

## Supreme Court Update: Trump v. New York (No. 20-366)

Article By:

Tadhg A.J. Dooley

David Roth

---

Greetings, Court Fans!

On Friday, the Court issued its much (but only briefly) awaited decision in [\*Trump v. New York\* \(No. 20-366\)](#), rejecting (for now) a challenge to the Trump administration's recently announced policy of *trying* to exclude those without lawful immigration status from the upcoming census. If that gives you a bit of déjà vu, it's probably because you're recalling the similarly captioned [\*Department of Commerce v. New York\*](#) (2019). That case concerned the legality of the Commerce Department's proposal to ask census respondents about their citizenship, an effort that most viewed as a first step toward excluding those who were not lawful residents of the U.S. from the decennial census. But Chief Justice Roberts joined with the (then four) liberal Justices in holding that the Commerce Department's proposed addition of a citizenship question violated the Administrative Procedure Act. Given the timing of that decision—shortly before the census began—the Trump administration was unable to develop a legally valid ground for asking about citizenship, so it abandoned its proposed citizenship question.

But the administration was not willing to give up entirely. Instead, in July, President Trump issued a memorandum to the Secretary of Commerce announcing the administration's policy to exclude "from the apportionment base aliens who are not in lawful immigration status." To that end, the President ordered the Secretary to include in his final report on the 2020 census not only the full population numbers for each state (a number calculated regardless of citizenship status), but also to provide information that would allow the President to carry out this policy of excluding non-lawful residents from the census figures "to the extent practicable." A number of states, local governments, and organizations promptly sued, concerned that the final census report submitted by President Trump to Congress, which serves as the basis for everything from reapportioning congressional seats to state-by-state allocations of federal funds, would exclude some without lawful immigration status. A special three-judge district court agreed, concluding that the challengers had standing and that the administration's policy violated federal law's requirement that the census count "the whole number of persons in each state." Because the President's report is due shortly (early in January, before the new Biden administration takes office), the Supreme Court granted certiorari and ordered accelerated briefing and argument.

On Friday, however, the Court issued a per curiam decision dismissing the case on standing and

ripeness grounds. In the majority's view, the case was "riddled with contingencies and speculation that impede judicial review." For while the President has made clear his *desire* to exclude aliens without lawful status from the census count, it's far from clear whether he'll be able to do that. After all, the Commerce Department did not include questions about immigration status on the census questionnaire. It might be able to use other records in its possession to try to identify census respondents who lack lawful immigration status, but everyone agreed there was no way the Commerce Department could feasibly do that for all the estimated 10.5 million people in the United States without lawful status. And even if the Commerce Department provided numbers that might allow the President to exclude some portion of these individuals from the census's population counts, it was uncertain whether the President would in fact do so when he submits his final report to Congress in the coming weeks. All this meant that judicial resolution of the case was "premature." Challenges to the Trump administration's census counts will thus have to wait until the President's final report to Congress, which is due shortly.

Although we do not know which members of the Court joined (or wrote) the per curiam decision, we can probably assume it was the Court's six conservative justices, the three liberal justices joined in a lengthy dissent written by Justice Breyer. In their view, the case was ripe for review now, because regardless of what the administration ultimately did, it had already announced what it *intended* to do: exclude those without lawful immigration status from the census count. Sure, the extent to which the Trump administration might succeed in that goal was not yet clear. But standing and ripeness do not require *certainty*; they only require plaintiffs to show a "substantial risk" of harm. That seemed to be met here, since the government's whole objective was to do something that would cause a harm sufficient for standing purposes. The dissenters then turned to the merits. The federal census statute requires that the census count "the whole number of persons in each state." As a rule, "persons" means people and thus includes aliens without lawful status. Historical practice supports this interpretation, as from the founding era until today, the decennial census has always looked solely to the *residency* of those counted, not their immigration status. The dissenters would thus affirm the lower courts' decision and enjoin the administration from trying to carry out the policy announced in President Trump's July memorandum.

Barring the unexpected, that brings Calendar Year 2020 to an end for the Court, though October Term 2020 will continue apace in 2021. Until next year!

© 1998-2025 Wiggin and Dana LLP

---

National Law Review, Volume X, Number 356

Source URL: <https://natlawreview.com/article/supreme-court-update-trump-v-new-york-no-20-366>