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United States General Accounting Office  
Washington, DC 20548

B-289852

April 4, 2002

The Honorable Bob Barr  
Vice Chairman  
Committee on Government Reform  
House of Representatives

Subject: Legal Authority for American Community Survey

Dear Mr. Vice Chairman:

This responds to your letter regarding the legal authority of the U.S. Census Bureau (Bureau) to conduct the American Community Survey (ACS), a monthly survey of a sample of households that, beginning in 2003, is intended to replace the long form questionnaire for the decennial census in 2010. You asked us to provide (1) the legal authority under which the Bureau is conducting the ACS, including any legislative history concerning the development and implementation of ACS, (2) the Bureau's legal authority to require recipients to respond to the ACS, and (3) information on any other federal government questionnaires or surveys that require similar specific, detailed personal information be provided to the government.

In order to respond to your questions, we examined various legislative materials such as public laws, committee reports and hearings, and the Congressional Record for references to the ACS, requested and received comments from the Department of Commerce (Commerce), and met informally with Commerce and Bureau officials to discuss these issues. We also searched an Office of Management and Budget (OMB) database for surveys that require specific detailed personal information. As discussed in detail below, we find that the Bureau has the authority under 13 U.S.C. §§ 141 and 193 to conduct the ACS. Although there is little legislative action tracking this Bureau initiative, the Bureau clearly has authority to require responses from the public to this survey. See 13 U.S.C. § 221. The Bureau must still receive clearance for the ACS through the Paperwork Reduction Act process. Finally, we found no other government surveys that respondents are required to respond to that ask specific, detailed personal information similar to that required by the ACS.

## BACKGROUND

According to Commerce, the ACS, which is designed to replace the long form portion for future decennial censuses, tracks the questions asked in the long form questionnaire from the 2000 Census. The long form questionnaire asked a sample of persons and households for information on population topics, such as ancestry, veteran status, disability, labor force status, and income, and housing topics, such as value of home or rent paid, size and age of structure, plumbing and kitchen facilities, and expenses for utilities, mortgage, and taxes.

The Bureau began conducting supplementary surveys of selected counties under its authority at 13 U.S.C. § 182 in 1996 using the ACS methodology to test the operational feasibility of collecting long form type data in a different methodology from that of the decennial census. Beginning in 2003, the Bureau plans to expand the ACS nationwide in a yearly sample of three million households (250,000 each month) as part of its decennial census in order to move from a once-every-ten years activity to continuous data collection and data dissemination. By starting in 2003, data will be available for areas and population groups of 65,000 or more beginning in 2004 and for small areas and population groups of less than 20,000 people beginning in 2008.<sup>1</sup> According to Bureau officials, this will provide information on a timelier basis than is now currently available. For example, the most current long form information available from the Bureau is from the 1990 Census, since the 2000 Census data will not be available until this summer.

According to Commerce, the ACS information will provide more current data to a number of federal agencies including the Department of Health and Human Services, the Department of Education, and the Food and Nutrition Service of the Department of Agriculture.

## DISCUSSION

Article I of the United States Constitution requires an enumeration of the population every ten years “in such Manner as they [Congress] shall by Law direct.” U.S. Const. art. I, § 2, cl. 3. To implement this Constitutional requirement, Congress enacted 13 U.S.C. § 141, which requires “a decennial census of population as of the first day of April of such year . . . in such form and content as he [the Secretary of Commerce] may determine . . . . In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.” Section 141 also authorizes the decennial census to include the use of sampling procedures and special surveys.<sup>2</sup>

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<sup>1</sup> “What is the American Community Survey?”, [www.census.gov/acs](http://www.census.gov/acs), visited on March 18, 2002.

<sup>2</sup> The authority of Commerce and the Bureau to gather census information has been viewed broadly by the courts except in one particular area—how data is gathered for  
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The uses of census data have grown significantly beyond congressional apportionment of representatives in Congress into many other areas such as managing federal agencies, allocating federal aid and assistance, assisting local governments, and helping businesses.<sup>3</sup> The courts have generally viewed the authority of Commerce and the Bureau to gather census information broadly.<sup>4</sup> In a recent court decision, Morales v. Evans,<sup>5</sup> the court held that the questions and the long form from the 2000 census are constitutional.

In Morales, the court first reviewed both the short form and the long form questions from the 2000 Census and traced the origin of each question from prior censuses. The court noted the authority of the Bureau to collect more than headcount information, and then specifically addressed whether such collection violated the plaintiffs rights under the Fifth Amendment (due process), First Amendment (protection against compelled speech), and Fourth Amendment (unreasonable and illegal search). In each instance the court found the collection of information related to governmental purposes and there was no basis for holding such collection unconstitutional.

While Census clearly has authority to conduct the ACS, we found no public laws, committee reports, or other congressional actions in which Congress has required the Bureau to develop and implement the ACS. Two oversight hearings were held in 2000 and 2001 concerning the ACS,<sup>6</sup> and Congress has provided funding over the past

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purposes of the enumeration for the apportionment of seats in the U.S. House of Representatives. See Department of Commerce v. United States House of Representatives, 525 U.S. 316 (1999), which held that sampling may not be used in the enumeration for apportionment purposes.

<sup>3</sup> See Decennial Census, Overview of Historical Census Issues, GAO/GGD-98-103 (1998); Douglas A. Kysar, Kids & Cul-De-Sacs: Census 2000 and the Reproduction of Consumer Culture, 87 Cornell L. Rev. 853, March 2002 (book review).

<sup>4</sup> Wisconsin v. City of New York, 517 U.S. 1, 17 (1996).

<sup>5</sup> 116 F. Supp. 2d 801 (S.D. Tex. 2000), aff'd 275 F.3d 45 (5<sup>th</sup> Cir. 2001), cert. denied, 122 S. Ct. 1079 (Mem) (2002).

<sup>6</sup> The American Community Survey--A Replacement for the Census Long Form? : Hearing before the Subcomm. on the Census of the House Committee on Government Reform, 106<sup>th</sup> Cong. (2000); The Census Bureau's Proposed American Community Survey: Hearing before the Subcomm. on the Census of the House Committee on Government Reform, 107<sup>th</sup> Cong. (2001).

several years for this program under the caption of “continuous measurement.”<sup>7</sup> Commerce states that testing of the ACS has been part of the President’s budget since 1996 and a pilot program has been funded since that time. Commerce also points out that it has regularly kept Congress informed of the development and intended implementation of the ACS in the annual budget justification that accompanies the President’s budget. It is clear that Census was not reacting to congressional direction in developing the ACS but acting on its own initiative to address the costs associated with the collection of data in the decennial census and the timeliness of that data.

On the basis of the statutory authority cited above and the discretion recognized by the courts, we conclude that Commerce and the Bureau have the legal authority to conduct the ACS under 13 U.S.C. §§ 141 and 193. This finding does not address the question of whether the data should be collected, but only whether there is sufficient legal authority to conduct this annual survey.<sup>8</sup>

With regard to the question of whether the Bureau may require recipients to respond to the ACS, Bureau officials stated that the ACS is conducted under sections 141 and 193, cited above, and that because responses to Census Bureau censuses and surveys are required under 13 U.S.C. § 221, responses to the ACS are mandatory. Section 221 subjects recipients of a survey to monetary penalties for failure to answer questions on any survey conducted by the Bureau under certain authorities found in Chapter 5 of Title 13 of the United States Code. These authorities include censuses of manufacturers and other businesses under section 131, the decennial census of population under section 141, and interim current data for collection of population data between each census under section 181. Section 225 permits application of penal provisions in certain cases. For example, the provision for imprisonment does not apply to the interim current data surveys under section 181, although it does apply to the decennial census. 13 U.S.C. § 225(b). We note that the courts have held that there is a sufficient governmental interest to require the collection of census data and to assess penalties for the failure to comply.<sup>9</sup> We conclude therefore that the Bureau may require responses to the ACS survey.

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<sup>7</sup> See, e.g., H. Rep. No. 105-207, at 66-67 (1997). See also Fiscal Year 2003 Budget Appendix, pp. 213-214 (2002).

<sup>8</sup> 13 U.S.C. § 141(f) directs Commerce to report to Congress three years in advance of the decennial census on the subjects to be covered and two years in advance on the questions to be asked in the decennial census. Commerce and Bureau officials indicated to us that they intend to initiate the ACS in October 2002 if funding is available, even though they will not have time to provide the information contemplated by subsection 141(f).

<sup>9</sup> See Morales, discussed above; United States v. Rickenbacker, 309 F.2d 462 (2nd Cir. 1972), cert. denied, 371 U.S. 962 (1963); United States v. Little, 317 F. Supp. 1308 (D.Del. 1970).

With regard to providing statutory references for each question on the survey which is “required by federal law to manage or evaluate government programs,” Commerce noted that each federal agency submits to the Interagency Committee for the ACS, led by OMB, its legal justifications for agency-specific topics and questions, and the questionnaire content is reviewed by the Interagency Committee. Commerce has provided an extensive table of statutory authorities to justify each question, but the response from Commerce notes that additional information may be added or corrected by the agencies as Commerce prepares its submission of the ACS questionnaire under the Paperwork Reduction Act (PRA) clearance process.<sup>10</sup> Since this process for development of the ACS questionnaire is still underway, we cannot state as a matter of law whether the requisite statutory authority supports each question. However, Commerce and the Bureau will be required under the provisions of 44 U.S.C. §§ 3506 and 3507 to demonstrate that this collection of information is necessary, is not duplicative, and is understandable to those who are to respond.

Finally, to determine what other federal government surveys require specific, detailed personal information, we used information provided by federal agencies on Form 83-I, the Paperwork Reduction Act submission to OMB.<sup>11</sup> Agencies requesting clearance to collect information are required to report on this form the various characteristics of the collection including the following: who the collection affects—e.g., individuals or households, businesses, or the federal government; whether responses to the collection are voluntary, required to obtain or retain benefits, or mandatory; and the purpose of the collection—e.g., program evaluation, general purpose statistics, regulatory, or compliance.

Using information provided by OMB, we found no other government surveys that respondents are required to fill out that request specific, detailed personal information similar to that required by the ACS. The only information collections that met the conditions of being required or mandatory and affecting individuals or households for statistical or research purposes were those related to the 2000 decennial censuses, including the ACS.

## CONCLUSION

For the reasons set forth above, the Bureau has authority under 13 U.S.C. §§ 141 and 193 to conduct the American Community Survey. The Bureau also has authority to require responses from the public to this survey.

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<sup>10</sup> See the request for comments on the proposed collection of information under the Paperwork Reduction Act of 1995, Public Law 104-13, 67 Fed. Reg. 2186, Jan. 16, 2002.

<sup>11</sup> The key requirements under the Paperwork Reduction Act are set forth in Appendix II of Information Resources Management: Comprehensive Strategic Plan Needed to Address Mounting Challenges, GAO-02-292, February 2002.

We trust that this responds to your request. Should you have any questions, please contact Ms. Susan A. Poling at (202) 512-2667. We are sending an identical letter to The Honorable Dan Burton Chairman, Committee on Government Reform.

Sincerely yours,

Handwritten signature of Anthony H. Gamboa in cursive script.

Anthony H. Gamboa  
General Counsel