

September 7, 2018

Melody Braswell
Department Clearance Officer
United States Department of Justice
145 N St. NE, 3E.405B
Washington, DC 20530

Dear Ms. Braswell,

The undersigned organizations oppose a proposed request by the Bureau of Justice Statistics (BJS) for information from state agencies about inmates' citizenship and country of birth. The proposal appears in a Federal Register Notice of a Proposed Information Collection for the National Corrections Reporting Program (NCRP), OMB Docket No. 1121-0065, published on July 9, 2018 at 83 FR 31778.

Data collection for federal statistical programs must serve necessary government purposes and follow the strongest scientific standards. The proposed questions violate these rules because the data:

- Are already available elsewhere.
- Would serve no necessary purpose.
- Are likely to be inaccurate.

Ultimately, if the BJS proceeds with this initiative, it runs a serious risk of conflict with its own standards.

The organizations endorsing these comments are non-profit entities that advocate the fair and equal treatment of all people, regardless of race, ethnicity, national origin, immigration status, or any other personal characteristic. Our organizations, and where applicable our members, regularly use federal statistical data to understand trends in the economy and social welfare, to identify historically persistent disparities, and to craft and advocate policies that advance equal justice. We rely upon government data to be of the highest accuracy and completeness.

1) These Data Are Already Available

Executive Order 13768, signed on January 25, 2017, directed Cabinet officials to report quarterly on the immigration status of people incarcerated for a criminal conviction—and in particular, to identify incarcerated noncitizens. The stated purposes of this Order are to secure public safety, and to provide transparency and situational awareness. The BJS has proposed these questions about prisoners' citizenship and countries of birth to carry out this directive.

We strongly disagree that collecting these data will improve public safety. However, even if the responses helped in this regard, it would be wasteful and unnecessary to collect them through the NCRP. Several data collections already exist which have enabled a significant body of analysis.

One is the National Prisoner Statistics (NPS) Program. The NPS receives reports every year from the state Departments of Correction on the numbers of noncitizens in their custody. Its data, which go back to 1926, have included the citizenship of prisoners for nearly 20 years. BJS has long used NPS data to create and publish reports about inmates' demographic characteristics and duration in custody. (It also uses other instruments, such as the Survey of Prison Inmates, Annual Probation Survey, Annual Parole Survey, and Annual Survey of Jails.) These data include, in addition to citizenship information, the length of sentences; types of offenses; prisoners' gender, age, race, and ethnicity; and the nature of release (unconditional or under supervision). The information is sufficiently detailed to enable sophisticated analysis for policymaking that may rely on, for example, changes in the percentage of noncitizen inmates over time, and variations among states and custodial arrangements.

Another is the American Community Survey (ACS). It collects up-to-date, detailed information about incarcerated people and their personal characteristics, including citizenship and national origin. The Census Bureau conducts the ACS on a rolling basis, and draws information about prison populations from surveys completed by facility administrators as well as interviews conducted annually with randomly-chosen inmates. The ACS has a larger sample size than many other publicly- or privately-fielded surveys, in part because response is mandatory and while not every facility submits ACS data every year, the ACS has a higher response rate. Hence ACS data are considered among the most accurate about Americans' demographic, social, and economic characteristics. Researchers have used ACS data from incarceration sites to study prisoners' educational attainment, recidivism, citizenship, and other issues, and have lauded its unique suitability for those purposes. For example, analysts have noted that its "large sample size allows for analyses of subgroups within prison population," and that the "inclusion of household and group quarters populations in the same survey enables comparisons" between incarcerated and non-incarcerated people.¹

The NPS, ACS, and other Census Bureau surveys provide thorough, detailed information about prisoners' citizenship, yet they do not exhaust the universe of data sources. Information is also available from the State Criminal Alien Assistance Program (SCAAP) reimbursement requests, FBI arrest histories, and records of convictions from state court systems.

For example, the SCAAP provides partial repayment from the federal government to states for the cost of incarcerating certain noncitizens. To get these funds, almost all the states have participated in this program, and they submit detailed information every year about known and suspected noncitizens in their custody to the Department of Justice (DOJ). The DOJ in turn secures DHS confirmation of the status of the listed individuals so it can approve reimbursements only for incarcerated noncitizens who meet statutory criteria. As a result, for participating

¹ Stephanie Ewert and Tara Wildhagen, Educational Characteristics of Prisoners: Data from the ACS, April 2011, available at <https://www.census.gov/library/working-papers/2011/demo/SEHSD-WP2011-08.html>.

states, DOJ already possesses annually updated, individual, detailed records of the citizenship status, country of origin, and other personal characteristics of most, or all, suspected and confirmed noncitizens in criminal custody.

In sum, BJS should avoid duplication of effort and strike the proposed questions about prisoners' citizenship and country of origin.

2) The Proposed Data Collection Will Not Serve the Purpose of Improving Public Safety

The citizenship status of an accused offender is irrelevant to the determination of guilt of virtually all state and local crimes. An innocent act does not become a burglary, for instance, solely because a noncitizen commits it. Hence this data collection concerning people serving sentences for state and local crimes would not improve the administration of justice or public safety. Executive Order 13768 and the proposed gathering of inmate citizenship information seem motivated by an interest in falsely portraying noncitizens as disproportionately dangerous, and in seeking justification for actions that may discriminate on the basis of national origin, potentially in violation of the Civil Rights Act of 1964.

In fact, the data have repeatedly proved that noncitizens are underrepresented among those incarcerated for non-immigration-related crimes. Of the immigration status-related crimes noncitizens do commit, most are not violent, and most can only be prosecuted and punished by federal authorities. Convictions of illegal entry and re-entry into the country are by far the most common. Others involve unauthorized transactions² or false claims of US citizenship³, principally committed to gain work or admission into the country.

Noncitizens are more law-abiding than U.S. citizens, and the evidence is sustained, overwhelming, and beyond dispute. Recent studies have reached this conclusion by looking to data about arrestees' and convicts' citizenship, self-reports about criminal behavior (with independent confirmations of reliability), and sophisticated comparisons of the density of noncitizen populations in various jurisdictions with noncitizens' and U.S. citizens' arrest and conviction rates in the same jurisdictions over time.⁴ For example, a 2015 paper by Drs. Walter Ewing, Daniel Martinez, and Ruben Rumbaut concluded that "innumerable studies have confirmed two simple yet

² Although states' and localities' attempts to criminalize actions including seeking work without authorization as an immigrant and failing to carry immigration documents at all times have largely been invalidated by federal courts, federal law does punish, for example, the forgery or false use of a visa or other immigration document, 18 U.S.C. § 1546.

³ Making a false claim to U.S. citizenship for any purpose is a federal crime, 18 U.S.C. § 911, and states and localities may also punish such false claims made to, for example, register to vote, e.g. California Elections Code § 18100(a).

⁴ *E.g.*, Nazgol Ghandnoosh, Ph.D., and Josh Rovner, The Sentencing Project, Immigration and Public Safety, March 16, 2017, available at <https://www.sentencingproject.org/publications/immigration-public-safety/> (finding that "foreign-born residents of the United States commit crime less often than native-born citizens"); Daniel P. Mears, Immigration and Crime: What's the Connection?, 14 Federal Sentencing Reporter 284 (2002) (finding no material at all in any published academic literature on the criminal activity of the foreign-born that contradicted the conclusion that foreign-born residents commit fewer crimes than native-born residents).

powerful truths about the relationship between immigration and crime: immigrants are less likely to commit serious crimes or be behind bars than the native-born, and high rates of immigration are associated with lower rates of violent crime and property crime. This holds true for both legal immigrants and the unauthorized, regardless of their country of origin or level of education.”⁵

Immigrants are not just more law-abiding, but much more so. Analysis of Census data stretching back to 1980 has shown that incarceration rates for foreign-born residents have consistently been one-half to one-fifth those of native-born citizens.⁶ Strikingly, analysis of the incarcerated population in California—home to more than 24 percent of all foreign-born residents in the country—found that “U.S.-born men have an institutionalization rate that is 10 times higher than that of foreign-born men,” and that when researchers compared populations of similar age and educational attainment, the disparity between incarceration rates grew even larger.⁷ The authors concluded compellingly, “From a perspective of public safety, then, there would be little reason to limit immigration, to try to increase the education levels of immigrants, or to increase punishments to deter noncitizens from committing crimes.”⁸

Since noncitizens are much less likely to commit criminal activity, and since their citizenship status and countries of origin are irrelevant to prosecuting almost all kinds of crime, the collection of redundant information about inmates’ citizenship and national origin serves no logical purpose related to public safety.

Executive Order 13768 implies the actual intention of the proposal when it misleadingly states, “Many aliens who illegally enter the United States and those who overstay or otherwise violate the terms of their visas present a significant threat to national security and public safety.” This conclusion contradicts the evidence. Our organizations are concerned about, and oppose, the compilation of data to promote the false, divisive propositions that: a) noncitizens are particularly likely to commit crimes or b) federal immigration authorities cannot identify and pursue civil removability charges against noncitizens in state and local criminal custody. Credible academic research strongly and uniformly refutes the former, and the Department of Homeland Security’s (DHS) swift, routine removal of convicted individuals disproves the latter. DHS has universal access to arrest and incarceration records from throughout the country, including inmates’ fingerprints, and on that basis, the agency issued more than 140,000 detainer requests to take custody of criminal inmates in the most recent fiscal year, FY17.⁹

⁵ Dr. Walter Ewing, Dr. Daniel E. Martinez, and Dr. Rubén G. Rumbaut, *The Criminalization of Immigration in the United States*, July 13, 2015, available at <https://www.americanimmigrationcouncil.org/research/criminalization-immigration-united-states>.

⁶ *Id.*

⁷ Kristin F. Butcher and Anne Morrison Piehl, *Crime, Corrections, and California: What Does Immigration Have to Do with It?*, *California Counts: Population Trends and Profiles* Vol. 9 No. 3 (Feb. 2008), available at http://www.ppac.org/content/pubs/cacounts/CC_208KBCC.pdf

⁸ *Id.*

⁹ Transactional Records Access Clearinghouse, *Latest Data: Immigration and Customs Enforcement Detainers (ICE Data through April 2018)*, available at <http://trac.syr.edu/phptools/immigration/detain/>.

3) These Questions Would Likely Yield Poor Quality Responses, Especially Since Key States May Not Provide Them

Documents regarding the deliberations that led to the present Federal Register Notice reveal that BJS understands that some—if not the majority—of these data held by states is of relatively poor quality and reliability. Moreover, BJS is aware that if it proceeds with the proposed request, it will obtain uneven degrees of cooperation from jurisdictions. The undersigned organizations have well-substantiated doubts about state agencies' ability and willingness to provide this information, partly because the effort would serve no legitimate purpose and impose a needless burden.

A principal reason that states' records are of low quality is that citizenship and country of birth are irrelevant to states' and localities' law enforcement. Few agencies seek to compile accurate information if it is useless to them.

BJS has already seen many omissions and inaccuracies in states' records when collecting data for the NPS. For example, in its most recent comprehensive reports on prisoners in the United States, BJS explicitly noted that some responding jurisdictions could only provide data reflecting inmates' countries of birth, not their current citizenship. This handicap is serious. The most recent Census Bureau statistics from the 2016 ACS 1-year file show that nearly 49 percent of U.S. residents who are foreign-born are naturalized American citizens. As a result, information on country of birth is effectively useless for comparing U.S. citizens and noncitizens.

The states' data is unreliable on another dimension. BJS studies and documents indicate that inmates self-report much of it, and that such self-reports are not trustworthy. In the agency's December 20, 2017 clearance request, it noted that its most recent inquiries to states, conducted in 2012, revealed that most of the jurisdictions queried obtained citizenship information from self-reports by prisoners at admission. In addition, NPS submissions led the agency to believe that the majority of states continued to employ this procedure, and that very few sought verification from courts, federal authorities, or state law enforcement agencies. The BJS acknowledged that "of [] lower quality are data that show current citizenship status...based on self-report by the inmates, that has not been externally verified... the lowest quality data on current citizenship are those derived from self-reported country of birth."

Finally, state response to the NCRP is voluntary and many states are likely to ignore the questions altogether. Several—including California, in recent years—typically decline to provide any information about inmates' citizenship or national origin in the NPS, and would likely decline if these inquiries appeared in the NCRP. Because California is home to such a large share of the nation's total foreign-born, its non-participation, on its own, would severely diminish the accuracy and usefulness of any resulting NCRP data.

4) The Proposed Data Collection Would Likely Violate BJS Criteria

The known weaknesses of the data that BJS is likely to collect should have prevented the attempt in the first place. The agency's December 20, 2017 clearance request to

OMB states that if any of the following criteria is met, BJS would recommend against seeking citizenship and country of birth in the NCRP:

- If any single state will discontinue participation in NCRP because of the addition of a citizenship question, the variable should not be added because it would compromise the integrity of the rest of the NCRP data;
- If more than 20% of prisoner records would come from states that cannot provide the data due to state or Department of Corrections policy, the variable should not be added because it would result in high levels of missing data for the citizenship variable;
- If more than 40% of prisoner records in NCRP would come from states that could only report country of birth, the variable should not be added because country of birth is a poor proxy for citizenship; and
- Most pertinently, if more than 60% of prisoner records would come from the combination of inmate self-report without verification or through the reporting of place of birth, the variable should not be added because data would be drawn from the two least trustworthy sources.

If California does not participate, the second condition will likely fail and invalidate the data collection. Even if it does take part, our organizations believe that the remaining three criteria may also fail. The information request is at real risk of not meeting the standards BJS has set for it.

Finally, even if BJS were able to secure the best possible data about inmates' citizenship and countries of birth—despite the agency's own expectation that states cannot provide sufficiently complete and reliable data—it still will not support the analysis the agency envisions.

The goals elude the data. For example, BJS proposes to “examine recidivism rates by U.S. citizenship status.” The agency ignores the fact that the sample will be skewed. Many or most noncitizens serving criminal sentences—who may be theoretically eligible for community supervision—are in fact charged as removable and taken into DHS custody in lieu of conditional or unencumbered release from custody.¹⁰ They are much less likely to be repeat offenders. As a result, the sample will lean heavily toward U.S. citizens, because immigration enforcement mechanisms will preclude noncitizens' post-custody liberation. The data collection cannot fulfill its purposes.

Conclusion

The proposed collection of state and local prisoners' citizenship and countries of birth through the NCRP is unnecessary, unjustified by its stated purposes, and unlikely to produce sufficiently reliable and accurate data according to BJS's own

¹⁰ For example, a large majority of noncitizens in New York state criminal custody between 2003 and 2013 who completed a sentence were released to Immigration and Customs Enforcement custody rather than to the community. New York State Department of Corrections & Community Supervision, Research In Brief: Department Procedures For Processing Criminal Aliens 2014, available at http://www.doccs.ny.gov/Research/Reports/2014/Alien_Processing_2013.pdf.

standards. Even worse, this effort arises at the same time as data collection and other efforts by government agencies to stigmatize noncitizens and instill fear and mistrust in immigrant-origin communities. In the context of the Administration's explicit embrace of anti-immigration policies and rhetoric, and actions like the Department of Commerce's last-minute decision to add an untested citizenship question to the 2020 Census, there is widespread and growing apprehension about the consequences of any interaction with government officials. The more they are aware that government representatives are scrutinizing foreign-born residents, the less willing individuals—including legal immigrants and U.S. citizen relatives of noncitizens—are to take actions that promote every American's welfare and safety.

Hence this superfluous proposal is likely to have perverse negative ripple effects. Wary residents will be less likely to open their doors to police, to report and help prosecute crimes, to pay taxes and municipal fees, and to respond to the decennial Census, the most consequential data collection our country undertakes.

Our organizations are committed to supporting the federal government's collection of comprehensive, accurate data about U.S. residents. We know that some burden on respondents is justified by the enormous value of statistics that serve critical government purposes and meet established, scientific standards. However, the proposed data collection does neither. We oppose it, and urge you to remove these questions from the NCRP questionnaire for 2018 and subsequent years.

Thank you for your consideration of these comments.

Sincerely,

American-Arab Anti-Discrimination Committee (ADC)
Archivists Round Table of Metropolitan New York (ART)
Asian Americans Advancing Justice | AAJC
Campaign for Youth Justice
Coalition for Humane Immigrant Rights (CHIRLA)
Common Cause
The Center for Law and Social Policy (CLASP)
Equality California
Government Information Watch
Human Rights Watch
Jewish Council for Public Affairs
The Leadership Conference on Civil and Human Rights
NALEO Educational Fund
National Black Justice Coalition
National Center for Transgender Equality
National Immigration Law Center
National Juvenile Justice Network
National LGBTQ Task Force
PFLAG National
Prison Policy Initiative
Service Employees International Union (SEIU)
Southeast Asia Resource Action Center (SEARAC)

Transgender Law Center
URGE: Unite for Reproductive & Gender Equity