In March 2018 Secretary of Commerce Wilbur Ross issued a memorandum stating a citizenship question would be added to the 2020 census questionnaire. In In Re Department of Commerce the Supreme Court will not be deciding whether this question may be legally added. Instead, the Court will decide—among other things—whether Secretary Ross may be deposed as to his motives for adding this question.

A number of state and local governments and nonprofits sued the Secretary claiming that adding this question is arbitrary and capricious in violation of the Administrative Procedure Act.

In the 2018 memorandum Secretary Ross stated that he “began a thorough assessment” of whether to add a citizenship question “[f]ollowing receipt” of a December 2017 letter from the Department of Justice (DOJ) requesting citizenship data to enforce the Voting Rights Act’s prohibition against diluting the voting power of minority groups.

But after the litigation began Secretary Ross acknowledged in another memorandum he had begun considering adding a citizenship question long before DOJ’s letter. And according to the challengers “DOJ had not submitted the December 2017 letter on its own initiative, as the Secretary’s March 2018 memorandum suggested. Instead, the Secretary and his staff had approached DOJ to ask that it ‘request[] inclusion of a citizenship question.’”

A federal district court ruled the challengers could depose Secretary Ross and Acting Assistant Attorney General John Gore, DOJ’s point person on the citizenship question, and engage in additional discovery based on the “irregularity of the record” and “a strong showing of bad faith or improper behavior.” In late October the Supreme Court stayed the deposition of Secretary Ross but allowed the deposition of Gore and the additional discovery to go forward.

The Department of Commerce argues the district court should not have allowed either the depositions of Ross or Gore or the additional discovery. According to Commerce, “the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court. And the orders defy equally well settled law establishing that plaintiffs challenging agency action may not probe the subjective mental processes of the agency decisionmaker, especially by compelling his testimony. Although this Court has recognized a narrow exception where the plaintiffs make ‘a strong showing of bad faith or improper behavior,’ the district court clearly erred in applying that exception here.”

Among other things the challengers respond that the district court “reasonably found that extraordinary circumstances unique to this case provided a sufficiently strong showing of bad faith or improper conduct.” Specifically, the Secretary changed his story about why he first started thinking about adding the citizenship question to the census questionnaire. Also, the “Secretary’s belated revelation of a nearly yearlong decision-making process, referred to nowhere in his initial public announcement, triggered significant concerns that [the Secretary] had not provided [in the litigation record] all information that the Secretary ‘directly or indirectly considered.’”
While the Supreme Court is not deciding in this case whether to allow or disallow the citizenship question whether it allows this testimony and additional discovery may influence how a court rules on the ultimate question.

States and local governments receive some federal funding based on population as determined by the census. As Commerce [4] explains: “All of the claims [against Commerce] rest on the premise that reinstating a citizenship question will reduce the self-response rate to the census because, notwithstanding the legal duty to answer the census some households containing at least one noncitizen may be deterred from doing so (and those households will disproportionately contain racial minorities).”

By:
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