U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

April 9, 2019

The Honorable Elijah E. Cummings
Chairman
Committee on Oversight and Reform
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

We write in response to the Committee's April 2, 2019 subpoena to John Gore, Principal Deputy Assistant Attorney General for the Department's Civil Rights Division. The subpoena seeks Mr. Gore's testimony for a deposition on April 11, 2019, concerning the Secretary of Commerce's decision to restore the citizenship question to the 2020 Census.

On March 7, 2019, Mr. Gore appeared voluntarily for a transcribed interview on the same topic. Committee staff questioned him for several hours, and he answered hundreds of questions. Department counsel participated in the interview and instructed Mr. Gore not to answer particular questions that sought information concerning confidential Executive Branch deliberations that are protected under well-established law. The Department's interest in protecting such subject matter is particularly acute given that much of this information was withheld from public disclosure by the district courts considering challenges to the inclusion of the citizenship question on the 2020 Census and that such disclosure could compromise the integrity of ongoing litigation in the Supreme Court.

The Committee now has subpoenaed Mr. Gore to return to answer the questions that he could not answer at his interview. But the subpoena will not change his responses. Because the Department will instruct him to decline to respond to the same categories of questions to which he declined to respond during the Committee's March 7 interview, we question the value of Mr. Gore's appearing before the Committee for an additional time and would ask the Committee to reconsider whether the deposition would really further the Committee's oversight needs. This is particularly true where the Department has produced, and will continue to produce, a substantial volume of documents to the Committee.

Should the Committee wish to go forward with the deposition, we will expect that Department counsel again appear and represent him. Because of concerns that go to the heart of the relationship between our two co-equal Branches, we strongly object to the Committee's

effort to bar Department counsel from Mr. Gore's deposition. In accordance with the constitutionally mandated accommodation process, the Executive Branch has been working in this and numerous oversight contexts to accommodate congressional information needs in a manner consistent with the constitutional and statutory responsibilities of the Executive Branch. But the Committee now seeks to undermine the Executive Branch's ability to protect its interests by excluding agency counsel from its depositions. In this case, Committee staff has informed the Department that the Committee intends to apply Committee Rule 15(e) to Mr. Gore's deposition. That rule prohibits "[o]bservers or counsel" from the Department from attending the deposition. We do not understand the basis for such a rule. Mr. Gore would be appearing to testify in his official capacity about Department matters. There is no legitimate legislative purpose served by requiring Mr. Gore to appear without counsel for the Department, particularly given that he appeared with Department counsel for his transcribed interview.

The Committee's exclusion of agency counsel from a compelled deposition would unconstitutionally infringe upon the prerogatives of the Executive Branch. The exclusion would conflict with the long-standing oversight practice in congressional interviews under which agency counsel represents the agency and the witness in his official capacity. Indeed, Department counsel has already appeared at the staff interview of Mr. Gore in this very matter without objection from the Committee. It is standard practice for Department counsel to accompany Department officials who are testifying in civil or other matters, including congressional oversight interviews, depositions, and hearings. The need for such Department representation is obvious. When a witness testifies in his official capacity, he is asked to provide Department information. The Department has a strong interest in ensuring that the questioning is limited to the proper scope, the information provided on its behalf is accurate and complete, and any ambiguity or confusion is promptly resolved. In addition, the Department representative can follow up on questions that may be raised in the course of the interview that the official cannot answer. As an employer, moreover, the Department has an interest in providing support to its officials when they are called to Congress to testify about their work-related activities.

Most importantly, Department counsel must be present at depositions of the Department's officials to protect the constitutional equities of the Executive Branch. The Department, like other agencies, has a fundamental interest in ensuring that its officials are not pressed into revealing privileged information, such as internal deliberations, attorney-client communications, or national security information, *see United States v. Nixon*, 418 U.S. 683, 705-06 (1974); *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974), or pressed into responding to inquiries that are beyond Congress's oversight authority, *see Barenblatt v. United States*, 360 U.S. 109, 111-12 (1959). There is no legitimate legislative interest served by prohibiting Department counsel from attending congressional depositions, and such a rule would impermissibly infringe on the President's constitutional authority to supervise the Executive Branch's dissemination of information to Congress and to protect information within the scope of executive privilege. This concern is

heightened with respect to Mr. Gore's deposition because of the ongoing litigation in the Supreme Court.

The Department recognizes Congress's oversight responsibilities and stands ready to cooperate with the Committee's inquiry in any way it can, consistent with the Department's constitutional and statutory obligations. But barring Department representatives from Committee depositions undermines, rather than enhances, such oversight, and unconstitutionally encroaches on fundamental Executive Branch interests. As a result, the Attorney General has determined that Mr. Gore will not appear at the April 11 deposition unless a Department representative may accompany him.

We reiterate our request that the Committee reconsider the need for this deposition, given that the Committee has access to Mr. Gore's transcribed interview on the very subject, that Mr. Gore will not be permitted to disclose information concerning confidential Executive Branch deliberations, and that the Committee has received, and will continue to receive, numerous documents concerning the underlying subject matter. Should the Committee nonetheless wish to proceed on April 11, we would ask you to confirm that Department counsel will be permitted to attend and represent Mr. Gore at the deposition.

Sincerely,

Stephen E. Boyd
Assistant Attorney General

cc: The Honorable Jim Jordan
Ranking Member