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# What the Census Case Will Say About the Supreme Court

Can the Trump administration add a citizenship question? The answer will be a test of the court's politicization.

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When the Supreme Court takes up the question on Tuesday of whether the Trump administration may add a question about citizenship to the census, more will be on the line than the integrity of the coming population count and possible shifts in congressional representation and federal dollars to the states. The case will also be a revealing test for the Roberts court and the oft-stated commitment of its conservative justices to political neutrality and the rule of law.

The case centers on the decision by Commerce Secretary Wilbur Ross, announced in March 2018, to add a citizenship question to the short-form census questionnaire sent to most American households once every 10 years. For reasons he has never explained, Mr. Ross has steadfastly pushed to add this question even though the Census Bureau's own experts say it would result in a roughly 5 percent drop in responses and increased inaccuracy in the population count.

Remarkably, nothing in the regulatory record contradicts this set of facts, as three Federal District Court judges have found. Mr. Ross's goal may be to strip congressional seats and federal money from states with large noncitizen populations — most of which are blue states — but that would be illegal. The census must measure total population as accurately as possible, without regard to citizenship status. Those numbers are then used to calculate the number of seats each state is entitled to in the House of Representatives.

The Constitution and federal laws guide the census process. Although the government in the past included a question on citizenship, since 1960 no citizenship question has appeared on the short-form census because of concerns about undercounting and inaccuracies. Then in 1976, Congress passed a law that discouraged adding questions. But President Trump and Secretary Ross reversed course.

The legal problem, as the trial judges found, was that the addition of the citizenship question followed a flawed administrative process, disregarded contrary data and advice from the Census Bureau and was justified with inaccurate, false or pretextual reasoning.

Secretary Ross's action violated three mandates from Congress. First, the government must use alternative data sources before adding questions to a census questionnaire to acquire the information. Second, Congress required Mr. Ross to review any changes with Congress three years before the census. He failed to meet that deadline. Third, agency officials cannot act arbitrarily and without a factual basis, as Mr. Ross did.

Perhaps as a result of those failures in the agency's decision-making, lawyers for the Trump administration have asked the Supreme Court to, in effect, look the other way. They have challenged the right of New York and other states and municipalities to bring the lawsuit, despite court precedent calling for "special solicitude" for state litigants. They say claims of harm are speculative and defy "logic," though the agency's own experts have warned of an inaccurate count if the question is included. The administration's lawyers even argue that adding the question is within the discretion of the Commerce Department and not subject to review by the courts. But abundant case law says courts should review administrative actions to ensure conformity with congressional requirements. Here, governing law makes an accurate population count the priority and strongly directs the commerce secretary to avoid additional questions "to the maximum extent possible."

An avalanche of Supreme Court law establishes that agencies like the Department of Commerce can act only as authorized by governing law. They often can adjust their policies, but they must provide "good reasons" and point to relevant law, facts and data, as Justices Antonin Scalia and Anthony Kennedy each wrote in influential court opinions that traced back to foundational 1980s law rejecting unjustified deregulation of car safety. These cases affirm fundamental principles of the rule of law. In essence, agencies cannot disregard the law or make things up.

Concerns of the court's conservative justices about the power of the administrative state are well documented in hundreds of opinions, speeches and testimony. The newest additions to the court, Justices Neil Gorsuch and Brett Kavanaugh, have similarly called for judges to rein in administrative agencies that act arbitrarily or in violation of statutes.

Many of those opinions, articles and speeches involved close judicial review of federal agencies during the Obama years as they advanced efforts to address pressing social ills. Will these conservative justices apply the same scrutiny in the highly politicized census case, when a green light from the court for President Trump would result in a win for the Republican Party and anti-immigrant sentiment?

The law they must apply is clear: An agency action deserves judicial scrutiny and rejection when it violates congressionally set process, dodges contrary evidence and the views of the agency's own experts, offers explanations lacking any support in the record and disregards Supreme Court precedent about agency obligations to follow the law.

Hence the real test is of the Supreme Court's integrity and politicization. Will justices long professing concern about arbitrariness by administrative agencies grapple with the Commerce Department's thoroughly documented irregularities? Will they adhere to the court's own abundant precedents mandating judicial scrutiny of agencies?

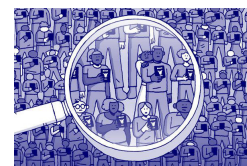
If the court's conservatives dodge the troubling facts and violations of law in this case, then their political stripes will be revealed. But if they call it straight and reject this politicized, illegal and unjustified action, they will do much to enhance the court's reputation during these times of partisan division.

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