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A 6-3 Supreme Court Could Allow the Government to Openly Discriminate in Its Policies

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Last term, the Justice Department glossed over the president's true motives. Now the mask can come off.

Perspective by Leah Litman and Kate Shaw

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Over the past few days, the Supreme Court has agreed to hear challenges to hot-button Trump administration policies involving the border wall, an attempt to exclude noncitizens from the census breakdown used for allocating seats in Congress and limits on who can apply for asylum from Mexico.

The decision to hear these cases, and their prospects before a court with a 6-to-3 conservative majority including Amy Coney Barrett, suggests we are at a turning point regarding judicial checks on President Trump's policies. In other recent challenges to administration programs, some of which involved alleged invidious discrimination against immigrants and other groups, the court has questioned the government's public rationale for its stances. Chief Justice John G. Roberts Jr. has been the swing vote, and in some cases, he has suggested that the administration's true motive was less benign than its stated one — and used that as a reason to rule against Trump.

But with the court's new makeup, the administration may not have to engage in subterfuge. (Or the court may decide to wink at it.) The result may be somewhat more transparency. Yet it will also mean more defeats for the liberal position if the court lets pass poorly manufactured justifications that barely conceal its true motives or gives the administration a free hand to openly pursue invidious discrimination.

Last term, the court rejected the administration's attempt to end the Deferred Action for Childhood Arrivals (DACA) program. The case, *Department of Homeland Security v. Regents of the University of California,* had several parallels with 2019's *Department of Commerce v. New York,* which shot down the administration's efforts to add a citizenship question to the 2020 Census. In both instances, Roberts wrote the majority opinion.

Each policy, on its face, sought to implement an anti-immigrant vision of America — one that aligned with the president's rhetoric — and each was defended by government lawyers in terms that flatly denied those underlying purposes. That is because the law largely prohibits the discrimination on the basis of race or national origin that manifestly drove those policies. The administration, therefore, had a choice: It could defend its policies based on *actual* justifications (that were probably illegitimate), or it could offer reasons that might be legitimate in the abstract, but were purely or largely pretextual in these cases.

The Trump administration opted to try to bluff its way through. For example, while the president said forthrightly during a briefing in July 2019 that adding a citizenship question to the census was designed to determine "the number of illegal aliens in our midst" — to enforce immigration law or to draw legislative districts that exclude undocumented immigrants — administration lawyers advanced a different rationale. And it was a preposterous one: that the citizenship question was necessary to aid in the enforcement of the Voting Rights Act. Likewise, while the president has slandered undocumented immigrants as "animals" and described DACA recipients as "hardened criminals," administration lawyers defended the DACA rescission as grounded in concerns about the policy's legal footing. (President Barack Obama established the program through a memo by the secretary of homeland security.)

The administration was in a bind last term because the key statute governing agency decision-making, the Administrative Procedure Act, requires executive branch officials to reveal their "genuine" reasons for adopting a policy so courts and the public can evaluate those reasons. Yet the law as presently understood largely takes off the table certain motivations involving animus toward particular racial or religious groups. But if the court becomes less skeptical of policies that may be motivated by such animus, the government may no longer find itself in that predicament. And that may be where we are headed if Barrett is confirmed to the court.

Consider the new census-related challenge. After ultimately accepting defeat in the Supreme Court on whether it could add a citizenship question to the census, Trump issued a presidential memorandum announcing that "it is the policy of the United States to exclude from the apportionment base aliens who are not in lawful immigration status." The memo directed the Commerce Department to prepare a census report excluding noncitizens from the count that will be used to apportion congressional seats and to allocate federal funds. (To determine citizenship status, the department would cross-check existing administrative records.)

There was no more talk about the Voting Rights Act. Instead of denying the invidious motives behind adding a citizenship question, the administration has embraced them.

In September, a three-judge appeals court panel invalidated the policy on the ground that excluding noncitizens violates the statutes governing the administration of the census. The Supreme Court's decision to schedule the case for argument — rather than simply affirming the panel decision — sends a worrying signal that the court may be more receptive to *this* effort to manipulate the census than it was to the efforts to add a citizenship question. The court and the administration may also be recalibrating what counts as permissible policies for the government to pursue.

The two other Trump administration policies that the court recently agreed to review — the president's reallocation of federal funds from the Defense Department to construct a border wall, without consulting Congress, and the policy requiring asylum applicants who crossed through Mexico to return and wait there — raise somewhat different issues. In both cases, the main legal claim concerns whether the administration has violated the statutes that govern emergency funding and asylum. There is also a constitutional claim about the president's powers in the border wall case and an international law claim in the asylum case. The wall issue does not directly involve invidious distinctions — though the asylum case may. But at a minimum, both policies are based on specious claims about the state of the border with Mexico that may mask darker motives.

The court's decision to grant review in both cases, after courts of appeals invalidated the policies, suggests that more justices may be willing to buy what the administration is selling in this term than last.

For the past four years, the court has largely ruled out of bounds the anti-immigrant sentiment that underlies some of the Trump administration's policies, and it has called out the administration when it appears to lie to conceal its true motives. That seems about to change. And it's hard to say which would be worse: a court that accepts disingenuous arguments, or one that accepts overt defenses of discrimination.