



INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER

January 18, 2018

The Honorable Wilbur L. Ross, Jr.
Secretary, Department of Commerce
1401 Constitution Avenue NW
Washington, D.C. 20230
Concurrently via email: wlross@doc.gov

Dear Secretary Ross,

The work of the Census Bureau is a critical aspect of the Commerce Department’s mission. The Bureau’s conduct of an accurate and fair decennial census is a vital fulfillment of our federal government’s constitutional obligation to ensure that an “actual Enumeration” underlies our country’s federal elections—the pillar of our democracy. Ensuring qualified and appropriately selected leadership for the Census Bureau is, in turn, crucial; and you have a key role to play in that task.

As we proceed along a critical timeline for executing the 2020 Census, the Census Bureau lacks a permanent Director and Deputy Director. [Reports](#) have suggested that the Administration has identified a candidate for Deputy Director. There have been no public reports of a potential Director nominee beyond your testimony before Congress last summer in which you indicated that you had considered a single candidate who did not complete the vetting process. We therefore write to underscore our concern that, if the Trump Administration is considering installing a Deputy Director with the expectation that he or she will serve indefinitely as Acting Director, that approach would raise serious legal concerns. In particular, adopting this approach would flout the will of the Congress by disregarding duly passed statutes and circumventing the Senate’s vital role in providing advice and consent for key officers such as the Director of the Census Bureau.

First, a [provision](#) of federal law duly passed by the Congress and signed by the President requires that the “[Census] Bureau *shall* be headed by a Director” (emphasis added). This is not permissive statutory language—it is mandatory. Every President is, of course, entitled to a reasonable period of time to consider suitable nominees for offices like this one. However, given the imminence and importance of the 2020 Census, this position should not be left without a qualified nominee any longer. Even if this President believes that the position of Census Bureau Director is unnecessary—perhaps reflected in [statements](#) that the President has made suggesting that there are too many political appointees in the federal government—the President [may not, consistent with the constitutionally allocated separation of powers, unilaterally repeal a statutory provision by deliberate inaction](#). Instead, he is entitled to work with Congress to revisit the statute creating that role. Until then, however, he has the solemn constitutional obligation to “take Care that the Laws be faithfully executed” by working in good faith and on a reasonable timeline to fill a role that federal law requires him to fill.



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Second, the Congress has made clear that the Director’s duties cannot devolve indefinitely to the highest-ranking official remaining at the Census Bureau. The [Vacancies Reform Act](#) provides that, now that more than 210 days have elapsed since the last Director resigned, the Census Bureau’s First Assistant may no longer perform the duties that would otherwise be performed by the Director. That provision exists, of course, because the Congress wants those duties performed by a duly installed *Director*. Installing instead a Deputy Director in anticipation of *his* exercising the Director’s duties would merely perpetuate rather than resolve the existing legal infirmity, and thus further contravene congressional will as reflected in duly enacted federal law.

Third, another [provision](#) of federal law passed by the Congress and signed by the President requires that the particular office of the Census Bureau Director be filled with someone chosen from a slate of individuals with particular qualifications: “Such appointment shall be made from individuals who have a demonstrated ability in managing large organizations and experience in the collection, analysis, and use of statistical data.” This is an unusually specific requirement for the Congress to impose on such a high-ranking position and reflects the importance that Congress has wisely attached to ensuring that the census is overseen by someone with a keen technical and managerial background. To install a Deputy Director—for whom there are no similar statutory qualification requirements—and then rely on him to serve indefinitely as Acting Director would evade these critical requirements specifically imposed by Congress on the Director’s position.

Fourth, [federal law](#) demands that the Census Bureau Director be “appointed by the President, *by and with the advice and consent of the Senate*, without regard to political affiliation” (emphasis added). This requirement ensures that, for a position as important as this one, the Senate fulfills a key role in our system of checks and balances by vetting a candidate before she assumes office. Moreover, for this particular office, this requirement allows the Senate to ensure that the President has approached this appointment “without regard to political affiliation,” as directed by law, and furthermore has selected an individual who satisfies the specific criteria described in the previous paragraph, also as directed by law. There is no such requirement that the Senate provide its advice and consent for a Deputy Director. To install a Deputy Director and then have him serve indefinitely as Acting Director would be a flagrant evasion of the Senate’s role in considering a candidate nominated for the vital responsibility of overseeing the census.

Fifth, installing the individual reportedly under consideration as Deputy Director may raise its own set of legal concerns, regardless of whether a Director nominee is imminently forthcoming. That is because the Deputy Director of the Census Bureau is a “general” appointment, meaning that it is typically filled by career civil servants through the required competitive hiring process. Although such a position *can* be filled by a political appointee, doing so would require you as Secretary to certify that the individual is qualified for the role, which in this case would require certifying that the individual has, among other qualifications, the capacity to act as chief operating officer for the Census Bureau. We ask that you approach your central role in this process with a full appreciation of your responsibility in it and of the stakes associated with your consideration of certification, especially before this Administration breaks with the longstanding tradition of filling the Deputy Director position with an experienced career official.



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All told, installing a Deputy Director in anticipation of having him or her serve indefinitely as Acting Director would be an unlawful and inappropriate end-run around the will of the Congress and the requirements of the law, while also injecting unnecessary liabilities into the results of the 2020 Census. We therefore ask that you work with the White House and the Congress to ensure, in a transparent manner, that the leadership of the Census Bureau complies with statutory requirements and is prepared to carry out effectively its vital responsibility of overseeing a fair and just census. Thank you for your consideration and attention to this important matter.

Sincerely,

American Constitution Society

American Oversight

Campaign Legal Center

Citizens for Responsibility and Ethics in Washington

Democracy Forward

Institute for Constitutional Advocacy and Protection

Project on Government Oversight

Protect Democracy

cc: Donald F. McGahn, White House Counsel

Peter Davidson, General Counsel, Department of Commerce

The Honorable Ron Johnson
Chairman, Senate Homeland Security and Governmental Affairs Committee

The Honorable Claire McCaskill
Ranking Member, Senate Homeland Security and Governmental Affairs Committee

The Honorable Trey Gowdy
Chairman, House Committee on Oversight and Government Reform

The Honorable Elijah Cummings
Ranking Member, House Committee on Oversight and Government Reform