunctive and declaratory relief, the Court determined that the Presidential Memorandum caused a "chilling effect," which will supposedly discourage certain individuals from participating in the census. *See, e.g.*, Op. 39-41. But the relief the Court ordered was to prevent the Secretary from including in his "report to the President pursuant to Section 141(b)" the requested information. Judgment 2. That report will not be sent until December 31, 2020. *See* 13 U.S.C. 141(a), (b). Yet field operations for the census are scheduled to conclude by

September 30, 2020.[3] There is therefore a mismatch between the asserted injury on which the Court relied (the chilling effect) and the relief that it ordered (an injunction of conduct after census field operations end). For one thing, even assuming that there are some number of census respondents who are chilled by the Memorandum, plaintiffs did not identify any non-speculative number of those respondents who then would become unchilled merely by this Court's entry of the Judgment, even though their fears could still be realized if the Judgment is reversed on appeal—let alone that there are sufficient numbers of such hypothesized respondents to cause plaintiffs to lose funding or suffer other harms. The Court's relief thus would not redress the asserted injury. Moreover, as even the Court appeared to recognize (*see* Op. 39, 57), the chilling injury will cease to exist when field operations end. At that point, there would no longer be *any* basis to support the Court's order of injunctive and declaratory relief, for there would no longer be any continuing or future injury that the relief could or would redress. In such circumstances, the relief becomes legally untenable and must be vacated. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

Given that the Court's relief will indisputably become moot before it ever actually constrains Defendants' actions, the Judgment is improper. Put differently, federal courts cannot redress "chilling effects" by issuing *advisory opinions* to assuage the fears of the public. They can do so only by issuing *relief* that will likely redress such injuries through their legal effect on the defendants—and here, the relief itself (separate and apart from the court's opinion) will not and cannot redress any such injuries because they will have been realized (to whatever extent they may occur) well before the relief ever even goes into effect—as is evidenced by the fact that there would be no real-world difference if the Court had issued its legal opinion rejecting the Presidential Memorandum but denying all relief because

[3] Litigation in California could potentially lead to extending field operations through the end of October, *see* Order Granting Motion for Temporary Restraining Order, ECF No. 84, *Nat'l Urban League v. Ross*, Case No. 5:20-cv-05799-LHK (N.D. Cal.), but in no event will field operations still be ongoing by December 31, 2020, given the need to tabulate the results of the field operations.

the Memorandum will not be implemented until after census field operations conclude. Accordingly, Defendants are very likely to succeed on appeal in obtaining reversal of the Judgment, especially once census field operations conclude.

B. The Court Erred in Concluding the Secretary's Use of Administrative Records Is "Outside" of "the Census" Given the Secretary's Statutory Discretion to Use Such Records in Conducting the Enumeration.

The Court's opinion indicates that the Court mistakenly believes that using administrative records to identify aliens without lawful status under the Immigration and Nationality Act for possible exclusion from the apportionment base ventured outside "the census." But that misunderstands both the statutory structure and the history of the census.

The statutory structure provides wide discretion to the Secretary of Commerce to utilize administrative records. The Constitution directs that the census shall be performed "in such Manner as [Congress] shall by Law direct. U.S. Const. art. I, § 2, cl. 3. Congress has delegated authority over the census to the President and the Secretary of Commerce, including authorizing the Secretary to administer the census "in such form and content as he may determine." 13 U.S.C. § 141(a); *see also* 2 U.S.C. § 2a(a).

Exercising such long-standing delegated authority, the Secretary of Commerce (through the Census Bureau) has long considered and used administrative records when conducting the enumeration. As the Court itself recognized (Op. 68 n.15), in 1990, the Bureau counted overseas armed-services members and federal civilian employees *solely* by relying on administrative data; no questionnaires or in-person field operations were conducted to count those individuals. *See Franklin v. Massachusetts*, 505 U.S. 788, 794–96, 803–06 (1992); *see also* U.S. Census Bureau, 2020 Census Detailed Operational Plan for Federally Affiliated Count Overseas Operation (FACO), at 3 (May 28, 2019) (explaining that "[i]n the 1990 and 2000 censuses," the counts of overseas members of the armed forces, federal civilian employees, and their dependents living with them "were obtained from federal

departments and agencies and were principally based on administrative records"). And as explained in *Utah v. Evans*, 536 U.S. 452 (2002), the Bureau uses administrative records to impute persons who were *never counted* using the questionnaires or in-person follow-ups. *See id.* at 457–59, 473–79. Yet those indisputably were part of the "census." If using administrative records to *add* people not counted by field operations is permissible, then using administrative records to *subtract* people who are counted but who the Executive has determined to exclude from the apportionment base must be part of "the census," too. Indeed, the Court did not explain (*cf.* Op. 68 n.15) why the former would be within the Secretary's discretion to conduct the decennial census "in such form and content as he may determine," 13 U.S.C. 141(a), but the latter would not be.

This significant misunderstanding about how "the census" is conducted and the numbers tallied undermines the justification for issuing injunctive relief. This misunderstanding is likely to be corrected during further appellate review, and it further militates in favor of staying the Judgment during that review.

C. The Court Erred in Concluding that Section 2a Requires Inclusion of All Illegal Aliens who Reside in this Country, Regardless of Whether the President has Discretion to Conclude Otherwise under the Constitution.

In its Opinion, the Court mistakenly suggested (*see* Op. 73-74 & n.17) that the meaning of 2 U.S.C. § 2a is different from the substantive standard under the Constitution. But the statutory text is identical to the constitutional text, and thus they presumptively mean the same thing. *Compare* 2 U.S.C. § 2a(a) *with* U.S. Const. amend. XIV. There is no basis to override that presumption. *Cf. Hall v. Hall*, 138 S. Ct. 1118, 1128 (2018) ("[I]f a word is obviously transplanted from another legal source, … it brings the old soil with it.") (citation omitted). Indeed, not even Plaintiffs contend that the President must include *literally* every "person[] in each State," 2 U.S.C. 2a, such as foreign tourists and visitors. Instead, the enumeration should count only "inhabitants" or "usual residents." The Supreme Court has made clear that "usual residence" generally "include[s] some element of allegiance or

enduring tie to a place," *Franklin*, 505 U.S. at 804 (citation omitted), and the Founders were familiar with Vattel's definition of "inhabitants" as "foreigners, who are permitted to settle and stay in the country," 1 Emer de Vattel, *The Law of Nations*, ch. 19, § 213 (1817). Unlike lawfully admitted aliens, an alien who is here unlawfully cannot be said to have an "enduring tie" to, or to have been "permitted to settle and stay in," this country. At the very least, the historical record indicates that "inhabitancy" at the Founding was an unsettled concept, especially as applied to the unconsidered issue of whether aliens in the country unlawfully may be considered "inhabitants." Thus, under *Franklin*, there is discretion to define the bounds of the term "inhabitant" and Vattel's definition is at least one permissible view of inhabitancy. Although the Court emphasized that the views of the 1929 Congress are dispositive here, it, like Plaintiffs, appeared to rely (Op. 74-75) on statements suggesting a view only that *aliens* (writ large) cannot be excluded from the enumeration count for apportionment; that, however, does not answer the question whether a smaller subset—some or all aliens *who are here unlawfully*—may be excluded.

This precise question is at the heart of this case, and it likely will be answered favorably to the government by the Supreme Court. This, again, militates in favor of staying the Judgment pending that review.

II. The Defendants May Suffer Irreparable Injury Without a Stay of the Judgment.

Injunctive relief is an extraordinary remedy. It is more so in this case considering the relief directly interferes with a once-in-a-decade duty that is assigned (by both the Constitution and congressionally-enacted statutes) to coordinate branches of the government. This warrants, at the least, a respectful hesitation. That respectful hesitation is best served by a stay of the Injunction while the Supreme Court conducts its review.

The Court's Judgment prevents the Secretary of Commerce from complying with the reporting requirements set forth in the Presidential Memorandum. And the information to be

reported by the Secretary in December is necessary to effectuate the policy goal of the Memorandum.

The serious problem here for the Defendants is one of timing. The Secretary of Commerce is statutorily required to report the census results to the President by December 31, 2020. *See* 13 U.S.C. § 141(b). The President uses that information to develop the apportionment of the House of Representatives, and the President is then statutorily required to submit that apportionment to Congress "within one week" after the first session of Congress. 2 U.S.C. §2a(a). With Congress scheduled to convene on January 3, 2021, the President's statutory deadline will likely fall on January 10, 2021. Absent timely relief from the Judgment, Congress's statutory deadlines will be undermined, because the Secretary and the President will be forced to make reports by those deadlines that do not reflect the President's policy judgment, and then changes may be necessary afterward if the government subsequently prevails in the Supreme Court. *Cf. Utah*, 536 U.S. at 462 (holding that post-apportionment redress is possible if the apportionment calculation contains an error); *see also Franklin*, 505 U.S. at 803 (finding that a post-apportionment order against the Secretary would provide redress for plaintiffs).

III. The Risk of Harm to the Plaintiffs is Minimal.

Here, the Plaintiffs face no cognizable harm if the Judgment is stayed because the Court's relief only prohibits activity by Defendants that will not take place until December—long after census operations are completed. As discussed above, this Court's *relief* does not actually redress any "chilling effect"—it is at most the advisory impact of this Court's opinion that affects census respondents, and thus any impact on census respondents from staying the relief is both speculative and legally immaterial.

IV. The Public Interest is Best Served by a Stay.

A stay of the Judgment best serves the public interest. As explained above, the Plaintiffs will not be harmed by the issuance of a stay. At the same time, a stay serves the public interest by allowing

the government's preferred and legitimate policy to be put into effect. That is a fundamental value in our constitutional republic. If the Defendants prevail before the Supreme Court, then they are legally entitled to put into effect their preferred policy. Without a stay, however, it becomes difficult for the administration to meet the December 31, 2020, and January 10, 2021, statutory deadlines with reports that reflect the administration's preferred policy choices. It would be an unfortunate and needless occurrence if Defendants succeed in the Supreme Court but their preferred policy—along with their ability to comply with congressionally-mandated statutory deadlines—was interfered with by the lack of a stay in the interim.

Additionally, a stay serves the public interest by promoting clarity for the public (and for the parties) as to exactly what will happen in the upcoming census process in December, 2020. As described above, the injunction ordered in the Judgment must be vacated once the ground for relief (the alleged chilling effect) becomes moot. That chilling effect becomes moot once census field operations are concluded. Yet the Census Bureau faces a December 31st statutory deadline to report to the President. Thus, the legally-untenable injunction would continue to apply during this critical phase. Staying the Judgment would eliminate this uncertainty and provide clarity for the public and the parties while the Supreme Court considers this appeal.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion to stay the Judgment pending the resolution of the Defendants' appeal to the Supreme Court.

Dated: September 16, 2020

Respectfully submitted,

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EXHIBIT B

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

NATIONAL URBAN LEAGUE, et al.,

Plaintiffs,

v.

WILBUR L. ROSS, et al.,

Defendants.

Case No. 20-CV-05799-LHK

ORDER TO PRODUCE THE ADMINISTRATIVE RECORD

Plaintiffs National Urban League; League of Women Voters; Black Alliance for Just Immigration; Harris County, Texas; King County, Washington; City of Los Angeles, California; City of Salinas, California; City of San Jose, California; Rodney Ellis; Adrian Garcia; National Association for the Advancement of Colored People; City of Chicago, Illinois; County of Los Angeles, California; Navajo Nation; and Gila River Indian Community (collectively, "Plaintiffs") sue Defendants Commerce Secretary Wilbur L. Ross, Jr.; the U.S. Department of Commerce; the Director of the U.S. Census Bureau Steven Dillingham, and the U.S. Census Bureau ("Bureau") (collectively, "Defendants") for violations of the Enumeration Clause and Administrative Procedure Act ("APA").

Plaintiffs seek to preliminarily enjoin Defendants from implementing Defendants' August 3, 2020 Replan. The Replan shortens census data collection and processing timelines from the eight months set forth in the Defendants' April 13, 2020 COVID-19 Plan to four months. Plaintiffs claim that the Replan's shortened timelines will unlawfully harm the accuracy of crucial census

data.

Before the Court are the parties' submissions regarding production of the administrative record. Having considered the parties' submissions; the parties' oral arguments at the September 8, 2020 case management conference; the relevant law; and the record in this case, the Court ORDERS the production of the administrative record.

I. BACKGROUND

A. Factual Background

Before addressing the merits of the parties' submissions, the Court briefly notes the factual context. Defendants acknowledge that the Bureau's Census data collection and processing responsibilities are "a 15.6 billion dollar operation years in the making." Defendants' Opp. to Plaintiffs' Motion for Stay or Preliminary Injunction at 1 ("PI Opp."). The Bureau spent most of a decade preparing the original operational plan for the 2020 Census, which was called the Final Operational Plan and was issued in December 2018. Albert E. Fontenot, Jr., Associate Director for Decennial Census Programs at the U.S. Census Bureau, describes the extensive work over a period of many years that the Bureau performed to develop the Final Operational Plan, which the Bureau also called Version 4.0. For example, Fontenot discusses eight significant census tests the Bureau performed in 2013, 2014, 2015, 2016, and 2018 to improve their field operations. Fontenot Decl. ¶ 71. Fontenot describes partnerships with stakeholders such as organizations and tribal and local governments. *E.g.*, Fontenot Decl. ¶¶ 12, 28. The Final Operational Plan reflects the conclusions of subject-matter experts such as statisticians, demographers, geographers, and linguists. *See, e.g.*, ECF No. 37-5 at 79, 144 (2020 Census Operational Plan—Version 4.0).

The Final Operational Plan also set timeframes for three operations that especially affect the quality of the count: (1) self-responses to census questionnaires, (2) non-response follow-up ("NRFU"), and (3) post-data collection processing. First, the timeframe for self-responses refers to when people may respond to census questionnaires on their own. Second, NRFU refers to the process of "conduct[ing] in-person contact attempts at each and every housing unit that did not self-respond to the decennial census questionnaire." Fontenot Decl. ¶ 48. "The NRFU Operation is

entirely about hard-to-count populations." ECF No. 37-5 at 219. NRFU is thus "the most important census operation to ensuring a fair and accurate count." Thompson Decl. ¶ 15. Lastly, post-collection data processing refers to the Bureau's "procedures to summarize the individual and household data that [the Bureau] collect[s] into usable, high quality tabulated data products." Fontenot Decl. ¶ 66.

Under the Final Operational Plan issued in December 2018, self-responses spanned 20.5 weeks from March 12 to July 31, 2020. NRFU spanned 11.5 weeks from May 13 to July 31, 2020. Data processing spanned 22 weeks from August 1 to December 31, 2020. These operational dates would culminate in the Secretary of Commerce reporting (1) by December 31, 2020, "the tabulation of total population by States" to the President for the purpose of Congressional apportionment; and (2) by April 31, 2021, the same tabulation of population to the states for the purpose of redistricting. 13 U.S.C. § 141(b).

On March 18, 2020, however, the Bureau announced that it would suspend all field operations for two weeks because of the COVID-19 pandemic. *See* Press Release, U.S. Census Bureau, *U.S. Census Bureau Director Steven Dillingham on Operational Updates* (Mar. 18, 2020), https://www.census.gov/newsroom/pressreleases/2020/operational-update.html. On March 28, 2020, the Bureau announced another two-week suspension. Press Release, *Census Bureau Update on 2020 Census Field Operations* (Mar. 28, 2020), https://www.census.gov/newsroom/press-releases/2020/update-on-2020-census-field-operations.html. The Bureau halted all hiring and training of hundreds of thousands of Census field staff known as "enumerators," who implement NRFU by trying to contact people who do not respond to the Census questionnaire. Fontenot Decl. ¶ 49. The Bureau also experienced staffing shortages at its call centers and the contractor responsible for printing the six mail-in self-response forms. ECF No. 37-7 at 8 (GAO, *COVID-19 Presents Delays and Risks to Census Count* (June 2020)).

As a result, on April 13, 2020, the Bureau issued an adjustment to its Final Operational Plan to account for the impact of COVID-19 (the "COVID-19 Plan"). ECF No. 37-3 (April 13,

2020 statement of Secretary of Commerce Wilbur Ross and Census Bureau Director Steven Dillingham). The COVID-19 Plan extended the operational deadlines.

Specifically, first, the COVID-19 Plan expanded the timeframe for self-responses from 20.5 weeks to 33.5 weeks (March 12 to October 31, 2020) to account for the pandemic's disruptions to Bureau operations and the public's ability to respond to the census. For instance, the Bureau had to adapt to staffing shortages at call centers and the self-response printer. ECF No. 37-7 at 8. The Bureau also had to cope with "delays to the Update Leave operation, in which [census] field staff hand-deliver questionnaires," *id.* at 6, to "areas where the majority of the housing units do not have mail delivery . . . or the mail delivery information for the housing unit cannot be verified." Fontenot Decl. ¶ 46. In sum, as of June 2020, "self-response rates var[ied] widely across states and counties," with "markedly different operational environments and challenges" facing the Bureau "from one locale to another." ECF No. 37-7 at 6 (citing self-response rates "below 3 percent" in counties in Alaska, Texas, Utah, and South Dakota).

Second, NRFU likewise expanded from 11.5 weeks (May 13 to July 31, 2020) to 12 weeks (August 11 to October 31, 2020). The pandemic disrupted NRFU in at least two ways. One, the pandemic made it harder to hire and retain enumerators to contact households. *See, e.g.*, Gurmilan Decl. ¶ 13 ("Monterey County is still advertising for census enumerator job listings because traditional applicant groups like senior citizens have concerns about the risk of catching COVID-19"). Two, "door-to-door visits for NRFU interviewing may be less effective" during a pandemic. ECF No. 37-7 at 18.

Third, given the pandemic's effects on "the quality of the data, especially for groups that are less likely to self-respond (often hard to count populations)," post-data collection quality control was deemed especially important. ECF No. 37-7 at 18. Data processing for Congressional apportionment thus expanded from 22 weeks (August 1 to December 31, 2020) to 26 weeks (November 1, 2020 to April 30, 2021). The processing was to include an independent review of the final address list, analysis by subject-matter experts, and the remediation of software errors. Fontenot Decl. ¶ 89.

Lastly, the press release announcing the COVID-19 Plan stated that "the Census Bureau is seeking statutory relief from Congress of 120 additional calendars days to deliver apportionment counts." ECF No. 37-3 at 3. The COVID-19 Plan would thus "extend the window for field data collection and self-response to October 31, 2020, which will allow for apportionment counts to be delivered to the President by April 30, 2021, and redistricting data to be delivered to the states no later than July 31, 2021." *Id.*

Although these delays would result in the Bureau missing statutory deadlines, Bureau officials publicly stated that meeting the December 31, 2020 deadline would be impossible in any event. For instance, on May 26, 2020, the Bureau's head of field operations, Tim Olson, stated that "[w]e have passed the point where we could even meet the current legislative requirement of December 31. We can't do that anymore. We -- we passed that for quite a while now." Nat'l Conf. of Am. Indians, 2020 Census Webinar: American Indian/Alaska Native at 1:17:30–1:18:30, YouTube (May 26, 2020), https://www.youtube.com/watch?v=F6IyJMtDDgY. Similarly, on July 8, Associate Director Fontenot confirmed that the Bureau is "past the window of being able to get" accurate counts to the President by December 31, 2020. U.S. Census Bureau, *Operational Press Briefing – 2020 Census Update* at 20–21 (July 8, 2020), https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/news-briefing-program-transcript-july8.pdf.

On July 21, 2020, President Donald J. Trump issued a memorandum declaring the United States' policy to exclude unlawful immigrants from the congressional apportionment base.

On July 31, 2020, the Bureau removed from its website the October 31, 2020 deadlines for self-responses and NRFU. *Compare* ECF No. 37-8 (July 30 Operational Adjustments Timeline), *with* ECF No. 37-9 (July 31 Operational Adjustments Timeline).

On August 3, 2020, the Bureau issued a press release announcing the Replan. ECF No. 37-1. In Fontenot's declaration, Fontenot avers that the Secretary approved the Replan on the day it was announced. Fontenot Decl. ¶ 85.

The Replan accelerated and compressed the Bureau's data collection and processing

timeframes from eight months to four months. Specifically, self-response compressed from 33.5 weeks to 29 weeks, with the deadline advancing from October 31 to September 30. *Id.* ¶ 100. NRFU compressed from 11.5 weeks to 7.5 weeks, with the deadline advancing from October 31 to September 30. Lastly, data processing was halved from 26 weeks to 13 weeks with the deadline advancing from April 30, 2021 to December 31, 2020.

B. Procedural History

On August 18, 2020, Plaintiffs filed suit to challenge the Replan's advancement of the deadlines for self-responses, field operations to attempt to count NRFU, and data processing. To allow Plaintiffs to effectively challenge the Replan, including the September 30, 2020 end of field operations, the parties stipulated to a briefing schedule and hearing date of September 17, 2020 on Plaintiffs' motion for stay and preliminary injunction (hereafter, "motion for preliminary injunction" or "Mot."). ECF No. 35. Pursuant to that schedule, Plaintiffs filed a motion for a preliminary injunction on August 25, 2020 based on their claims under the Enumeration Clause and the APA. ECF No. 36.

On August 26, 2020, the Court held a case management conference. At that conference, the Court asked Defendants whether there was an administrative record for the purposes of APA review. Defendants repeatedly denied the existence of an administrative record. *E.g.*, ECF No. 65 at 9:22–:24 (Q: "Is there an administrative record in this case?" A: "No, Your Honor. On behalf of the Defendants, no, there's not."), 10:17–:18 ("[A]t this point there is no administrative record."). Rather, Defendants suggested that the only document that provided the contemporaneous reasons for the Replan was the Bureau's August 3, 2020 press release. *Id.* at 20:6–:7 ("[A]t this point I'm not aware of any other documents, but I would propose that I check with my client . . . ."). Even so, the Court instructed Defendants that "[i]f there's an administrative record, it should be produced. [The Court] will need it to make a decision in this case." *Id.* at 10:13–:14.

To assist the Court in determining by what date a ruling on Plaintiffs' motion for preliminary injunction must be issued, Defendants agreed to file a statement by September 2, 2020 as to when the winding down of field operations would begin relative to the September 30, 2020

deadline for ending data collection. Defendants filed the following statement:

> [T]he Census Bureau has already begun taking steps to conclude field operations. Those operations are scheduled to be wound-down throughout September by geographic regions based on response rates within those regions. As will be described in Defendants' forthcoming filing on Friday, September 4, 2020, any order by the Court to extend field operations, regardless of whether those operations in a particular geographic location are scheduled to be wound-down by September 30 or by a date before then, could not be implemented at this point without significant costs and burdens to the Census Bureau.

ECF No. 63. Based on Defendants' statement, Plaintiffs moved on September 3, 2020 for a temporary restraining order to preserve the status quo for 12 days until the September 17, 2020 preliminary injunction hearing. ECF No. 66. On September 4, 2020, Defendants opposed the motion, and the Court held a hearing on the motion.

At the hearing on the motion for a temporary restraining order, Defendants reiterated their position that no administrative record existed, ECF No. 82 at 33:13–:15, but disclosed that there were documents contemporaneously explaining the Replan. Defendants stated:

> The Census Bureau generates documents as part of its analysis and as part of its decisions and as part of its deliberations. And there are documents that the Replan was not cooked up in a vacuum, it was part of the agency's ongoing deliberations. And so certainly there are going to be documents that reflect those documents.

Id. at 33:2–:7. That said, Defendants said no administrative record technically existed because "the documents that fed into the operational plans and the operational decisions are internal documents that are subject to the deliberative process privilege." *Id.* at 32:14–:16.

Only a few minutes later, however, Defendants retracted their assertion of deliberative process privilege. *Id.* at 36:15–:17 ("[T]o be clear, we are not asserting the deliberative process privilege because there is no record and there's nothing to consider."). Defendants conceded that "[i]f there is final agency action that is reviewable and the APA applies, we would have an obligation to produce the administrative record." *Id.* at 35:24–36:1. Defendants instead urged the Court to rely solely on a declaration that Defendants would file that night with Defendants' opposition to the motion for preliminary injunction. *E.g.*, *id.* at 16:21–:23 ("We will not be filing documents in addition to the declaration.").

Later on September 4, 2020, Defendants filed their opposition to Plaintiffs' motion for preliminary injunction. As Defendants stated at the TRO hearing, Defendants' sole evidence against Plaintiffs' motion for temporary restraining order and motion for preliminary injunction is the declaration of Albert E. Fontenot, Jr., Associate Director for Decennial Census Programs at the U.S. Census Bureau.

On September 5, 2020, the Court granted a temporary restraining order until the September 17, 2020 preliminary injunction hearing. On September 8, 2020, Defendants filed a notice regarding compliance with the TRO. ECF No. 86.

Also on September 8, 2020, the Court held another case management conference. At that conference, Defendants again stated that "there is no administrative record in this case because there is no APA action." ECF No. __ (forthcoming) at 62:15–:16. Even so, Defendants confirmed their statements from the TRO hearing that the Replan is "indeed codified." *Id.* at 21:7. The Replan simply was "not necessarily codified in one particular document." *Id.* at 21:9–:10. Accordingly, Plaintiffs asked the Court to order Defendants to produce the administrative record. *E.g.*, id. at 43:16–:17. The parties briefed the issue on September 8 and 9, 2020. *See* ECF Nos. 88–89, 92.

II. DISCUSSION

The Court first addresses threshold issues raised by Defendants. However, the Court notes that the cases that require determinations of those threshold issues before production of the administrative record are distinguishable from the instant case. Thereafter, the Court explains why the administrative record must be produced. Given the September 17, 2020 hearing and the Census Bureau's September 30, 2020 deadline for data collection, the analysis herein is necessarily brief. The Court will provide a more fulsome analysis in its ruling on Plaintiffs' motion for preliminary injunction promptly after the September 17, 2020 hearing. Thus, the Court's conclusions herein are provisional and may be subject to change after production of Defendants' administrative record.

A. The Instant Case is Reviewable.

Defendants argue that the instant case is unreviewable on four grounds: (1) the Replan presents a political question; (2) Plaintiffs lack standing; (3) the Replan is not final agency action, and (4) the Replan is committed to agency discretion by law. The Court addresses each ground in turn.

1. The Replan does not present a political question.

A "political question" is one which is "outside the courts' competence and therefore beyond the courts' jurisdiction." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019). "Among the political question cases the Court has identified are those that lack 'judicially discoverable and manageable standards for resolving [them].'" *Id.* at 2494 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

Defendants argue that whether the Replan violates the Administrative Procedure Act is a political question. Their argument is essentially the following syllogism. *First*, Congress has "virtually unlimited discretion in conducting the decennial 'actual enumeration.'" *Wisconsin*, 517 U.S. at 19. *Second*, Congress has used that discretion to set a statutory deadline of December 31, 2020 for when the Secretary must report a "tabulation of total population" to the President. 13 U.S.C. § 141(b). *Third*, Defendants replaced the COVID-19 Plan with the Replan in order to meet the statutory deadline. *Therefore*, the promulgation of the Replan is under Congress' virtually unlimited discretion; there "is no evident standard" for review; and the Replan poses a political question. PI Opp. 6.

The Court disagrees. Defendants' syllogism breaks down at its third step and conclusion. To start, the whole reason why the Court and Plaintiffs need the administrative record is to identify the contemporaneous justifications for the Replan. Only then can those justifications be reviewed under the deferential standard that the APA provides. That deferential APA review, as discussed in Section C below, includes determining if the agency considered—and gave a contemporaneous explanation of—all relevant aspects of a problem before taking action. Here, Congress has set forth more than just the December 31, 2020 statutory deadline as a relevant

aspect of the census. The Census Act also "imposes 'a duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment.'" *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (quoting *Franklin*, 505 U.S. at 819–820 (Stevens, J., concurring in part and concurring in judgment)) (discussing 2 U.S.C. § 2a). Similarly, the text, structure, and history of the Constitution evinces "a strong constitutional interest in accuracy." *Utah v. Evans*, 536 U.S. 452, 479 (2002).

Thus, in its decision on the census citizenship question last year, the Supreme Court rejected Defendants' claim that there is "no meaningful standard against which to judge the agency's exercise of discretion." *Dep't of Commerce v. New York*, 139 S. Ct. at 2568 (quoting *Weyerhaeuser Co. v. United States Fish and Wildlife Serv.*, 139 S. Ct. 361, 370 (2018)). The standard is provided by the Census Act, the Constitution, and APA. Accordingly, it is no surprise that the overwhelming weight of authority rejects applying the political question doctrine to census-related decisionmaking. *See, e.g., U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 458–59 (1992) (holding that "political question doctrine presents no bar"); *Franklin v. Massachusetts*, 505 U.S. 788, 801 n.2 (1992) (noting that the Court "recently rejected a similar argument" in *Montana* that "the courts have no subject-matter jurisdiction over this case because it involves a 'political question'"); *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (per curiam) (rejecting the Census Bureau's argument that "allegations as to mismanagement of the census made in the complaint involve a political question," and holding the case reviewable under the Constitution and APA); *New York v. United States Dep't of Commerce*, 315 F. Supp. 3d 766, 791 (S.D.N.Y. 2018) (rejecting political question doctrine in citizenship question litigation; and collecting cases); *Young v. Klutznick*, 497 F. Supp. 1318, 1326 (E.D. Mich. 1980) (rejecting political question doctrine), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 674 (E.D. Pa. 1980) (same); *Texas v. Mosbacher*, 783 F. Supp. 308, 312 (S.D. Tex. 1992) (same); *District of Columbia v. U.S. Dep't of Commerce*, 789 F. Supp. 1179, 1185 (D.D.C. 1992) (same); *City of N.Y. v. U.S. Dep't of Commerce*, 739 F. Supp. 761, 764 (E.D.N.Y. 1990) (same); *U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 95

(D.D.C. 1998) (three-judge court) (same; and stating "the court sees no reason to withdraw from litigation concerning the census"), *aff'd*, 525 U.S. 316 (1999); *see also Utah v. Evans*, 536 U.S. 452 (2002) (engaging in review without noting any jurisdictional defect stemming from political question doctrine); *Wisconsin v. City of N.Y.*, 517 U.S. 1 (1996) (same); *Morales v. Daley*, 116 F. Supp. 2d 801 (S.D. Tex. 2000) (same), *aff'd sub nom. Morales v. Evans*, 275 F.3d 45 (5th Cir. 2001) (unpublished); *Prieto v. Stans*, 321 F. Supp. 420, 421 (N.D. Cal. 1970) (finding jurisdiction over a motion to preliminarily enjoin the census's "mail-out, mail-back procedure" and "community education and follow-up procedures"). In sum, the political question doctrine does not bar the Court from ordering Defendants to produce the administrative record.

2. Plaintiffs have standing to challenge the Replan.

"To have standing, a plaintiff must 'present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling.'" *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019). Plaintiffs here allege—and support with affidavits—the same injuries that the Supreme Court found supported standing in the citizenship question case: "[1] diminishment of political representation, [2] loss of federal funds, [3] degradation of census data, and [4] diversion of resources." *Id.* at 2565 (agreeing that "at least some" plaintiffs had standing).

First, Plaintiffs allege that "[t]he undercount resulting from the Rush Plan will likely result in an unfair apportionment that will cause local government Plaintiffs, individual Plaintiffs, and members of multiple organizational Plaintiffs, to lose their fair share of representation." Mot. at 29. For example, given the historically low census response rates in the City of Los Angeles and City of Salinas in California, and in Harris County, Texas, the Replan creates a substantial risk that their residents will not be counted, and a substantial risk of diminished political representation. *See* M. Garcia Decl. ¶¶ 8–15; Briggs Decl. ¶¶ 7, 15–17; Gurmilan Decl. ¶¶ 6, 8–14. Specifically, 57% of the residents in the City of Los Angeles, which is home to roughly 4 million people, live in census block groups that are hard or very hard to count. M. Garcia Decl. ¶ 7. Similarly, the City of Salinas comprises 38.5% of Monterey County's hard to count population, and the City's response

rate is 9.5% below its response rate from the 2010 Census. *Id.* ¶ 6. The Replan's shortened schedule for data collection imposes a substantial risk that the hard to count populations will be undercounted, and that therefore their political representation will be diminished.

Second, local government Plaintiffs are recipients of multiple sources of federal funding that turn on census data. For example, King County, Washington and the City of Los Angeles receive Community Development Block Grants and other funds in the millions of dollars; and Seattle received over $108 million in Transit Formula Grants. Dively Decl. ¶ 7; Westall Decl. ¶¶ 34–36. The Replan will likely diminish both localities' funding because both localities have many hard to count persons who risk being undercounted because of the Replan's shortened schedule for data collection. M. Garcia Decl. ¶¶ 7–8; Dively Decl. ¶ 5; Hillygus Decl. ¶¶ 12, 19, 39. As another example, "approximately $90,529,359 of the grants expended by Harris County in FY2019 depended on accurate census data." Wilden Decl. ¶ 5. In fact, as the Supreme Court found last year, undercounting even a subset of the hard to count population can result in the loss of federal funding. *See Dep't of Commerce v. New York*, 139 S. Ct. at 2565 (finding standing, in the context of state-wide undercounting, because "if noncitizen households are undercounted by as little as 2% . . . [states] will lose out on federal funds").

Third, the local government Plaintiffs allege that the Replan will degrade granular census data that they rely on to deploy services and allocate capital. For instance, King County, Washington uses census data to place public health clinics, plan transportation routes, and mitigate hazards. Dively Decl. ¶ 6. The City of Los Angeles uses "reliable, precise, and accurate population count data" to deploy the fire department, schedule trash-pickups, and acquire or improve park properties. Westall Decl. ¶ 32.

Lastly, Plaintiffs will divert resources to mitigate the undercounting that will likely result from the Replan. For instance, the City of Salinas already promoted the October 31 deadline "on social media and in thousands of paper flyers." Gurmilan Decl. ¶¶ 11–12. Thus, "some residents who received the City's messaging will fail to respond before the R[eplan] deadline because the City has limited remaining resources to correct what is now misinformation." *Id.* ¶ 12. Moreover,

the City "is still advertising for census enumerator job listings because traditional applicant groups like senior citizens have concerns about the risk of catching COVID-19. With fewer enumerators working, every extra day the City has to use the existing staff to support the count." *Id.* ¶ 13.

As more examples, Harris County "participated in over 150 events," including "food distribution events," during which it "announced the October 31, 2020 deadline for the 2020 Census." Briggs Decl. ¶ 12. "Harris County will be forced to expend additional resources to clear confusion about the last date for self-response during the Census, to ensure that people who have not responded are counted in time." *Id.* ¶ 16. The Black Alliance for Just Immigration already "publicized the October 31 deadline for self-response during digital events between April and July" and is diverting resources to publicize the new September 30 deadline. Gyamfi Decl. ¶¶ 13–14. The League of Women Voters "has already had to spend time and financial resources" developing and distributing public education materials on the Replan timeline. Stewart Decl. ¶ 12. The National Urban League has similarly had "to divert resources from other programs and projects" to "alleviate the confusion" about the change in deadlines. Green Decl. ¶ 15. Indeed, even now, the Census Bureau boasts of how its communications program was "more integrated than ever before" with Plaintiffs such as National Urban League. Fontenot Decl. ¶ 40. Mitigating those now-counterproductive education campaigns and a likely undercount will only be harder in the midst of a pandemic. *E.g.*, M. Garcia Decl. ¶¶ 14–14; Gurmilan Decl. ¶¶ 11–14; Briggs Decl. ¶¶ 11–12, 15–17.

The above harms are "concrete, particularized, and actual or imminent." *Dep't of Commerce v. New York*, 139 S. Ct. at 2565 (quoting *Davis*, 554 U.S. at 733). They are also "fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling.'" *Id.* (quoting *Davis*, 554 U.S. at 733). As the Supreme Court stressed last year, "Article III 'requires no more than de facto causality.'" *Id.* at 2566 (quoting *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.)). Here, Plaintiffs' theory of standing rests "on the predictable effect of Government action on the decisions of third parties"—specifically, the predictable harms of accelerating census deadlines, without warning, after months of publicly operating under a plan

tailored to COVID-19. *Id.* Accordingly, enjoining the Replan's last-minute change in deadlines would redress those harms. *See, e.g.*, *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 328–34 (1999) (affirming injunction against the planned use of statistical sampling to prevent apportionment harms, among others); *New York v. United States Dep't of Commerce*, 351 F. Supp. 3d 502, 675 (S.D.N.Y.) (issuing injunction to prevent "the loss of political representation and the degradation of information"), *aff'd in part, rev'd in part and remanded sub nom. Dep't of Commerce v. New York*, 139 S. Ct. 2551.

3. The Replan constitutes final agency action.

The Replan constitutes final agency action. "To maintain a cause of action under the APA, a plaintiff must challenge 'agency action' that is 'final.'" *Wild Fish Conservancy v. Jewell*, 730 F.3d 791, 800 (9th Cir. 2013) (citing *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61–62 (2004)).

Courts should take a "'pragmatic' approach" to finality. *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1815 (2016) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967)). For an agency's action to be final, two conditions must be met. First, the action "must mark the consummation of the agency's decisionmaking process —it must not be of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). Second, the action "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* Five years earlier, the Supreme Court found that the same two requirements applied in a census case. *Franklin*, 505 U.S. at 797 (the central question "is [1] whether the agency has completed its decisionmaking process, and [2] whether the result of that process is one that will directly affect the parties.").

The Replan meets both criteria. First, the Replan marks the consummation of the agency's decisionmaking process. *Id.* An agency action marks the consummation of the agency's decisionmaking process when the decision is "not subject to further agency review." *Sackett v. E.P.A.*, 566 U.S. 120, 127 (2012); *see also Hawkes*, 136 S. Ct. at 1813–14 (holding that an agency action was final because the determination was "typically not revisited"); *Fairbanks North Star*

Borough v. U.S. Army Corps of Engineers, 543 F.3d 586, 593 (9th Cir. 2008) (holding that an agency's action was final where "[n]o further agency decisionmaking on the issue can be expected"). According to Fontenot's declaration, the Secretary approved the Replan. Fontenot Decl. ¶ 85. No further agency decisionmaking will be conducted on the Replan. These facts support the conclusion that the agency has reached a definite position that the census will be conducted according to the schedule set forth in the Replan. *Fairbanks*, 543 F.3d at 593.

Second, the Replan is a decision by which rights or obligations have been determined. The Replan determines the rights and obligations of the Census Bureau because it determines the dates on which the Census Bureau will end its data collection and processing. The Replan also determines the rights and obligations of people who seek to participate in the census by preventing them from participating in the census after September 30, 2020. *See Sackett*, 566 U.S. at 126 (holding that an agency action determined rights and obligations of property owners where it "severely limit[ed] [the owners'] ability to obtain a permit . . . from [the agency]"); *Alaska, Dep't of Environmental Conservation v. E.P.A.*, 244 F.3d 748, 750 (9th Cir. 2001) (holding that an agency action determined rights and obligations where its effect was to halt construction at a mine facility). These people will be unable to participate despite the Census Bureau's previous representations that they could participate until October 31, 2020. Because the Replan determines rights and obligations, the Replan constitutes final agency action.

Disputing this conclusion, Defendants rely on the Supreme Court's decision in *Franklin v. Massachusetts*, 505 U.S. 788 (1992). That case concerned the Secretary of Commerce's transmission of the census report to the President. *Franklin*, 505 U.S. at 797–98. The data presented to the President was still subject to correction by the Secretary. *Id*. In addition, the President could instruct the Secretary to reform the census. *Id*. at 798. Accordingly, the report was a "moving [target]" or a "tentative recommendation," rather than a "final and binding determination," so it carried "no direct consequences for the reapportionment." *Id*. Based on these characteristics, the Supreme Court held that the transmission of the census report was not final agency action. *Id*. at 798.

Defendants argue that the Replan also does not constitute final agency action. However, *Franklin* underscores why the Replan constitutes final agency action. The Replan is not a tentative recommendation that will be revisited by the agency, or reviewed by a higher official. Rather, no further review of the Replan will be conducted. Moreover, the Replan does have direct consequences for the reapportionment. The Replan determines the date on which data collection will end, past which people can no longer participate in the census. Thus, the Replan constitutes final agency action.

Defendants also argue that the Replan does not constitute agency action at all. Agency action includes "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). To satisfy this requirement, the matter must be a "circumscribed, discrete agency action[]." *S. Utah Wilderness All.*, 542 U.S. at 62–63. This requirement "precludes [a] broad programmatic attack" on an agency's operations. *Id.* at 64.

Defendants analogize this case to *NAACP v. Bureau of the Census*. 945 F.3d 183 (4th Cir. 2019). In *NAACP*, the plaintiffs brought a challenge in 2018 to the census "methods and means," which the Fourth Circuit repeatedly referred to as "design choices." *NAACP*, 945 F.3d at 186. The plaintiffs' complaint alleged insufficient numbers of enumerators, insufficient networks of area census offices, the insufficiency of the Bureau's plan to rely on administrative records, and insufficient partnership program staffing. *Id.* at 190. Each of these factors was "expressly . . . tied to one another." *Id.* at 191. As a result of these relationships, "'[s]etting aside' one or more of these 'choices' necessarily would impact the efficacy of the others, and inevitably would lead to court involvement in 'hands-on' management of the Census Bureau's operations." *Id.* (citing *S. Utah Wilderness All.*, 542 U.S. at 66–67). The Fourth Circuit further held that the cancellation of a specific field test in 2016 did not give rise to legal consequences, rights or obligations. *Id.* In concluding that there was not final agency action, the Fourth Circuit emphasized that its holding was "based on the broad, sweeping nature of the allegations that the plaintiffs have elected to assert under the APA." *Id.* at 192.

NAACP is inapposite. The instant case does not challenge the census "methods and means" or "design choices." The instant case does not challenge multiple aspects of the census that are expressly tied to one another such that the Court must engage in "hands-on" management of the Census Bureau's operations. The Replan itself concerns only one aspect of the Bureau's operations—the census schedule. The Replan does give rise to legal consequences, rights, and obligations. In addition, the Replan was announced in a single press release. *See* ECF No. 37-1. These facts support the conclusion that the Replan is a circumscribed, discrete agency action.

4. The Replan is not committed to agency discretion by law.

The Replan is not committed to agency discretion. The APA creates a "strong presumption favoring judicial review of administrative action." *Weyerhaeuser*, 139 S. Ct. at 370 (quoting *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 489 (2015)). However, the APA precludes courts from reviewing actions that are committed to agency discretion by law. 5 U.S.C. § 701(a)(2). Courts have read this exception "quite narrowly, restricting it to 'those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Weyerhaeuser*, 139 S. Ct. at 370 (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)).

The Replan does not fit into this narrow exception. In *Department of Commerce v. New York*, the Supreme Court explained that "[t]he taking of the census is not one of those areas traditionally committed to agency discretion," acknowledging that "courts have entertained both constitutional and statutory challenges to census-related decisionmaking." 139 S. Ct. at 2568. The Supreme Court explained that there were meaningful standards against which to judge the agency's action, including the Census Act, which requires that the agency "conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment." *Id*. at 2568–69 (citing *Franklin*, 505 U.S. at 819–20 (Stevens, J., concurring in part and concurring in judgment)). Therefore, there are meaningful standards against which to judge the Replan, and the Replan is not committed to agency discretion.

B. Although Defendants rely on cases holding that reviewability must be decided before production of the record, those cases are distinguishable.

Defendants argue that the Court cannot order production of the administrative record before deciding whether the case is reviewable. For the reasons stated below, the Court disagrees. The cases cited by Defendants are readily distinguishable. Furthermore, several district courts have ordered production of the administrative record prior to deciding reviewability.

Defendants rely on *In re United States*, a mandamus action stemming from challenges to the termination of the Deferred Action for Childhood Arrivals (DACA) program. 138 S. Ct. 443 (2017). In that case, the Supreme Court reversed a district court order requiring the government to complete the administrative record and concluded that the district court should have first decided whether the case was reviewable. *Id*. at 445.

However, *In re United States* is easily distinguishable from this case for at least three reasons. First, the government had already produced an administrative record. *Id.* at 444. Accordingly, *In re United States* addressed completion of the administrative record, and not whether an administrative record must be produced in the first instance. *Id.* As explained below, the government is always required to produce an administrative record for the purposes of APA review. Second, *In re United States* concerned the government's assertions of the deliberative process privilege. *Id.* By contrast, in the instant case, the government initially asserted deliberative process privilege, but then immediately withdrew such assertion and has not asserted any other privilege. ECF No. 82 at 32:14–:16; 36:15–:17. Finally, *In re United States* concerned an overly broad district court order, which compelled the production of "all DACA-related materials considered by persons (anywhere in the government) who thereafter provided [the Secretary] with written advice or input . . . [or] verbal input" on the decision. *In re United States*, 138 S. Ct. at 444. Such an overly broad order is not at issue here. In light of the Supreme Court's instruction that *In re United States* be cabined to "the specific facts of [the] case," we cannot apply its ruling here. *Id*. at 145.

Defendants additionally rely on *NAACP v. Bureau of the Census*, --- F. Supp. 3d ---, 2020 WL 1890531 (D. Md. Apr. 16, 2020). In that case, the Fourth Circuit resolved threshold issues

before an administrative record was produced and concluded that there was not final agency action. *NAACP v. Bureau of the Census*, 945 F.3d 183, 190 (4th Cir. 2019). However, *NAACP* is distinguishable from this case in at least two respects. First, in *NAACP*, the plaintiffs initially brought only an Enumeration Clause claim, not APA claims. *Id*. at 187–88. Second, in *NAACP*, the plaintiffs had access to information outside of the administrative record, including discovery that had already been ordered on the Enumeration Clause claim and a public record. *See NAACP v. Bureau of the Census*, 382 F. Supp. 3d 349, 356 (D. Md. 2019) (ordering discovery on the plaintiffs' constitutional claims). In the instant case, Defendants have produced only a single declaration drafted for this litigation, which attempts to give contemporaneous reasons for the agency action.

Moreover, while the Fourth Circuit ruled on reviewability before the production of the administrative record, other courts have demanded the production of the administrative record before deciding reviewability. *See Ctr. for Popular Democracy Action v. Bureau of the Census*, No. 1:19-cv-10917-AKH (S.D.N.Y. Jan. 9, 2020) (granting motion to expedite production of administrative record before deciding reviewability); *see also Doe # 1 v. Trump*, 423 F. Supp. 3d 1040, 1046 (D. Ore. 2019) (holding that production of administrative record was appropriate because the court required the administrative record to determine whether the agency action is final); *Friends of the River v. U.S. Army Corps of Engineers*, 870 F. Supp. 2d 966, 976 (E.D. Cal. 2012) ("Determining whether [the challenged actions] are final agency actions in the instant case requires a review of the full administrative record, because . . . 'the question of jurisdiction is dependent on the resolution of factual issues going to the merits' of [the] action.").

C. Defendants must produce the administrative record.

Defendants' position that they need not produce the administrative record must be evaluated in the context of the APA. Under the APA, "judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'" *Dep't of Homeland Security v. Regents of the Univ. of Ca.*, 140 S. Ct. 1891, 1907 (2020). The agency cannot provide new reasons after the action is taken because such reasons would be "post hoc rationalization[s]" that do not

represent the agency's reasons for acting. *Id*. at 1908 (quoting *Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1972)).

To permit the Court to review the agency's reasons for acting, the agency must produce an administrative record, which consists of "all documents and materials directly or indirectly considered by agency decision-makers" at the time of the decision. *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). The Court must then use the administrative record to evaluate Plaintiffs' APA claims. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973) (explaining that "[t]he focal point for judicial review [of APA claims] should be the administrative record"), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *Overton Park*, 401 U.S. at 420 (holding that "[APA] review is to be based on the full administrative record that was before the Secretary at the time he made his decision").

Defendants argue that this Court should instead decide the APA claims based on Fontenot's declaration. However, this Court cannot engage in APA review based on "[a] new record made initially in the reviewing court," especially a declaration drafted for litigation, because the declaration would be an impermissible post hoc rationalization that does not reveal the agency's reasons for acting at the time of the action. *Camp*, 411 U.S. at 142. Accordingly, the Supreme Court has held that a district court erred in relying on litigation affidavits, which were impermissible "post hoc rationalizations." *Overton Park*, 401 U.S. at 419; *see also Cmty. for Creative Non-Violence v. Lujan*, 908 F.2d 992, 998 (D.C. Cir. 1990) (R. Ginsburg, Thomas, Sentelle, JJ.) (concluding that relying on litigation affidavits is "manifestly inappropriate"). In *Overton Park*, the Supreme Court remanded in order for the district court to conduct its review based on the administrative record. *Overton Park*, 401 U.S. at 419–20; *see also Am. Bioscience, Inc. v. Thompson*, 243 F.3d 579, 580 (D.C. Cir. 2001) (vacating and remanding because the district court should have required the FDA to file the administrative record and the circuit court could not "tell on what basis the Food and Drug Administration took the agency action the plaintiff seeks to enjoin"). In accordance with this case law, the Court must require the agency to file an administrative record on which it can review Plaintiffs' APA claims.

If the agency claims that some parts of the administrative record are privileged, the Defendants shall produce a privilege log according to the same production deadlines. *See Ctr. for Food Safety v. Vilsack*, No. 15-cv-01590, 2017 WL 1709318, at *5 (N.D. Cal. May 3, 2017) (requiring the production of a privilege log when the agency asserted privilege); *Inst. For Fisheries Res. v. Burwell*, No. 16-cv-01574-VC, 2017 WL 89003, at *1 (N.D. Cal. Jan. 10, 2017) (same).

III. CONCLUSION

For the foregoing reasons, the Court orders Defendants to produce an administrative record. For the purposes of the immediate production of the administrative record for the preliminary injunction motion, the administrative record shall be limited by subject matter, date range, and custodians in the following ways:

By September 13, 2020, Defendants Bureau Director Steven Dillingham and Secretary of Commerce Wilbur Ross and all of their direct reports/subordinates shall file the following, and a privilege log for any privileged documents: All documents comprising the Replan and its various components for conducting the 2020 Census in a shortened time period, including guidance, directives, and communications regarding same. The date range of the documents is April 13, 2020 to August 3, 2020. These custodians can limit their review to documents and materials directly or indirectly considered during these four months.

By September 16, 2020, Associate Director Fontenot, his subordinates, and the individuals engaged with Fontenot to consider and prepare the Replan shall file the following, and a privilege log for any privileged documents: All documents and materials directly or indirectly considered when making the decision to replace the COVID-19 Plan with the Replan. The date range of the documents is April 13, 2020 to August 3, 2020. These custodians can limit their review to documents and materials directly or indirectly considered during these four months.

Plaintiffs' reply in support of their motion for preliminary injunction shall be filed on September 15, 2020.

The administrative record cannot be artificially constrained in time. If the Replan was

informed by the Bureau's prior planning, then such documents must be included. Thus, the Court will consult with the parties on a schedule for the production of the complete administrative record after the Court's ruling on Plaintiffs' motion for preliminary injunction.

IT IS SO ORDERED.

Dated: September 10, 2020

LUCY H. KOH
United States District Judge

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

STATE OF NEW YORK, et al.,

Plaintiffs,

v. 20 CV 5770 (RCW)(PWH)(JMF)

DONALD J. TRUMP, *in his official capacity as President of the United States*, et al.,

Defendants.

----------x

New York, N.Y.
September 3, 2020
10:00 a.m.

Before:

HON. RICHARD C. WESLEY,
Circuit Judge

HON. PETER W. HALL,
Circuit Judge

HON. JESSE M. FURMAN,
District Judge

APPEARANCES (Telephonic)

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U.S. DEPARTMENT OF JUSTICE
OFFICE OF SOLICITOR GENERAL
Attorneys for Defendants
BY: SOPAN JOSHI

(Via telephone)

JUDGE FURMAN: Good morning and welcome. Since the panel is now here, we can get started.

Let me go over a few ground rules before we take appearances. First, this is Judge Furman. Let me ask that if you're not speaking that you mute your line, although remember to unmute yourself if you want to say anything, and I will do the same when I'm not speaking.

I will also try to model this, but I would ask that anytime anyone says anything, please begin by saying your name, just so that the court reporter and the Court know who is speaking and that is clear. There shouldn't be any chimes during our call. In theory, everybody who is on the speaking line should already be here, but if you hear a chime and you're speaking, just pause for a moment so that I can take stock of who has either joined or left, as the case may be, and make sure that everybody is still with us.

A reminder to everyone, whether you're on the listen-only line or the speaking line, that you are prohibited from recording this conference, and a reminder, of course, that it is a public conference as it would be if it were being held in open court.

With that, I will take appearances from counsel, beginning with counsel for the plaintiffs.

Let me start with the governmental plaintiffs.

MS. VALE: Yes, your Honor, this is Judith Vale for the governmental plaintiffs.

JUDGE FURMAN: Good morning, Ms. Vale.

And for the NGO plaintiffs?

MR. HO: Good morning, your Honors, Dale Ho for the non-governmental plaintiffs.

JUDGE FURMAN: Good morning to you.

And finally for the defendants?

MR. JOSHI: Good morning, your Honor, Sopan Joshi for the defendants.

JUDGE FURMAN: Good morning to you and Mr. Ho as well.

All right. With that, unless my colleagues have anything they want to add by way of preliminaries, I think we can get started. As indicated in our order, basically each side will have something in the neighborhood of 20 to 30 minutes. I don't think that we need to set a strict time limit per se, but hopefully we will continue along if it's helpful to us.

We'll begin with the plaintiffs since they filed the initial motion. I think you can probably guess from some of our questions that you should focus in the first instance on the jurisdiction and justiciability issues of standing and ripeness. Those are obviously threshold issues in any event, but if you want to begin by addressing those, I think that would be helpful.

Before you do that, let me check with Judges Wesley and Hall to see if there's anything that they want to say before I turn it over.

Judge Hall?

JUDGE HALL: Nothing for me. Thank you, Judge Furman.

JUDGE FURMAN: And Judge Wesley?

JUDGE WESLEY: No, I'm fine. Thank you very much, Judge Furman.

JUDGE FURMAN: I don't know, Mr. Ho or Ms. Vale, which of you intends to go in the first instance, but I will turn it over to one of you.

MS. VALE: Yes, your Honor, this is Judith Vale for the governmental plaintiffs.

If the Court is amenable, I would like to start with the justiciability issues for the apportionment harms, and particularly with ripeness. And then I will turn it over to Mr. Ho for justiciability issues on the census count harms, including traceability and redressability, and then turn to merits with myself addressing constitutional apportionment claims. And then I will turn it back to Mr. Ho for the statutory claims plus the Courts' questions about scope of relief, and we would also appreciate an opportunity for a short rebuttal on the summary judgment motion.

JUDGE FURMAN: All right. You may proceed.

MS. VALE: Thank you, your Honor. This case is ripe

because plaintiffs are substantially likely to be injured by the categorical and blatantly unconstitutional exclusion of undocumented immigrants from the apportionment base. That likely injury provides standing and constitutional ripeness, and there is no prudential reason for the Court to wait to decide the purely legal questions presented rather than resolving them now and preventing the injury and disruption and uncertainty that will otherwise hang over the apportionment of seats in the House of Representatives and the plaintiffs' redistricting processes.

The memorandum itself makes clear that at least some of the plaintiffs are substantially likely to lose House seats and Electoral College electors by the subtraction of undocumented immigrants from the apportionment base. As the memo says, that is defendants' express intention, to have some states with many undocumented immigrants lose House seats.

And the memo itself predicts that excluding undocumented immigrants will likely result in California losing at least one seat. The same result is exceedingly likely in Texas. Defendants' own predictions are enough for ripeness, but the undisputed declaration of Dr. Warshaw confirms that there is a 98 percent likelihood that Texas will lose a seat, a 72 percent likelihood that California will lose a seat, and a 70 percent likelihood the New Jersey will lose a seat. Defendants have provided no evidence to rebut that, so there is

no issue of disputed fact here about the substantial likelihood of injury.

That's more than enough for ripeness, because substantial likelihood is enough, as the Supreme Court and this Court has made clear in cases like *Department of Commerce* and *House of Representatives*, the latter of which was decided on a summary judgment motion before the census or apportionment had happened. Those cases make clear that a predicted future injury is enough as long as it's substantially likely. You do not need a literal certainty, just enough to have a concrete rather than purely hypothetical stake in the matter.

JUDGE FURMAN: Let me stop you, Ms. Vale. This is Judge Furman.

Number one, do you agree that those harms could be remedied after the President submits his report to Congress, as was the case for instance in *Utah v. Evans*; and number two, are you not ignoring the language in the Presidential Memorandum that directs the Secretary of Commerce to provide information only if it is, quote, unquote, "feasible?" That is to say, we don't yet know whether and to what extent he will provide the information being requested.

MS. VALE: To take the first question first, your Honor, while the plaintiffs think that it is at least possible for the Court to provide relief after January, it's not certain that defendants agree. It seems like there will at least be a

substantial question as to whether and how long it would take defendants to fix the apportionment after the fact, given that they are here arguing that no injunction can be issued against the President at all. Under their theory, it seems like the case cannot be ripe until the President issues his report. But once he does so it is at least unclear how the Court will provide effective relief without ordering the injunction that defendants say is not possible.

But even assuming that it is possible, as we think, to get relief, that's not the standard for ripeness. Even though it might be possible to get relief, there will still be hardship and disruption and uncertainty to plaintiffs and the public because plaintiffs' redistricting processes start right after the apportionment reports go out. The data to the States starts to roll out in February. By statute, all the data has to be out by March, and States can and do start at that point a long process that has many steps that will be disrupted if it turns out that everyone is working off an unconstitutional apportionment.

And by "disruption," I mean for example that States like New York and California have robust public participation processes that are required that involve public meetings in cities and counties all around the State, opportunities for the public to send in maps based on the apportionment that has been done. In New York, the public needs to receive draft maps that

the officials have done. And this is all real work that takes time and resources and is important for the legitimacy of the process.

JUDGE WESLEY: Ms. Vale, this is Judge Wesley. But that's not to say, having once participated in a redistricting process in a former life of the legislature, it's necessarily pleasant and often long and drawn out, but that's not to say that because these things are difficult that they couldn't be done if a court at some point in time ultimately said that the numbers that the Secretary of Commerce propose or identifies to send to the President would constitute *ultra vires* or inappropriate data from which the President could then perform his ministerial functions, would it?

What keeps us from waiting, from a prudential standpoint, waiting until the Secretary of Commerce comes up and says "Okay, Homeland Security tells me there are 1.5 illegal aliens living in so and so," and then isn't it crystal clear to everybody what the nature of the dispute is and whether that number could or could not be used by the President?

MS. VALE: Yes, your Honor, this is Judith Vale. I agree that it might still be physically possible to redistrict again and start the process again if it needs to be changed, but there would be substantial hardship and disruption to the process. And when we're talking about ripeness, especially in

an area like redistricting, which is critical for elections, there's a strong principle in cases like *Purcell* that we should resolve these disputes earlier rather than later before we start getting even close to deadlines because so many stakeholders, including officials and candidates and residents, need more time rather than less, or at least benefit from more time rather than less.

Turning to the issue --

JUDGE WESLEY: Excuse me, this is Judge Wesley again. Did the States identify any injuries to them from the census undercount other than with regard to reapportionment?

MS. VALE: Yes, your Honor. The undermining of the census count itself also harms the State, the undermining that is happening right now because of the memorandum, because States use the census data to do redistricting and for many other things as well.

JUDGE WESLEY: Wait a second. Federal funds with regard to clean waters, federal funds with regard to transportation, highway/bridge repair, all kinds of local aid that goes out from the State that is funneled through the State is premised on census data, isn't it?

MS. VALE: Many things are premised on census data, correct.

JUDGE WESLEY: I don't understand then why the census count isn't a more immediate injury to you as opposed to the

reapportionment.

MS. VALE: I agree that the census count harm is more immediate in time and quite serious because so many things flow from the census count. I will defer I think to my colleague Mr. Ho on some of the issues about the census count harm, but I certainly agree that that is also a very immediate and serious injury that also provides both standing and ripeness, and that needs to be resolved as soon as possible.

And I do want to touch on two other things. Going to Judge Furman's second question about defendants' speculation that they might not be able to do what the President has directed, the possibility that defendants might do a bad job at doing what the President has commanded is not the type of future contingency that can defeat ripeness. The memorandum says, quote, "It is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status." It is not a suggestion to do research about this, it is a final policy and a directive from the President, and defendants admit that they are doing everything that they can to exclude all undocumented immigrants. Dr. Abowd's declaration says that the Census Bureau is working on implementing this right now. Director Dillingham testified to the same in Congress. This is what they want to do, they want to exclude all undocumented immigrants, not a sliver.

Now it is always possible that the government, having

made a final decision, may change course later if it turns out that what they have finally decided to do turns out not to be feasible. That's always a possibility, and it does not undermine ripeness. And the courts have made that clear in cases like *Central Delta* and this Court's decision in *Department of Commerce* where OMB had to review the citizenship question and could have rejected it, could have said we're not doing this. But that didn't undermine ripeness because Secretary Ross had already made that decision. That decision was effected and was being implemented. And the same thing is true here. Even if it's possible that defendants might abandon it if it turns out that they can't do what they want to do, the President has already decided that this is the final policy and defendants are already implementing it.

JUDGE FURMAN: Let me interject. I would say, unless my colleagues have additional questions on this round, I would propose that we shift gears and let Mr. Ho address the census harms.

Let me check with Judge Wesley, any further questions from you?

JUDGE WESLEY: I'm good, thank you.

JUDGE FURMAN: Judge Hall?

JUDGE HALL: Thanks, I'm fine.

JUDGE FURMAN: So with the apologies to you, Ms. Vale, let me turn to Mr. Ho and pick up with the second serious harm.

Go ahead, Mr. Ho.

MR. HO: May it please the Court, Dale Ho on behalf of the non-governmental plaintiffs.

The defendants' policy of excluding undocumented immigrants from the census is causing ongoing injury to the plaintiffs because it is deterring census responses now. By undermining the Census Bureau's core outreach message that everyone counts in the census, that is degrading the quality of census data that's used for a wide variety of purposes, and it's causing our clients, in particular seven immigrant sites organizations, to divert resources to combat these negative effects, resources that could be rerouted to other organizational priorities. These facts establish standing under the Supreme Court's decision in the citizenship question case last year where the Court held that injury due to government action that predictably reduces census responses is traceable back to the government and redressable via an injunction. Not a single justice dissented on that point.

And because these census count injuries are occurring now, we seek immediate relief from this Court. We believe that summary judgment on standing is appropriate, as these injuries are not genuinely disputed given the absence of contrary evidence about the quality of the census count. And for purposes of appellate review, we would also request that this Court further find that if preliminary fact finding is

necessary on these threshold issues that the preponderance of the evidence establishes standing on the basis of this census count injury.

If I could go into a bit more detail, there's really no genuine dispute that the Presidential Memo is suppressing census responses now. There are two reasons why it's doing that. The first is that it communicates directly that census participation is a futile act for undocumented immigrants. And that sows confusion in the broader immigrant community and, as I mentioned, undermines not only the Census Bureau's core outreach message but the outreach work of non-governmental organizations like the plaintiffs on whom the Census Bureau relies to ensure an accurate count. Second, it triggers mistrust in immigrant communities by signaling that lawful status is a component of census participation.

Again, these two reasons that the Presidential Memo undermines census participation are essentially uncontradicted in the record. The former Census Bureau Director John Thompson, who submitted two declarations on our behalf, Exhibits 57 and 66, explains these points in some detail, as well as declarations from our clients. Those are at Exhibits 14, 18, 26, 36, and 43. And I think it's somewhat ironic that the government discounts their testimony kind of with a wave of a hand, given that as Judge Furman found in your Honor's trial decision last year, the Census Bureau itself relies on

organizations like the NGO plaintiffs to ensure a successful census.

And it's not just our clients' testimony. The notion that excluding undocumented immigrants from the census will harm the accuracy of the census is actually consistent with the defendants' own longstanding position going back decades. As far back as 1989, Commerce Secretary Mosbacher wrote a letter to Congress opposing an effort to exclude undocumented immigrants from the census, noting that it would, quote, "jeopardize the accuracy of the census." We neglected to cite that in our brief, but it is referenced in our amended complaint with a hyperlink to the letter at paragraph 171. And just a few weeks ago, former Census Bureau Director Vincent Barabba, who oversaw the 1980 census, testified before Congress that immigrants will be, quote, "less likely to fill out the census because of the Presidential Memo." That's cited in paragraph 173 of our amended complaint.

And the timing for this couldn't be worse. The enumeration period is set to end at the end of this month. So these injuries are occurring now, they're degrading the quality of the census data now, and we need immediate relief from this Court to avoid those injuries.

JUDGE FURMAN: Mr. Ho, this is Judge Furman. Let me jump in and ask you to address the issues of traceability and redressability, which obviously are independent requirements

for standing. The defendants argue that the harms that you're describing are not traceable to the memorandum but rather the misreporting about the memorandum. That is, in essence, the argument.

And number two, particularly to the extent that you're relying on the diversion of resources needed for the NGOs to convey the message that everybody does in fact count, et cetera, would a judicial ruling in your favor actually redress that harm, and would you actually need to spend more when your organizations have to divert even more resource to essentially make sure that everybody was aware of the Court's ruling and that everybody does count?

MR. HO: Thank you for those questions, Judge Furman. With respect to the question of traceability, the Supreme Court explained in *Lujan* that traceability simply requires a causal connection between the government's challenged action and the injury that the plaintiffs are asserting. And as the Supreme Court held in the citizenship question case last year, the predictable effect of government action on the decisions of third parties is traceable back to the government. There was a citizenship question which predicably reduced census participation. Here it's the decision to exclude undocumented immigrants. Again, that's a predictable outcome of the government taking an official position that census participation for undocumented immigrants is a futile act

because the core purpose of the census, the apportionment of political representation, the participation of undocumented immigrants will ultimately be irrelevant to that core constitutional function of the census. It not only communicates futility to them, it creates confusion in the broader community about whether or not census participation is actually required for everyone, because the Census Bureau's core message has been everyone counts in the census unequivocally, categorially, and now there's a lot of widespread confusion about that.

I don't think that's because of media misreporting, but even if this Court were to determine that there were other factors that were contributing to the effect of the Presidential Memo on census responses, that wouldn't destroy traceability. As your Honor put it in your trial decision, even in a dry season it is fair to trace the fire to arsonist. The Presidential Memo is undoubtedly the cause of the reduction in census participation that our clients testified about in their declarations, and that's supported by not just the former Census Director John Thompson's declaration, but also the declaration of political scientist Matt Barreto, on whom we relied at trial last year.

If I could turn to your second question, these injuries are also redressable here. In order for a plaintiff to establish redressability the Supreme Court explained in

Larson v. Valente that the relief requested will remedy, quote, "an injury to the plaintiff, not every injury to the plaintiff."

And two basic facts establish redressability here. First, as Former Bureau Director Thompson testified, enjoining the Presidential Memo would mitigate its damage and, quote, "improve the effectiveness of census outreach efforts." That's in his supplemental declaration at Exhibit 66. And then the supplemental declarations of three of our clients, Exhibits 62 through 64, all indicate that if their outreach were made more effective because of an injunction against the Presidential Memo, that would free up significant time and resources that could then be rerouted to their pre-existing organizational priorities, such as Covid relief.

Now these facts, they're not genuinely disputed by the defendants. There isn't any evidence that the defendants have put in, for example, that the Presidential Memo is having no effect on census outreach efforts. And I think that's telling. The Census Bureau represents I think repeatedly throughout litigation that the decennial census is the largest peacetime mobilization of federal personnel that the country engages in. There are census takers all throughout the country right now and field operation supervisors out there. And it's I think telling that not a single one of them has submitted a declaration saying that the Presidential Memo hasn't affected

their work in any way. The only thing we have is a declaration from Mr. Lamas who says that the Census Bureau isn't changing its operation in any way in response to the Presidential Memo. But I think that only shows precisely why what the Census Bureau is doing right now is inadequate to mitigate the damage of the Presidential Memo because they're not doing anything to account for the deterrent effect that the memo is having.

JUDGE HALL: Mr. Ho, this is Judge Hall. Could you address, for me at least, why the burden that the NGOs have taken on with respect to the census, which are causing them now as a result of the memorandum as alleged and supported by data, causing them to do more work, why that isn't a self-imposed burden?

MR. HO: Thank you, Judge Hall.

JUDGE HALL: Why they couldn't just shift their resources anyway to deal with Covid cases and those sorts of things.

JUDGE FURMAN: Mr. Ho, hold on one second. This is Judge Furman, and let me just add to that the following question, which is: Could we rely solely on the diversion of resources, a *Havens Realty* theory of standing, if you will, in the wake of *Clapper*, or does *Clapper* not stand for the proposition that the expenditure of resources is a self-inflicted harm unless it is intended to prevent a harm that would itself constitute Article III injury?

MR. HO: Thank you, Judges Hall and Furman. If I could start by addressing Judge Hall's question, the notion that the diversion of resources to account for the deterrent effect of the government's action on census responses, the notion that that is a form of self-inflicted injury. I think the Supreme Court's decision in the citizenship question litigation last year forecloses that particular argument. Advocacy on behalf of immigrants and immigrant communities is a central core aspect of our clients' missions. That work has been made harder by virtue of the government's action. And under *Havens Realty*, the diversion of resources from other organizational priorities in order to account for the negative effects of government action, that's cognizable injury and it's not deemed self-inflicted.

In response to your question, Judge Furman, about whether or not *Clapper* changes the equation there, I don't think it does. *Clapper* did not overrule *Havens Realty sub silentio*. I think what *Clapper* is best understood as stating is that resource diversion is not a cognizable injury where it's in response to a speculated or assumed harm. In *Clapper*, the plaintiffs didn't know whether or not they were actually being surveilled by the government, they simply assumed that they were and diverted resources to try to account for that.

Here, by contrast, there isn't any speculation about the need for resource diversion, and there are two reasons why

that's the case. The first is that the deterrent effect on census responses is happening now. It's being observed now in the communities where census outreach is happening. It's not something that is speculated or assumed. And second, the government's policy is not speculated or assumed, it's unequivocal and categorical that the policy of the United States is to exclude from the apportionment base aliens who are quote, "not in lawful status under the INA," and it's being implemented now, as the government's own submissions indicated.

And I think in response to the third bullet point from the Court's order as to whether or not the underlying harm for which the plaintiffs are diverting resources, whether or not that underlying harm itself must be sufficiently imminent and impending to satisfy Article III requirements, I don't think it does, because as Judge Furman noted in your Honor's trial decision last year, it would be illogical to recognize that organizations may be injured and have cognizable standing by virtue of expenditures, but only in cases where that would be superfluous because they're also suffering a separate underlying injury which itself satisfies Article III requirements.

Organizational plaintiffs asserting *Havens Realty* standing have never been required to do that. The plaintiffs in *Havens Realty* itself did not suffer an underlying cognizable injury for which they diverted resources. That case I believe,

as I'm sure the Court recalls, was a case about housing discrimination. The plaintiffs themselves did not suffer from housing discrimination but they were first forced to divert resources in order to respond to a pattern of housing discrimination in their community. And the Supreme Court held and has not since departed from the holding that that kind of resource version is cognizable, it's traceable to challenged conduct, and it's redressable by an injunction blocking that conduct.

JUDGE WESLEY: Mr. Ho, this is Judge Wesley. In light of your answer there, where do we look and what assurances do the NGO plaintiffs make with regard to the fact that an injunction would somehow remedy the situation and thwart the undercount in any significant way? And how significant need it be for it to meet the test of redressability?

MR. HO: Well, I don't think there's a bright line that the Court can point to below which a certain percentage of the injury would somehow defeat standing. I would just look to Supreme Court's language in *Larson v. Valente* that as long as an injury to the plaintiff is remedied, that establishes redressability. We don't have to redress every injury to the plaintiff. In *Larson* the plaintiffs were religious organizations who challenged one of several requirements to obtain a religious organization exemption from certain governmental reporting requirements. The defendants argued

look, if the court enjoins one of these requirements, the plaintiffs will still have to satisfy all of the other ones. There's no guarantee they will be able to do that, they may end up in the same place as a practical matter even after relief is ordered. And the Supreme Court held: Look, that doesn't defeat redressability. Their job is now easier, and they may not ultimately obtain the religious organization exemption, but it will be easier for them to do so and that is meaningful relief.

And I think the same holds true here. We have uncontroverted testimony from a former director of the Census Bureau who says census outreach will be made easier if this Court issues declaration that it is unlawful under federal law to exclude undocumented immigrants from the census count. And we have three declarations, the supplemental declarations that I mentioned earlier at Exhibit 62 through 64 from three of our clients, FIEL in Texas, Make The Road in New York, and ARI in Southern California, all of them stating that if their census outreach efforts could be more effective in the remaining non-response follow-up period that would not only help them advance their organizational missions but it would free up a significant amount of staff time and resources which they could then reroute to their existing programmatic work.

JUDGE FURMAN: Thank you, Mr. Ho. Unless my colleagues have any other questions, I propose that we move on

to next area, which I think is the merits.

But let me check, Judge Wesley, anything from you?

JUDGE WESLEY: No, thank you very much.

JUDGE FURMAN: Judge Hall?

JUDGE HALL: Thank you, I'm fine.

JUDGE FURMAN: All right. So I think Ms. Vale had said that she was going to address the constitutional issues, if I remember correctly.

MS. VALE: Yes, Judge Furman, I will. If I could add just one new thing on the census count harm that I just want to stress, which is that it is not just diversion of resources that is a harm from the census count harm, but also, as Judge Wesley was suggesting, much funding for many, many programs with federal funding comes from the census count, and that flows through the states and then to the counties who are plaintiffs here. And the census data is also used for redistricting. So there are severe harms that do come from the census count in addition to diversion of resources, and that injury is shown through the detailed declaration that defendants have not even tried to capture.

JUDGE FURMAN: This is Judge Furman. Let me ask you a question on the merits, sort of threshold question, which is that both sides have focused on the constitutional claims and arguments, but shouldn't we first look at the statute? And if we can decide the case on statutory grounds without needing to

reach constitutional issues, shouldn't we do that?

And to the extent there is any doubt about how to construe the statute, should the doctrine of constitutional avoidance not play some role?

MS. VALE: Yes, your Honor, this is Judith Vale. Certainly if the Court thinks that excluding all undocumented immigrants -- I might agree that it does, that that is another basis to invalidate this memorandum, but we don't think that the principle of constitutional avoidance holds that much sway here for a couple of reasons. One is, as mentioned before, because we are talking about something as important as redistricting that affects elections, there is also a strong legal principle that those decisions should be decided early and that we shouldn't wait or hesitate to resolve issues that affect something like elections. And I think that principle sort of counteracts constitutional avoidance here.

And we don't think this is a difficult constitutional question. We think that the categorical exclusion of undocumented immigrants who undisputedly live here blatantly violates the Constitution and the Census Act. As this Court said in *Department of Commerce*, the Constitution requires the apportionment base to include every single person residing here, whether living here with legal status or without. And that command in the Constitution is crystal clear from the terms of the 14th Amendment which requires the inclusion of the

whole person of numbers in each state, and more than 200 years of history, practice, judicial precedent, including the *Evans* decision and defendants' own representations in past litigation.

Defendants simply have no authority, no discretion to subtract millions of undocumented immigrants even though they have every indicia of usually residing here. They in fact do live here most of the time. They have done so for a long time. For example, DHS estimated that in 2015 9.6 million undocumented immigrants have lived in the United States for more than ten years. Millions of these undocumented immigrants intend to keep living here, and in fact will keep living here, even if defendants wish that it were otherwise.

And defendants themselves are going to make the essentially factual finding under the residence rule that millions of undocumented immigrants do usually reside here, and they are going to count them in the actual enumeration because they usually reside here. And the memorandum is directing defendants to simply ignore all of that, simply disregard that millions of undocumented immigrants usually reside here, ignore that, even though it is the lodestar of the 14th Amendment and apportionment, and subtract them based solely on their undocumented status. And that is just blatantly --

JUDGE FURMAN: Let me interrupt, this is Judge Furman. Could you address the defendants' argument that you are

bringing a facial challenge, and as such that you have to demonstrate that it is unlawful to exclude essentially all categories of illegal aliens, including, for instance, illegal aliens apprehended at the border who are being held in detention pending removal? Do you agree with that, and if you don't, do you have authority that would support your proposition on that front?

MS. VALE: We don't agree with that characterization of this case at all. I think that characterization of this sort of facial challenge is really getting this case precisely backwards. We are challenging the memorandum that exists, and the memorandum that exists says that it is the policy to exclude all undocumented immigrants based on their lack of immigration status. That is the action of the government that is challenged here.

And so it is defendants that have to somehow justify that categorical exclusion of everyone, including undocumented immigrants who undisputedly live here. The memorandum is not remotely targeted at folks who are physically crossing the border on census day or who are in a car being transported back over the border on census day. That is just not what this case is about. And those kinds of sort of fringe hypotheticals, I think it's no accident that what they're really talking about are folks who, when maybe there is a serious question as to whether they usually reside here, there could be a question as

to whether someone who arrives yesterday usually resides here. But those kinds of questions exist for folks who are undocumented, who are legal permanent residents, or who are citizens. And this case is not about that, because even defendants agree they are going to decide that millions of undocumented immigrants do live here. They usually reside here and they are going to count them and then they're going to exclude them anyway.

So that is what this case is about, and these fringe examples I think are really a red herring and get this backwards. What the memorandum is doing and declaring is directing the defendants to do what the framers forbid. The framers were very purposeful in requiring apportionment be based on living here, on your usual residence, on your abode, and you cannot ignore that and exclude people based only on a legal status that doesn't have anything really to do with whether you usually reside here or not.

And I would like to touch --

JUDGE FURMAN: This is Judge Furman. I was going to check if Judge Hall or Judge Wesley have any questions, and otherwise propose that we give Mr. Ho a little time to address the statutory arguments.

JUDGE HALL: Not me, I'm good.

JUDGE WESLEY: No, that would be fine, thank you.

JUDGE FURMAN: All right. Mr. Ho, why don't you turn

to the statutes then.

MR. HO: Thank you, Judge Furman. Dale Ho for the non-governmental plaintiffs.

13 USC 141 and 2 USC 2(a) set forth an interlocking statutory structure governing the census and congressional apportionment. The defendants have violated this statutory scheme in two distinct respects. First, the statutes require including the total population and the whole number of persons in the apportionment base. That includes undocumented immigrants, and defendants' arguments to the contrary just torture the plain language of the statute.

Second, the statutes require using the decennial census for apportionment, which in 2020 undisputedly includes undocumented immigrants. That is, even if defendants were correct that *ex ante* they have some discretion to exclude certain populations of undocumented immigrants from the census, this particular census does not exclude undocumented immigrants, and defendants are under a ministerial duty to use the actual census for purposes of apportionment.

If I could address that second argument for a moment, the text of Section 141(b) clearly provides that the Commerce Secretary in his report to the President must use, quote, "total population for the apportionment," and that calculation must be based on the decennial census. Section 2(a) provides that the President's report to Congress must similarly use the

whole number of persons ascertained under the decennial census.

Now the legislative history to 1929 Census Act I think makes very clear that once the census is complete there can only be, quote, "one mathematical answer." That's from the Senate report. So once the census is complete, the President does not have discretion *ex post* to manipulate the census data to his liking, add or subtract other kinds of data from the census count and use different kinds of calculations to arrive at a different apportionment number. The statutory and constitutional function of the enumeration is that it is used for apportionment, and if the President could simply revise or alter the census results and adjust them as he sees fit after the census is complete, there's no real limit on what he can't do, as I think Justice Thomas' separate opinion in *Utah v. Evans* goes to some length to explain why granting the President that kind of discretion would be problematic.

To Judge Furman's first question about I think resolving this case empirically on statutory grounds, the Court could certainly look at the statutory claims first. We do think, given the exigencies here and the likelihood of quick appellate review if this Court were to rule quickly, that for purposes of completeness of the record and to facilitate appellate review the better course would be to resolve both sets of claims, the statutory and constitutional ones.

JUDGE FURMAN: All right. Why don't we spend a few

minutes on the remedies and then we'll hear from defendants, unless either Judge Hall or Judge Wesley have a question on the statute.

So Judge Wesley?

JUDGE WESLEY: No, thank you.

JUDGE FURMAN: Judge Hall?

JUDGE HALL: Nothing here, thank you.

JUDGE FURMAN: All right. So I can't remember who was planning to address the remedies questions, but let me start by posing a question and whoever is addressing it can answer, which is assuming that we agree with you on jurisdiction and the merits and intend to grant some relief, do we need to address the question of whether such relief would need to extend to the President or would it not suffice to enter an injunction barring the Secretary from sharing the information with the President that he's directed to share in the memo?

And then let me actually throw out a second question that you can address in the meantime. Defendants argue in a footnote in their brief that such an injunction would violate the opinions clause of the Constitution. Could you address that as well?

MR. HO: Thank you, Judge Furman. In response to your first question, we would agree that effective relief is possible even without relief against the President, that this Court could order an injunction which enjoins the other

defendants in this case from taking any action in furtherance of the Presidential Memo's policy of excluding undocumented immigrants from the census. That would provide us with effective relief, but we do think that the better course would be to order relief against the President. Declaratory relief I think, for example, is available under Second Circuit precedent under the *Knight Institute* decision affirming declaratory relief against the President.

And with respect to injunctive relief, I would just simply say that the defendants don't deny that if the President's duties here are in fact ministerial, then an injunction would be proper, and we think that the duty that the President has that we're asserting he's violated are in fact ministerial. There is a constitutional requirement to include all people living in the United States. The President has no discretion to depart from that. And there's a statutory duty to use the census numbers for purposes of apportionment, which the Supreme Court in *Franklin* noted is a, quote, "admittedly ministerial task." So we think that relief against the President is available, and we think it would be the better course to sort of ensure the finality of relief that's effective.

To your second question, Judge Furman, I think this case could be different if the President's Memo had simply directed the Census Bureau to conduct a research assignment,

tell us how many undocumented immigrants or non-citizens there are in each state. But that's not what has happened here. What happened here is the President has declared an official policy of the United States which is unequivocal and in direct contravention of the Constitution and statutory requirements. And in that circumstance, the work that the defendants, including Congress and the Census Bureau are undertaking in furtherance of that memo, are properly enjoined. It could be a different story with a different kind of directive from the President, but that's just not the case that we're presented with here.

JUDGE FURMAN: All right. Thank you.

Unless Judge Hall or Judge Wesley want to ask anything, I think we can switch to defendants. Judge Wesley?

JUDGE WESLEY: Thank you very much.

JUDGE FURMAN: Judge Hall?

JUDGE HALL: Thank you. We're ready to switch to defendants.

JUDGE FURMAN: All right. So Mr. Joshi, if you want to pick it up and start with the issues of standing and ripeness, please.

MR. JOSHI: Thank you, Judge Furman, and may it please the Court.

The Court should dismiss this case at the outset because plaintiffs don't have standing for any of the injuries.

So let me just take them in order. I think the apportionment injury is not imminent or even ripe for review because the memorandum asks the Secretary to transmit information and a second set of numbers, if you will, to the extent feasible and the maximum extent feasible. And the Secretary has not yet determined what is feasible or presented any information breaking down what categories of aliens who don't have lawful status under the INA could be accounted for and excluded from the enumeration that would serve as the apportionment base.

In fact, I think plaintiffs in their complaint, and I am looking here at paragraph 175 to 179 of the NGO plaintiffs, amended complaint 137 to 141 of the governmental plaintiffs --

JUDGE WESLEY: Mr. Joshi, this is Judge Wesley. Are you shuffling papers?

MR. JOSHI: No, I'm not.

JUDGE WESLEY: Someone is shuffling papers. If you could stop.

JUDGE FURMAN: Judge Furman here. Just a reminder, if you're not speaking -- and Mr. Joshi should be the only one speaking at the moment -- place yourself on mute, please.

MR. JOSHI: Thank you, this is Sopan Joshi again.

So I think plaintiffs in their complaint have actually alleged that it will prove completely infeasible to count and exclude such aliens, in which case the two sets of numbers the Secretary will present will be the same and there will be no

apportionment injury at all. So in some ways --

JUDGE WESLEY: Mr. Joshi, this is Judge Wesley. I don't know that that will deter the Secretary of Commerce. It may present a difference of opinion with regard to whether the numbers are in any way reliable, but isn't the law issue a little bit more distinct already? What is indefinite about the posited intent to exclude illegal aliens from the delivery of numbers to the Congress? It's the policy of this administration. What is indefinite about that? What's so indefinite about that?

MR. JOSHI: So your Honor, I think what is indefinite --

JUDGE WESLEY: It sounds definite to me.

MR. JOSHI: I'm sorry, I didn't catch that last part.

JUDGE WESLEY: I said it sounds definite to me.

MR. JOSHI: So the memorandum by its own terms and the policy by its own terms is to exclude such aliens, quote, "to the maximum extent feasible and consistent with the discretion delegated to the executive branch." So the memorandum statement of policy is itself self-limiting, and it includes a condition of feasibility that the Secretary needs to determine first.

JUDGE WESLEY: Let me ask you this: Is it your view that the Secretary could get a number from the Department of Homeland Security as a number of people currently subject to

orders of removal in which their appeals have been exhausted from the Bureau of Immigration appeals and/or any petitions before the circuits, and that number of people, those people still remain in the United States, could the Secretary get that number and then deliver it to the President?

MR. JOSHI: So my understanding is yes, under the Executive Order 13880.

JUDGE WESLEY: And in your view, that would not violate Section 2(a), is that your view?

MR. JOSHI: So 2(a), we think the substantive standard encompassed in 2(a) is identical to the constitutional standard.

JUDGE WESLEY: So your answer is no, it doesn't violate it then, is that it?

MR. JOSHI: If hypothetically that were what were done then that may well be the case. I think our point on standing --

JUDGE WESLEY: Stick with me on the question for a few minutes, Mr. Joshi. Is it your view that that would not violate Section 2(a)?

MR. JOSHI: Yes, that would be a proper exercise of executive discretion to --

JUDGE WESLEY: So let me ask you this: Have you been in touch with the Secretary of Commerce to determine to what extent he has at the present time formulated methodologies with

regard to counting and those other agencies that he's contacted persistent to the President's directive?

MR. JOSHI: The Secretary of Commerce has not yet stated what he will or --

JUDGE WESLEY: I didn't ask you that question. I asked if you have been in touch with him before this oral argument to determine how far along that was such that you could report to this Court how much more definite the Secretary was with regard to his ability to fulfill the order of the President?

MR. JOSHI: So we have been in touch with the Commerce Department but we have not received any definite information as to what will or won't be feasible at this time.

JUDGE WESLEY: You received no information -- you're telling me right now as an officer of this Court you have received no information with regard to any particular set of figures that the Secretary proposes to deliver to the President?

MR. JOSHI: That is correct. As I stand here today I have not received that.

JUDGE WESLEY: All right. Thank you.

MR. JOSHI: And I think, given that uncertainty, we think the dispute right now isn't ripe because we dispute plaintiffs' characterization of the memorandum as being --

JUDGE WESLEY: Well, this is Judge Wesley again. Did

you receive an estimate as to when you might receive that information?

MR. JOSHI: No, I have not, your Honor.

JUDGE WESLEY: Did you ask? The issuance of the order is the person who determines the definiteness of this, according to your theory. It's kind of easy to hide the ball, isn't it?

MR. JOSHI: Fair enough, your Honor, but I point out the Supreme Court's decision --

JUDGE WESLEY: The uncertainty can't be self-induced, can it?

MR. JOSHI: Well, it can, in this sense, and let me explain, if I might: The Supreme Court in *Franklin* made very clear that the Secretary could deliver numbers for the very first time at the deadline, December 31st, and the President could turn around and say, "No, I disagree. I have a policy disagreement with whom you decided to count or not count in this enumeration, go back and redo the numbers."

JUDGE WESLEY: I will absolutely give you that, Mr. Joshi. In fact, quite frankly, I agree with you. But what about the census count itself, and what about the immediate effect with regard to the diminution in the overall numbers and the effect that that then has on agent localities, the types of injuries that flow from that you yourself, your side doesn't even contest?

MR. JOSHI: So I dispute that we don't contest it. So if we're moving to the census count injury, I think first and foremost it is simply not traceable or redressable under *Clapper*. As even the citizenship question case last year and even right now I think we all agree that that census count injury would have to be traceable to the memoranda. And so it's incumbent on plaintiffs here to identify some subset of people who would not have been chilled and were not chilled from answering the census between April 1st and July 21st, then became chilled on July 21st after the memorandum was issued, and then will be unchilled in the next 27 days by an order of this Court that the government would vigorously contest and that would remain reviewable on appeal.

JUDGE HALL: This is Judge Hall. How many people have to be unchilled in order for your hypothetical or your discussion to bear fruit and provide standing? One? If the plaintiff showed one person was, "Ah-hah, I read this and now I will answer the census," is that enough?

MR. JOSHI: It would have to to be non-speculative, whatever the number is.

JUDGE HALL: One seems to be pretty non-speculative.

MR. JOSHI: But you would then, I would assume, have to identify it and provide a reason and make sure that that is actually fairly traceable to the memoranda. It can't just be self-inflicted, as I think *Clapper* tells us. And *Clapper* also

tells us that governmental actions that don't directly, quote, "regulate, constrain or compel any action" are simply not the source, as a matter of law, as being the fairly traceable source of an alleged injury.

JUDGE FURMAN: This is Judge Furman. Didn't you effectively make and lose that argument in the citizenship question litigation, that is to say, the theory of harm in the citizenship question litigation was that people would not respond to the census out of essentially fear that their identities would become known to the government. That was based on a misunderstanding or a misimpression that census responses and census data would be available to immigration authorities or the like, that is to say it was premised on a misunderstanding. Yet both I and the Supreme Court found that because there was a predictable effect on the third parties that ultimately caused harm to the plaintiffs that that sufficed for standing. So why does that argument not hold here?

MR. JOSHI: For two reasons, Judge Furman. First is that I think in that case it was still the question was: Is it traceable to the citizenship question's inclusion on the form? Here it's: Is it traceable to the memoranda? And the difference between those two is that the census count injury right now is happening in the middle of the census. So you would have to show someone who was not chilled from April 1st

to July 21st and then became chilled, and then on redressability would become unchilled in the next 27 days, even though the order would still remain reviewable on appeal. That's the difference.

JUDGE FURMAN: Let me interrupt for a second. The President made the decision to wait until July 21st to issue this memorandum. If he had issued it on March 30, prior to census technically beginning altogether, would you still be making this argument, or is this argument essentially dependent on the fact that the President, for whatever reason he may or may not have had, waited until the census was near over? And indeed, the Census Bureau decided to shorten the period of the census. So in other words, can it be that the President's decision to essentially truncate the amount of time that is remaining with this memorandum in place, that that undermines the ability of the plaintiffs to challenge this?

MR. JOSHI: I will directly answer that question, but let me just recite the premise a little bit. Under *Franklin* he could have done this in the ten days between December 31 and January 10. In fact, I would say it was laudable this was announced in advance and allows the Secretary to do work in a less expedited timeframe. And *Franklin* makes clear that that's a perfectly permissible way to go.

JUDGE FURMAN: Mr. Joshi, that's not what he did, and also had he done that, had he waited until October 1st when the

census is technically over, there would have been no argument that this could affect the ongoing census count itself. Instead, he made the decision to issue this memorandum with essentially only one month remaining, but time remaining nonetheless. So we're now confronted with declarations that say this is having a demonstrable effect on the ongoing census count. You haven't countered those declarations. You didn't ask for a deposition of those witnesses. Are we not required, in essence, to rely on that, that it is having ongoing harm?

MR. JOSHI: No, for two reasons. One, to answer your earlier question, I think we would be making the same traceability argument in the sense that there's a meaningful difference here between someone who looks at the citizenship question and being asked to answer it, and then as a result chooses not to answer the question and to throw away the form, and someone who is looking at the census form and is concerned about an entirely different document that deals with post-processing of the census data.

But to your second question, in terms of the declarations, I do think we have evidence in the record. Dr. Abowd's declaration helps us in two ways: Number one, on the summary judgment posture, if that's what you're considering right now, you have to take the facts in the light most favorable to us. And two, Dr. Abowd's declaration makes clear that when the census citizenship question was actually put to

the test by the bureau, and plaintiffs' experts don't even address this study, it showed no statistically significant decrease in response rates. So we think if you take that in the light most favorable to us *a fortiori* the memorandum, which is not even on the census, it's a completely separate statement of policy, will not result in a substantial decrease in non-response rate, which then shows that the census count injury won't occur and is not traceable to the memorandum.

And of course I think as your Honor's questions earlier on the diversion of resources under *Clapper* suggest, we agree that you can't have a self-inflicted diversion of resources injury if that diversion of resources are not intended to counter something that is itself not a cognizable injury. And here, as the census count injury is not cognizable because it's neither traceable nor redressable, so too the diversion of resources falls with it.

JUDGE FURMAN: This is Judge Furman. Let me follow up on that particular point. Would that not render *Havens Realty* essentially a dead letter or a null set? That is to say, how could one ever have organizational standing by virtue of the diversion of resources in the absence of another form of injury that would itself suffice for standing purposes?

MR. JOSHI: I don't think so, your Honor, for a couple of reasons. One, it's not that you have to have suffered the other injuries, it's that the other injury, had it

materialized, would be cognizable, so hence the diversion. You're not penalized for having prevented that. And I think that's the principle that *Clapper* was getting at. It doesn't undermine *Havens* because remember in *Havens* they had already suffered the injury and then they were expending resources to try to prevent the additional suffering of the injury, including the informational injury in *Havens*. So *Havens* is perfectly consistent with *Clapper*, and both of those cases together do not support a diversion theory here.

Now if I might move on to -- I think that addresses the standing and the ripeness issue, so I will move on to the merits unless there are further questions on it.

So on the merits we're considering, of course, both plaintiffs' summary judgment motion and our motion to dismiss. So at the threshold, which I think is proper to start with, we believe all the claims against the President and all of the APA claims should be dismissed under *Franklin*; the APA claims because there's no final agency action yet and the President is not an agency, and then the claims against the President I suppose we can talk about later in the relief, but under *Mississippi v. Johnson* and under *Franklin* there simply can't be the sort of relief against the President in the conduct of his official act.

JUDGE FURMAN: Mr. Joshi, could I interrupt and ask you: Can you address the facial challenge question? In your

brief you argue that it's the plaintiffs' burden to demonstrate that, in essence, any or every illegal alien who would not be counted, that that would be unlawful. Doesn't that get it backwards, as Ms. Vale said? Isn't the question whether there's anyone under the President's memorandum who would be excluded who it would be unlawful to exclude; and if there is, then the memorandum is either in violation of the statute or the Constitution?

MR. JOSHI: With respect, I disagree, as you might have expected. The memorandum itself is self-limiting. It says to the maximum extent feasible and consistent with the discretion delegated to the executive branch. And so as I said when we were discussing ripeness, plaintiffs' choice to challenge it right now means they have to show that if the Secretary were to find it feasible to exclude only those aliens without lawful status who have been paroled while waiting for their removal to be effectuated, if that's all he finds then that would be the question before the Court, whether that is consistent with the discretion delegated to the executive branch. By bringing the challenge now before we know what is feasible and what the President has determined is within the extent of his discretion, they are bringing a facial challenge, and they have to show that there would be no set of such alien whom the President could exercise its discretion to exclude from the apportionment base if the Secretary were to find it

feasible.

So it really is a facial challenge, and I think *Texas v. United States* is most on point. There Texas passed a statute and what they wanted was to say: Look, which way we apply this statute, there would be no circumstances under which it would affect voting, and therefore we don't need Section 5 preclearance for it. And the Supreme Court said: No, we're not going to evaluate that right now, because I think the quote was, "We don't have sufficient confidence in our powers of imagination to affirm such a negative, and that the operation of the statute is better grasped when viewed in light of a particular application." So too here, we need to first see the application of this memorandum, we need to see what the Secretary finds is feasible and then see exactly what the President then excludes from the apportionment base. And then you will have an actual target, an actual application to evaluate. So I disagree.

JUDGE FURMAN: On the merits -- this is Judge Furman -- the Court has repeatedly looked to history in forming its understanding of constitutional provisions and, for that matter, statutory provisions. Can you identify any historical instance where the executive branch or the legislative branch or the judicial branch, for that matter, had taken the position that it would be lawful to exclude illegal immigrants from the census count or the apportionment base?

And I would note I think the Department of Justice took the position that it would be unlawful in the 1980 *FAIR* litigation. In the *Ridge v. Verity* litigation in 1989 there is a six-page fairly thorough letter from an assistant attorney general in the Department of Justice in 1988 commenting on a bill that would have excluded illegal aliens from the reapportionment count and explicitly took the position that would be unconstitutional. There was a 1989 letter when the current Attorney General was the assistant Attorney General for the Office of Legal Counsel reaffirming that position. There's an opinion of the Senate legal counsel in 1929, the year that Congress passed the sort of modern Census Act, stating that it would be unconstitutional. Is there any instance, any support for the proposition that you are pressing here today in the historical record?

MR. JOSHI: We have not been able to identify any. But in *Franklin* there was a nearly unbroken 180-year history of not including service members in the count, and nevertheless Secretary Mosbacher made a different determination. And he did so in the wake of at least nine bills that had been presented in the 100th and 101st Congresses proposing to include such service members, none of which made it very far. And nevertheless, he exercised his discretion to do so, and the President agreed, and the Supreme Court upheld that decision.

In this case I think what we point to is the original

meaning of "inhabitants" and the legal concept of "usual residents" that the Supreme Court has explicated that we say could be read, and in fact is most fairly read to exclude aliens who don't have permission to stay and settle in the country, that's the definition of "inhabitant," or who don't have enduring ties because they could be removed at any time by the sovereign.

On the other hand, I agree with you, plaintiffs' best argument is history, and that cuts the other way. But I think in the end when you compare those two together what it really means is that the concept of persons in each state or inhabitants or usual residents or those with allegiance or enduring ties, all of these concepts are not particularly well defined and therefore leave a considerable amount of room to the executive to exercise his discretion.

Now the fact is the executive did not exercise that discretion in the way that the memorandum here is exercising it, but that doesn't make the exercise unlawful. There's no laches on executive discretion or, for that matter, congressional discretion over defenses. Of course the executive branch's nearly unlimited discretion -- to use the phrase in *Wisconsin* -- over the census operation is by delegation from Congress. And Congress, of course, can take back that delegation in whole or in part, temporarily or permanently, at any time. So if this memorandum -- if the

President acts in accordance with this memorandum and delivers the apportionment to Congress on January 10, they can disapprove it. They can pass a bill and they can exercise the discretion that the Constitution grants them.

JUDGE FURMAN: Mr. Joshi, this is Judge Furman. Hasn't Congress already exercised that discretion in US Code Section 2(a), that is, by directing the President to use the whole number of persons in each state, quote, "as ascertained under the decennial census of the population" to determine apportionment? And by definition isn't it the case that if the President uses anything other than the number given to him pursuant to the residence rule, that is, subtracting any category of illegal immigrant from that number, isn't it by definition not consistent with that statute?

MR. JOSHI: No, for several reasons, and let me walk through them, if I might. First, the substantive standard in 2(a) simply echoes the constitutional text, and I think it would be a mistake to read it as being anything different from the constitutional text, as far as the substantive standard.

As far as like whom to count, I think, with respect, that just begs the question here, because remember in *Franklin* the Supreme Court was very clear that the enumeration, the thing that is the enumeration used to calculate the apportionment is not final until the President says it is. And so if you think about a case like *Franklin*, if the Secretary

delivers the census result that counted all the people he thinks should have been counted to the President, and the President turns around and says, "No, I disagree" -- so let's say Secretary Mosbacher in *Franklin* had submitted a census that included the overseas service members -- as he did, in fact -- and then had President Bush turned and said, "You know what? I disagree with that policy. I'm going with what we have done for 180 years, with very few exceptions, I don't want to include them at all," Secretary Mosbacher would have gone back within those ten days, subtracted those service members, sent the new results back to the President, and he would have used that in the apportionment. That's exactly what is happing here. So it begs the question to say you're taking the --

JUDGE WESLEY: Mr. Joshi, there's a significant difference though. The Secretary had made the allocation determination and had counted service members and decided where they were to be counted under the census. Here, the stated policy is to draw a number outside of the census from data not collected by the census itself and reduce the allocation as determined by the census. This is not the President disagreeing with some data that is within the census, this is the President reducing the census. The census does not count illegal aliens, does it?

When I filled out my questionnaire, it didn't ask me if I was an illegal alien.

MR. JOSHI: No, I don't understand --

JUDGE WESLEY: This is completely different. This isn't *Franklin v. Massachusetts*, and I wonder why we have to wait. The stated purpose is to draw a number outside of the census and take it from the number that is produced by the Secretary. It's not a disagreement with what the Secretary provides to the President and then an alteration by the President. He can do that, I agree with you, that's *Franklin v. Massachusetts*, and it's not ripe until he makes that decision. This is the stated policy that illegal aliens are not to be counted, and yet they are counted, and now the President is trying to find a way to take them out of the number, but not from the data collected by the Census Department, correct?

MR. JOSHI: No, I don't agree with that.

JUDGE WESLEY: Where is he getting the data from? Where's he getting the data from? He's not getting it from Census Bureau data, is he?

MR. JOSHI: With respect, your Honor, the Census Bureau maintains and gets administrative records that Congress has directed that they do to the maximum extent possible.

JUDGE WESLEY: Just answer my question, with respect, please. Is the Census Bureau maintaining records in the allocation and enumeration of illegal aliens?

MR. JOSHI: It is attempting to collect the

information.

JUDGE WESLEY: I didn't ask you that, I said: Is it maintaining records? I'm not asking whether it's asking other agencies. Did it count illegal aliens as part of the census?

The answer is yes.

MR. JOSHI: So far, yeah.

JUDGE WESLEY: Right. Because they didn't ask anybody if you were an illegal alien, did they?

MR. JOSHI: Correct.

JUDGE WESLEY: So now they're looking to figure out if there's other data outside of the census to provide to the President from which he could then deduce that there are illegal aliens within the census count, is that correct?

MR. JOSHI: That is correct.

JUDGE WESLEY: And that is not *Franklin v. Massachusetts*, is it?

MR. JOSHI: I disagree there.

JUDGE WESLEY: It is? You disagree why? Because in *Franklin v. Massachusetts* the service members were counted, it was the question of where they were to be allocated, wasn't it?

MR. JOSHI: So two responses to that, your Honor, if I might, and I hope I can clear up some misunderstandings here. Number one, the decision and the discretion that we're talking about here is always binary, include or exclude, and it can't possibly be that the executive discretion works only one way

like a ratchet. The decision to include is just the same kind of exercise of discretion as the decision to exclude.

JUDGE FURMAN: Well, Mr. Joshi, let me --

MR. JOSHI: Sorry, I just want to clarify something, if I might. I really apologize, but it's important.

In *Franklin* there was not a census taken of those overseas service members. There was going to be an attempt to do it and then DOD said in fact it wound up being infeasible, so they counted those service members both to include in the first place and then to allocate based on separate records outside the census. So I disagree that it's anything unusual here, it is just like *Franklin*. I just wanted to clear up that misunderstanding.

I'm sorry, Judge Furman.

JUDGE FURMAN: Well, perhaps that answers the question, but I wanted to tether it to language of Section 2 which requires the President to use the whole number of persons as ascertained under the census. Isn't the case if the whole number is determined by taking the census number, that is the number as ascertained under the census, and subtracting a number based on something totally unrelated to the census, that it is no longer using the whole number of persons as ascertained under the census?

MR. JOSHI: No, for the same reason I think I just mentioned in *Franklin*. If you're taking the census and then

adding, based on administrative records overseas service members, you've done the same thing. Likewise, in *Utah v. Evans* you're taking the numbers from the census and then you're looking at gaps and then you're just imputing people into it based on other administrative records and statistical formulas, et cetera.

JUDGE FURMAN: But Mr. Joshi, you've made two arguments repeatedly in your briefs. One is that the census has never been conducted solely on the basis of questionnaires, that the Census Bureau uses other things, administrative records, imputation, et cetera, to produce the whole number of persons. So in essence that's what happened in *Utah v. Evans* and that's what happened in *Franklin*.

The second argument that you've made is the President's memo has nothing to do with the census, that the census is being conducted as it was prior to July 21st, and that the Census Bureau will produce a whole number of persons as ascertained under the census pursuant to the residence rule and provide that information to the President. Doesn't it follow *a fortiori* that if the Secretary provides another number that it is not a number that is ascertained under the census?

MR. JOSHI: No, it doesn't, with respect, and here's why: If this had proceeded as if under *Franklin*, let's say the Secretary applies the residence criteria, delivers that number to the President, the President turns and says, "I disagree, I

want you to give me a new number, to the maximum extent feasible and consistent with the discretion delegated to me, to exclude aliens who don't have lawful status under the INA." The Secretary goes back, redoes the numbers using the administrative records, just like in *Franklin* using the DOD records, sends the new number back to the President. The President says, "Ah-hah, yes, I like this, this is the now the enumeration and the apportionment." What *Franklin* says is that's when you get the actual census enumeration and apportionment. The only difference here is that the Secretary is providing both numbers in parallel rather than seriatim. That's the only difference. But I don't think that's a difference that violates Section 2(a).

JUDGE FURMAN: Unless Judge Wesley or Judge Hall have other questions on the merits, maybe you should have a brief word on remedies and then we'll go back for a brief rebuttal from plaintiffs.

Judge Wesley?

JUDGE WESLEY: I'm fine, thank you.

JUDGE FURMAN: Judge Hall?

JUDGE HALL: I'm fine as well.

JUDGE FURMAN: Why don't you wrap up, Mr. Joshi, by addressing the remedies question.

MR. JOSHI: I'm happy to do that. If I might just add one sentence, I think since we do have our motion to dismiss

here as well, I would just say that the Section 195 sampling claim should be dismissed because the memorandum says nothing about sampling. The Tenth Amendment claims I think should be dismissed because it doesn't coerce or even ask States to do anything. And we think equal protections claims are deficient under the *Regents* case because it tends to bootstrap statements that are far removed in time and context.

So on remedies, as I mentioned earlier briefly, we think there's no relief possible against the President under *Franklin* and under *Mississippi v. Johnson* because there cannot be such relief against the President in the conduct of his official duty.

Now there is an open question, and I disagree with my friend Mr. Ho that we conceded, but there is an open question as to whether such relief could lie for purely ministerial acts. But this is not ministerial, as *Franklin* makes clear. Although the mathematical formula might be ministerial, picking what number you plug into that formula is certainly not ministerial, and that's what we have here. We're picking what number goes in based on a policy judgment about who should be included. So under those cases, no relief against the President.

JUDGE FURMAN: This is Judge Furman. Does that not open the door to precisely the political chicanery, to use Justice Thomas' language, that the Census Act was prevented to

prevent? In other words, my understanding of the history if not the language of the statute is that Congress wanted this performed by a constitutional officer but effectively limited that role to one that could be done with simple arithmetic.

If you're saying that as a matter of policy the President could basically decide only people from red states count in the census and that's a policy decision, doesn't that precisely result in the political chicanery that the act was intended to prevent?

MR. JOSHI: I disagree for a couple of reasons. One, I think there's a difference between determining the enumeration based on policy judgments. And then the second step from enumeration from apportionment, there is a different policy judgment that's involved there, and I think the *Department of Commerce v. Montana* case probed that aspect. What Congress has done is exercised its discretion and made the policy judgment as to that second theme, as to the enumeration to apportionment calculation, but it is still left to the President the discretion on policy for determining the enumeration itself, as *Franklin* and *Utah v. Evans* makes clear.

But there are also -- as we said, the President has discretion, and *Wisconsin* calls it virtually unlimited, but it is not unlimited, and it might be limited by other constitutional doctrines, of course. So if the President says, "I refuse to count any one of a certain race or religion," we

think that would be not within his discretion. That's far removed from, obviously, the situation here.

Now in terms of the final question that the Court issued, which is if there is no relief against the President could there be any other effective relief, I think that is a difficult question. But ultimately we agree that in *Evans* the court found it sufficient to presume that the President would be substantially likely to abide by an injunction against the Secretary, even though he wouldn't be bound by it, and nothing in the record here would cast doubt on that presumption. So although the government obviously already did the opposite in *Evans* and *Franklin*, we think this Court would just follow the course there. But it is important to say, in answer to the Court's question, assuming you were to get this on the threshold issue then the merits, which we don't think you should, what such relief might look like.

And I think it's important to note that any such injunction, preliminary injunction against the Secretary, could not prevent him from providing the information that the memorandum asks him to provide. In fact, if you read the actual memorandum, what it directs the Secretary to do is, quote, "The Secretary shall take all appropriate action, consistent with the Constitution and other applicable law, to provide information permitting the President, to the extent practicable, to exercise discretion to carry out the policy."

And under the opinions clause, the President can demand in writing the opinion on any subject relating to the duties of the office, and this would plainly qualify under that.

JUDGE FURMAN: Mr. Joshi, let me ask you one final question, unless my colleagues have a question on that. You invoke the opinions clause in a footnote in your brief. I think this Court, the Second Circuit and the Supreme Court have generally taken the view that that's not sufficient to present an argument. Why should we not view that argument as having been waived?

MR. JOSHI: Because, your Honor, first of all, we did raise it in our affirmative motion. It was a combined brief, of course, so it's hard to separate.

JUDGE FURMAN: In a footnote.

MR. JOSHI: That is true, it was in a footnote, but we didn't take necessarily plaintiffs to be asking to prevent the transmittal of even information, we take plaintiffs to be asking -- and we think an injunction would have to be so limited to simply saying that the second set of numbers cannot properly serve as the enumeration for the apportionment purposes. That would be the limits of what the injunction could do. It couldn't actually prevent the Secretary from doing the work to provide the information.

In this respect, Judge Furman, I respectfully point to the decision in the prior census litigation. I think at the

end of that trial there you were clear in your order, or I thought it was, that the government could not actually include the citizenship question on the census questionnaire, but you clearly said that we were not enjoined from taking other preparatory steps to prepare to include it as long as we didn't take that final step. And I think that would be analogous to this situation here.

And really I think I would like to close by saying an injunction that said: Secretary, the second set of numbers called for by the memorandum would be unconstitutional or *ultra vires* if it were to serve as the enumeration number for purposes of the apportionment base. I think just saying that demonstrates the problem with this case, which is you don't have the second set of numbers and you couldn't possibly say exactly what the problem with it is.

And I think that just underscores why this case is not ripe at this moment. We should wait to see what is feasible, what those numbers are, and then the case can proceed exactly as *Franklin* proceeded, exactly as *Evans* proceeded, exactly as *Wisconsin v. New York* proceeded. And the one case that plaintiffs have identified that was litigated beforehand was *Department of Commerce v. House of Representatives* dealing with statistical sampling which expressly provides a cause of action pre-enumeration.

So for all those reasons we think you should dismiss

the case at the threshold, but at a minimum no relief against the President and only limited preliminary injunctive relief against the Secretary if you disagree.

THE COURT: Thank you, Mr. Joshi.

We'll hear briefly from Ms. Vale and/or Mr. Ho, but I emphasize "briefly."

MS. VALE: Yes, your Honor, this is Judith Vale. I will try to be brief.

First, I do want to touch on the point that another reason why the memorandum is both unconstitutional and a violation of the statute is that defendants are untethering the apportionment from the actual enumeration. That is what they are doing, and it is what they have said they are doing. Director Dillingham in his sworn testimony to Congress said that the memorandum has nothing to do with our operation right now with the census, we're counting everybody, it has to do with the tabulation that has been requested on apportionment.

In the joint letter that we submitted earlier, defendants also said, unlike the citizenship question, plaintiffs are not challenging a procedure that will be used in the actual census but an apportionment number that will be chosen by the President after the census is complete. And that is quite different from what happened in either *Franklin* or *Utah* where it is true that in *Franklin* and *Utah*, and during the census process of counting who usually resides here, the Census

Bureau does use information from administrative records or imputation, but that was as part of deciding who usually resides here.

And that's not what is going on here. That is not what defendants have represented that they are doing. They are going to do the count, they are going to find out who usually resides here. They are going to count undocumented immigrants as usually residing here using not just the questionnaire but all of the census processes that they use, and then when that is done they're going to give that number to the President. And separate from that, they are getting another number that the President will use to subtract. That is unconstitutional because I think it is undisputed that the actual enumeration has to be the basis for apportionment, and it also violates the statute.

The second point I just want to hit quickly is on the claim about this being infeasible, and in particular that plaintiff has said it might be infeasible. What we said is that we don't think defendants can do this accurately. We don't think they can actually accurately do a head count of every single undocumented immigrant. But doing it, implementing it and doing it well are not the same thing. And I think we have every indication from both the citizenship question case and what defendants have said so far that they will go forward even if there are serious questions about

whether their numbers are accurate. They said they might only abandon course if it's infeasible. They have not said they would abandon course if there were questions about accuracy.

In any event, it's really rank speculation from defendants to suggest that they are actually going to give the President some small subset of numbers rather than do everything that they can to count as many undocumented immigrants as they can. And they have provided no proof, no information whatsoever to suggest that they are going to provide a subset of numbers. And that absence of proof is entirely self-inflicted during the time that's gone by when presumably the Census Bureau has been working on this, as Dr. Abowd and Director Dillingham have said. They have provided no evidence whatsoever to suggest that what is really going to happen is a smaller number.

And so the question of what the memo says right now on its face is that the decision of the President as of right now is to exclude all undocumented immigrants. And even if that is some sort of facial challenge, which we obviously disagree with, there is no set of circumstances under which excluding undocumented immigrants based solely on their immigration status rather than their usual residence is constitutional or lawful.

JUDGE FURMAN: Thank you, Ms. Vale.

MS. VALE: The last thing I was going to say was just

on ripeness that we should also balance not just the hardship to the plaintiffs but the fact that there is no hardship to defendants from resolving this now and getting it right the first time.

JUDGE FURMAN: Thank you, Ms. Vale.

Let me check with my fellow panelists to see if they have any final questions, and otherwise we'll wrap up. Judge Wesley?

JUDGE WESLEY: No, thank you very much, counsel. Thank you all, counsel. I gave you a rough time at times but I appreciate your honest answers. Thank you.

JUDGE FURMAN: Judge Hall?

JUDGE HALL: No. My thanks to counsel as well, but no further questions. Thank you.

JUDGE FURMAN: In that case, let me close by thanking counsel as well for your very helpful briefs and oral argument, and we will reserve decision and try to give you a ruling as soon as we can. And with that, I wish everybody a good day and stay safe. Thank you very much.

(Adjourned)

EXHIBIT D

THE CONGRESSIONAL GLOBE:

CONTAINING

THE DEBATES AND PROCEEDINGS

OF

THE FIRST SESSION

OF

THE THIRTY-NINTH CONGRESS:

BY F. & J. RIVES.

CITY OF WASHINGTON:
PRINTED AT THE CONGRESSIONAL GLOBE OFFICE.
1866.

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to representation here on the condition that they will allow to these negroes the unqualified right of suffrage on a perfect equality with the white citizen.

Mr. KELLEY. Will the gentleman yield to me one moment for a question?

Mr. ROGERS. Yes, sir.

Mr. KELLEY. I would like to inquire of the gentleman whether it is not possible that the male minor may come to an age that will secure him the right to vote; and whether it is not possible for the unnaturalized foreigner also to acquire that right; and whether, inasmuch as both may acquire it in the current decade, they should not be included in the basis of representation; and whether the mere efflux of time or force of will will change the complexion of an intelligent quadroon, so that he may vote. The freeman who can never vote should not be counted among voters and possible voters in fixing the basis of suffrage.

Mr. ROGERS. I can answer that question by stating to the gentleman that it is not improbable that, even without any constitutional legislation, the States (as many of them have already done in a qualified form, and some upon an unqualified basis) may yet allow to the negroes the same political *status* that the gentleman says may be allowed to the man under twenty-one and the unnaturalized foreigner. The gentleman's suggestion, therefore, does not affect the force of the argument which I am endeavoring to present.

Why, sir, I undertake to say, and I defy contradiction, that this proposed amendment will give to negroes rights that it will not allow to white men. It will allow a State to retain its full quota of representation, though it should disfranchise all its white citizens, not on account of race or color, provided it will enfranchise the negroes. White men may be disfranchised to an unlimited extent by the States and the States still be allowed representation for that whole race; yet if they do the same thing to negroes that whole race is excluded from the basis of representation.

It appears to have in its body, in its soul, and in its life only one great object and aim, that is, to debase and degrade the white race, and to place upon a higher footing than the white men are placed, under the Constitution, this African race.

Now, sir, at the formation of the Constitution of the United States there was not a single State of the whole thirteen which adopted that instrument that did not impose conditions upon the right of suffrage to the white men. Every State constitution which existed at the time the States entered into the Union, and for a long time afterward, imposed qualifications as conditions precedent to the exercise of the right of suffrage on the part of the white men. No man will deny that on this or on the other side of the House. The organic law of the land, if amended as proposed, will give Congress the sovereign power and right to control the States through its power of refusing representation unless the States acquiesce in the contemptible doctrine of negro suffrage.

This amendment allows the States in their sovereign capacity to exclude white men from the polls on the ground of property or any other reason, except race or color, while it deprives the States of representation for doing the same thing to the colored people, as the intent of the States would be construed to be their act, exercised by them, upon the negroes, on account of race or color.

Mr. CONKLING. Will the gentleman yield to me for a moment?

Mr. ROGERS. Certainly.

Mr. CONKLING. Will the gentleman be kind enough to inform the House why he says that such a distinction between races could occur under this amendment? Is it not true of one race as much as another that any qualification or requirement could be imposed? If inflicted upon either race or the members of either race, "on account of race or color merely," then only exclusion from the basis of representation would be worked, but no more in favor of one race, or against one race or color more than another.

Mr. ROGERS. That does not meet the argument that I am making. If they are disfranchised on account of race or color—and that is the only conceivable reason for which they would be construed to be disfranchised—then the whole race would be unrepresented; whereas no disfranchisement of white people would be construed to be done on account of race and color, as it cannot be expected that white people would disfranchise their own people because they were white. The States, in the exercise of sovereign power, can impose such qualifications upon the exercise of the right of suffrage as they please. That right they reserved, and there I want to leave it, free from any penalty.

Mr. CONKLING. In answer to the gentleman's question, I do undertake to say if any State should impose qualifications alike upon white and black, and those qualifications thus impartially imposed should happen to include negroes, because they could not come up to them, notwithstanding that the State would be entitled to its entire negro population for the purpose of representation. I do say that would be the law.

Mr. ROGERS. I do say that no such construction as that can be given the law, because it is a well-settled principle of construction that you must look at the intent and object of the Legislature which passed the law. In the construction of a law you must ascertain what was the mischief the Legislature intended to remedy. That is the way to construe a law. It is a settled maxim of construction that the object and intent of the Legislature are to be ascertained by finding out the mischief it intended to remedy. What is the object of this amendment? What is the injury it is intended to prevent? The injury is that negroes are not allowed to vote on account of their race. The object, then, is to prevent that injury by annexing such a penalty to the continuance of the mischief as will eventually compel the States to grant to the negroes unqualified suffrage. Now, sir, if the States abridge the right of suffrage to the negroes, would not a true construction of this amendment make such action of the States a violation of the organic law, in this, that such action would prevent the aim and object of the law, and for that reason the States would lose their representation for such race? By refusing the States untrammeled sovereignty over the elective franchise you violate the great principle of democracy, that all the population in a country ought to be represented, although not allowed to exercise the elective franchise. The withdrawal of that right ought not to deprive them of representation.

The object of this amendment is to remedy this supposed evil which the members of the Republican party suppose exists in the Constitution in allowing to the States in their sovereign capacity the right to control the elective franchise—either to disallow it entirely, or to put such restriction on it as the States in their sovereign power may dictate. Therefore they claim that the Federal Government ought to take under its wings and under its control this sovereign power of a State by saying to it, "If you refuse to allow a certain portion of your population to vote, or impose conditions upon their voting, on account of race or color, you shall have no representation in the councils of this country for any of the people of that race or color." Why, sir, was there ever anything so unjust in the annals of the history of legislation in this country? Was there ever anything proposed that strikes at the foundation of liberty like this; that pours out the vials of despotic wrath so profusely upon the heads of the people of the southern States—States which now, in my judgment, constitute gallant stars in the galaxy of the glorious old Union of the United States as it existed before the commencement of civil hostilities in this land?

Mr. THAYER. Will the gentleman allow me a question?

Mr. ROGERS. I will.

Mr. THAYER. I desire to ask the gentleman whether that provision of the Constitution which confines the basis of representation to three fifths of this class of people has not been abrogated by war, or rather by the results of the war, in freeing that class of people; whether, therefore, now, the South, notwithstanding this provision in the Constitution, would not be entitled to count the whole black population as five fifths instead of three fifths in computing the number of Representatives to which they are entitled; and whether the result of that computation would not be to add to the representation of the States lately in rebellion on this floor twelve or thirteen members in addition to the number which they had before the war. I desire to ask the gentlemen whether he is in favor of that result.

Mr. ROGERS. I am in favor of that result; and I was just going to show the reason and justice of it. Why, I ask the gentleman, should not the southern States, the colored population of which have been freed by the results of the war, have a representation based upon that population, the same as they were entitled to under the old Constitution in regard to freemen? Did not all the States which freed the slaves afterward have representation for five fifths of them?

Under the Constitution as it now is, representation in all the States is based upon their free male and female persons, without regard to their being of African, Asiatic, or European origin. The Constitution spreads its wings over the whole population; and because slaves in the South were not regarded as a proper basis of full representation—it being decided in the celebrated Dred Scott case that they were not considered as people or citizens within the meaning of the organic law—they had the representation for those slaves cut down to three fifths, on the ground that they ought to have some representation; and as they were mere chattels in the eyes of the law, the States in which that chattel property existed were not entitled to the whole representation that they would or ought to have had, under the organic law with regard to people of that race or color or *status*.

Now, the result of the war has been to change the *status* of that whole population from slaves into freemen. It is a cogent and most forcible argument in favor of the wisdom, genius, and patriotism of those who adopted the old Constitution of the United States, that every free man in a State, of whatever color, was entitled to representation. And that is one of the safeguards of the rights of the State. It was thrown around the States in order that they should have sovereign power to control the right of suffrage to all persons.

The proposed amendment to the Constitution undertakes to consolidate the power in the Federal Government. It throws out a menace to the States, and the inevitable result of the passage would be to induce every State in the Union to adopt unqualified negro suffrage so as not to deprive them of the great and inestimable right of representation for that class of population in the Halls of the legislation of the United States.

Mr. KELLEY. Will the gentleman allow me to ask a question?

Mr. ROGERS. Certainly.

Mr. KELLEY. Before asking the question I desire to say that I am irrevocably opposed to the passage of the amendment to the Constitution now before the House. I ask the question simply to elucidate the argument. I want the gentleman to tell me, if he can, whether there is any reason that when our Government shall be reconstructed, one pardoned rebel of South Carolina who may not be able to read and write, and who may have fought for four years against the Government, shall, in political power, alike on the floor of Congress and in electing a President, outweigh three or five intelligent returned soldiers of New Jersey, who throughout the same four years fought for the Union; and whether, if the colored people of South Carolina be represented on this floor, and yet be denied a vote, the gentleman who will succeed the late Preston S. Brooks will not be elected by a vote so small that it

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will take at least five Jersey soldiers to counterbalance the vote of each South Carolina voter in that district? The votes in the gentleman's district will number more than five to one in that district. If there must be inequality, the patriot soldier should, in my judgment, outweigh the pardoned but bloody handed traitor in the councils of the nation.

Mr. ROGERS. The argument which I was making was tending to answer the very objection which the gentleman makes.

Now, sir, I hold to the doctrine of the Constitution as it is, allowing the States to exercise sovereign control and power over the qualifications and rights of the whole voting population. I say that if the State of South Carolina, or the State of Louisiana, in the exercise of its sovereign and delegated powers, sees fit to enfranchise those who have taken up arms against the flag of their country, it is within their discretion and under their control, and under the Constitution of the United States and the organic law of their own States they may exercise that right. And let me say to gentlemen that when the State of Missouri struck at the foundation of political rights and political society and disfranchised one half or two thirds of the population of the State because they took up arms against the country, it degraded the memory of Washington and his compeers who declared by revolution and appeal to God that they would be free from Great Britain because she attempted to exercise the powers of despotism and tyranny over them, and the action of that State is a burning disgrace upon the proud record of civil, political, and religious liberty in this country.

Ah! sir, it will yet have to be admitted—it has been admitted by all men—that the right of revolution is an inherent power which God Almighty has implanted in the human breast. Whenever a people believe they are oppressed by despotism and tyranny, and have sufficient power to throw them off, they have the right to resort to revolution.

Without saying anything in disparagement of the sages and heroes of the Revolution, do not let us forget that had it not been for revolution the first flag of liberty would never have been planted on this continent; and that by the blood of the sires of the Revolution are we to-day enjoying, because of their revolution against England, the proud heritage of civil liberty, which I want to hand down to the people of this country and their children and children's children unimpaired for ever and ever.

Now, sir, do not let me be reported as favoring secession. I am here to stand by the doctrines of Andrew Johnson. I am here to reconstruct these States at once. I would go further. I would open the halls of legislation in this country to our erring brethren, and in a Christian spirit say to them, "Come here through your Representatives into the Halls of Congress; let us bind ourselves together as a band of brothers, and march in joint phalanx to the halls of the Montezumas, and drive the imperial despot from his throne." [Applause in the galleries.]

Sir, it is because I love my country, because I love these States, because I love the grand foundations of liberty which were cemented by the blood of our fathers, that I invoke the Power above to so control and direct our hearts that every single one of the stars and stripes which now emblazon themselves upon that glorious flag shall wave in triumph from one end of this country to the other. It is because this joint resolution saps the foundation of the principles which induced our fathers to spill their blood upon the battle-fields of the Revolution that I, in my humble capacity as a Representative of one of the old thirteen States, and as a Representative of this whole Union, use my voice and my power in behalf of that great constitutional Government which gives us peace, liberty, happiness, and prosperity, and whose foundations were laid broad, strong, and deep in the beginning by George Washington and the other patriots and heroes of the Revolution.

Sir, why should South Carolina, North Carolina, Virginia, Florida, and the other glorious States of this Union have such a law as this passed upon them, taking away representation from half their population, when tyranny and despotism are preventing their Representatives from entering the Halls of legislation of the country, and preventing them from joining the body of the *vox populi* and speaking out in opposition to the legislation proposed by the portion of the States now assembled in Congress?

Why, sir, take two or three States of the South; take South Carolina and the other three States whose negroes constitute a majority of the population. By the passage of this joint resolution you strip them of more than one half of the whole representation for which their fathers, side by side with the men of the North, shed their blood; that blood which now glows in the veins of us, their descendants. That representation they derived, based not upon the voting population, but upon the whole people who are free, without regard to their race or color. If this amendment shall pass, and New Jersey shall alter her organic law and strike from it the word "white," and give to her colored population a qualified suffrage, still she can have no representation for any of the race or color who have their franchise abridged by reason of that qualification. Would it not be better, be more consonant to reason and to common sense, would it not be doing according to the injunction of Holy Writ, "Do unto others as ye would have others do unto you," to submit this organic law to the people of the different States? This amendment provides that whenever any portion of the colored population shall have but qualified suffrage, on account of race or color, the whole of that population shall be excluded from the basis of representation. It goes so far that if New Jersey pass a law allowing such of her black population to vote as can read the Constitution of the United States, and although every negro in that State could take advantage of that qualification and could read the Constitution of the United States except one, then New Jersey would lose the advantage of representation for the whole of that population. Will honorable gentlemen stand here in the face of this country, and the intelligence and patriotism of the masses of the South, and say to them, now when reason ought to have resumed its sway and the roaring of cannon ceased, "we shall so far exercise our power in a tyrannical manner as to prohibit representation to a State for its colored population if a single man of that colored population is prohibited from voting by the operation of a qualification based upon property, intelligence, or anything else?"

But I object to this joint resolution upon another ground—upon the same ground that I objected to the passage of the negro suffrage bill for the District of Columbia—without consulting the people. It has been said in this country that all power emanates from the people. And I say that to submit this grave question to the consideration and decision of partisan Legislatures in the different States, Legislatures which were elected without any regard to this question, is violative of the great principles which lie at the foundations of the liberties of this country; that no organic law, affecting the whole people, should be passed before submitting it to the people for their ratification or rejection. Now this joint resolution proposes simply to submit this amendment for ratification to the Legislatures of the different States.

The Legislatures are not the States; the Legislatures are not the people in their sovereign capacity; Legislatures are not the source from which all power emanates. But the people, the sacred people, in the exercise of their sovereign power, either at the ballot-box or in conventions, are the only true and proper forum to which such grave and serious questions should be submitted. If the people of the United States want negro suffrage, unqualified and unabridged, to be adopted in the United States of America, I, as a Democrat, as a citizen believing in the power of the majority, will yield to their decision. But I want that decision rendered in the manner contemplated by the spirit of self-government and not by Representatives of the people who have not been elected with reference to the decision of this question. Let it be submitted to conventions of the people, the delegates to which can be instructed to vote for or against inflicting a penalty in this indirect manner upon States, if they do not choose to adopt the policy of unqualified negro suffrage.

Why, sir, as I stated in the argument I made against the adoption of the bill passed by this House to inflict the disgraceful policy of negro suffrage upon the unoffending, harmless, and unprotected people of this District, I am now here to remind gentlemen that the State of Kansas was refused admission into the Union because her constitution, framed by the convention at Lecompton, had not been submitted directly to the people for their ratification or rejection. And you may look through the history of the States, and you will find nowhere in modern times, within a period of forty years, a State that has adopted or changed its organic law without first submitting the proposition which its Legislature or convention has adopted to the people at the ballot-box, where they can decide directly whether they want it or not.

Now, gentlemen, I am ready to meet this negro question. I am ready to go before the people of this country upon this policy; and I say that if we submit this question to the sovereign people in the election of delegates, so that they may pass upon it directly, we shall then have at least an invitation on the part of three fourths of the States to the other States to adopt unqualified negro suffrage. But when this question is submitted to the Legislatures that were elected without any regard to the question embraced in this bill, controlled by party rules, and acting under the party whip, they will be compelled to adopt it as a party measure, whether they approve it or not, as many members in this House voted the other day upon the question of negro suffrage in the District of Columbia.

Now, sir, when the Constitution was adopted every State that then constituted the Union had a negro population, quite a large population, too; and every State except the State of Massachusetts had a slave race. Now, sir, with a few exceptions, the negroes were not permitted to vote. By the Constitution of the United States none of them could exercise the right of voting; it was only under the organic laws of the States, adopted in the exercise of their sovereign power, that the negroes had the right to vote in any State. Yet neither the framers of the Constitution nor anybody else at that day claimed that it would not be right to allow representation for the colored population, whether that population was entitled to vote or not. Now, sir, I maintain that the Constitution of the United States, as it now exists, is not as liberal toward the southern States, now that slavery has been abolished, as it was before the abolition of slavery. Why, sir, in the days of the past, under our Constitution, the southern States have been allowed a representation for a population that was not classed as citizens or people; they were allowed a representation for people who had no political *status* in the State, persons who were not entitled even to exercise the right of coming into a court of civil justice as a plaintiff or defendant in the prosecution or defense of a suit.

Now, after the raging fires of war have swept from the domain of every State in the South the pernicious institution of slavery, after the result has been that every slave has received his freedom, after the slaves have gained more by the success of this war than any other class of people in the United States, white men, men who are the representatives of the white race, come here proposing to compel the States, on pain of being deprived of a portion of their representation, to allow all the negroes within their limits to vote, without regard to qualification or anything else, while under the same provision the State may, by its organic law, impose qualifications and conditions upon the exercise of the right of suffrage by the white population.

Why, sir, four million slaves have been set

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free; $3,000,000,000 have been expended in setting them free. In the northern States, for the purpose of carrying on the war, we have run up a county, township, and State indebtedness of $1,500,000,000 or $2,000,000,000 more. Five thousand million dollars have been expended; five hundred thousand brave white soldiers who left their families to go into the war; men without property; men whose hearts glowed with patriotism; have been sacrificed on the altar of negro philanthropy. Yet the ruling party is not content with robbing the South of millions of dollars invested in slaves and nearly ruining the country to free them, but they seek to inflict a disgrace upon the Anglo-Saxon race of the South by coercing them to bestow upon these slaves political rights after they have been taken away from their masters without compensation.

I think it time that we should begin to legislate for white people. What are the object and intent of this bill? Simply to force upon an unwilling population, in this indirect manner, negro suffrage, when the States of the gentlemen advocating this measure have not adopted negro suffrage. The gallant little State of Connecticut has repudiated negro suffrage by six or seven thousand majority. Why should you undertake, in this way, to force the doctrine of unqualified negro suffrage upon the southern States when your own States repudiated it? I have too much reverence for the fathers of our Government to give my approval to such a measure, I have not forgotten that our Government was established for the benefit of the white population of the country.

I have not forgotten it was white men who put down the tyranny of England and established the principles of liberty on this continent. I have not forgotten it was the white men of the northern States who went in thousands to the banks of the Mississippi to drive back the invaders from our soil. Yet when a soldier who fought for his country happened to be under twenty-one years of age, or unnaturalized, he was not permitted to vote, while the whole class of negroes must have that right until they adopt it and pass such laws as will give unqualified suffrage to the negro race.

It will not do to attempt to deny what is the object of this bill. This amendment is to constitute one of the barriers, to be devised by the committee of fifteen, to keep the South out of the Union. It is one of the points of that committee. Its object is to keep the States out. Let us extend to the southern people the hand of fellowship, and so let us act that they will regard the Constitution and the Union more sacredly than ever before. Let us look upon them as the father looked upon the prodigal son. Let us look over their violations of law, and take them again into full fellowship. In this way we will render the Union stronger than ever; and those southern States will then constitute, as they have done in the past, a bright galaxy upon the flag of our country.

The southern people are entitled, in my judgment, to representation without such qualifications as much as the northern men. When Andrew Johnson appointed southern men provisional governors of the southern States he did it in a spirit of Christianity and humanity. I beseech you not to pass legislation of this kind, because it will engender a spirit that will drive every sentiment of Union from the southern States. It will inflict an injury upon both the northern and southern States. It will diminish the representation of New York, Pennsylvania, and New Jersey, because it will exclude from the basis of representation the negro population of those States.

[Here the hammer fell.]

Mr. CONKLING. Mr. Speaker:

"Representatives and direct taxes shall be apportioned among the several States which may be included within this Union according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons."—*Constitution, art. 1, sec. 2.*

This is the provision by which apportionment and representation have till now been regulated in the United States. It is one of the compromises of the Constitution.

Strange as it may seem to the gentleman from New Jersey, [Mr. ROGERS,] it owes its existence to the same principle asserted in the pending amendment. What is that principle? That political representation does not belong to those who have no political existence.

The government of a free political society belongs to its members, and does not belong to others. If others are allowed to share in its control, they do so by express concession, not by right.

It was this principle which rendered necessary such a provision as I have read. It was this principle which brought that provision into our national charter.

The slaves of the South were not members of that political society which formed the Constitution of the United States. They were without personal liberty, and therein they were without a natural right, not a political right; but they were also without political rights, and therefore they were not members of the political community.

From this it followed that they were not to be represented as members.

From this it followed that political power was not to be apportioned by treating them as political persons.

Natural persons they were, producers they were, and the product of their labor was the proper subject of taxation.

But direct taxes and representation ought to be distributed uniformly among the members of a free Government. All alike should bear the burdens; all alike should share the benefits.

Here was a clear principle, palpably right and easy and certain in its application. It applied itself. It applied itself universally, and covered the whole case with only one exception.

I do not treat "Indians not taxed" as an exception, because uncivilized Indians in their tribal state were so far beyond the scope within which the Constitution was to act that they were named only to prevent possible mistake as to the meaning of language.

Neither was a fixed exception, or even an obstacle, found in the case of aliens or unnaturalized foreigners.

The Constitution was to leave to the States and to give to the Congress power to clothe foreigners with full political rights as fast as they should be prepared to assume them. The only question remaining, therefore, as to them, was how they should be treated during the interval between their arrival and their naturalization, during their political nonage.

This question was disposed of in the liberality in which the Government was conceived. The political disability of aliens was not for this purpose counted at all against them, because it was certain to be temporary, and they were admitted at once into the basis of apportionment.

The slave alone was the anomaly and the nondescript.

A man, and not a man. In flesh and blood, alive; politically, dead.

A native, an inhabitant, a producer, but without recognized political attribute or prerogative; the representative in the system of nothing but value.

What could be done with him? He was nowhere.

It could not be maintained by the slaveholding States that slaves were persons to be represented. It could not be maintained by the free States that slaves were persons to be taxed. For these purposes slaves were excluded altogether by the principle on which the Government was built. They were not embraced within it because they had no political standing in the States wherein they were held. Without some special provision, therefore, they would have been altogether ignored.

Taxes, however, were desirable on the one side and representation on the other, and for mere convenience a compromise was invented for the sake of both.

A purely arbitrary agreement was made and inserted in the Constitution, an agreement with nothing to support it but the consent of the parties, based upon the facts as they then stood. It was agreed in substance that the free people of all the States should be counted alike, and should all have their fair share of power as thus ascertained, and that then the free people of the slaveholding States should have as much power beside as would be measured by counting every slave as three fifths of a "person;" direct taxes to follow the same rule. The power thus agreed upon could not be exercised by the fractional persons themselves, but as somebody else owned them, it was so arranged that that same somebody else should own the political power also.

The covenant, whether wise or not, was operative as long as there was anything for it to operate upon.

That time is past. The provision has become impotent. The fall of slavery has superseded it. We have nothing now to rely upon in its place but the residue of the second section of the first article of the Constitution. That section, owing to the rupture of the technical tie of slavery, would, as it stands, work out results now which, when the Constitution was made, were condemned by the judgment of all.

"Free persons" was the term employed to describe all who had political rights and standing, because only slaves had neither.

But now a new anomaly exists. Four million people are suddenly among us not bound to any one, and yet not clothed with any political rights. They are not slaves, but they are not, in a political sense, "persons."

No figment of slavery remains with which to spell out a right in somebody else to wield for them a power which they may not wield themselves. This was one of the appurtenances of property in man, and has been extinguished by constitutional amendment, if it was not destroyed before.

This emancipated multitude has no political *status*.

Emancipation vitalizes only natural rights, not political rights.

Enfranchisement alone carries with it political rights, and these emancipated millions are no more enfranchised now than when they were slaves.

They never had political power. Their masters had a fraction of power as masters. But there are no masters now.

There are no slaves now. The whole relationship in which the power originated and existed is gone. Does this fraction of power still survive? If it does, what shall become of it? Where is it to go?

We are told the blacks are unfit to wield even a fraction of power, and must not have it. That answers the whole question. If the answer be true, it is the end of controversy. There is no place logically for this power to go save to the blacks; if they are unfit to have it, the power would not exist. It is a power astray, without a rightful owner. It should be resumed by the whole nation at once.

It should not exist; it does not exist. This fractional power is extinct.

A moral earthquake has turned fractions into units, and units into ciphers. If a black man counts at all now, he counts five fifths of a man, not three fifths. Revolutions have no such fractions in their arithmetic; war and humanity join hands to blot them out.

Four millions, therefore, and not three fifths of four millions, are to be reckoned in here now, and all these four millions are, and are to be, we are told, unfit for political existence.

Did the framers of the Constitution ever dream of this? Never, very clearly. Our fathers trusted to gradual and voluntary emancipation, which would go hand in hand with education and enfranchisement. They never peered into the bloody epoch when four million fetters would be at once melted off in the fires of war. They never saw such a vision as we see. Four millions, each a Caspar Hauser, long shut up in darkness, and suddenly led out into the full flash of noon, and each, we are told, too blind

the starving white and black, to give the right to hold real and personal estate to the negro, to enable him to sue and be sued in courts, to let him be confronted by his witnesses, to have the process of the courts for his protection, and to enjoy in the respective States those fundamental rights of person and property which cannot be denied to any person without disgracing the Government itself. It was simply to carry out that provision of the Constitution which confers upon the citizens of each State the privileges and immunities of citizens in the several States. These measures did not pretend to confer upon the negro the suffrage. They left each State to determine that question for itself. Their highest aim was to secure what the lawyers call civil rights to every person within the jurisdiction of the Government. The necessity for these or similar measures was imperative. To have failed in this duty would not only have rendered the results of the war perfectly abortive, but would have completely withered the laurels we won in its successful prosecution.

The President saw fit to veto these measures, supposing them to be unconstitutional. I never doubted the power of Congress to pass them. I never doubted that the Government would be disgraced if it failed to establish for the private citizen the muniments of freedom intended to be secured by them. I did have my doubts whether this was the best way to accomplish the end. It would necessarily bring about a conflict between State and Federal jurisdiction. I knew it would meet with resistance in the States. I thought it would be repulsed, as even beneficence itself is always repulsed when forced on an unwilling community. I feared that in the conflict to arise the rights of the weak would be lost sight of, and finally sacrificed. I then believed, and do now believe, that the necessity for these measures is an unfortunate necessity. That necessity cannot exist where the local government is founded upon the consent of the entire people. The people of Georgia know what laws are best for their own happiness and security. But when one half of the people legislate for all this truth ceases in its application. Let all have a voice in making the law and the popular heart will execute it, because the liberty of all consists in its enforcement. It is only where political power is in the hands of a favored few that oppression can be practiced. It is only where oppression exists that the agents of a superior power are needed for protection. Give the negro the ballot and he will take care of himself, because his interest requires it. Give him a bureau agent, and he will sometimes be plundered, because his interest and the interest of the agent may differ.

At an earlier day in the session I offered a proposition which I thought would secure these ends. It was a constitutional amendment in three lines. It prohibited the States, in prescribing the qualifications of voters, from discriminating against the negro on account of his color. Had this been adopted, by its own force it made him a citizen in each State, because it gave him the highest prerogative of a freeman. There would then have been no necessity for declaring who are citizens of the United States, for every freeman would have worn the honored badge of citizenship. It would then have been useless to declare that no State shall abridge the privileges and immunities of citizens of the United States, for those simple words presented an effectual bar against it. It would have been superfluous to interdict the States from taking life, liberty, or property from the citizen without due process of law; for liberty being first given, the citizen can protect his own life and property. The provision securing equal protection of the laws against inimical State legislation might then be dispensed with as wholly unnecessary. The very section we are now considering, with all its difficulties of verbal adjustment, might be abandoned and the Constitution be left in that respect as our fathers made it. The necessity for abridging representation would have ceased, for both representative and elector would have been loyal. These few words would have accomplished directly what this proposes to accomplish indirectly after years of political strife, in which truth and conscience and patriotism are too often sacrificed to the attainment of success. Had that been done it were useless to enact an exclusion from office of the leaders of the rebellion. Where all men are interested in the Government, none but peaceful revolutions are needed. Reforms are worked at the ballot-box. Government then, and only then, becomes a divine institution. Rebellion against it not only injures the public weal, but it shocks the moral sense of a contented and happy people. They who lead such rebellions are at once visited with public odium. In public estimation traitors then stand as the greatest of criminals. They are looked upon as monsters in human shape. Cain bore the mark of one crime—murder; but a people perfectly free will never fail to stamp traitors, as they deserve to be stamped, with the mark of all crimes.

If that proposition had been adopted we need not pledge our faith to the payment of the public debt. That faith would have been best secured in the honest convictions and the moral sense of the people. Had it been adopted, we need not have proclaimed by constitutional enactment the invalidity of the rebel debt, founded as it is upon contracts made in contravention of public policy, against the best interests of the State, in violation of the laws of the land, and for the purpose of enslaving the very men whose substance would be required to pay it.

But, Mr. President, in all this I may have been mistaken. The presumption is, I was mistaken, for a large majority have ruled against me. I yet have faith in its ultimate success. Necessity, if nothing else, will soon bring believers. Believers may be now few, but as through the faith of the Hebrew mother, so again they will soon be "many as the stars of the sky in multitude, and as the sand which is by the sea-shore innumerable."

The old saying is true, that we must take things as we find them. I am somewhat an optimist, and this at last may be the best. The negroes during the war were our faithful allies. They are now steeped in poverty and must remain so unless Congress does something to help them. The poor whites of the South are not in a much better condition. State governments are already in the hands of those hostile, through prejudice or interest, to their improvement or amelioration. The legislation of these governments even now frets with oppression. Within the scope of State jurisdiction there is no such thing as equality in the law. The State courts are already deciding the "civil rights bill" to be unconstitutional. The validity of all laws must depend at last upon human judgment. Judges, even in the highest courts, are but mortals. Should the Supreme Court of the United States affirm the judgment of these inferior tribunals, the present period would be no better for the rights of the negro than that when the Supreme Court once before supposed he had no rights which the white man was bound to respect. Should such be the action of this tribunal, the problem would at once be presented, whether four million people can be peacefully held nominally free, but actually slave.

If it be true that these negroes are not susceptible of education; if they are more nearly allied to brutes than to men; if as free men they can add nothing to the wealth of the country; if they are unfit to take part or lot in the State governments, it may be asked, why should they be represented in Congress? If they are incapable of choosing a Representative for themselves, why should those who treat them as inferior beings, and almost deny their humanity, claim the right to represent them as citizens? It is said that women and aliens in the North are retained in the basis of representation, why should not the negroes be retained in the South? It may be answered that these women and aliens are treated as human beings; they are regarded as persons and not dumb brutes; they enjoy the right to acquire property, to enter the courts for its protection, to follow the professions, to accumulate wealth, whereby national resources are increased and national power augmented; they are a part of the people. The road to the ballot is open to the foreigner; it is not permanently barred. It is not given to the woman, because it is not needed for her security. Her interests are best protected by father, husband, and brother. The negro is the object of that unaccountable prejudice against race which has its origin in the greed and selfishness of a fallen world. That prejudice belongs to an age of darkness and violence, and is a poisonous, dangerous exotic when suffered to grow in the midst of republican institutions, where we boast an asylum for the oppressed of every land. Why do we shudder to meet this question? Nearly five million people, strong, vigorous, and inured to labor, are in your midst, partially without civil, wholly without political rights. What will you do with them? You have three alternatives before you, and only three. You must kill them, colonize them, or ultimately give them a part of your political power. For this last alternative the country is not yet prepared. With the two former humanity and common sense will successfully struggle.

But I am told that this proposition will operate as a penalty on the South. Suppose it were a penalty from which she could not escape, would it be an adequate punishment for the crime committed? Might it not, if justice untempered with mercy were consulted, be made a permanent rule until the public debt were paid and the curses of treason were effaced from the land? If it be a penalty, it is one which the offender may escape. It is likened unto the penalties of the divine law. The choice of good and evil is before them. The indulgence of evil is followed by punishment, because it is an inexorable law of man's organization. The choice of good is followed by happiness, contentment, prosperity. It is thus wisely ordained, that interest may constrain to duty, in the exercise of which the world is advanced and man is ennobled. This may be called a penalty, but a simple act of justice will fully discharge it. It is equal, for it applies to all the States.

Another advantage consists in the fact that it compels the moral and intellectual culture of the lower classes. If not properly qualified for the exercise of the ballot, the State governments may fall into the hands of incompetent and dangerous persons. Until all can vote, all cannot be represented. All cannot safely vote until a large majority are educated. This provision, then, may constrain to justice in a double sense. The strong argument in favor of it is, that as the Constitution now stands four white voters in the South, formerly soldiers in Lee's army, will be equal in representative power to six of those who followed Grant from the Rapidan to Richmond or Sherman from Atlanta to the sea. I therefore accept it, in the hope that the South, seeing its true interests, will, even before the next census, learn to seek justice for themselves in the exercise of the golden rule.

The third section of this amendment provides that no person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid and comfort to the enemies thereof. But Congress may by a two-thirds vote of each House remove the disability. The language of this section is so framed as to disfranchise from office the leaders of the past rebellion as well as the leaders of any rebellion hereafter to

EXHIBIT E

Exhibit 61

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al. *Plaintiffs*, v. DONALD J. TRUMP, in his official capacity as President of the United States, et al. *Defendants*.	20-CV-5770 (JMF)
NEW YORK IMMIGRATION COALITION, et al. *Plaintiffs*, v. DONALD J. TRUMP, in his official capacity as President of the United States, et al. *Defendants*.	20-CV-5781 (JMF)

DECLARATION OF JENNIFER MENDELSOHN

JENNIFER MENDELSOHN, pursuant to the provisions of 28 U.S.C. § 1746, declares under penalty of perjury as follows:

1. I work as a journalist and genealogist. My past work experience includes serving as a People magazine special correspondent and Slate columnist. My work has appeared in numerous local and national publications including The New York Times, The Washington Post, USA Today, Politico, Time and the Los Angeles Times.

2. I am a member of the board of the Jewish Genealogy Society of Maryland and a member of the Association of Professional Genealogists.

3. Esther Kaplan of the Supreme Court case *Kaplan v. Tod*, 267 U.S. 228 (1925), was enumerated in the 1920 census. I located a copy of the relevant page from the 1920 census records online; it is attached as Attachment A. Esther Kaplan is listed on line 95. The rest of her family is listed on the adjacent lines, including her father, Schaje Kaplan aka Sam or Samuel Kaplan, on line 92. This document is available via the website FamilySearch.org at the following link: https://www.familysearch.org/ark:/61903/3:1:33SQ-GRFC-995S?i=17&cc=1488411&personaUrl=%2Fark%3A%2F61903%2F1%3A1%3AMJYH-TNC (membership required).

4. I also located a passenger manifest from July, 1914, including Esther Kaplan's name as a passenger. It is attached to this declaration as Attachment B. Ms. Kaplan is listed on line 12. This document is available at the following link: https://www.familysearch.org/ark:/61903/3:1:3Q9M-C9TX-79KC-X?cc=1368704&personaUrl=%2Fark%3A%2F61903%2F1%3A1%3AJJQR-529.

5. I also located a record of the Kaplan family's detention at Ellis Island, which lists her as having arrived on July 20, 1914. It is attached to this declaration as Attachment C. Ms. Kaplan is listed on the last line. This document is available at the following link: https://www.familysearch.org/ark:/61903/3:1:3Q9M-C9TX-79RZ-H?i=614&cc=1368704. The arrival date of July 20, 1914 on this document matches the Supreme Court's description that "[o]n July 20, 1914, being then about thirteen years old, she was brought to this country." *Kaplan*, 267 U.S. at 229

6. I also located a record of Ms. Kaplan's father's naturalization. It is attached to this declaration as Attachment D. This document is available at the following link: https://www.familysearch.org/ark:/61903/3:1:3QS7-89M8-LTRG?i=88&wc=MDSY-

YP8%3A326209701%2C329928701&cc=1999177, starting at pg. 89. The date of naturalization, which is listed on the second page of the document, is December 14, 1920. This matches the Supreme Court's description that, "[o]n December 14, 1920, [Esther Kaplan's] father was naturalized." *Kaplan*, 267 U.S. at 229. The naturalization documents lists Esther as among Sam Kaplan's children, and that she was born in the year 1900, which would have made her 13 or 14 years old in 1914. This matches the Supreme Court's description that Esther Kaplan was "about thirteen years old" at the time that she entered the country on July 20, 1914. The two other children listed, Abraham and Samuel, as well as the household address, 249 Monroe Street, match the census record in Attachment A.

I declare under penalty of perjury that the foregoing is true and correct.

Dated. August 24, 2020

Baltimore, Maryland

Jennifer Mendelsohn

Attachment A

STATE N.Y. 9—187 **DEPARTMENT OF COMMERCE—BUREAU OF THE CENSUS** [D1—578]

COUNTY N.Y.

FOURTEENTH CENSUS OF THE UNITED STATES: 1920—POPULATION

SUPERVISOR'S DISTRICT NO. 1 — ENUMERATION DISTRICT NO. 318 — SHEET NO. 9 B

TOWNSHIP OR OTHER DIVISION OF COUNTY Borough of Manhattan [Insert proper name and, also, name of class, as township, town, precinct, district, hundred, beat, etc. See instructions.]

NAME OF INCORPORATED PLACE N.Y.C. [Insert proper name and, also, name of class, as city, village, town, or borough. See instructions.]

WARD OF CITY 4 A-D

NAME OF INSTITUTION [Insert name of institution, if any, and indicate the lines on which the entries are made. See instructions.]

ENUMERATED BY ME ON THE 12th DAY OF Jan, 1920. Daniel Silverman ENUMERATOR. 56848 2698

Line	Street (1)	House no. (2)	Dwelling (3)	Family (4)	Name (5)	Relation (6)	Home owned or rented (7)	Owned free or mortgaged (8)	Sex (9)	Color or race (10)	Age (11)	Single, married, widowed, divorced (12)	Year of immigration (13)	Naturalized or alien (14)	Year of naturalization (15)	Attended school (16)	Able to read (17)	Able to write (18)	Person: place of birth (19)	Person: mother tongue (20)	Father: place of birth (21)	Father: mother tongue (22)	Mother: place of birth (23)	Mother: mother tongue (24)	Able to speak English (25)	Trade, profession (26)	Industry, business (27)	Employer, salary or wage worker, or own account (28)	Farm schedule (29)	Code
51			16	172	Smith Tillie	Mother			F	W	63	M	1908	al			No	No	Russia	Yiddish	Russia	Yiddish	Russia	Yiddish	No	None				
52					Levine Dora	Grand Child			F	W	8	S				Yes			New York City		Russia	Yiddish	Russia	Yiddish	Yes	None				
53			16	173	Smith Ike	Head 12	R		M	W	30	M	1908	al			No	No	Russia	Yiddish	Russia	Yiddish	Russia	Yiddish	No	Tailor	Mens Clothing	W		592
54					— Celia	Wife			F	W	26	M	1914	al			No	No	Russia	Yiddish	Russia	Yiddish	Russia	Yiddish	No	None				
55			16	174	Goldman Max	Head 14	R		M	W	27	M	1910	al			No	No	Russia	Yiddish	Russia	Yiddish	Russia	Yiddish	Yes	Operator	Cloak	W		446
56					— Sarah	Wife			F	W	23	M	1909	al			No	No	Russia	Yiddish	Russia	Yiddish	Russia	Yiddish	Yes	None				
57					— Leon	Son			M	W	2 1/12	S							New York City		Russia	Yiddish	Russia	Yiddish						
58					— Irving	Son			M	W	2/12	S							New York City		Russia	Yiddish	Russia	Yiddish						
59			16	175	John Jacob	Head 15	R		M	W	46	M	1892	Na			No	No	Russia	Yiddish	Russia	Yiddish	Russia	Yiddish	Yes	Musician	Job	W		8[illegible]
60					— Sarah	Wife			F	W	39	M	1903	Na			No	No	Russia	Yiddish	Russia	Yiddish	Russia	Yiddish	Yes	None				
61					— Ida	Daughter			F	W	17	S					Yes	Yes	New York City		Russia	Yiddish	Russia	Yiddish	Yes	Stenographer	Dress Hse	W		499
62					— Dorothy	Daughter			F	W	9	S				Yes	Yes	Yes	New York City		Russia	Yiddish	Russia	Yiddish	Yes	None				
63					Black Fannie	Boarder			F	W	22	S	1910	Un			No	No	Russia	Yiddish	Russia	Yiddish	Russia	Yiddish	Yes	Operator	Dresses	W		448
64			16	176	Berman Abraham	Head 16	R		M	W	26	M					Yes	Yes	New York City		Russia	Yiddish	Russia	Yiddish	Yes	Laborer	Navy Yard	W		805
65					— Mary	Wife			F	W	21	M	1902	Na			Yes	Yes	Russia	Yiddish	Russia	Yiddish	Russia	Yiddish	Yes	None				
66			16	177	Levine Isadore	Head 17	R		M	W	25	M	1906	al			No	No	Russia	Yiddish	Russia	Yiddish	Russia	Yiddish	Yes	Knitter	Sweater	W		524
67					— Sadie	Wife			F	W	20	M	1913	al			No	No	Russia	Yiddish	Russia	Yiddish	Russia	Yiddish	Yes	None				
68					— Irene	Daughter			F	W	3	S							New York City		Russia	Yiddish	Russia	Yiddish						
69			16	178	Weingart Hyman	Head 18	R		M	W	45	M	1900	Pa			No	No	Russia	Yiddish	Russia	Yiddish	Russia	Yiddish	Yes	Tailor	Mens Clothes	W		592
70					— Lena	Wife			F	W	38	M	1906	al			No	No	Russia	Yiddish	Russia	Yiddish	Russia	Yiddish	No	None				
71					— Harry	Son			M	W	20	S	1907	al			Yes	Yes	England	English	Russia	Yiddish	Russia	Yiddish	Yes	Maker	Doll Factory	W		524
72					— Rubin	Son			M	W	13	S				Yes	Yes	Yes	New York City		Russia	Yiddish	Russia	Yiddish	Yes	None				
73					— Pauline	Daughter			F	W	7	S				Yes	Yes	Yes	New York City		Russia	Yiddish	Russia	Yiddish	Yes	None				
74			16	179	Bronstein Max	Head 19	R		M	W	40	M	1907	Un			No	No	Russia	Yiddish	Russia	Yiddish	Russia	Yiddish	Yes	Carpenter	House	W		148
75					— Fannie	Wife			F	W	36	M	1907	Un			No	No	Russia	Yiddish	Russia	Yiddish	Russia	Yiddish	No	None				
76					— Hyman	Son			M	W	5	S							New York City		Russia	Yiddish	Russia	Yiddish						
77					— Esther	Daughter			F	W	4	S							New York City		Russia	Yiddish	Russia	Yiddish						
78					— George	Son			M	W	3	S							New York City		Russia	Yiddish	Russia	Yiddish						
79					— Celia	Daughter			F	W	6/12	S							New York City		Russia	Yiddish	Russia	Yiddish						
80		284	17	180	Hurwitz Max	Head 1	R		M	W	49	M	1891	Na	1898		Yes	Yes	Russia	Yiddish	Russia	Yiddish	Russia	Yiddish	Yes	Store	Clothing	O/a		750
81					— Fannie	Wife			F	W	49	M	1887	Na			No	No	Russia	Yiddish	Russia	Yiddish	Russia	Yiddish	Yes	None				
82					— Ida	Daughter			F	W	19	S					Yes	Yes	New York City		Russia	Yiddish	Russia	Yiddish	Yes	Bookkeeper	Fur Hse	W		9[illegible]
83					— Celia	Daughter			F	W	17	S					Yes	Yes	New York City		Russia	Yiddish	Russia	Yiddish	Yes	Bookkeeper	Fur Hse	W		988
84					— Evelyn	Daughter			F	W	13	S				Yes	Yes	Yes	New York City		Russia	Yiddish	Russia	Yiddish	Yes	None				
85					— Ruth	Daughter			F	W	8	S				Yes	Yes	Yes	New York City		Russia	Yiddish	Russia	Yiddish	Yes	None				
86					— Gertrude	Daughter			F	W	22	M					Yes	Yes	New York City		Russia	Yiddish	Russia	Yiddish	Yes	Bookkeeper	Bank	W		988
87					Borsowitz Joseph	Son in Law			M	W	26	M	1907	Na			Yes	Yes	Russia	Yiddish	Russia	Yiddish	Russia	Yiddish	Yes	None				
88			17	181	Leonard Simon	Head 2	R		M	W	23	M	1913	al			No	No	Russia	Yiddish	Russia	Yiddish	Russia	Yiddish	Yes	Operator	Cloaks	W		446
89					— Fannie	Wife			F	W	25	M	1913	al			No	No	Russia	Yiddish	Russia	Yiddish	Russia	Yiddish	No	None				
90					— Nathan	Son			M	W	1 8/12	S							New York City		Russia	Yiddish	Russia	Yiddish						
91					— Mary	Daughter			F	W	3/12	S							New York City		Russia	Yiddish	Russia	Yiddish						
92			17	182	Kaplan Samuel	Head 3	R		M	W	51	M	1910	Pa			No	No	Russia	Yiddish	Russia	Yiddish	Russia	Yiddish	No	Maker	Buttons	W		548
93					— Anna	Wife			F	W	49	M	1914	al			No	No	Russia	Yiddish	Russia	Yiddish	Russia	Yiddish	No	None				
94					— Abraham	Son			M	W	22	S	1914	al			Yes	Yes	Russia	Yiddish	Russia	Yiddish	Russia	Yiddish	Yes	Maker	Buttons	W		548
95					— Esther	Daughter			F	W	19	S	1914	al			Yes	Yes	Russia	Yiddish	Russia	Yiddish	Russia	Yiddish	Yes	None				
96					— Samuel	Son			M	W	10	S	1914	al		Yes	Yes	Yes	Russia	Yiddish	Russia	Yiddish	Russia	Yiddish	Yes	None				
97			17	183	Kaufman Samuel	Head 4	R		M	W	24	M	1911	Na	1919		Yes	Yes	Russia	Yiddish	Russia	Yiddish	Russia	Yiddish	Yes	Manufacturer	Caps	O/a		370
98					— Pearl	Wife			F	W	21	M	1907	Na			Yes	Yes	Russia	Yiddish	Russia	Yiddish	Russia	Yiddish	Yes	None				
99			17	184	Goldberg Barnett	Head 5	R		M	W	65	M	1898	Al			No	No	Russia	Yiddish	Russia	Yiddish	Russia	Yiddish	No	Peddler	Old Clothes	O/a		770
100					— Osne	Wife			F	W	65	M	1898	al			No	No	Russia	Yiddish	Russia	Yiddish	Russia	Yiddish	No	None				

Attachment B

Form 500 B
U. S. DEPARTMENT OF LABOR
IMMIGRATION SERVICE

LIST OR MANIFEST OF ALIEN PASSENGERS FOR THE UNITED

ALL ALIENS, in whatsoever class they travel, MUST be fully listed and the master or commanding officer of each vessel carrying such passengers

S. S. S.S.Kursk sailing from Libau. 7 JUL.1914, 191

(This space for use by Government officials.)

No. on List	Family Name	Given Name	Age Yrs.	Sex	Married or Single	Calling or Occupation	Read	Write	Nationality (Country of which citizen or subject)	Race or People	Last Permanent Residence: Country	Last Permanent Residence: City or Town	The name and complete address of nearest relative or friend in country whence alien came
1	~~Guschansky~~	~~Berka~~	~~26~~	~~m~~	~~s~~	~~merchant~~	~~yes~~	~~yes~~		~~Hebrew~~		~~Kowno gub.~~	~~mother R. Guschansky, Kowno, Kowno gub.~~
2	Dubra	Dorothea	16	f	s	domestic	yes	yes	Russia.	Lithuanian	Russia.	Birscha	mother E. Dubra, Birscha, Kowno gub.
3	Dawud oglu	Maragula	20	m	s	labourer	no	no	Russia.	Syrian	Russia.	Chanischan	father M. Dawud, Chanischan, Persia.
4	Michalczuk	Germogen	18	m	s	tailor	yes	yes	Russia.	Russian	Russia.	Wilerai	father G. Michalczuk, Wolhyn., Wolyn. gub.
5	Bereshny	Fedor	25	m	s	farmlabourer	no	no	Russia.	Russian	Russia.	Mozgin	father K. Bereshny, Mozgin, Minsk gub.
6	Jamulionis	Ignaty	19	m	s	labourer	yes	yes	Russia.	Lithuanian	Russia.	Niemieischun	father I. Jamulionis, Niemieischun, Kowno gub.
7	Jaika	Artem	28	m	m	farmlabourer	yes	yes	Russia.	Russian	Russia.	Shidowcein	wife E. Jaika, Shidowcein, Kiew gub.
8	~~Mancziunas~~	~~Iwan Josif~~	~~21~~	~~m~~	~~s~~	~~labourer~~	~~yes~~	~~yes~~		~~Lithuanian~~		~~Niemienkschuny~~	~~father K. Mancziunas, Niemienkschuny, Kowno gub.~~
9	Kaplun	Chana Gitja	45	f	m	housewife	yes	yes	Russia.	Hebrew	Russia.	Nowokonstantinow	father
10	Kaplun	Arjemi	16	m	s	scholar	no	no	Russia.	Hebrew	Russia.	Nowokonstantinow	Ch. Mener
11	Kaplun	Mischka-Schmul	5	m	s	child	no	no	Russia.	Hebrew	Russia.	Nowokonstantinow	Nowokonstantinow,
12	Kaplun	Ester	4	f	s	child	no	no	Russia.	Hebrew	Russia.	Nowokonstantinow	Podolien gub.
13	Krojan	Aliana	20	f	m	domestic	no	no	Russia.	Russian	Russia.	Likowcy	father A. Krojan,
14	Swerin	Pawel	3	m	s	child	no	no	Russia.	Russian	Russia.	Likowcy	Likowcy, Volyn gub.
15	Scharkanas	Maria	17	f	s	domestic	yes	yes	Russia.	Lithuanian	Russia.	Primnukschni	mother R. Scharkanas, Primnukschni, Kowno gub.
16	Rubanowicz	Sara	17	f	s	milliner	yes	yes	Russia.	Hebrew	Russia.	Kursk	father G. Rubanowicz, Kursk,
17	~~Kaleikowa~~	~~Zinia Maria~~	~~4~~										
18	~~Kaleikowa~~	~~Neonila~~	~~23~~										
19	Popojantz	Barlugnimas	18	m	s.	farmlabour	yes	yes	Russia.	Armenian	Russia	Suaniwedi	Father Geworke Popojantz, Suaniwedi, gub. Erivan
20	Czernewskaja	Herwnbria	17	f	s.	domestic	yes	yes	Russia.	Polish	Russia	Libau	Father Adam Chernewsky, Libau, gub. Kurland
21	Chorzjanowsky	Wladislaw	26	m	s.	farmlabour	yes	yes	Russia.	Polish	Russia	Luchitzi	Mother Chatrina Chorzjanowsky, Luchitzi, gub. Grodnenskaya
22													
23													
24													
25													
26													
27													
28													
29													
30													

S.I. ADMITTED (rows 9–12)

IN HOSPITAL DISCHARGED (row 12)

65

Number of aliens on this sheet as to whom Collector has been requested to collect head tax:

* Last permanent residence is the country in which the alien has last resided for one year or more.
† List of races will be found on the back of this sheet.

Attachment C

Form 518
U. S. DEPARTMENT OF LABOR
IMMIGRATION SERVICE
14—377

RECORD OF ALIENS HELD FOR SPECIAL INQUIRY.

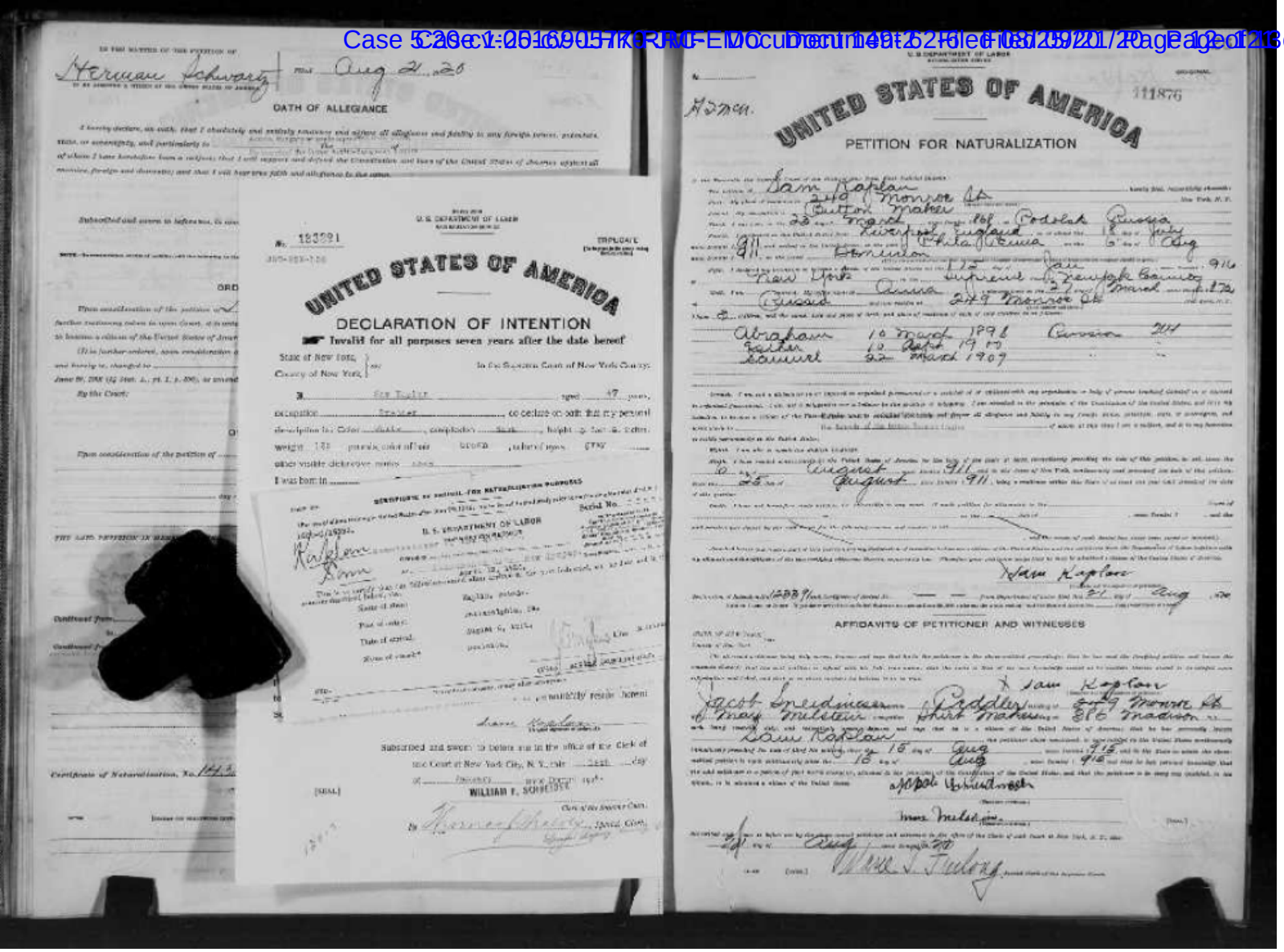
NO.______

S. S. "KURSK" RA arrived July 20, 1914. , 191 , M., , from open

	Index No.	Names.	Manifest. Group.	Manifest. No.	No. Persons.	Cause of Detention.	Inspector.	Def.—Excl. Date.	Def.—Excl. Page.	Def.—Excl. Sec'y.	Rehearings. Date.	Rehearings. Page.	Rehearings. Sec'y.	Admitted. Date.	Admitted. Page.	Admitted. Sec'y.	Admitted. Time.	Departmental and Executive Orders. Date.	Record No.	Orders.	Deported. Date.	Deported. Ship.	Officer.	Meals. Breakfast.	Dinner.	Supper.
31f	31	Gorlik, Sifra, children	3	12/17	6	lpc, phd-cert, 4;	Flannery							7/21	9	8	11.25							6	-	6
10m		" Elie												—										—		
8m		" Scholem												—										—		
4m		" Srul												—										—		
2m		" Hirsch												—										—		
6f		" Rosa												—										—		
45f	32	Kaplin Chona	14	9/12 (9-11-14 65)		L.P.C., cert + SI 7/22 1.45 pm	Tedesco	7/22	39	Gr	7/23	39	ff					10/1/14	3.00	Landed		✓		4/78	4/79	4/79 ☆
16m		Avrum					4	—			—			~~Landed 7/29~~			~~12.05~~	7/29	12.05	Landed				—		
5m		Schmuel					4	—			—							10/1/14	3.50	Landed		✓		—		
14f		Ester				To Hosp 3/15/15. From Hosp 3/19/15 * cert F.M.	"	—			—							6/18/15	3.35	Released		✓		—		
																								6	-	6 h.2

Kursk 7/20 Totals

Attachment D



OATH OF ALLEGIANCE

UNITED STATES OF AMERICA

DECLARATION OF INTENTION

Invalid for all purposes seven years after the date hereof

UNITED STATES OF AMERICA

PETITION FOR NATURALIZATION

AFFIDAVITS OF PETITIONER AND WITNESSES

IN THE MATTER OF THE PETITION OF

Sam Kaplan

TO BE ADMITTED A CITIZEN OF THE UNITED STATES OF AMERICA.

Filed Aug. 21, 1920

OATH OF ALLEGIANCE

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to the bounds of the former Russian Empire *of whom I have heretofore been a subject; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; and that I will bear true faith and allegiance to the same.*

x Sam Kaplan

Subscribed and sworn to before me, in open Court, this 14 *day of* Dec, *A. D. 19*20

Frank J. Mullen, Clerk.

NOTE.—In renunciation of title of nobility, add the following to the oath of allegiance before it is executed: "I further renounce the title of (give title), an order of nobility, which I have heretofore held."

ORDER OF COURT ADMITTING PETITIONER

Upon consideration of the petition of Sam Kaplan*, and affidavits in support thereof, and further testimony taken in open Court, it is ordered that the said petitioner, who has taken the oath required by law, be, and hereby is, admitted to become a citizen of the United States of America, this* 14 *day of* Dec, *A. D. 19*20

(It is further ordered, upon consideration of the petition of the said ....*, that his name be, and hereby is, changed to* ....*, under authority of the provisions of section 6 of the act approved June 29, 1906 (34 Stat. L., pt. 1, p. 596), as amended by the act approved March 4, 1913, entitled "An act to create a Department of Labor.")*

By the Court:

Richard P. Lydon, J.S.C.

ORDER OF COURT DENYING PETITION

Upon consideration of the petition of .... *and the motion of* .... *for the United States in open Court this* .... *day of* ...., *19*...., *it appearing that* ....

THE SAID PETITION IS HEREBY DENIED.

.........., *J*.

MEMORANDUM OF CONTINUANCES

REASONS FOR CONTINUANCE

Continued from ...., *19*....

to ...., *19*....

Continued from ...., *19*....

to ...., *19*....

NAMES OF SUBSTITUTED WITNESSES

.........., *occupation* ...., *residing at* ....

.........., *occupation* ...., *residing at* ....

Certificate of Naturalization, No. 1437278*, issued on the* 14 *day of* Dec, *A. D. 19*20

14—91A [INSERT ON FOLLOWING LINES MARRIAGES AND BIRTHS OCCURRING AFTER PETITIONING AND BEFORE NATURALIZATION.]

U. S. DEPARTMENT OF LABOR
NATURALIZATION SERVICE

No. ....

ORIGINAL

111877

A 2 mu

UNITED STATES OF AMERICA

..., hereby filed, respectfully showeth:

..., New York, N. Y.

Austria

30 day of Oct

1 day of Nov

anno Domini 1916

York County

NUMBER 92 PAID $4.00

869

Nass

Aug 30 1920

Nass

1 E 139 St

W. 116"

1 day of Aug anno Domini 1920

14—230 [OVER.]

A. Dutcher, Special Clerk of the Supreme Court.

EXHIBIT F

Congressional Record

PROCEEDINGS AND DEBATES

OF THE

FIRST SESSION OF THE SEVENTY-FIRST CONGRESS

OF

THE UNITED STATES
OF AMERICA

VOLUME LXXI—PART 2

MAY 13 TO JUNE 3, 1929

(Pages 1167 to 2304)

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1929

page 8501 of the hearings, stated that he formerly consumed 9,000 bales of Delta staples 1¼ to 1⅝ inches in length annually. He stated that now these staples are nonexistent. I know he is correct. The odds are against the American producer. The weather, the pests, and the labor costs are against him. Which is the short-sighted policy, to deny the benefits of the tariff or to follow the example of the Egyptian Government and promote domestic production?

All cotton is now raised in spite of the boll weevil. As shown by page 2303 of the Summary of Tariff Information, 1929, the acreage planted to staple cotton is determined by the spread in the price. This is but another way of saying that if there is no premium over the price of short cotton, the production of staple cotton in the United States will cease. The interest of the American consumer must be considered. Is it wise to continue a policy that will make the American people dependent upon a foreign production?

When the ravages of the boll weevil became manifest in the United States the growth of Sakellarides cotton was encouraged in Egypt. The production is growing less in Egypt each year. In Egypt the British Government is encouraging the extension and cultivation in the Sudan. The cotton growers of the South and the Southwest are familiar with foreign operations. The late Dwight B. Heard, of Arizona, visited all of the cotton operations in the British colonies some three years ago. He returned to the United States a more confirmed advocate than ever of a reasonable tariff on staple cotton.

DISCREPANCIES

In a speech on Tuesday, May 14, 1929, as shown by the RECORD, page 1293, Mr. TREADWAY gave statistics as to domestic exports of staple cotton. It is passing strange that Mr. TREADWAY overlooked the comments contained in the Summary on page 2306, and I quote the important matter which my colleague from Massachusetts did not include:

> The recorded exports of long staple cotton (over 1⅛ inches) are much larger than the estimated production, although large quantities are known to be used domestically. There is some confusion in the trade as to how staple length is to be measured and cotton considered 1⅛ inches in certain localities is considered short staple in others. The discrepancy can merely be pointed out, not satisfactorily explained here.

The statistics quoted by Mr. TREADWAY are reported to the Department of Commerce by exporters. They are not statistics collected by any governmental agency. Ex-Senator Lippitt referred to the discrepancy, and he stated on page 8475 of the hearings that the exports of staple cotton amount to about 300,000 bales annually. There was no guessing as to exports on the part of the domestic producers. Their records show, on page 8441 of the hearings, that from 70 to 75 per cent of Delta staples are consumed in the United States.

I have repeatedly pointed out that the United States Government for the past two years has estimated, as required by law, the domestic production. They have also estimated the domestic consumption. Their figures show that the domestic production for 1928 is around 700,000 bales, while the domestic consumption of domestic staples is less than that figure.

Mr. TREADWAY states that there is no satisfactory substitute for any Egyptian cotton. I speak from the hearings and from the uncontradicted hearings. I quote from the testimony of Mr. John B. Clark, representing the Clark Thread Co., in answer to a question by Mr. Collier, page 8490 of the hearings:

> I did not say that the Delta staple could not be substituted.

His statement is typical of other statements.

We have a very high tariff on wool. We do not grow enough for domestic consumption. It is just as reasonable to argue that a tariff on wool would prevent the imports of wool that we must have as to argue that a tariff on staple cotton will prevent the imports of staple cotton. The same argument applies to sugar.

Again, as repeatedly pointed out in the briefs and in the hearings, the fair conclusion from all the testimony is that Delta staples can be substituted for Egyptian uppers. At the present time there are being imported about 50,000 bales annually of Sakellarides. We ask for no embargo. We believe that a reasonable tariff on staple cotton would foster domestic production and would protect the domestic producer in the difference in labor costs in the United States and Egypt.

PREMIUMS

The growers of staple cotton are suffering unusual depression, and it is reflected in the entire cotton industry. Millions are engaged in the cotton fields of the South, where hundreds are employed in the factories. The importations of Egyptian cotton have reduced the premiums on staple cotton. The condition of the staple cotton grower is worse than that of the United States textile mills. He must compete with Egyptian labor, the cost of which is from 75 to 80 per cent less than that of American labor. He must overcome floods and pests. The importations are depressing the price of staples, and unless the domestic grower receives the equal benefit of the tariff the American people will be the loser in the long run. We know what the British interests will do when there is a monopoly. We have not forgotten the rubber situation two years ago.

TARIFF BENEFICIAL

The emergency tariff act, with a duty of 7 cents per pound on long-staple cotton, was in effect from May 27, 1921, to September 21, 1922. Approximately, 50,000 bales of Sakellarides and its equivalent were imported in 1928, as shown by the hearings, page 8458. I refer to page 2304 of the summary:

Sixteen thousand bales of Sakellarides were imported during the emergency tariff in 1921, and 31,000 bales in 1922.

The Tariff Bulletin, No. 27, to which I have referred, issued by the Tariff Commission, states that Pima cotton was substituted for the Sakellarides, and the hearings, on page 8458, show that the spinners themselves substitute Delta staples for Egyptian uppers when the premiums are too high. Alas, however, it will be too late to substitute when staples have disappeared in the United States.

TARIFF ON TIRE FABRICS

Ex-Senator Henry F. Lippitt, on page 8484 of the hearings, stated that long staples are combed, and that they make very fine numbers, such as 100 or 150. Staples are used in fine cotton goods and fine yarns, in sewing thread, tire fabrics, and for high grade special purposes.

In his speech, to which I have referred, on page 1287 of the RECORD, Mr. TREADWAY pointed out that the average tire fabric under the pending bill would carry a duty of 17 per cent ad valorem. I am aware that paragraph 905 has been modified. I admit that the present bill carries a smaller tariff on tire fabrics in general. However, all the fabrics that have the highest numbers have the highest tariff in history. The tariff on the textiles manufactured from domestic staples has been raised very materially. Replying to Mr. TREADWAY, I say that the tariff on tire fabrics in which staples are used has very materially increased. I quote from the hearings. As shown by page 8502, the tire industry uses about 700,000 bales of cotton annually, of which not more than 30 per cent, as shown by pages 8506 and 8507, is long-staple cotton. In other words, at least 70 per cent of the cotton, or 500,000 bales, used in tire fabrics would still remain on the free list if a reasonable tariff is granted on staple cotton; and inasmuch as the tariff on larger numbers has been materially increased it must follow that while the average duty on all tire fabrics may be 17 per cent ad valorem, where it is now 25 per cent, it will be much higher than 25 per cent on tire fabrics using staple cotton.

COMPENSATORY DUTIES

Mr. TREADWAY stated that there was no showing before the committee as to compensatory duties, in the event a tariff was granted on staple cotton. With so many tariff matters before him, he has again overlooked the hearings. Senator Lippitt, on page 8476, gave it as his judgment that there should be at least 40 per cent more duty on the products than the duty levied on the cotton. Senator Lippitt made this statement again on page 8484, and it was reinforced by the statements of other witnesses.

We do not ask that Delta staples be given a tariff without similar compensation to manufacturers. The probability is that the committee has anticipated the matter of compensatory duties. The tariffs, as I read the bill, on the articles manufactured from staple cotton, have been raised to and in excess of the figures suggested by Senator Lippitt. If I am in error, I concede that an adequate tariff on staple cotton should provide for adequate compensatory duties.

DOMESTIC AND FOREIGN COSTS

Agricultural workers in Egypt, according to the report of the American consul, dated December 22, 1928, received from 30 to 50 cents per day for men and from 15 to 25 cents per day for women and children.

Cotton pickers in Egypt are paid from 7½ and 25 cents per day for picking cotton. The pickers, many of whom are children, work under the lash. They are beaten if the overseer is dissatisfied with their work. The hearings disclose that the wage rate in the staple areas of the South and Southwest is from $1.25 to $3 a day. Cotton pickers of domestic staple cotton receive from $1 to $3 per day.

Labor is the major cost in any product. It applies to the raw, as well as to the manufactured, product.

the case of a vessel of foreign registry. There is no reason, except the temporary moral influence of the *Vestris* case, why the tragedy might not be repeated to-morrow. Senator WAGNER has introduced a resolution in the Senate calling for a careful study by a committee as a preliminary to new legislation; and there are few subjects before the special session of Congress which are of more importance.

DECENNIAL CENSUS AND APPORTIONMENT OF REPRESENTATIVES

The Senate, as in Committee of the Whole, resumed the consideration of the bill (S. 312) to provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives in Congress, the pending question being on Mr. SACKETT's amendment, in section 22, page 16, line 15, after the word "State," to insert the words "exclusive of aliens and," so as to make the section read:

SEC. 22. That on the first day, or within one week thereafter, of the second regular session of the Seventy-first Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, exclusive of aliens and excluding Indians not taxed, as ascertained under the fifteenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the existing number of Representatives made in the following manner: By apportioning the existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census, by the method used in the last preceding apportionment, no State to receive less than one Member.

Mr. REED. Mr. President, speaking to the amendment of the Senator from Kentucky [Mr. SACKETT], which, as all Senators know, would exclude aliens from the count on which the apportionment of Representatives is based, let me say that I do not remember a time when I have been faced in the Senate with a proposition which has my more ardent support than this amendment. I want to vote for it; everything in my experience and outlook would lead me to vote for this amendment if that possibly could be done. I have tried hard, in studying the briefs and the arguments in the House and in listening with care to the Senator from Kentucky, to find some basis on which I could vote for his amendment, because, as I say, it has my most ardent sympathy and I wish that it were possible for me to support it.

While I do not believe I can vote for it, I hope the Senate will understand that when I say that I feel I am oath bound in the matter, that does not reflect in the slightest upon any Senator who differs from me; but the oath which we take to support the Constitution includes the obligation to support it when we dislike its provisions as well as when we are in sympathy with them. I believe that this amendment would be unconstitutional and that it would jeopardize the entire measure.

The use of the word "persons" as it occurs in Article I of the original Constitution was not an accident, Mr. President, as is shown by the records of the Constitutional Convention. The original language was that the apportionment should be based on the "free citizens and inhabitants," obviously including both citizens, other than slaves, and inhabitants. When that went to the committee on style of the Constitutional Convention it was reported back with the word "persons" substituted for the words "free citizens and inhabitants." The change led to no discussion, so far as the records of the convention disclose. We know of no question that was raised about the use of the word "persons" in substitution for the term "free citizens and inhabitants," and obviously the necessary inference is that the committee on style had tried to shorten the phrase without changing its meaning.

Every Congress that acted on that part of Article I of the original Constitution and every apportionment that was made in reliance upon that article included all free persons literally. It excluded Indians not taxed and it excluded slaves, but in every apportionment inhabitants who were not citizens were included. That construction has been continuous and consistent.

Then, when the fourteenth amendment was under consideration, as is shown by the memorandum put in the RECORD by the Senator from Michigan [Mr. VANDENBERG], which Senators will find at pages 1821 and 1822 of the CONGRESSIONAL RECORD, of course it was desired to change the provision which counted slaves at only three-fifths of their actual number. With the abolition of slavery that became an anomaly in the Constitution, and the prime attention of Congress was directed to that point. But while the question was under discussion it was then suggested in the House of Representatives that the word "persons" should be changed to read "citizens" and another proposition was made to change it to read "voters." After a considerable debate upon the subject it was deliberately decided then that the word "persons" should not be changed to read "citizens"; it should not be changed to read "voters"; and one of the reasons assigned was that it would disregard in the apportionment about 2,000,000 of law-abiding aliens who had not yet become naturalized.

Mr. ALLEN. Mr. President——

The VICE PRESIDENT. Does the Senator from Pennsylvania yield to the Senator from Kansas?

Mr. REED. I yield.

Mr. ALLEN. Will the Senator give us the authority for the quotation he is now making?

Mr. REED. The Senator will find that in the CONGRESSIONAL RECORD of that day, which was called the Congressional Globe. The references have been collected, and the Senator will find them in a memorandum prepared by the legislative counsel of the Senate which is printed on page 1831 of the CONGRESSIONAL RECORD of this session. I take it that it is unnecessary to repeat the references, because they are all contained in that memorandum.

So, Mr. President, while, as I have tried to make clear, I disagree to the bottom of my heart with the action then taken, while if it were a free question I should unhesitatingly vote to substitute the word "citizens" for "persons" or to substitute the words "voters who actually have cast their votes at the last general election," yet I am forced to the conclusion that the word "persons" must be taken in its literal sense; that it was not an accident that it occurred but was the deliberate choice, first, of the Constitutional Convention and next of the Congress in acting on the fourteenth amendment.

Mr. BARKLEY. Mr. President——

The VICE PRESIDENT. Does the Senator from Pennsylvania yield to the Senator from Kentucky?

Mr. REED. I do.

Mr. BARKLEY. Regardless of any reason given by the Members of the Congress which submitted to the States the fourteenth amendment, the sum of their action was to leave the language precisely as it was framed by the original framers of the Constitution?

Mr. REED. As far as this question is concerned, yes.

Mr. BARKLEY. Yes; as far as this question is concerned. So if any Member of either House of Congress believes that the original intention of the framers of the Constitution was not to include all aliens, would he, in good conscience or in the performance of his duty, be bound by any reasons assigned by those who framed the amendment to the Constitution in which they used that language?

Mr. REED. No, Mr. President; if he believed that, of course, he would be free to vote in accordance with that belief; and I am not speaking in the effort to swerve the decision of anyone else. I really hoped the Senate would disagree with me and would feel that this is constitutional; but I am explaining why, in my conscience, I can not vote otherwise than as I am going to vote.

Mr. WALSH of Montana. Mr. President——

The PRESIDING OFFICER (Mr. BINGHAM in the chair). Does the Senator from Pennsylvania yield to the Senator from Montana?

Mr. REED. I do.

Mr. WALSH of Montana. I understand clearly that if the Senator had had a voice either in the preparation of the Constitution in the first place or in the preparation of the fourteenth amendment, he would have felt constrained to use the word "citizen" or some other term which would exclude aliens.

Mr. REED. Yes, Mr. President.

Mr. WALSH of Montana. Exactly. Does the Senator find any reason at all why, in the apportionment of direct taxes, aliens should be excluded—the provision of the original Constitution being:

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service—

And so forth.

Mr. REED. I can conceive that to exclude resident aliens from the apportionment of direct taxes might work an injustice.

Mr. WALSH of Montana. Can the Senator see any reason at all why, in imposing direct taxes upon the various States, a State which has a heavy alien population should be exempted from that proportion of the burden, and it should be imposed upon those States having a small alien population?

Mr. REED. I think that just as the inclusion of aliens works an injustice where privileges are being granted, so the inclusion of aliens might work an injustice where obligations are being imposed. One is an obligation; the other is a privilege.

DECENNIAL CENSUS AND APPORTIONMENT OF REPRESENTATIVES

The Senate, as in Committee of the Whole, resumed the consideration of the bill (S. 312) to provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives in Congress, the pending question being on Mr. SACKETT's amendment, in section 22, page 16, line 15, after the word "State," to insert the words "exclusive of aliens and," so as to make the section read:

SEC. 22. That on the first day, or within one week thereafter, of the second regular session of the Seventy-first Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, exclusive of aliens and excluding Indians not taxed, as ascertained under the fifteenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the existing number of Representatives made in the following manner: By apportioning the existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census, by the method used in the last preceding apportionment, no State to receive less than one Member.

The VICE PRESIDENT. The question is on the amendment of the Senator from Kentucky [Mr. SACKETT].

Mr. HEFLIN and others called for the yeas and nays, and they were ordered.

The VICE PRESIDENT. The Secretary will call the roll.

The Chief Clerk proceeded to call the roll.

Mr. TYDINGS (when his name was called). On this vote I have a general pair with the senior Senator from Arkansas [Mr. ROBINSON]. Not knowing how he would vote, I withhold my vote.

The roll call was concluded.

Mr. ALLEN. On this vote I have a special pair with the Senator from Nevada [Mr. ODDIE], and in his absence I withhold my vote. Were the Senator from Nevada present, he would vote "nay," and if I were permitted to vote I would vote "yea."

Mr. BINGHAM (after having voted in the negative). I have a general pair with the junior Senator from Virginia [Mr. GLASS]. I understand that if he were present he would vote "yea." As I am unable to obtain a transfer, I withdraw my vote.

Mr. ASHURST. I wish to announce that my colleague [Mr. HAYDEN] is absent from the Chamber on a very important conference relating to the Colorado River. He is paired with the junior Senator from Arkansas [Mr. CARAWAY]. If my colleague were present, he would vote "nay," and if the Senator from Arkansas were present and permitted to vote he would vote "yea."

Mr. GEORGE. I wish to inquire if the senior Senator from Colorado [Mr. PHIPPS] has voted?

The VICE PRESIDENT. He has not voted.

Mr. GEORGE. I have a general pair with the senior Senator from Colorado [Mr. PHIPPS], who, I am advised, is unavoidably detained from the Senate at this moment on official business. If he were present, he would vote "nay," and if I were privileged to vote I would vote "yea."

Mr. SCHALL. I wish to announce that my colleague [Mr. SHIPSTEAD] is ill in the hospital.

Mr. SHEPPARD. I desire to announce that the senior Senator from New Mexico [Mr. BRATTON] is paired with the junior Senator from New Mexico [Mr. CUTTING]. If present, the senior Senator from New Mexico [Mr. BRATTON] would vote "nay" and the junior Senator from New Mexico [Mr. CUTTING] would vote "yea."

I also desire to announce that the junior Senator from Oklahoma [Mr. THOMAS] is necessarily detained on official business. If present, he would vote "yea."

I also announce that the Senator from Wyoming [Mr. KENDRICK] and the Senator from Nevada [Mr. PITTMAN] are necessarily detained from the Senate on official business.

I also desire to announce that the Senators from Arkansas [Mr. ROBINSON and Mr. CARAWAY] are necessarily out of the city. This announcement may stand for the day.

Mr. HEFLIN. Mr. President, I ask for a recapitulation of the vote.

The Chief Clerk again recapitulated the vote, and the result was announced—yeas 29, nays 48, as follows:

YEAS—29

Barkley	Harris	Nye	Smith
Black	Harrison	Overman	Steck
Blease	Hawes	Pine	Swanson
Brookhart	Heflin	Robinson, Ind.	Trammell
Capper	Howell	Sackett	Tyson
Dill	McKellar	Schall	
Fletcher	McMaster	Sheppard	
Frazier	Norbeck	Simmons	

NAYS—48

Ashurst	Glenn	Keyes	Stephens
Blaine	Goff	King	Thomas, Idaho
Borah	Goldsborough	La Follette	Townsend
Broussard	Gould	McNary	Vandenberg
Burton	Greene	Metcalf	Wagner
Connally	Hale	Moses	Walcott
Copeland	Hastings	Norris	Walsh, Mass.
Couzens	Hatfield	Patterson	Walsh, Mont.
Deneen	Hebert	Ransdell	Warren
Edge	Johnson	Reed	Waterman
Fess	Jones	Shortridge	Watson
Gillett	Kean	Steiwer	Wheeler

NOT VOTING—18

Allen	Dale	Oddie	Smoot
Bingham	George	Phipps	Thomas, Okla.
Bratton	Glass	Pittman	Tydings
Caraway	Hayden	Robinson, Ark.	
Cutting	Kendrick	Shipstead	

So Mr. SACKETT's amendment was rejected.

Mr. HARRISON. Mr. President, I desire to offer an amendment.

The VICE PRESIDENT. The Senator from Mississippi offers an amendment, which will be reported.

The CHIEF CLERK. On page 16, strike out lines 11 to 25, inclusive, in the following words:

SEC. 22. That on the first day, or within one week thereafter, of the second regular session of the Seventy-first Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the fifteenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the existing number of Representatives made in the following manner: By apportioning the existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census, by the method used in the last preceding apportionment, no State to receive less than one Member.

And in lieu thereof insert:

SEC. 22. That before the expiration of the second regular session of the Seventy-first Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons (stating separately the number of aliens) in each State, excluding Indians not taxed, as ascertained under the fifteenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives made in each of the following manners: (1) By apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States (including aliens but excluding Indians not taxed) as ascertained under such census, by the method used in the last preceding apportionment, no State to receive less than one Member, and (2) by apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States (excluding Indians not taxed and aliens) as ascertained under such census, by the method used in the last preceding apportionment, no State to receive less than one Member.

And on page 17 strike out lines 1 to 7, inclusive, in the following words:

If the Congress to which the statement required by section 1 is transmitted fails to enact a law apportioning Representatives among the several States, then each State shall be entitled, in the second succeeding Congress and in each Congress thereafter until the taking effect of a reapportionment on the basis of the next decennial census, to the number of Representatives shown in the statement; and it.

And insert in lieu:

If the Congress to which the statement required by this section is transmitted, and the succeeding Congress, fail to enact a law apportioning Representatives among the several States, then each State shall be entitled, in the third Congress succeeding the Congress to which such statement is transmitted, and in each Congress thereafter until the taking effect of a reapportionment on the basis of the next decennial census, to the number of Representatives shown in clause (1) of the statement; except that upon the ratification of any amendment to the Constitution excluding aliens from the persons to be counted in making an apportionment of Representatives then each State shall be entitled, in the second Congress succeeding the Congress during which such ratification occurs, and in each Congress thereafter until the taking effect of a reapportionment on the basis of the next decennial census, to the number of Representatives shown in clause (2) of the statement. It.

Mr. HARRISON. Mr. President, I want to explain this amendment briefly, so as to indicate just what is intended to be accomplished by it.

Under the bill the President of the United States, following the enumeration, will submit, either on the first day of the December session of Congress the next year, or within a week

Mr. WALSH of Montana. Manipulation can occur; but how can manipulation occur?

Mr. BLACK. It can occur exactly as it occurred when Representatives were taken away from four States.

Mr. WALSH of Montana. But then, obviously, according to the statement of the Senator, the House disregarded the rule of major fractions and with respect to certain States did not give them the representation to which they were entitled by the application of the principle of major fractions.

Mr. BLACK. That is the Senator's interpretation, but the Senator does not understand major fractions, because the Senator has the idea that the constituency which has the largest major fraction gets a Representative as a matter of right.

Mr. WALSH of Montana. Yes.

Mr. BLACK. But the Senator from Michigan, who says he understands it thoroughly, has just told the Senator that that is not the case.

Mr. WALSH of Montana. He has indicated that under certain circumstances that is not the case, but I have not been able to understand what those circumstances are.

Mr. BLACK. Neither do I; neither does anybody else, and that is what I am complaining about when the power is given to the President.

Mr. GEORGE. Mr. President, may I ask the Senator from Michigan a question?

Mr. VANDENBERG. I have not the floor.

Mr. GEORGE. Then I will take the floor, if I may be recognized, and will ask the Senator is not the major-fractions rule when the number of Representatives in the House has been fixed and the population has been ascertained, then it is necessary to find a divisor that will make it possible to give to all the States that have major fractions, that is, the greater part of the unit of the divisor, each a Representative in the House?

Mr. VANDENBERG. That is correct.

Mr. GEORGE. In that way it is necessary to keep searching, I should say, until a divisor is obtained which will result in bringing the total number of Representatives down to the number which has been fixed and predetermined.

Mr. VANDENBERG. The searching is done by mathematical calculation which is perfectly understood.

Mr. GEORGE. But if merely a fixed number were taken and divided into the population, there might be sufficient States with major fractions left over to give a larger number of Representatives in the House than the number fixed.

Mr. VANDENBERG. That is correct.

Mr. GEORGE. So it is necessary by a mathematical process to find a divisor that will leave exactly the proper number of major fractions.

Mr. VANDENBERG. That is correct. May I say to the Senator that under the system of major fractions as known in Daniel Webster's day there might be more major fractions than the size of the House justified. Then we reached the point where it was not satisfactory not to have a fixed objective in the size of the House; and that is the system of major fractions employed to-day.

The VICE PRESIDENT. The question is on agreeing to the amendment offered by the Senator from Alabama [Mr. BLACK].

Mr. BLACK. On that I ask for the yeas and nays.

The yeas and nays were ordered, and the Chief Clerk proceeded to call the roll.

Mr. METCALF (when his name was called). I have a general pair with the Senator from Arkansas [Mr. ROBINSON]. Not knowing how he would vote on this question, I withhold my vote.

The roll call was concluded.

Mr. FESS. I desire to announce that on this question the senior Senator from Massachusetts [Mr. GILLETT] is paired with the junior Senator from Arkansas [Mr. CARAWAY].

Mr. SHEPPARD. I desire to announce that the Senator from Oklahoma [Mr. THOMAS] is necessarily detained on official business.

The result was announced—yeas 36, nays 52, as follows:

YEAS—36

Barkley	Dale	Heflin	Sackett
Black	Frazier	Howell	Sheppard
Blaine	George	King	Smith
Blease	Glass	McKellar	Steck
Bratton	Greene	McMaster	Stephens
Brookhart	Harris	Norbeck	Swanson
Broussard	Harrison	Norris	Trammell
Connally	Hawes	Nye	Tyson
Cutting	Hayden	Pittman	Wheeler

NAYS—52

Allen	Capper	Edge	Goldsborough
Ashurst	Copeland	Fess	Gould
Bingham	Couzens	Fletcher	Hale
Borah	Deneen	Glenn	Hastings
Burton	Dill	Goff	Hatfield
Hebert	Moses	Schall	Vandenberg
Johnson	Oddie	Shortridge	Wagner
Jones	Overman	Simmons	Walcott
Kean	Patterson	Smoot	Walsh, Mass.
Kendrick	Phipps	Steiwer	Walsh, Mont.
Keyes	Pine	Thomas, Idaho	Warren
La Follette	Ransdell	Townsend	Waterman
McNary	Reed	Tydings	Watson

NOT VOTING—7

Caraway	Metcalf	Robinson, Ind.	Thomas, Okla.
Gillett	Robinson, Ark.	Shipstead	

So Mr. BLACK's amendment was rejected.

Mr. BLACK. Mr. President, I send to the desk an amendment which I ask to have stated.

The VICE PRESIDENT. The amendment will be stated.

The CHIEF CLERK. On page 5, after the period in line 13, it is proposed to insert the following new section:

Such censuses shall also include an enumeration of aliens lawfully in the United States and of aliens unlawfully in the United States.

The VICE PRESIDENT. The question is on the amendment of the Senator from Alabama.

Mr. BLACK. I thought perhaps the committee might accept that amendment.

Mr. JOHNSON. Mr. President——

The VICE PRESIDENT. Does the Senator from Alabama yield to the Senator from California?

Mr. BLACK. I yield.

Mr. JOHNSON. It would be an utter impossibility to undertake that enumeration in the census, so I am advised. It would simply add to the cost, and would accomplish no purpose, so far as that is concerned, because the particular matter is under the Labor Department at the present time in regard to the aliens lawfully and unlawfully in the United States; and it is obvious that if we gave to enumerators the right to determine, as I understand the amendment—I heard it read only for the first time—whether one were here lawfully or unlawfully, we would give them a task that is impossible of performance in the very brief period that is accorded.

May I inquire of the Senator if I am accurate in saying that the amendment provides for ascertaining the aliens lawfully and those unlawfully in the country?

Mr. BLACK. That is correct.

Mr. JOHNSON. That is what the amendment provides?

Mr. BLACK. That is correct.

Mr. JOHNSON. Of course, that can not be done in an enumeration of the sort that is indicated.

Mr. BLACK. Mr. President, the Senator stated, as I understood him, that he had been informed that it was impracticable to do that. May I ask the Senator——

Mr. JOHNSON. No; that was not in relation to the particular matter of the lawfulness or the unlawfulness. It had naught to do with this amendment. At first I did not quite comprehend, having heard the amendment for the first time, what its proposal was; but a proposal to put in the hands of an enumerating officer the determination of whether an alien is here lawfully or unlawfully I leave to the Senate to decide.

Mr. BLACK. Mr. President——

SEVERAL SENATORS. Vote!

Mr. BLACK. We are not going to vote right this minute. I think probably we will not speed up any by making an effort to vote hurriedly.

The VICE PRESIDENT. The Senator from Alabama has the floor.

Mr. BLACK. Mr. President, this is an important amendment. I understand that perhaps no amendments to the bill are considered of any importance; but this is one upon which it might be wise to have a vote by the full Senate. It certainly can not be said that the United States should not know how many aliens are unlawfully in this country.

Mr. TYDINGS. Mr. President, will the Senator yield?

Mr. BLACK. I yield.

Mr. TYDINGS. In the course of the Senator's explanation of his amendment I hope he will point out how a census would be taken of the aliens unlawfully in this country—how they could be tracked down and enumerated.

Mr. BLACK. I shall be glad to do that. One of the ways to find out whether or not a man is unlawfully in the country is to ask him when he came, how he came, and where he came from. Another way is to find out whether or not he was born in this country.

I understand, Mr. President, that the very moment any question is raised with reference to aliens there are some who take the viewpoint that it is an attempt to injure America. Why, the statement was even made on the floor of the Senate yesterday afternoon that the percentage of native-born Americans who came to the colors to defend this country during the World

War was a smaller percentage than that of the foreign born who flew to the flag.

Mr. TYDINGS. Mr. President——

The VICE PRESIDENT. Does the Senator from Alabama yield to the Senator from Maryland?

Mr. BLACK. I yield to the Senator.

Mr. TYDINGS. The Senator may have planned to have a census taken of aliens unlawfully in the United States; but it seems to me that if a census enumerator were going about, and came to a house where he met a man who was a Hungarian, say, and could not speak English, and the enumerator asked how long the man had been in the country and how he came to get into the country, all he would really have from the man would be his own statement. How could he check up whether the man was telling the truth or making a false statement? How would he ascertain that the man had come into the country unlawfully? He would have only the individual's word for it; would he not? The individual might be in Jackson, Miss., but he might have come unlawfully into the country in Michigan six months before; and how would the man's history be traced so that it would be known whether he came in lawfully or unlawfully in a case of that kind?

Mr. GEORGE. Mr. President——

The VICE PRESIDENT. Does the Senator from Alabama yield to the Senator from Georgia?

Mr. BLACK. I do.

Mr. GEORGE. May I suggest to the Senator from Alabama that the legality of entry would necessarily raise a judicial question upon which rights would, of course, depend; and it does not seem to me that the census enumerators could settle in any satisfactory way that important question.

Mr. BLACK. Mr. President, I realize that the census enumerators could not settle the question. I realize, further, that the statement made by the Senator from Maryland that the enumerator would only have the man's statement in the census report is true; but that would be more than we have to-day.

Mr. TYDINGS. Mr. President, will the Senator yield?

The VICE PRESIDENT. Does the Senator from Alabama yield to the Senator from Maryland?

Mr. BLACK. When I have finished replying to the Senator from Georgia.

I was led to offer this amendment by reason of the fact that a few days ago I took up with the Secretary of Labor a question as to the number of aliens in this country who had entered illegally. He stated to me that it was absolutely impossible for him even to approximate, or to hazard a guess. The statement was further made that the only thing to do would be to make an attempt, by an appropriation by Congress, to have an investigation made in order to determine that fact.

All facts can not be obtained at once, but certainly we would be further along than we are to-day if we attempted, through the census enumerators, to ascertain whether or not a man had been born in this country and how he had come into the country.

Mr. TYDINGS. Mr. President, will the Senator yield?

Mr. BLACK. I yield.

Mr. TYDINGS. The Senator has just stated that we would have to rely upon the individual himself as to whether or not he came into the country legally or illegally. Anyone coming into the country illegally would have to lie or sneak in, and if he lied his way in, does the Senator think the answers we would get in these statistics would justify the expense and trouble that would have to be entailed to obtain the information? If a man is going to steal his way into the country, or is going to lie his way into the country, if he gets here illegally, certainly anything that comes from him should be taken with a grain of salt, and the information so obtained would be worthless. It would not be worth the effort necessary to obtain it.

Mr. BLACK. I can see no reason why there should be any great anxiety as to the whether the gentleman was going to tell the truth or tell something which was not true.

Mr. BRATTON. Mr. President——

The VICE PRESIDENT. Does the Senator from Alabama yield to the Senator from New Mexico?

Mr. BLACK. I will yield when I have replied to the question of the Senator from Maryland.

The Senator from Maryland takes the position that because a man might state something that was untrue, he should not be interrogated. If that is correct, the enumerators should not ask questions of any kind, because the answers might not be true.

Mr. HAWES. Mr. President, will the Senator yield?

Mr. BLACK. After I have yielded to the Senator from New Mexico. I yield now to the Senator from New Mexico.

Mr. BRATTON. I ask a question purely for information. In the absence of the adoption of the pending amendment, what is the duty of a census enumerator in ascertaining the place of birth of a given individual, and if it develops to be in a foreign country, the time of his entry into this country? Is he or not required to gather all the facts from which a judicial tribunal could determine whether such foreigner is here lawfully or otherwise?

Mr. BLACK. The Senator from Michigan could answer that perhaps better than I can. As I understand it, the pending bill does not require the enumerators to obtain information as to the place of birth or the ancestry of the individual.

Mr. VANDENBERG. I am unable to answer the question of the Senator.

Mr. JONES. Mr. President, I might suggest to the Senator that the Director of the Census has made up a schedule of questions to be asked, based largely on the questions which have been asked heretofore, and it was not deemed necessary to specify the different questions in the bill. I want to say to the Senator that the nativity of the different persons is one of the items that is brought out.

Mr. BRATTON. Mr. President, will the Senator yield to me further in order that I may seek additional information from the Senator from Washington?

Mr. BLACK. I yield.

Mr. BRATTON. If in the course of interrogation a given individual it develops that he is born in some foreign country, has it been the practice heretofore to develop the facts with reference to the time of entry into this country?

Mr. JONES. I doubt that, although I have not exact information as to that. There is a long list of questions that are to be asked by the enumerator, but just how far they go I am not prepared to say. Whether the questions cover exactly the point the Senator has mentioned I can not say, but the enumerator does inquire, of course, to determine whether a man is an alien, or whether he is a native-born citizen.

Mr. BRATTON. If the Senator from Alabama will allow me to pursue that matter a little further——

The VICE PRESIDENT. Does the Senator from Alabama yield further to the Senator from New Mexico?

Mr. BLACK. I yield.

Mr. BRATTON. The point I have in mind is whether or not, in the administration of laws under which previous censuses have been taken, the facts have been gained from which a court or other tribunal could ascertain whether a foreigner entered this country legally or otherwise.

Mr. JONES. Mr. President, I do not think the census enumerators go into that phase of the question. They could not pass on that.

Mr. BRATTON. The Senator misapprehends what I have in mind. In taking a previous census, when an individual announced that he was born in a foreign country, has the enumerator pursued the subject to the extent of ascertaining when he came into this country, and gathered such other facts from which it could determine whether the foreigner was here illegally?

Mr. JONES. I am inclined to think that they find out when he came into the country, but just how far they go in that particular I can not tell the Senator.

Mr. HEFLIN. Mr. President, why could not the census enumerator ask these men at what port of entry they came in, and then we could communicate with the port and see if their names were on the record; and if they had told a falsehood about it, and it was shown that they had been smuggled into the country, we could get them out of the United States.

Mr. BRATTON. That is the point upon which I have been trying to get information, namely, as to whether in taking any previous census those questions or similar questions have been asked the foreigner from which a department or court could arrive at a conclusion as to whether the alien was here with legal sanction, or otherwise.

Mr. HAWES. Mr. President——

The VICE PRESIDENT. Does the Senator from Alabama yield to the Senator from Missouri?

Mr. BLACK. I yield.

Mr. HAWES. In all seriousness, I would like to suggest to the Senator that if an alien is here unlawfully, what we really want is not an enumerator but a policeman to arrest him.

Mr. BLACK. If we find out where he is, and whether he is unlawfully here.

Mr. HAWES. It is not the business of an enumerator to look after violators of the law. So it seems to me that that provision, if it remains in, would mean an enumeration of men who were violating the law, and that is a question for the Department of Justice and not one for the census enumerators.

Mr. BLACK. Mr. President, I desire to get through as quickly as I can. I will state first, with reference to the question now raised, that it is my desire to have the information secured, as far as it can be obtained, in order that the Depart-

ment of Justice and the policeman whom the Senator from Missouri has mentioned may later do their duty.

There is at present no method whatever provided by this great country, so far as I am aware, which affords us any information as to the number of aliens who are illegally in America. It may be that there are some who think that we should not get that information; I do not know. Personally, I take the position that when an alien is illegally here, here in violation of the plain laws of this country, we ought to utilize every power at our command, whether it be by enumerators or otherwise, to ascertain the identity of those aliens who are illegally in our midst, in order that we may sooner or later deport them back to the countries from which they came.

Mr. WALSH of Montana. Mr. President——

The VICE PRESIDENT. Does the Senator from Alabama yield to the Senator from Montana?

Mr. BLACK. I yield.

Mr. WALSH of Montana. I am very sure that everybody would assent to the proposition that it would be exceedingly advantageous to know about how many people there are in this country who are illegally here; but how could a census of them be taken by anyone? If the department knows about people who are here illegally, of course, the department immediately causes their arrest for the purpose of deportation. The only way by which we could ascertain whether they were here legally or not would be to consult the department. It seems to me the difficulty is not alone that the enumerators can not get the information, but that it would be next to impossible for anybody to get the information. Of course, in every case where the attempt to get the information was resisted an inquiry would be necessitated.

Mr. BLACK. I take the position that if the enumerators could find 5,000 aliens illegally in our midst the money expended in getting the information and sending them from this country would be money well spent.

Mr. WALSH of Montana. I fully agree with that, but let me ask the Senator, How will the enumerators determine that question?

Mr. BLACK. I have no sort of doubt but that the information can be obtained—not a particle of doubt.

Mr. WALSH of Montana. Mr. President, will the Senator yield again?

Mr. BLACK. I yield.

Mr. WALSH of Montana. Let me ask, then, if that would not be an impeachment of the officers of the Department of Labor, whose duty it is immediately to arrest those who are here illegally and deport them?

Mr. BLACK. If the enactment of a law to find out the number of aliens who are in our midst, when we all know they are here, can be construed as an impeachment of any department, then I am ready to impeach them. The Labor Department is not finding out those who are here. If the Senator should call them up, they would not even hazard a guess as to the number of aliens who are in our country illegally. At the same time, the aliens are here illegally, taking the jobs of American citizens, getting the money that would otherwise be earned by American citizens living under American standards, and whenever an effort is made to pass legislation for the purpose of getting information on this subject, some argument is advanced about the impossibility or the unconstitutionality of any effort to protect the present American citizenship from a surplus of foreigners.

Mr. WALSH of Montana. If the Senator will pardon me further——

Mr. BLACK. I yield to the Senator.

Mr. WALSH of Montana. Let me ask the Senator this: Are we to understand that his accusation now is that the Department of Labor is not performing its duty, is neglecting to ascertain who are illegally in this country and to cause them to be deported?

Mr. BLACK. I shall be glad to answer the Senator's question, but I shall not be diverted from the issue which is before us, and which is, "Are we willing to vote for a measure which will tend to some extent to inform the country how many aliens are illegally in America?" I make no indictment of the Department of Labor.

Mr. GEORGE. Mr. President——

The VICE PRESIDENT. Does the Senator from Alabama yield to the Senator from Georgia?

Mr. BLACK. I shall yield again just for a question. I am under a 30-minute limitation.

Mr. GEORGE. I appreciate that fact. I want to say this: I think it is not exactly fair to the Department of Labor to criticize them about this matter.

Mr. BLACK. I was just about to say that.

Mr. GEORGE. Because under a proper registration of aliens, and in no other way, could we properly get the information which the Senator wishes to secure by the enumeration, because it is a judicial process, and it would be very unwise, it seems to me, to inject into the enumeration of the population machinery that ought to be kept within the other field.

Mr. WHEELER. Mr. President——

The VICE PRESIDENT. Does the Senator from Alabama yield to the Senator from Montana?

Mr. BLACK. Mr. President, due to the fact that my time is about exhausted——

Mr. WHEELER. I was merely going to suggest this to the Senator, that I can not see how it is possible to get the information which he suggests in his amendment; but there is one thing that could be done without a question of doubt. Every alien who comes into the United States is supposed to come in through a port of entry. Every alien could be asked through what port of entry he came into the United States, and we could then have the Department of Labor check up all the aliens in the United States and ascertain whether or not they had given the correct information if we wanted to go to that extent.

Mr. BLACK. That is exactly correct.

Now, lest there be a misunderstanding, I have not sought to indict the Department of Labor, and I do not. I have not done it directly or indirectly, by inference, remotely, or in any other way. The Department of Labor, in my judgment, is doing its best with the funds on hand, and if I am not mistaken—and I am not sure about this—that department has sought appropriations in order that it might get this very information with reference to aliens. Why the bills making the necessary appropriations have not been enacted I do not know, but I do know that there is a decided minority sentiment in this country opposed to any measure that will curtail immigration to the slightest extent.

Mr. BRATTON. Mr. President, will the Senator yield?

Mr. BLACK. Certainly.

Mr. BRATTON. The objection has been raised against the Senator's amendment that it attempts to vest in the census enumerators the power to pass upon judicial questions. I doubt the wisdom of that, but I am in full sympathy with the proposal to gather data for proper use by the Department of Justice or otherwise in determining whether aliens are in the country legally or otherwise. I suggest to the Senator that language substantially reading as follows might be substituted which would eliminate the objection entertained by some Senators to the pending amendment. This is the language I suggest to the Senator:

> That such census shall also include an enumeration containing full information respecting all aliens in the United States, including therein the facts and circumstances under which each entered the United States.

Under that provision an enumerator could interrogate an alien and gather from him the facts which might be used by the Department of Justice or the Department of Labor or otherwise, by which a competent tribunal in exercising its jurisdiction could determine whether or not the alien is here lawfully, and if not to deport him or take proper action.

Mr. BLACK. I think the Senator's suggestion is a good one, and I would be glad to have him offer that as a substitute.

Mr. BRATTON. I shall do so.

Mr. TYDINGS. Mr. President——

The VICE PRESIDENT. Does the Senator from Alabama yield to the Senator from Maryland?

Mr. BLACK. I yield.

Mr. TYDINGS. I would like to ask the Senator from New Mexico a question. As I understand the Senator, the census will be taken of all persons, citizens and aliens, and I assume the questionnaire which is to be circulated in each case would have the effect of producing the information mentioned in the Senator's amendment and that the Department of Labor or the Department of Justice, having certain investigators or enumerators, would get the information without the amendment being incorporated in the bill at all.

The VICE PRESIDENT. Does the Senator from Alabama modify his amendment, as proposed, by the Senator from New Mexico?

Mr. BLACK. I will modify it in line with the suggestion of the Senator from New Mexico, and now I would prefer to proceed with my remarks without being called upon to answer any further questions so that I may conclude what I have to say.

I want to call attention to the fact that the Department of Labor has invited our attention to the number of immigrants who illegally entered our borders last year and they have asked for aid and assistance to prevent illegal entry in the future. The Secretary of Labor whom, instead of criticizing, I desire

to commend for his work in the position which he holds, has expressed himself all over this land as favoring methods which will permit the Nation to determine whether a man who has come to America from a foreign land has entered our country legally or illegally. There is nothing strange about the amendment and nothing revolutionary. It is merely a proposition suggesting that we utilize the machinery which is at hand to get as much information as we can to determine the facts with reference to the entrance of immigrants into the country.

Statistics show there are 14,500,000 aliens in our land to-day. Many of them can not speak the English language. They come from countries with various kinds of governments. It is my judgment, and I have offered a bill for the purpose, that if the Congress would do its duty it would absolutely prohibit the entrance of a single immigrant into this land for the next five years while we take stock of our present citizenship, with the view of educating the foreign born for their own good and for the welfare of our country.

I do not wish to be understood as criticizing the statement made by the Senator from Massachusetts [Mr. WALSH] on yesterday. I said in the beginning that I did not intend to do that. I desire, however, to quote from statistics with reference to services rendered by native-born Americans and those who were foreign born. After the statement made yesterday on this subject, I sent for the report of the provost marshal general in order that I might find for myself whether the native-born citizens of this land of ours were shown to be recreant to their duty when the call of war sounded in the land. I find these facts, which I shall now read, on page 90 of the report of the provost marshal general, made in 1919.

Mr. WALSH of Massachusetts. Mr. President——

The VICE PRESIDENT. Does the Senator from Alabama yield to the Senator from Massachusetts?

Mr. BLACK. I yield.

Mr. WALSH of Massachusetts. I understand that during my absence from the Chamber the Senator made some reference to something I said yesterday.

Mr. BLACK. That is correct.

Mr. WALSH of Massachusetts. Will the Senator kindly repeat it?

Mr. BLACK. I am just beginning now to discuss it. It would be impossible to repeat the exact language, because my statement was not written. I was commenting upon the Senator's statement with reference to native born and foreign born in the World War.

Mr. WALSH of Massachusetts. I had understood that the Senator attributed to me the use of the word "slackers" in referring to those whom the Army rolls showed to be on the deferred and exempted classes of aliens and Americans registered.

Mr. BLACK. I stated in response to a statement of the Senator from Utah [Mr. KING] that the Senator from Massachusetts quoted or stated that he was using the language of somebody else in calling them "slackers."

Mr. WALSH of Massachusetts. There was a hearing before the Immigration Committee some time ago and statistics were presented along the line that I presented and that the Senator is about to present, and in those hearings the term "slackers" was used. I used the expression yesterday with quotation marks, as I said at the time, and did not myself attribute to these classes of registrants the condition of being slackers.

Mr. BLACK. In Table 24 of the second report of the provost marshal general I find the following figures.

The VICE PRESIDENT. The Senator's time on the amendment has expired.

Mr. BLACK. I have not spoken on the bill.

The VICE PRESIDENT. The Senator is entitled to 30 minutes on the bill.

Mr. BLACK. Those who were placed in class 1 were 24.33 per cent of aliens. Those placed in the deferred classes—those who gave excuses as to why they should not serve, those whom the Senator said someone had called "slackers," though personally I would not and I do not agree with that statement—were 75.67 per cent.

Mr. TYDINGS. Mr. President, will the Senator yield?

Mr. BLACK. I yield.

Mr. TYDINGS. Is the Senator quoting from draft statistics or from the volunteers?

Mr. BLACK. I am quoting from the table of classification of aliens and citizens compared in the draft army.

Mr. WHEELER. Mr. President——

The VICE PRESIDENT. Does the Senator from Alabama yield to the Senator from Montana?

Mr. BLACK. I yield.

Mr. WHEELER. Of course, those figures would not be fair to the aliens because of the fact that a good many of them could not be taken into the Army, as I recall the law, because of the fact that they came from countries with which we were at war. That is my recollection.

Mr. BLACK. Those of native-born Americans who were placed in deferred classes were 63.33 per cent. I do not mean to infer that either the 63 per cent of native Americans or the 75 per cent of foreign born were slackers. In my judgment the fact that they were put in the deferred classes is no indication that they were slackers. Some of them may have been, but I am giving the statistics simply in order that the record may be clear as to what the provost marshal general's report showed in this controversial matter.

Mr. WALSH of Massachusetts. Of course, there was no dispute about the figures I gave yesterday. The figures I gave were correct, were they not?

Mr. BLACK. I did not have the opportunity, in the short time available to me, to get exactly what the 24 per cent meant which the Senator referred to, unless it was the 24.33 per cent of Americans placed in class 1.

Mr. WALSH of Massachusetts. The Senator will find on page 1980 of the RECORD the figures which were used in the colloquy that took place between himself and myself on yesterday. The number of aliens registered was 1,703,000; exempted as enemy aliens, 334,949; aliens exempted or received deferred classification, 580,003; per cent other than enemy aliens exempted or deferred, 33 per cent. Number of Americans registered, 8,976,808; Americans exempted or received deferred classification, 5,684,533; percentage of Americans exempted or deferred, 64 per cent. I was simply making a comparison between the percentage of Americans and the percentage of aliens who were not enemies that were placed in the exempted or deferred classes.

Mr. BLACK. The figures show that those placed in deferred classes among the aliens were 75.67 per cent, as against 63.33 per cent of native born. I have not been able to find in the report the distinction drawn by the Senator in his figures, but there can be no doubt that there were 75 per cent of the aliens who were put in deferred classes either because they belonged to enemy countries or because of requests for some other reason.

Mr. WALSH of Massachusetts. It is very easy to figure out the percentage. The enemy aliens exempted were 335,000 and other aliens 580,000, together they representing about 915,000. The total number of aliens registered was 1,703,000. The percentage of all aliens, including enemy aliens, who were placed in these classes was about 54 per cent. The total percentage of all Americans placed in deferred classes was about 64 per cent. If we deduct enemy aliens, who could not serve, the alien percentage is about 33 per cent.

Mr. BLACK. As I said, the total number of aliens placed in deferred classes was 75.67 per cent. I have the provost marshal general's report before me. There were placed in deferred classes 1,288,617 of aliens.

It will also be remembered that the percentage of married men, according to our census statistics, among native-born Americans is greater than the percentage of married men among the alien born. Of course, at that time that was properly a cause for deferred classification.

Going just a step farther and quoting from the same report, at page 462 we find that the report shows the number of desertions, by citizenship, from the American Army: Desertions of native-born Americans, 3.23 per cent; desertions of foreign-born, 10.87 per cent. That is, more than three times as many foreign born deserted from the American Army as did native-born Americans.

Going a step farther in the report of the provost marshal general, I find this statement:

> It is not too much to say that the spectacle of American boys, the finest in the community, going forth to fight for the liberty of the world, while sturdy aliens—many of them born in the very countries which have been invaded by the enemy—stay at home and make money has been the one notable cause of dissatisfaction with the scheme of military service embodied in the selective-service act.

So, Mr. President, while I admit without question there are now many good men who have come to this country from foreign lands, and there have been many immigrants in the past who have become good citizens, yet I take the position that to-day what this country needs is not more immigrants but a less concentration of the wealth which the Senator from Massachusetts [Mr. WALSH] mentioned on yesterday, and that can not be obtained unless there can be found paying employment for our citizens. With millions of our people out of work, what possible excuse can there be for failing to adopt every means at our hand to remove from our land the aliens who have unlawfully intruded themselves in our country? With cities advertising that there are inexhaustible supplies of un-

organizable Mexican labor in our country, what excuse can we offer for a failure to adopt every possible means to discover aliens illegally here, that we may later remove this unfair competition with American labor?

I acknowledge the statement of the Senator from Massachusetts that there are many aliens who have entered America who can and who have made real contributions to our citizenship, but it is my belief that what America needs to-day is not more immigrants but a fair opportunity for our present population. It needs positions for those who are now within our midst. We need to shut the door and close the gates against foreign immigration from any land until those here have absorbed our principles and become merged in the social, political, and economic life of the Nation.

There is nothing unfair about this for prospective immigrants and it is certainly just to our present citizenship. With fourteen and one-half million immigrants in our midst, why should we not spend a little money for the purpose of placing our hands on the aliens who have come here illegally? Why should we dispute as to whether the method is perfect and whether the results would be 100 per cent accurate? After all, Mr. President, the question comes down to this: Those who are in favor of restricted immigration are in favor of using all possible means to register the aliens and thereafter to deport those who are not lawfully here. Those who are opposed, and are honestly opposed, to the restriction of immigration, fight every means and every measure which has a tendency to further restrict immigration.

I submit that this amendment is fair and just to America. If Senators believe in a restriction of foreign immigration, if they believe in the principles of nationalism, which would make this a land of Americans; if they believe in keeping the country true to the old-fashioned principles and ideals of American liberty and democracy, then they do not want immigrants in this country who are here illegally. The amendment merely provides a method by which we may use the best means at our command to determine what immigrants are here legally and what immigrants are here illegally.

Mr. WALSH of Massachusetts. Mr. President, will the Senator from Alabama yield for a question?

The VICE PRESIDENT. Does the Senator from Alabama yield to the Senator from Massachusetts?

Mr. BLACK. I yield.

Mr. WALSH of Massachusetts. The Senator from Alabama has properly called attention to, and during this whole debate repeated comment has been made about, the large number of persons who have entered this country illegally. Personally I think the figures have been exaggerated, though I think it is deplorable that there are so many immigrants smuggled into the country. I wish to inquire what steps have been taken by anyone in this body, in the other Chamber, or by the administration to increase the number of immigration inspectors or to secure additional appropriations so as to prevent the "bootlegging" of immigrants into this country? Why are not those who are urging more and more limitations upon the immigrant doing something effective to stop smuggling and bootlegging of foreigners who seek and enter the country illegally?

Mr. BLACK. I understand that there was an increased appropriation for that purpose made at the last session of Congress but that it was not sufficient.

Mr. WALSH of Massachusetts. I think we all can agree that no person ought to be allowed to enter this country illegally. There should be no official vigilance so sweeping as that of preventing this offense against national authority by nonresidents.

Mr. BLACK. That is absolutely true. I am heartily in favor of increasing the appropriations to prevent that.

Mr. TYDINGS. Mr. President, I offer a short amendment which I propose to add to the amendment of the Senator from Alabama [Mr. BLACK] as modified. I send the amendment to the amendment to the desk and ask that it be read.

The VICE PRESIDENT. The amendment to the amendment will be stated.

The LEGISLATIVE CLERK. At the proper place it is proposed to add the following:

Exclude from the count all persons who have violated the eighteenth amendment or the Volstead Act.

The VICE PRESIDENT. The question is on agreeing to the amendment to the amendment.

Mr. COPELAND. Mr. President, I am unwilling to permit the discussion about aliens to end here. I have no disposition to continue the debate or to postpone the vote. But when I think about the thousands and tens of thousands and hundreds of thousands of persons in my home city who are of alien birth, who have distinguished themselves in every walk of life, in the professions and in trade, I can not let the moment pass without saying a word concerning them.

It is not fair—I say it in all kindness—to raise repeatedly in this body questions which bring heart burnings and unhappiness into thousands of American homes. When I think about the men and women who have come to America from foreign shores, who have succeeded here, who have contributed to everything making for the upbuilding of our country, I consider it unjust, if I may say so, to reflect upon the whole group because there happen to be those who have "bootlegged" their way into the country. In the last analysis, with the exception of the American Indian, all of us are aliens.

I went to the Russian border immediately after the World War. I visited Poland. I saw there a country which had been devastated by seven armies which crossed back and forth during the Great War, a country which had been further devastated by the war with the Russian Bolshevists. After that last war with Russia, when the Russians were finally driven out of Poland they took three and one-quarter million of the population; took away the flocks and herds and destroyed every building in eastern Poland. When under the treaty of Riga those people were permitted to came back to Poland they came to find their homes destroyed, their lands grown up with underbrush, no animals, no tools, no seed. I saw them living in covered-over portions of trenches and in the dugouts. I am not surprised if thousands of them found their way to this country of wealth and opportunity.

I have no question but there are hundreds of thousands of immigrants who are here illegally. But when we consider the conditions under which they were forced to live, and the pressure under which they lived, the destruction of their homes in the old country, I am not surprised that they came. And when I recall the aliens who, coming here years ago and acquiring wealth, have used their money for the benefit of humanity: when I think about a man like Nathan Straus, who came here an immigrant boy and has done more, in my opinion, for child life in America and the world than any other two men who ever lived; when I see a member of our own body who was born in a foreign country contributing $10,000,000 to the welfare of the children of America; when I remember that a citizen of my city, Mr. August Heckscher, another alien, has contributed $4,000,000 to the same purpose; when I think of what these and other aliens have done in contributing to the welfare of America, I am not willing, sir, to sit in my place and hear the whole group reflected upon, as apparently they will feel has been done, by many things which have been said here.

I have no desire to say more than this, except to add that there are aliens and aliens, and it is not fair thus, as I view it, to reflect upon the whole alien group because a limited number perhaps have not lived up to those standards which we believe to be right.

Mr. HEFLIN. Mr. President, nobody has intended to reflect upon the whole alien group. Of course, there are bound to be some honest aliens in the country; but no alien, no foreigner, who has been smuggled into the United States—it makes no difference how bright he is or how good he is—if he is not here properly, he has no business being here. Whenever one of them is smuggled in he has violated the immigration law, and he is not here properly and, I repeat, has no business being here. We are going to do something ultimately to solve this alien problem which the Senate refuses to solve now.

The VICE PRESIDENT. The question is on agreeing to the amendment offered by the Senator from Maryland [Mr. TYDINGS] to the amendment of the Senator from Alabama [Mr. BLACK].

The amendment to the amendment was rejected.

The VICE PRESIDENT. The question recurs on the amendment proposed by the Senator from Alabama.

Mr. BLACK. On that I ask for the yeas and nays.

The yeas and nays were not ordered.

Mr. HEFLIN. Division, Mr. President.

Mr. President, I suggest the absence of a quorum.

The VICE PRESIDENT. The Secretary will call the roll.

The Chief Clerk called the roll, and the following Senators answered to their names:

Allen	Couzens	Greene	Keyes
Ashurst	Cutting	Hale	King
Barkley	Dale	Harris	La Follette
Bingham	Deneen	Harrison	McKellar
Black	Dill	Hastings	McMaster
Blaine	Edge	Hatfield	McNary
Blease	Foss	Hawes	Metcalf
Borah	Fletcher	Hayden	Moses
Bratton	Frazier	Hebert	Norbeck
Brookhart	George	Heflin	Norris
Broussard	Glass	Howell	Nye
Burton	Glenn	Johnson	Oddie
Capper	Goff	Jones	Overman
Connally	Goldsborough	Kean	Patterson
Copeland	Gould	Kendrick	Phipps

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Pine	Shortridge	Townsend	Walsh, Mont.
Pittman	Simmons	Trammell	Warren
Ransdell	Smith	Tydings	Waterman
Reed	Steck	Tyson	Watson
Robinson, Ind.	Steiwer	Vandenberg	Wheeler
Sackett	Stephens	Wagner	
Schall	Swanson	Walcott	
Sheppard	Thomas, Idaho	Walsh, Mass.	

The VICE PRESIDENT. Eighty-nine Senators have answered to their names. A quorum is present.

Mr. WATSON. Mr. President, I should like to ask the Senator from Michigan how many more amendments are pending, and about the length of time he thinks it will take to complete the bill?

Mr. VANDENBERG. I should be unable to answer the Senator. I think there are perhaps four or five amendments pending and there ought to be no lengthy debate upon them.

Mr. WATSON. I desire to ask the two Senators, then—they are here together now—whether or not they want the bill completed to-night?

Mr. JOHNSON. I should prefer it.

Mr. WATSON. Very well.

Mr. BLEASE. Mr. President, I have three amendments. I do not think all three of them will take over half an hour.

Mr. KING. Mr. President, will the Senator yield?

The VICE PRESIDENT. The Senator from Indiana has the floor. Does the Senator yield?

Mr. WATSON. There is a vote pending, as I understand, and I shall not interfere with that.

Mr. KING. I merely wish to suggest to the Senator, if I may do so, that the so-called George amendment will be brought before the Senate, and that will lead to some debate.

The VICE PRESIDENT. The question is on the amendment of the Senator from Alabama [Mr. BLACK].

Mr. BLACK. I call for the yeas and nays.

The yeas and nays were ordered, and the Chief Clerk proceeded to call the roll.

Mr. METCALF (when his name was called). I have a general pair with the Senator from Arkansas [Mr. ROBINSON]. Not knowing how he would vote on this question, I withhold my vote.

Mr. WATSON (when his name was called). I transfer my pair with the Senator from South Carolina [Mr. SMITH] to the Senator from Missouri [Mr. PATTERSON] and will vote. I vote "nay."

The roll call was concluded.

Mr. SHEPPARD. I desire to announce that the Senator from Montana [Mr. WHEELER] and the Senator from Oklahoma [Mr. THOMAS] are necessarily absent on official business.

The result was announced—yeas 24, nays 56, as follows:

YEAS—24

Barkley	Connally	Heflin	Sheppard
Black	Frazier	McKellar	Steck
Blease	George	McMaster	Stephens
Bratton	Glass	Pine	Swanson
Brookhart	Harris	Pittman	Trammell
Capper	Harrison	Robinson, Ind.	Tyson

NAYS—56

Allen	Fletcher	Kean	Shortridge
Ashurst	Glenn	Kendrick	Simmons
Bingham	Goff	Keyes	Steiwer
Blaine	Goldsborough	King	Thomas, Idaho
Borah	Gould	La Follette	Townsend
Broussard	Greene	McNary	Tydings
Burton	Hale	Moses	Vandenberg
Copeland	Hastings	Nye	Wagner
Couzens	Hatfield	Oddie	Walcott
Cutting	Hawes	Overman	Walsh, Mass.
Deneen	Hayden	Phipps	Walsh, Mont.
Dill	Hebert	Reed	Warren
Edge	Johnson	Sackett	Waterman
Fess	Jones	Schall	Watson

NOT VOTING—15

Caraway	Metcalf	Ransdell	Smoot
Dale	Norbeck	Robinson, Ark.	Thomas, Okla.
Gillett	Norris	Shipstead	Wheeler
Howell	Patterson	Smith	

So Mr. BLACK'S amendment was rejected.

Mr. WATSON. Mr. President, I ask unanimous consent that after 2 o'clock to-morrow no further speeches shall be made on this bill and that all speeches on amendments shall be limited to five minutes.

The VICE PRESIDENT. Is there objection?

Mr. BLEASE. Mr. President, does the Senator mean on pending amendments?

Mr. WATSON. All pending amendments.

Mr. HARRISON. That would not preclude the Senator from South Carolina from offering his amendment.

Mr. BLEASE. I have here an amendment that I have had printed and laid on the desk. I do not think I will take over 10 minutes in discussing it. If it is on pending amendments, I will not consent to that.

Mr. HARRISON. Mr. President, may I say to the Senator from South Carolina that under my interpretation of the proposed agreement he has a right to offer his amendment at any time and have it be a pending amendment. The agreement will not preclude him from talking on the amendment.

Mr. BLEASE. But, as I understand the proposal of the Senator from Indiana, speeches on amendments from now on are to be limited to 5 minutes.

Mr. HARRISON. No; after 2 o'clock to-morrow.

Mr. WATSON. After 2 o'clock to-morrow afternoon.

Mr. BLEASE. I do not think I shall want to speak at all after that time.

The VICE PRESIDENT. Is there objection to the proposed unanimous-consent agreement?

Mr. JOHNSON. Mr. President, I want to have the proposed agreement entirely clear, so that there will be no misunderstanding or mistake. After 2 o'clock to-morrow, as I understand, no further speeches shall be made upon the bill; and the only speeches shall be upon amendments, in duration five minutes—amendments that are pending at 2 o'clock.

The VICE PRESIDENT. Is there objection to the proposed unanimous-consent agreement? The Chair hears none, and it is so ordered.

The agreement was reduced to writing, as follows:

Ordered, by unanimous consent, That after the hour of 2 o'clock p. m. on to-morrow further debate on the bill (S. 312) to provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives in Congress is precluded, and no Senator may speak more than once or longer than 5 minutes upon any amendment that may be pending or any amendment that may be submitted and ordered to lie on the table prior to the hour of 2 o'clock p. m.

Mr. PITTMAN. Mr. President, is there an amendment pending now?

The VICE PRESIDENT. There is no amendment pending.

Mr. PITTMAN. I desire to offer an amendment.

The VICE PRESIDENT. The Senator from Nevada offers an amendment, which will be stated.

Mr. WATSON. Mr. President, I should like to ask——

The VICE PRESIDENT. Does the Senator from Nevada yield to the Senator from Indiana?

Mr. PITTMAN. I will yield after the amendment is stated.

The VICE PRESIDENT. The amendment will be stated.

The CHIEF CLERK. On line 24, page 16, after the word "apportionment," it is proposed to insert "and by the method of equal proportions"; and in line 3, page 17, after the word "States," it is proposed to insert "under either method"; and in line 7, page 17, after the word "statement," it is proposed to insert "based upon the apportionment under the method used at the last preceding apportionment."

Mr. WATSON. Mr. President, will the Senator from Nevada yield for me to make a motion to go into executive session, and after that to take a recess?

Mr. PITTMAN. With the understanding, of course, that this amendment is pending.

Mr. LA FOLLETTE. Mr. President, I desire to be recognized very briefly in my own right, and I ask the Senator from Indiana to withhold his motion. I desire to discuss a matter which does not pertain to the pending bill, and it will not take me much more than a couple of minutes to explain it, and ask to have printed in the RECORD a decision of the Supreme Court of the United States.

Mr. WATSON. I yield, if I have the floor.

The VICE PRESIDENT. The Senator from Nevada has the floor. To whom does he yield?

Mr. PITTMAN. I understand that the effort at the present time is to go into executive session, looking to a recess or an adjournment——

Mr. WATSON. A recess.

Mr. PITTMAN. To which I have no objection. I understand that the Senator from Wisconsin [Mr. LA FOLLETTE] desires to make a statement on another subject. I have no objection to that. I simply give notice that to-morrow morning I shall attempt to get the floor and discuss briefly this amendment.

THOMAS W. CUNNINGHAM, RECUSANT WITNESS

Mr. LA FOLLETTE. Mr. President, on March 22, 1928, the junior Senator from Utah [Mr. KING] introduced Senate Resolution 179, which was as follows:

Whereas it appears from the report of the Special Committee Investigating Expenditures in Senatorial Primary and General Elections that a witness, Thomas W. Cunningham, twice called before the committee making inquiry as directed by the Senate under Senate Resolution 195 of the Sixty-ninth Congress, declined to answer certain question relative and pertinent to the matter then under inquiry:

EXHIBIT G

To Amend the Constitution : hearings before the United States House Committee on the Judiciary, Seventieth Congress, second session, on Feb. 13, 14, 18, 1929.

United States.
Washington : U.S. G.P.O., 1929.

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House

To amend the Constitution.

70:2; H.J.Res. 102, 351: Feb. 13-18, 1929.

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TO AMEND THE CONSTITUTION

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HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

SEVENTIETH CONGRESS

SECOND SESSION

ON

H. J. Res. 102

H. J. Res. 351

Serial 38

FEBRUARY 13, 14, AND 18, 1929

UNITED STATES
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COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

SEVENTIETH CONGRESS

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CHARLES A. CHRISTOPHERSON, South Dakota.
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EARL C. MICHENER, Michigan.
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JOHN N. TILLMAN, Arkansas.
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SAMUEL C. MAJOR, Missouri.
ROYAL H. WELLER, New York.
WILLIAM B. BOWLING, Alabama.
ZEBULON WEAVER, North Carolina.
HENRY ST. GEORGE TUCKER, Virginia.

GUILFORD S. JAMESON, *Clerk*
M. D. TURTON, *Assistant Clerk*

TO AMEND THE CONSTITUTION

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Wednesday, February 13, 1929.

The committee met at 10.30 o'clock a. m., Hon. George S. Graham (chairman) presiding.

The CHAIRMAN. The business specially for to-day is the hearing upon the joint resolution offered by Mr. Hoch, to amend the Constitution by adding, at the end of the first sentence to section 2, Article XIV, the words "and aliens." There is also a joint resolution in the hands of the committee offered by Mr. Stalker, to amend the Constitution by adding a new article as follows:

Aliens shall be excluded in counting the whole number of persons in each State for apportionment of Representatives among the several States according to their respective numbers.

You will consider that resolution as before the committee at the same time, but Mr. Hoch's resolution is first in order and he will be heard first.

[H. J. Res. 351, Seventieth Congress, second session]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following amendment is proposed to the Constitution of the United States, which,

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when ratified by the legislatures of three-fourths of the several States, shall be valid to all intents and purposes as a part of the Constitution:

Amend section 2 of Article XIV by adding at the end of the first sentence of said section the following words "and aliens".

[H. J. Res. 102, Seventieth Congress, first session]

JOINT RESOLUTION Proposing to amend the Constitution of the United States to exclude aliens in counting the whole number of persons in each State for apportionment of Representatives among the several States

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following amendment to the Constitution of the United States be proposed to the several States, which, when ratified by the legislatures of three-fourths of the States, shall be valid and binding as a part of the Constitution of the United States.

"ARTICLE —

"Aliens shall be excluded in counting the whole number of persons in each State for apportionment of Representatives among the several States according to their respective numbers."

STATEMENT OF HON. HOMER HOCH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF KANSAS

Mr. HOCH. Mr. Chairman and members of the committee, House Joint Resolution 351 which we are to consider is very short and I would like to ask that it be inserted in the record at the beginning of the hearing, in order that we may have it before us.

I am sure it is not necessary in this presence to say that it is always a serous thing to suggest any amendment to the Constitution of the United States, however minor in phrascology that amendment may be; for, of course, we all of us pay the greatest homage to the wisdom and the foresight of the framers of the Constitution under which our country has grown and prospered. And I would not be here to present a matter of this sort if I did not believe that the amendment here proposed, which deals with the basis of the apportionment of Representatives in the House of Representatives, touches a fundamental consideration and that the present situation is fraught with very serious injustices to some of the States of the Union and has within it very serious possibilities.

Section 2 of Article XIV of the amendments of the Constitution reads as follows; the first sentence:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

The CHAIRMAN. Your amendment just adds the words "and aliens" after that.

Mr. HOCH. The amendment simply adds the two words "and aliens," so that the sentence will read—

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed and aliens.

The same result might be obtained by other methods, of course. We might add a new article to the amendments, or I think the same result would be achieved by changing the word "persons" in the sentence which I have just read to the words "citizens." The method,

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however, is not the important thing. I have suggested the method here because it seemed to me that, by adding the words "and aliens," we call attention at once to the ordinary reader of the purpose of the amendment. In other words, it is proposed to exclude aliens from the count in each State upon which the number of Representatives in the House of Representatives is apportioned.

Let me say, at the outset, that this involves in no way an attack upon the aliens. Those aliens who are in America lawfully are, of course, entitled to the protection of all of our laws that apply to them and are entitled to the privileges which we have extended to them under our laws. The only question is whether it is right that the aliens—and by "alien," of course, I use the word in the technical sense, an unnaturalized foreign-born person—whether it is right that these unnaturalized foreign-born persons should be counted in determining the number of Representatives which the State shall have and shall also, therefore, as a result, be counted in determining the number of votes which that State shall have in the electoral college, in the election of a President and Vice President of the United States.

The change here suggested, in my opinion, is in no way contrary to the spirit of the Constitution; rather, it is a proposed change to meet an entirely changed situation and condition from that which existed when the Constitution was framed, and a changed situation which has arisen especially within the last 10 years, as I shall show a little later on.

Briefly, let me recall the situation at the time the Constitution was framed. All of the members of this committee, of course, recall the great controversy which waged in the Constitutional Convention over the constitution of the legislative branch of the new Federal Government that was to be established. There were many issues over which there was sharp controversy—the question of the relative strength of the large States and the small States; the question of whether States which should subsequently be admitted into the Union should be admitted upon an equality in all regards, and so forth. And you will recall that there were those among the leaders, many of them, who insisted that the new States which should subsequently come in should be limited in their representation and provision should be made by which the States then going into the Union should always maintain a dominance in the legislative branch. Without going further into those questions, interesting as they are, let it be noted here again, simply by way of an orderly statement of this proposition, that out of it came, in the first place, the compromise by which two branches were set up—the one in which each State, regardless of wealth, regardless of size, or population, should have an equal vote in one legislative branch with every other State; in the other branch, the States should have a vote according to their population, which was to be the popular branch of the Federal Legislature. And then there came the question of how this popular branch was to be constituted—in what proportion were its representatives to be apportioned among the States then existing and among the States which should subsequently be admitted into the Union?

Perhaps the most insistent contention which was rejected by the Constitutional Convention upon this proposition was a contention that the representation should be partly, in fact largely, based upon the property, upon the wealth of the various States. And some of

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the most distinguished early leaders insisted that that should be included as a basis of representation in the House of Representatives. There were those who contended, vigorously, that the primary purpose of government is the protection of property rights. Happily, as we look back upon it now, I am sure we all rejoice that that contention was rejected and that wealth, property rights, were not made a basis of representation among the States in the popular branch of the Congress. As we look through all of those controversies, we note that there was no discussion whatever with reference to the matter here suggested this morning, as to whether aliens should be counted, and the sentence which I have just read from the fourteenth amendment (which in that respect follows the original Constitution), uses the word "persons," and the only reason that we are here this morning is because it is contended, that the word "persons" must be held to include both aliens and citizens. But there was no discussion of that in the Constitutional Convention and that may, at first thought, seem surprising to us; but if we recall the situation which existed when the Constitution was framed with reference to aliens and our naturalization laws, the reason becomes readily apparent. The crying need of that day was for more people in America. You will recall that one of the complaints against George III, in the Declaration of Independence (and let me just read the sentence), was this:

> He has endeavored to prevent the population of these States, for that purpose obstructing the laws for naturalization of foreigners, refusing to pass others to encourage, migrations hither and raising the conditions of new appropriations of and.

The whole temper of the times was different from that which faces us to-day, and I recall to your minds this fact, that when the Constitution was adopted there were practically no naturalization laws in America in the sovereign States which entered into the compact of the Federal Union. There were no naturalization laws in Connecticut; there were none in New Hampshire; there were none in Pennsylvania; there were none in North Carolina; none in Georgia. And the remaining States had the simplest sort of naturalization laws. For instance, in Massachusetts no length of residence was required; the only thing that was necessary was to take the oath of allegiance to the Constitution and to the country. I might go through the various laws; perhaps it would be of interest. Delaware required simply an oath of allegiance to become a citizen; no length of residence required. However, in Delaware, although persons might thus become citizens, they could not hold certain offices until five years after they had become citizens. In Maryland all that was necessary was to take the oath of allegiance; and Maryland had one additional phrase, that they must declare their belief in the Christian religion. They could not hold certain offices, however, until seven years. In New York the only thing that was necessary was a petition to the legislature and a certain formal proceeding, without any requirement of residence. In South Carolina, after one year, they might take the oath, but could not vote or hold certain offices until they had been a citizen two years. In Virginia two years' residence was required; an oath of allegiance and intention to reside here permanently were the only two requirements.

There was no State law which required a declaration of intention to become a citizen prior to naturalization. In fact, the declaration

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of intention was a later development in our history. The first Federal law providing for naturalization contained no requirement of declaration of intention. The first Federal law (which, as you know, was enacted under the specific grant of power to Congress to pass a uniform naturalization law), simply provided that any alien who had resided here two years might be admitted by making proof of character (that is the first time that was introduced), and taking the oath of allegiance. Let me state again that not only did a number of the States, as I have mentioned, have no naturalization laws whatever, but in no State was there any test of knowledge of our institutions nor was there even the necessity that an applicant should speak the English language, and the taking of the oath of allegiance was practically the only thing that was required in order to become a citizen of the United States.

In that situation, we can certainly understand why no lines were drawn, at the time the Constitution was framed, between citizens and aliens, because no line could be drawn. The word "alien" had no definite meaning in our established policy and, if the Constitution had used the word "alien," we would have had in the various States no uniformity whatever as to what an alien was. Aliens voted in many of the States; in fact, and I might as well proceed to that point right here, although I had intended to reach it later, for many years in our country aliens voted in many of the States, and it is a matter of very recent development where we have no State where an alien is permitted to vote. Since 1917, seven States of the Union have changed their constitutions in order to take away the right of an alien, who had simply declared his intention to become a citizen, to vote.

Mr. TUCKER. How many States?

Mr. HOCH. Seven States, since 1917. In 1917 there were still seven States in this Union where an alien might vote; because after he has simply declared his intention, he is, of course, still an alien. As some one has worded it, he is in something of "an inchoate state of citizenship," but he is still technically an alien until he becomes naturalized. Yet in 1917 there were seven States where an alien who had declared his intention might vote and, of course, it is not necessary to state here that the matter of suffrage is primarily a State function and that the Federal Government has no jurisdiction over the matter of suffrage, aside from the limitations which are to be found in the Constitution of the United States, particularly in the fourteenth, fifteenth, and nineteenth amendments to the Constitution. The States having it within their own power to determine the conditions and the qualifications of suffrage, that situation I have referred to with reference to aliens is to-day entirely changed and there is no State in this Union to-day where an alien can vote until he has been fully naturalized and has met the other conditions of suffrage in the State. All seven of those States and let me name the States—Arkansas, Indiana, Kansas, Missouri, Nebraska, South Dakota, and Texas—have changed their constitutions and put them in line with the situation reached by the other States before that time, where it requires full citizenship as a condition precedent to suffrage.

Mr. TUCKER. The other States besides the seven that you have mentioned—did you say that all of them had in their constitutions that no alien could vote?

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Mr. HOCH. I say that to-day all of them have in their constitutions that no alien can vote; that is to say, as a condition of suffrage in every State of the Union to-day, one of the conditions precedent is citizenship. And I call that to your attention—I think the reason is evident—to show you that the situation to-day is diametrically opposed to the condition which existed at the time the Constitution was framed and that the change here proposed is, therefore, in no sense contrary to the spirit of the Constitution and, as I veritably believe, is in harmony with the very genius of the Constitution. It meets a changed condition by virtue of these changes in the various States and by virtue of an entirely different situation which we have to-day with reference to naturalization and immigration.

I think that no one has given a better statement of the fundamental consideration upon this subject than was given by Madison in the Constitutional Convention. Let me read it. I read from Elliott's Debates on the Federal Constitution, reading now from page 289:

"Mr. Madison reminded Mr. Patterson that his doctrine of representation which was, in its principle, the genuine one, must forever silence the pretensions of any small States to equality of votes with the large ones"—

that is in the House of Representatives.

Now here is the sentence I particularly call your attention to:

* * * They ought to vote—

that is, the States in the House of Representatives—

in the same proportion in which their citizens would do if the people of all the States were collectively met.

I read again from Madison at page 314:

"He [Madison] appealed to the doctrine and arguments used by those on a former occasion. It had been very properly observed by Mr. Patterson, said Mr. Madison, that representation"—.

And I ask you to get this; that is, representation in the House of Representatives—

* * * was an expedient by which the meeting of the people themselves was rendered unnecessary and that the representatives ought, therefore, to bear a proportion of the votes which their constituents, if convened, would respectively have.

In other words, the contention was that the House of Representatives was the voice of the people and, because it was impossible for all of the people to gather and register their will in legislative enactments, their Representatives from the various States should vote in the House of Representatives in the same proportion that those people would vote if they were collectively assembled to legislate for the public welfare.

Now, if we applied that principle to the condition which existed at the time the Constitution was adopted, obviously many, if indeed in not all of the States, in many at least of the States, the aliens, if gathered together, would be permitted to vote. But is that true to-day? Why, we have said by constitutional enactment in every State of the Union that it is not true and, if the people in all of the States to-day collectively were gathered to register their legislative will in the House of Representatives, of course we would not permit the aliens to vote when they are not permitted to vote under the suffrage laws of the sovereign States from which they come. There-

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fore I say it is a fundamental proposition which Madison lays down, absolutely applicable to the situation which confronts us to-day and which, of course, as I view it, makes the adoption of the amendment here proposed entirely consistent with the theory upon which our House of Representatives was constituted.

I do not know, Mr. Chairman, how much time I am supposed to take, but this is a matter in which I hope you will bear with me. I do not want to take too much time, but I come now to the preactical effect of the present situation under which, for all these years, aliens are counted in a State in determining the number of Representatives from that State. I have it from the Commissioner of Immigration that there are probably between seven and eight million aliens in the United States. That is no inconsiderable proportion of our total population. That is more than the total combined population of a considerable number of our States, Therefore, this is no trifling matter that we are here considering.

Mr. WELLER. Have you the figures of the alien population of the State of New York?

Mr. HOCH. I do not have them at hand; but, as I recall them, it was something like 1,600,000. I think that is the number.

Mr. WELLER. It was over a million?

Mr. HOCH. I think that is the last estimate. I will be glad to get it accurately and put it in the record if the committee desires.

Mr. LAGUARDIA. Is that the statement of the Commissioner General of Immigration?

Mr. HOCH. That is the statement to me by Mr. Hull, the Commissioner General of Immigration.

Mr. HICKEY. Have you the alien population of all States?

Mr. HOCH. I do not have it at hand, and of course such figures as we now have are of the 1920 census; we do not have the accurate figures as of to-day.

The CHAIRMAN. The committee would like to have the figures for all of the States.

Mr. HOCH. I shall be glad to furnish them.

The CHAIRMAN. They will have a determining influence upon our minds as to the exclusion of aliens, because it will affect the total number of Representatives.

Mr. HOCH. Yes. I do have here an apportionment of the House of Representatives at 435, as prepared for me by the Census Bureau, upon the basis of the exclusion of aliens as compared with the apportionment including the aliens, which table I here present for the record.

The CHAIRMAN. Presenting the contrast with and without?

Mr. HOCH. Yes; I have it here in table form.

Mr. DOMINICK. Is that based upon the 1920 Census?

Mr. HOCH. This is based upon the 1920 census. This is headed—

Table showing a reapportionment of 435 Representatives in Congress on the basis of the total population as compared with a reapportionment based on the population exclusive of the foreign born who have not become naturalized. It is based on the census of 1920 and the method of "major fractions" was used.

This table, which I submit for the record, shows that 16 States (one-third of the States of this Union), would be affected if we were to reapportion to-day upon the 1920 census, excluding the aliens as compared with the inclusion of the aliens. If we were reapportion-

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ing to-day upon the 1920 census, in other words, we would find that if we excluded the aliens there would be 16 States of the Union which would have a different representation in the House of Representatives than they would have if we included the aliens under the 1920 census. Those 16 States, if the committee is interested here, I may name—and bear in mind that this is a comparison between a reapportionment under the 1920 census, excluding the aliens and including aliens:

Arkansas, instead of retaining its present number of Congressmen, would gain one.

California, instead of gaining three, would gain two.

Connecticut, instead of gaining one, would remain the same.

Georgia, instead of remaining the same, would gain one.

Indiana, instead of losing one, would remain the same.

Kansas, instead of losing one, would remain the same.

Kentucky, instead of losing one, would remain the same.

Louisiana, instead of losing one, would remain the same.

Mississippi, instead of losing one, would remain the same.

Massachusetts, instead of remaining the same, would lose two.

Missouri, instead of losing two, would lose one.

Nebraska, instead of losing one, would remain the same.

New Jersey, instead of gaining one, would remain the same.

Oklahoma, instead of remaining the same, would gain one.

New York, instead of remaining the same, would lose four.

Pennsylvania, instead of remaining the same, would lose one.

Mr. DOMINICK. The balance of the States not named would remain the same?

Mr. HOCH. The other States, based on the 1920 census, would not be affected. Of course, what would happen upon the basis of the 1930 census is entirely problematical.

(The table above referred to is as follows:)

Table showing a reapportionment of 435 Representatives in Congress on the basis of the total population as compared with a reapportionment based on the population exclusive of the foreign born who have not become naturalized. It is based on the census of 1920 and the method of "major fractions" was used

State	Present membership	Reapportionment on basis of—	
		Total population	Total population excluding aliens (unnaturalized foreign born)
Total	435	435	435
Alabama	10	10	10
Arizona	1	1	1
Arkansas	7	7	8
California	11	14	13
Colorado	4	4	4
Connecticut	5	6	5
Delaware	1	1	1
Florida	4	4	4
Georgia	12	12	13
Idaho	2	2	2
Illinois	27	27	27
Indiana	13	12	13
Iowa	11	10	10
Kansas	8	7	8
Kentucky	11	10	11
Louisiana	8	7	8

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Table showing a reapportionment of 435 Representatives in Congress on the basis of the total population as compared with a reapportionment based on the population exclusive of the foreign born who have not become naturalized. It is based on the census of 1920 and the method of "major fractions" was used—Continued.

State	Present membership	Reapportionment on basis of—	
		Total population	Total population excluding aliens (unnaturalized foreign born)
Maine	4	3	3
Maryland	6	6	6
Massachusetts	16	16	14
Michigan	13	15	15
Minnesota	10	10	10
Mississippi	8	7	8
Missouri	16	14	15
Montana	2	2	2
Nebraska	6	5	6
Nevada	1	1	1
New Hampshire	2	2	2
New Jersey	12	13	12
New Mexico	1	1	1
New York	43	43	39
North Carolina	10	11	11
North Dakota	3	3	3
Ohio	22	24	24
Oklahoma	8	8	9
Oregon	3	3	3
Pennsylvania	36	36	35
Rhode Island	3	2	2
South Carolina	7	7	7
South Dakota	3	3	3
Tennessee	10	10	10
Texas	18	19	19
Utah	2	2	2
Vermont	2	1	1
Virginia	10	10	10
Washington	5	6	6
West Virginia	6	6	6
Wisconsin	11	11	11
Wyoming	1	1	1

Mr. LAGUARDIA. That is based on the 1920 census. Since 1920, the act of 1924 has gone into effect and, naturally, there has been the regular proportion of deaths among aliens the same as among others, and children of unnaturalized aliens have become of age and have been born, and the difference in 10 years, owing to our change in immigration policy, might make quite a difference in the computation. Do you not think so?

Mr. HOCH. I think it doubtless would make some difference; but, how much difference, no one can say. But certainly the existence of between seven and eight million aliens in this country, congregated as we know they are, quite largely, in a comparatively few States, although scattered all over the country, would make a very substantial difference. I am not prepared to say, nor is anyone prepared to say, that there would be fewer States affected by the 1930 census than there would be by the 1920 census.

Mr. LAGUARDIA. Was it part of the duty of the Census to ascertain the citizenship in the 1920 census, or was that just an incident?

Mr. HOCH. Well, I have not examined the law.

Mr. CHRISTOPHERSON. That is part of its duty, I think.

Mr. HOCH. It has been done, as a matter of fact; whether it is a matter of regulation or of law, I am not prepared to say.

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Mr. CHRISTOPHERSON. It is part of the information that the census is to get.

Mr. HOCH. At least it is part of the information which they do get. It certainly is not necessary for me to emphasize the importance of the representation of any State in this Union in the transaction of the business of the House and in a vote upon the many important questions that are presented to the House.

Mr. BOIES. Why do you refer to the vote as affecting the House; does it not affect the Senate at all?

Mr. HOCH. No, Judge. You see, it does not affect the Senate; because, of course, the Senate is not affected by this apportionment.

Mr. BOIES. But if they could vote, they could vote for a Senator as well as a Representative.

Mr. HOCH. Yes. Of course, Judge, I am not here discussing the question of suffrage as such; I am simply discussing the question of whether there should be any votes in the House of Representatives based solely upon alien population.

Mr. LAGUARDIA. Based solely?

Mr. HOCH. Certainly. I say that, under this showing here, there would be four from the State of New York, if I may be specific, the very existence of which in the House is based solely upon the presence of alien population in the State of New York.

Mr. LAGUARDIA. Does the gentleman then assume, if it is based solely on alien population, that four congressional districts have nothing else but aliens constituting their population?

Mr. HOCH. Oh, no; I do not say that all the aliens are in four districts; but I say there are four votes on the basis of the 1920 census, from the State of New York, that are here and in action solely because of the fact that there is congregated in the State of New York a tremendous body of aliens. And I call your attention to this fact, that every time you give to one State an additional vote in the House on the ground that a certain number of aliens happen to reside within that State, by the same procedure you take that vote away from other States where the vote would be based upon citizen population.

Mr. DOMINICK. May I suggest one thing that has occurred to my mind there, Mr. Hoch, in response to the suggestion by Mr. LaGuardia: Would it not be possible for these aliens to be so distributed among all of the several districts of the State of New York that it would make no change whatsoever in the number of Representatives in the House?

Mr. HOCH. No, it would not be possible.

Mr. DOMINICK. For instance, if there are 7,000,000 there and 45 districts, is it not within the realm of possibility——

Mr. HOCH. Not at all.

Mr. DOMINICK (continuing). That that 7,000,000 could be so distributed amongst the immense population of New York that it would not affect them in so far as fractions were concerned, and they would hold the same representation?

Mr. HOCH. No; you could not distribute them within the State in a way so as not to affect the representation. You might, of course, conceive of all the aliens so distributed among all of the States in the Union that the result would not change the proportion; but if you have 1,600,000 aliens in New York State, for instance, regardless of whether they are in one district or scattered in all of the districts,

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the existence of 1,600,000 aliens in the State of New York gives the State of New York four more Representatives than it would otherwise have, regardless of how they are distributed. If we are to go into the realm of conjecture, we may also conjecture that a large part of those aliens might be congregated in certain districts and the fact is (and we might as well speak plainly) that the bulk of those aliens (and I use New York not in any sense of opprobrium to New York, but only because New York has been singled out as an illustration) are assembled in a comparatively few districts and there would be found districts in New York State where a large proportion of the constituency are foreign-born, unnaturalized persons.

Mr. DOMINICK. My point is just this, Mr. Hoch: For instance, of the 1,600,000 aliens in New York State, if they were equally distributed throughout New York State, that would be less than 40,000 in each district, and I imagine, if you will examine the apportionment at this time you will find more than 40,000 population difference in some of the districts.

Mr. HOCH. Of course, there is no doubt about that, but the question I understood you to raise was whether the distribution within the State would in any way affect the number of Representatives it would have.

Mr. SUMNERS. You were merely speaking of the delegations as entities?

Mr. HOCH. Yes; I was taking the delegations as entities, and New York State will have four more Representatives.

Mr. DOMINICK. I understand, but the reapportionment is not made on that basis; it is so much for a district.

Mr. HOCH. Oh, no. If I may make that perfectly clear, the apportionment is made solely upon the basis, when you come to the Constitution which we are seeking here to amend, that they shall be apportioned among the several States according to the number of persons in each State. And you take the total number of persons including aliens in the State of New York, regardless of what districts they are located in, and by virtue of the fact the State has within its borders that many persons, whether aliens or citizens, gives to that State its proportionate number. Now, when it comes to the matter of districting the State, that is a matter for the State Legislature to determine.

Mr. CHRISTOPHERSON. By reducing it 1,600,000, that would naturally reduce the number of districts, using the multiple of the basis of apportionment.

Mr. HOCH. Yes; using the multiple, it would reduce the number of districts by four in the illustration I have given, in the State of New York.

Mr. DYER. In other words, it would be incumbent upon the State to reapportion the State and divide it equally, according to section 2 of the Constitution, Article X. Of course some States might do, as my State does, refuse to apportion and allow people not to be represented on the basis of the Constitution. New York might do that.

Mr. HOCH. Yes; New York might elect them all at large. Of course that is true entirely aside from this alien question. We passed the reapportionment bill and whether aliens are included, or excluded, of course it is solely up to the States as to whether

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they shall district their States; because, if I read the Constitution correctly, the Constitution says nothing whatever about the erection of districts within the State, and that is a matter for the State to determine.

Mr. LAGUARDIA. Fundamentally, then, you argue that the apportionment should be according to the voting strength of each State?

Mr. HOCH. I have suggested citizenship rather than voting strength; although, Mr. LaGuardia, suffrage is coming to have approximate proportion to citizenship, but not entirely so.

Mr. LAGUARDIA. You would not exclude children and minors, would you?

Mr. HOCH. The Constitution says according to the number of persons. Now that, of course, includes children; it includes everyone, we may assume, who is within the borders of the State, although I think that, perhaps, is subject to some reservations. But basing it upon citizenship would presumably give about the same proportion that you would have if based upon suffrage; because we may assume that people marry and have children in about the same proportion in one State as in another. And I am not here suggesting suffrage as a sole basis. In the days before we had equal suffrage, for instance, there would have been a very great difference if it were based upon suffrage, when some States permitted women to vote and other States did not permit women to vote. But by basing it upon citizenship, we reach a ground that is common to all States. That is the only question.

Mr. LAGUARDIA. Your amendment would not exclude the counting of children?

Mr. HOCH. Not at all. All persons would still be counted and may I say, of course, the children born in this country of alien parents would, of course, also be counted; because, under the fourteenth amendment, they are citizens of the United States although their parents may never become citizens of the United States.

Mr. LAGUARDIA. For your computation for the future study, I will just state that for every one of those aliens in New York that you talk so much about, who are not citizens, they have about five to eight native-born citizens who are children.

Mr. HOCH. Well I am not seeking to change our Constitution which provides that all persons born in the United States are citizens of the United States and of the respective States; I am not, of course, seeking to change that situation.

Now I do not want to take too much time and so I will say, in conclusion upon this phase of the subject, that when it comes to casting a vote in the House of Representatives upon all of the important questions that we confront, even including a declaration of war, which is an illustration that might be made, that raises a very serious question in connection with this proposition. By no test of logic, by no sound theory of government that I know about, by no sound Americanism that I know about, is it proper to count those who are foreign-born, who have not become naturalized citizens of the United States.

Mr. LAGUARDIA. Right there: Will you be good enough, then, to put in an analysis of the vote of the various delegations on the Spanish-American War and also the German war? You will find——

Mr. HOCH. I am not casting any reflections upon any Member of the House upon any proposition; I am raising the naked question as

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a governmental issue and I hope we can approach it in that respect, aside from any of these incidental and irrelevant things that might be raised—the naked question whether it is a proper theory of government that those who do not yet owe allegiance and have not established their citizenship in America should be counted in determining the representation of that State in the popular branch of the American Congress.

I now raise the second question, which, in my mind, is of equal if not of greater importance. Is it right, is it sound governmentally, that any State in this Union should have its vote in the Electoral College upon the election of the President and Vice President of the United States increased, or another State should have its vote in the Electoral College decreased, solely because there happens to be in one State a great gathering of aliens and in the other State there does not happen to be. We might easily have a situation, and this is no fancy, where the Presidency itself would depend solely upon the fact—with no other consideration whatever—that in a certain State there resided a great number of aliens. And I leave it to the sober judgment of this committee whether, in a situation such as that, the result would be one consistent with any proper theory of the participation of States in the legislative branch of the Government or in the election of a President and Vice President of the United States.

Now some one has suggested—and I think perhaps it is involved in the question, Mr. LaGuardia, which you asked a moment ago—whether, as time goes on, the situation will not cure itself. I say that as long as there is a possibility of the change of one vote in the House of Representatives, the change of one vote in the Electoral College, based solely upon the existence, if you please, within a State of a body of aliens, the situation is not cured from a proper governmental standpoint, and I am not at all sure it will be cured even though we adopt stricter immigration laws than we have now. I go back in our history and I find the situation has not materially changed. It is an interesting fact that when the fourteenth amendment was being discussed upon the floor of the House and this issue was discussed by Thaddeus Stephens of Pennsylvania, who was head of the Joint Committee on Reconstruction following the Civil War, he called attention to the States which would then have added representation based solely upon aliens. And it is rather significant, to use New York as an example again, that it so happens New York then had, according to his estimate, about the same number of votes that they have to-day, namely, three or four, based on aliens, and he gave a number of other States by way of illustration. So that the situation has not cured itself.

Mr. LAGUARDIA. What interests me more than anything else is this: The tendency now all over the world is to get away from representative government. Should we pass a resolution, would it not be the first step for further restriction of the right of suffrage and representation? I can not imagine any other fair restriction that might be imposed that would limit representation of the citizenship and, if your amendment were adopted, would you be willing to add that no further restriction upon representation shall be placed in the Constitution unless with the consent of all the States (that is in the Constitution now), or representation in the Senate?

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Mr. HOCH. I have not given any thought to that at all. I know of no other restriction proposed.

Mr. LAGUARDIA. I do not, either; but the gentlemen will recall, in the debates in the Constitutional Convention, there was a great deal of talk there of fixing representation or suffrage upon a property qualification.

Mr. HOCH. I would say this, knowing as we all do the conservatism of the American people, particularly with reference to the Constitution—and I am sure we all agree with that conservatism—that personally I have no fear at all that any unwise amendments in this regard would subsequently be adopted to the Constitution. And it seems to me this is no radical step whatever, just basing the representation upon citizenship, and I do not at the moment have in mind any limitation that might subsequently be agreed to by the American people that we ought, at this time, to have in fear.

Mr. SUMNERS. You could not do it anyhow.

Mr. HOCH. Even though we could do it.

Mr. SUMNERS. The original provision of the Constitution, which is rigid and I think was agreed to in the original compact, excluded, from the power to amend, a provision of the Constitution with reference to that. And, certainly, any subsequent acts would be subject to the general provision.

Mr. LAGUARDIA. I think the gentleman from Texas is right.

Mr. TUCKER. Your amendment evidently contemplates that it is necessary in order to exclude them.

Mr. HOCH. Yes; it does, because that is the language of the Constitution, and I think in a very real American sense it is necessary.

Mr. TUCKER. I have not come to any conclusion upon the subject, but I find my mind tending very strongly to the view that what this amendment would accomplish may be accomplished without any amendment.

Mr. HERSEY. How?

Mr. TUCKER. As I say, I have not come to any conclusion about it, but this Constitution was made for the people of the United States—"we, the people of the United States." I do not often quote that provision in the preamble with much pleasure, and I think it has been perverted very often, but I think there are landmarks all through this Constitution showing that it is made for the people of this country and not for aliens.

Mr. HOCH. Yes.

Mr. TUCKER. I was wondering if your argument included anything on that line.

Mr. HOCH. I gave very serious consideration myself to the question of whether the word "persons," which is the key word in this matter, might be interpreted by legislative enactment in a way that would stand the test of constitutionality not to include aliens, and I confess that there is some little doubt in my mind. I suggest a proposition to illustrate that doubt. I will take an extreme illustration to raise the issue: Suppose in the State of Kansas we happened to have at the time the census was taken a million alien visitors, people who admittedly were transients, tourists; and at the time the census was taken they were within the State. Now, the exact language here is——

Mr. HERSEY. Well, could the tourists be counted?

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Mr. HOCH. Judge, I am just raising that question for illustration.

Mr. TUCKER. They are persons within the United States.

Mr. HOCH. Yes, and it says "count the whole number of persons in each State."

Mr. HERSEY. That means residents, does it not?

Mr. HOCH. That is the question here. The word is "persons," shall count the "whole number of persons." Obviously those transients are persons; obviously they are within the State; yet I think we would all say that certainly there was no intention to count them. Yet, if we are to be absolutely strict in our interpretation, without any reservations, we would have to include them. And I think, judge, it might be argued that an alien is a transient in a sense; he might be classed as one who has not yet full residence in America, the same as a tourist. If I may divert just a moment, I considered the question very seriously in connection with the reapportionment bill just passed, whether it would be proper to seek to engraft upon the reapportionment bill this provision I now seek to put in the Constitution. But because I favored a reapportionment measure and realized it certainly was a very doubtful matter at least, I did not desire to seek to put the provision upon the reapportionment bill, which would require an amendment to the Constitution. But, of course, the moment we admit any reservations to the word "persons," such as this one of transients, certainly we must admit that there is raised at least the academic question as to whether, having made one reservation, we can, therefore, make another reservation—namely, citizenship.

Mr. DYER. Mr. Hoch, this provision of the Constitution, in my judgment, is not being obeyed at the present time. Representatives are not apportioned among the several States according to the Constitution and why take on more trouble until we can get that corrected? Now the gentleman here from Michigan, I think, among several Members of this House, represents some six or seven hundred thousand people—do you not, Mr. Hudson?

Mr. HUDSON of Michigan. About a million and a half.

Mr. DYER. About a million and a half in his district. I have one district in my State that has more than six hundred thousand, and some districts in my State and other States have only 150,000 to 160,000 people. And until we can get a reapportionment and have the country apportioned according to the Constitution, why worry about your amendment?

Mr. HOCH. Well we have just passed in the House a reapportionment measure.

Mr. DYER. It is not going to pass the Senate, though.

Mr. HOCH. If you will pardon a personal reference: Believing as you have suggested, Mr. Dyer, that there is a mandate in the Constitution for reapportionment, I resolved some objections which I had to the particular measure in favor of a vote for it, in spite of the fact my own State of Kansas would lose one vote under it. But that reapportionment measure is pending and its very provisions do not apply if it should become a law until the 1930 census, and that is one of the very reasons that I here propose an amendment to the Constitution, in order that the people of the United States may have a chance to pass upon this question in connection with the reapportionment.

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And I, personally, would not do anything to obstruct a reapportionment under the present Constitution; but I see no inconsistency—in fact, I claim a very great consistency—in insisting, at the same time, upon amendment of the Constitution in the way I have outlined.

Mr. HERSEY. If you will permit me, I think you will agree with me that the gentleman from Missouri, Mr. Dyer, is capable of representing a million people.

Mr. HOCH. I think we can take judicial notice of that.

Mr. MOORE. Have you considered whether or not it might have any coercive influence upon aliens, to in any way influence them to become citizens, when really they did not care to be, otherwise?

Mr. HOCH. I think any measure which would lead to naturalization, proper naturalization of proper persons, subject to naturalization in this country, would be a good measure. And while I do not want to stop to discuss it, I think there are many observations that might properly be made in criticism of the policy we have pursued in this country of permitting indefinite residence in this country without becoming citizens.

Mr. MOORE. Assuming they are in the country and we would like to see them become citizens if they wanted to be, but assuming they did not want to be and we insisted upon their becoming citizens, do you not think it would be better for them not to be citizens, than to have them become unwilling citizens?

Mr. HOCH. That is a problem that arises in every naturalization case. Whether we count them or not, I certainly think if any State has a body of aliens who are proper to become citizens, all that State needs to do in order to hold its representation, based upon those persons, is to bring about the naturalization of those persons and they then are subject to all the obligations as well as entitled to all the privileges of an American citizen.

Mr. MOORE. When you give them all of the privileges, the point of my question is how are you going to make them become citizens, even though they say they are going to become citizens?

Mr. HOCH. You never know that and you can not know it, whether you pass this amendment or not.

Mr. LAGUARDIA. The trouble now is not that they are not willing, but there are so many captious and unreasonable reasons given for refusing the application.

Mr. HOCH. No doubt there are all sorts of reasons of thousands of aliens that are entirely honest, of course; there are other thousands and hundreds of thousands of men, though, who have no intention of becoming citizens.

Mr. MOORE. Then I am taking that group that have no intention. Would you also agree that they really did not care to be citizens?

Mr. HOCH. I will agree there are a great many people who apparently do not care to be citizens.

Mr. MOORE. Yes. Then the point I am making is whether it would not be better to eliminate that group. I do not say this would coerce them, but assuming it would, do you believe in people becoming citizens at all who do not want to become citizens; but, under the circumstances, would apply to become citizens as a matter of expediency? Do you think it would be well to have those people citizens of the United States?

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Mr. HOCH. My opinion is those people do not care about now many Representatives they have in the Congress of the United States, or votes in the Electoral College.

Mr. MOORE. I agree to that, too; but you do give representation and do give the right to vote to people who may not want to be citizens of the United States.

Mr. HOCH. Of course it is entirely up to the State; the question of suffrage is entirely a matter of State jurisdiction. Now let me conclude with one or two very brief observations. The argument has been made that if you do not count the aliens, you have taxation without representation. Now that is a good old phrase, but let us see whether it applies to this situation. The proposition of representation before taxation means, if it means anything, that those who are taxed shall have something to do with the choosing of their representatives. We complained, in the Revolutionary days, against taxation without representation; but certainly it would not have satisfied us if Great Britain had said, "Oh, no, we are going to give you representation, but we propose to choose the representatives." The proposition of taxation without representation goes just as much to the matter of who chooses the representatives, certainly, as to the fact of representation; and yet no one is here proposing that these aliens shall be permitted to choose their representatives in the House of Representatives, to vote upon elections; in fact, as I have said, every State in the Union has said that they can not vote. And, aside from that, no one is proposing to take away from those aliens lawfully in America the full protection of our laws and all the privileges which they enjoy by virtue of residence in America, with our liberal institutions; no one is proposing to do that and I do not believe the matter of taxation without representation applies at all.

And let me call your attention to this, that we have two Territories in the United States, people also of property and also citizens of the United States, and yet in Alaska and Hawaii, and in the District of Columbia, they have no vote in the popular branch of Congress, and no vote in the Electoral College. And no one seems to be concerned about their lack of representation, and yet here are these people who are citizens of the United States to whom we have not accorded full privileges. I am not saying that by way of objection to the Constitution, but simply calling attention to the fact which exists, and, in the face of that situation, it certainly can not be alleged that, because these people have property and are aliens, they are, therefore, entitled to representation in the American House of Representatives and in the Electoral College. Now this is no new proposition——

Mr. SUMNERS. Before you go into the history of the thing——

Mr. HOCH. I am just about to conclude, but I will be very glad to yield.

Mr. SUMNERS. I wanted to know if you had given consideration to the administrative difficulties. I assume they would not be controlling——

Mr. HOCH. I think there are no administrative difficulties whatever.

Mr. SUMNERS (continuing). But, in taking the Census, you could not tell by looking at a person whether he was an alien.

Mr. HOCH. The Census Bureau now have just as accurate a count, I think, as any other part of the census, of the aliens in each State

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and they have, as I have said, already furnished a table showing the apportionment. There are no administrative difficulties.

Mr. WELLER. Has there been any attempt made to ascertain what is the alien worth in the United States; for instance, what is the property value and personal taxes paid by the alien population of the United States?

Mr. HOCH. I am not prepared to answer that; I do not know what the Census shows.

Mr. WELLER. I do not, either.

Mr. SUMNERS. Just a practical question: Of course our whole system has its element of a lack of uniformity and I assume your proposition is based upon the theory that the reason we have Representatives here is because the people can not come——

Mr. HOCH. That is the Madison doctrine——

Mr. SUMNERS (continuing). And the people who could not come have no right to have Representatives.

Mr. HOCH. The people who could not vote if they got here have no right to have people voting for them.

Mr. SUMNERS. That is, the people vote through their Representatives.

Mr. HOCH. They vote through their Representatives.

Mr. SUMNERS. And nobody should have a Representative who could not go in that capacity if that were the form of Government.

Mr. HOCH. Certainly. And if all of the people of New York were here to legislate, they would not cast the comparative number of votes that they do cast under the present system.

Mr. SUMNERS. I suppose that is all right, too; but now, in the practical operation of the Government, do you think this matter to which you direct attention is in the whole very important?

Mr. HOCH. I certainly think it is of sufficient importance, or I would not be here presenting it.

Mr. SUMNERS. I mean practically?

Mr. HOCH. I think it is of tremendous importance. If you look at just the human side, you may well understand how the people of my own State of Kansas, to whom I go and say to them "I have voted in the American Congress to take one Representative away from you, which I do believing it my duty under the Constitution to do it, and I have always done it in every vote in the House," but it is a matter of very great feeling upon their part if I turn around and say to them "while I have voted to take one Representative away from you, we have an apportionment that gives certain States one, two, three, and four more Representatives, based solely upon the fact that there are resident within that State a large body of aliens." And you can readily understand how to those people in the States, that are disadvantageously affected by the situation, it is a matter of great importance.

Mr. SUMNERS. Upon the basis of the total citizen population, then, you feel you would be taking under this arrangement one Representative away from Kansas, from people who have full citizenship and a right to vote, and giving it to aliens in one of the other States?

Mr. HOCH. I say that—not only a Representative, but a vote in the Electoral College. And it is a fundamental proposition of government that the representation and the vote of the representation should be based upon those who are qualified to be governors in this

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country—participants in the privileges of citizenship—rather upon any other basis.

In conclusion, I say this is no new proposition. There are eight States in this Union which do not count aliens in the districting of their States or in the apportionment, rather, of the members of their State legislatures. The State of New York, for instance——

Mr. HERSEY. How could they then comply with the Constitution?

Mr. HOCH. I am speaking, Judge, of the State constitution, the State legislatures.

The CHAIRMAN. He is referring to regulating the representation in the legislature.

Mr. HERSEY. Oh, in the legislature?

The CHAIRMAN. Yes.

Mr. HOCH. I referred to the State legislature.

Mr. HERSEY. Excuse me.

Mr. HOCH. Each State has the same privilege of apportioning among its people the representatives in the popular branch of its legislature that we have as to Congress. New York, for instance, provides that representatives in the legislature of the State—

shall be apportioned * * * among the several counties of the State, as nearly as may be, according to the number of their respective inhabitants, excluding aliens.

That is precisely the proposition I have suggested here. And Idaho, Kansas, Maine, Massachusetts, New York, North Carolina, Tennessee and, to a certain extent, California, do not count aliens in the apportionment for their State legislatures. The provision in California is not quite that. I will read the California provision.

The CHAIRMAN. I do not think you need to bother with that.

Mr. HOCH. It is just three lines and I would like to get it in the record. The California provision is that it excludes those "who are not eligible to become citizens of the United States under the naturalization laws of the United States."

The CHAIRMAN. Your proposition is sustained, you know, if you simply state the fact that eight States do not recognize aliens in making their apportionments.

Mr. HOCH. Yes. The word "aliens" is not the word used in every case. For instance, Tennessee goes farther and bases it solely upon qualified voters, which might be narrower than "aliens." But every one of these States goes as far or further than the exclusion of aliens.

I must not take more of the time of the committee. I appreciate your attention very much and I simply say that, in my judgment, this proposition is founded upon a sound consideration of governmental theory and policy and its adoption would be entirely consistent with the whole spirit of the Constitution and the genius of our legislative branch of government.

The CHAIRMAN. I want to say, before Mr. Stalker begins, the committee has allowed Mr. Hoch, as the proponent of this measure, a larger latitude of time in explaining than we can afford to give to each gentleman who may follow. So I would like to have it understood that the speeches will be limited. Now, Mr. Stalker, we will be glad to hear you.

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STATEMENT OF HON. GALE H. STALKER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. STALKER. Mr. Chairman, I would like at this time to insert in the record House Joint Resolution 102, which I introduced in the first session of this Congress, on December 15, 1927. I would also like to insert at this place in the record a part of the constitution of the State of New York, relative to the apportionment of assemblymen:

> The members of the assembly shall be chosen by single districts and they shall be apportioned by the legislature, at the first regular session after the return of the regular enumeration, among the several counties of the State, as nearly as may be, according to the number of their respective inhabitants, excluding aliens.

Now, I shall be very brief, because I desire to give my time to Mr. Anderson, who is here from New York. I wish to state this, however, that what I propose to do is to create an amendment to the Constitution, whereas Mr. Hoch proposes to offer or to create an amendment to the fourteenth amendment. As you know, that amendment is highly controversial, and I believe it is a very hazardous and dangerous piece of legislation. I believe that we might better undertake an amendment to the Constitution to exclude aliens, but I leave that to the good judgment of your committee. I will be glad to give the balance of my time to Mr. Anderson, of New York.

STATEMENT OF WILLIAM H. ANDERSON, NEW YORK, N. Y.

Mr. ANDERSON. Mr. Chairman and members of the committee, I shall be exceedingly brief. Mr. Hoch has covered the general considerations involved. I have been working on this proposition for a great many years. My interest primarily was in behalf of prohibition, although this is a measure that can stand on its own feet. The measure which Mr. Stalker introduced a year ago last December was the measure that, in my judgment, best met the needs of the situation; that is to say, knowing the tactics of the opposition to mess up any kind of a proposition, I foresaw, with almost 30 years' experience in legislative matters outside of legislative bodies, that the opposition might try to give the impression to the general public that we were trying to put over some of the things that we did in the fourteenth amendment and we would have to pass the fourteenth amendment again. And I believe it would be far simpler to have a simple little amendment which is self-contained; that is the reason why that particular form was introduced. Now, I recognize, in case this committee approves the principle that is involved, the committee will decide, in its own judgment, what is the best way of getting at the proposition and I am perfectly content to leave that to the committee; but that is the reason why this form was adopted—the form that was introduced by Mr. Stalker.

Now, as to the origin. If it were a mere question of credit, it would not be worth fooling with at all, but some question was brought up on the floor of the House, by some remarks by Mr. Hoch, attributing this to a source that had not anything to do with the genesis of it; and it is important to fix the origin of it in case there is any attempt to becloud the issue and bring up questions that have nothing to do with it. This proposition raises no questions of creed, race, or

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party; it raises simply the common-sense question of who shall control the policies and ultimately the destiny of this country, the representatives of our own citizens or the representatives of a lot of citizens of a lot of different nations who just happen to be here and get caught by the census enumerator when the census is being taken. That is the only thing involved in it.

I say to you very frankly my interest was the prohibition interest. I was connected with the Anti-Saloon League at the time when I first made this proposal and brought it up in 1921. Now, I have not the slightest idea I am the first person who ever thought of it; I have not the slightest doubt but that a good many men thought of it before I was ever born. But it did originate with me in my own mind and, so far as I know from the record, I am the first person who got it into the Congress of the United States. I say that solely in order to negative any idea there is an ulterior idea behind it, aside from the natural benefit that would flow to the prohibition cause, because most of those Congressmen that would be cut out are opposed to the prohibition policy.

Mr. SUMNERS. Mr. Anderson, might I suggest that this committee would consider the resolution upon its merits, in its legislative and governmental effect, without regard to where it came from.

Mr. HERSEY. Or who would oppose it.

Mr. LAGUARDIA. I wish Mr. Anderson would make his complete statement and give the reasons and the origin of it. I think it is very informative and instructive.

Mr. ANDERSON. I really have made that statement in order to get the record clear, so that no extraneous objection, that had nothing to do with the merits of the proposition, might be brought out. Now, without going further on that, I just want to say a few things.

The CHAIRMAN. What the gentleman from Texas meant was this, I think, that it made no difference whether this cut out dry Representatives or wet Representatives; if the matter itself is meritorious and ought to be adopted as a basis of representation, we ought to vote on it.

Mr. ANDERSON. Yes, sir.

Mr. LAGUARDIA. Yes, but Mr. Anderson argues and states frankly and announces that that was what gave rise in his mind to the necessity for such a change, originally.

The CHAIRMAN. That is already in the record.

Mr. ANDERSON. Yes; I said that was my original interest in it, although it is a proposition that stands fairly and squarely upon its merits; and I brought in that particular interest of mine in order to negative completely and entirely a different sort of thing that has been brought up on the floor of the House. That was my reason—only to make that clear.

Now, respecting New York, according to this suggested apportionment that Mr. Hoch indicated was prepared for him, New York would have four fewer representatives. Of course, there has been an increase in population. As a matter of fact, if we applied the present ratio, which is about 211,000, the last ratio that was used under the last census, of course that is not exact, but that would show about seven representatives from New York State. In other words, with the seven or eight millions that there are of aliens in the country, when there is a new apportionment, taking any ratio that

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would be likely to come, a quarter of a million or something like that, there would be approximately 30 Congressmen that would represent nothing but unnaturalized aliens. So that it is very decidedly a sizeable proposition. Now applying the last used ratio of the last census, it would give 34 representatives in Congress who would represent nothing but unnaturalized aliens; that is, those unnaturalized aliens would have as many members on that basis—it is not quite accurate, but it is the nearest we can get—as for all of the States combined of Arizona, Delaware, Florida, Idaho, Montana, Nevada, New Hampshire, New Mexico, North Dakota, Oregon, Rhode Island, South Dakota, Utah, Vermont, Wyoming and all of Maine except one congressional district. That is 15¾ of the American States, according to their votes; their entire representation in the Lower House. These States ought to demand a population scale that eliminates all de facto representative of these unnaturalized aliens. That is just one example.

Now we have taken the position in pursuing this matter that we were not asking that the apportionment be held up; but, on the other hand, let the apportionment go through on its merits as the Congress sees fit to leave it go through, and, at the same time, push this proposition on its merits so that, in case the States desire to impose this limitation, it may go into effect, should they act promptly enough, to be considered in the next apportionment that is made, assuming the pending apportionment bill goes through. If that is not done, there will then be 10 years more of Congresses where there will be approximately 30 Members that represent nothing but unnaturalized aliens and there will be three presidential elections, 1932, 1936, and 1940, that will be conducted on that basis where the unnaturalized aliens will have the electoral votes—some 30 electoral votes in certain States, a small group of States, where most of them are found.

So that we consider it is a matter that calls for extreme speed and earnestness in the consideration of the merits of the proposition. Now I know the time of the committee is very decidedly limited and, in view of that fact, I think that my cutting this off at this time would be more eloquent than any words I could possibly use.

(The committee thereupon went into executive session, at the conclusion of which an adjournment was taken subject to the call of the chairman.)

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Thursday, February 14, 1929.

The committee, at 11.15 o'clock a. m., proceeded in open hearing, Hon. Leonidas C. Dyer, presiding.

Mr. DYER. Gentlemen, the committee will resume the hearing had yesterday on H. J. Res. 351 and H. Res. 102. Mr. Stephens is here and desires to make a brief statement to the committee touching these resolutions.

STATEMENT OF ROYAL C. STEPHENS, PRESIDENT THE PATRIOTIC CITIZENS CIVIL LEAGUE, PHILADELPHIA, PA.

Mr. STEPHENS. My name is Royal C. Stephens. I am president of the Patriotic Citizens Civic League.

Mr. MICHENER. Where?

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Mr. STEPHENS. Care of 1331 Divinity Place, Philadelphia, Pa.

Mr. MICHENER. Is this a national organization?

Mr. STEPHENS. No, sir. It is the civic league in Philadelphia, but it is interested in national affairs.

Mr. Chairman and members of the committee, I have the honor to be the founder and president of this organization. It is interested in this bill because we are interested in the welfare of the country. Both of these resolutions are practically more or less the same, have the same object in view, and that is to amend the Constitution basing the proportion of the Members of Congress on citizenship, and we are heartily in accord with that.

I had the pleasure of living in other countries for some years and I want to say, gentlemen, I respected the laws of those countries. I saw the acts and the feeling of the people of those countries where they demanded that the people, the foreigners, then living in those countries respected their laws and their customs and rights. We had no chance to mold legislation in those countries and I feel this is right in line and we ought to think along the same way.

I want to call to your attention the necessity of this proposition. I have in my hands here a copy of the bill that was introduced by Senator Salus of Pennsylvania, at the request, long ago, of the foreign groups in Philadelphia, which shows you the attitude that is taken frequently by members of these groups, that come from other countries, desiring that all official business published by the city government in Philadelphia shall be published in all the foreign language press where they are in existence three years. Now I wish to call your attention to this fact, gentlemen, that every year we face that in Pennsylvania. A few years ago it included Italian, German, and Jew with a population of 40. Now they seem to feel—and I am sorry to say that—that we should change our laws to suit them, and this is a matter I feel, in the first place, that America has failed to convince them of the proper duties or respect, or what the Constitution is, or the customs of our country, and that is due largely in a measure to the failure of the Americans themselves to obey or live up to their ideals. However, quite recently you remember we had the sesquicentennial.

I want to call your attention to this thing, that when the proposition was called up regarding the opening of the sesquicentennial on the Sabbath—now regardless of what your opinion may be proper con on that, there is a provision of the State legislation against it—those in charge made this statement, "the foreign groups in the city of Philadelphia who have elected us—those who have the franchise—and their future voters who will follow their wishes, have elected us and we are going to concede to them, and you Americans who do not vote can do as you please,"—which is an illustration of what I desire to talk about that is a factor in the feeling that many of the organized groups of aliens who have come to this country, have taken out citizenship, yet they fail to imbibe the spirit of the customs, the ideals and the principles that were written in the Declaration of Independence.

Now I want to say that it is our opinion that America should take the steps now to amend this Constitution and ought to at this session of Congress, that will make it possible to base it upon citizenship; for these aliens who have come here, they have the same rights that

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our forefathers did to take out citizenship and thereby have a right to vote as our forefathers did, so that they are not denied any right in that respect.

Then I wish to call your attention to the fact the statement was made—a man 24 years in this country, who has not taken out citizenship, said, "I am making my money here and when I have enough I am going back to Italy to live, where I can live cheaper." But that man is active in molding opinion and is a strong committeeman in Philadelphia in electing your public officers, because of the influence and money he may have. I am only showing you some of these features.

Now I call your attention that there will be brought up in Pennsylvania Monday night a resolution petitioning Congress to act at this session so that we in Pennsylvania can ratify this proposed amendment before the legislature adjourns on April 18. And I feel confident of the legislature that they will adopt it in the House Monday night and probably Tuesday in the Senate. However, at the same time, a joint resolution amending the State constitution of Pennsylvania will be called up also, which was introduced Tuesday, this last Tuesday morning, in Harrisburg. I want to say I believe we can not do any greater help or impress upon those who have taken out citizenship papers than the fact we ourselves are convinced we must take this action.

Now there are one or two other thoughts and I will close, that are in a measure dependent upon this, and I have given serious thought to this in the last 15 years in my life's activity in behalf of my fellow men and my country; that is this, that many of our foreign press often, frequently, criticize our customs or our ideals and our laws and many of the adult population of those who do not speak English, or do not care to take it up, or can not learn English, still mold opinion, still impress upon politicians; and I say to you frankly that I heard one Member of Congress say, when he was asked why he voted against the immigration question, that 70 per cent of his constituents were foreign born and future citizens and that he would receive a consideration. So that they are molding opinion and impressing upon the members in our legislative halls their wishes, and they are not Americans and it is a dangerous thing.

I was impressed by the remark of Mr. LaGuardia in regard to the number of children that are born to these people, and I do hope they will be able to imbibe the true spirit of Americanism; but if we permit and continue these foreign papers to carry on and criticize, and they hear these things in their homes, we can not Americanize them—far from it—and it is under the circumstances I feel that is a danger to the welfare of this country. I would like to see and I believe it is a national affair, that these foreign papers be compelled to publish the English version alongside of whatever language it is published in. We will know then they are not criticizing or creating in the minds of those adults who are not able to learn English—we can know they are not encouraging them to violate the laws and customs of this country.

Another thought along that line—I want to call your attention to the thing which I think in citizenship is very important. I look at this when I think that I myself and all others here waited 21 years for a right to vote, and what I want you to look at is this: If we do not instill into the hearts of these men, these aliens who come here,

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the men and women, the true spirit of Americanism, we have not only failed but are permitting them to instill into the hearts of their children and future voters of the country, that will outnumber the American stock, because the American stock don't have large families like they do, and if they don't imbibe the ideals of this country, it will be going like Rome and Greece did. Now that is only a thought along that line that might be considered.

But here is a solution I believe, if carried out, will have a tremendous effect in not only Americanizing them, but making better citizens of them all around the entire world, and making right thinking citizens; that is, if we would place in our schools, public and all others, what they call the Gill system of teaching in the young republics of our schools, based on the golden rule, where all of the children from the garden years up are practicing and putting into effect the election three or four times a year and the duties of every officer—we will make them, when they become citizens 21 years of age, they will know the duties of every one of their respective obligations as citizens and I think it will be a solution in a large measure that will do away with many of these things.

Mr. TUCKER. You do not ask us to pass such a law as that?

Mr. STEPHENS. No; I merely mention that as a solution. I will leave a copy of this Senator Salus's bill with you and I hope, gentlemen, you will see fit to place upon the calendar this amendment so that we can get some action and encourage Pennsylvania, also, in ratifying the Constitution over there.

I want to say I was glad to hear New York has that provision in their constitution and I want to see this provision. There is not a person in this country more interested in the welfare of the aliens who come to this country and here is one, and the organization which I represent treats them as fellow men and we don't stand back trying to get all we can out of them and deceive them, but try to set an example to them that they may be better citizens, and I hope we may instill into them that spirit that they must or should respect our laws. And it is really due to the failure of the Americans and I say with shame that many of our plblic citizens, because of the desire to go into office, will concede to things that they know are wrong to get that office at the expense of the welfare of their country, and I hope to see the day we may have men and women who will stand up and be counted for their principles first and last and fight for the welfare of the American people.

If you have any questions to ask, I will be glad to answer them.

Mr. LAGUARDIA. What did you say the name of your organization is?

Mr. STEPHENS. The Patriotic Citizens' Civic League of Philadelphia.

Mr. LAGUARDIA. Where is the office of this organization?

Mr. STEPHENS. It has no office.

Mr. LAGUARDIA. What is its membership?

Mr. STEPHENS. Its membership is about 50.

Mr. LAGUARDIA. What is your business?

Mr. STEPHENS. My business is to get other people to do things worth while. My life has been devoted to making this country a civic righteous nation—a big job on my hands, I confess.

Mr. LAGUARDIA. What is your source of income?

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Mr. STEPHENS. I have no source of income. I receive contributions from the people who are interested in these things, who contribute. And I want to say this, Mr. LaGuardia, that frequently I am one of those myself who is interested in this cause, that I do not wait and look for the almighty dollar to do this for the cause. That is because of the fact that there are too many forming organizations who think of the almighty dollar first and the cause second.

Mr. LAGUARDIA. Quite right. And all of the arguments stated by you to-day are in support of the amendment now before the committee?

Mr. STEPHENS. Certainly.

Mr. YATES. How many are involved; how many would be involved? Have you any estimate?

Mr. STEPHENS. That I do not know.

Mr. YATES. How many would be affected in Pennsylvania. I understand there are 1,600,000 in New York.

Mr. STEPHENS. I do not know at present how many it would affect in Pennsylvania. Only the Census Bureau would be able to answer that question.

THE GENERAL ASSEMBLY OF PENNSYLVANIA

[File of the senate, No. 51, session of 1929. Introduced by Mr. Salus, January 15, 1929. Referred to Committee on Judiciary General, January 15, 1929]

AN ACT To amend section one of the act approved the nineteenth day of July, one thousand nine hundred and seventeen (Pamphlet Laws one thousand one hundred and twenty-two), entitled "An act providing that every advertisement and notice required by authority of law or rules of court to be published in any county in the Commonwealth or in any city coincident to the boundaries of a county may, in addition to the publication of such advertisements or notices required to be made in newspapers published and printed in the English language, be also published by the public officer, body, or court directed by law or rules of court to publish such advertisement or notice in newspapers printed in the English language in one or more daily newspapers printed in a foreign language or languages; such newspaper printed in a foreign language or languages to be printed in and have general circulation in the county or the city coincident to the boundaries of said county for at least three years continuously before the publication of such advertisements or notices; and further providing for the prices to be charged for publishing such advertisements or notices in any such foreign newspapers, how often the same shall be published, and the stipulation and regulations under which the same shall be published

SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met and it is hereby enacted by the authority of the same*, That section one of the act approved the nineteenth day of July, one thousand nine hundred and seventeen (Pamphlet Laws one thousand one hundred and twenty-two), entitled "An act providing that every advertisement and notice required by authority of law or rules of court to be published in any county in the Commonwealth, or in any city coincident to the boundaries of a county may, in addition to the publication of such advertisements or notices required to be made in newspapers published and printed in the English language, be also published by the public officer, body, or court directed by law or rules of court to publish such advertisement or notice in newspapers printed in the English language in one or more daily newspapers printed in a foreign language or languages; such newspapers printed in a foreign language or languages to be printed in and have general circulation in the county or the city coincident to the boundaries of said county for at least three years continuously before the publication of such advertisements or notices; and further providing for the prices to be charged for publishing such advertisements or notices in any such foreign newspapers, how often the same shall be published, and the stipulation and regulations under which the same shall be published" is hereby amended to read as follows:

"SECTION 1. *Be it enacted, etc.*, That hereafter every advertisement and notice required by authority of law or by rules of court to be published in any county of the Commonwealth or in any city thereof whose boundaries are coincident with a county, may, in addition to the publication thereof required to be made in newspapers printed in the English language, be also published by the public officer, body, or court directed by law or rules of court to publish such advertisements or notices in newspapers printed in the English language in one or more

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daily newspapers printed in a foreign language or languages. Such newspaper or newspapers printed in such foreign language or languages to be such as are [printed] *published* in and of general circulation in such county or a city and of general circulation in such county or a city whose boundaries are coincident thereto. That the prices to be charged for such publication of such advertisements or notices in such newspapers published in a foreign langugae or languages shall not exceed the rates charged for such publication in newspapers printed in the English language for the same services when publication is made in such newspaper or newspapers printed in a foreign language or languages, it shall be made as often as that made in newspaper or newspapers printed in the English language and shall be subject to the same stipulations and regulations as those imposed for like services in such newspapers printed in the English language.

Mr. DYER. We will hear now from Mr. Brand and then from Mr. Hudson.

STATEMENT OF HON. CHARLES BRAND, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. BRAND. Mr. Chairman and members of the committee, it may seem to you that there is not a great deal of interest in this subject, because of the few that are here this morning; but I wish to say when I came here, at 11 o'clock, and found "executive session" on your door, there was a representative of the American Farm Bureau there and a representative of the Grange of the United States, and I learned also that a representative of the Daughters of the American Revolution was up here to appear this morning; but they all came to the conclusion that you were not going to reach this hearing this morning, so that they have gone back to their various places of activity.

The evidence already before you shows that there are from 7,000,000 to 8,000,000 aliens in the United States and, when you figure 300,000 for each Representative in Congress, or each electoral vote, you find that there are 26 or 27 Members of Congress representing aliens now in the House, and 26 or 27 votes in the Electoral College representing aliens. It seems to me that is a fair mathematical deduction.

Mr. YATES. You mean that would not be there?

Mr. BRAND. That would not be there if aliens were not counted. And, in making the reapportionment, if we count the aliens, there will be that many representing aliens, really. Now that is a balance of power in the House. All close questions are settled upon a less majority than that and often we elect a President on a less majority than 26 or 27. So that this really is a vital question for this committee to consider.

I know that we approach any constitutional amendment with a good deal of fear and trembling and we hesitate to change a word in that instrument and here is a question that I think will come to this committee in the consideration of this question—whether or not we will gradually absorb the aliens and eventually be without them, and whether this is a temporary matter. Now my study of the question has developed that there are two classes of aliens, those who can not be naturalized on account of the law and those who do not wish to be naturalized. There are a great many millions of aliens in the United States that never can be naturalized, because of their coming in by the smuggling route. They came in without the pale of the law and those aliens can never be naturalized, because they can never be

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in a position to prove that they entered this country legally. Therefore they are here for all times, as long as they live here, as aliens. I saw in a paper recently, it is not very good evidence, perhaps, but it will give some idea of the seriousness of the question—that there is now an organization in this country bootlegging foreigners into this country for so much per head, and this same article also contained a statement that there were more than a million coming in here every year. Now that is a consant supply for these alien inhabitants of the country.

Mr. LAGUARDIA. Mr. Brand, I think that figure is terribly exaggerated, for this reason: While we have no check up on what may be the bootlegging of aliens across the border, we certainly have a check up on what the ships bring over to Mexico, Cuba, or Canada, and I think, granting they have that leeway, that it would not be possible to smuggle a million aliens a year. I know there is a great deal of smuggling going on, but I mean it can not be anything like a million aliens a year.

Mr. BRAND. It seemed to be out of the question to me, but I give you that for what it is worth.

Mr. HERSEY. There are two borders, the Canadian border about three thousand miles, as well as the Mexican border. Aliens get into Canada from other countries very easily and then come across the border.

Mr. BRAND. I do not know that there is any way absolutely to check up on this.

Mr. LAGUARDIA. It would take over four hundred steamers to bring a million aliens over, if they had nothing else than aliens, to be smuggled. Even in our biggest days of immigration, when I was at Ellis Island, they were coming with their steamers just full and the total immigration then was just a million. So that I say it can not be anything like that.

Mr. KURTZ. I think Secretary of Labor Davis says it is something in excess of 100,000 a year.

Mr. BRAND. That is his opinion.

Mr. KURTZ. Yes; that is my recollection.

Mr. BRAND. Now, I wish to address myself next to those who do not wish to become American citizens. I had an illustration that was very clear as to the reason why men live in the United States, come here as immigrants, and do not become citizens. Traveling in Europe I found a great many people, especially in southern Europe, that talk the American language—not English, but the kind of language we talk. When I was in England I could hardly understand the English at times, but these people in southern Europe understood our language. And why? Because they had been over here and accumulated a sufficiency and had gone back, and I want to tell you there are many of them over there; you can find them everywhere. And they do not make any excuse except to say they never intended to give up their own nationality and that they came here for the purpose of accumulation and, when they had reached their ambition, they went back. And I want to say to you that when you are over there you know that you never would live there and give up your nationality. So that it is a natural thing for men to come here and stay a while and then go back.

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So that there two classes of these aliens, those that come in here without coming in legally and must remain aliens, and the other class are those who do not come here intending to be American citizens. And I say to you gentlemen that I do not believe these aliens ever will be absorbed so that there is no question of this kind. We will always have this question and, therefore, I am fully convinced that we ought to act on this question and so arrange the Constitution or the laws, which ever is necessary, so that they will not be counted when we apportion our Representatives in the National Congress.

I thank you.

Mr. DYER. Now, Mr. Hudson, we will hear you.

STATEMENT OF HON. GRANT M. HUDSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. HUDSON. Mr. Chairman and gentlemen of the committee, I had no particular desire to offer any testimony before the committee on this resolution. I listened to the argument given by Representative Hoch yesterday before the committee, which I considered a most excellent argument of the reasons for the enactment of this joint resolution. I can see, personally, the need for it perhaps more than some of you who live in a different State. We are on the border line of perhaps the bootlegging industry of the aliens, unless it would be the Mexican border line. There is not any question but what there is a very systematic, well-organized industry in the matter of smuggling aliens across the Canadian line on the Detroit and St. Claire Rivers, and they are being brought in and then sifted on down into the other sections and cities.

The passage of this resolution it seems to me ought to be at this time, because of the matter of reapportionment that is before us. I believe if we could pass this resolution there would be less opposition to reapportionment on the basis of holding the House at a stated number; that it would reduce the opposition more than anything else that could be done.

I am sure that back in my State, as the gentleman from Ohio has just testified, the Grange, the Farm Bureau, the Women's Federation, the Daughters of the American Revolution, and the other organizations of a patriotic character are more than heartily in favor of this bill. And let me say it seems to me that we are not, by the passage of it, working any injury to anyone. By the adoption of the resolution, we are placing the Federal Constitution and the Federal Government on the same basis that the States have placed their State governments.

I think I have not anything further to say, Mr. Chairman; I just simply wanted to add my own testimony to what I think is the saneness and constructive bearing of this joint resolution upon our American Government.

Mr. HALL. Mr. Hudson, do you favor the Hoch amendment or the Stalker amendment to arrive at the result they both seek to accomplish?

Mr. HUDSON. I would favor the Hoch amendment, I think, largely for this reason: It is not adding another amendment to the Constitution. I think there is a very decided temper over the country that we ought not to add another amendment. Of course, you could

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say, "Well this has the effect of it." But, in a sense, it does not have the effect of submitting an entirely new amendment to the Constitution For that reason I would favor this rather than the other.

Mr. HICKEY. Do you think, if there is favorable action on this Hoch amendment by the committee and later by the Congress, that it would hasten action on the apportionment bill that is pending before the Senate?

Mr. HUDSON. Yes; I think it would. I have not checked up on the Senate on that, of course, in any way, but I am sure there could be no joint resolution before the House which would receive such hearty indorsement over the country as would this resolution.

Mr. HERSEY. You heard Mr. Hoch's testimony, did you?

Mr. HUDSON. Yes; I did.

Mr. HERSEY. And his statement as to the effect upon the next apportionment if this sould become a law?

Mr. HUDSON. Yes.

Mr. HERSEY. Would this affect the delegation from Michigan if this became a law?

Mr. HUDSON. I apprehend it might cut down one. How, this is a rough estimate without any basis for making it, and I do not know that it is wise to make it, but I presume in the district that is represented in the House by the two gentlemen from the city of Detroit—the gentleman from the sixth district and the gentleman from the second district—there may be as high as 300,000 aliens within those districts.

Mr. MICHENER. In the second district?

Mr. HUDSON. No, I say within the four districts—the first, the thirteenth, the second, and the sixth.

Mr. MICHENER. Well a large part of those foreigners would be in your district, would they not?

Mr. HUDSON. No.

Mr. MICHENER. In Hamtramck and that country?

Mr. HUDSON. Hamtramck is a city of 100,000, of course, with an extremely large foreign population. West Detroit, in its Polish section, has another extremely large foreign population.

Mr. MICHENER. That is the thirteenth district?

Mr. HUDSON. And down there and across you will find another large section of foreign population.

Mr. MICHENER. Foreign. They are American citizens?

Mr. HUDSON. No, I think the proportion would hold—not quite as nearly as it would in Hamtramck, but nearly so.

Mr. HERSEY. You mean aliens?

Mr. HUDSON. I mean aliens.

Mr. YATES. Three hundred thousand aliens in a territory comprising four districts?

Mr. HUDSON. What would be known as the metropolitan district of Detroit. Now the city of Flint in the sixth district would probably have more than these other districts, because of the great industrial centers. The city of Flint embraces a great number of aliens in the total population; Lansing not so large. The city of Pontiac has a great number; Pontaic has a great number of Mexicans that have come in there. Of course all of these cities have a large negro population but they are American citizens; they are not aliens.

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Mr. DYER. Thank you very much, Mr. Hudson. Now I understand from Mr. Hoch, the author of one of the resolutions, that there are others who desire to be heard. Mr. Stalker, do you know whether that is a fact or not, that there are others who wish to be heard on these resolutions?

Mr. STALKER. I do not, but if I may just take a minute—in connection with the remarks I made yesterday I said I believed, if this resolution was reported out, that it should be a separate amendment. Now I can mention seven or eight States that will not ratify, in my opinion——

Mr. HERSEY. What do you mean by "separate amendment?"

Mr. STALKER. It should not be attached to the fourteenth amendment.

Mr. MICHENER. The fourteenth amendment, if amended, would be known under a new number and in the print would appear as a new amendment anyway, would it not?

Mr. STALKER. Yes.

Mr. MICHENER. You would have to reenact the amendment as it now exists?

Mr. STALKER. Yes.

Mr. MICHENER. And it would have a new number, just the same?

Mr. STALKER. And there is a question whether there would not be some States in the South that would not be active in reenacting that amendment. Now you take States like Connecticut, New York, Pennsylvania, New Jersey and Illinois, those States, perhaps, would not ratify. So that if you add any additional burdens or connect it up with the fourteenth amendment, which would perhaps cause some of the Southern States to not act upon it, why you would perhaps lose the amendment in my opinion; because I can readily count seven industrial States of the East, including Illinois, that would not ratify it.

That is all I desire to say.

(The committee thereupon adjourned until Monday, February 18, 1929, at 10 o'clock a. m.)

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Monday, February 18, 1929.

The committee met at 10.30 o'clock a. m., Hon. Leonidas C. Dyer presiding.

Mr. DYER. The committee has met for the purpose of hearing any further testimony on House Joint Resolution 351 and House Joint Resolution 102.

Mr. Hoch, do you have any further testimony to offer?

STATEMENT OF HON. HOMER HOCH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF KANSAS—Resumed

Mr. HOCH. Mr. Chairman and members of the committee, I do not intend to take up any more of the committee's time myself, but a number of Members have advised me that they would like to say a few words in reference to this resolution. Doctor Menges seems to be the only one present this morning. Of course, you know how it is with Members appearing before committees when they have so many

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other matters on hand. I take it that a number of them would like to file brief statements for inclusion in the record.

Mr. DYER. On the subject of these resolutions?

Mr. HOCH. Yes, sir.

Mr. DYER. Without objection, that will be done.

(There was no objection.)

Mr. HOCH. I have a letter here that was sent to me by Mr. Chester H. Gray, representing the American Farm Bureau Federation, which I would like to have the clerk read, or, if you prefer, it might be inserted in the record without reading. He makes a brief argument in support of the proposition contained in the resolution, and he approaches it from a somewhat different angle from the one to which I addressed myself the other day.

Mr. DYER. It may be inserted in the record at this point.

(The letter referred to is as follows:)

WASHINGTON, D. C., *February 16, 1929.*

Hon. HOMER HOCH, M. C.,
House Office Building,
Washington, D. C.

MY DEAR CONGRESSMAN HOCH: Inability to attend the hearings of the House Judiciary Committee next Monday, February 18, at 10.30 a. m., leads me to submit to you briefly the statement of position for the American Farm Bureau Federation, relative to H. J. Res. 351.

The purpose of this resolution fits in precisely with the principles contained in the effort which the American Farm Bureau Federation put forth several years ago when the present immigration act was being formulated. That principle, briefly stated, was and is that the American Government should be an institution composed of American citizens and should not allow forces or disintegration to became imbedded within its structure which ultimately might be expected to lessen its virility.

H. J. Res. 351 advances this principle by adding the words "and aliens" to section 2 of the fourteenth amendment to the Federal statute, so that the entire sentence would read "Representatives shall be apportioned among the several States according to their respective numbers counting the whole number of persons in each State, including Indians not taxed, and "aliens."

The Farm Bureau membership views the entire question of nationality more from social, governmental, and ehtnic aspects than it does from the economic point of view. It might be economically profitable to some farmers to let down the immigration bars and allow foreigners to come in more freely. But to do so would be equivalent to saying that our social structure in America, our governmental methods and practices, and our ethnic characteristics would eventually, if not immediately, be subjected to immense hazards.

The Farm Bureau folks want to keep America for Americans, and if foreigners do come here, as many of them have come in the past, they should become Americans rather than continue to be foreigners in America.

Of course, it is recognized that there must be in all civilized nations a small and numerical percentage of foreigners or aliens scattered among the nationals for various reasons, commercial and otherwise. It does not follow, however, that these foreigners or aliens should be incorporated in the governmental procedures of our Nation. If in the future, as is now the case, these aliens shall continue to be counted in making up our House of Representatives, and if, as now seems probable, our international commercial relations become greater and greater, we may expect a corresponding increase in our alien population. If this alien population does not intend to become naturalized as a part of our nationals, or if it has not taken the initiatory steps to become so naturalized, it is nothing more than a subversion of our representative principles of government that such aliens continue to be counted in determining upon representation in the lower House of Congress.

I trust you will use this letter for the record, or in any way which occurs to you at the hearing of the Judiciary Committee, owing to my inability, as above noted to be present.

Very respectfully,

AMERICAN FARM BUREAU FEDERATION,
CHESTER H. GRAY, *Washington Representative.*

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Mr. HERSEY. Mr. Hoch, if this committee should report this resolution favorably to the House, would you have any expectation of getting it through at this session, or at this short session?

Mr. HOCH. I want to be entirely frank with the committee, and when you say "expectation" all of us know the situation that exists in the House. I think that it is not impossible that it might be considered in the House, but I would not want to make the statement that I am convinced that we would be able to secure consideration for it in the House. Yet, I am not at all sure that we would not be able to secure consideration for it.

Mr. DYER. Of course, these hearings would be available for the use of the Members in the next Congress.

Mr. HOCH. Personally, I should attempt to have the resolution considered at this session, and hope to have it adopted.

Mr. HERSEY. If the House acted upon it favorably, would you expect that it would be ratified by the States before the next census?

Mr. HOCH. I have a very lively expectation that if it were submitted to the States, it would be ratified by three-fourths of them.

Doctor Menges is here, and I would be glad if the committee would hear him now.

STATEMENT OF HON. FRANKLIN MENGES, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. MENGES. Mr. Chairman, I am very much in favor of the amendment proposed by Mr. Hoch. It is short, and I believe it could be gotten through the House at this session, and probably through the Senate.

As you know, I am from Pennsylvania, and probably Pennsylvania will have to adopt a definition as to who is an alien. In the early history of our State, we had a little trouble about who were aliens. As you know, during the Revolutionary War and afterward we had Tories, Quakers, Dutch and Irish, and none of them loved each other any too well, and to determine who were aliens among them was somewhat hazardous. Therefore, I believe that probably we would have to define who are aliens. I am not sure about that. My friend, Mr. Kurtz, of the committee, probably knows as much about that as I do. I simply want to say that I feel that in the State of Pennsylvania, we need this kind of legislation, or this constitutional amendment, in order to have our representatives from the State selected and elected by those who are citizens of the State.

Mr. HERSEY. You want to keep your representation 100 per cent pure.

Mr. MENGES. Yes, sir; that is what I am anxious to do.

That is about all I have to offer in the way of a statement, but I will be glad to answer any questions.

Mr. LAGUARDIA. A witness told us the other day, in the course of the hearings, that the Pennsylvania Assembly, or House of Representatives, would pass a resolution indorsing this proposal on Tuesday of last week, and that on Friday the Pennsylvania Senate would adopt it: Have they taken any action on the resolution?

Mr. MENGES. Two resolutions have been introduced; one, as I understand it, favoring Mr. Hoch's amendment, and I think the other favored the constitutional amendment proposed by the gentleman who was speaking here at the last hearing.

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Mr. LAGUARDIA. Has any action been taken yet?

Mr. MENGES. No action has been taken. It was said it might be taken this evening. I doubt very much whether any action will be taken that speedily.

Mr. LAGUARDIA. The other witness practically assured us that action would be taken.

Mr. MENGES. I wish the legislature would take action, but I am not that hopeful. If I may interpose there, the resolution was only introduced last Monday or Tuesday, and it could not have been acted upon before this Tuesday.

Mr. KURTZ. I think the witness meant that it would likely pass Tuesday of this week, instead of Tuesday of last week.

Mr. MENGES. I am not that hopeful.

I thank you for your attention.

Mr. HOCH. Mr. Chairman, I would like to inquire what the policy of the committee is with reference to receiving additional brief statements that may be handed to me for inclusion in the record. I have introduced one or two that have been handed to me.

Mr. DYER. The committee has already authorized the clerk to receive brief statements from Members of the House for the purpose of inserting them in the record. Do you have any other statements from persons other than Members of the House that you would like to submit?

Mr. HOCH. I have a note on my desk this morning from Mr. Brinkman, representing, I believe, the National Grange, saying that he was called out of town when he expected to appear, and that he would like to file a statement in favor of the resolution. If it is satisfactory to the committee for him to do that——

Mr. HALL (interposing). Who was that?

Mr. HOCH. Mr. Brinkman, representing the National Grange.

Mr. DYER. If there is no objection, Mr. Hoch may submit such statements as he refers to to the clerk so they may be included in the hearings.

Mr. LAGUARDIA. I have no objection to including the statements he has just referred to. Statements may be received from Members, of course, but as to any other statements that may come in, I suggest that they be presented to the committee for authorization.

Mr. DYER. They may be presented to the clerk of the committee and he will take them up with the chairman.

Mr. HERSEY. Then do we understand that the hearings are closed?

Mr. DYER. The Chair will be pleased to receive suggestions with reference to that. What is the judgment of the committee?

Mr. STOBBS. Do you understand that the Order of the Patriotic Sons of America, of Pennsylvania, in convention assembled, has adopted resolutions similar to these?

Mr. HOCH. No; I was not aware of that. I will say frankly to the committee that I have made no effort to start any sort of propaganda on this proposition. However, I have realized that it is a matter that might have been taken up by many patriotic organizations. So far as my connection with the matter is concerned, I have chosen to proceed upon the assumption that the committee would pass upon this proposition entirely upon its merits, and, while I know you are always glad to hear from those organizations, I did not desire to promote any propaganda. I am confident that there are many

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organizations in the country which, if the matter were presented to them, would pass resolutions in behalf of the measure.

If I may say a word in conclusion, with reference to the form of this resolution, as I said in my opening statement, I have no personal pride of authorship as to the form it takes. I am rather inclined to think that if a proposition of this sort were to be submitted, the simplest way to do it—whether the most tactical, might be debatable—but the simplest way would be to change the word "persons" to "citizens." I think that would accomplish the whole purpose, and it would be, to my mind, the simplest way to do it.

Mr. MONTAGUE. I offered an amendment in that form some six or eight years ago.

Mr. HOCH. Then, I am confirmed in my opinion that that is a desirable way to do it.

Mr. HERSEY. Then you put upon the census enumerators the responsibility of finding out who are aliens and who are not.

Mr. HOCH. That responsibility is now being carried by the Census Bureau. They would do that regardless of whether we adopt this amendment, or not.

Mr. DOMINICK. That is a part of the information that is collected by the census.

Mr. HOCH. Yes. I think there are no administrative difficulties.

Mr. DYER. Are there any other witnesses who desire to be heard in favor of the resolution?

(There was no response.)

Are there any who wish to be heard in opposition to it?

(There was no response.)

There being no other witnesses, the hearings will be closed.

Mr. LAGUARDIA. I do not think it is fair to state the hearings are closed, if no one appears for or against it. I do not know what notice has been given of these hearings. I think the fair statement would be, is there anybody else who wants to be heard.

Mr. DYER. The Chair is asking if there is anyone who wishes to be heard this morning. What is the pleasure of the committee about closing the hearings?

Mr. KURTZ. I have no desire to prolong it, but this matter has not been long before the committee, and somebody might want to be heard on one side or the other.

Mr. DYER. Is it your motion that the hearings be deferred?

Mr. KURTZ. I have no objection to closing them. So far as I am concerned, I can vote now, but, perhaps, there are some other witnesses who might want to appear.

Mr. DYER. The question is whether it is agreeable to the committee to close the hearings on this resolution.

(The question was taken, and the committee voted to close the hearings.)

Mr. DYER. If any witness should appear, the chairman would surely give them a chance to be heard.

(Thereupon, the committee went into executive session.)

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Calendar No. 3

71ST CONGRESS, 1st Session | SENATE | REPORT No. 2

CENSUS AND REAPPORTIONMENT

APRIL 23, 1929.—Ordered to be printed

Mr. JONES and Mr. VANDENBERG, from the Committee on Commerce, submitted the following

REPORT

[To accompany S. 312]

The Committee on Commerce, to whom was referred the bill (S. 312) to provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives in Congress, having considered the same, report favorably thereon, and recommend that the bill do pass without amendment.

That part of the bill relating to the census is substantially the same as the bill which passed the House last session. The following changes have been made in the language of the bill as it passed the House:

Page 1, line 4, the word "unemployment" has been inserted. Senators Couzens and Wagner have taken a special interest in the matter of a census of unemployment in the country and the committee has been glad to provide for this.

Line 5, "1929" has been substituted for "1930".

Page 2, line 2, after the words "Canal Zone" there have been inserted a comma and the word "all".

Line 9, after the word "period", the following has been inserted:

Provided, That the tabulation of total population by States as required for the apportionment of Representatives shall be completed within twelve months and reported by the Director of the Census to the Secretary of Commerce and by him to the President of the United States.

Page 3, line 5, at the beginning of the line the words "annual or piece-price" included in the House bill, have been omitted.

Line 7, the following has been inserted:

Provided, That census employees who may be transferred to any such temporary positions shall not lose their permanent civil-service status by reason of such transfer.

Line 18, the word "temporary" has been inserted in lieu of the words "clerical, mechanical, and subclerical".

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Page 4, lines 8, 9, 10, 11, 12, 13, 14, 15, 16, to and including "6.)" in line 17, have been inserted in lieu of the House language, i. e., "Employees of the Post Office Department may, with the consent of the Postmaster General, in cases of necessity, and in far distant and outlying localities, be appointed and compensated for work performed under the provisions of this act."

Line 19, after the words "compensation at", there have been omitted the words "per diem or piece-price" as included in the House bill.

Page 5, line 13, the word "unemployment" has been inserted.

Page 6, line 20, "November" has been substituted for "May".

Page 12, lines 24 and 25 are new language.

Page 13, line 17, "1934" has been substituted for "1935".

Line 24, "November" has been substituted for "May".

Page 15, sections 19 and 20 are new language.

Page 16, line 11, the bill to provide for apportionment of Representatives in Congress has been added as a new section to the census bill, i. e., section 22.

Senator Vandenberg, a member of the committee has taken a great interest in the apportionment bill and, because the functions served by them interlock, the committee, at his suggestion, has joined the census bill and the apportionment bill. The following is submitted by Senator Vandenberg as a part of this report:

REAPPORTIONMENT

The committee has joined the census bill with the reapportionment bill because the functions served by them interlock. Indeed, there is but one basic constitutional function served by the census. It is to provide an enumeration of the people for the purpose of redistributing congressional representation proportioned thereto. The debates in the Constitutional Convention clearly prove that this necessity was the sole motive for requiring the decennial censuses at all. The faithful decennial habit of following the census with a responsive reapportionment was practiced from 1790 to 1910. The mandate of the Constitution, in other words, is accepted and validated by 120 years of congressional action. In putting the two functions into one law, therefore, the committee but emphasizes the order of the Constitution and the congressional practice of more than a century. It warrants a constitutional use of the census in the future.

The language of this recommended measure as it relates to apportionment closely follows the language of the so-called Fenn bill (H. R. 11725), which was passed by the House on January 11, 1929, and favorably reported to the Senate by this committee on January 14, 1929, but which failed of Senate consideration prior to adjournment. The basic purpose, namely, to validate Article I of the Constitution, and the basic phraseology remain the same. There is a change at two points in the body of the bill, principally to make it more flexible in its accommodation to the serial judgments of Congress in ministerial details. These will be analyzed subsequently.

NEED FOR THE BILL

The need for legislation of this type is confessed by the record of the past nine years during which Congress has refused to translate the 1920 census into a new apportionment. The House has twice

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acted, but the Senate has twice declined to approve, although this is a problem primarily affecting the House itself. As a result, great American constituencies have been robbed of their rightful share of representation, not only in the Congress itself but also in the presidential Electoral College. On the prospective basis of the next census, more than 30,000,000 people are relatively disfranchised as a result of this lapse in a fundamental constitutional function. Already we have had two presidencies and four Congresses elected out of an anticonstitutional source. On the basis of census estimates, it is safe to say that reapportionment, with the present size of the House maintained, would affect 23 seats in the House of Representatives and 23 votes in the presidential Electoral College. So large a factor of misrepresentation is a travesty upon representative democracy, a flagrant mockery of constitutional equalities, an ugly hazard to domestic tranquility, and an insufferable affront to victimized States.

Despite the progressive development of this trespass during recent years, Congress has failed to correct the situation. The Senate has refused either to accept reapportionment initiated by the House or to originate such legislation itself. There is no convicing reason to anticipate that the same influences and considerations which have prevented constitutional apportionment in the past will not prolong these defaults indefinitely. As entrenched inequities increase, their voluntary correction proportionately becomes less easy and less likely. Thus it becomes evident that the protection of the roots of our representative Government requires an enabling act paralleling and authenticating Article I of the Constitution. Otherwise, the article is impotent. Therefore, the committee recommends this legislation. If it proves to be unnecessary—as will be the case if each decennial Congress hereafter does its independent duty to reapportion the Congress—no harm is done. If it proves to be necessary—as will be the case if congressional default persists—then its invocation will preserve the constitutional character of our representative institutions.

The Federalist Papers, oracle of the Constitution, said: "A power equal to every possible contingency must exist somewhere in the Government." Without this proposed legislation, where is the "power" to compel effective attention to the serious "contingency" created by the failure of Congress to apportion Representatives as the Constitution requires? Where is the "power" which shall protect the paramount theory of representative equality in our system of constitutional government? The "power" is lacking until this law is passed.

WHAT IS PROPOSED?

The theory of this legislation, as originated by the House in the last session, is that in every decennium the Congress shall have a free opportunity—as is its right and responsibility—to translate the current census into a new apportionment on whatever basis it pleases. There is no disposition or effect in this law which delimits freedom of action by Congress in this respect. This law does not operate unless Congress fails to act. In other words, it takes from Congress nothing except the right of inertia—the privilege of capitalizing inaction into a constitutional affront. Even then it accepts whatever decisions Congress itself may have last made as to the size of the

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House or the mathematical method of apportionment, and fits these indices to the new census enumeration. It preserves the status quo in every respect except as the new census requires, under the Constitution, a new application of these fixed indices to the new enumeration.

This proposal is not intended for 1930 alone. It is written in broad terms so that it will fit any subsequent decennial emergency which may arise. This is its great virtue. It is a permanent contribution to our representative institutions. It does not concern itself merely with the redistribution of a few seats which are contemporarily misplaced, serious as this immediate contemplation is, when one congressional district with one Congressman to-day has as great a population, in two typical instances, as have whole States with as many as eight Congressmen. The primary purpose of this proposal is to cure a basic statutory flaw and cure it with a formula which will be just as applicable in 1940 or 1950 or 1960 as in 1930. But perhaps it can best be visualized in its operations by indicating the schedule it would produce in connection with the next census and the next apportionment.

The census would be taken in November, 1929. One year later, with these figures in hand, the President would report the census figures, together with a table showing how, under these figures, the House would be apportioned with "the existing number of representatives" (which at this moment would be 435) "by the method used in the last preceding apportionment" (which was the method of "major fractions" as used in 1911). This report would be made in December, 1930, at the first day of the second regular session of the Seventy-first Congress. That entire session would be free to pass its own reapportionment on any basis it might see fit, fixing any size House it might desire and following any method it might care to embrace. But if it failed to act, then the Clerk of the House would notify the States in March, 1931, that the apportionment tables reported to Congress by the President, pursuant to a purely ministerial and mathematical formula, would be forthwith effective. Then the States would have the balance of 1931 and the first half of 1932 in which to redistrict themselves as they may choose. The new apportionment would govern the election of representatives to the Seventy-third Congress and presidential electors in November, 1932. Precisely the same process would protect reapportionment in each subsequent decennium.

OBJECTIONS

The committee believes that there are no sound objections to any phase of this proposal, particularly in view of the manner in which the phraseology of this new act meets certain previous objections to prior attempts at too much and needless detail.

The objection that this is an improper "delegation of power" to the Department of Commerce (which takes the census) and to the President (who reports the arithmetic) is answered by an examination of the facts. No power whatever is delegated. The Department of Commerce counts the people (as it always has done) and the President reports upon a problem in mathematics which is standard, and for which rigid specifications are provided by Congress

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itself, and to which there can be but one mathematical answer. Congress always has and always will depend upon outside experts to do this mathematical problem. The usual situation in this respect is not changed.

This objection, and the kindred objection that this is "anticipatory legislation," would defeat practically every enabling act ever written. But they are not infirmities. The Supreme Court repeatedly has passed upon this issue. It is settled. "Let the end be legitimate, let it be within the scope of the Constitution; and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, and consist with the letter and spirit of the Constitution, are constitutional." (McCullock *v.* Maryland, 4 Wheat. 316.) It equally is settled that the delegation of a purely ministerial function by Congress, in pursuit of these ends, is beyond constitutional question. "It is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact of the state of things upon which the enforcement of its enactment depends would be to stop the wheels of government and to bring about confusion, if not paralysis, in the conduct of the public business." (Union Bridge Co. *v.* U. S., 204 U. S. 364.)

Another objection to the previous bill was that the Secretary of Commerce should not be intrusted with the final responsibility for making so important a report to Congress. The new and pending bill recognizes this objection to the extent that the President is substituted for the Secretary of Commerce so that this function may be served by a constitutional officer. This makes for greater permanence, which is one of the major virtues to be desired in such a statute.

Other objections heretofore have complained against the identification of any specific House membership or any specific method of apportionment in a measure of this character. These objections are met—and, in the judgment of the Committee, the bill is improved—by the new language which accommodates itself to the serial decisions of Congress in respect to these details. Constant power is left with Congress to control these details if it sees fit to act. Thus, for example, if the Congress passes a reapportionment act in 1930–31 and decides to embrace the method of "equal proportions," this law will recognize and embrace "equal proportions" in 1940–41 and thereafter until again changed by Congress itself.

To identify any one method in this permanent act, whether the method of major fractions or equal proportions, would be to assume that science itself has traversed the subject with finality. Science is thus not static. For example, there are at least three other methods discussed in the report of the National Academy of Sciences, which is careful to delimit its present findings to "the present state of knowledge." Again, there never yet has been a deliberate effort to fix the constitutional objective which the method of apportionment should answer. In other words, the subject is far from closed. The last word by no means has been spoken. Scientists themselves will be among the first to recognize this fact, and, like the National Academy, scrupulously confess themselves limited to the "present state of knowledge." A permanent ministerial apportionment act should be susceptible of accommodation to the progressive state of knowledge. Progressive latitude is impossible if any one method be frozen into this neutral law. This act expressly and purposely avoids all limitation, leaving to each decennial Congress the right of unpreju-

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diced selection. Such a purpose can be achieved by the language proposed.

It should be stated in this connection that the quarrel over "methods" heretofore has magnified this factor out of all proper perspective. As a matter of fact, the choice between the two principal rival methods would have affected but three seats out of 435 in 1920 and, on the basis of census estimates, would affect but one seat out of 435 in 1930. The basic problem involved in this contemplation is too great and too vital to be submerged in controversy over comparatively trivial detail. This new proposal lifts itself above such controversy by confining its specific corrections to the fundamental default in all apportionment.

RECOMMENDATION OF EXPERTS

Previous discussions of this problem have been clouded by an external disagreement among scientists as to the best method for arriving at a constitutional conclusion. Happily, this controversy does not attach to the phraseology recommended in this bill. All of the experts attached to the Government are unanimous in recommending the passage of this bill. These experts comprise the advisory committee of the census, consisting at the present time of Prof. Walter F. Willcox, of Cornell, chairman; Prof. George E. Barnett, of Johns Hopkins University; Prof. Robert E. Chaddock, of Columbia; Prof. W. I. King, of New York University; and Prof. George F. Warren, of Cornell. The full committee met in Washington on April 13, 1929, and unanimously recommended the phraseology of this enabling act for ministerial reapportionment. (Their complete report is found at p. 94 of the Congressional Record.) This recommendation is approved by Dr. William M. Steuart, Director of the Census, and by Dr. Joseph A. Hill, assistant director. There is further concurrence by Prof. Carroll W. Doten, of Massachusetts Technology; Prof. Edwin R. A. Seligman, of Columbia; and Prof. Wesley C. Mitchell, of Columbia, all of whom are surviving members of the advisory committee of 1921 which last officially passed upon this problem. Doten, Mitchell, and Willcox have been presidents of the American Statistical Association. Seligman, Chaddock, Willcox, and Mitchell have been presidents of the American Economic Association. These are the two associations from which the membership of the advisory committee is drawn. Thus, there is no disagreement regarding this proposed measure by the experts upon whom Congress leans for advice in relation to problems of this character. They preserve their right of independent judgment as to details, but they insist, with the committee, that the need for this enabling act is fundamental and that it best serves its highest purpose by leaving details for the serial decisions of Congress in connection with actual apportionments.

CONCLUSION

With these credentials and for the urgent reasons given, the committee recommends the provisions in this bill, which will provide for ministerial apportionment in the event that any further decennial Congress declines to validate its decennial census. This breach in our system of representative institutions must be closed, not only for the sake of equity and justice to the people of the United States but also for the sake of the perpetuity of our institutions.

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CERTIFICATE OF SERVICE

Case Name: **State of California, et al. v. Donald J. Trump, et al.** No. **5:20-cv-05169-LHK-RRC-EMC**

I hereby certify that on September 21, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DECLARATION OF SHANNON D. LANKENAU IN SUPPORT OF PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR PARTIAL SUMMARY JUDGMENT

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on September 21, 2020, at Sacramento, California.

Eileen A. Ennis	*/s/ Eileen A. Ennis*
Declarant	Signature

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