



Democrats' Investigation of the Citizenship Question: A Transparent Attempt to Improperly Influence the Supreme Court of the United States

**Minority Staff Report
Committee on Oversight and Reform
U.S. House of Representatives**



April 2, 2019

Executive Summary

Democrats do not want to know how many citizens there are in the United States. Although the Census Bureau has sought citizenship information regularly in the past, Democrats now fear that a full survey of U.S. citizens will hurt their political fortunes for years to come. Liberal state attorneys general and left-wing special interests have sued the Commerce Department to prevent the Census Bureau from reinstating a citizenship question on the 2020 Census. The case is now before the United States Supreme Court, which will hear arguments later this month.

Chairman Elijah Cummings and Democrats on the Oversight and Reform Committee are now interfering with the Supreme Court's proceedings in favor of the liberal special interests. They are seeking to conduct extra-judicial fact-finding about the Commerce Department's decision to reinstate the citizenship question on the decennial census. After the Supreme Court stopped a deposition with Commerce Secretary Wilbur Ross, Chairman Cummings demanded that Secretary Ross appear before the Committee under oath to testify directly on the issues before the Supreme Court. Chairman Cummings is demanding additional documents and testimony from key Commerce Department officials.

Chairman Cummings is pursuing this oversight in a transparent attempt to interfere with the ongoing litigation over the citizenship issue, at the Supreme Court and in lower courts. At the Committee's hearing, the Democrats sought to examine Secretary Ross's intent behind reinstating the citizenship question. Chairman Cummings asked Secretary Ross about his "interest" in reinstating the citizenship question to the census; Rep. Mark DeSaulnier asked *why* Secretary Ross reinstated the citizenship question; and Rep. Jamie Raskin asked Secretary Ross about the Supreme Court's interpretation of the citizenship question. Rep. Jimmy Gomez even admitted that the Democrats seek this information so that "the courts can use" it in the ongoing litigation.

In fact, in a recent letter to Secretary Ross, Chairman Cummings explicitly explained that he is seeking Commerce Department documents and testimony to discover "contemporaneous evidence of the real reason that you [Secretary Ross] added the citizenship question and the process you followed."¹ This is exactly the issue currently before the Supreme Court.

By interfering in ongoing litigation, Chairman Cummings is doing the very thing that he warned against just eight years ago during the Obama Administration. He said then that an "ongoing legal proceeding should be allowed to take its full course without any further interference from Members of Congress."² Outside experts—including both Republican and Democrat Justice Department officials—caution against using the Committee's power to interfere with court proceedings.

¹ Letter to Hon. Wilbur Ross, Secretary, Dep't of Commerce, from Rep. Elijah Cummings, Chairman, H. Comm. on Oversight & Reform (Mar. 29, 2019) (on file with Committee).

² Letter from Rep. Elijah Cummings, Ranking Member, H. Comm. on Oversight & Gov't Reform, to Rep. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform (Nov. 9, 2011) (on file with Committee.)

Chairman Cummings's investigation of the Commerce Department's reinstatement of the citizenship question on the census is just another example of his partisan oversight of the Trump Administration. Chairman Cummings and left-wing special interests are desperate to prevent anyone from knowing the number of citizens in the United States. They see interfering with the Supreme Court's ongoing litigation as their last best chance, and Chairman Cummings and the Democrats are willing to influence the Court by any means necessary.

Background

The Road to the Supreme Court

On March 26, 2018, Commerce Secretary Wilbur Ross announced his intention to reinstate a question regarding citizenship on the 2020 Census.³ On March 29, 2018, the Census Bureau presented the 2020 Census questions to Congress, including the question regarding citizenship.⁴

Reaction to Secretary Ross's decision was swift. Democrats in Congress, liberal states, and left-wing special interest groups decried the decision, arguing it would depress responses in states with large immigrant populations and lead to an inaccurate population count.⁵ Almost immediately, multiple lawsuits were filed challenging Secretary Ross's decision. The first lawsuit to be decided by the lower courts was *State of New York, et al. v. U.S. Department of Commerce, et al.*

Judge Jesse Furman, an Obama appointee, presided over this case and initially authorized the deposition of Secretary Ross.⁶ On October 22, 2018, however, the Supreme Court rebuked Judge Furman, issuing a stay to halt the deposition of Secretary Ross.⁷ In a concurring statement, Justices Neil Gorsuch and Clarence Thomas questioned the lower court's determination that Secretary Ross had demonstrated bad faith in deciding to reinstate a citizenship question to the Census. The Justices wrote:

But there's nothing unusual about a new cabinet secretary coming to office inclined to favor a different policy direction, soliciting support from other agencies to bolster his views, disagreeing with staff, or cutting through red tape. Of course, some people may disagree with the policy and process. But until now, at least, this

³ Letter from Secretary Wilbur Ross, Department of Commerce, to Karen Dunn Kelley, Undersecretary for Economic Affairs, Department of Commerce (March 26, 2018).

⁴ Questions Planned for the 2020 Census and American Community Survey: Federal Legislative Programs and Uses, U.S. Census Bureau (March 2018).

⁵ Letter from The Leadership Conference on Civil and Human Rights, et. al. to Wilbur Ross, Secretary, U.S. Dep't of Commerce (January 10, 2018).

⁶ Order re: Deposition of Secretary of Commerce Wilbur Ross, New York v. U.S. Dep't of Commerce, 315 F.Supp.3d 766 (S.D.N.Y. 2018) (No. 18-CV-2921).

⁷ In re Department of Commerce, et al. on Application for Stay at 2, U.S. Dep't of Commerce, et al. v. State of New York, et al., 586 U.S. (2018) (No. 18A375).

much has never been thought enough to justify a claim of bad faith and launch an inquisition into a cabinet secretary's motives.⁸

On January 15, Judge Furman issued his ruling in *Department of Commerce*. Judge Furman held that Secretary Ross violated the Administrative Procedure Act (APA) in adding a citizenship question to the 2020 Census questionnaire. Given the immediacy of the 2020 Census timeline, the Department of Justice appealed the decision directly to the Supreme Court of the United States, which agreed to hear the case. The Court agreed to hear the case on February 15, 2019.⁹

Democrats Seek the Same Information at Issue in the Supreme Court Litigation

The United States Supreme Court scheduled oral argument in *Department of Commerce* on April 23, 2019, to review Judge Furman's decision.¹⁰ On March 15, 2019, at the request of the Trump Administration, the Supreme Court expanded the scope of oral arguments to include the constitutional challenge to the Enumeration Clause of the Constitution, Article I, Section 2, Clause 3.¹¹ The constitutional challenge to the Enumeration Clause is at issue in another case about the reinstatement of the citizenship question, *State of California, et al. v. Ross et al.*¹²

Under Chairman Cummings, the Democrats initiated a partisan inquiry into Secretary Ross's decision to add the citizenship question to the 2020 Census. Chairman Cummings is using the authority of the Committee to gather documentary and testimonial evidence at the heart of the case before the Supreme Court. One Democrat Member of the Committee even proclaimed that the Committee's oversight was intended to "reveal something that the courts can use" in the litigation.¹³

At issue before the Supreme Court is whether Secretary Ross's mental intent is necessary to determine the validity of his decision to reinstate the citizenship question when the Secretary had already memorialized the reasons for his decisions in writing.¹⁴ The parties challenging the reinstatement of the citizenship question want to probe the Secretary's "mental processes." These parties even tried to depose Secretary Ross before the Supreme Court stopped it. Unfortunately, Chairman Cummings now seeks the same information from Secretary Ross.

On January 8, 2019, even before the Committee organized for the 116th Congress, Chairman Cummings wrote to Secretary Ross requesting documents.¹⁵ He asked Secretary Ross for six broad categories of documents, as well as answers to fourteen questions about the

⁸ *Id.*

⁹ Certiorari Granted, *U.S. Dep't of Commerce, et al. v. State of New York, et al.*, 586 U.S. (2019).

¹⁰ *State of New York, et al. v. U.S. Dep't of Commerce, et al.*, No. 18-CV-2921 (S.D.N.Y. Jan. 15, 2019).

¹¹ U.S. CONST. art. I, § 2, cl. iii.

¹² *California v. Ross*, No. 18-cv-01865-RS (N.D. Cal. 2018).

¹³ Hansi Lo Wang, Commerce Secretary to Face Lawmakers in Hearing on Census Citizenship Question, Nat'l Pub. Radio, Mar. 14, 2019.

¹⁴ Petition for a Writ of Certiorari Before Judgment, *U.S. Dep't of Commerce, et al. v. State of New York, et al.*, 586 U.S. (2019).

¹⁵ Letter from Elijah E. Cummings, Chairman, H. Comm. on Oversight & Reform, to Wilbur L. Ross, Jr., Sec'y, Dep't of Commerce (Jan. 8, 2019).

addition of the citizenship question to the census.¹⁶ Chairman Cummings posed several questions that probed Secretary Ross's actions and state of mind at the time that he decided to reinstate the citizenship question on the 2020 Census.¹⁷

On March 14, 2019, Chairman Cummings convened a hearing featuring sworn testimony from Secretary Ross about the 2020 decennial census and the reinstatement of a citizenship question.¹⁸ In light of the Supreme Court's decision to stay Secretary Ross's deposition, demanding Secretary Ross's sworn testimony is in effect an end-run around the Supreme Court's stay order. Secretary Ross appeared voluntarily before the Committee knowing Chairman Cummings would issue a subpoena for his appearance.¹⁹

At the outset of the hearing, Chairman Cummings characterized the purpose of the hearing to "examine Secretary Ross's decision" to reinstate the question and noted that he expected Secretary Ross to testify fully on these issues.²⁰ The Democrats posed questions to Secretary Ross designed to litigate the merits of the citizenship question and probe Secretary Ross's intent in reinstating the question.²¹ For example:

- Chairman Cummings (D-MD) asked Secretary Ross about his "interest" in reinstating the citizenship question;²²
- Rep. Raskin (D-MD) asked Secretary Ross if there is "anything that you would tell [the Committee] that would somehow alter the Supreme Court's interpretation of whether or not your judgment to add the citizenship question is constitutional";²³
- Rep. DeSaulnier (D-CA) asked Secretary Ross *why* he requested an internal Commerce Department memorandum about reinstating the citizenship question;²⁴
- Rep. Tlaib (D-MI) and Rep. Pressley (D-MA) asked Secretary Ross about his communications with other Administration officials about reinstating the citizenship question;²⁵ and
- Rep. Gomez (D-CA) asked Secretary Ross whether he had any communications with the White House about reinstating the citizenship question.²⁶

In his concluding remarks, Chairman Cummings again complained about Secretary Ross's reluctance to answer questions that involved information related to pending litigation before the Supreme Court:

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Commerce Secretary Wilbur L. Ross, Jr.: Hearing Before the H. Comm on Oversight and Reform*, 116th Congress (March 14, 2019).

¹⁹ Letter from Elijah E. Cummings, Chairman, H. Comm. on Oversight & Reform to Wilbur Ross, Secretary, U.S. Department of Commerce (Mar. 6, 2019) (on file with the Committee).

²⁰ *Commerce Secretary Wilbur L. Ross, Jr.: Hearing Before the H. Comm on Oversight and Reform*, 116th Congress, 29 (2019) (statement of Chairman Elijah E. Cummings).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

But today when I heard your testimony, I felt like you were trying to pull a fast one on me. I've got to be honest with you, man. You went back to the old argument about ongoing litigation. I was a little disappointed And let me make this clear so that there would be absolutely no doubt, Mr. Secretary. This committee does not accept the argument that you can withhold documents or testimony from us because you have other separate litigation. *(emphasis added).*²⁷

Republican members of the Committee noted the Democrats' obvious motives to elicit testimony at the heart of the Supreme Court litigation. Rep. Greg Steube (R-FL) explained:

Mr. Steube. Procedurally, Mr. Secretary, isn't it true that this issue and related issues, as you have previously testified, are currently before the U.S. Supreme Court in the Department of Commerce v. State of New York?

Secretary Ross. Yes. Yes, sir. The issue is before the Supreme Court. It's also pending in a couple of lower courts at this time.

Mr. Steube. And isn't it also true that on October 22, 2018, the Supreme Court issued a stay granting the administration's request to halt your deposition as requested by the plaintiffs?

Secretary Ross. That is correct, sir.

Mr. Steube. So the U.S. Supreme Court has stayed your deposition, yet we are here today deposing you under oath where the rules of evidence and the civil procedure do not apply. Is that correct?

Secretary Ross. I am here voluntarily, and I am here under oath today, yes, sir.

Mr. Steube. The very issue before the court is to your intent on placing this question on the form, and all of Mr. Cummings' questions and the previous members' questions were directly trying to elicit answers to those very questions that are before the court. Is that correct?

Secretary Ross. Yes, sir.²⁸

Similarly, Rep. Kelly Armstrong (R-ND) succinctly noted the inherent difficulties that are implicated when a high-ranking Executive Branch official is called by a congressional committee to provide sworn testimony on a matter currently pending in federal court:

²⁷ *Id.* 204.

²⁸ *Id.*

[A]nything that is being done here today under oath is going to be more than free game in front of oral arguments ***Anything provided to a congressional inquiry at that point in time is going to end up into the federal case.*** That is just the way it is going to happen. So whenever lawsuits are filed, there is a competing interest between what is going to be discoverable in a federal courtroom and what is being requested in front of a congressional hearing (emphasis added).²⁹

As the Republican Members pointed out, it is entirely foreseeable—and, in fact, likely—that Secretary Ross’s sworn testimony before the Committee could be used against the Commerce Department in the pending litigation. Although Congress is not prohibited from holding hearings on matters that are currently involved in litigation, the decision to do so does carry with it the potential to jeopardize the impartiality of the judicial proceedings and is a purely political decision on the part of the majority—in this case, a decision of the Democrats to influence the Supreme Court.³⁰

Democrats Should Not Interfere with Ongoing Litigation, Especially at the Supreme Court

Chairman Cummings and Democrats on the Committee are pursuing information from Secretary Ross because they believe that they can use it to influence the Supreme Court. The Chairman should know better than to interfere with pending litigation. After all, when Chairman Cummings was in the minority, he advised against it.

Outside experts agree that Chairman Cummings should not force Secretary Ross to disclose information at issue in the Supreme Court litigation.³¹ As former Justice Department official Hans von Spakovsky wrote, “with civil litigation over [the citizenship issue] now before the Supreme Court, the House committee should cancel the hearing in recognition of the fact that having Ross testify is inappropriate and could, as the Justice Department has recognized in the past, jeopardize the government’s litigation.”³² Mr. von Spakovsky cited long-standing Justice Department guidance warning that congressional interference would harm the government’s litigation position.³³

Going back as far as the Clinton Administration, the Justice Department has maintained a practice of protecting federal government materials that are the subject of pending or ongoing litigation. In 2000, then-Assistant Attorney General Robert Raben highlighted the importance of protecting information that may be used in litigation against the federal government. Raben wrote:

²⁹ *Id.*

³⁰ *Id.*

³¹ Hans A. von Spakovsky, *Why the Commerce Secretary Shouldn’t Testify to Lawmakers About the Census* (Mar. 12, 2019), <https://www.heritage.org/political-process/commentary/why-the-commerce-secretary-shouldnt-testify-lawmakers-about-the-census>.

³² *Id.*

³³ *Id.*

The Department has similar interests in the confidentiality of internal documents relating to its representation of the United States in civil litigation. Our litigation files usually contain confidential correspondence with client agencies as well as the work product of our attorneys in suits that frequently seek millions of tax dollars. They also contain ‘road maps’ of our litigation plans and preparations, as well as confidential reports from experts and consultants. *Those plans could be seriously jeopardized and our positions in litigation compromised if we are obliged to disclose our internal deliberations including, but not limited to, our assessments of the strengths and weaknesses of evidence or the law, before they are presented in court.* That may result in an unfair advantage to those who seek public funds and deprive the taxpayers of confidential representation enjoyed by other litigants (emphasis added).³⁴

While Assistant Attorney General Raben stressed the need for the Executive Branch to protect information that may be the subject of pending litigation, he did not suggest the Legislative and Executive Branches must consistently be at odds with one another. The federal courts and the Department of Justice have regularly indicated Congress and the Executive Branch must strive to accommodate the “legitimate needs of the other branch.”³⁵

Ironically, Chairman Cummings previously chided Republicans for pursuing investigations while litigation was pending. But unlike Chairman Cummings, the issues involved at the time did not involve seeking information from a cabinet official to influence a Supreme Court case.

In 2011, the Committee, under former Chairman Darrell Issa, launched an investigation into the National Labor Relations Board’s (NLRB) treatment of Boeing and its corporate decision to move some production facilities to South Carolina. Committee Democrats sent no less than three letters to former Chairman Issa asking the investigation be suspended pending the conclusion of litigation.

On June 16, 2011, then-Ranking Member Elijah Cummings sent a letter condemning former Chairman Issa for inviting then NLRB Acting General Counsel, Lafe Solomon to testify. Ranking Member Cummings wrote:

But it is the Committee's concern, and it is the concern of all Members of Congress that we conduct ourselves in a manner that upholds the Constitution. Recognizing the risk of interference, as well as the risk of the appearance of interference, a responsible

³⁴ Assistant Attorney General Robert Raben, U.S. Department of Justice, Office of Legislative Affairs, Memorandum to the Honorable John Linder, 4-5 (2000).

³⁵ Opinion of the Attorney General for the President, Assertion of Executive Privilege in Response to a Congressional Subpoena, 5 Op. O.L.C. 27, 31 (1981).

chairman would take care to minimize these risks. *Rather than creating a new basis for appealing any final agency decision, increasing uncertainty, and shifting the costs of your interference onto private parties, the Committee should wait until the case is no longer pending before calling the chief prosecutor to testify at a hearing about that case* (emphasis added).³⁶

In a letter dated, November 9, 2011, then-Ranking Member Cummings wrote:

As I have said repeatedly, I believe it is an inappropriate use of Committee resources to interfere with this ongoing legal action in order to benefit the corporate interests of a single company. . . . *The ongoing legal proceeding should be allowed to take its full course without any further interference from Members of Congress* (emphasis added).³⁷

Also in 2011, during the Committee's investigation of the botched Fast and Furious gun-walking operation, then-Ranking Member Cummings warned that the Committee should not interfere with ongoing legal processes. On June 13, 2011, Ranking Member Cummings wrote:

The challenge is that when congressional committees embark on investigations while ongoing prosecutions are pending, there is a dangerous potential to compromise criminal prosecutions, especially if a committee is reckless and does not consult with the Department. *For these reasons, many congressional committees defer investigations until after prosecutions are complete.* (emphasis added).³⁸

Chairman Cummings ought to consider the advice he gave in 2011, as well as the Clinton Administration guidance, that cautions against congressional interference in ongoing litigation. Forcing Secretary Ross and Commerce Department to produce information and material at issue in the Supreme Court litigation seriously risks the integrity of the ongoing litigation and is an inappropriate use of Committee resources.

³⁶ Letter from Elijah Cummings, Ranking Member, H. Comm. on Oversight and Gov't Reform and George Miller, Ranking Member, H. Comm. on Ed. and Workforce, to Darrell E. Issa, Chairman, H. Comm. on Oversight and Gov't Reform (June 16, 2011) available at https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2011-06-16.GM%20and%20EEC%20Letter%20to%20Issa.NLRB__0.pdf.

³⁷ Letter from Elijah E. Cummings, Ranking Member, H. Comm. on Oversight and Gov't Reform, to Darrell E. Issa, Chairman, H. Comm. on Oversight and Gov't Reform (November 9, 2011) available at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2011-11-09.EEC%20to%20Issa.Boeing-NLRB.pdf>.

³⁸ Letter from Elijah E. Cummings, Ranking Member, H. Comm on Oversight and Gov't Reform, to Darrell E Issa, Chairman, H. Comm on Oversight and Gov't Reform (June 13, 2011) available at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/EEC%20to%20Issa%2006-13-11.pdf>.

Conclusion

The Oversight and Reform Committee should not use its limited resources to interfere directly in matter on appeal before the United States Supreme Court. The fact that Chairman Cummings is eager to do so—in the face of his prior statements counseling against such actions—shows just how desperate the Democrats are to prevent the Census Bureau from soliciting citizenship information.

The Democrats do not want anyone—the Census Bureau, Congress, or the American public—to know with accuracy the number of United States citizens in the country. A majority of Democrats in the House of Representatives support non-citizens voting in U.S. elections.³⁹ It seems rather apparent, therefore, that Democrats in the House hope to prevent the Census Bureau from asking about citizenship to increase the number of non-citizens voting in elections.

Chairman Cummings's decision to use Committee resources to interfere so directly in the Supreme Court's proceedings is another example of partisan, improper investigations into the Trump Administration.

³⁹ H.R. 1, 116th Cong., Motion to Recommit offered by Rep. Dan Crenshaw, Cong. Record March 8, 2019 H2600-H2602.

Appendices

Congress of the United States
Washington, DC 20515

January 8, 2019

The Honorable Wilbur L. Ross, Jr.
Secretary
U.S. Department of Commerce
1401 Constitution Avenue N.W.
Washington, D.C. 20230

Dear Secretary Ross:

The Committee on Oversight and Reform is seeking your testimony regarding the ongoing preparations for the 2020 Census and your decision to add a citizenship question—despite warnings from the Census Bureau that it could seriously harm the accuracy of the count.

The Committee also has serious concerns about new evidence, including emails and a supplemental memorandum you submitted in ongoing litigation in this matter, indicating that you orchestrated the addition of the citizenship question before any request was made by the Department of Justice (DOJ). This evidence appears to contradict your previous testimony to Congress.

Over the past three weeks, my staff have repeatedly tried to communicate with your office about a date in January or February on which you would be available to testify. I asked my staff to work with your office to identify a date that would work with your schedule, but your staff declined to identify any day on which you would be willing to appear.

Recently, your staff indicated that you would not testify until the government shutdown ends. This response is problematic for two reasons. First, President Trump indicated last week that the shutdown could last for “years.” The Trump Administration may not use the President’s own actions in causing the shutdown—and extending it—to avoid oversight by Congress, which is one of our core responsibilities under the Constitution. Second, the current partial government shutdown does not apply to the Census Bureau, which is funded and operating.

Yesterday, you were asked during an interview whether you would agree to appear before the Committee at my request. You indicated that you would, stating: “We feel like we have nothing to hide, so we will deal with all of his questions.”¹

For these reasons, I am writing to request that you testify before the Committee on February 12, 2019. If you have a conflict on that date that cannot be resolved, please contact my staff to arrange an alternate date for your testimony.

¹ *Squawk Box*, CNBC (Jan. 7, 2019) (online at www.cnbc.com/video/2019/01/07/secretary-ross-addresses-allegations-of-misleading-testimony.html).

Request for Documents

In addition, I request that you finally comply with the previous request for documents that I made with Representative Carolyn Maloney and other Members of the Oversight Committee on April 4, 2018.² Specifically, please provide the following documents to the Committee:

1. All documents and communications relating to any concerns expressed by the Census Bureau regarding the addition of a citizenship question to the 2020 Census;
2. All analyses, including drafts, relating to the potential impact that adding a citizenship question would have on response rates;
3. All communications between or among officials from the Department of Commerce, the Census Bureau, and any other office or entity inside or outside of the government regarding the addition of a citizenship question; and
4. All documents, communications, and analyses relating to cost increases that could result from the addition of a citizenship question.

In addition to producing these previously-requested documents, I ask that you provide the following documents regarding the Census' budget and timing:

5. All documents and communications relating to any 2020 Census program or testing that has been cancelled, delayed, or modified due to budget constraints; and
6. All documents and communications relating to concerns raised by the Department or the Census Bureau regarding budget constraints for the 2020 Census.

Requests for Information

Finally, I request that you provide answers to the questions that were sent to you by me, Representative Maloney, and more than 40 Members of Congress on June 28, 2018, and August 3, 2018.³ Specifically, please provide answers to the following questions:

² Letter from Ranking Member Elijah E. Cummings, Rep. Carolyn B. Maloney et al., House Committee on Oversight and Government Reform, to Secretary Wilbur L. Ross, Jr., Department of Commerce, and Acting Director Ron Jarmin, Ph.D., Census Bureau (Apr. 4, 2018) (online at https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/2018-04-04.%20EEC%20Maloney%20Norton%20Clay%20Connolly%20%26%20Gomez%20to%20Commerce%20re.Cens_....pdf).

³ Letter from Rep. Carolyn Maloney et al., to Secretary Wilbur L. Ross, Jr., Department of Commerce (June 28, 2018) (online at <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/2018-06-28.EEC%20et%20al%20to%20Ross-DOC%20re%202020%20Census%20Citizenship%20Question.pdf>); Letter from Rep. Carolyn Maloney et al., to Secretary Wilbur L. Ross, Jr., Department of Commerce (Aug. 3, 2018)

1. Who were the other senior Administration officials who proposed adding a citizenship question?
2. Who did you consult with, both inside or outside the Administration, about the addition of a citizenship question and when did these discussions take place?
3. Why did you testify before the House Ways and Means Committee on March 22, 2018, that DOJ had “initiated the request” for a citizenship question when your supplemental memo clearly states that you initiated that discussion with DOJ?
4. Did the rationale for the citizenship question being necessary for enforcement of the Voting Rights Act originate with the Department of Commerce or the Department of Justice?
5. When did you first begin considering adding a citizenship question to the 2020 Census? Who or what prompted you to begin this consideration?
6. When did you decide that a citizenship question should be added to the 2020 Census? Why did you come to that decision?
7. When did you first request that the Census Bureau include a citizenship question and to whom did you request this?
8. Did you discuss adding a citizenship question to the 2020 Census with any Trump Administration, Trump transition, or Trump campaign officials before you were nominated to be Secretary? If so, who did you speak to and what was the nature of the conversation?
9. Did you discuss or seek advice from past Census Bureau Directors about the impact that a citizenship question could have on the accuracy of the Census? If so, who?
10. Why did you and your staff believe it was necessary to have the Department of Justice request that the Bureau add a citizenship question? Why did you contact the Department of Homeland Security about a potential request and why did they deem the Justice Department to be in a better position to assist with your request?
11. When did the Department of Commerce begin working with the Department of Justice to request that a citizenship question be added to the census? Who was involved in this process? Were officials from the White House a part of the process? If so, who?

(online at <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/2018%200803%20Letter%20to%20Secretary%20Ross.pdf>).

12. Why did you repeatedly tell Congress, under oath, that the request for a citizenship question was initiated by the Department of Justice when your own emails show that you initiated the request?
13. Why did you provide a supplemental memo to the court on June 21, 2018, contradicting your testimony to Congress? Why did you not disclose these facts to Congress before the document was publicly released?
14. Please name all past and present senior administration officials with whom you discussed the idea of adding a citizenship question to the 2020 Census.

Please provide the documents requested above and the answers to the questions above by January 22, 2019.

The Committee on Oversight and Reform is the principal oversight committee of the House of Representatives and has broad authority to investigate "any matter" at "any time" under House Rule X.

An attachment to this letter provides additional instructions for responding to this request. If you have any questions, please contact my staff at (202) 225-5051.

Sincerely,



Elijah E. Cummings
Chairman
Committee on Oversight and Reform

Enclosure

cc: The Honorable Jim Jordan, Ranking Member



UNITED STATES DEPARTMENT OF COMMERCE
Office of Legislative and
Intergovernmental Affairs
Washington, D.C. 20230

January 11, 2019

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

Dear Representative Cummings,

Thank you for your January 8, 2019 letter regarding Secretary Wilbur Ross's decision to reinstate a citizenship question on the 2020 Census, which was announced in his March 26, 2018 Decision Memorandum. As you know, the Secretary shares your goal of ensuring a complete and accurate 2020 Census, has worked tirelessly to that end, and appreciates the opportunity to address your concerns.

In your correspondence, you mentioned several letters from 2018 you believe the Department did not answer. I look forward to working with your staff on this issue, because it is my understanding that we fully responded to those letters.

I also look forward to providing responses to your requests for documents and information; however, the staff and resources necessary to respond to your requests are currently unavailable due to the ongoing partial lapse in appropriations. This includes Census Bureau staff and resources that will be reassigned to this task upon the partial shutdown's resolution. I will, however, work with excepted Department employees who can be approved to work on this project and will plan to provide you with a first installment of responsive documents by January 29, 2019.

Unfortunately, the Secretary is unable to appear before the Committee on February 12, 2019, or later in February due to preexisting international travel commitments for government business. As of this date, the Secretary can be available to appear before the Committee on March 14, 2019 or March 28, 2019, and my staff will work together with yours to confirm one of those dates as they draw nearer. However, I am confident that the documents and information you will receive will obviate any need for the Secretary to appear and testify on this topic.

We appreciate the opportunity to assist with your inquiry. If you have any additional questions, please contact me at 202-482-3663.

Sincerely,

Michael Platt Jr.
Assistant Secretary for Legislative
and Intergovernmental Affairs

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND REFORM

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MINORITY (202) 225-5074

<http://oversight.house.gov>

February 12, 2019

Mr. Matthew G. Whitaker
Acting Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20230

Dear Acting Attorney General Whitaker:

I am writing to request that the Department of Justice (DOJ) fully comply with a previous request for documents regarding DOJ's role in the Trump Administration's decision to add a citizenship question to the 2020 Decennial Census.

On May 1, 2018, I wrote to DOJ with Representative Carolyn Maloney and 17 other Members of the Committee requesting documents to "help understand the substance of DOJ's justification" for requesting the addition of a citizenship question to the 2020 Census and "the process by which its request was made."¹ DOJ has not produced any of the documents we requested more than nine months ago.

Our previous letter referred to a December 12, 2017, letter from DOJ that asked the Census Bureau to add a citizenship question to the 2020 Census and asserted that gathering citizenship data on the decennial census was "critical to the Department's enforcement of Section 2 of the Voting Rights Act."²

On March 20, 2018, Secretary of Commerce Wilber Ross testified before Congress about his decision to add the citizenship question to the 2020 Census, stating: "We are responding *solely* to the Department of Justice's request."³

¹ Letter from Ranking Member Elijah E. Cummings, et al., Committee on Oversight and Government Reform, to John Gore, Acting Assistant Attorney General, Department of Justice (May 1, 2018) (online at <https://maloney.house.gov/sites/maloney.house.gov/files/2018-05-01.%20Dem.Members%20to%20DOJ-Gore%20re.Citizenship%20Question-2020%20Decennial%20Census.pdf>).

² Letter from Arthur E. Gary, General Counsel, Justice Management Division, Department of Justice, to Ron Jarmin, Acting Director, Census Bureau (Dec. 12, 2017) (online at www.documentcloud.org/documents/4340651-Text-of-Dec-2017-DOJ-letter-to-Census.html).

³ House Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies, *FY19 Budget Hearing: Department of Commerce* (Mar. 20, 2018) (emphasis added).

Since that time, new information has come to light that casts grave doubts on the veracity of Secretary Ross's testimony and assertions in the December 2017 letter from DOJ to the Census Bureau. Last month, a federal judge found that Secretary Ross violated the Administrative Procedures Act and other laws by adding the citizenship question to the Census, explaining:

He failed to consider several important aspects of the problem; alternately ignored, cherry-picked, or badly misconstrued the evidence in the record before him; acted irrationally both in light of that evidence and his own stated decisional criteria; and failed to justify significant departures from past policies and practices—a veritable smorgasbord of classic, clear-cut APA violations.⁴

The Court also found that aides to Secretary Ross “fed DOJ with the rationale for the request” in the December 2017 letter and that there is “reason to doubt that DOJ *itself* believed the VRA rationale” put forward in that letter.⁵

The Court noted that Acting Assistant Attorney General Jon Gore, who drafted the letter, later admitted that “none of the DOJ components with principal responsibility for enforcing the VRA requested the addition of a citizenship question; instead, he drafted the letter solely in response to the Secretary’s request.”⁶

Please produce the following documents by February 26, 2019. Unless otherwise stated, please produce documents for the period from January 20, 2017, through the present:

1. All documents and communications relating or referring to the addition of a citizenship question to the census;
2. Documents and communications sufficient to show who was involved in this request and the role of each individual who was involved;
3. All documents and communications within the Department of Justice and with outside entities regarding the request to add a citizenship question to the census, including but not limited to the White House, the Commerce Department, the Republican National Committee, the Trump Campaign, or Members of Congress;
4. All documents and communications relating or referring to the need to add a citizenship question to the Census in order to enforce the Voting Rights Act;
5. A list of all instances in which the lack of a citizenship question on the Decennial census negatively impacted DOJ’s Voting Rights Act enforcement efforts; and

⁴ *State of New York, et al., v. United States Department of Commerce, et al.* (Jan. 15, 2019) (online at www.brennancenter.org/sites/default/files/legal-work/2019-01-15-574-Findings%20Of%20Fact.pdf).

⁵ *Id.* (emphasis in original).

⁶ *Id.*

6. A list of all voting rights enforcement actions taken by the Department of Justice since January 20, 2017.

The Committee on Oversight and Reform is the principal oversight committee of the House of Representatives and has broad authority to investigate “any matter” at “any time” under House Rule X.

An attachment to this letter provides additional instructions for responding to this request. If you have any questions, please contact the Oversight Committee staff at (202) 225-5051.

Thank you for your attention to this matter.

Sincerely,



Elijah E. Cummings
Chairman

Enclosure

cc: The Honorable Jim Jordan, Ranking Member

Responding to Oversight Committee Document Requests

1. In complying with this request, produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. Produce all documents that you have a legal right to obtain, that you have a right to copy, or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party.
2. Requested documents, and all documents reasonably related to the requested documents, should not be destroyed, altered, removed, transferred, or otherwise made inaccessible to the Committee.
3. In the event that any entity, organization, or individual denoted in this request is or has been known by any name other than that herein denoted, the request shall be read also to include that alternative identification.
4. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, thumb drive, or secure file transfer) in lieu of paper productions.
5. Documents produced in electronic format should be organized, identified, and indexed electronically.
6. Electronic document productions should be prepared according to the following standards:
 - a. The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - b. Document numbers in the load file should match document Bates numbers and TIF file names.
 - c. If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
 - d. All electronic documents produced to the Committee should include the following fields of metadata specific to each document, and no modifications should be made to the original metadata:

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH, PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE, SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM, CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE, DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD,

INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION,
BEGATTACH.

7. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, zip file, box, or folder is produced, each should contain an index describing its contents.
8. Documents produced in response to this request shall be produced together with copies of file labels, dividers, or identifying markers with which they were associated when the request was served.
9. When you produce documents, you should identify the paragraph(s) or request(s) in the Committee's letter to which the documents respond.
10. The fact that any other person or entity also possesses non-identical or identical copies of the same documents shall not be a basis to withhold any information.
11. The pendency of or potential for litigation shall not be a basis to withhold any information.
12. In accordance with 5 U.S.C. § 552(d), the Freedom of Information Act (FOIA) and any statutory exemptions to FOIA shall not be a basis for withholding any information.
13. Pursuant to 5 U.S.C. § 552a(b)(9), the Privacy Act shall not be a basis for withholding information.
14. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
15. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) every privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author, addressee, and any other recipient(s); (e) the relationship of the author and addressee to each other; and (f) the basis for the privilege(s) asserted.
16. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (by date, author, subject, and recipients), and explain the circumstances under which the document ceased to be in your possession, custody, or control.
17. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, produce all documents that would be responsive as if the date or other descriptive detail were correct.

18. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data, or information not produced because it has not been located or discovered by the return date shall be produced immediately upon subsequent location or discovery.
19. All documents shall be Bates-stamped sequentially and produced sequentially.
20. Two sets of each production shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2105 of the Rayburn House Office Building.
21. Upon completion of the production, submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control that reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, data, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, communications, electronic mail (email), contracts, cables, notations of any type of conversation, telephone call, meeting or other inter-office or intra-office communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape, or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, mail, releases, electronic

message including email (desktop or mobile device), text message, instant message, MMS or SMS message, message application, or otherwise.

3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information that might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neutral genders.
4. The term “including” shall be construed broadly to mean “including, but not limited to.”
5. The term “Company” means the named legal entity as well as any units, firms, partnerships, associations, corporations, limited liability companies, trusts, subsidiaries, affiliates, divisions, departments, branches, joint ventures, proprietorships, syndicates, or other legal, business or government entities over which the named legal entity exercises control or in which the named entity has any ownership whatsoever.
6. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual’s complete name and title; (b) the individual’s business or personal address and phone number; and (c) any and all known aliases.
7. The term “related to” or “referring or relating to,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is pertinent to that subject in any manner whatsoever.
8. The term “employee” means any past or present agent, borrowed employee, casual employee, consultant, contractor, de facto employee, detailee, fellow, independent contractor, intern, joint adventurer, loaned employee, officer, part-time employee, permanent employee, provisional employee, special government employee, subcontractor, or any other type of service provider.
9. The term “individual” means all natural persons and all persons or entities acting on their behalf.

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5051
MINORITY (202) 225-5074
<http://oversight.house.gov>

February 14, 2019

Mr. John Gore
Principal Deputy Assistant Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20230

Dear Principal Deputy Assistant Attorney General Gore:

The Committee on Oversight and Reform requests your appearance for a transcribed interview on Thursday, February 28, 2019, at 10:00 a.m., in room 6400 O'Neill House Office Building.

The transcribed interview will address the Department of Justice's request to the Census Bureau to add a citizenship question to the 2020 Decennial Census and other topics.

We ask that you contact the Committee by February 20, 2019, to confirm your attendance.

The Committee on Oversight and Reform is the principal oversight committee of the House of Representatives and has broad authority to investigate "any matter" at "any time" under House Rule X.

If you have any questions, please contact Committee staff at (202) 225-5051.

Sincerely,


Elijah E. Cummings
Chairman

cc: The Honorable Jim Jordan, Ranking Member



UNITED STATES DEPARTMENT OF COMMERCE
Office of Legislative and
Intergovernmental Affairs
Washington, D.C. 20230

February 19, 2019

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

Dear Representative Cummings,

Pursuant to my January 11, 2019 and January 29, 2019 responses to your January 8, 2019 letter regarding Secretary Wilbur Ross's decision to reinstate a citizenship question on the 2020 Census, enclosed please find approximately 4,315 pages of documents responsive to Document Requests 1 through 4, along with a privilege log.

I look forward to producing a third installment of the documents you requested on March 6, 2019. The Department and its staff are devoting substantial time and resources to be as cooperative and responsive as possible.

In your January 8 letter, you requested that the Secretary provide answers to the questions asked in your June 28, 2018 and August 3, 2018 letters. The Secretary responded to those letters and answered those questions (which are reprinted nearly verbatim¹ in your January 8 letter) in two letters dated December 21, 2018. For your convenience and ease of reference, I have enclosed the December 21 letters here.

I remain confident that the documents and information you are receiving will obviate any need for the Secretary to appear and testify on this topic. We appreciate the opportunity to assist with your inquiry. If you have any additional questions, please contact me at (202)-482-3663.

Sincerely,

Michael Platt Jr.
Assistant Secretary for Legislative
and Intergovernmental Affairs

¹ All the questions in your January 8, 2019 letter are verbatim restatements of the questions asked in your June 28, 2018 and August 3, 2018 letters, except for one. Question 11 in your January 8 letter corresponds to Question 7 in your August 3 letter. On August 3 you asked, "When did the Department of Commerce begin working with the Department of Justice to request that a citizenship question be added *back* to the Census?" (emphasis added). However, in your January 8 letter, you removed the word "back" from the otherwise identical question. Although the later form of your question less accurately describes the facts, the Secretary's December 21, 2018 letter is responsive to both versions of the question.

Cc:

The Honorable Jim Jordan
Ranking Member, Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Enclosures:

1. December 21, 2019 letter from Secretary Ross to Representative Elijah Cummings
2. December 21, 2019 letter from Secretary Ross to Representative Elijah Cummings
3. Installment Number 2 of documents responsive to January 8, 2019 Letter from Chairman Elijah Cummings to Secretary Ross and Privilege Log

February 19, 2019 Letter from Secretary Wilbur
Ross to Hon. Elijah Cummings

Enclosure 1



UNITED STATES DEPARTMENT OF COMMERCE
The Secretary of Commerce
Washington, D.C. 20230

December 21, 2018

The Honorable Elijah E. Cummings
U.S. House of Representatives
Washington, DC 20515

Dear Representative Cummings:

Thank you for your letter regarding my decision to reinstate a citizenship question on the 2020 Decennial Census questionnaire. I apologize for the delay in response. I appreciate your perspective on Census Bureau issues and the time you have taken to share your concerns. Ensuring a complete and accurate Decennial Census is one of my most important duties and remains one of my highest priorities.

As you know, the Department of Justice (DOJ) on December 12, 2017 formally requested that the Census Bureau reinstate the citizenship question on the Decennial Census. DOJ stated that reinstatement of the citizenship question on the Decennial Census questionnaire "would best enable the Department to protect all American citizens' voting rights under Section 2."¹ DOJ's request initiated my decision-making process, which entailed a comprehensive program, policy, and legal review. During that process, I maintained an open mind and I consulted with my staff, the Census Bureau, and various stakeholders² to evaluate and respond to the request. No officials from the White House were a part of this process. After considering the information provided to me during this process, I made the conclusions described within my March 26, 2018 decision memorandum³ to reinstate the citizenship question. I directed my decision memorandum to the Under Secretary of Economic Affairs with instructions that the Census Bureau reinstate the question.⁴

Before receiving DOJ's formal request to reinstate the citizenship question, I and my staff discussed the concept with personnel at other federal departments.⁵ As the Secretary of

¹ Letter from Art Gary, Department of Justice, to Ron Jarmin, Census Bureau (Dec. 12, 2017) at Administrative Record (AR) 663, [http://osec.doc.gov/opog/FOIA/Documents/AR%20-%20FINAL%20FILED%20-%20ALL%20DOCS%20\[CERTIFICATION-INDEX-DOCUMENTS\]%206.8.18.pdf](http://osec.doc.gov/opog/FOIA/Documents/AR%20-%20FINAL%20FILED%20-%20ALL%20DOCS%20[CERTIFICATION-INDEX-DOCUMENTS]%206.8.18.pdf).

² See AR 763-1276.

³ Decision Memorandum from Secretary Wilbur Ross on Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire (Mar. 26, 2018) at AR 1313-1320. Also available at https://www.commerce.gov/sites/default/files/2018-03-26_2.pdf/.

⁴ *Id.* at 1320.

⁵ Before receipt of the DOJ request in December 2017, my staff or I had discussions with federal government officials including Mary Blanche Hankey, James McHenry, Gene Hamilton, Danielle Cutrona, John Gore, and Jefferson Sessions. Moreover, Steven Bannon called in the Spring of 2017 to request that I speak with Kris Kobach

Commerce, I felt it important to explore such issues with my staff to ensure that the Department is fulfilling its mission to the American people. DOJ repeatedly requested inclusion of the citizenship question on the American Community Survey for Voting Rights Act purposes. Based on this experience, DOJ ultimately determined that it wanted more granular citizenship data.⁶ Given that the Department of Commerce faced an April 1, 2018 statutory deadline to provide Congress with "a report containing the Secretary's determination of the questions proposed to be included" on the census questionnaire, 13 U.S.C. § 141(f)(2), I hoped to receive a definitive determination of non-interest or interest from DOJ as early in 2017 as possible.⁷ The decision-making process and my ultimate conclusion that the question should be reinstated occurred only after and in response to DOJ's request.

My testimony to Congress has been truthful and candid. The questions to which I responded and the context of those conversations make clear that I was referring to my decision-making process and thorough review of DOJ's request – not informal and hypothetical discussions predating that request.

Thank you for your inquiry and I look forward to continuing to work with the Census Bureau and the Members of Congress to ensure a complete and accurate 2020 Decennial Census.

If you have further concerns or questions, please have your staff contact Michael Platt, Jr., Assistant Secretary for Legislative and Intergovernmental Affairs, at (202) 482-3663.

Sincerely,

A handwritten signature in dark ink, appearing to read "Wilbur Ross", written in a cursive style.

Wilbur Ross

about the latter's ideas about including a citizenship question on the 2020 Decennial Census. Notably, my only decision in response to Mr. Kobach's ideas was my complete rejection of his proposed citizenship question configuration and the purposes motivating his preferred configuration. I have always been and will always be committed to counting everyone once, only once, and in the right place.

⁶ Earl Comstock was referred to Gene Hamilton at the Department of Homeland Security (DHS) by Mr. McHenry at the Department of Justice (DOJ). However, Mr. Hamilton informed Mr. Comstock that DOJ – not DHS – was the federal agency that would most utilize the data obtained from asking a citizenship question on the Decennial Census.

⁷ As stated in the document, itself, I issued my June 21, 2018 Supplemental Memorandum "to provide further background and context regarding my March 26, 2018, memorandum concerning the reinstatement of a citizenship question to the decennial census."

February 19, 2019 Letter from Secretary Wilbur
Ross to Hon. Elijah Cummings

Enclosure 2



UNITED STATES DEPARTMENT OF COMMERCE
The Secretary of Commerce
Washington, D.C. 20230

December 21, 2018

The Honorable Elijah E. Cummings
U.S. House of Representatives
Washington, DC 20515

Dear Representative Cummings:

Thank you for your letter regarding my decision to reinstate a citizenship question on the 2020 Decennial Census questionnaire. I apologize for the delay in response. I appreciate your perspective on Census Bureau issues and the time you have taken to share your concerns. Ensuring a complete and accurate Decennial Census is one of my most important duties and remains one of my highest priorities.

As you know, the Department of Justice (DOJ) on December 12, 2017 formally requested that the Census Bureau reinstate the citizenship question on the Decennial Census. DOJ stated that reinstatement of the citizenship question on the Decennial Census questionnaire "would best enable the Department to protect all American citizens' voting rights under Section 2."¹ DOJ's request initiated my decision-making process, which entailed a comprehensive program, policy, and legal review. During that process, I maintained an open mind and I consulted with my staff, the Census Bureau, and various stakeholders² to evaluate and respond to the request. After considering the information provided to me during this process, I made the conclusions described within my March 26, 2018 decision memorandum³ to reinstate the citizenship question. I directed my decision memorandum to the Under Secretary of Economic Affairs with instructions that the Census Bureau reinstate the question.⁴

Before receiving DOJ's formal request to reinstate the citizenship question, I and my staff discussed the concept with personnel at other federal departments.⁵ As the Secretary of

¹ Letter from Art Gary, Department of Justice, to Ron Jarmin, Census Bureau (Dec. 12, 2017) at Administrative Record (AR) 663, [http://osec.doc.gov/opog/FOIA/Documents/AR%20-%20FINAL%20FILED%20-%20ALL%20DOCS%20\[CERTIFICATION-INDEX-DOCUMENTS\]%206.8.18.pdf](http://osec.doc.gov/opog/FOIA/Documents/AR%20-%20FINAL%20FILED%20-%20ALL%20DOCS%20[CERTIFICATION-INDEX-DOCUMENTS]%206.8.18.pdf).

² See AR 763-1276.

³ Decision Memorandum from Secretary Wilbur Ross on Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire (Mar. 26, 2018) at AR 1313-1320. Also available at https://www.commerce.gov/sites/default/files/2018-03-26_2.pdf.

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⁵ Before receipt of the DOJ request in December 2017, my staff or I had discussions with federal government officials including Mary Blanche Hankey, James McHenry, Gene Hamilton, Daniell Cutrona, John Gore, and Jefferson Sessions. Moreover, Steven Bannon called in the Spring of 2017 to request that I speak with Kris Kobach about the latter's ideas about including a citizenship question on the 2020 Decennial Census. Notably, my only decision in response to Mr. Kobach's ideas was my complete rejection of his proposed citizenship question.

Commerce, I felt it important to explore such issues with my staff to ensure that the Department is fulfilling its mission to the American people. DOJ repeatedly requested inclusion of the citizenship question on the American Community Survey for Voting Rights Act purposes. Based on this experience, DOJ ultimately determined that it wanted more granular citizenship data. Given that the Department of Commerce faced an April 1, 2018 statutory deadline to provide Congress with "a report containing the Secretary's determination of the questions proposed to be included" on the census questionnaire, 13 U.S.C. § 141(f)(2), I hoped to receive a definitive determination of non-interest or interest from DOJ as early in 2017 as possible.⁶ The decision-making process and my ultimate conclusion that the question should be reinstated occurred only after and in response to DOJ's request.

My testimony to Congress has been truthful and candid. The questions to which I responded and the context of those conversations make clear that I was referring to my decision-making process and thorough review of DOJ's request – not informal and hypothetical discussions predating that request.

Thank you for your inquiry and I look forward to continuing to work with the Census Bureau and the Members of Congress to ensure a complete and accurate 2020 Decennial Census.

If you have further concerns or questions, please have your staff contact Michael Platt, Jr., Assistant Secretary for Legislative and Intergovernmental Affairs, at (202) 482-3663.

Sincerely,

A handwritten signature in dark ink, appearing to read "Wilbur Ross". The signature is fluid and cursive, with the first name "Wilbur" written in a larger, more prominent script than the last name "Ross".

Wilbur Ross

configuration and the purposes motivating his preferred configuration. I have always been and will always be committed to counting everyone once, only once, and in the right place.

⁶ As stated in the document, itself, I issued my June 21, 2018 Supplemental Memorandum "to provide further background and context regarding my March 26, 2018, memorandum concerning the reinstatement of a citizenship question to the decennial census."

February 19, 2019 Letter from Secretary Wilbur
Ross to Hon. Elijah Cummings

Enclosure 3



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

FEB 25 2019

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

Dear Chairman Cummings:

This responds to your letter to Acting Attorney General Whitaker, dated February 12, 2019, requesting certain documents related to the addition of a question on citizenship to the 2020 Census.

Enclosed with this letter is a CD-ROM containing 7 files, consisting of 190 pages, produced in response to your request, Bates numbered HOCR-Census-02122019 -000001- HOCR-Census-02122019-000190. This production contains emails from Department of Justice officials and correspondence, which have previously been made public.

We will supplement this response when additional materials become available. If you have questions regarding this production, please feel free to contact my office.

Sincerely,

A handwritten signature in black ink, appearing to read "S.E. Boyd", written over the word "Sincerely,".

Stephen E. Boyd
Assistant Attorney General

Enclosure

cc: The Honorable Jim Jordan
Ranking Member



March 5, 2019

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

Dear Chairman Cummings,

I am writing regarding the Committee's request for Secretary Ross to testify about the "ongoing preparations for the 2020 Census and [the] decision to add a citizenship question" made in your January 8, 2019 letter to the Department. The Secretary takes his commitment to Congress seriously as evidenced by his initial offer to appear early in the 116th Congress and remains committed to appearing voluntarily before the Committee. As you are aware, we responded to your January 8 letter three days later on January 11, expressing our intention to fully cooperate with the Committee, providing potential dates (March 14 and March 28) for the Secretary to appear and testify on those two important subjects. In the days following our written response, our staffs arrived at March 14 as the mutually preferable date and agreed to have the Secretary testify on those specific topics. Since that time, the Department of Commerce ("Department") has begun to plan and prepare for this March 14 testimony. Recognizing the significant oversight role of the Committee, the Department has prioritized its finite resources and personnel to identify and produce a large volume of documents to your staff in its best effort to be responsive.

The Department then received your February 8, 2019 letter. That letter requests another large-scale search and production of documents related to Secretary Ross's financial disclosures and ethics obligations. In the days following our receipt of that letter, it became clear that the Committee intended to expand the scope of the March 14 hearing to ask the Secretary questions about his personal finances and ethics obligations—topics that we did not anticipate nor expect to be covered in such detail and depth based on the frequent and cordial communications between our staffs. In continuing communications, your staff then expressed its desire to review as many documents as possible related to financial disclosures *prior* to the March 14 hearing. In addition, the Department also received your February 19, 2019 letter about reported technology transfer to Saudi Arabia, which requires a further comprehensive search for responsive documents. Based on our limited resources, constrained personnel, timing, and desire to be responsive to the Committee's initial request, my staff reiterated to yours that the agreed scope of the March 14 hearing was the two subjects you identified in your January 8 letter. In response, your staff clarified that the Committee reserves the right to question the Secretary about *any* topic on March 14, notwithstanding our earlier correspondence and understood scope of the hearing.

Under the Secretary's leadership, the Department has cooperated fully and in good faith with the Committee's requests. We have produced approximately 5,700 pages of documents responsive to your requests, and another installment of approximately 3,000 pages is scheduled to

be produced on March 6. My staff has stayed in virtually constant communication with yours. We have expended hundreds of hours of staff time to satisfy your requests (including time expended during the 35-day lapse in appropriations, to the extent consistent with the law). This should demonstrate that we take oversight responsibilities and obligations very seriously and accordingly are working as quickly as possible to produce on a rolling basis the significant volume of information you have requested in three separate letters concerning three separate topics.

In light of our good faith efforts and hard work of the Department's personnel, I was surprised to see that your chief oversight counsel sent an email to the Department's Chief of Staff on Friday, March 1, 2019, expressing unfounded "concern[] that the Department does not appear to be making a sufficient effort to produce documents responsive to the Committee's requests." Given the sincere efforts of the Department's staff to be maximally cooperative and responsive to your requests, I found this communication somewhat disappointing given the open and affable relations we have nurtured throughout this process.

On substance, your chief counsel's email appears to make claims about our staffs' working relationship that are at odds with the facts. As previously noted, my team has been in nearly constant communication with yours, has provided voluminous documents responsive to your requests, and is continuing to work as expeditiously as possible to produce the remainder. Moreover, we have now three times responded to the same fourteen questions posed in your January 8 letter. In addition, the Department's Director of Legislative Affairs provided a phone briefing to your staff to further detail those previous written responses to the Committee. You are likely aware that our current staffing levels and the sheer volume of the Committee's and other congressional requests compel us to prioritize those requests in the order in which they are received.

Furthermore, your chief counsel's email states that the Department failed to respond to a February 7, 2017, request from the Subcommittee on Government Operations regarding compliance with whistleblower protection laws. This is simply not true. The Department responded to the Subcommittee letter on March 10, 2017. I have enclosed another copy of that response with this letter.

Your chief counsel's email has raised one fair point, which we have also repeatedly been told by your staff: the Committee would like all of the documents you have requested before the Secretary testifies. Given that legitimate demand, our genuine desire to be responsive to the Committee's requests, and because we feel the Committee expanded the originally agreed upon scope of the hearing, we feel as though we have no choice but to temporarily postpone the Secretary's testimony until a date after March 14. To be clear, the Secretary has every intention to appear before the Committee and continue assisting in your oversight capacity—the Department simply needs more time to produce responsive documents and prepare to testify on the broad range of important topics raised in your letters.

To that end we commit to work with your staff on a more appropriate and reasonable time for the Secretary to testify. As soon as we receive, in writing, a complete list of the subject matter and scope about which the Committee intends to question the Secretary, my office will work with your staff to confirm a hearing date. Based on the extensive array of topics raised in your January

8, February 8, and February 19, 2019 letters, the Department will simply not be adequately prepared to provide responsive documents and testimony before April 29, 2019, upon your return from recess. However, we are open to working with your staff on earlier times if the scope could be limited to allow for proper review and preparation.

We appreciate the opportunity to assist with your inquiries and will continue to cooperate with the Committee fully and in good faith. If you have any additional questions, please contact me at (202) 482-3663.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael Platt Jr.", with a stylized flourish at the end.

Michael Platt Jr.
Assistant Secretary for Legislative
and Intergovernmental Affairs

Cc:

The Honorable Jim Jordan
Ranking Member, Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Enclosure

1. March 10, 2017 Letter to Hon. Mark Meadows, Committee on Oversight and Government Reform, regarding WPEA compliance

March 4, 2019 Letter to Hon. Elijah Cummings

Enclosure 1



The Honorable Mark Meadows
Chairman, Committee on Oversight and Government Reform
Subcommittee on Government Operations
Washington, DC 20515

Dear Chairman Meadows:

This responds to your letter of February 7, 2017 requesting information about the Department of Commerce's (the Department) use of nondisclosure agreements and the implementation of its responsibilities under the Whistleblower Protection Act of 2012 (WPEA). The Department takes its obligations under the WPEA seriously and has undertaken a number of appropriate steps to ensure that employees are notified of their rights as they pertain to communications with Congress, the reporting of violations to an inspector general, or other whistleblower protections under the Act.

The Department's Office of Inspector General (OIG) oversees the Whistleblower Protection Program, and promotes awareness of, and compliance with, whistleblower protections. The Department's OIG has posted on its website a notice informing employees of the WPEA's requirement that every nondisclosure policy, form, or agreement (with current or former federal employees) contain the statutorily required language set forth in Section 115 of the Act, codified at 5 USC § 2302(b)(13). The OIG has also posted a list of relevant Executive Orders and statutory provisions. The language from the Department OIG's website is provided below and can also be found online at: <https://www.oig.doc.gov/Pages/Whistleblower-Protection-Program.aspx>

Important Notice: Whistleblower Protection Enhancement Act of 2012 Required Statement — Nondisclosure Agreements

Pursuant to the Whistleblower Protection Enhancement Act of 2012, the following statement applies to every nondisclosure policy, form, or agreement of the Government (with current or former federal employees), including those in effect before the Act's effective date of December 27, 2012:

"These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling."

The following Executive orders and statutory provisions are controlling in the case of any conflict with an agency non-disclosure policy, form, or agreement, as of March 14, 2013:

- Executive Order No. 13526;
- Section 7211 of Title 5, United States Code (governing disclosures to Congress);
- Section 1034 of Title 10, United States Code as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the military);
- Section 2302(b)(8) of title 5, United States Code, as amended by the Whistleblower Protection Act of 1989 (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats);
- Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing disclosures that could expose confidential Government agents);
- The statutes which protect against disclosure that may compromise the national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code; and
- Section 4(b) of the Subversive Activities Control Act of 1950 (50 U.S.C. 783(b)).

The Department has also posted on its Office of General Counsel website a model standard non-disclosure agreement (NDA), which contains the statutorily mandated provision as well as a separate provision that the agreement does not bar disclosures to Congress. The language from the Department's own model standard NDA is provided below and can also be found online at:

https://ogc.commerce.gov/sites/ogc.commerce.gov/files/gld_standard_nondisclosure_agreement_new.pdf

6. As required by 5 U.S.C. § 2302(b)(13), any restriction with respect to disclosure by a Government employee must be consistent with, not supersede, nor conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling. This paragraph shall not be construed to authorize the withholding of information from Congress or the taking of any personnel action against an employee who discloses information to Congress.
7. This agreement does not bar disclosures to Congress or to an authorized official of an executive agency or the Department of Justice that are essential to reporting a substantial violation of law.

In addition, several of the Department Bureaus have posted model standard NDAs online that include the required statutory language.¹ Moreover, the Department's No Fear Act training, which is mandatory for all employees, describes avenues for employees to report whistleblowing activities, and includes explicit reference to Congress (as well as to the OIG or the Office of Special Counsel) as an appropriate confidential channel for disclosures involving classified national security information.

Moreover, in the summer of 2014, the Department issued guidance by e-mail to all Department employees reminding them of the WPEA's protections for federal employees who disclose evidence of waste, fraud, or abuse, including that any NDAs signed in order to access classified or other sensitive information include, or if previously executed without the provision, should be read to incorporate, the required language set forth in Section 115 of the Act. In addition to the Department-wide notice, a separate notification was also sent to all Department Bureau and Office heads reminding them of the WPEA's requirement that any non-disclosure policy, form, or agreement include the Section 115 language.

Finally, we note that the Department's Administrative Order DAO 219-1 on Public Communication, which is posted on the Department's website, explicitly references the Lloyd-LaFollette Act (5 U.S.C. § 7211) and states: "The rights of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied."

See: http://www.osec.doc.gov/opog/dmp/daos/dao219_1.html

We hope this information has been helpful. If you have any further questions, please contact me at 202-482-3663.

Sincerely,



James Schuffreider
Performing the non-exclusive duties of the
Assistant Secretary of Commerce
for Legislative and Intergovernmental Affairs

✓cc: The Honorable Gerald E. Connolly, Ranking Member

¹ See e.g. <https://www.uspto.gov/about-us/organizational-offices/office-general-counsel/whistleblower-protection-enhancement-act> and <http://www.wrc.noaa.gov/wrso/forms/sf312.pdf> and https://www.nist.gov/sites/default/files/documents/2017/01/12/nist_model_nda_receipt_of_proprietary_information_v2016.2_fillable_for_website.doc_003.pdf

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5051

MINORITY (202) 225-5074

<http://oversight.house.gov>

March 6, 2019

The Honorable Wilbur L. Ross, Jr.
Secretary
U.S. Department of Commerce
1401 Constitution Avenue, N.W.
Washington, D.C. 20230

Dear Mr. Secretary:

I have reviewed the letter that your Assistant Secretary for Legislative and Intergovernmental Affairs sent yesterday seeking to postpone your long-planned testimony before the Committee on March 14, 2019.¹ After carefully considering this request, I am writing to inform you that the Committee's hearing will remain on March 14, and the Committee expects you to testify as agreed. However, the Committee is willing to make several accommodations to address the concerns set forth in the letter yesterday, and they are detailed below.

The Committee invited you to testify on January 8, 2019—more than nine weeks ago—and you have had more than enough time to prepare.² In addition, your staff confirmed repeatedly over the past two months that you would appear voluntarily:

- On January 11, 2019, your Assistant Secretary for Legislative and Intergovernmental Affairs responded to the Committee's invitation by writing that, although you were unavailable for the entire month of February, you were "available to appear before the Committee on March 14, 2019 or March 28, 2019."³

¹ Letter from Michael Platt Jr., Assistant Secretary for Legislative and Intergovernmental Affairs, Department of Commerce, to Chairman Elijah E. Cummings, Committee on Oversight and Reform (Mar. 5, 2019) (online at https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019.03.05%20Letter%20to%20Chairman%20Cummings_0.pdf).

² Letter from Chairman Elijah E. Cummings, Committee on Oversight and Reform, to Secretary Wilbur L. Ross, Jr., Department of Commerce (Jan. 8, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-01-08.EEC%20to%20Ross-DOC%20re%20Citizenship%20Question.pdf>).

³ Letter from Michael Platt Jr., Assistant Secretary for Legislative and Intergovernmental Affairs, Department of Commerce, to Chairman Elijah E. Cummings, Committee on Oversight and Reform (Jan. 11, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019.01.11%20Response%20to%20Chairman>

- On January 18, 2019, Committee staff emailed your staff, writing: “We will proceed with the March 14th date for the hearing with Secretary Ross.” Your staff confirmed receipt.
- On January 23, 2019, your staff confirmed during a telephone call with Committee staff that you were comfortable with the March 14 hearing date and that no further discussion was necessary.
- On February 1, 2019, your staff confirmed again to Committee staff that you would appear at the March 14 hearing.
- On February 7, 2019, the Committee sent a letter thanking you for agreeing to testify at the hearing, which would “examine the ongoing preparations for the 2020 Decennial Census, the addition of a citizenship question, and other topics.”⁴
- On February 22, 2019, your staff confirmed yet again during a telephone call with Committee staff that you would appear before the Committee voluntarily on March 14.

In the letter yesterday, your Assistant Secretary stated that you would not be prepared to testify about topics unrelated to the Census. Specifically, he wrote that you would not be ready to answer questions relating to two letters the Committee sent to you last month: the first was sent on February 8, 2019, requesting information relating to your financial disclosure filings; and the second was sent on February 19, 2019, seeking information about efforts by the Trump Administration to transfer sensitive nuclear technology to Saudi Arabia.⁵

In order to accommodate these concerns, the scope of the Committee’s March 14 hearing will not include questions relating to the transfer of nuclear technology to Saudi Arabia. In addition, if you believe you are not prepared to answer questions relating to your own financial disclosures, the Committee will allow you to provide responsive information for the record, and I will make a statement to this effect at the hearing.

In his letter yesterday, your Assistant Secretary also expressed concern that the

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⁴ Letter from Chairman Elijah E. Cummings, Committee on Oversight and Reform, to Secretary Wilbur L. Ross, Jr., Department of Commerce (Feb. 7, 2019) (emphasis added) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-02-07%20EEC%20to%20Ross%20re%20Thanking%20for%20Agreeing%20to%20Testify.pdf>).

⁵ Letter from Chairman Elijah E. Cummings, Committee on Oversight and Reform, to Secretary Wilbur L. Ross, Jr., Department of Commerce (Feb. 8, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-02-08.EEC%20to%20Ross%20re%20Conflicts%20of%20Interest.pdf>); Letter from Chairman Elijah E. Cummings, Committee on Oversight and Reform, to Secretary Wilbur L. Ross, Jr., Department of Commerce (Feb. 19, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-02-19.EEC%20to%20Ross-DOC%20re%20IP3.pdf>).

Committee is insisting on full compliance with our document requests. This should not come as a surprise to anyone. However, as an additional accommodation, the Committee will agree to receive document productions relating to both your financial disclosures and the transfer of nuclear technology to Saudi Arabia after the March 14 hearing.

To further accommodate your concern, the Committee will narrow the documents that must be produced before the March 14 hearing to a specific set of priority documents that are key to our understanding of the communications around the addition of the citizenship question. These priority documents were sought in Request 3 of the Committee's January 8, 2019, letter. For your reference, that request asked you to produce the following documents, which the Committee must receive in unredacted form:

All communications between or among officials from the Department of Commerce, the Census Bureau, and any other office or entity inside or outside of the government regarding the addition of a citizenship question.⁶

Please note that the existence of separate civil litigation is not a valid basis to withhold these documents from the Committee. As the Supreme Court has stated:

But surely a congressional committee which is engaged in a legitimate legislative investigation need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding, *Sinclair v. United States*, supra, at 295, or when crime or wrongdoing is disclosed, *McGrain v. Daugherty*, 273 U.S. 135, 179-180.⁷

I trust that these multiple accommodations and clarifications address the concerns set forth in the letter from your Assistant Secretary. Please confirm by 5 p.m. tomorrow, Thursday, March 7, 2019, whether you will appear voluntarily on March 14, as previously agreed, and whether you intend to produce the priority documents in unredacted form.

If you do not accept this offer, the Committee may need to consider alternative means to obtain your testimony.

⁶ Letter from Chairman Elijah E. Cummings, Committee on Oversight and Reform, to Secretary Wilbur L. Ross, Jr., Department of Commerce (Jan. 8, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-01-08.EEC%20to%20Ross-DOC%20re%20Citizenship%20Question.pdf>).

⁷ *Hutcheson v. United States*, 369 U.S. 599, 618 (1962).

The Honorable Wilbur L. Ross, Jr.
Page 4

If you have any questions, please contact Committee staff at (202) 225-5051.

Sincerely,



Elijah E. Cummings
Chairman

cc: The Honorable Jim Jordan, Ranking Member



UNITED STATES DEPARTMENT OF COMMERCE
The Secretary of Commerce
Washington, D.C. 20230

March 7, 2019

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

Dear Mr. Chairman:

Thank you for your March 6, 2019, letter and for taking my phone call this afternoon. As we discussed, your letter added a new request for unredacted documents, and I proposed rescheduling the hearing to April 9 in order to permit the time needed to respond to this new request. I am disappointed that this reasonable request could not be accommodated.

As requested in your letter, I will appear at the hearing on March 14 at 10:00 am to answer the Committee on Oversight and Reform's (Committee) questions on the preparations for the 2020 Census and the addition of the citizenship question. I appreciate the commitment you made in the letter that the scope of the hearing will not include questions relating to the transfer of nuclear technology to Saudi Arabia and that additional documents requested in your letters of February 8 and February 19 will be provided after the hearing. I also appreciate your commitment to state at the hearing that the Committee will allow me to provide written responses for the record to questions related to my financial disclosures.

As part of our continuing cooperation, the Department of Commerce yesterday delivered another approximately 3,000 pages of responsive documents to the Committee. This was the third production of documents the Department has provided in response to the Committee's requests, which total nearly 9,000 pages so far. Furthermore, we have committed to making a fourth production to the Committee on March 28, 2019. The Department already has committed many hundreds of hours solely to the task of responding to the Committee's document requests.

I look forward to continuing to work together to serve the American public.

Sincerely,

A handwritten signature in black ink, reading "Wilbur Ross".

Wilbur Ross

cc: The Honorable Jim Jordan, Ranking Member



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

MAR 25 2019

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

Dear Mr. Chairman:

The Department of Justice (Department) writes to correct the record regarding the transcribed interview of Department official John Gore and to provide context for the circumstances that gave rise to the interview. As set forth below, the March 14, 2019 Memorandum from the Committee's Majority Staff, entitled "Supplemental Memo on Transcribed Interview with John Gore Regarding Addition of Citizenship Question to Census" (Supplemental Memorandum), mischaracterizes Mr. Gore's testimony and the record in this matter.

The Constitution establishes the executive and legislative branches as co-equal. "The constitutional role of Congress is to adopt general legislation that will be implemented—'executed'—by the executive branch."¹ As part of its legislative function, Congress has "[b]road . . . power" to conduct oversight, but that power is not "without limitations" and does not extend to inquiring "into matters which are within the exclusive province of one of the other branches of Government."² Moreover, in the course of carrying out its duty to faithfully execute the law, including its duty to represent the United States in court, the executive branch may have "a legitimate, constitutionally recognized need to keep certain information confidential."³

As co-equal branches of government, Congress and the executive branch have "the obligation . . . to accommodate the legitimate needs of the other," where "Congress has a legitimate need for information that will help it legislate, and the executive branch has a legitimate, constitutionally recognized need to keep certain information confidential."⁴ The executive branch

¹ Congressional Requests for Confidential Executive Branch Information, 13 Op. O.L.C. 153, 153 (1989) (Congressional Requests).

² *Barenblatt v. United States*, 360 U.S. 109, 111-12 (1959).

³ Congressional Requests, 13 Op. O.L.C. at 157.

⁴ *Id.* at 157-58.

and the Department have long maintained a “general practice [of] attempt[ing] to accommodate whatever legitimate interests Congress may have in obtaining information, while, at the same time, preserving executive branch interests in maintaining essential confidentiality.”⁵ The executive branch and Congress have facilitated this interbranch cooperation through an “accommodation process” that calls upon each branch to “explain to the other why it believes its needs to be legitimate” and “to assess the needs of one branch and relate them to those of the other.”⁶

Consistent with this accommodation responsibility, the Department agreed to make Mr. Gore voluntarily available to the Committee for a transcribed interview. The Department conditioned this agreement on several mutual understandings. Chief among those was the Committee’s agreement that the Department would have a full and fair opportunity to review the transcript of Mr. Gore’s testimony before it was made part of the Committee record, and that the transcript would not be made public or become part of the record prior to that review. In addition, and importantly, the Department maintained throughout this phase of the accommodation process that Mr. Gore would not be able to answer questions bearing on the Department’s internal deliberations. The Committee was well aware of the Department’s position on the scope of the transcribed interview and elected to move forward with the interview under those limitations.

This mutual understanding was vital to the Department’s willingness to make Mr. Gore available for a voluntary interview. As the Department repeatedly explained to the Committee, the Department has an essential need to maintain the confidentiality of its internal deliberations. Maintaining confidentiality in executive branch deliberations facilitates robust and open discussion. Fully-informed decision-making would be chilled if executive branch officials and staff believed that those discussions could become public. Moreover, the Department continues to represent the United States in ongoing litigation, including in the United States Supreme Court, regarding the Commerce Department’s decision to reinstate the citizenship question on the 2020 Census. The United States’ litigation position regarding privileges, which was not challenged in litigation, could be compromised if those very same confidential deliberations were made public through a concurrent oversight process.

Premised upon our mutual understanding, Mr. Gore appeared voluntarily and was questioned by majority and minority Committee staff for several hours on March 7, 2019. Mr. Gore answered hundreds of questions from Committee staff. When Mr. Gore did not answer a question during the interview, he did so only on the instruction of the Department’s counsel and based on the Department’s legitimate confidentiality and litigation interests. Both majority and minority staff stated on the record that they had asked all of their questions of Mr. Gore and had no further questions at that time.⁷ This process represents a good faith effort by the Department

⁵ *Id.* at 153.

⁶ *Id.* at 159.

⁷ Transcribed Interview of John Gore (March 7, 2019) at 99 (minority), 179 (majority) (Gore Transcript).

to accommodate the Committee and to establish a record of which questions implicate vital executive branch confidentiality interests and remain open for further discussion in the accommodation process.

The Committee also had access to a transcript of Mr. Gore's seven-hour deposition in the civil litigation before interviewing Mr. Gore. The Department offered that transcript to the Committee, and it is our understanding that the Committee obtained that transcript from another source.

In light of these good faith efforts by the Executive Branch, the Department is disappointed that the Committee has acted in a manner inconsistent with the spirit of mutual accommodation.

On March 14, just one week after Mr. Gore's interview, the Committee publicly released the Supplemental Memorandum, which includes and mischaracterizes Mr. Gore's testimony and provides selective, misleading excerpts from the transcript. On the same day, the Committee issued a press release that linked to the Supplemental Memorandum on both its website and its Twitter feed.⁸ The Committee provided the Supplemental Memorandum to its members and referenced the Supplemental Memorandum repeatedly in its questioning of Secretary Ross at a public hearing that same day. The Department did not have a full and fair opportunity to review the transcript prior to the Committee's public disclosure of portions of it, nor did the Department receive an advance copy of the Supplemental Memorandum for review.⁹ This has limited the Department's ability to timely respond to mischaracterizations in the record.

The Supplemental Memorandum mischaracterizes Mr. Gore's testimony to the Committee in at least four ways. First, the Supplemental Memorandum alleges that Mr. Gore exhibited a "refusal to answer" the Committee's requests.¹⁰ This is an unfair characterization. Mr. Gore answered over five hundred questions posed by Committee staff, and when he did not answer, he did so only on the instruction of Department counsel. As the Committee knew, the Department's accommodation was to make Mr. Gore available for a voluntary interview to answer only those

⁸ Oversight Committee (OversightDems). "News Alert: Chairman @RepCummings releases memo on interview with #DOJ Official on citizenship question for #2020Census <https://oversight.house.gov/news/press-releases/cummings-releases-memo-on-interview-with-doj-official-on-citizenship-question-0>." Mar. 14, 2019, 10:30 a.m. Tweet. <https://twitter.com/OversightDems/status/1106216034812547073>.

⁹ Majority staff emailed the Department after 6 p.m. on Tuesday, March 12, inviting the Department to review the transcript the next day in Committee offices. The Department was unable to review the transcript in Committee offices on Wednesday, March 13. The Department was offered a subsequent opportunity to review the transcript of Mr. Gore's interview in Committee offices on March 15, after issuance of the Supplemental Memorandum, and the appropriate attorneys did so on March 19.

¹⁰ Supplemental Memorandum at 1.

questions that could be answered without compromising the ongoing litigation or other executive branch confidentiality interests. This was an appropriate effort to satisfy the Committee's request at this phase in the accommodation process.¹¹ The Supplemental Memorandum's suggestion that the Department's instructions were somehow improper or unexpected contravenes both our shared understanding that the Department would make those instructions and the Committee's fundamental accommodation obligation.¹²

Second, the Supplemental Memorandum misleadingly describes as "new information" received from Mr. Gore's interview the existence of a "secret" memorandum and note authored by a Department of Commerce official.¹³ But Mr. Gore previously testified regarding the memorandum and the note during his deposition in the civil litigation and the Committee had access to a transcript of that deposition prior to interviewing Mr. Gore.¹⁴ The Department also provided a description of the memorandum and note on a privilege log produced in the *New York v. Department of Commerce* litigation. The parties in that case extensively litigated the government's assertion of privilege over those documents. After an in camera review, the district court upheld the government's assertion of privilege and held that the government could not be compelled to produce those documents to the plaintiffs.¹⁵ Producing those documents to the Committee could be viewed in these circumstances as a waiver of the privilege that the federal court already has upheld.

Third, the Supplemental Memorandum incorrectly implies that Mr. Gore identified Mark Neuman as "a former member of the Trump Transition Team."¹⁶ Mr. Gore, however, offered no such testimony. The transcript excerpts in the Supplemental Memorandum omit the portion of Mr. Gore's testimony where he stated that he believes Mr. Neuman to be a former employee of the Department of Commerce or the Census Bureau who in the fall of 2017 was serving as an "advisor" to the Commerce Department on Census-related issues.¹⁷ Mr. Gore had no knowledge of, and has never testified about, whether Mr. Neuman was affiliated with the Trump Transition Team.

¹¹ See Congressional Requests, 13 Op. O.L.C. at 157-62.

¹² See *id.*

¹³ Supplemental Memorandum at 1-2.

¹⁴ Gore Deposition, 118:18-125:22 (Oct. 16, 2018) (discussing the note and the memorandum).

¹⁵ See *New York v. Department of Commerce*, No. 18-CIV-2921, Minute Order, ECF No. 361 (S.D.N.Y. Sept. 30, 2018).

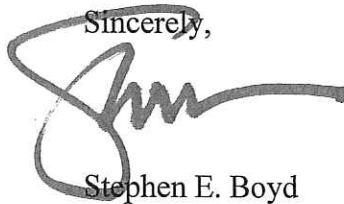
¹⁶ Supplemental Memorandum at 2.

¹⁷ See Gore Transcript at 22.

Finally, the Department is concerned with the Committee's mischaracterization of the draft letter that Mr. Neuman provided to Mr. Gore. The Department produced that draft letter in litigation and has since produced it to the Committee. The Chairman's opening statement described that draft as an "an initial draft of a letter from the Department of Justice asking for the citizenship question to be added."¹⁸ To the extent that the Chairman suggested that the draft Mr. Neuman provided served as an "initial draft" of the Department's December 12, 2017 letter, that suggestion is incorrect. Any such suggestion also is unsupported by the draft itself and the transcript of Mr. Gore's testimony. The transcript confirms that at no time did Mr. Gore agree that the draft he received from Mr. Neuman served as a basis for, let alone "an initial draft of," the Department's December 12, 2017 letter. Unfortunately, this mischaracterization has implied, perhaps unintentionally, that Mr. Gore's statements during his deposition and his transcribed interview, in which he stated that he wrote the first draft of the December, 12, 2017 letter, were untrue. Mr. Gore's testimony in his deposition and his testimony to the Committee were truthful. The Department rejects any implication to the contrary as it is inconsistent with the evidence.

The Department respectfully requests that, in the interests of accuracy and transparency, the Committee make this letter part of the legislative record and disseminate it to all Committee members and staff. The Department also requests that the Committee withdraw or correct the Supplemental Memorandum based upon the information provided in this letter.

Sincerely,

A handwritten signature in dark ink, appearing to read "S. Boyd", with a large, stylized loop at the end.

Stephen E. Boyd
Assistant Attorney General

cc: The Honorable Jim Jordan
Ranking Member

¹⁸ Opening Statement Chairman Elijah E. Cummings Hearing with Commerce Secretary Wilbur Ross March 14, 2019, at 2. <https://oversight.house.gov/legislation/hearings/commerce-secretary-wilbur-l-ross-jr>.



UNITED STATES DEPARTMENT OF COMMERCE
Office of Legislative and
Intergovernmental Affairs
Washington, D.C. 20230

March 26, 2019

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

Dear Representative Cummings,

Thank you for the Wednesday, March 20, 2019 email of 7:25 p.m. from your chief counsel. In that email, the chief counsel requested that the Department respond to two inquiries no later than today, Friday, March 22. Although we would normally try to oblige such a request despite the short turnaround time, we have some clarifying questions that must be answered before we can respond. As we have consistently demonstrated, we will continue to work to accommodate the Committee's legitimate oversight interests. This mutual obligation to accommodate is consistent with long-standing judicial precedent, past practices of administrations of all political parties, and numerous opinions of the Department of Justice's Office of Legal Counsel.

Your chief counsel first asked whether the Department will commit to produce in unredacted form each of the eleven documents identified in his March 15 email. As I stated in my March 19 letter, the Department has produced in unredacted form several of the documents your chief counsel asked about: Documents 2, 3, and 5, and the email in Document 6. Moreover, as our privilege log demonstrates, the redactions in Documents 4, 7, and 8 protect the confidentiality of Departmental deliberations on non-Census policy issues, including those related to the National Oceanic and Atmospheric Administration, the International Trade Administration, and the Minority Business Development Administration. We trust that you are not asking us to remove redactions of material that is wholly unrelated and therefore irrelevant to any subject matter about which the Committee has inquired. With these facts in view, the Department has already offered substantial accommodations to the Committee, most notably in its unredacted production of most of the eleven documents your chief counsel identified. Accordingly, his statement "that the Department still has not produced any of the key documents requested by the Committee" is incorrect.

As previously explained, the Department has clearly asserted various bases for withholding some information in Documents 1, 9, 10, 11, and the attachment to Document 6. One such basis is the longstanding executive branch interest in the confidentiality of attorney-client communications. Before we can consider whether there is an accommodation we can provide with respect to such information, we request that you identify the Committee's specific, particularized information needs that you believe cannot be satisfied without access to confidential attorney-client communications.

We also request an identification of the Committee's particularized needs with respect to your chief counsel's request that the Department produce Peter Davidson and James Uthmeier for transcribed interviews. Mr. Davidson is the General Counsel of the Department, and Mr. Uthmeier was his Senior Counsel during the relevant time period. The work of Mr. Davidson and Mr. Uthmeier, of course, generally consists of providing confidential legal advice. All of their non-privileged communications are already contained in the substantial documentary record the Department has been producing to you.

We also request further justification regarding your request for a transcribed interview of Earl Comstock. Mr. Comstock's relevant unredacted communications are in the documentary record, and his seven-hour deposition transcript is publicly-available. Three full-length trials regarding Secretary Ross's decision to reinstate the citizenship question on the census have examined extensively Mr. Comstock's actions and communications. Accordingly, please identify what additional, specific, and particularized information the Committee hopes to obtain by interviewing Mr. Comstock that it believes it cannot access elsewhere in the public domain.

The Department has made substantial efforts to accommodate the Committee's interests. To allow the Department to continue to move forward in this accommodation process, we ask that the Committee provide the above-requested information. We appreciate the opportunity to assist with your inquiry. Please be assured we are working as expeditiously as possible on all of our outstanding Congressional requests. If you have any additional questions, please contact me at (202) 482-3663.

Sincerely,



Ross Branson
Deputy Assistant Secretary for
Legislative and Intergovernmental Affairs

Cc: The Honorable Jim Jordan, Ranking Member

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5051
MINORITY (202) 225-5074

<http://oversight.house.gov>

March 29, 2019

The Honorable Wilbur L. Ross, Jr.
Secretary
U.S. Department of Commerce
1401 Constitution Avenue, N.W.
Washington, D.C. 20230

Dear Secretary Ross:

This letter responds to the March 26, 2019, letter from Ross Branson at the Department of Commerce. Because no officials from the Department were able to attend a meeting we requested this week to discuss these issues, they are described in detail below.

For more than two months, the Department has withheld key documents requested by the Committee regarding your decision to add a citizenship question to the 2020 Census. The Department has continued to withhold these documents despite repeated follow-up requests from the Committee and despite accommodations we have made to extend deadlines and allow the Department to prioritize certain documents.

During your testimony before the Committee on March 14, you refused to commit to providing the documents requested by the Committee, and you also refused to answer critical questions from Committee Members regarding the addition of the citizenship question.

Just yesterday, we received another document production from the Department, but you again failed to produce unredacted copies of any of the key documents we have requested.

Mr. Branson's March 26 letter set forth "some clarifying questions that must be answered before we can respond."¹ This letter addresses those questions and several inaccuracies in Mr. Branson's letter.

First, Mr. Branson's letter asserts that four of the 11 documents that my staff identified as priorities (Priority Documents 2, 3, 5, and 6) have already been produced in unredacted form. This claim is inaccurate.

¹ Letter from Ross Branson, Deputy Assistant Secretary, Legislative and Intergovernmental Affairs, Department of Commerce, to Chairman Elijah E. Cummings, Committee on Oversight and Reform (Mar. 26, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/DOC.032619.%20Response%20to.pdf>).

My staff's request stated: "For all responsive emails, the entire unredacted email chain and all attachments should be produced." Although the top emails in Priority Documents 2, 3, and 5 have been produced without redactions, all three documents contain redactions of key emails lower in the email chain. For example:

- Priority Document 2 includes an email that was sent from you to Earl Comstock and Ellen Herbst at 10:04 a.m. on May 2, 2017, that is entirely redacted except for the following excerpt:

Worst of all they emphasize that they have settled with congress on the questions to be asked. I am mystified why nothing have been done in response to my months old request that we include the citizenship question. Why not?

- Priority Document 3 contains a redacted email sent from Wendy Teramoto to you at 7:17 a.m. on May 2, 2017. The unredacted portion describes Ms. Teramoto's interactions with former Trump transition official Mark Neuman and asks: "Do you want me to set up another meeting?" This document also contains the redacted email described above that was sent at 10:04 a.m. on May 2, 2017.
- Priority Document 5 contains a redacted email from you to Earl Comstock at 1:20 p.m. on August 8, 2017. In the unredacted portion of that email, you wrote:

Were you on the call this morning about Census? They seem dig in [*sic*] about not sling [*sic*] the citizenship question and that raises the question of where is the DoJ in their analysis? If they still have not come to a conclusion please let me know your contact person and I will call the AG.

The Department also withheld a critical attachment from Priority Document 6. The August 11, 2017, email sent from Earl Comstock to you describes the attachment, stating in part: "Per your request, here is a draft memo on the citizenship question that James Uthmeier in the Office of General Counsel prepared and I reviewed."

Second, Mr. Branson's letter asserts that certain priority documents have been redacted for reasons "wholly unrelated" to the Committee's investigation. However, because the Department failed to follow Committee guidelines for producing documents with Bates stamps and a clear privilege log, the bases for these redactions is unclear:

- Priority Document 4 includes the same redacted email from you to Mr. Comstock that is included in Priority Document 5, described above. In addition, Priority Document 4 includes a response from Mr. Comstock to you on August 8, 2017, at 7:44 p.m. with a large block of redacted text. This specific timestamp does not appear to match any entries on your privilege log.
- Priority Documents 7 and 8 contain heavily redacted email exchanges between you, Mr. Comstock, and Ms. Teramoto from August 30, 2017, through September

1, 2017. Again, the specific timestamps on these emails do not appear to match any entries in your privilege log.

In light of these discrepancies and the inaccuracies of other statements in the letter, the Committee cannot rely on your statement at this time to release our request for the production of these documents in unredacted form. As an accommodation to the Department, the Committee will agree to review these three documents in unredacted form *in camera* on Monday, April 1, and if we can confirm that the information in the emails is “wholly unrelated” to the Committee’s investigation, we will drop our request for you produce those documents to the Committee in unredacted form.

As for Priority Documents 1, 9, 10, and 11, and the attachment to Priority Document 6, Mr. Branson’s letter asserts “various bases” for redactions, including the “confidentiality of attorney-client communications.”² As you know, however, the attorney-client privilege is not a valid basis to withhold information from Congress. That is especially true here, where the withheld information is central to the Committee’s investigation.

Mr. Branson’s letter asks for the Committee to explain our “particularized information needs” to receive these documents. The letter also asks for the Committee to identify our “particularized needs” to conduct transcribed interviews with Peter Davidson and James Uthmeier and asks for “further justification” for our request to conduct a transcribed interview with Earl Comstock.³

Our need for these documents and interviews is clear. The Committee is seeking to understand the real reason that you added a citizenship question to the 2020 Census. You have testified that you added the question “solely” in response to a December 2017 request from the Department of Justice, but the record contradicts your claim, showing that you began orchestrating a campaign to add the citizenship question just days after taking office at the Department of Commerce and more than nine months before DOJ sent its request.

The requested documents and interviews may provide contemporaneous evidence of the real reason that you added the citizenship question and the process you followed. For example, they may provide insight into:

- Your apparent interest in adding a citizenship question beginning in early 2017 and your instructions to your staff on this issue;
- Your communications on the citizenship question with senior Trump Administration officials and others;
- Your efforts over the course of several months to find another agency to request the addition of the citizenship question to the Census;

² *Id.*

³ *Id.*

- The Department of Commerce's communications with DOJ before and after DOJ's December 2017 request letter;
- The role of the White House in coordinating the addition of the citizenship question; and
- Your deliberations leading to the issuance of the pretextual decision memorandum in March 2018.

The Committee's need for these documents and interviews has been heightened by your refusal to answer key questions during the Committee's March 14 hearing based on vague and meritless claims of "confidentiality."

As a further accommodation, we will give the Department until Monday, April 1, 2019, to inform the Committee whether you will agree to produce all priority documents the Committee has previously identified without redactions and whether you will make Mr. Davidson, Mr. Uthmeier, and Mr. Comstock available for transcribed interviews. If you do not agree, the Committee will consider compulsory process to obtain the documents at our next business meeting on April 2, 2019.

Thank you for your attention to this matter.

Sincerely,



Elijah E. Cummings
Chairman

cc: The Honorable Jim Jordan, Ranking Member

Opinion of GORSUCH, J.

SUPREME COURT OF THE UNITED STATES

IN RE DEPARTMENT OF COMMERCE, ET AL.

ON APPLICATION FOR STAY

No. 18A375. Decided October 22, 2018

The application for stay presented to JUSTICE GINSBURG and by her referred to the Court is granted in part and denied in part. The application is granted as to the order of the United States District Court for the Southern District of New York dated September 21, 2018, which is stayed through October 29, 2018 at 4 p.m. The application is denied as to the orders of the United States District Court for the Southern District of New York dated July 3, 2018 and August 17, 2018.

If the applicants file a petition for a writ of certiorari or a petition for a writ of mandamus with respect to the stayed order by or before October 29, 2018 at 4 p.m., the stay will remain in effect until disposition of such petition by this Court. Should the petition be denied, this stay shall terminate automatically. In the event the petition is granted, the stay shall terminate upon the sending down of the judgment of this Court. The denial of the stay with respect to the remaining orders does not preclude the applicants from making arguments with respect to those orders.

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, concurring in part and dissenting in part.

To implement the constitutional requirement for an “actual Enumeration” of the people every 10 years, Art. I, §2, cl. 3, Congress has instructed the Secretary of Commerce to “take a decennial census . . . in such form and content as he may determine.” 13 U. S. C. §141(a). Most censuses in our history have asked about citizenship, and Commerce Secretary Wilbur Ross recently decided to

Opinion of GORSUCH, J.

reinstate a citizenship question in the 2020 census, citing a statement from the Department of Justice indicating that citizenship data would help it enforce the Voting Rights Act of 1965. Normally, judicial review of an agency action like this is limited to the record the agency has compiled to support its decision. But in the case before us the district court held that the plaintiffs—assorted States and interest groups—had made a “strong showing” that Secretary Ross acted in “bad faith” and were thus entitled to explore his subjective motivations through “extra-record discovery,” including depositions of the Secretary, an Acting Assistant Attorney General, and other senior officials. In two weeks, the district court plans to hold a trial to probe the Secretary’s mental processes.

This is all highly unusual, to say the least. Leveling an extraordinary claim of bad faith against a coordinate branch of government requires an extraordinary justification. As evidence of bad faith here, the district court cited evidence that Secretary Ross was predisposed to reinstate the citizenship question when he took office; that the Justice Department hadn’t expressed a desire for more detailed citizenship data until the Secretary solicited its views; that he overruled the objections of his agency’s career staff; and that he declined to order more testing of the question given its long history. But there’s nothing unusual about a new cabinet secretary coming to office inclined to favor a different policy direction, soliciting support from other agencies to bolster his views, disagreeing with staff, or cutting through red tape. Of course, some people may disagree with the policy and process. But until now, at least, this much has never been thought enough to justify a claim of bad faith and launch an inquisition into a cabinet secretary’s motives.

Unsurprisingly, the government tells us that it intends to file a petition seeking review of the district court’s bad faith determination and its orders allowing extra-record

Opinion of GORSUCH, J.

discovery. Toward that end, it has asked us to stay temporarily all extra-record discovery until we may consider its petition for review.

Today, the Court signals that it is likely to grant the government's petition. It stays Secretary Ross's deposition after weighing, among other things, the likelihood of review and the injury that could occur without a stay. And it expressly invites the government to seek review of all of the district court's orders allowing extra-record discovery, including those authorizing the depositions of other senior officials.

Respectfully, I would take the next logical step and simply stay all extra-record discovery pending our review. When it comes to the likelihood of success, there's no reason to distinguish between Secretary Ross's deposition and those of other senior executive officials: each stems from the same doubtful bad faith ruling, and each seeks to explore his motives. As to the hardships, the Court apparently thinks the deposition of a cabinet secretary especially burdensome. But the other extra-record discovery also burdens a coordinate branch in most unusual ways. Meanwhile and by comparison, the plaintiffs would suffer no hardship from being temporarily denied that which they very likely have no right to at all.

There is another factor here, too, weighing in favor of a more complete stay: the need to protect the very review we invite. One would expect that the Court's order today would prompt the district court to postpone the scheduled trial and await further guidance. After all, that is what normally happens when we grant certiorari or indicate that we are likely to do so in a case where trial is imminent. But because today's order technically leaves the plaintiffs able to pursue much of the extra-record discovery they seek, it's conceivable they might withdraw their request to depose Secretary Ross, try to persuade the trial court to proceed quickly to trial on the basis of the remain-

Opinion of GORSUCH, J.

ing extra-record evidence they can assemble, and then oppose certiorari on the ground that their discovery dispute has become “moot.” To ensure that the Court’s offer of prompt review is not made meaningless by such maneuvers, I would have thought it simplest to grant the requested extra-record discovery stay in full. Of course, other, if more involved, means exist to ensure that this Court’s review of the district court’s bad faith finding is not frustrated. I only hope they are not required.



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 27, 2000

The Honorable John Linder
Chairman, Subcommittee on Rules and
Organization of the House
Committee on Rules
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

We have carefully reviewed the testimony presented to the Subcommittee on Rules and Organization of the House at its hearing on July 15, 1999, on "Cooperation, Comity, and Confrontation: Congressional Oversight of the Executive Branch." The Department of Justice appreciates the Subcommittee's interest in this area, and we would like to take this opportunity to present in this letter, for the benefit of both Members of Congress and the public at large, the approach we take to the issues raised at the hearing. As always, we are committed to cooperating with your Subcommittee, and all committees of Congress, with respect to the oversight process.

The testimony presented at the hearing suggests to us that there is a need for improved communication and sensitivity between the Executive and Legislative Branches regarding our respective institutional needs and interests. It also suggests that there is considerable misunderstanding about the principles that govern the Department's longstanding positions and practices on responding to congressional oversight requests. We hope that this discussion of those governing principles will be helpful to the Committee and foster an improved understanding of the Department's interests in responding to oversight requests.

General Approach

The oversight process is, of course, an important underpinning of the legislative process. Congressional committees need to gather information about how statutes are applied and funds are spent so that they can assess whether additional legislation is necessary either to rectify practical problems in current law or to address problems not covered by current law. By helping Congress be better informed when it makes legislative decisions, oversight promotes the accountability of government. The information that committees gather in this oversight capacity is also important for the Executive Branch in the future implementation of the law and its participation in the legislative process. We have found that the oversight process can shed

valuable light on Department operations and assist our leadership in addressing problems that might not otherwise have been clear.

President Reagan's November 4, 1982 Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information" sets forth the longstanding Executive Branch policy on cooperating with Congressional oversight:

The policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch . . . [E]xecutive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary. Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches.

The D.C. Circuit Court of Appeals has recognized the obligations of Congress and the Executive Branch to seek to accommodate the legitimate needs of the other:

The framers . . . expect[ed] that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system. Under this view, the coordinate branches do not exist in an exclusively adversary relationship to one another when a conflict in authority arises. Rather, each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.

United States v. American Tel. & Tel. Co., 567 F.2d 121, 127 (D.C. Cir. 1977). Attorney General William French Smith captured the essence of the accommodation process in a 1981 opinion: "The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch." Opinion of the Attorney General for the President, Assertion of Executive Privilege in Response to a Congressional Subpoena, 5 Op. O.L.C. 27, 31 (1981).

In implementing the longstanding policy of the Executive Branch to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch, the Department's goal in all cases is to satisfy legitimate legislative interests while protecting Executive Branch confidentiality interests. Examples of confidential information include national security information, materials that are

protected by law (such as grand jury information pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure and taxpayer information pursuant to 26 U.S.C. § 6103); information the disclosure of which might compromise open criminal investigations or prosecutions or civil cases or constitute an unwarranted invasion of personal privacy; and predecisional deliberative communications (such as internal advice and preliminary positions and recommendations).

We believe that it must be the Department's efforts to safeguard these important Executive Branch institutional interests that have led to the frustrations expressed during the Subcommittee's hearing. We hope that we can reduce those frustrations in the future by setting forth here our perspective on some of the more important institutional interests that are implicated during the course of Congressional oversight.

Open Matters

Much of the testimony at the hearing addressed oversight of ongoing Department investigations and litigation. Although Congress has a clearly legitimate interest in determining how the Department enforces statutes, Congressional inquiries during the pendency of a matter pose an inherent threat to the integrity of the Department's law enforcement and litigation functions. Such inquiries inescapably create the risk that the public and the courts will perceive undue political and Congressional influence over law enforcement and litigation decisions. Such inquiries also often seek records and other information that our responsibilities for these matters preclude us from disclosing. Consequently, we have sought whenever possible to provide information about closed, rather than open, matters. This enables Congress to analyze and evaluate how statutory programs are handled and the Department conducts its business, while avoiding the potential interference that inquiries into open matters entail.

The open matters concern is especially significant with respect to ongoing law enforcement investigations. The Department's longstanding policy is to decline to provide Congressional committees with access to open law enforcement files. Almost 60 years ago, Attorney General Robert H. Jackson informed Congress that:

It is the position of the Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to "take care that the Laws be faithfully executed," and that congressional or public access to them would not be in the public interest

40 Op. Att'y. Gen. 45, 46 (1941). Attorney General Jackson's position was not new. His letter cited prior Attorney General letters taking the same position dating back to the beginning of the 20th century (*id.* at 47-48).

The rationale for this policy is set forth in a published opinion of the Office of Legal Counsel issued by Charles J. Cooper, Assistant Attorney General for the Office of Legal Counsel

during part of the Reagan Administration. See Response to Congressional Requests for Information Regarding Decisions made Under the Independent Counsel Act, 10 Op. O.L.C. 68, 76-77 (1986). Mr. Cooper noted that providing a Congressional committee with confidential information about active criminal investigations would place the Congress in a position to exert pressure or attempt to influence the prosecution of criminal cases. Id. at 76. Congress would become, "in a sense, a partner in the investigation," id., and could thereby attempt to second-guess tactical and strategic decisions, question witness interview schedules, debate conflicting internal recommendations, and generally attempt to influence the outcome of the criminal investigation. Such a practice would significantly damage law enforcement efforts and shake public and judicial confidence in the criminal justice system. Id. at 76-77.

Decisions about the course of an investigation must be made without reference to political considerations. As one Justice Department official noted 30 years ago, "the Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation." Memorandum for Edward L. Morgan, Deputy Counsel to the President, from Thomas E. Kauper, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Submission of Open CID Investigation Files 2 (Dec. 19, 1969).

In addition to the problem of Congressional pressure and the appearance of such pressure, the disclosure of documents from our open files could also provide a "road map" of the Department's ongoing investigations. The documents, or information that they contain, could come into the possession of the targets of the investigation through inadvertence or a deliberate act on the part of someone having access to them. The investigation would be seriously prejudiced by the revelation of the direction of the investigation, information about the evidence that the prosecutors have obtained, and assessments of the strengths and weaknesses of various aspects of the investigation. As Attorney General Jackson observed:

Disclosure of the [law enforcement] reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or a prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain.

40 Op. Atty. Gen. at 46. The Department has similar interests in the confidentiality of internal documents relating to its representation of the United States in civil litigation. Our litigation files usually contain confidential correspondence with client agencies as well as the work product of our attorneys in suits that frequently seek millions of tax dollars. They also contain "road maps" of our litigation plans and preparations, as well as confidential reports from experts and consultants. Those plans could be seriously jeopardized and our positions in litigation compromised if we are obliged to disclose our internal deliberations including, but not limited to,

our assessments of the strengths and weaknesses of evidence or the law, before they are presented in court. That may result in an unfair advantage to those who seek public funds and deprive the taxpayers of confidential representation enjoyed by other litigants.

In addition, the reputations of individuals mentioned in internal law enforcement and litigation documents could be severely damaged by the public release of information about them, even though the case might ultimately not warrant prosecution or other legal action. The Department takes very seriously its responsibility to respect the privacy interests of individuals about whom information is developed during the law enforcement process or litigation.

Internal Department Deliberations

With respect to oversight on closed matters, the Department has a broad confidentiality interest in materials that reflect its internal deliberative process. In particular, we have sought to ensure that all law enforcement and litigation decisions are products of open, frank and independent assessments of the pertinent law and facts -- uninhibited by political and improper influences that may be present outside the Department. We have long been concerned about the chilling effect that would ripple throughout government if prosecutors, policy advisors at all levels and line attorneys believed that their honest opinion -- be it "good" or "bad" -- may be the topic of debate in Congressional hearings or floor debates. These include assessments of evidence and law, candid advice on strengths and weaknesses of legal arguments, and recommendations to take or not to take legal action against individuals and corporate entities.

The Department must seek to protect this give-and-take process so that the participants in the process can vigorously debate issues before them and remain able to provide decisionmakers with complete and honest counsel regarding the conduct of the Department's business. If each participant's contribution can be dissected by Congress in a public forum, then the free and candid flow of ideas and recommendations would certainly be jeopardized. The Supreme Court has recognized the legitimacy of this "chilling effect" concern: "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." United States v. Nixon, 418 U.S. 683, 705 (1974). Our experience indicates that the Department can develop accommodations with Congressional committees that satisfy their needs for information that may be contained in deliberative material while at the same time protecting the Department's interest in avoiding a chill on the candor of future deliberations.

The foregoing concerns apply with special force to Congressional requests for prosecution and declination memoranda and similar documents. These are extremely sensitive law enforcement materials. The Department's attorneys are asked to render unbiased, professional judgments about the merits of potential criminal and civil law enforcement cases. If their deliberative documents were made subject to Congressional challenge and scrutiny, we would face a grave danger that they would be chilled from providing the candid and independent analysis essential to just and effective law enforcement or, just as troubling, that

they might err on the side of prosecution simply to avoid public second-guessing. This in turn would undermine public and judicial confidence in our law enforcement processes, untoward consequences we are confident that Congress, like the Department, wishes to avoid.

Privacy

In addition to these concerns, disclosure of declination memoranda would implicate significant individual privacy interests as well. Such documents discuss the possibility of bringing charges against individuals who are investigated but not prosecuted, and often contain unflattering personal information as well as assessments of witness credibility and legal positions. The disclosure of the contents of these documents could be devastating to the individuals they discuss. We try to accommodate Congressional needs for information about declinations whenever possible by making appropriate Department officials available to brief Committee Members and staff. This affords us an opportunity to answer their questions, which can be helpful because it can include the context and process that accompanied the decision. Hence, the discussion with staff may provide useful information and minimize the intrusion on individual privacy and the chill on our attorneys' preparation of future deliberative documents.

Line Attorneys

The Department also has a strong institutional interest in ensuring that appropriate supervisory personnel, rather than line attorneys and agents, answer Congressional questions about Department actions. This is based in part upon our view that supervisory personnel, not line employees, make the decisions that are the subjects of congressional review, and therefore they should be the ones to explain the decisions. More fundamentally, however, we need to ensure that our attorneys and agents can exercise the independent judgment essential to the integrity of law enforcement and litigation functions and to public confidence in those decisions. Senator Orrin Hatch has recognized the legitimacy of the Department's practice in this area, observing that Congressional examination of line attorneys "could chill career Department of Justice lawyers in the exercise of their daily duties." See Letter to Attorney General Janet Reno from Senator Orrin Hatch, dated September 21, 1993. Representative Henry Hyde has likewise opposed Congressional interviews of line prosecutors. See Letter of Representative Hyde to Representative Carlos Moorhead, dated September 7, 1993. By questioning supervisors and ultimately the Department's Senate-confirmed leadership, Congress can fulfill its oversight responsibilities without undermining the independence of line attorneys and agents.

* * *

In sum, the Department recognizes that the process of Congressional oversight is an important part of our system of government. We are committed to cooperating with oversight requests to the fullest extent consistent with our constitutional and statutory responsibilities.

We welcome your suggestions about how we should work together to accommodate the needs of our respective branches of government. Please do not hesitate to contact me if you would like to discuss these matters further. I intend at all times to work diligently with you toward satisfying the respective needs of our coordinate branches.

Sincerely,

A handwritten signature in dark ink, appearing to read "Robert Raben". The signature is fluid and cursive, with the first name "Robert" and last name "Raben" clearly distinguishable.

Robert Raben
Assistant Attorney General

cc: The Honorable Tony Hall
Ranking Minority Member

Reps. Jordan and Meadows: Democrats don't care about the integrity of the census

By Reps. Jim Jordan and Mark Meadows

Published March 13, 2019
Fox News

Do you know how many people in the United States are American citizens? No one does. And the Democrats don't want you to find out.

For nearly 150 years, the United States asked people whether they were citizens when filling out various census forms. Thomas Jefferson first proposed the idea in 1800. A citizenship question was added to the official census in 1820. The question was consistently asked until 1960. In December of 2017, the Trump administration added the question back to the survey.

Democrats were furious when news broke that the citizenship question would be added to the 2020 census. They argued that "Adding [the] question to the 2020 census could scare away millions of immigrants from filling out their mandatory surveys."

Several liberal states immediately sued the Trump administration, mistakenly arguing that the administration had acted arbitrarily when it added the citizenship question back into the survey. The case now awaits its fate in the Supreme Court. But that isn't stopping the Democratic-led House Oversight Committee from calling Commerce Secretary Wilbur Ross to testify about the administration's decision on Thursday.

Such a hearing is designed to interfere with the ongoing Supreme Court case. The inappropriateness of this is not a partisan issue. Even President Bill Clinton's assistant attorney general, Robert Raben, warned that holding a Congressional hearing in the midst of litigation creates the risk that the court will be swayed by undue political and Congressional influence.

All of this begs the question: Why wouldn't we want to know how many American citizens live in America?

Asking a citizenship question is common when filling out government forms. For instance, states throughout the country ask people whether they are citizens when getting a driver's license, applying for college, and registering to vote.

The truth is, Democrats don't care about the integrity of the census. To them, political calculations are more important than the population count. Democrats believe that asking the citizenship question on the census will cause them to lose power in Washington. This is because the census is used to reapportion Congressional seats, and Democrats know that Congressional apportionment according to the population of citizens, rather than total population, will cause them to lose seats in Congress.

Democrats need the votes of non-citizens to survive as a party. That's why Democrats across the country are already campaigning for non-citizens to vote in U.S. elections.

Last October, liberals in San Francisco began allowing undocumented immigrants to register to vote in school board races. Last January, Democratic star Stacy Abrams said she "wouldn't oppose" non-citizens voting in local elections. Last week, 20 Democrats on the House Oversight Committee failed

to affirm the idea that allowing illegal immigrants the right to vote devalues the voting power of United States citizens.

The truth is, asking the citizenship question will help protect the sanctity of the Voting Rights Act, which was enacted to prevent the disenfranchisement of minority voters. The U.S. Department of Justice maintains that it needs accurate citizenship data in order to enforce voting protections, and that it cannot get accurate data without asking the citizenship question on the 2020 census.

Protecting the Voting Rights Act is one of the principle campaign promises of the Democratic Party. Shouldn't that make this whole issue non-controversial? Sadly, that's not the case. As we've learned many times since 2016, the left is more focused on stopping the president than helping the country.

We should support the Trump administration's decision to add a citizenship question to the 2020 census. Lawsuits and Congressional hearings could do nothing but delay the non-partisan survey from taking place. This is disappointing because the Census Bureau has worked hard to make the 2020 census the easiest and most efficient census ever. In fact, for the first time in our history, people will be allowed to respond to the census online.

Let's be honest. Asking the citizenship question makes sense. Democrats on the House Oversight Committee should wake up and realize that this is a nonpartisan issue. If they don't, it will confirm that this week's hearing is nothing more than another attack on President Trump.

Republican Mark Meadows represents North Carolina's 11th District in the U.S. House of Representatives. He serves as chairman of the House Freedom Caucus and on the House Oversight Committee, Foreign Affairs Committee, and Transportation and Infrastructure Committee. Republican Jim Jordan represents Ohio's Fourth District in the U.S. House of Representatives. He serves as the ranking member on the House Committee on Oversight and Reform, is a member of the House Judiciary Committee, and is a co-founder of the House Freedom Caucus.



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Why the Commerce Secretary Shouldn't Testify to Lawmakers About the Census

Hans von Spakovsky / March 12, 2019

Commerce Secretary Wilbur Ross is scheduled to testify Thursday before the House Oversight and Reform Committee in a hearing on the Trump administration's reinstating a standard citizenship question on the U.S. census.

But with civil litigation over that very issue now before the Supreme Court, the House committee should cancel the hearing in recognition of the fact that having Ross testify is inappropriate and could, as the Justice Department has recognized in the past, jeopardize the government's litigation.

The Supreme Court is scheduled to hear oral arguments April 23 in *Department of Commerce v. New York*, in which the state of New York challenged the addition of the citizenship question to the 2020 census form.

The case presents two issues. First, whether a lower district court erred when it enjoined Ross, as secretary of the Department of Commerce, from reinstating the citizenship question. Second, whether the district court could compel the testimony of Ross to, as the government's brief says, "probe the mental processes of the agency decision-maker" outside of the administrative record in the case.

Rep. Elijah Cummings, D-Md., chairman of the Oversight and Reform Committee, says in a press release that Ross will testify about the "ongoing preparations for the census" and "the addition of a citizenship question."

No one questions the fact that Congress has oversight authority over the executive branch. As the Justice Department said in a letter dated Jan. 27, 2000, oversight is "an important underpinning of the legislative process."

Oversight provides Congress with information necessary to "rectify practical problems in current law or to address problems not covered by current law," the agency wrote to then-Rep. John Linder, who was chairman of a House subcommittee on rules and organization.

However, as Justice said in the letter, while its goal is to "satisfy legitimate legislative interests," it also must protect the executive branch's "confidentiality interests." Examples of confidential information

include “information the disclosure of which might compromise open ... civil cases.”

Congressional inquiries “during the pendency of a matter,” Justice wrote, “pose an inherent threat to the integrity of the Department’s law enforcement and litigation functions.”

Although such confidentiality considerations are particularly important in criminal matters, the Justice Department (and thus the executive branch) have “similar interests in the confidentiality of internal documents relating to its representation of the United States in civil litigation.”

Such files, it said:

[C]ontain confidential correspondence with client agencies as well as the work product of our attorneys in suits that frequently seek millions of tax dollars. They also contain ‘road maps’ of our litigation plans and preparations, as well as confidential reports from experts and consultants. Those plans could be seriously jeopardized and our positions in litigation compromised if we are obliged to disclose our internal deliberations including, but not limited to, our assessments of the strengths and weaknesses of evidence or the law, before they are presented in court. That may result in an unfair advantage to those who seek public funds and deprive the taxpayers of confidential representation enjoyed by other litigants.

Moreover, according to Justice’s 2000 letter, such congressional inquiries about ongoing litigation matters—such as *Department of Commerce v. New York*—“inescapably create the risk that the public and the courts will perceive undue political and Congressional influence over law enforcement and litigation decisions.”

The Justice Department argues in its brief filed with the Supreme Court that Ross acted fully within his authority under federal law, 13 U.S.C. §141(a), to determine the “form and content” of the census and to “obtain such other census information as necessary.”

The department also points out that the high court previously stayed an order from the district court compelling Ross’ testimony.

Requiring Ross to answer questions from lawmakers about reinstating the citizenship question on the census potentially would reveal confidential information, as outlined in Justice’s 2000 letter to Linder in the midst of an open case. It also would be obtaining testimony from the commerce secretary when the legitimacy of a lower court order compelling his testimony is a subject of contentious debate before the Supreme Court.

While the Supreme Court hasn’t issued a final decision on the latter issue, it temporarily has stopped that lower court order from going into effect until it resolves the case. Forcing Ross to testify before the House committee would be an end run around the Supreme Court.

Under these circumstances, it is inappropriate for Ross to appear before the committee to answer questions. If the commerce secretary appears at all, no one should be surprised if the Justice Department advises him to refuse to answer any questions relevant to the issues being fought over in the courts.

As the Justice Department recognizes, “the process of Congressional oversight is an important part of our system of government.” Executive branch agencies such as the Justice and Commerce Departments should cooperate with Congress when it is properly engaged in oversight.

But there are exceptions to that, including when Congress potentially is interfering with the executive branch’s defense of its actions and policies in civil litigation. The Justice Department has an obligation to maintain the confidentiality of the internal deliberations, communications, and decisions of an agency that has been sued when Justice is defending that agency.

Once this case is over, and the Supreme Court has rendered a decision, congressional oversight may be appropriate to the extent it is needed for legislative purposes.

But now, with litigation in full swing and oral arguments only a month away, is not the time.