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The Current: Will new documents sway the Supreme Court on Census citizenship question?

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PITA: You are listening to “The Current” from the Brookings Podcast Network. With us today is Alan Berube, senior fellow and deputy director of the Metropolitan Policy Program here at Brookings.

The Trump administration's push to add a citizenship question to the 2020 Census is currently under review by the Supreme Court. New documents submitted to the court suggest that this move was highly influenced by Republican redistricting strategist, aware that including the citizenship question would lead to undercounting in Latino and Democratic districts.

Alan, what can you tell us about this new information that was uncovered and what this information says about the citizenship question?

BERUBE: So, as you just related, Adrianna, this is really just the latest revelation in what's been a long running battle between the Trump administration and a wide range of other parties on adding this so-called citizenship question to the 2020 Census. In April, the Supreme Court heard oral arguments in a case challenging the constitutionality of asking all respondents to the census whether they are citizens of the United States. And all along, the administration had asserted its authority to add this question -- in particular, claiming that the data from the census on citizenship is essential information for enforcing the Voting Rights Act. This was actually happening despite some evidence that former White House adviser Steve Bannon and Kris Kobach -- a couple gentlemen not really known for their devotion to minority voting rights -- were really influential in convincing commerce secretary Wilbur Ross to add the question.

So, then, late last week I think we got what some might call the “smoking-est of smoking guns” in this debate, which was a series of studies and memos written by a North Carolina-based Republican Party strategist named Thomas Hofeller. He actually died last year and in his obituary, The New York Times referred to him as the quote “Michaelangelo” of the modern gerrymander. And his estranged daughter discovered these files on the hard drive of his computer. And essentially what those files show is Hofeller was sharing with the Trump transition team and eventually, the Trump Justice Department, the true rationale for the citizenship question -- which was to help states exclude noncitizens and their

children from population counts when they draw their legislative district maps. And, as a consequence, those maps would dilute the voting power of traditionally Democratic leaning constituencies.

PITA: So, can you give us a little more context about why this is so important, aside from the political question, asking about the citizenship on the census? What are the ramifications?

BERUBE: The citizenship question goes back at least a couple of years here, where the proposal to add the question has been the subject of a lot of controversy. And that's based in part because the Census Bureau itself has published research showing that putting the question on a census form would reduce the participation of noncitizen households. And those households, quite understandably I think, fear that the federal government could use that information for, let's say immigration enforcement purposes. More than that, states use the census data to apportion their population to legislative districts, so reducing the count of noncitizens and their children means that those groups would receive less representation in state houses, less representation in Congress.

So, Congress grilled Secretary Ross and Department of Justice officials about the citizenship question. Business advocacy, research communities, think tanks like Brookings, right, we vocalized our opposition to the question since it will undoubtedly reduce the quality of information that we get from the census itself. And then, civil rights organizations, cities, and states have sued the administration to block the addition of the question. Now, lower courts ruled in their favor. But then, the Supreme Court agreed to hear the case in April so that they could resolve the issue by this month when the Census Bureau has to begin printing forms from mailout next year. During oral arguments for the case, the court's five Republican appointed justices actually seemed inclined to uphold the use of the question, essentially accepting the administration's arguments that the citizenship data are important for enforcing the Voting Rights Act.

So, when I referred to these documents earlier as a smoking gun, actually, for people that have been paying attention to this debate all along, really just confirm what I think was a very poorly kept secret -- which is that the Trump administration wants to add this question in order to lock in political advantages for the Republican Party in redistricting.

PITA: Are there any details of this in the broader coverage that you think maybe are being overlooked that should be discussed?

BERUBE: Yeah, I'd guess I'd point to a couple of things. I think first, for all of the implicitly and explicitly racist language that President Trump uses in reference to immigrants and people of color, I think these new documents show the commitment to racial exclusion goes actually a lot deeper within the Trump administration. So, Hofeller's own conclusion, which drove the administration's adoption of the question, was that the question would yield critical information for states to draw political maps based on citizens of voting age, rather than total population, which is the way most everybody does it today. And Hofeller wrote that these maps, quote, would be "advantageous to Republicans and non-Hispanic whites." So, the fact that the administration claimed under oath that adding the question was necessary to ensure

the enfranchisement of people of color under the Voting Rights Act, while, actually, was designed to disenfranchise many of those same people I think speaks volumes about the administration's devotion to existing white power structures.

And second, however the Supreme Court rules in the case later this month, I think much of the damage has been done already. The administration's really politicized the census to an unprecedented degree. Immigrant communities are already on edge about the census and their leaders are conflicted about whether and how to encourage the participation of those communities in the census. There are laws in place that protect the confidentiality of census data but if you're an immigrant in America today, I don't know if you're really going to trust the administration to honor those laws.

PITA: Yeah. So, what is it that happens next? Since the Supreme Court did already hear arguments in April, are they going to take new evidence into effect? How does this affect that piece of it?

BERUBE: Yeah, there's a certain chain of events here. So, based on the documents that just came to light, the American Civil Liberties Union filed a motion in Federal District Court late last week asking that court to sanction the government for false testimony it provided regarding the origins and purpose of the question. That court's going to hear that motion on Wednesday, June 5th and then, the Supreme Court itself is scheduled to hand down its decision on the citizenship question sometime toward the end of this month.

But, I think it is an open question the degree to which these new revelations will influence the court's more conservative justices. Justices Thomas and Alito are already on record from an earlier case out of Texas that they believe states have the right to draw districts based on eligible voting age population, not total population. So, if the other conservative justices adopt that same view, it may not matter to them whether the administration followed proper procedures in adding the question, or whether they actually lied about their intent in doing that. As law professor Rick Hasen recently argued in Slate, it may only matter that those justices view the real motivation behind the question as a permissible one. So, we'll know more in a few weeks. But, I think for people who care about bedrock values like equal representation under the law, truth and honesty in governance, judicial nonpartisanship, last week's revelations were just more evidence of a democracy under threat.

PITA: And finally, if the question does wind up getting included, if this court does vote in favor of including it, what do you think are some the ramifications for the voting rights groups and immigrant rights groups that you are talking about? What is some of the likely response to try and overcome the detriment?

BERUBE: Yeah, I mean, I think immigrant rights groups, people, and communities are working on strategies to assure communities that participating in the census in the long-run is good for their communities -- for getting resources that they might need: schools, libraries, parks...so many decisions the government makes are based on the census data themselves. But whether those efforts are going to be enough to overcome all of the mistrust and fear that the administration has sown in those

communities, through not only the citizenship question, but lots of other actions they've been undertaking, I think remains to be seen.

PITA: All right, Alan. Thank you for explaining this.

ALAN: Thanks, Adrianna.