On November 30, one month before the Secretary of Commerce is supposed to report to the President the results of the census, the Supreme Court will hear oral argument in *New York v. Trump* [2]. In this case, a three-judge panel ruled that the Secretary of Commerce may not provide the President with a census count that excludes undocumented persons. The state-by-state population breakdown the Secretary of Commerce provides to the President is used to apportion seats to the House of Representatives.

The U.S. Constitution requires Congress to conduct an “actual Enumeration” every 10 years. Congress delegated to the Secretary of Commerce to conduct a “decennial census of population.” Federal statute requires the Secretary to report to the President “[t]he tabulation of total population by States under [the decennial census].” The President then must transmit to Congress “a statement showing the whole number of persons in each State . . . as ascertained under the . . . decennial census.”

President Trump’s July 21, 2020 Presidential Memorandum [3] asks the Secretary of Commerce to provide him two numbers: the total population as determined in the 2020 census and that same number minus the number of “aliens who are not in a lawful immigration status.” The Memorandum offered no guidance as to how the Secretary of Commerce would count the number of undocumented persons; the 2020 census contains no question about immigration status.

The three-judge panel described the legal issues in this case as “not particularly close or complicated.” The challengers, including states, local governments, and the U.S. Conference of Mayors, claim the Memorandum violates federal statutes because it “contemplates calculating apportionment using tabulations other than those produced by the census,” and excludes undocumented persons from “persons in” a “State,” as those term are used in federal law. The three-judge panel agreed on both accounts.

It concluded federal statutes prevent the Secretary of Commerce from giving the President two numbers. Per the statutes’ “plain terms: The Secretary is required to report a single set of figures to the President — namely, ‘[t]he tabulation of total population by States’ under the ‘decennial census.’”

Before the Supreme Court, the federal government argues [4] that the Secretary of Commerce has “virtually unlimited discretion” in conducting the census which allows him to “supplement data gathered from the census questionnaires with data from administrative records concerning the immigration status of census respondents.”

The three-judge panel agreed with the federal government that “persons in each State” could include “inhabitants” or “usual residence.” But, according to the court, “it does not follow that illegal aliens — a category defined by legal status, not residence — can be excluded from the phrase.”

Before the Supreme Court the federal government argues [4] that the “text, history, and precedent reveal, the term ‘inhabitants’ does not completely bar the President from exercising discretion to
exclude illegal aliens.”

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