

## LA DECISIONE DELLA CORTE SUPREMA SUL CENSUS CASE

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Lo scorso 27 giugno la Corte Suprema degli Stati Uniti si è pronunciata sulla controversia relativa al censimento 2020 ([Department of Commerce v. New York](#)).

La decisione, tra le più attese del term e molto dibattuta dall'opinione pubblica, aveva ad oggetto la liceità dell'introduzione di una "citizenship question" all'interno del questionario da sottoporre a tutta la popolazione residente negli Stati Uniti. Secondo molte associazioni, l'Amministrazione Federale avrebbe spinto per introdurre la "citizenship question" allo scopo di scoraggiare la partecipazione al censimento di vasti strati di residenti non cittadini americani, e così sottorappresentare la popolazione residente nelle aree con maggiore presenza di immigrati regolarmente residenti, soprattutto le aree urbane, anche al fine di alleggerirne il peso in sede di mappatura dei collegi elettorali.

A commento della decisione, che censura l'operato dell'Amministrazione Federale ed impone un ripensamento della misura, ripubblichiamo un commento di Amy L. Howe, già pubblicato

in <http://amyhowe.com>

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Court orders do-over on citizenship question in census case

Amy L. Howe

The fate of a question about citizenship on the 2020 census remains up in the air today. Although the Trump administration had hoped that the Supreme Court would clear the way for it to include such a question, the justices instead sent the issue back to the Department of Commerce. In a deeply fractured opinion, Chief Justice John Roberts joined the court's four liberal justices in ruling that the justification that the government offered at the time for including the citizenship question was just a pretext. The decision left open the possibility that the Trump administration could try again to add the citizenship question, but the clock is ticking: The government has repeatedly told the justices, in urging them to resolve the case quickly, that it needs to finalize the census questionnaire by the end of this month.

The dispute began last year, when Secretary of Commerce Wilbur Ross announced that the 2020 census would include a question about citizenship. Questions about citizenship have been used on the census before, although since 1950 such questions have only been asked on forms that go to some (but not all) households. The government wanted to ask everyone about their citizenship on the 2020 census, Ross explained, to obtain data that would help the Department of Justice to better enforce federal voting-rights laws.

Ross' announcement drew an immediate legal challenge from New York and other state and local governments, as well as immigrants' rights groups. The challengers contended that including a question about citizenship on the census will lead to inaccurate results, because households with undocumented or Hispanic immigrants won't respond. And that, they argued, could lead states with large immigrant populations – which tend to lean Democratic – to lose billions in federal funding and possible even seats in the U.S. House

of Representatives.

With the stakes so high, the dispute proved to be a particularly contentious one. The government came to the Supreme Court for the first time last fall, asking the justices to block the depositions of Ross and John Gore, a senior official in the Department of Justice, and to bar the district court from allowing additional fact-finding outside the official record for the decision. The Supreme Court gave the government a partial victory, barring the challengers from deposing Ross but allowing the deposition of Gore and the additional fact-finding.

In November 2018, the justices agreed to weigh in on the clash over evidence. But that case was transformed into a review of the merits of the dispute after a federal district judge in New York blocked the government from including the question. Judge Jesse Furman ruled that, in deciding to include a question about citizenship, Ross had committed a “smorgasbord of classic, clear-cut violations” of the federal law governing administrative agencies.

The government appealed directly to the Supreme Court, urging the justices to take up the case immediately – without requiring the government to first seek relief from a federal appeals court. Time is of the essence, the government told the justices: It needs to know whether it can include the citizenship question by the end of June, so that it can finalize the census questionnaire and start to print the forms.

The justices granted the government’s request in February. In addition to the question of whether Ross’ decision complied with federal laws governing administrative agencies, the justices also asked the federal government and the challengers to brief whether the decision to include the citizenship question violates the Constitution, which requires an “actual Enumeration” of the U.S. population every 10 years. The addition came after a federal judge in California ruled that the use of the citizenship question also violates the “enumeration clause”; the government wanted to avoid a scenario in which it prevailed in the Supreme Court but was

nonetheless prohibited from including the citizenship question by a different lower-court ruling on an issue that the Supreme Court hadn't addressed.

The justices heard oral argument in the case in late April. Although most cases are quiet after oral argument, the oral argument in this one was followed by a series of events worthy of a made-for-TV movie. In late May, the challengers notified the justices about new evidence indicating that Thomas Hofeller, a Republican redistricting strategist, had played a key role in the decision to add the citizenship question to the census, and that the question had been added to provide whites and Republicans with an advantage in future elections. The evidence came from several hard drives that Hofeller's estranged daughter had found while going through his things after his death last year. Stephanie Hofeller had shared the hard drives with the North Carolina chapter of the watchdog group Common Cause, which is involved in a partisan-gerrymandering case in that state, after she called the group seeking a recommendation for a lawyer for her mother.

The challengers returned to the Supreme Court last week. Emphasizing that the district court had agreed that the new allegations were "serious" but concluded that its hands were tied because the case is now before the justices, the challengers told the Supreme Court that it should either uphold the district court's ruling or send the case back to the lower court for more fact-finding in light of the new revelations. The challengers argued that if the Trump administration actually wanted to add the citizenship question to give an advantage to whites and Republicans, that would be "the diametric opposite" of what the administration has maintained throughout this lawsuit.

The government pushed back, dismissing the challengers' allegations as a "conspiracy theory" that was "implausible on its face" and urging the justices to go ahead and decide the case.

Things became even more interesting – and, for the justices, more complicated – earlier this week. On Tuesday, the U.S. Court of

Appeals for the 4th Circuit sent another challenge to the use of the citizenship question back to a federal district court in Maryland so that the lower court could consider, in light of the new evidence, whether Ross had added the question because he intended to discriminate against Hispanics. In a concurring opinion, Judge James Wynn suggested that U.S. District Judge George Hazel might want to consider whether to temporarily block the government from including the citizenship question on the census questionnaire. The 4th Circuit's order led to another flurry of last-minute filings in the Supreme Court. In a letter to the justices on Tuesday afternoon, the federal government again implored the justices to go ahead and resolve the dispute over the citizenship question now, including the question whether Ross had intended to discriminate against Hispanics. The government had addressed this issue in its brief in the Supreme Court, Solicitor General Noel Francisco stressed. And in any event, because the census questionnaire needs to be finalized by the end of June, the 4th Circuit's order makes it likely that the justices will inevitably have to tackle this question one way or another, so it would be better to do so now in this case, instead of having to do it on an emergency basis in the Maryland case.

The challengers responded on Wednesday afternoon. In a letter from New York Solicitor General Barbara Underwood, they urged the justices to deny what they characterized as the government's "extraordinary request" to decide the discrimination question now. Except for a "single conclusory paragraph" in the government's brief, they emphasized, the issue wasn't briefed or argued in the case in the Supreme Court.

It was no surprise that Chief Justice John Roberts wrote for the court in the case – both because of the magnitude of the ruling and because he had not yet written an opinion for April, when the case was argued. The court's disposition of the case, however, proved more surprising – and took a few minutes to decipher, given the splintered nature of the decision.

Only the first parts of the ruling were unanimous. The first laid out

the facts and procedural history of the case, while in the second part the justices agreed that at least some challengers have a legal right – known as “standing” – to bring their lawsuit. Some of the states in the lawsuit have shown, Roberts recounted, that if households with residents who are not U.S. citizens are undercounted by even two percent, they will lose federal funding. The justices rejected the government’s argument that such losses are too hypothetical, because they would only happen if those households choose not to comply with the legal duty to return their census questionnaires out of fear that the information will be used against them – which, the government says, is not its fault. But this theory isn’t just speculation, Roberts concluded: It “relies instead on the predictable effect of Government action on the decisions of third parties” and is therefore enough to allow the challengers to sue.

The court’s other conservative justices – Justices Clarence Thomas, Samuel Alito, Neil Gorsuch and Brett Kavanaugh – joined the third part of the Roberts opinion, in which the court concluded that the decision to add the citizenship question did not run afoul of the enumeration clause. Whether the decision bears a “reasonable relationship” to getting an accurate headcount isn’t the right question to ask here, Roberts reasoned. Otherwise, the Census Bureau would never be able to ask any questions about demographics on the census, because none of those have anything to do with the number of people who live in the United States. Instead, Roberts noted, the court should look at the history of the census, and that history shows that all “three branches of Government have understood the Constitution to allow Congress, and by extension the Secretary, to use the census for more than simply counting the population,” and specifically for “information-gathering purposes.” Therefore, Roberts concluded, the enumeration clause “permits Congress, and by extension the Secretary, to inquire about citizenship on the census questionnaire.” Six justices – all but Alito and Gorsuch – joined the next subsection of Roberts’ opinion, in which the court rejected the government’s

contention that the Census Act gives Ross carte blanche – not subject to review by courts – to decide what questions to include on the census questionnaire. The court acknowledged that the Secretary of Commerce has significant latitude in formulating the questionnaire, but it emphasized that his discretion was not “unbounded.” The census is not a subject that has been “traditionally committed” to the discretion of the agency in charge; indeed, the court noted, courts have previously reviewed several challenges arising from decisions relating to the census.

Thomas, Alito, Gorsuch and Kavanaugh signed on to the next two parts of Roberts’ opinion. In the first, the court reversed two parts of the district court’s ruling that overturned Ross’ decision to add the citizenship question. Addressing the district court’s conclusion that the decision wasn’t supported by the evidence before Ross, because the Census Bureau had recommended that the citizenship data be gathered from administrative records instead, Roberts observed that neither approach was perfect, so it was reasonable for Ross to decide to use the citizenship question instead of the administrative records. And it was also reasonable for him to decide that it would be worth it to include the citizenship question even though that might result in a lower response rate from households with residents who are not U.S. citizens, Roberts suggested – particularly because Ross believed that the risk of a lower response rate was “difficult to assess.”

Roberts and his conservative colleagues also reversed the district court’s ruling that Ross’ decision violated provisions of the Census Act that require the Secretary of Commerce to use administrative records, rather than questions on the census, whenever possible and to inform Congress about his plans for the census. The court explained that, even if the provision about the administrative records applies, Ross reasonably concluded that administrative records would not “provide the more complete and accurate data that DOJ sought.” And although Ross did notify Congress about his plan to include the citizenship question, Roberts wrote, there was

certainly no harm from any technical violation of the requirement because Ross “fully informed Congress of, and explained, his decision.”

Roberts and his conservative colleagues parted ways in the fifth and final – and ultimately dispositive – part of the court’s opinion. The district court had also ruled that Ross’ rationale for including the citizenship question – that the Department of Justice had asked for the data to better enforce federal voting-rights laws – was a pretext for its actual reasoning, and here Roberts, in an opinion joined by Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan, agreed. “The evidence showed,” Roberts wrote, that Ross “was determined to reinstate a citizenship question from the time he entered office; instructed his staff to make it happen; waited while Commerce officials explored whether another agency would request census-based citizenship data; subsequently contacted the Attorney General himself to ask if DOJ would make the request; and adopted the Voting Rights Act rationale late in the process.” Taking that evidence in its entirety, Roberts determined, “we share the District Court’s conviction that the decision to reinstate a citizenship question cannot be adequately explained in terms of DOJ’s request for improved citizenship data to better enforce the” Voting Rights Act.

Roberts acknowledged that courts should be “deferential” when reviewing an agency’s action, but he countered – citing Judge Henry Friendly, for whom he clerked on the U.S. Court of Appeals for the 2nd Circuit – that “we are not required to exhibit a naiveté from which ordinary citizens are free.” And here, when “the evidence tells a story that does not match the explanation the Secretary gave for his decision,” judicial review calls for “something better than the explanation offered for the action taken in this case.” “In these unusual circumstances,” Roberts concluded, the district court was therefore correct to send the case back to the Department of Commerce for it to provide a better explanation. “Reasoned decisionmaking,” Roberts emphasized, “calls for an explanation for



agency action. What was provided here was more of a distraction.” Justice Clarence Thomas filed an opinion concurring in part and dissenting in part, which was joined by Gorsuch and Kavanaugh. In his view, the Supreme Court’s “only role in this case is to decide whether the Secretary complied with the law and gave a reasoned explanation for his decision.” Because the “Court correctly answers these questions in the affirmative,” Thomas argued, that “ought to end our inquiry.”

Thomas warned that the court’s holding could have much broader implications for administrative law because it “reflects an unprecedented departure” from the court’s normal practice of deferring to discretionary decisions by federal agencies. “It is not difficult,” he posited, “for political opponents of executive actions to generate controversy with accusations of pretext, deceit, and illicit motives.” “Crediting these accusations on evidence as thin as the evidence here could lead judicial review of administrative proceedings to devolve into an endless morass of discovery and policy disputes,” he cautioned.

The court’s four liberal justices joined Roberts in agreeing to send the case back to the Department of Commerce, but Justice Stephen Breyer also filed an opinion that was joined by Justice Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan. They maintained that, even if Ross’ decision to add the citizenship question wasn’t pretextual, it still violated the federal laws governing administrative agencies because he decided to ask the question even though all of the evidence “indicated that asking the question would produce citizenship data that is less accurate, not more.” His failure to consider what Breyer characterized as “a severe risk of harmful consequences” “risked undermining public confidence in the integrity of our democratic system itself,” Breyer wrote.

Justice Samuel Alito also filed an opinion concurring in part and dissenting in part. He began by lamenting that it “is a sign of our time that the inclusion of a question about citizenship on the census has become a subject of bitter public controversy and has led to today’s

regrettable decision.” There is no dispute, he continued, that “it is important to know how many inhabitants of this country are citizens”; given that, he said, the best way to “gather this information is to ask for it in a census” – as the United Nations recommends. He would have ruled that the decision to add the citizenship question to the census fell within the discretion of the Department of Commerce and could not be challenged at all. He “put the point bluntly,” writing that the federal judiciary has “no authority to stick its nose into the question whether it is good policy to include a citizenship question on the census or whether the reasons given by Secretary Ross for that decision were his only reasons or his real reasons.”

The Department of Justice did not tip its hand about its possible next steps. In a statement this afternoon, spokeswoman Kelly Laco indicated that the government was “disappointed” by the ruling but would “continue to defend this Administration’s lawful exercises of executive power.” President Donald Trump had a stronger reaction, tweeting that it seemed “totally ridiculous” that the citizenship question could not be used and indicating that he had asked “the lawyers if they can delay the Census, no matter how long, until the United States Supreme Court is given additional information from which it can make a final and decisive decision on this very critical matter.” With the government’s June 30 deadline for finalizing the census questionnaire looming, we may know more about the government’s plans soon.