



**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.