



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

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DIVISION OF APPEALS & OPINIONS
NEW YORK CITY BUREAU

October 6, 2018

Catherine O'Hagan Wolfe
Clerk of Court, United States Court of Appeals for the Second Circuit
40 Foley Square
New York, NY 10007

Re: *In re United States Department of Commerce*, Nos. 18-2856, 18-2659

Dear Ms. Wolfe:

I write on behalf of plaintiffs-respondents in the above-captioned matters. In the course of our ongoing work in this litigation, we recently learned that the Secretary of Commerce was deposed during an earlier census-related lawsuit, *Carey v. Klutznick*, in which New York State and New York City challenged an alleged undercount by the Census Bureau. While this deposition is not referenced in any published decisions, *see Carey v. Klutznick*, 508 F. Supp. 416 (S.D.N.Y.), *aff'd*, 637 F.2d 834 (2d Cir. 1980); *Carey v. Klutznick*, 508 F. Supp. 420 (S.D.N.Y. 1980), *rev'd*, 653 F.2d 732 (2d Cir. 1981), contemporaneous press accounts (attached) confirm that the plaintiffs deposed the Secretary in that litigation. That this deposition took place provides additional confirmation that, contrary to defendants' suggestion, a deposition of Secretary Ross would not be unprecedented.

Respectfully submitted,

BARBARA D. UNDERWOOD
Attorney General of the State of New York

By: /s/ Steven C. Wu
Steven C. Wu
Deputy Solicitor General
28 Liberty Street
New York, NY 10005
Attorney for Government Plaintiffs

Re: *In re United States Department of Commerce*, Nos. 18-2856, 18-2659

cc (via CM/ECF):

All counsel of record

COMMERCE SECRETARY IS TOLD TO TESTIFY ON CENSUS COUNT

The New York Times

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Byline: By ROBERT McG.THOMAS Jr.

Body

A Federal judge in Manhattan yesterday ordered the Secretary of Commerce to come to New York to complete a legal deposition in the city-state census litigation. He said that if the Secretary did not come voluntarily, he would "send a marshal to pick him up."

The action by the judge, Henry F. Werker of District Court, came as he opened a trial in a lawsuit filed against the Census Bureau by New York City and New York State. They are seeking a mathematical adjustment to make up for an alleged undercount of a million or more city and state residents.

Federal Judge Henry Werker orders Commerce Secretary to testify in suit brought against Census Bureau by New York City and New York State

"The Government has been obstructive, and I don't think it was by chance," declared Judge Werker, who ordered the Secretary, Philip M. Klutznick, to complete a deposition. The taking of the deposition was suspended in Washington last Friday after an assistant United States attorney repeatedly protested that questions being put to the Secretary by a lawyer representing the city and state went beyond the scope of a prior agreement approved by Judge Werker.

Testimony 'Without Restriction'

Judge Werker, denying that he had limited the scope of the deposition, said that he was directing Mr. Klutznick "to appear for examination in New York without restriction" and that it be done "most expeditiously." The judge did not set a specific day.

A spokesman for Mr. Klutznick said later that the Commerce Department's general counsel was "making arrangements for a continuation of the deposition," but he could not say when it might take place.

Lawyers for the city and state asserted that Mr. Klutznick's refusal to continue the deposition last Friday was the latest in a series of defiant actions by the Government. Judge Werker had previously declared Mr. Klutznick and other defendants in the case, including President Carter and the director of the Census Bureau, Vincent P. Barabba, in contempt of court for defying an order requiring them to provide city and state lawyers with master address registers and lists of vacant buildings.

In light of that defiance, Judge Werker issued a so-called preclusion order, in effect requiring the Government to concede many of the factual claims made by the city and state, including their contention that there had been a substantial local undercount and that a mathematical adjustment would be required to make up for it.

City-State Victory Seen

COMMERCE SECRETARY IS TOLD TO TESTIFY ON CENSUS COUNT

As a result of that order, city and state officials have said they are virtually assured of winning the case at the district level. The Census Bureau has already lost a similar suit in Detroit, and the ultimate determination of whether, and to what extent, the bureau will be required to use a mathematical adjustment to make up for alleged undercounts seems certain to be resolved by the Supreme Court.

One area not covered by the preclusion order is the feasibility of designing and implementing an adjustment formula, and Gaines Gwathmey, the assistant United States attorney who made the Government's opening statement, said he would present expert testimony that there was no way to devise "a rational or valid methodology for an adjustment."

"You can change the numbers and make them bigger," Mr. Gwathmey said, "but you can't make them more accurate." The opening statement for the city and state was presented by Frederick A. O. Schwarz Jr., a partner of Cravath, Swaine & Moore, which is representing the city without fee.

Witnesses Point to Flaws

He accused the Government of "changing its tune" in recent weeks. Previously, he said, the Government conceded that there had been an undercount, particularly among minority groups. Now, he said, the Government position is that there has been no undercount.

The three witnesses called by Mr. Schwarz yesterday gave testimony designed to show that mismanagement of the local enumeration effort had led to a large undercount.

One, Steven P. Glusman, a former enumerator and crew chief in Harlem, told of occupied buildings misclassified as vacant and of "curbstoning," the practice of filling out forms without conducting the required interviews.

Another witness, Sister Mary T. Higgins, a Roman Catholic nun, said that she had repeatedly called the Census Bureau to get it to count 45 nuns living in a church retirement home in the Riverdale section of the Bronx, but that no forms had ever been received and no enumerators had been sent to the home.

Judge Summons Commerce Secretary to Give Deposition

The Associated Press

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Body

A federal judge Wednesday ordered U.S. Commerce Secretary Philip N. Klutznick to come to New York to finish a deposition in a lawsuit over a census undercount and threatened "to send a marshal" after Klutznick if he failed to appear.

U.S. District Judge Henry F. Werker, who is hearing the suit filed by the city and state of New York, said Klutznick's failure to complete the deposition in Washington, D.C., last week was "obstructive."

"If necessary, I'll send a marshal to bring him here," he said.

Klutznick, who has jurisdiction over the federal Census Bureau, originally was asked to come to New York to give the deposition. But Werker allowed him to stay in Washington because his attorneys said he was too busy to travel. Klutznick gave the deposition for about an hour last week but then interrupted the session and failed to resume it.

The city and state filed a joint suit last August in an effort to obtain an adjustment in census figures. They charged the Census Bureau with mismanagement and claimed the official counters missed about 800,000 city residents and 200,000 residents upstate.

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