

The Census Citizenship Question & the Supreme Court Cliffhanger

08.21.19 | Linda J. Rosenthal, JD



In [13 Famous TV Cliffhangers That Still Get Fans Talking](#), we're reminded that Hollywood executives take delight in leaving fans over the long hot summer with the agony of worrying about the fate of a beloved (or hated) television-series character.

Perhaps the most sensational cliffhanger in TV history is the final scene of the 1979-80 season of the CBS hit, "Dallas." J.R. Ewing, played by the late Larry Hagman, was the scion of an oil-business clan who schemed and double-crossed his way across the Texas landscape. When **he is shot** by an "unseen assailant" outside his office, anyone and everyone (family, friends, business associates, and commercial rivals) is a plausible suspect. Some 350 million viewers worldwide tuned into that episode. Among the fans left waiting and **wondering about the answer** to the mystery were President Gerald R. Ford and the U.K.'s Queen Mother, Elizabeth. In the new Fall season, the producers revealed that the shooter was Kristen, J.R.'s villainous sister-in-law and mistress, but J.R. didn't press charges because she was pregnant.

The Long Hot Summer of the Census

When the American public tuned into the final episode of the U.S. Supreme Court season of 2018-19 – (that is, the last week of June) – we learned that the high court had treated us to an intriguing cliffhanger about the fate of the controversial "citizenship question" on the 2020 Census.

For background on the nonprofit sector's keen interest in a full and fair census process that encourages, rather than *discourages*, the broadest possible participation, see our post from May 15, 2019: [Why the Census is a Big Deal for Nonprofits](#).

There, we also explained the hasty and irregular push by the Administration, well after the usual deadline to finalize the official census form, to insert a constitutionally unnecessary citizenship question. Census Bureau professionals objected "because the information could be obtained other ways and adding the unnecessary question would decrease the census count, cost taxpayers more, and corrupt the data." Commerce Secretary Wilbur Ross, presumably following orders, plunged

ahead.

Opponents, concerned about depressed participation by minority communities (already fearful of harassment and deportation), **filed three separate lawsuits**. In expedited bench trials, each federal judge blocked the government's move, on grounds including that "... Secretary Ross **violated administrative and/or constitutional law.**"

The U.S. Supreme Court agreed to bypass the circuit-court level and hear an emergency appeal by the government in one of those cases, **Department of Commerce v. New York**. The justices took this extraordinary step in part because the Administration argued there was a June 30, 2019, deadline to get the final census form to the printers in enough time to produce the massive quantities needed for the 2020 count. Again and again, including at the oral argument on April 23, 2019, government lawyers made **unequivocal representations** to the justices that this was a hard-and-fast, no-exceptions, we're-really-not-kidding, deadline.

Bearing this in mind, the justices may have gotten around to deciding the case before the last minute, but something curious happened in May 2019. Reputable evidence surfaced **that Administration officials had lied** about the process by which they decided to include the citizenship question and the (purportedly nondiscriminatory) reason they wanted it on the official form.

In **The Census (Non)Decision: What's Next?** (July 2, 2019), we reported that, with just three days left before for the printing "deadline" and no days left before the justices headed off for the summer hiatus, the high court released its final ruling of the term: **Department of Commerce v. New York**. By a vote of 5-4, including the apparent eleventh-hour switch of Chief Justice John Roberts from the conservative side to the liberal one, the justices planted a giant red light in the path of the Administration's late push to include the citizenship question.

Perhaps the high court's move is better described as a flashing yellow light that was about to turn red in 72 hours or so. Writing for the majority, the Chief Justice told the government: "Not so fast." He took the rare step of characterizing the government's stated reasons for needing the citizenship question as **"contrived."** Notwithstanding the imminent printing deadline, the court prohibited the government from including the citizenship matter on the census questionnaire unless and until it could come up with a better – and more believable – justification for why *and how* it arrived at the decision that citizenship-related questions must be part of the 2020 Census.

Faced with the clear futility of presenting new and compelling arguments untainted by the former dodgy representations and rationales – and with almost no time left – someone high up in the Department of Justice sent the word out that the government was throwing in the towel.

As described in more detail in news stories like **here**, the federal judge in one of the related lawsuits wanted to hear definitively that this was the end of the line. In a hearing on Monday, July 1st, DOJ lawyers confirmed that the case was over. But by Tuesday, July 2, 2019, tweets emerged from inside the hallowed walls of the White House, casting doubt on any purported finality and also casually tossing aside the supposed drop-dead printing deadline of June 30th.

The aforesaid district judge was not amused by the Administration's shenanigans; he called an emergency hearing for Wednesday, the 3rd, to get some clarification. But there were more tweets and more confusion and contradictions; the judge demanded written assurances by Friday. (We can only guess that if any of the 5 justices voting "no" had turned on the news that week, they would have been miffed as well.)

The next several days were characterized by a **"whiplash-inducing series** of developments, including the refusal by many of the Justice Department lawyers to continue to associate their

names and reputations with this carnival sideshow. They asked to formally withdraw from representation, but the court denied permission to bail out.

Over the next week or so, there was less and less chatter about the whole mess. On July 11, 2019, Attorney General Bill Barr and Commerce Secretary Wilbur Ross announced in the Rose Garden that **the fight, is, indeed over.** Since then, each of the three federal district judges involved in these related cases has entered formal orders “**permanently blocking** the Trump administration from using next year’s head count to ask about the U.S. citizenship status of every person living in every household in the country.”

And so, ladies and gentlemen, the Supreme Court end-of-term uncertainty is cleared up: There will be no citizenship issues on the 2020 Census.

We’re sure of that, right? No more twists and turns down the road, no surprises or secret plans to flout the court orders or circumvent them? This is – after all – a “Dallas”-type cliffhanger resolution, isn’t it?: all questions answered and loose ends neatly tied up in relatively short order.

Or is this more like those mind-bending season finales of ABC’s hit “Lost”: Are we stranded on a weird **tropical island with polar bears?**

Good Census News But Some Dangers

According to long-standing plans, the federal Census Bureau is partnering with state and local governments to **launch the first phase of the census process.** These activities include preliminary canvassing to map out exactly where people now live so they can be found early next year to collect the necessary census data. The Census Bureau is already hiring full- and part-time workers. Joining the state and local government personnel are broad coalitions of philanthropic organizations along with activists and advocacy groups dedicated to educating the general public about the need to participate in Census 2020.

While many states, including California, have budgeted substantial sums for these persuasion and assistance efforts, other states have allocated little or no money at all. In those places, some city governments, aided by the nonprofit sector, are stepping up to do whatever they can.

A normal challenge every ten years is to get the public to participate in the constitutionally mandated population count. This time around, a heightened fear in minority and immigrant communities of harassment and deportation is making this task more difficult, notwithstanding assurances there will no citizenship questions. A bright spot in the face of this ongoing intimidation is the no-holds-barred efforts already underway around the nation starting this month. A quick glance at hashtags including #Census2020 reveals an extraordinary amount of interest and activity so far.

Complicating efforts to tamp down fear of participation are confusing reports and rumors that the government has already printed up census forms with citizenship questions. In ***Why Is the Census Bureau Still Asking a Citizenship Question on Forms*** (August 9, 2019) NPR’s national correspondent, Hansi Lo Wang, explains that “a citizenship question won’t be included on 2020 census forms, but other Census Bureau surveys ask about a person’s U.S. citizenship status.”

The Census Bureau, he writes, conducts “more than 100 surveys for the federal government,” some of which may continue to ask about citizenship. But “unlike the census, these **surveys involve only a sampling of households,** and “their results produced anonymized citizenship data that the government has relied on for years to, for example, **protect the voting rights of racial minorities.**” This, of course, has “...**sparked plenty of confusion** around the country.”

Compounding this ambiguity, an earlier version of this NPR story “identified the 2020 census questionnaires for American Samoa, Guam, the Commonwealth of the Northern Mariana Islands and

the U.S. Virgin Islands” as proof that there are citizenship questions on the official forms. As soon as Census Bureau personnel saw that news report, they quickly contacted NPR to make clear that the agency is “... removing the citizenship question it was originally planning to include on next year’s island-area census forms.”

Conclusion

Some icing on the cake for opponents of the citizenship question: “When the Trump administration backed down last month on adding a citizenship question to the 2020 census, it didn’t just lose the policy fight. It’s now paying millions of dollars in legal fees to the groups that sued.”

Under federal law, the challengers have the right to make that demand, and in early August, the Justice Department reached a \$2.7 million agreement with the American Civil Liberties Union and other groups that sued over the citizenship question in federal court in Manhattan.