

## Opinions

# Eric Holder: The Supreme Court can't allow Trump to weaponize the census

By Eric H. Holder Jr.

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Following oral arguments earlier this week, I'm deeply concerned that the Supreme Court [appears willing](#) to allow the Trump administration to weaponize the 2020 Census to determine where political and economic power in the United States should reside. Allowing the administration to demand citizenship information from every household as part of the decennial census for the first time in more than half a century would dramatically depress the count in areas with significant Latino and immigrant populations and would reposition political representation toward areas more likely to elect Republicans. Yet a 5-to-4 opinion along ideological lines in this case would further erode the public's trust in the Supreme Court as an apolitical body.

Litigation over the inclusion of a citizenship question has raised significant constitutional concerns. It has also clearly shown that the Commerce Department violated the Administrative Procedure Act in failing to appropriately test its proposed change to the census questionnaire. Part of the purpose of the APA is to ensure that federal agencies do not inject ideological considerations into what are supposed to be fact-based determinations, precisely what Commerce Secretary Wilbur Ross has done.

Ross falsely claimed that he added the citizenship question "[solely](#)" at the request of the Justice Department so that it could more effectively enforce the Voting Rights Act. Given the total lack of VRA enforcement by the Trump administration, this is both untrue and rank hypocrisy. And the litigation process revealed that in 2017, Ross planned the addition of a citizenship question with his staff, [as well as](#) former White House official Stephen K. Bannon and then-Kansas Secretary of State Kris Kobach, two of President Trump's radical, anti-immigrant political advisers, before broaching the subject with Justice Department leadership.

Ross also [disregarded](#) a unanimous warning from Census Bureau professional staffers that including the question would undermine the accuracy of the count, as well as suggestions of [better ways](#) to acquire citizenship data for VRA purposes. As attorney general, I did not request the addition of this question — nor did my predecessors — because we had adequate data for voting rights litigation from other sources. Indeed, three U.S. district courts concluded that the VRA rationale was merely a pretext for Ross's true motivation.

That true motivation becomes apparent when examining the political implications of Ross's decision. The primary constitutional purpose of the census is to count all "persons" living in the United States — not just citizens — so that congressional representation is fairly apportioned among the states based on total population.

The Census Bureau's own analysis found that the question could result in 6.5 million people not participating in the count. This effect is unsurprising, given the climate of fear created by the president's anti-immigrant rhetoric and inhumane immigration policies. [Three federal courts](#) have found that the citizenship question will lead to a grossly disproportionate undercount in certain states — including California, Illinois and New York — denying their residents the congressional and electoral-college representation that is their constitutional right.

In addition to federal apportionment, census population data is used to redraw voting districts at the congressional and state legislative levels. And it is also used to determine federal funding for hundreds of federal programs each year — as much as [\\$900 billion](#) in aid for health care, education, infrastructure and other pressing needs. A targeted undercount would shift political representation and critical federal support away from areas with large populations of people of color, immigrants and Latinos.

Republicans will also likely attempt to use citizenship data to further shift power to their political base within the states. In 2016, the Supreme Court's [decision](#) in *Evenwel v. Abbott* left unanswered whether states could draw congressional and state legislative districts based solely on the number of citizens, not total population, as it is currently done. Lawmakers and officials in Arizona, Missouri, Nebraska and Texas have [already indicated](#) they might use citizenship data this way.

Given the evidence and the three lower-court opinions, this should not be a hard decision for the court, particularly regarding APA violations. Americans could view a 5-to-4 decision siding with the Trump administration efforts as more evidence that partisanship and ideology have infected the nation's highest court.

Over the past decade, the court has allowed dark money to poison our elections via *Citizens United* and opened the floodgates for widespread voter suppression by gutting Section 5 of the Voting Rights Act in *Shelby County*. Along with the census case, the court will also decide this term whether to curtail partisan gerrymandering or to allow politicians to make themselves immune to the will of the voters. If there are institutionalists on the court concerned with the perception of their important body, it is time for them to act like it. Otherwise, we are on the verge of a profound, ill-advised reshaping of our democracy that would allow a minority party to exert majority control for the next decade and beyond and would risk the reputation of one of our most sacred institutions.

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### **Eric H. Holder Jr.**

Eric H. Holder Jr., the attorney general of the United States from 2009 to 2015, chairs the National Democratic Redistricting Committee. Follow 

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