

You have the Right to an Administrative Record that is Whole, Complete and Without Omission

From: *RECENT DEVELOPMENTS* - Administrative Records after *Department of Commerce v. New York* (attached):

The Supreme Court recently addressed the composition of “the whole record” in APA litigation for the first time in decades in Department of Commerce v. New York. In that case, which considered whether the U.S. Census Bureau lawfully added a question regarding U.S. citizenship to the impending 2020 U.S. Census, the Court held that the challengers had made a “strong showing of bad faith or improper behavior” that merited record supplementation and concluded that although the initial supplementation order was premature, the error was harmless and justified in hindsight.

The APA, which provides for judicial review of “the whole record or those parts of it cited by a party,” led the Court to consider the propriety of completing or supplementing the administrative record in a case challenging the addition of a citizenship question to the decennial census.³ 5 U.S.C. § 706 (2012); see Dep’t of Commerce, 139 S. Ct. at 2573–74 (questioning the constitutionality of the citizenship question’s addition to the census and examining the exception that allows for probative inquiry of the administrative record).

Under the text of the APA and the textually-derived principle that a court cannot impose additional requirements on an agency that are not compelled by the APA, generally only record “completion” is lawful.¹⁸ - See Gavoor & Platt, *supra* note 11, at 31–35 (presenting the presumption of a complete record and circumstances wherein petitioners should be afforded the ability to “rebut the presumption of agency regularity in the compilation and presentation of the administrative record”).

Completion entails ordering the agency to add materials to the record presented to the court if the agency did indeed consider those materials.¹⁹ - Gavoor & Platt, *supra* note 11, at 33 (proposing that the “whole record” should include only materials directly considered by those involved in the agency decision).

From: Administrative Records and the Courts_Gavoor_2018.pdf (attached):

Whole and Complete:

Because the APA directs courts to review the legality of agency action upon “the whole record,”² the government filed what it deemed to be the complete administrative record of all non-deliberative documents considered by the agency when it undertook the challenged initiative.³ The plaintiffs responded by arguing the record was missing thousands of pages of documents.⁴ The plaintiffs moved the court to order the Department of Homeland Security to complete the administrative record.⁵ Just five weeks after the lawsuit was filed, a federal district judge granted the plaintiffs’ motion.⁶ Despite later acknowledging that “[t]he Supreme Court has never defined ‘the whole record’ in the context of informal agency action”—the kind

of agency action at issue there⁷—the judge found that the government did not file a **complete** record.⁸

Without Omission:

In other words, whether the deliberative process material is privileged is irrelevant. A court may prefer to review the withheld or redacted information in camera to ensure it is properly outside the scope of the record (e.g., deliberative process) or properly privileged.²⁴⁸ A court may also require the government file the unredacted version under seal.²⁴⁹

Footnotes:

2. 5 U.S.C. § 706.

3. *Regents of Univ. of Cal.*, 2017 WL 4642324, at *1; 5 U.S.C. § 706.

4. *Regents of Univ. of Cal.*, 2017 WL 4642324, at *1.

5. *Id.*

6. *Id.* at *8.

7. *Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, No. C 17-05211, 2018 WL 1210551, at *2 (N.D. Cal. Mar. 8, 2018).

8. *Regents of Univ. of Cal.*, 2017 WL 4642324, at *8.

9. *Id.* at *8–9.

10. *In re United States*, 875 F.3d 1200 (9th Cir. 2017).

11. *In re United States*, 138 S. Ct. 371 (2017); *id.* at 371–76 (Breyer, J., dissenting).

248. *E.g.*, *Nat'l Courier Ass'n v. Bd. of Govs. of Fed. Reserve Sys.*, 516 F.2d 1229, 1243 (D.C. Cir. 1975) (finding no significant omission and denying petitioners' request for disclosure of the redacted portions of internal agency memoranda); *Smith v. Brady*, 813 F. Supp. 1382, 1386 (E.D. Wis. 1993).

249. *E.g.*, *Poett v. United States*, 657 F. Supp. 2d 230, 234 n.2 (D.D.C. 2017).

Note: I also found some GREAT case law in the attached USDC case from 2017 (Colorado), attached!

Note2: Don't forget about the Accardi doctrine; work it in reverse here!

Call me directly if you have any questions! I'm on a Zoom call for the next 1.5 hours (after 4pm EST)...