

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>

June 3, 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 am writing to inform you that the Committee is scheduling a vote to hold you in contempt of Congress as a result of your failure to comply with a bipartisan subpoena issued more than two months ago for documents relating to the addition of a citizenship question to the 2020 Census. This step will initiate the process of bringing a civil enforcement action to obtain compliance with the Committee's subpoena.

Unfortunately, your actions are part of a pattern. The Trump Administration has been engaged in one of the most unprecedented cover-ups since Watergate, extending from the White House to multiple federal agencies and departments of the government and across numerous investigations. The tactics of this cover-up are now clear. The Administration has been challenging Congress' core authority to conduct oversight under the Constitution, questioning the legislative bases for congressional inquiries, objecting to committee rules and precedents that have been in place for decades under both Republican and Democratic leadership, and making baseless legal arguments to avoid producing documents and testimony.

This cover-up is being directed from the top. Several weeks ago, President Trump vowed publicly, "We're fighting all the subpoenas."¹ Since then, he has refused to work on legislative priorities, such as infrastructure, until Congress halts all oversight and investigations of his Administration.² Although he has suggested that all subpoenas from Congress are partisan and are somehow related to the Russia probe, neither claim is true. The subpoenas in this investigation were adopted on a bipartisan basis, and this investigation has nothing to do with Russia.

¹ *Trump Vows Stonewall of 'All' House Subpoenas, Setting Up Fight Over Powers*, New York Times (Apr. 24, 2019) (online at www.nytimes.com/2019/04/24/us/politics/donald-trump-subpoenas.html).

² *Trump Refuses to Repair Infrastructure Unless Congress Halts All Investigations*, New York Magazine (May 22, 2019) (online at <http://nymag.com/intelligencer/2019/05/trump-stop-investigating-me-or-infrastructure-deal-dies.html>).

New Documents Suggest Real Reason for Adding Citizenship Question

As the Committee has explained repeatedly, we are investigating, among other matters, the actual reasons behind the Trump Administration's decision to add a citizenship question to the 2020 Census. You testified that you added the citizenship question "solely" at the request of the Department of Justice to help enforce the Voting Rights Act.³ However, documents obtained during the course of the Committee's investigation reveal that this rationale was merely a pretext. In fact, you began a secret campaign to add the citizenship question just days after assuming your post and several months before any request from the Department of Justice.⁴

In addition, last week, new documents were unearthed that suggest that the real reason the Trump Administration sought to add the citizenship question was not to help enforce the Voting Rights Act at all, but rather to gerrymander congressional districts in overtly racist, partisan, and unconstitutional ways.⁵

These newly discovered documents include a secret study authored a year before the 2016 election by Thomas Hofeller, a Republican gerrymandering expert who is now deceased. One of the principal conclusions of this study is that counting voting-age citizens in legislative districts—rather than counting all persons—"would be advantageous to Republicans and Non-Hispanic Whites." Although Mr. Hofeller acknowledged that such an approach would be a "leap," he noted that the process could not work unless Republicans started collecting citizenship data through the 2020 Census. He wrote: "Without a question on citizenship being included on the 2020 Decennial Census questionnaire, the use of citizen voting age population is functionally unworkable."⁶

In 2016, Mr. Hofeller reportedly had direct communications with the Trump Transition Team about adding the citizenship question, and they discussed using the rationale of assisting with the enforcement of the Voting Rights Act instead of the actual purpose identified in Mr. Hofeller's study—to help "Republicans and Non-Hispanic Whites." For example, Mr. Hofeller communicated directly with Mark Neuman, the Trump Transition Team official responsible for census issues. Mr. Neuman reportedly had a relationship with Mr. Hofeller going back decades, and he also communicated directly with you about this approach.⁷

³ House Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies, *Hearing on FY19 Budget Hearing: Department of Commerce*, 115th Cong. (Mar. 20, 2018) (online at <https://republicans-appropriations.house.gov/calendar/eventsingle.aspx?EventID=395131>); see also Committee on Oversight and Reform, *Hearing with Commerce Secretary Wilbur L. Ross, Jr.*, 116th Cong. (Mar. 14, 2019) (online at <https://oversight.house.gov/legislation/hearings/commerce-secretary-wilbur-l-ross-jr>).

⁴ *Supplemental Memorandum by Secretary of Commerce Wilbur Ross Regarding the Administrative Record in Census Litigation* (June 21, 2018) (online at <https://apps.npr.org/documents/document.html?id=4550951-Supplemental-Memo-by-Wilbur-Ross>).

⁵ *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, New York Times (May 30, 2019) (online at www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html).

⁶ Thomas Hofeller, *The Use of Citizen Voting Age Population in Redistricting* (2015) (online at <https://assets.documentcloud.org/documents/6111284/May-31-2019-Unredacted-Exhibits.pdf>).

⁷ *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, New

Last week, the Department of Justice responded to the public disclosure of Mr. Hofeller's study by claiming that it "played no role in the department's December 2017 request to reinstate a citizenship question to the 2020 decennial census."⁸

However, the newly discovered documents include two instances in which "Mr. Hofeller's digital fingerprints are clearly visible" on Administration actions related to the citizenship question.⁹

First, one document found on Mr. Hofeller's hard drive includes a paragraph citing court decisions in support of the Voting Rights Act pretext. That exact paragraph subsequently appeared in a draft of a Department of Justice letter requesting the addition of the citizenship question that Mr. Neuman provided to Deputy Assistant Attorney General John Gore. Mr. Neuman's outreach to Mr. Gore appears to have been arranged by Peter Davidson, General Counsel at the Department of Commerce.¹⁰ Although this language was not used in the final request to the Census Bureau, it shows a direct link between Mr. Hofeller, Mr. Neuman, Mr. Gore, and Mr. Davidson on this issue.

Second, when the Department of Justice sent its final request to add the citizenship question to the Census Bureau on December 12, 2017, the letter included technical arguments in the same order—and sometimes with identical terms—as Mr. Hofeller's study.

Failure to Comply with Document Subpoena

On January 8, 2019, after becoming Chairman of the Committee, I sent a letter to the Department of Commerce requesting documents regarding the citizenship question. I had previously requested many of these documents nine months earlier as Ranking Member, but the Department had not produced them.¹¹

On March 5, 2019, the Department sent a letter to the Committee seeking to postpone your testimony at a previously agreed upon March 14 hearing and claiming that the Department

York Times (May 30, 2019) (online at www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html).

⁸ *Lawyer Claims Documents Reveal Census Question Added to Help Republicans*, CBS News (May 31, 2019) (online at www.cbsnews.com/news/lawyer-claims-documents-reveal-census-changed-to-help-republicans/).

⁹ *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, New York Times (May 30, 2019) (online at www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html).

¹⁰ John Gore stated in his March 7, 2019, interview with Committee staff that he spoke to Peter Davidson about the citizenship question in October 2017, and that Mr. Davidson mentioned Mark Neuman, who then contacted Mr. Gore.

¹¹ 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>); Letter from Ranking Member Elijah E. Cummings, Committee on Oversight and Government Reform, et al., to Secretary Wilbur L. Ross, Jr., Department of Commerce (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>).

needed more time to produce documents. As an accommodation, I agreed to prioritize certain documents to be produced prior to the hearing. However, I also made clear that “the existence of separate civil litigation is not a valid basis to withhold these documents from the Committee.”¹²

The Department did not produce the priority unredacted documents prior to the March 14 hearing. During the hearing, you refused to commit to producing documents that the Department had withheld, stating: “I will certainly address the question to my staff and to my counsel. To the degree that this is involved in pending litigation, there may be problems.” You also refused to discuss key communications related to the citizenship question, including your conversations with Attorney General Jeff Sessions. You did not assert any valid privilege but claimed vaguely that such conversations implicated “the confidentiality of Executive Branch deliberations.” I told you that I expected full compliance with the Committee’s requests by March 19, 2019.¹³

The following day, as a further accommodation, Committee staff provided Department staff with a list of 11 key documents within the Committee’s set of priority documents, and asked the Department to commit by March 19, 2019, to produce these documents without redactions. After the Department failed to meet this deadline, Committee staff followed up repeatedly to explain the Committee’s need for these documents and to offer additional accommodations, including an offer to review certain documents *in camera*. The Department did not accept this offer and did not produce the key documents the Committee identified.

On April 2, 2019, following a bipartisan vote, the Committee issued a subpoena requiring the Department to produce the documents it refused to provide voluntarily.¹⁴ Although the Department produced some documents in response to this subpoena, many are heavily redacted and do not include attachments, and others are not responsive to the subpoena. The Department has consistently declined to produce unredacted copies of the 11 high priority documents demanded by the subpoena.

On May 8, 2019, I wrote to you to explain that the Department’s refusal to comply with the Committee’s bipartisan subpoena for documents “is obstructing and delaying the Committee’s investigation” and that further investigative steps had become necessary, including transcribed interviews with current and former Department officials.¹⁵ I also wrote:

¹² Letter from Chairman Elijah E. Cummings, Committee on Oversight and Reform, to Secretary Wilbur L. Ross, Jr., Department of Commerce (Mar. 6, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-03-06.EEC%20to%20Ross-DOC%20re%20Documents%20and%20Testimony.pdf>).

¹³ Committee Oversight and Reform, *Hearing with Commerce Secretary Wilbur L. Ross, Jr.*, 116th Cong. (Mar. 14, 2019) (online at <https://oversight.house.gov/legislation/hearings/commerce-secretary-wilbur-l-ross-jr>).

¹⁴ Committee on Oversight and Reform, *Committee Approves Subpoenas in Security Clearance and Census Investigations* (Apr. 2, 2019) (online at <https://oversight.house.gov/news/press-releases/committee-approves-subpoenas-in-security-clearance-and-census-investigations>).

¹⁵ Letter from Chairman Elijah E. Cummings, Committee on Oversight and Reform, to Secretary Wilbur L. Ross, Jr., Department of Commerce (May 8, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-05-08.EEC%20to%20Ross-DOC%20re%20Meeting.pdf>).

I would like to meet with you in person, preferably in the next two weeks, to ensure that you are fully apprised of the actions of your staff and to determine whether there is any way to resolve this impasse before initiating potential enforcement action.

On May 20, 2019, you sent a letter declining my invitation to meet.¹⁶ Instead, you demanded that the Committee identify the “particularized legislative need”¹⁷ for the documents in question—even though the Committee has already done so repeatedly.¹⁸ You also claimed vaguely that the documents “implicate Executive Branch confidentiality interests,” which is not a valid reason to withhold them from the Committee.¹⁹

On May 31, 2019, Committee staff spoke to Department staff to seek to resolve these issues. They explained again the Committee’s need for the key documents identified in the subpoena, but Department staff would not commit to produce any of them.

¹⁶ Letter from Secretary Wilbur L. Ross, Jr., Department of Commerce, to Chairman Elijah E. Cummings, Committee on Oversight and Reform (May 20, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-05-20%20Sec.%20Ross%20to%20Chm%20Cummings.pdf>).

¹⁷ While the Committee has described its particularized need for these documents in detail, courts have never found a requirement that Congress justify its requests for information line-by-line. As District Court Judge Amit Mehta recently described: “Once a court finds that an investigation is one upon which legislation could be had, it must not entangle itself in judgments about the investigation’s scope or the evidence sought ... [I]t is not the judicial officer’s job to conduct a ‘line-by-line review of the Committee’s requests.’ *Bean LLC v. John Doe Bank*, 291 F. Supp. 3d. 34, 44 (D.D.C. 2018). ‘There is no requirement that every piece of information gathered in such an investigation be justified before the judiciary.’ *McSurely*, 521 F. 2d at 1041.” *Donald J. Trump, et al. v. Committee on Oversight and Reform of the U.S. House of Representatives*, et. al, 19-cv-01136 (May 20, 2019).

¹⁸ *See, e.g.*, Letter from Chairman Elijah E. Cummings, Committee on Oversight and Reform, to Secretary Wilbur L. Ross, Jr., Department of Commerce (Mar. 6, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-03-06.EEC%20to%20Ross-DOC%20re%20Documents%20and%20Testimony.pdf>); Letter from Chairman Elijah E. Cummings, Committee on Oversight and Reform, to Secretary Wilbur L. Ross, Jr., Department of Commerce (Mar. 29, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-03-29.EEC%20to%20Ross-DOC.pdf>); Letter from Chairman Elijah E. Cummings, Committee on Oversight and Reform, to Secretary Wilbur L. Ross, Jr., Department of Commerce (May 8, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-05-08.EEC%20to%20Ross-DOC%20re%20Meeting.pdf>).

¹⁹ Your May 20, 2019, letter claims that the Committee’s requests “implicate Executive Branch confidentiality interests, including material protected by the deliberative process and attorney-client privileges, among others.” This vague assertion of confidentiality interests and common-law privileges is not a valid reason to withhold information subject to a lawful subpoena from this Committee. *See* Letter from Chairman Jason Chaffetz, Ranking Member Elijah E. Cummings, et al., Committee on Oversight and Government Reform, to Huban Gowadia, Acting Administrator, Transportation Security Administration (May 2, 2017) (“[N]either the Committee nor the United States House of Representatives recognizes purported non-disclosure privileges associated with the common law. Further, the mere possibility that a common law privilege may apply in a judicial proceeding is not, in and of itself, a legal justification to withhold documents from this Committee or the Congress.”) (online at <https://republicans-oversight.house.gov/wp-content/uploads/2017/05/2017-05-02-JEC-EEC-to-Gowadia-TSA.pdf>).

Oversight and Legislative Jurisdiction Over Census

The Constitution expressly empowers Congress to pass laws governing the Census,²⁰ and that power has been assigned to the Committee on Oversight and Reform, which has both oversight and legislative jurisdiction over the Census.²¹ The Committee 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.

In this investigation, the Committee is seeking information on a host of questions, including the Administration’s actual reasons for trying to add the citizenship question, the process the Administration followed to add the citizenship question, the Administration’s understanding of how the question could reduce census response rates and could impact congressional apportionment, and the accuracy of the Administration’s past statements to Congress and the public regarding these issues.

The Committee’s investigation may lead to legislation, including but not limited to reforming the process used to add questions to the Census, changing requirements for congressional notifications or testing of new or existing topics and questions, requiring disclosure of Census questions proposed by third parties, mandating additional non-response follow-up to prevent an undercount, or prohibiting the inclusion of a citizenship question altogether.²² This list is not exhaustive, but rather illustrative of many legislative steps Congress could take after examining the evidence obtained during this investigation.

Conclusion

For all of the reasons described above, I respectfully request that you stop defying the Committee’s bipartisan subpoena and immediately begin producing all subpoenaed documents in unredacted form, including full email chains and associated attachments.

As an additional effort towards accommodation, the Committee will consider postponing its contempt vote if you produce—by June 6, 2019—unredacted copies of the 11 documents identified in Item 1 of the subpoena.

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

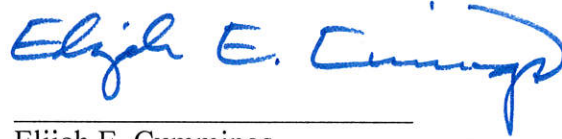
²⁰ U.S. Const. art. 1, sec. 2.

²¹ House rule X, clause 1(n), clause 4(c).

²² *See, e.g.*, 13 U.S.C. §141(f) (requiring the Secretary of Commerce to report to Congress regarding the subjects and questions to be included in the decennial census).

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Sincerely,



Elijah E. Cummings
Chairman

cc: The Honorable Jim Jordan, Ranking Member