

MINORITY VIEWS

Report of the Committee on Oversight and Reform

Resolution Recommending that the House of Representatives Find William P. Barr, Attorney General of the United States, and Wilbur L. Ross, Jr., Secretary of Commerce, in Contempt of Congress for Refusal to Comply with a Subpoena Duly Issued by the Committee on Oversight and Reform

June 17, 2019

On June 12, 2019, the Committee adopted a resolution and report concluding that Attorney General William P. Barr and Secretary of Commerce Wilbur L. Ross, Jr., should be held in contempt of Congress over documents relating to the reinstatement of a citizenship question on the 2020 decennial census (“contempt citation”). Chairman Elijah E. Cummings issued subpoenas to Attorney General Barr and Secretary Ross for documents on April 2, 2019.

The contempt citation was premature, unnecessary, and designed to advance a partisan goal of influencing ongoing litigation presently before the Supreme Court of the United States. Both the Department of Justice and the Department of Commerce have cooperated extensively with Chairman Cummings’s investigation into the Trump Administration’s decision to reinstate a citizenship question on the census. The Administration has produced over 31,000 pages of documents in response to Committee requests. Secretary Ross voluntarily testified for over six hours in a public hearing, and the Administration has made four witnesses available for day-long transcribed interviews.

These views provide important—and missing—context to the contempt citation as adopted by the Committee. A question soliciting citizenship information appeared on the census in one form or another from 1820 to 2000 and has been asked annually on the Census Bureau’s American Community Survey since 2005. Other nations request citizenship information as part of their population surveys, which the United Nations recommends as a best practice. Information solicited as a part of the census is protected from dissemination by federal law.

In the face of these facts, the contempt citation spins baseless conspiracy theories and cherry-picks information to create false narratives about the Administration’s decision to reinstate the citizenship question. The contempt citation is the culmination of the Committee’s effort to use its oversight authority to influence the Supreme Court—first by gathering information the “courts can use”¹ and then by picking a public fight with the Administration to generate controversy around the issue. Meanwhile, the Committee has eschewed and abandoned its legislative function in this area, and instead chosen the path of publicity. By not considering any legislative proposals aimed at the propriety of the citizenship question, the Committee is misusing its oversight authority.

¹ Hansi Lo Wang, *Commerce Secretary To Face Lawmakers In Hearing On Census Citizenship Question*, NAT’L PUB. RADIO (Mar. 14, 2019), <https://www.npr.org/2019/03/14/702185342/commerce-secretary-to-face-lawmakers-in-hearing-on-census-citizenship-question>.

These views seek to address the contempt citation’s shortcomings and inaccuracies. To provide as much context as possible, the views also hereby incorporate and attach a 72-page staff report and a 386-page staff report issued by Ranking Member Jim Jordan.

I. The contempt citation is premature because Chairman Cummings’s investigation is active and ongoing

The Committee’s action in approving the contempt citation was premature. The Committee’s fact-finding is active and ongoing. Because the Committee could obtain the information it seeks in future investigative steps, the Committee has not exhausted all avenues to obtaining the information such that contempt is appropriate at this time.

Upon assuming the chairmanship of the Committee in January 2019, Chairman Cummings formally initiated an inquiry into Secretary Ross’s decision to reinstitute a citizenship question on the 2020 census, requesting documents from both the Department of Commerce (DOC) and the Department of Justice (DOJ).² Since then, both the DOC and DOJ have cooperated with the Chairman’s investigation (Table 1). The DOC and DOJ have produced over 31,000 responsive documents—14,000 from DOC and 17,000 from DOJ (Table 2). In addition, the Committee has received testimony from Secretary Ross, three senior current and former DOC and DOJ officials, and the former Kansas Secretary of State. At the time of the Committee’s action, it had scheduled two transcribed interviews with senior DOC officials.

TABLE 1 - TIMELINE: CITIZENSHIP INVESTIGATION	
December 12, 2017	DOJ sent a letter to the Census Bureau requesting reinstatement of a citizenship question on the 2020 census to better enforce Section 2 of the Voting Rights Act.
March 26, 2018	Secretary Ross announced his decision to reinstate a citizenship question on the 2020 census.
March 29, 2018	Secretary Ross formally submitted the 2020 census questions to Congress as required by law.
May 8 and 18, 2018	Chairman Gowdy held a hearing with senior officials from DOC and DOJ to discuss census oversight, including the citizenship question. At the hearing, the Administration committed to producing the administrative record to the Committee when it was produced to the court in the New York case.
June 8, 2018	DOC produced documents responsive to Chairman Gowdy’s request.
July 3, 2018	DOC produced additional documents responsive to Chairman Gowdy’s request.
January 8, 2019	Chairman Cummings requested documents from the Department of Commerce regarding the decision to reinstitute the citizenship question.

² Letter from Rep. Elijah Cummings, Chairman, H. Comm. on Oversight & Reform, to Hon. Wilbur Ross, Sec’y, Dep’t of Commerce (Jan. 8, 2019). Although Chairman Cummings previously sought some information about the 2020 census as Ranking Member, this request was his first following his selection as chairman and the Committee’s organizing meeting.

TABLE 1 - TIMELINE: CITIZENSHIP INVESTIGATION	
March 7, 2019	The Committee conducted a transcribed interview with Principal Deputy Assistant Attorney General John Gore.
March 14, 2019	The Committee held a day-long hearing with Secretary Ross.
April 2, 2019	Chairman Cummings issued subpoenas to the DOC and DOJ. The Chairman also subpoenaed Mr. Gore for a deposition.
May 7, 2019	Chairman Cummings sent letters requesting transcribed interviews with Earl Comstock, Peter Davidson and James Uthmeier from the Department of Commerce.
May 8, 2019	Chairman Cummings sent a letter to Secretary Wilbur Ross requesting a meeting to discuss the Committee's citizenship question investigation.
May 30, 2019	The Committee held a transcribed interview with Gene Hamilton, Counselor to the Attorney General.
June 3, 2019	Committee held a transcribed interview with Kris Kobach, former Kansas Secretary of State.
June 3, 2019	Chairman Cummings sent letters to Attorney General Barr and Secretary Ross threatening to hold them in contempt of Congress.
June 11, 2019	The Committee held a transcribed interview with James Uthmeier, former Senior Counsel, Department of Commerce Office of General Counsel.
June 13, 2019	The Committee approved a resolution and report concluding that Attorney General Barr and Secretary Ross should be held in contempt of Congress.
June 18, 2019	Scheduled transcribed interview with Peter Davidson, General Counsel, Department of Commerce.
June 21, 2019	Scheduled transcribed interview with Earl Comstock, Deputy Chief of Staff and Director of Policy, Department of Commerce.

TABLE 2 - CITIZENSHIP QUESTION INVESTIGATION: DOCUMENT PRODUCTION SCHEDULE	
Total Number of Documents Produced: 31,000 pages³	
<i>Department of Commerce</i>	<i>Department of Justice</i>
(14,000 pages)	(17,000 pages)
June 8, 2018	February 25, 2019
July 3, 2019	March 15, 2019
January 29, 2019	March 29, 2019
February 19, 2019	April 11, 2019
March 5, 2019	April 16, 2019
March 15, 2019	April 26, 2019
March 19, 2019	May 10, 2019
March 28, 2019	May 24, 2019
April 25, 2019	
June 3, 2019	

³ Total pages of documents produced as of June 7, 2019.

If not for Chairman Cummings’s decision to abruptly cease the constitutionally mandated accommodation process and proceed to contempt of Congress for two cabinet officials, there is no reason to believe that the DOC and DOJ would not continue to cooperate with the Committee’s investigation.

II. The contempt citation is unnecessary because the Supreme Court will decide the merits of the citizenship question soon

The Committee’s contempt citation was an unnecessary act of political theater. The Supreme Court will issue its decision in *Department of Commerce v. New York* in a matter of weeks, settling any controversy around the reinstatement of the citizenship question on the 2020 census. The Court’s decision will have a direct effect on the Committee’s investigation. Accordingly, a prudent and responsible exercise of the Committee’s contempt authority would dictate waiting for the Court’s decision.

On April 23, 2019, the Supreme Court heard oral argument in *Department of Commerce* to review the lower court’s decision as well as a constitutional challenge to the Enumeration Clause of the Constitution, Article I, Section 2, Clause 3.⁴ The Supreme Court is expected to issue its decision sometime in June 2019. Both the DOJ and DOC have explained to the Committee that producing some privileged documents at this time would harm litigation interests of the United States.⁵

The contempt citation seeks to punish Attorney General Barr and Secretary Ross for declining to harm the litigation interests of the United States. This manifest unfairness could have been avoided if the Committee deferred consideration of the contempt citation until after the Supreme Court issued its decision. Waiting, however, may have been antithetical to the Committee’s strategy—according to Rep. Jimmy Gomez (D-CA), the Committee sought information from the Commerce Department that “the courts can use” in the ongoing litigation.⁶

III. The contempt citation baselessly implies a vast conspiracy to use the census for partisan political gain

The Committee’s action in approving the contempt citation stems from a baseless assumption: that Secretary Ross has not been truthful in articulating his reasons for reinstating a citizenship question on the 2020 census. Chairman Cummings has said the purpose of his investigation is “to understand the *real* reason that you [Secretary Ross] added a citizenship question to the 2020 Census.”⁷ Although Secretary Ross explained his reasons in detail in a

⁴ *State of New York et al. v. United States Department of Commerce et al.*, 1-277 (S.D.N.Y. 2019).

⁵ See, e.g., E-mail from Kira Antell, Office of Legislative Affairs, Dep’t of Justice (Mar. 22, 2019 3:27PM); *Commerce Secretary Wilbur L. Ross, Jr.: Hearing Before the H. Comm on Oversight and Reform*, 116th Congress, 47 (statement of Secretary Ross) (2019) [hereinafter “Ross hearing”].

⁶ Wang, *supra*, note 1.

⁷ Letter from Rep. Elijah Cummings, Chairman, H. Comm. on Oversight & Reform, to Hon. Wilbur Ross, Sec’y, Dep’t of Commerce (Mar. 29, 2019) (emphasis added).

public memorandum,⁸ Chairman Cummings and the Committee refuse to believe them and instead search for evidence to show a nefarious plot carried out by shadowy and powerful political operatives. However, the Committee has no evidence to support such a conclusion.

The contempt citation cites a redistricting study authored in 2015 by a now-deceased man named Thomas Hofeller as evidence that Secretary Ross's reasons were pretextual.⁹ In the study, conducted for the *Washington Free Beacon*, Mr. Hofeller made several general assertions about the effects of adding a citizenship question to the census:

- A shift from a redistricting determined using total population to adult population is a radical departure from the federal 'one person, one vote' rule presently used in the United States.
- Without a question on citizenship being included on the 2020 decennial census questionnaire, the use of citizen voting age population is functionally unworkable.
- The Obama Administration and congressional Democrats would probably be extremely hostile to the addition of a citizenship question on the 2020 Decennial questionnaire.
- The chances of the U.S. Supreme Court mandating the addition of a citizenship question to the 2020 decennial census are not high.
- A switch to the use of citizen voting age population as the population base for redistricting would be advantageous to Republicans and Non-Hispanic Whites.
- A proposal to use citizen voting age population can be expected to provoke a high degree of resistance.¹⁰

The plaintiffs suing the DOC over the citizenship question assert that Secretary Ross and DOC officials had knowledge of Mr. Hofeller's study before he decided to add a citizenship question to the 2020 census. Further, the plaintiffs allege that the DOC shared the study with Principal Deputy Assistant Attorney General John Gore, who signed a letter in which the DOJ

⁸ Letter from Hon. Wilbur Ross, Sec'y, Dep't of Commerce, to Karen Dunn Kelley, Undersecretary for Economic Affairs, Dep't of Commerce (Mar. 26, 2018).

⁹ Thomas Hofeller was a Republican political consultant specializing in redistricting. Mr. Hofeller died in August 2018 and as part of the resolution of his estate, 18 hard drives of his work were passed to his daughter, Stephanie Hofeller. Ms. Hofeller was estranged from her parents after she and her ex-husband were accused of involvement in a series of domestic disputes and child abuse. Following these charges, Thomas Hofeller and his wife Kathleen were granted custody of their 2 year-old grandson. According to the *New York Times*, Stephanie Hofeller is a "a political progressive who despises Republican partisanship." When Ms. Hofeller read her late father's papers, she contacted the Raleigh office of Common Cause, which is suing North Carolina over the state's legislative maps that Thomas Hofeller helped draw. These documents were then passed to the liberal plaintiffs in the *Department of Commerce, et al. v. State of New York, et al.* lawsuit. See Michael Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. TIMES (May 30, 2019).

¹⁰ Thomas Hofeller, *The Use of Citizen Voting Age Population in Redistricting*, available at <https://www.brennancenter.org/sites/default/files/legal-work/2019-05-31-595-1-Unredacted%20Exhibits.pdf>.

requested the reinstatement of the citizenship question.¹¹ The DOJ and the DOC have strongly disputed these allegations in filings in federal court, calling them “smoke and mirrors.”¹²

The record before the Committee refutes and debunks the conspiracy claims surrounding Mr. Hofeller’s study. The Committee has no evidence that the DOC or DOJ relied on the Hofeller study. The Committee has conducted four transcribed interviews, and no witness had even heard of Thomas Hofeller or his study until the study was the subject of media reports.

For example, on June 11, 2019, the Committee interviewed James Uthmeier, a former Senior Counsel at DOC, who worked closely with Secretary Ross on the citizenship question. Mr. Uthmeier was the author of a legal memorandum about the citizenship question, which he provided to Secretary Ross and Principal Deputy Assistant Attorney General John Gore. Mr. Uthmeier testified unequivocally that he did not have contact with Mr. Hofeller, nor did he recall seeing anything written by Mr. Hofeller. Uthmeier testified:

Q. Mr. Uthmeier, do you know who Thomas Hofeller is? Or Hoffler [sic]?

A. I am familiar with the name. But I do not know this individual, no.

Q. Did you ever speak or communicate with him during the transition, or any other time?

A. I did not.

Q. Have you ever read anything or seen anything written by him?

A. No. To my knowledge, no, I have never seen anything written by him.

Q. Have you ever discussed him with anyone?

A. I discussed him with counsel in preparation for this interview. However, I had no other discussions. I was present for the deposition of Mark Newman, where I also would have heard the name mentioned.

Q. Are you familiar with his 2015 study or report?

A. I am not.¹³

¹¹ Unredacted Exhibits in Support of Motion for Order to Show Cause, *New York v. United States Dep’t of Commerce*, no. 1:18-cv-02921-JMF (S.D.N.Y. May 31, 2019).

¹² Department of Justice Response on Motion to Compel Defendants to Show Cause, *State of New York v. United States Department of Commerce*, No. 18-cv-2921 (S.D.N.Y. June 3, 2019) (emphasis added).

¹³ James Uthmeier Transcribed Interview 12, June 11, 2019 (on file with Committee) [hereinafter “Uthmeier interview”].

Gene Hamilton, a senior administration official working on immigration issues at DOJ, had direct knowledge about aspects of the decision-making process that led to the DOJ's request to reinsert the citizenship question on the 2020 census. Mr. Hamilton testified that he had "no idea" who Hofeller was. He explained:

Q. Did you ever hear of – did you ever speak to or hear of anyone speaking to Thomas Hofeller?

A. No.

Q. Also a member of the transition team.

A. Okay.

Q. Doesn't ring a bell?

A. No.

Q. Okay.

Q. That's H-o-f-e-l-l-e-r.

A. He could spell it H-o-e-f-l-e-r, and I have no ideas [sic] who he is.¹⁴

The Committee also conducted a transcribed interview with Kris Kobach, former Kansas Secretary of State. During the interview, Kobach testified:

Q. Mr. Kobach, during the campaign or transition, did you ever discuss adding a citizenship question to the 2020 census with Thomas Hofeller?

A. I don't recall ever meeting or talking with anyone by that name. I just read an article yesterday about I think it was that – but – and my recollection upon reading the article was that I've never heard of this guy.¹⁵

Q. Mr. Kobach, were you aware of a 2015 study that Mr. Hofeller wrote about the citizenship question?

¹⁴ Gene Hamilton Transcribed Interview 68, May 30, 2019 (on file with Committee) [hereinafter "Hamilton interview"].

¹⁵ Kris Kobach Transcribed Interview 13, June 3, 2019 (on file with Committee) [hereinafter "Kobach interview"] (emphasis added).

- A. No, I've never read any such study or heard of any such study. As I said, there was an article about that gentleman, I think I saw it yesterday, that alluded to a study, but I'd never heard of it until I read that article.¹⁶

In addition, Kobach testified that he fundamentally disagreed with Hofeller's assertions, explaining: "I don't agree with his assumption that when you count – when you count accurately the number of citizens, that that necessarily helps one party or another party. We don't know."¹⁷

Finally, although the Hofeller study was not publicly known at the time of the Committee's transcribed interview with Mr. Gore in March 2019, his testimony directly contradicts any conspiracy theories about the "real" reasons for the reinstatement of the citizenship question. Gore testified how specific, granular data about citizenship helps to enforce the Voting Rights Act, explaining:

- Q. Can you help us understand how the lack of data prior to, I guess, the current situation impacts the prosecution of Voting Rights Act cases?

- A. So, as I've explained, we've been making do with the ACS [American Community Survey] data –

- Q. Right.

- A. -- and extrapolating the ACS block group level estimates down to the block level to identify potential investigations and enforcement actions.

- Q. Right.

- A. *There's, I think, an acknowledgment that the ACS data is an estimate.* The Census Bureau puts confidence intervals and margins of error around it. And we don't bring cases unless we can win them. So we've been able to file cases and litigate them under -- using the ACS data.

We would like to get an additional source of data because there may be districts or cases out there where that data provides a clearer picture of what's going on at the block level and within a particular district or redistricting plan, and we might be able to

¹⁶ Kobach interview at 79.

¹⁷ Kobach interview at 90 (emphasis added).

*identify additional cases for investigation and potential prosecution.*¹⁸

IV. The contempt citation improperly and baselessly implies a nefarious White House connection to the decision to reinstitute a citizenship question

The contempt citation suggests the existence of a vast Republican conspiracy to reinstate the citizenship question, one that was directed from the highest levels of the White House. Chairman Cummings has said repeatedly that the White House has orchestrated a “cover up” from the very “top.”¹⁹ The Majority has sought to tie former Attorney General Jeff Sessions, former White House advisor Steven Bannon, and other senior Trump Administration officials to the effort to add a citizenship question to the census.²⁰ The record before the Committee, however, does not support these charges.

Mr. Uthmeier unequivocally stated that no one from the White House ever asked or directed him to seek the reinstatement of a citizenship question to the census. According to Mr. Uthmeier, he was never instructed to consult with White House officials about seeking the reinstatement of a citizenship question. Mr. Uthmeier further testified that he never spoke with Stephen Miller, Steve Bannon, Reince Priebus, or President Trump about the decision to add a citizenship question to the census.²¹

Similarly, Mr. Gore testified he did not have interactions related to the citizenship question with any of the senior Trump Administration officials whom the Majority believe were involved in a conspiracy to misuse the census. Mr. Gore testified:

Q. Were you aware of any conversations between Attorney General Jeff Sessions and Steve Bannon about the addition of a citizenship question?

A. No.

Q. Were you aware of any conversations with anyone else at the Department of Justice and Kris Kobach about an addition of a citizenship question?

A. No.

¹⁸ John Gore Transcribed Interview 87-88, Mar. 7, 2019 (on file with Committee) [hereinafter “Gore interview”] (emphasis added).

¹⁹ See Letter from Rep. Elijah Cummings, Chairman, H. Comm. on Oversight & Reform, to Hon. William Barr, Attorney General, Dep’t of Justice (Jun. 3, 2019); Letter from Rep. Elijah Cummings, Chairman, H. Comm. on Oversight & Reform, to Hon. Wilber Ross, Sec’y, Dep’t of Commerce (Jun. 3, 2019); Press Release, H. Comm. on Oversight & Reform, Cummings Delivers Remarks on Resolution to Fully Enforce Committee Subpoenas and Hold the Trump Administration Accountable (Jun. 11, 2019), <https://oversight.house.gov/news/press-releases/cummings-delivers-remarks-on-resolution-to-fully-enforce-committee-subpoenas-and>.

²⁰ Ross hearing, *supra* note 5, at 142-143 (statement of Rep. Carolyn Maloney, Member, H. Comm. on Oversight & Reform).

²¹ Uthmeier interview at 134-135.

Q. Were you aware of any conversations between anyone at the Department of Justice and Steve Bannon about an addition of a citizenship question?

A. No.²²

Q. Did you ever speak with a little known official named Steve Bannon?

A. I have never spoken to Mr. Bannon in my life.²³

Q. Have you ever had any discussions with Stephen Miller at the White House?

A. No, I have not.

Q. There's a fellow by the name of Thomas Brunell?

A. No, I have not, not on this issue.

Q. But on different issues?

A. Yes. I believe when I was in private practice, I had conversations with Mr. Brunell connected to a voting rights case, but it had nothing to do with the census or with the Department's request to reinstate a citizenship question on the census questionnaire.²⁴

Like Mr. Uthmeier and Mr. Gore, Mr. Hamilton also testified he had no contact about the citizenship question with many of the officials whom the Majority accuses of conspiring to add the citizenship question. Hamilton testified:

Q. Aside from the communications we just talked about, are you aware of any communications with anybody at the White House that related to the census citizenship question?

A. Between whom?

²² Gore interview at 56.

²³ *Id.* at 78.

²⁴ *Id.* at 96-97.

Q. Between the White House and any agency. Are you aware of any conversations involving the White House? I think we've talked about a handful of conversations with John Zadrozny. Aside from those, are you aware of any conversations?

A. No, I don't think so.

Q. What about Steve Bannon when he was at the White House?

A. No.²⁵

Q. Have you ever had any conversations with Stephen Miller about census or citizenship question?

A. I think I answered that earlier.

Q. Just --

A. I don't remember having any conversation with Stephen.

Q. Did you ever become aware of him having conversations with anyone else about census or a citizenship question?

A. I couldn't tell you.²⁶

Q. Did you have any cause to or had you ever had any other discussions with James Uthmeier about other topics or about topics in general?

A. No. I don't recall having any discussions with James Uthmeier or Brian Lenihan. I couldn't pick them out of a lineup.²⁷

Q. Have you ever had discussions with Peter Davidson from the Department of Commerce?

A. I don't think -- I don't think so. I don't recall.²⁸

²⁵ Hamilton interview at 64.

²⁶ *Id.* at 66.

²⁷ *Id.* at 53.

²⁸ *Id.* at 53-54.

Q. Did you ever have any conversations with someone named Mark Neuman about the citizenship question?

A. What was the name?

Q. Mark Neuman.

A. No.

Q. Do you know who that is, N-e-u-m-a-n, Mark Neuman?

A. No.

Q. He's a member of the President's transition team?

A. Mark Neuman? No.

Q. He also apparently served as some kind of outside adviser to the Department of Commerce on the issue of the citizenship question?

A. I have no idea who he is.

Q. Do you remember ever hearing that there were – that there was more outside advisers providing advice or guidance to the Department of Commerce or to the Department of Justice —

A. No.

Q. — relating to the citizenship question?

A. Huh uh, no.²⁹

Q. [S]o you mentioned that you had a discussion with Mr. Kobach during the transition about the citizenship question, correct, or you got an email from him?

A. I got an unsolicited email from him.

Q. Did you have any further conversations with him after the transition about this topic?

²⁹ *Id.* at 67.

A. No.³⁰

Finally, Mr. Kobach also testified that he had no contact about the citizenship question with many of the individuals who the Majority contends were central figures in the decision to add the citizenship question. The Majority even went as far as to ask Kobach if he spoke with the Republican National Committee about the citizenship question; Kobach responded that he had not. Kobach testified:

Q. Did you ever speak with Earl Comstock at the Department of Commerce?

A. What was the first name?

Q. Earl, and his last name is Comstock.

A. I don't recall ever speaking to that person. The name doesn't sound familiar.

Q. Did you ever speak with Peter Davidson, the general counsel at the Department of Commerce?

A. I don't specifically recall, but as I mentioned earlier, there was one – there was one individual, a male, who informed me about the notice and comment period, that if I wanted to send an official letter, I could, and I don't remember that person's name.

Q. Okay. Did you ever speak with James Uthmeier at the Department of Commerce, the Deputy General Counsel?

A. I don't remember that name. It is certainly possible that one of those people was the one I spoke to on the phone, but I don't remember those names specifically.³¹

Q. During the campaign or transition, did you ever discuss adding a citizenship question to the 2020 census with a transition official named Mark Neuman, and I'm happy to spell that if that's helpful.

A. I don't recall anybody named Mark Neuman. It's possible I met him and forgot him, but that name does not ring a bell at this time.³²

³⁰ *Id.* at 68.

³¹ Kobach interview at 69.

³² *Id.* at 12.

Q. Have you ever had any conversations regarding the citizenship question with anybody at the Republican National Committee?

A. No.³³

V. The contempt citation fails to note the protections in federal law prohibiting the unauthorized use of census data

The contempt citation ignores protections entrenched in federal law on the unauthorized use of census data. The purpose of the Census Bureau and all census surveys is to collect data used for apportionment and to better inform the public about the population, business, and economics of the United States. Title 13 of the U.S. Code protects all data provided to the Census Bureau. Disclosure of census data is a very serious federal crime punishable by five years in prison and a \$250,000 fine.³⁴ All officers, employees (permanent and temporary), contractors, volunteers, or anyone else handling census data must sign a lifetime oath to keep the data confidential.³⁵

Once responses are collected, the Census Bureau goes to great lengths to ensure that any statistical data is anonymized and cannot be traced back to an individual person or household. Additionally, the Census Bureau does not share individual response information with other federal or state agencies. Data sets gleaned from responses may be shared with other agencies, but only for statistical purposes and only if the agency has requested the data from the Secretary of Commerce.

The Majority and others suggest that the responses to the citizenship question could be used for law enforcement or immigration proceedings. In the 1940s, census data was used to locate Japanese-Americans for relocation to internment camps.³⁶ However, in the 70 years since this tragedy, Congress has acted to codify and strengthen Title 13 privacy protections. Such disclosures would be unlawful today. At a Committee hearing in 2018, the DOJ and DOC refuted assertions that data would be used for law enforcement or immigration proceedings.³⁷

Since then, the Committee has heard repeated testimony reinforcing the fact that information obtained from the citizenship question cannot and will not be used for any law enforcement proceeding. For example, Mr. Hamilton testified:

³³ *Id.* at 96.

³⁴ 13 U.S.C. § 214 (1994).

³⁵ In 2018, Committee staff traveled to Rhode Island to conduct oversight of the 2018 Census Test. Committee staff was required to sign documents swearing not to disclose any private information, in perpetuity, which the staffer may come in contact over the course of the time conducting oversight.

³⁶ Lori Aratani, *Secret use of census info helped send Japanese Americans to internment camps in WWII*, WASH. POST (Apr. 6, 2018).

³⁷ *Progress Report on the 2020 Census: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 115th Cong. 57-58 & 80-81 (May 8, 2018) (statement of Earl Comstock, Dept. of Commerce).

Q. Are you aware of any conversations that happened within the administration about whether adding a citizenship question would impact immigration policy or immigration enforcement?

A. No.

Q. Were you aware of any documents that came from the Department of Commerce to the Department of Justice about the citizenship question issue?

A. No.

Q. So you said you were not aware of any discussions about the citizenship question impacting immigration policy. Is that correct?

A. I don't recall having any discussions about that.

Q. Okay. How about impacting immigration enforcement?

A. I don't recall having any discussions about that.³⁸

Mr. Hamilton later expressly stated, “*this citizenship question on the census has nothing to do with illegal immigration.*”³⁹

Likewise, Mr. Uthmeier explained the statutory protections surrounding census response information. He testified:

Q. Do you recall the penalties under Title 13 for disclosing confidential responses to the citizenship question?

A. I only recall that there are significant penalties, but I cannot remember specifics, no.

Q. If I told you that the penalties were 5 years in prison and a \$250,000 fine, would that be consistent with your research into the topic?

A. Yes, that sounds right.

Q. Okay. To your knowledge, will the responses to the 2020 census question on citizenship be used by either the Department of Justice, the Department of Commerce, or any other law enforcement agency in any judicial proceeding?

³⁸ Hamilton interview at 71-72.

³⁹ *Id.* at 80 (emphasis added).

A. *To my knowledge the data is not allowed to be used for those purposes pursuant to Federal law.*

Q. And to your knowledge, would responses to the 2020 census question be permitted to be used in any immigration or deportation proceeding?

A. No.

Q. If such information were to be used, either in a judicial proceeding, deportation proceeding, or other immigration related proceeding, and the Department of Commerce found out about it, what do you believe the Department's response would be?

A. Can you ask that question one more time?

Q. Sure. If the Department of Commerce became aware that data from the census was used in any sort of judicial deportation or immigration proceeding, what do you think the Department's response would be to that disclosure?

A. I don't want to speculate for the Department, but I can tell you if I was still there in my capacity as a senior lawyer, I would ask the Department of Justice to take immediate action.

Q. So when you were [at the Department of Commerce], you believe that if the census data was disclosed, you would recommend the Department immediately refer a criminal case to the Department of Justice?

A. Yes. Yes, absolutely. *The Title 13 protections are imperative to data collection to ensure that people across the country feel comfortable providing information to the government.* The data and studies show that Americans are generally suspect of the government coming in to their homes and asking questions about anything. So Title 13, we certainly at Commerce, I know the Census Bureau had some advertising that they were working on, that tries to make it known to the public, that this data cannot be used for anything other than statistical collection purposes, and it cannot be used for law enforcement or immigration purposes.

*I wish that attorneys general in all the States were also echoing that information rather than startling people through, you know, negative press and, you know, allegations.*⁴⁰

⁴⁰ Uthmeier interview at 113-114 (emphasis added).

VI. The contempt citation fails to note that a citizenship question on the census is not new

During the Committee’s business meeting to consider the contempt citation, Rep. Ralph Norman (R-SC) offered an amendment to provide necessary context that soliciting citizenship information on a census is not new. The Committee did not approve this amendment, and therefore the contempt citation fails to recognize this important context.

Every decennial census from 1820 to 1950 asked about citizenship. From 1970 to 2000, the Census Bureau mailed a “long-form census” with the decennial census to five percent of American households.⁴¹ In addition to asking the 10 basic census questions on the short form, the long-form census asked more expansive questions about a person’s dwelling and the composition of the household. From 1970 to 2000, each long-form census asked a citizenship question.

After the 2000 census, the Census Bureau replaced the long-form census with the American Community Survey (ACS).⁴² Unlike the long-form census, the Census Bureau conducts the ACS on a continuing, annual basis, sending the survey to about 3.5 million households each year.⁴³ The ACS includes expanded questions on demographics, dwelling unit, and household composition, as well as a series of detailed citizenship questions.⁴⁴ The proposed question about citizenship on the 2020 census is similar to the question posed on the annual ACS survey.

Until Secretary Ross’s decision to reinstate a citizenship question on the 2020 census, there had been no constitutional challenge to the inclusion of a citizenship question on prior decennial censuses or the ACS.

VII. The contempt citation fails to note that state and federal entities regularly solicit citizenship information for a variety of reasons

The contempt citation ignores the simple truth that a variety of agencies—at the federal and state level—currently solicit and collect citizenship data for a variety of reasons, including employment and licensure. For example:

- The U.S. Citizenship and Immigration Services requires each prospective employee in the United States to submit an Employment Eligibility Verification Form (I-9 form), which asks about the employee’s citizenship status;⁴⁵

⁴¹ U.S. Census Bureau, History of Questionnaires available at https://www.census.gov/history/www/through_the_decades/questionnaires/.

⁴² U.S. Census Bureau, History: American Community Survey, available at https://www.census.gov/history/www/programs/demographic/american_community_survey.html.

⁴³ *Id.*

⁴⁴ U.S. Census Bureau, American Community Survey: Questions on the Form and Why We Ask, available at <https://www.census.gov/acs/www/about/why-we-ask-each-question/>.

⁴⁵ Dep’t of Homeland Security, U.S. Citizenship & Immigration Servs., Employment Eligibility Verification, https://www.uscis.gov/system/files_force/files/form/i-9-paper-version.pdf.

- The District of Columbia solicits citizenship status for individuals applying for a driver's license;⁴⁶
- The state of Wisconsin similarly requests citizenship status for individuals applying for a driver's license;⁴⁷
- The state of California asks about an individual's citizenship when applying to obtain a firearm;⁴⁸ and
- The state of Ohio requires an applicant for a concealed-carry license to state his or her citizenship.⁴⁹

In addition, the collection of citizenship information during a population census is a common practice among countries. In fact, as part of its principles and recommendations for population censuses, the United Nations recommends that countries gather citizenship information about its population.⁵⁰ As Secretary Ross testified during the Committee's hearing:

The United Nations has recommended that countries ask the citizenship question or some form of it, and many countries do. I believe I mentioned a few. Australia, Canada, France, Germany, Ireland, Mexico, and the United Kingdom are a few that occurred to me offhand.⁵¹

VIII. The contempt citation makes unfounded and conclusory assertions about Executive Privilege

The contempt citation, as amended during the business meeting, makes several unfounded legal conclusions about the sufficiency of the President's protective assertion of executive privilege. This protective assertion is only a result of the Committee's rush to contempt.

On June 12, 2019, Attorney General Barr sent a letter informing the Committee:

⁴⁶ D.C. Dep't of Motor Vehicles, DC Driver License or Identification Card Application, https://dmv.dc.gov/sites/default/files/dc/sites/dmv/publication/attachments/DMV%20BOE%20Application_2-25-19.pdf.

⁴⁷ Wisc. Dep't of Transportation, Wisconsin Driver License (DL) Application, <https://wisconsin.gov/Documents/formdocs/mv3001.pdf>.

⁴⁸ CA Dep't of Justice, Bureau of Firearms, Personal Firearms Eligibility Check Application, <https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/forms/pfecapp.pdf>.

⁴⁹ State of Ohio, Application for a License to Carry a Concealed Handgun, <https://www.ohioattorneygeneral.gov/Files/Forms/Forms-for-Law-Enforcement/Concealed-Carry-License-and-Renewal-Application.aspx>.

⁵⁰ United Nations, Principles and Recommendations for Population and Housing Censuses (2017), https://unstats.un.org/unsd/demographic-social/Standards-and-Methods/files/Principles_and_Recommendations/Population-and-Housing-Censuses/Series_M67rev3-E.pdf.

⁵¹ Ross hearing, *supra* note 5, at 64 (statement of Wilbur Ross, Secretary, Department of Commerce).

the President has asserted executive privilege over certain subpoenaed documents identified by the Committee . . . as well as drafts of the Department’s December 12, 2017 letter to the U.S. Census Bureau [T]his protective assertion ensures the President’s ability to make a final decision whether to assert privilege following a full review of these materials Regrettably, you [Chairman Cummings] have made these assertions necessary by your insistence upon scheduling a premature contempt vote.⁵²

The contempt citation concludes that the President waived the privilege because he did not comply with the Committee’s rules for invoking a privilege. This characterization of an imputed waiver for a constitutional privilege is baseless. The Supreme Court held in *United States v. Nixon* that executive privilege is “fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution.”⁵³

Additionally, in *In re Sealed Case*, the Court of Appeals for the District of Columbia Circuit examined whether the White House had waived executive privilege when it released a White House Counsel’s report. In its ruling, the court reasoned that “[s]ince executive privilege exists to aid the governmental decisionmaking process, a waiver should not be lightly inferred.”⁵⁴ The court ultimately determined that the White House had not waived executive privilege as to the documents generated in producing the final version of the released report but had waived the privilege as to documents it had voluntarily revealed to parties outside the White House.⁵⁵

As a “fundamental” privilege rooted in constitutional separation of powers, executive privilege ought to be afforded serious consideration. In addition, because an executive privilege waiver should not be lightly inferred, the Committee should be careful in imputing a waiver for failure to comply with Committee Rule 16(c). The Committee’s contempt citation errs in concluding unilaterally that executive privilege can be waived when the President does not invoke executive privilege in accordance with Committee rules.

IX. The contempt citation shows how Chairman Cummings has changed his view on contempt of Congress under the Trump Administration

Chairman Cummings’s position on holding executive branch officials in contempt of Congress has changed since the last time the Committee held an Attorney General in contempt of Congress. In 2012, the then-Committee on Oversight and Government Reform held former Attorney General Eric Holder in contempt of Congress for failing to produce documents related to the Committee’s Fast and Furious investigation. At the time, the Obama Administration had stonewalled the Committee’s subpoena for documents for over a year. During debate, then Ranking Member Cummings said:

⁵² Letter from Stephen Boyd, Assistant Attorney General, Dep’t of Justice, to Rep. Elijah Cummings, Chairman, H. Comm. on Oversight & Reform (Jun. 12, 2019).

⁵³ *United States v. Nixon*, 418 U.S. 683, 707-08 (1974).

⁵⁴ *In re Sealed Case*, 121 F.3d 729, 741 (1997).

⁵⁵ *Id.* at 740-742.

And there is something going on here that really should bother all of us, and that is that, you know, we do have an Attorney General who, just like we did, swear to uphold the Constitution of the United States, and it seems to be a presumption that when certain privileges are asserted, certain concerns are raised by that Attorney General with regard to deliberative documents that things have gone between staff and things that have traditionally been privileged, that so he has to be hiding something, that he has to be dishonest.

*And I think we do have to respect the separation of powers here. And so, you know, this whole idea, everybody, oh, what is he hiding? Well, I don't think he is hiding a damn thing.*⁵⁶

Now, however, Chairman Cummings has held Trump Administration officials in contempt of Congress after only two months while the Committee continues its fact-finding and the Trump Administration continues to cooperate with the Committee's investigation. Whereas Chairman Cummings believed in 2012 that then-Attorney General Holder was not hiding a "damn thing" by withholding documents, the Chairman now believes these actions "beg[] the question—what is he hiding?"⁵⁷

Similarly, while in the minority, then-Ranking Member Cummings often asserted ongoing litigation was a reason for the Obama Administration to withhold documents from the Committee. On June 16, 2011, then-Ranking Member Elijah Cummings urged former Chairman Issa that "the Committee should wait until the case is no longer pending" before moving forward with testimony.⁵⁸ In another 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***

⁵⁶ *Report recommending that the House of Representatives find Eric H. Holder, Jr., Attorney General, U.S. Department of Justice, in contempt of Congress: Full Committee Business Meeting*, 112th Cong. 127 (2012) (statement of Rep. Elijah E. Cummings, Ranking Member, H. Comm on Oversight & Gov't Reform) (emphasis added).

⁵⁷ Press Release, H. Comm. on Oversight & Reform, Cummings Delivers Remarks on Resolution to Fully Enforce Committee Subpoenas and Hold the Trump Administration Accountable (Jun. 11, 2019), <https://oversight.house.gov/news/press-releases/cummings-delivers-remarks-on-resolution-to-fully-enforce-committee-subpoenas-and>.

⁵⁸ Letter from Rep. Elijah Cummings, Ranking Member, H. Comm. on Oversight & Gov't Reform and Rep. George Miller, Ranking Member, H. Comm. on Ed. & Workforce, to Rep. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform (Jun. 16, 2011), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2011-06-16.GM%20and%20EEC%20Letter%20to%20Issa.NLRB__0.pdf.

without any further interference from Members of Congress
(emphasis added).⁵⁹

Now in the majority, Chairman Cummings has shifted his position. For example, during the March 2019 hearing with Secretary Ross, Chairman Cummings demanded full cooperation despite the ongoing litigation:

I expect Secretary Ross to fully answer all of our questions about the census *and not avoid our questions based on the meritless claim that there is a separate—there’s separate litigation going on* (emphasis added).⁶⁰

In his concluding remarks in March 2019, Chairman Cummings expressed his frustration with Secretary Ross declining to answer certain questions that pertained to information involved in pending litigation before the Supreme Court:

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.* That is not a valid basis to withhold information from the Congress of the United States of America.⁶¹

X. The contempt citation is flawed because Chairman Cummings did not distribute the business meeting memorandum within the period required by Committee rules

The contempt citation is procedurally flawed in that Chairman Cummings did not distribute to Committee Members a copy of the memorandum specifying the Committee’s business meeting as required by Committee rules. Rather than postpone the business meeting to cure this procedural defect, the Chairman offered an unpersuasive *ex post facto* interpretation of the relevant Committee rule—an interpretation contradicted by Chairman Cummings’s prior statement about the rule.

Under Rule 2(f) of the Committee’s rules, the Chairman must provide “ever member of the Committee . . . with a memorandum at least three calendar days (excluding Saturdays,

⁵⁹ Letter from Rep. Elijah Cummings, Ranking Member, H. Comm. on Oversight & Gov’t Reform, to Rep. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov’t Reform (Nov. 9, 2011), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2011-11-09.EEC%20to%20Issa.Boeing-NLRB.pdf>.

⁶⁰ Ross hearing, *supra* note 5, at 29 (statement of Chairman Elijah E. Cummings).

⁶¹ *Id.* at 204 (statement of Chairman Elijah E. Cummings) (emphasis added).

Sundays, and legal holidays . . .) before each meeting or hearing.”⁶² On Monday, June 10, 2019, at 5:48 p.m., Chairman Cummings noticed a business meeting for Wednesday, June 12, 2019, at 10:00 a.m. to consider the contempt citation. He distributed the business meeting’s agenda at the same time. Pursuant to Rule 2(f), however, the memorandum for the business meeting scheduled for Wednesday, June 12 should have been distributed no later than Friday, June 7.⁶³

On June 11, 2019, Ranking Member Jordan wrote to Chairman Cummings to alert him that the delayed agenda had violated Committee rules and called into question the legal sufficiency of the contempt proceeding.⁶⁴

On June 12, 2019, Chairman Cummings responded to Ranking Member Jordan, offering for the first time a new interpretation of Rule 2(f) in which the three days period under Rule 2(f) would “includ[e] the day on which the notice is sent and the day on which the business meeting is scheduled to occur.”⁶⁵ The Chairman noted that the Committee modified Rule 2(f) at the beginning of the 116th Congress, changing the rule’s wording from “at least 72 hours before each meeting or hearing” to “at least three calendar days . . . before each meeting or hearing.”⁶⁶ Chairman Cummings wrote that the Committee made this change to “conform the Committee’s rules to the rules of the House” regarding hearing notice.⁶⁷ As such, Chairman Cummings concluded, the memorandum was sufficiently noticed.

Chairman Cummings’s explanation is unpersuasive in two respects. First, if the Committee intended to amend Rule 2(f) to conform to the rules of the House, the Committee could have adopted *verbatim* the language found in the rules of the House. The Committee did not, choosing instead to adopt different language for Rule 2(f). Second, in explaining the justification for the change to Rule 2(f) at the beginning of the 116th Congress, Chairman Cummings specified then that the change was intended to provide “more advance notice for hearing memos.”⁶⁸ Yet, the Chairman’s interpretation as articulated on June 12 would actually provide *less* notice—effectively two days—than what was required before the change.

⁶² H. Comm. on Oversight & Reform R. 2(f) (emphasis added). This requirement is separate from the notice requirement under Committee Rule 2 (e). *Id.* at R. 2(e) (citing House of Representatives R. XI, cl. 2(g)(3)(A)). Rule 2(e) incorporates House Rule XI, clause 2(g)(3)(A), which states that a committee meeting “may not commence earlier than the third calendar day (excluding Saturdays, Sundays, and legal holidays . . .) on which members have notice thereof.” House of Representatives R. XI, cl. 2 (g)(3)(A)(ii) (emphasis added).

⁶³ This timing has been the Committee’s practice. *See e.g.*, Business Meeting of the H. Comm. on Oversight & Reform, 116th Cong. (May 8, 2019) (memorandum distributed May 3, 2019); Business Meeting of the H. Comm. on Oversight & Gov’t Reform, 115th Cong. (Sept. 27, 2018) (memorandum distributed September 24, 2018); Business Meeting of the H. Comm. on Oversight & Gov’t Reform, 115th Cong. (July 17, 2018) (memorandum distributed July 12, 2018); Business Meeting of the H. Comm. on Oversight & Gov’t Reform, 115th Cong. (May 23, 2018) (memorandum distributed May 18, 2018); Business Meeting of the H. Comm. on Oversight & Gov’t Reform, 115th Cong. (Mar. 15, 2018) (memorandum distributed March 12, 2018); Business Meeting of the H. Comm. on Oversight & Gov’t Reform, 115th Cong. (Feb. 6, 2018) (memorandum distributed February 1, 2018).

⁶⁴ Letter from Rep. Jim Jordan, Ranking Member, H. Comm. on Oversight & Reform, to Rep. Elijah E. Cummings, Chairman, H. Comm. on Oversight & Reform (Jun. 11, 2019).

⁶⁵ Letter from Rep. Elijah E. Cummings, Chairman, H. Comm. on Oversight & Reform, to Rep. Jim Jordan, Ranking Member, H. Comm. on Oversight & Reform (Jun. 12, 2019).

⁶⁶ *Id.*

⁶⁷ *Id.* (citing House Rule XI, clause 2(g)(3)(A)).

⁶⁸ Business Meeting of the H. Comm. on Oversight & Reform, 116th Cong., 13 (Jan. 29, 2019) (statement of Chairman Elijah E. Cummings).

In the Majority's haste to manufacture a controversy around the citizenship question, the Committee violated its rules by failing to distribute the memorandum "at least three calendar days . . . before" the meeting. Because the Majority declined to postpone the business meeting to cure this procedural defect, this defect calls into question the legal sufficiency of the contempt proceeding.

XI. Conclusion

The Committee's contempt citation will only harm the Committee's investigation into the citizenship question. By taking this step, the Majority has all but shut the door on obtaining the information it seeks. The Majority has chosen conflict over compromise.

A careful examination of the record before the Committee and publicly available information does not support contempt at this time. A question soliciting citizenship information has appeared on the census in one form or another since 1820. Federal and state agencies request citizenship information regularly for a variety of legitimate purposes. Other countries solicit citizenship information in their population censuses—a practice that the United Nations recommends as a best practice. Most importantly, any citizenship information obtained during the census is protected by federal law and cannot be used for any improper purpose.

Although the Majority resorts to conspiracy theories to delegitimize the reinstatement of a citizenship question on the census, these conspiracies are not supported by the facts of the Committee's investigation. The Committee has received testimony from several Administration officials to date showing that there was no direction from the White House to add a citizenship question to the census. In addition, several witnesses with firsthand knowledge of the decision-making process testified that they had no knowledge of a study—or its author—alleged to be the keystone in the nefarious conspiracy.

The Majority simply does not want to know the number of citizens present in the United States of America. Rather than attempt to legislate on the citizenship question, the Committee is using its oversight authority to create a controversy in the hopes of influencing the Supreme Court's imminent decision on the issue. For all the reasons set forth in these minority views, the Committee's contempt citation is unnecessary, premature, and designed merely to advance partisan political goals.

JIM JORDAN
Ranking Member