



**Judicial
Watch**[®]
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is above the law!*

April 30, 2017

VIA EMAIL ONLY

Chief Nancy A. Potok
Office of U.S. Chief Statistician,
Office of Information and Regulatory Affairs,
Office of Management and Budget
1800 G Street, NW
9th Floor
Washington, D.C. 20503
Race-Ethnicity@omb.eop.gov

RE: Comment in Response to Proposals From the Federal Interagency Working Group for Revision of the Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity, 82 Fed. Reg. 12242 (March 1, 2017), OMB-2016-0008 and OMB-2017-0003 (“Notice and Request for Comments”).

Chief Nancy A. Potok:

Judicial Watch submits the following comments to the proposals by the Federal Interagency Working Group for Research on Race and Ethnicity (“Working Group”) referenced above. The Working Group presented these proposals in its *Interim Report to the Office of Management and Budget by Federal Interagency Working Group for Research on Race and Ethnicity: Review of Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity* (“Interim Report”).¹ Judicial Watch has serious concerns about the proposals and, for the reasons set forth below, submits that OMB should reject the Working Group’s proposal to establish a new pan-ethnic, pan-national classification for Middle Eastern and North African (MENA) as a distinct reporting category. A MENA classification does not further OMB’s important obligation “to ensure the efficiency and effectiveness of the system as well as the integrity, objectivity, impartiality, utility, and confidentiality of information collected for statistical purposes.” 82 Fed. Reg. 12242, 12243 (March 1, 2017). In fact, the Proposal does just the opposite, leading to less precise and more arbitrary data classifications that, contrary to OMB’s disclaimer, will be used to combine and recast numerous small groups of individuals, with different ethnic origins, into one homogenized minority group.

The Background Section of the Notice and Request for Comments provides:

¹ The Working Group’s Interim Report is available at <https://goo.gl/0ZQx44>.

To operate efficiently and effectively, the Nation relies on the flow of objective, credible statistics to support the decisions of individuals, households, governments, businesses, and other organizations. Any loss of trust in the accuracy, objectivity, or integrity of the Federal statistical system and its products causes uncertainty about the validity of measures the Nation uses to monitor and assess its performance, progress, and needs by undermining the public's confidence in the information released by the Government. A number of Federal legislative and executive actions, informed by national and international practice, have been put into place to maintain public confidence in Federal statistics.

The Interim Report provides no explanation or findings as to how the creation of a new MENA classification facilitates this mission or assists the OMB in its role as coordinator of the Federal statistical system. Moreover, the only analysis contained in the Interim Report does not support, or even illustrate, how the new classification will improve the data rendered by the Census.² Further, the analysis does not indicate an overwhelming interest or demand by prospective MENA respondents to be reclassified as MENA going forward. More troubling, the Interim Report and other materials from the 2015 Forum on Ethnic Groups from the Middle East and North Africa (“2015 Forum”) indicate that there is no consensus, even within the working group, regarding what origins qualify an individual for MENA classification.³

Human race and ethnicity are inherently ambiguous social constructs that have no scientific validity. Invoking race and ethnicity, even for the collection of ostensibly objective data, relies on racial and ethnic stereotyping of individuals’ viewpoints, backgrounds, and experiences. Government policies, including those involving data collection, that seek to classify individuals by crude, inherently ambiguous, and arbitrary racial and ethnic categories do not further any rational government interest. Moreover, such attempts to categorize individuals by racial and ethnic groups necessarily lead to absurd results.

The concept of “race” defies precise legal definition. Originally, the concept of “racial groups” came about as a crude way to categorize populations before science later showed the concept of “race” to be hollow. As the American Anthropological Association (“AAA”) explains, to this day racial categories do not bear scrutiny from the standpoint of the biological sciences: “Genetic data show that, no matter how racial groups are defined, two people from the same racial group are about as different from each other as two people from any two different racial groups.”⁴ While Americans “have been conditioned to viewing human races as natural and separate divisions within the human species based on visible physical differences,” the “vast expansion of scientific knowledge in this century” shows “that human populations are not

² See Interim Report, Appendix 4, pp. 52-55.

³ See Angela Buchanan, Rachel Marks, and Magdaliz Álvarez Figueroa, *2015 Forum on Ethnic Groups from the Middle East and North Africa: Meeting Summary and Main Findings*, Population Division, U.S. Census Bureau (September 7, 2016), p. 30, available at <http://goo.gl/EaQ4Dx> (“2015 Forum Findings”).

⁴ *Response to OMB Directive 15: Race and Ethnic Standards for Federal Statistics and Administrative Reporting*, American Anthropological Association (Sept. 1997), available at <https://goo.gl/Gixnh2>.

unambiguous, clearly demarcated, biologically distinct groups.”⁵ The primary effect of systematic reliance on crude racial categories is to perpetuate misinformation and reinforce irrational beliefs and stereotypes about others. Contrived, racial categories needlessly promote the Balkanization of the population without any public benefit and, in fact, at a great cost. The establishment and institutionalization of a MENA classification comes with the imprimatur of government support, thus officially promoting such Balkanization. This classification does not appear anywhere else in the world, not even in the region defined by the proposed MENA category. Yet, the OMB may now institutionalize this useless, new classification.

Even if there were a valid basis for collecting racial and ethnic data, the process of doing so always will be plagued by practical difficulties. “Visual observation” of physical features such as skin color to determine whether someone belongs in a racial or ethnic category is humiliating and degrading, and even more disturbing whenever it is undertaken by a government agent. It also is imprecise, and requires the use of the simplest possible categories. But using self-identification (as suggested for MENA) to determine identity only works when categories are “acceptable and generally understood both by members and nonmembers of the groups to which they apply.”⁶ The OMB “prefers that self-identification should be facilitated to the greatest extent possible,” while recognizing that this may necessitate the use of additional categories beyond black, white, and Latino, because “[r]esearch shows that ethnic groups evolve and may modify their preferred ethnic group names; individuals may represent their affiliation with groups differently depending on the situation and may alter their perceived ethnic membership over time.”⁷ Of course, this preference may be motivated by factors other than accuracy, such as political self-interest, wishful thinking, or even self-delusion.⁸ While “self-identification” avoids the offensive and intrusive bloodline inquiries of the Jim Crow era (or a similarly dehumanizing visual inspection), it results nonetheless in a process that is arbitrary, imprecise, and inherently unequal, especially when the category at issue is as ill-defined as MENA.

While it always is problematic to create and record racial or ethnic classifications of any kind, for any reason, the MENA proposal is particularly unworkable. To begin with, the proposed classification ignores the diversity of the defined region. The Detailed Analysis of the MENA Category accompanying the Interim Report indicates that the new classification will

⁵ *Statement on ‘Race,* American Anthropological Association (May 17, 1998), available at <https://goo.gl/1tjuZh>.

⁶ *See Standards for the Classification of Federal Data on Race and Ethnicity,* Office of Management and Budget (Aug. 28, 1995) (broad self-identification categories are disfavored by the arguments of “some persons, particularly those of mixed heritage, that they cannot accurately identify their race and ethnicity as they prefer in Federal data systems using the current categories. They say the government should not limit their choice of identification.”), available at <https://goo.gl/Cw6RmC>.

⁷ *Id.*

⁸ For example, some individuals have used physical characteristics, *e.g.*, high cheek bones, as a basis for claiming their Native American ancestry. *See* Garance Franke-Ruta *Is Elizabeth Warren Native American or What?*, THE ATLANTIC, May 20, 2012, available at <https://goo.gl/fQ1CSZ>. Others have fabricated life stories or changed physical appearances to support self-identification as a racial minority. *See* Susan Svrluga, *Rachel Dolezal Admits She Was Born White*, THE WASHINGTON POST, Nov. 2, 2015, available at <https://goo.gl/1HNRWr>.

include individuals “having origins” from any one of 27 countries, spanning three continents.⁹ The distance between some of these points exceeds 2,500 miles. The classification also includes 15 other ethnic or ethnoreligious groups, including groups vaguely characterized as “Middle Eastern,” “North African,” “Other Middle Eastern,” and “Western Saharan.” The defined region has been torn by religious, ethnic, and national violence throughout the 20th century,¹⁰ and, indeed, for centuries. The Working Group simply ignores this grim reality. It recasts so many distinct tribes, sects, and clans as one homogenized ethnic and racial group that the MENA category is, ultimately, meaningless. Many of these groups would not describe themselves as sharing a common heritage or ethnicity. To point out just a few of the obvious questions those residing in the region would ask: What is there specially in common between Turkey and Morocco? How are ethnic Persians in Iran related to Arabs, Bedouins, or Berbers? What does a Russian Jew in Israel specially share with a Libyan? Greeks have lived in Turkey and Egypt for millennia; why are they not included, and for that matter why is Greece not included? The Maltese language has Arabic roots, so why is Malta not included? Why Iraq and Afghanistan but not Pakistan? Any setting down of geographic, national, ethnic, religious, or language boundaries is rendered arbitrary by the extraordinarily diverse nature of the region.¹¹

The geographic basis for the classification also is imprecise because it fails to provide any temporal or lineage limitation as to when individuals cease “having origins” in a foreign country. It is unclear how many generations a person’s ancestors must have lived, worked, married, and raised families in the United States before his or her continent or country of origin becomes North America or the United States. Any attempt to resolve this problem is necessarily arbitrary. As just one example, consider that, depending on how one counts, there have been any number of Jewish diasporas. If one’s ancestors migrated to Europe during one of them, and from there to the United States, and if one resided in, say, Brooklyn, New York, in 2017, and from there decided to move to Israel – is that person included in the new category? Would it matter if it the diaspora were pre-Roman, Roman, Medieval, 19th Century, or 20th Century? The Proposal does not specify whether individuals may decide for themselves how many generations are needed before their country or continent of origin changes. In any event, given these circumstances, even self-identification would be arbitrary.

The Interim Report admits that “[t]he Middle Eastern and North African population is one of the most diverse pan-ethnic groups in the Nation, including those of many different linguistic, religious, national, and ethnic backgrounds.”¹² Despite this recognition, the Working Group proposes to lump these diverse groups together to create a single, new classification. The

⁹ Lebanese, Iranian, Egyptian, Syrian, Moroccan, Algerian, Arab, Assyrian, Chaldean, Iraqi, Israeli, Jordanian, Kurdish, Libyan, Palestinian, Saudi Arabian, Tunisian, Yemeni, Afghan, Armenian, Azerbaijani, Cypriot, Georgian CIS, Somali, South Sudanese, Turkish, Bahraini, Bedouin, Berber, Druze, Emirati, Kuwaiti, Omani, Qatari, Syriac, Western Saharan, Djiboutian, Mauritanian, and Turkish Cypriot. *See* Interim Report, Appendix 4: Detailed Analysis on a New MENA Category, p. 54.

¹⁰ *See* David A. Fromkin, *A PEACE TO END ALL PEACE: THE FALL OF THE OTTOMAN EMPIRE AND THE CREATION OF THE MODERN MIDDLE EAST* (1989).

¹¹ The 2015 Forum’s own experts recognized that this is so. *See, e.g.*, 2015 Forum Findings at pp. 30-33 and throughout.

¹² Interim Report, p. 23.

reported impetus for this proposal was that those in the MENA population “do not identify with the Federal classification of White” and desired their own classification.¹³ Yet, the Working Group’s own data shows that this inference is not true. Specifically, the data shows that 33.5% percent of MENA respondents did not identify as MENA at all, that 24.7% also identified as White, and that only 33.9% identified as MENA *exclusively*.¹⁴ This data simply does not support the claim that there is a great demand for the creation of a new classification. Accordingly, the OMB has no reason to establish a new racial and ethnic division at the risk of further Balkanizing American society.¹⁵

Finally, the proposed MENA classification identifies a statistically small group.¹⁶ Despite the broad classification, the size of the overall group still constitutes a very a small percentage of total U.S. population, raising further questions about the need to capture the information at all. An Arab American Institute and MENA Advocacy Network representative estimated that there were only 3.2 million U.S. residents with MENA “ancestry,”¹⁷ or less than 1% of the total population. Given the Working Group’s finding that only 33.9% of those residents see themselves as MENA exclusively, the projected MENA-classified population may be as small as 1.08 million – or about 0.34% of the population. The remarkably small size of this population raises the further concern that a MENA response on the 2020 census survey may create privacy issues for respondents. A MENA household in a low-population census block may unknowingly make public the racial and ethnic identities of its members. In this way, the MENA classification also poses risks to the anonymity of census responses.

¹³ *Id.*

¹⁴ *Id.*, p. 53.

¹⁵ Another consequence of this change, whether intended or not, relates to the upcoming census. Without the MENA classification, 86% of MENA respondents identified as White. By carving out individuals previously classified as White, the new MENA category will artificially elevate the relative size of non-White groups. Thus, Hispanic and African American populations will appear to have grown in relative proportion during the next census, regardless of real changes in population. Such sleight of hand does not promote consistent and comparable data on race and ethnicity. *See Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, Office of Management and Budget (Oct. 30, 1997), available at <https://goo.gl/QLOIGD>.

¹⁶ *See* Interim Report, p. 4.

¹⁷ 2015 Forum Findings, p. 10.

Robert D. Popper

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For all of the above reasons, the OMB should reject the Federal Interagency Working Group for Research on Race and Ethnicity's proposal to create a MENA classification.

Sincerely

/s/ Robert D. Popper

Robert D. Popper
Director, Election Integrity Project
Judicial Watch, Inc.