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Legal Sidebar

Post-*Department of Commerce v. New York*: President Trump's Executive Order and What's Next for the Census

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On June 27, 2019, the Supreme Court issued its decision in *Department of Commerce v. New York*, which held that the Secretary of Commerce did not provide a legally sufficient justification for adding a citizenship question to the 2020 census. Though the Trump Administration ultimately declined to pursue further efforts to include the citizenship question on the census, President Trump did issue an executive order directing all executive departments and agencies to provide the Department of Commerce with records that may be used to determine the number of citizens, non-citizens, and unlawfully present persons in the United States. This data could become increasingly important in light of current or potential litigation over the extent to which non-citizens (or those unlawfully present in the United States) may (or must) be counted for purposes of apportioning state and federal legislative seats.

This Sidebar first provides a brief overview of the litigation in *Department of Commerce v. New York* and discusses President Trump's executive order. It then concludes by discussing legal issues related to state and federal apportionment for which the Department of Commerce's collection of citizenship data could prove relevant.

The Supreme Court's Decision

In March 2018, Secretary of Commerce Wilbur Ross issued a memorandum stating his decision to include a citizenship question on the 2020 census questionnaire distributed to every household in the United States. In that memorandum, Secretary Ross explained the decision was made in response to a request from the Department of Justice seeking additional citizenship information to better enforce Section 2 of the Voting Rights Act. Secretary Ross's decision was challenged in federal district court on multiple grounds, including that it violated the Enumeration Clause of the U.S. Constitution and the Administrative

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Procedure Act (APA). Several district courts concluded that the Secretary's decision to add the citizenship question was unlawful, and the Supreme Court earlier this year agreed to hear the case.

On June 27, 2019, the Supreme Court issued its decision in *Department of Commerce v. New York*. In that decision—written by Chief Justice Roberts—the Court held that the addition of a citizenship question to the 2020 census questionnaire did not violate the Enumeration Clause. But the Court concluded that the Secretary violated the APA because he failed to disclose the actual reason for adding the citizenship question. Thus, the Court's decision did not deem the addition of a citizenship question "substantively invalid"—that is, the error the Court identified was purely of a procedural nature and did not render the addition of a citizenship question per se unlawful. But it did prohibit the Department of Commerce from adding the citizenship question without disclosing the Secretary's actual justification for doing so. (For more on this decision, see this Sidebar.)

The President's Executive Order

After the Supreme Court's decision, the Trump Administration considered whether it could remedy the APA violation the Court identified by refining its justification for adding the question in sufficient time to carry out the census. However, on July 11, 2019, President Trump announced that his Administration would not pursue further efforts to add a citizenship question to the 2020 census questionnaire. That same day President Trump also issued an executive order requiring the Department of Commerce to collect citizenship and related data from other agencies and departments. Specifically, the executive order directs all executive agencies and departments "provide the Department [of Commerce] the maximum assistance permissible, consistent with law, in determining the number of citizens, non-citizens, and illegal aliens in the country." This assistance is to "includ[e] . . . any access that the Department [of Commerce] may request to administrative records that may be useful" for this objective. In addition, the executive order directs the Department of Commerce to "strengthen its efforts, consistent with law, to gain access to relevant State administrative records." Finally, the executive order instructs the Secretary of Commerce to "consider initiating any administrative process necessary to include a citizenship question on the 2030 decennial census" and to "consider" expanding the distribution of the American Community Survey—a survey containing a citizenship question that is distributed to a fraction of the population on an annual basis.

The executive order also notes that existing federal law protects the confidentiality of administrative records that the Department of Commerce receives in connection with the census. The executive order acknowledges that these confidentiality requirements apply to the information the Department of Commerce may collect pursuant to the executive order and observes that this data will not be used to "bring immigration enforcement actions against particular individuals," but instead will be used "for making broad policy determinations."

President Trump's executive order identified several reasons for collecting this data. First, the executive order explained that "data on the number of citizens and aliens" in the United States "is needed to help . . . understand the effects of immigration . . . and to inform policymakers considering basic decisions about immigration policy." Second, the order states that data on "citizens and aliens" will assist the federal government's implementation of public benefits programs. Third, the order states that "data identifying citizens will help the Federal Government generate a more reliable count of the unauthorized alien population in the country" to inform policy choices on immigration reform. Finally, the executive order states that the collection of citizenship information may also be useful for those states that wish to draw their legislative maps based "on the population of voter-eligible citizens," rather than on their total population.

Legal Issues for Consideration Going Forward

President Trump's July 11th decision and subsequent court rulings resulting from that decision foreclose further litigation on the addition of a citizenship question to the 2020 census questionnaire. Notably, on July 16, a federal court in New York permanently enjoined the Department of Commerce from adding the citizenship question to the 2020 census questionnaire or delaying the process of printing that questionnaire. However, litigation could arise with respect to the transfer, collection, and use of citizenship information resulting from the executive order. While federal law authorizes the Secretary of Commerce to "call upon any other department, agency, or establishment of the Federal Government . . . for information pertinent to" the census, other laws—such as the Privacy Act—restrict federal agencies' authority to disclose certain records within their possession. It is possible that a plaintiff could challenge whether a transfer of data resulting from President Trump's executive order complies with these laws. The executive order itself does require that all disclosures of citizenship data to the Department of Commerce be "consistent with law." Moreover, the Privacy Act allows for interagency disclosures of information "to the Bureau of the Census for purposes of planning or carrying out a census . . . or related activity." The scope of this exception to the Privacy Act's general prohibition on the disclosure of records within an agency's possession has not yet been explored by the courts.

Perhaps the most notable issue raised in President Trump's executive order is the possibility of states using the collected data to apportion their legislative districts based on voter-eligible citizens, rather than on total population. Relatedly, as Attorney General Barr stated in conjunction with the President's July 11th announcement, the State of Alabama has sued the Department of Commerce based on the Bureau of the Census's rule that all foreign nationals within the United States—whether or not lawfully present—must be counted for purposes of the decennial census and congressional apportionment. Alabama has argued that only persons lawfully present in the United States may constitutionally be counted in the apportionment of seats in the U.S. House of Representatives. If Alabama were to prevail in this lawsuit, states could attempt to use the data collected by the Department of Commerce to exclude persons unlawfully present in the United States from consideration in the apportionment of congressional seats.

State Apportionment

It is an open question as to whether states may apportion their legislative districts based on their voter-eligible populations—excluding (among others) persons unlawfully present in the United States—rather than on the total number of persons within each state. In *Evenwel v. Abbott*, the Supreme Court addressed a challenge to Texas's policy of basing the apportionment of its legislative districts on the total population of the state, rather than on the voter-eligible population. The plaintiffs in that case argued that the inclusion of non-voter eligible persons in the apportionment calculus diluted the votes of eligible voters in violation of the Equal Protection Clause's one-person-one-vote principle announced in *Reynolds v. Sims*. In response, Texas contended that the Constitution allows states a choice: they may choose to apportion their legislative districts based on total population or they may choose to apportion their seats based on voter-eligible population.

The Supreme Court in *Evenwel* held that states may constitutionally apportion their legislative districts based on total population. The Court began by surveying the ratification history of Article I, § 2 of the Constitution and Section 2 of the Fourteenth Amendment—the Constitutional provisions governing congressional apportionment—and concluded that these provisions contemplate that total population will be the congressional apportionment base. In light of this history, the Court concluded that "[i]t cannot be that the Fourteenth Amendment calls for the apportionment of congressional districts based on total population, but simultaneously prohibits States from apportioning their own legislative districts on the same basis." The Court supported this conclusion by pointing to the lengthy history of states using total population for reapportionment, emphasizing that an "overwhelming majority" of jurisdictions have used

this metric. "Adopting voter-eligible apportionment as constitutional command," the Court reasoned, "would upset a well-functioning approach to districting that all 50 states and countless local jurisdictions have followed for decades, even centuries."

Though concluding that states *may* base the apportionment of legislative districts on their total population, the Court stopped short of holding that they *must*. Indeed, the Court observed that one of its prior decisions—*Burns v. Richardson*—had upheld the apportionment of state legislative districts based on criteria other than total population. As a result, the *Evenwel* Court left undecided whether "States may draw districts to equalize voter-eligible population, rather than total population."

President Trump's executive order could result in the Supreme Court resolving the question left open in *Evenwel*. According to the executive order, the collection of data on "the number of citizens, non-citizens, and illegal aliens" in the United States is intended to make it easier for states to apportion their legislatures using criteria other than total population. And, if states choose to do so, the Supreme Court could ultimately be asked to decide the lawfulness of that practice.

Congressional Apportionment

The citizenship data collected by the Department of Commerce could also be used in conjunction with the apportionment of seats in the U.S. House of Representatives. As Attorney General Barr referenced in his July 11th remarks, Alabama has sued the Department of Commerce to prohibit the inclusion of persons unlawfully present in the United States in the apportionment of congressional districts. In its complaint, Alabama contends that counting persons unlawfully present in the United States violates (1) Section 2 of the Fourteenth Amendment, (2) the Enumeration Clause in Article I, § 2, and (3) the Electoral Apportionment Clause of Article II, § 1. Underlying each of these claims is Alabama's contention that unlawfully present persons are not "persons" for purposes of the Fourteenth Amendment's requirement that congressional apportionment be based on "the whole number of persons in each State." "Persons," according to Alabama, refers to those "who are 'members of the political community' constituted by the Constitution and the laws of the United States." Thus, Alabama asserts, because unlawfully present persons "have not been admitted to the political community," these persons are not "persons" within the meaning of the Fourteenth Amendment.

The merits of Alabama's arguments remain unsettled, as the Supreme Court has not directly addressed this question. There are, however, arguments that could be raised in opposition to Alabama's position to argue that the term "persons" encompasses all natural persons within each state, regardless of immigration status. This interpretation may find support in, among other places, Supreme Court decisions concluding in other contexts that the term "persons" in Section 1 of the Fourteenth Amendment "includ[es] aliens, whether their presence here is lawful, unlawful, temporary, or permanent." The Alabama litigation is still in its early stages, however, and the Department of Commerce is expected to soon respond to Alabama's complaint.

Considerations for Congress

Article I, § 2 of the Constitution gives Congress authority to conduct the census "in such Manner as [Congress] shall by Law direct." Thus, while existing law allows the Secretary of Commerce to obtain administrative records from other agencies or departments as part of carrying out the census, Congress may alter this authority, limit the purposes for which such data (once collected) may be used, or prohibit the Department of Commerce from providing such information to state or local governments. In addition, the Constitution also gives Congress the power of the purse, providing that "[n]o money shall be drawn from the Treasury" except by congressional appropriation. Congress could use this power to prohibit executive agencies and departments from expending money to provide the Department of Commerce with administrative records containing citizenship or lawful-status information or to prohibit the Department of

Commerce from expending money to provide such information to state or local governments. However, until Congress takes such steps, the Department of Commerce retains broad authority under federal law to obtain information from other departments or agencies of the federal government in connection with the census.