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OPINION | REVIEW & OUTLOOK

# Census Target: John Roberts

Liberals spin a memo to influence the Chief Justice in a crucial case.

By The Editorial Board

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Supreme Court Chief Justice John Roberts answers questions during an appearance at Belmont University in Nashville, Tenn., Feb. 6. PHOTO: MARK HUMPHREY/ASSOCIATED PRESS

When Democrats, liberal groups and the media combine to promote a narrative, it pays to be skeptical. A classic example is last week's portrayal of a document that purportedly shows the Trump Administration had partisan motives for adding a citizenship question to the 2020 Census. The truth is that Republicans were following the law that Democrats claim to revere, and the furor is a last-ditch attempt to turn the Supreme Court their way in an important case.

The Court is expected to issue a decision this month in *Department of Commerce v. New York*, and last week liberals claimed to uncover new evidence that the Census citizenship question was a Republican scheme to increase GOP seats in Congress and state legislatures. The

supposed Rosetta Stone is a 2015 study by deceased GOP consultant Thomas Hofeller that his estranged daughter recently discovered on a hard-drive.

The American Civil Liberties Union told federal Judge Jesse Furman last week that advisers to Commerce Secretary Wilbur Ross had discussed the citizenship question with Hofeller and that the “new evidence contradicts the sworn testimony” that the question could be used to “maximize” representation for the “Latino community.” The reality is that liberals are the ones contradicting themselves on the Voting Rights Act.

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Hofeller’s study isn’t the Da Vinci Code. He merely examined the effects of redrawing Texas’s legislative districts based on eligible voters—that is, the citizen voting-age population. Some Texas residents had challenged the state legislative maps as violating the one-person-one-vote principle. If all district populations are equal, votes in districts with more noncitizens carry more weight.

Under the Supreme Court Voting Rights Act precedents, state legislatures may show compliance with the law by drawing “majority-minority” districts in which a majority of eligible voters are a racial or ethnic minority. The Court has also ruled that the standard for these districts should be eligible voters. Otherwise, white voters could outnumber minority voters in districts with large numbers of noncitizens.

According to Hofeller’s study, changing the redistricting standard to eligible voters could increase Republican representation. The current standard based on population benefits white voters in Democratic cities with large numbers of noncitizens like Houston, Los Angeles and New York. Drawing districts based on eligible citizen voters could therefore reduce the number of Democratic districts.

Texas argued against redrawing districts based on eligible voters in part because it lacked block-level citizenship data. Judges have looked to the Census’s American Community Survey, which samples about 2% of the population annually, to review majority-minority districts. But this data is imprecise and unreliable. The Supreme Court ultimately held in *Evenwel v. Abbott* (2016) that Texas’s maps did not violate the one-person-one-vote principle, but left open the possibility that states *could* draw maps based on eligible voters.

Liberals are now worried that GOP states might do so if they obtain block-level citizenship data from the Census. This would reduce the clout of liberal voters in urban areas with large numbers of noncitizens and make it easier for Republicans to gerrymander under the Voting Rights Act. The original goal of creating majority-minority districts was to elect more minorities, so Trump officials were telling the truth when they said the citizenship question could maximize Hispanic seats in Congress.

Democrats are angry because they know the Voting Rights Act is a double-edged sword that could help Hispanics while hurting them. Republicans in many states have benefitted from carving out safe Democratic majority-minority seats, which typically creates safer GOP seats elsewhere. That's what happened after 2010 when Ohio Republicans redrew what had been two competitive House districts around Columbus. The result was a safe majority-minority seat for Democratic Rep. Joyce Beatty in Columbus, but a 12-4 margin in statewide House seats for Republicans.

Yet recall that only months ago Democrats claimed the Trump Administration was using the Voting Rights Act as a pretext to discriminate against Hispanics and liberal states. They claimed the citizenship question would deter Hispanics from responding to the Census and thereby *reduce* their representation in Congress. Now they're upset that Hofeller figured out how to elect more Hispanics and more Republicans to Congress at the same time.

The real goal of flogging the Hofeller memo now is to raise enough of a political stink to intimidate the Supreme Court to block the citizenship question. "Will the Legitimacy of the Supreme Court Survive the Census Case?" asked an op-ed in the New York Times. Whenever you read "legitimacy" in a sentence about the Court, you know it's a political missile aimed directly at Chief Justice John Roberts.

During oral arguments in the case, the five conservative Justices seemed to agree with the Trump Administration that Congress has delegated to the Commerce Secretary broad authority over Census questions. As Justices Neil Gorsuch and Clarence Thomas noted in a related opinion last fall, it's not unconstitutional for cabinet officers to have political motives for a policy. Political appointees also consult with outside experts like Hofeller all the time, as the Obama Administration often did on regulation and litigation.

The real problem for Democrats here is their own desire to carve up American politics by race. They created racial gerrymandering, and now they're upset it could be used to help Hispanics and Republicans. The solution is to make it illegal to gerrymander by race.

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