

# EXHIBIT C

# **EXHIBIT A**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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NEW YORK IMMIGRATION COALITION, ET AL.,

Plaintiffs,

vs. Case No. 1:18-CF-05025-JMF

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
Defendants.

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Global  
Objection: Washington, D.C.  
401; 403  
Thursday, August 30, 2018

Deposition of:

EARL COMSTOCK

called for oral examination by counsel for  
Plaintiffs, pursuant to notice, at the office of  
Arnold & Porter, 601 Massachusetts Avenue NW,  
Washington, D.C., before KAREN LYNN JORGENSEN,  
RPR, CSR, CCR of Capital Reporting Company,  
beginning at 9:08 a.m., when were present on  
behalf of the respective parties:

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VIDEOGRAPHER: Dan Reidy

1 P R O C E E D I N G S

2 WHEREUPON,

3 VIDEOGRAPHER: Good morning. We are  
4 going on the record at 9:01 a.m. on Thursday,  
5 August 30, 2018. Please note that the microphones  
6 are sensitive and may pick up whispering, private  
7 conversations and cellular interference. Please  
8 turn off all cell phones or place them away from  
9 the microphones, as that can interfere with the  
10 deposition audio. Audio and video recording will  
11 continue to take place unless all parties agree to  
12 going off the record.

13 This is Media Unit 1 of the video  
14 recorded deposition of Earl Comstock to be taken  
15 by counsel for the plaintiff in the matter of the  
16 New York Immigration Coalition, et al., v. The  
17 United States Department of Commerce, et al. This  
18 case is filed in the United States District Court  
19 for the Southern District of New York. This  
20 deposition is being held at the law office of  
21 Arnold & Porter located at 601 Massachusetts Avenue  
22 Northwest, Washington, D.C. 20001.

1           My name is Dan Reidy from the firm  
2           Veritext Legal Solutions, and I am the  
3           videographer. The court reporter is Karen  
4           Jorgenson from Veritext Legal Solutions.

5           I am not authorized to administer an  
6           oath. I am not related to any party in this  
7           action, nor am I financially interested in the  
8           outcome.

9           Also, counsel appearances will be noted  
10          on the stenographic report rather than orally at  
11          this time.

12          Will the court reporter please swear in  
13          the witness?

14                               EARL COMSTOCK,  
15          called as a witness, and having been first duly  
16          sworn, was examined and testified as follows:

17               THE WITNESS: I do.

18               EXAMINATION BY MR. COLANGELO:

19           Q     Please state your name and work address.

20           A     Earl Comstock, U.S. Department of  
21           Commerce.

22           Q     And we met a minute ago, but for the

1           And are you currently admitted to the  
2 practice?

3           A     In the District, yes.

4           Q     In D.C.

5           Is your registration active or inactive?

6           A     I believe it's active. I'd have to go  
7 double-check.

8           Q     Okay. And are you admitted in any other  
9 states?

10          A     I was admitted in Alaska and that's  
11 inactive.

12               (Thereupon, the court reporter  
13 clarified.)

14 BY MR. COLANGELO:

15          Q     And tell me what your college degree  
16 field of study was?

17          A     Political science.

18          Q     Do you have any education training or  
19 experience in statistics?

20          A     Did -- well, George Mason University does  
21 accounting, statistics and economics for lawyers,  
22 which is a required part of the course. So I had

1 two years of that, and also had an environmental  
2 science minor at UCSB, so did a number of  
3 statistics and chemistry and biology courses in  
4 relation to that.

5 Q And by in relation to that, you mean in  
6 relation to the environmental science degree?

7 A Correct.

8 Q Okay. Do you have any education,  
9 training or experience in survey methodology?

10 A No.

11 Q Do you have any education, training or  
12 experience in demography?

13 A Other than basic introduction to  
14 demography, no.

15 Q What do you mean by introduction?

16 A Well, what you take in an undergraduate  
17 course that covers demography.

18 Q Okay. Do you have any education,  
19 training or experience in voting rights law?

20 A No.

21 Q Do you have any education training or  
22 experience in redistricting?

1 A No.

2 Q Do you have any education, training or  
3 experience in election law?

4 A Again, other than as an attorney and the  
5 ability to read laws, no.

6 Q Okay. By as an attorney and the ability  
7 to read laws, you mean if you needed to read a  
8 law, you could?

9 A Meaning if I had read a statute related  
10 to those, then I would be able to understand it,  
11 yes.

12 Q But you've never studied election law?

13 A I've never studied election law.

14 Q You've never practiced election law?

15 A No.

16 Q Okay. Were -- between November 2016 and  
17 February 2017, you were a member of the  
18 presidential transition team?

19 A From November -- yeah, just after  
20 Thanksgiving until I began working for the  
21 Department of Commerce, yes.

22 Q Okay. And when did you begin working at

1 A Yes.

2 Q Do you remember a meeting that you and  
3 Wendy and the Secretary attended on the 18th after  
4 the confirmation hearing?

5 A Not with any particularity, no.

6 Q Okay. Mr. Comstock, tell me what your  
7 current position is?

8 A I'm the deputy chief of staff and  
9 director of policy.

10 Q Deputy chief of staff and director of  
11 policy.

12 When did you become the director of  
13 policy?

14 A On January 31st --

15 Q January 31st.

16 A -- 2017.

17 Q The -- was January 31, 2017 your first  
18 day in the office at the Commerce Department?

19 A Yes. If I'm recalling correctly, that  
20 that was Monday, yes. It was the 30th or 31st.  
21 It was whatever the Monday was at the end of  
22 January.

1 Q Other than the personnel onboarding, did  
2 you have conversations --

3 A No.

4 Q -- with anyone at the Commerce Department  
5 between January 20th and January 30th of 2017?

6 A No.

7 Q Did you have any conversations with  
8 Secretary Ross between January 20th and  
9 January 30th of 2017?

10 A Nothing particularly that I recall, but  
11 I'm sure I talked to him, yes.

12 Q Okay. You mentioned that your title is  
13 deputy chief of staff and director of policy.

14 When did you became deputy chief of  
15 staff?

16 A In April of this year.

17 Q So from January 30, 2017 until  
18 April 2018, you were director of policy?

19 A Correct.

20 Q Is director of policy a position within  
21 the Office of the Secretary?

22 A Yes.



1 Q And is that the same as director of  
2 policy and strategic planning?

3 A Correct.

4 Q Who do you report to?

5 A The Secretary.

6 Q Directly to the Secretary?

7 A Well, and to the chief of staff and to  
8 the deputy secretary.

9 Q Okay. Was there a chief of staff on  
10 January 30, 2017?

11 A There was not.

12 Q Okay. So until there was a chief of  
13 staff, who would you say you reported to?

14 A Well, until the Secretary came on board,  
15 sort of no one.

16 Q Okay.

17 A No. The -- the acting deputy secretary,  
18 obviously, was the career official who was in  
19 charge of making any final decisions for the  
20 department, so --

21 Q And can you identify her for the record?

22 A Ellen Herbst.

1 Q 2018?

2 A Sorry. 2017.

3 Q So you mentioned you work on whatever the  
4 Secretary wants you to work on?

5 A Correct.

6 Q How does he identify matters that he  
7 wants you to work on?

8 A He says, Earl, can you get this done? Or  
9 we attend this meeting, and he says, can you  
10 follow up on that?

11 Q And how do you keep the Secretary  
12 informed about what you are doing on important  
13 matters or on assignments that he's given you?

14 A By email, by oral briefing, and sometimes  
15 by memos.

16 Q How do you decide whether you're going to  
17 update Secretary Ross by email, by briefing or by  
18 memo?

19 A Just depends on the time frame, the speed  
20 of which I need to get something to him, how  
21 extensive it is. You know, if there's a lot of  
22 information that it would be helpful for him to

1 A No.

2 Q Please explain.

3 A Well, again, it depends on who you're  
4 talking about at the policy office. If you're  
5 talking about my staff at the policy office, they  
6 do not, as a general rule, develop the policy.  
7 The policy is generally developed by the Secretary  
8 with input from me and with input from them when  
9 needed.

10 Q And not with input from the bureaus?

11 A Well, absolutely. We go back and forth  
12 with the bureaus all the time.

13 Q You mentioned that the individuals in the  
14 policy office monitor specific areas; is that  
15 right?

16 A Correct.

17 Q Do you have somebody assigned to monitor  
18 the Census Bureau?

19 A Yes.

20 Q Who is that?

21 A David Langdon.

22 Q And what is David Langdon's background?

1           A    He is in the Economic & Statistics  
2   Administration and knows -- knows the people down  
3   there, knows how to get stuff done, so --

4           Q    Okay. And did you hire Mr. Langdon?

5           A    I did not.

6           Q    Was he in the policy office when you got  
7   there?

8           A    He was.

9           Q    How often do you interact with the  
10   Census Bureau?

11          A    Directly? Depends on the issue. Like  
12   when we were doing the lifecycle cost estimate,  
13   quite a bit. When we were doing the census -- the  
14   citizenship question, interacted with the staff  
15   there -- the senior staff on a fairly frequent  
16   basis.

17          Q    Do you have any standing meetings with  
18   the Census Bureau?

19          A    No. Well, other than when they come and  
20   brief the Secretary sort of on a monthly basis,  
21   I'll attend those meetings.

22          Q    Okay. I'll come back to the monthly

1 stakeholders?

2 A I take meetings when the Secretary can't,  
3 yes.

4 Q Do you ever take meetings independent of  
5 filling in for the Secretary?

6 A Yeah, on major policy issues I'm working  
7 on.

8 Q Did you meet with outside stakeholders on  
9 the citizenship question?

10 A No.

11 Q You didn't attend any meetings, including  
12 with the Secretary, on the citizenship question --

13 A I --

14 Q -- with outside stakeholders?

15 A With the outside stakeholders groups, no.

16 Q When did you first hear about the notion  
17 of adding a question about citizenship to the  
18 decennial census?

19 A Sometime in -- shortly after the  
20 confirmation.

21 Q And who did you hear it from?

22 A The Secretary.

1 Q And the Secretary was confirmed on  
2 February 28, 2017; is that right?

3 A I -- like I said, you'd have to confirm  
4 that date, but I think that was the date, yes.

5 Q And what did the Secretary tell you about  
6 the idea of adding a question on citizenship to  
7 the census during that first conversation shortly  
8 after his confirmation?

9 A Again, the exact time frame of the  
10 conversation, I can't tell you. It was sometime  
11 in that spring period. I don't recall the  
12 details. I think he simply inquired as to why  
13 don't we have a citizenship question on the  
14 census.

15 Q Okay. And what did you say to him when  
16 he inquired?

17 A Short answer, I don't know. I'll check.

18 Q Okay. And would that interaction be  
19 reflected in any documents?

20 A I don't -- I don't believe so, but it's  
21 possible it's in an email exchange.

22 MR. COLANGELO: Can we mark as Exhibit 1,

1 A I see it, yes.

2 Q And I take it that you would assume that  
3 Earl refers to you?

4 A I'm not aware of another Earl that works  
5 at the department at the moment, so --

6 Q Okay. Certainly, not another Earl that  
7 works at the Office of Secretary who's a political  
8 appointee?

9 A Correct.

10 Q And then Mr. Langdon then says, "Earl is  
11 very" -- underlined very -- "interested and thinks  
12 the Secretary will be, as well."

13 Do you see that?

14 A Yes.

15 Q On February 2nd of 2017 would have been  
16 your fourth day on the job; is that right?

17 A Yep.

18 Q Okay. And do you recall telling  
19 Mr. Langdon that you were very interested in  
20 Congressional notification of decennial ACS  
21 topics?

22 A I recall telling him that we were very

1 interested in the census and getting a briefing on  
2 it.)

3 Q Okay.

4 A I don't specifically recall that, but --

5 Q Were you very interested in the decennial  
6 topics on February 2, 2017?

7 A What probably would have caught my  
8 attention is if we had to notify Congress about  
9 something, I would want to make sure we were up to  
10 speed on what we needed to notify them about.

11 Q As of this date, February 2, 2017, do you  
12 recall if you had already had discussions  
13 regarding adding a citizenship question to the  
14 census?

15 A I don't recall having a discussion before  
16 that.

17 Q Mr. Langdon's email says, quote, it would  
18 make sense for John Thompson to touch on this  
19 topic in his overview briefing and then to have a  
20 follow-up briefing very soon.

21 Was Mr. Thompson the Census Bureau  
22 director at the time?



1 A Yes.

2 Q And did that overview briefing take place  
3 that's referred to in this email?

4 A I imagine it did.

5 Q Do you remember when that happened?

6 A I couldn't tell you.

7 Q Do you keep a calendar?

8 A Yeah. There's an electronic calendar  
9 somewhere.

10 Q And your calendar records the meetings  
11 that you attend?

12 A Generally, yes.

13 Q Would it typically record a meeting with  
14 the Census director?

15 A It would depend if somebody sent me a  
16 calendar invite.

17 Q Would somebody typically send you a  
18 calendar invite for a meeting with the Census  
19 director?

20 A At that point in time, possibly. Yeah, I  
21 don't know.

22 Q The email refers, also, to a follow-up

1 Q We'll mark this exhibit Comstock  
2 Exhibit 2.

3 (Plaintiffs' Exhibit 2, Email, was  
4 marked.)

5 BY MR. COLANGELO:

6 Q We are marking as Comstock 2 Document  
7 Bates numbered 2521.

8 Mr. Comstock, take a look at this email.  
9 You've seen this email before, right?

10 A I sent it.

11 Q So that's a yes?

12 A Yes.

13 Q Were you shown this email in preparation  
14 for your deposition today?

15 MR. GARDNER: I'm going to object and  
16 instruct the witness not to answer on the grounds  
17 of attorney work product.

18 I'm happy to let you answer when was the  
19 last time you saw the document.

20 But you're asking about documents counsel  
21 may have shown that would be protected.

22 BY MR. COLANGELO:

1 Q When's the last time you saw this  
2 document, Mr. Comstock?

3 A Yesterday.

4 Q And do you see the subject line of this  
5 email is your question on the census?

6 A Yep.

7 Q Okay. And Secretary Ross was confirmed  
8 on February 28th, I think we agreed; is that  
9 right?

10 A Like I said, if that's the date, yes.

11 Q Okay. So this would have been  
12 Secretary Ross's eleventh day on the job as  
13 Commerce Secretary, give or take?

14 A Approximately, yes.

15 Q And the subject line of this email is  
16 your question on the census?

17 A Right.

18 Q What was the Secretary's question on the  
19 census?

20 A He appeared to have asked whether  
21 undocumented people were counted in the census.

22 Q Okay. And how did he ask you that

1 question?

2 A I don't recall. Probably at a meeting,  
3 possibly following up on a census briefing. I  
4 don't know.

5 Q Have you checked your calendar for  
6 March 10, 2017 recently?

7 A I was going to say I probably haven't  
8 checked it from March 10, 2017 for that particular  
9 date.

10 Q Okay.

11 A By the way, I wanted to add one point.  
12 On the prior document, you need to understand that  
13 at that time, there were a number of questions  
14 that the prior administration had requested be  
15 placed, potentially, on the census that would have  
16 been involved in that notification. So that would  
17 have been a reason of why I would have been  
18 interested in that, on sexual orientation and  
19 gender identity. So that was an issue that was  
20 very at the forefront at the time of what to do  
21 about those requests.

22 Q So let's go back to Exhibit 2, your email

1 to Secretary Ross on Friday, March 10th. Do you  
2 know why the Secretary asked you whether  
3 undocumented people were counted?

4 A I have no idea.

5 Q Okay. Did he ask you whether noncitizen  
6 people were counted for apportionment purposes?

7 A Well, based on the answer, it appears he  
8 might have.

9 Q Appears he might have or appears he did?

10 A I couldn't tell you the answer on that.

11 Q Okay.

12 A I don't recall the question, so --

13 Q Okay. But you sent this email to the  
14 Secretary in response to a question?

15 A Yes.

16 Q And you would have presumably tried to  
17 make your answer responsive to his question?

18 A I generally do that, yes.

19 Q So you think it's likely that his  
20 question was about whether undocumented immigrants  
21 were counted for apportionment purposes?

22 A That's entirely possible, but he might

1 have also just asked do we count undocumented  
2 persons, and this is what I found on the Census  
3 website.

4 Q How do you think you found it on the  
5 Census website?

6 A By typing in census and going to their  
7 website and seeing what their FAQs say.

8 Q So you think you would have gone directly  
9 to the frequently asked questions page?

10 A That would not be unusual for me to do,  
11 yes.

12 Q This link you've identified at  
13 www.census.gov, that's the Census Bureau's  
14 frequently asked web page for Congressional  
15 apportionment; is that right?

16 A Again, without pulling it up, I couldn't  
17 tell you specifically what it says.

18 Q Okay. If I represent to you that if you  
19 pulled up that website, it would say frequently  
20 asked questions for Congressional apportionment,  
21 would that assist you?

22 A I'd be happy to take your word for it.

1 Q So does that assist you in recalling that  
2 the Secretary asked whether noncitizens were  
3 counted for apportionment purposes?

4 A And I have no recollection of the  
5 question, so I can only go by the answer.

6 Q Okay. The email also includes a blog  
7 post from the Wall Street Journal; is that right?

8 A Uh-huh.

9 Q Okay. And your email to the Secretary  
10 says that this blog post, quote, confirms that  
11 neither the 2000s, nor the 2010 census asked about  
12 citizenship?

13 A Correct.

14 Q So does that lead you to conclude that  
15 the Secretary asked about whether the decennial  
16 census asks about citizenship?

17 A That would be a reasonable supposition,  
18 based on the response.

19 Q And this blog post is called the pitfalls  
20 of counting illegal immigrants; is that right?

21 A Yep.

22 Q And were you concerned on March 10, 2017

1 about counting illegal immigrants?

2 A I -- no, not personally.

3 Q Was the Secretary concerned on

4 March 10, 2017 about counting illegal immigrants?

5 A Again, I have no recollection of the  
6 question, so I couldn't speculate as to what his  
7 concern was.

8 Q But you testified that a significant part  
9 of your job function involves answering questions  
10 from the Secretary on issues that matter to him,  
11 right?

12 A Correct.

13 Q And if he asked you a question, you would  
14 try to be responsive?

15 A Generally, yes.

16 Q You wouldn't ordinarily send him  
17 information that wasn't responsive to a question  
18 he asked, would you?

19 A Not -- not characterized this way, no.

20 Q So you testified a minute ago that the  
21 Secretary -- that you first heard about the notion  
22 of adding a question about citizenship to the



1 census when the Secretary raised it with you  
2 shortly after his confirmation. Does this email  
3 indicate to you that it was by March 10th that the  
4 Secretary first raised it with you?

5 A I wouldn't necessarily draw that  
6 conclusion from this email.

7 Q Would you draw the conclusion that it was  
8 later than March 10?

9 A No, I wouldn't. Again, this -- this  
10 question does not directly address -- it's a  
11 question about how -- who do we count, not whether  
12 or not -- and whether there's a citizenship  
13 question. So I don't know at this point whether  
14 he indicated he was interested in such a question,  
15 other than getting the factual information.

16 Q Okay. Who would know when the Secretary  
17 was interested in adding a citizenship question?

18 MR. GARDNER: Objection. Calls for  
19 speculation.

20 BY MR. COLANGELO:

21 Q You can answer.

22 A My counsel just objected, so why can --

1 March of 2017?

2 A Again, not that I recall.

3 Q Let me direct you to the highlighted line  
4 about three-quarters of the way down on the page  
5 that is stamped 2521 -- and we apologize for the  
6 copy quality.

7 A I was going to say --

8 Q This is how the document --

9 A Think you highlighted it so nobody could  
10 read it.

11 Q -- was produced to us.

12 A So this is not a redaction is what you're  
13 telling me?

14 Q Correct. This is not a redaction.

15 A If you can tell me what it says, I'd be  
16 happy to --

17 Q Sure. The highlighted line says, "No  
18 major government survey, including the decennial  
19 census now underway, asks Americans about their  
20 citizenship status."

21 And you see that this blog post is dated  
22 May of 2010, correct?

1 A Uh-huh.

2 Q So the decennial census now underway, do  
3 you understand we refer to --

4 A Would have been the 2010, yeah.

5 Q Remember to please wait for me to finish  
6 my question before you answer.

7 A Sure.

8 Q Did you highlight this line?

9 A Well, unless you did, then I'm assuming I  
10 did.

11 Q I can represent to you we did not  
12 highlight this line.

13 A Okay. Then I will assume that it was  
14 highlighted in the email.

15 Q And why did you highlight this line of  
16 the blog post before sending it to the Secretary?

17 A Well, it appears that the question was  
18 whether or not the citizenship question had been  
19 asked, at least on the 2010 census, and so I'm  
20 highlighting for him where in this article, so he  
21 doesn't have to read the whole thing that I found  
22 the information responsive to his question, which

1 is a statement by somebody in Wall Street Journal,  
2 which is, you know, in some circles considered a  
3 reasonably accurate paper. Stating that it was  
4 not collected in the 2010 census.

5 Q Okay. And take a look -- let's do that  
6 again. We had some interference from the  
7 conference line.

8 Take a look at the second page of  
9 Comstock Exhibit 2. This is the page marked 2522.

10 A Yep.

11 Q And, again, about two-thirds of the way  
12 down the page, there's another highlighted line.

13 Do you see that?

14 A I -- yep.

15 Q I'll represent to you this line was  
16 highlighted as the documents were produced to the  
17 plaintiffs in this lawsuits. We did not  
18 highlight.

19 A Okay.

20 Q That line reads --

21 A I can't read what it says.

22 Q -- "Many more foreign-born residents were

1 counted in 2000 than was expected based on annual  
2 estimates produced by the Bureau."

3 Do you see that line?

4 A Yep. I'm -- I see the highlighted line,  
5 but I'm taking it at your word that that's what it  
6 says.

7 Q Okay. The -- do you know why you  
8 highlighted that line when you sent this blog post  
9 to the Secretary?

10 A Again, it would appear to indicate that  
11 the census may have underestimated the number of  
12 undocumented folks.

13 Q Okay. So you told me that the Secretary  
14 first raised the idea of adding a citizenship  
15 question to the census shortly after he was  
16 confirmed. You've testified that on March 10th,  
17 you emailed him information showing that  
18 undocumented residents are included in the  
19 apportionment counts. You've testified on  
20 March 10th, you emailed him a blog post from the  
21 Wall Street Journal highlighting a line that no  
22 major government survey asks American's about

1 their citizenship status.

2 Does that help you remember when the  
3 Secretary first expressed interest in adding a  
4 citizenship question to the decennial census?

5 A No.

6 Q And does that help you remember that it  
7 was no later than March 10th that the Secretary  
8 first asked you that question?

9 A Again, you're speculating as to when he  
10 asked. But he appeared to have inquired about  
11 some relevant aspects of it --

12 Q Okay.

13 A -- on March 10th.

14 Q We'll mark this Comstock Exhibit 3. And,  
15 Mr. Comstock, is being handed Document Bates stamp  
16 3685.

17 (Plaintiffs' Exhibit 3, Email, was  
18 marked.)

19 BY MR. COLANGELO:

20 Q Mr. Comstock, do you have Exhibit 3 in  
21 front of you?

22 A I do.

1 is David Langdon asking you what your schedule --

2 A Right.

3 Q -- looks like to receive a briefing on  
4 the 2020 census --

5 A Right.

6 Q -- and ACS topics; is that right?

7 A Correct.

8 Q So is it your understanding that he was  
9 briefing the acting deputy secretary or that he  
10 was arranging everything for you?

11 A Again, I have no recollection of this  
12 exchange. So it's entirely possible that this  
13 briefing in the 3/10 email and briefing in the  
14 3/15 email are one in the same or they could be  
15 different. I don't know.

16 Q Okay. Let's mark this Comstock 5. This  
17 is document Bates -- the witness has been handed  
18 Comstock Exhibit 5 stamped 1321.

19 (Plaintiffs' Exhibit 5, Memo, was  
20 marked.)

21 BY MR. COLANGELO:

22 Q Mr. Comstock, do you have Exhibit 5 in

1 front of you?

2 A I do.

3 Q Have you seen this document before?

4 A I have.

5 Q When's the first time you saw this

6 document?

7 A Probably when we reviewed a draft in the

8 Justice Department.

9 Q Okay. When was that?

10 A I couldn't tell you the date.

11 Q Was it near in time to the date below

12 Secretary Ross's signature, which is June 21,

13 2018?

14 A I'd say that's likely, yes.

15 Q When's the last time you saw this

16 document?

17 A Right now.

18 Q When's the last time before right now

19 that you saw this document?

20 A I think maybe yesterday. I can't recall.

21 Q Okay. Did you draft this memo?

22 A I did not draft this memo, no.



1 Q Did you assist in drafting this memo?

2 A I provided some edits to this memo.

3 Q Okay. Who else assisted in providing  
4 edits to the memo?

5 A The Office of General Counsel.

6 Q Who in the Office of General Counsel?

7 A I believe Mike Walsh.

8 Q Anyone else?

9 A There may have been other counsel. I  
10 don't know.

11 Q Did Peter Davidson provide edits to this  
12 memo?

13 A It's entirely possible he did.

14 Q Did James Uthmeier provide edits to this  
15 memo?

16 A It's possible, yes.

17 Q The second sentence of this memo says,  
18 "Soon after my appointment as Secretary of  
19 Commerce, I began considering various fundamental  
20 issues regarding the upcoming 2020 census,  
21 including funding and content. Part of these  
22 considerations included whether to reinstate a

1 citizenship question, which other senior  
2 administration officials had previously raised."

3 A Yes.

4 Q Do you see that?

5 A I do.

6 Q Do you recall when -- strike that.

7 Do you know what time period the  
8 Secretary is referring to in this memo when he  
9 says, "Soon after my appointment, I began  
10 considering various fundamental issues"?

11 A Well, it appears that he would be talking  
12 about spring of 2017.

13 Q And the Secretary says in this memo, "My  
14 staff and I thought reinstating a citizenship  
15 question could be warranted."

16 Do you see that line?

17 A Yep.

18 Q Okay. Who is the Secretary referring to  
19 when he says my staff and I?

20 A That probably includes me and could  
21 include other staff.

22 Q Which other staff?

1           A    Other staff involved in this process  
2   would include James Uthmeier, Mike Walsh,  
3   Wendy Teramoto, the Census staff.   You know,  
4   again, the entire department that works for him,  
5   so --

6           Q    Okay.   He refers in that line to, "My  
7   staff and I thought reinstating a citizenship  
8   question could be warranted."

9                   Is that right?

10          A    Right.   So he's likely talking about me.  
11   And, again, whether he discussed this with  
12   Eric Branstad, I have no idea.   Izzy Hernandez was  
13   working on this for a while, so he might have  
14   talked to him about it.   And then, obviously,  
15   James Uthmeier was working on this.   Ellen Herbst,  
16   whether he discussed it with her, I don't know.

17          Q    Let me ask you another question about  
18   your review of this memo.   You mentioned that  
19   before today, the last time you saw it was  
20   yesterday; is that right?

21          A    Right.   Counsel showed it to me.

22          Q    And who was present at that meeting?

1 Q And who did you discuss it with when you  
2 were shown this -- the draft of this memo before  
3 June 21st?

4 A I would have discussed it with counsel.

5 Q The same counsel you just identified?

6 A No. Because I wasn't working with the  
7 Justice Department folks at the time. So this  
8 would have been internal at Commerce.

9 Q Okay. I thought you said it came over  
10 from the Justice Department.

11 A It did, the first draft.

12 Q Okay. What do you mean by I wasn't  
13 working with Justice Department folks at the time?

14 A I was not involved with direct  
15 interaction with the Justice Department --

16 Q Okay.

17 A -- I was seeing them through the Office  
18 of General Counsel.

19 Q So you discussed with your colleagues in  
20 OGC?

21 A Correct.

22 Q The same colleagues who are here today?

1           A     Michael Walsh, I know I did. I don't  
2     recall if I discussed with David or not.

3           Q     Anyone else?

4           A     I likely talked to James Uthmeier.

5           Q     Anyone else outside --

6           A     Peter Davidson.

7           Q     I'm sorry. Please answer.

8           A     No. Peter Davidson. But those would  
9     have been the likely candidates. Again, I don't  
10    recall the exact discussions.

11          Q     This was two months ago, correct?

12          A     Correct.

13          Q     Did you discuss the draft of this memo  
14     with anybody outside the Office of the General  
15     Counsel at Commerce?

16          A     Other than when the Secretary signed it,  
17     no.

18          Q     Okay. Tell me who you discussed it with  
19     when the Secretary signed it?

20          A     The Secretary.

21          Q     And what did you discuss with him when he  
22     signed it?

1           A    Mr. Secretary, the Justice Department  
2 recommends that we file this supplemental memo,  
3 and so we recommend you sign it.

4           Q    And did he read it when you showed it to  
5 him?

6           A    I believe he did, yes.

7           Q    Had you shown it to him before that  
8 conversation?

9           A    I -- I don't know.

10          Q    Do you know if OGC had shown it to him  
11 before that conversation?

12          A    It's entirely possible, yes.

13          Q    Do you know if the Justice Department  
14 showed it to him before that conversation?

15          A    I don't believe the Justice Department  
16 came over to meet with them.

17          Q    Did you talk with anyone other than the  
18 Secretary or your colleagues from the Office of  
19 General Counsel about this memo before June 21st?

20          A    Not that I recall.

21          Q    Did you discuss with it  
22 Karen Dunn Kelley?

1           A    That's entirely possible, yeah.

2           Q    Okay.  Anyone else?

3           A    Again, don't recall specific meetings on  
4   this.  I think it was done largely in back and  
5   forth as people were available.

6           Q    Did you discuss it with Wendy Teramoto?

7           A    No.  I don't believe I discussed it with  
8   Wendy.

9           Q    Wendy is the chief of staff?

10          A    Yes.

11          Q    And you report to her?

12          A    Yes.

13          Q    Do you know why you wouldn't have  
14   discussed it with Wendy?

15          A    Wendy doesn't get very involved in the  
16   policy matters, typically.

17          Q    Why not?

18          A    Because she's chief of staff.  That's her  
19   call.

20          Q    Got it.

21                You mentioned that you were likely one of  
22   the people the Secretary's referring to when he

1 says my staff and I thought reinstating a  
2 citizenship question could be warranted.

3 A Uh-huh!

4 Q Why did you think in the spring of 2017  
5 that reinstating a citizenship question could be  
6 warranted?

7 A Because a citizenship question had  
8 previously been asked. It's asked by every other  
9 major democracy in the world, so why wouldn't we  
10 ask?

11 Q And why did you want a citizenship  
12 question?

13 A Again, I think it provides important  
14 information that's used for all kind of programs.  
15 And if you want a complete and accurate census,  
16 you would provide it.

17 Q What caused you to form a view on whether  
18 the citizenship question should or should not be  
19 added?

20 A When I was -- and I didn't really know  
21 that it wasn't included in the census, but once I  
22 became informed of that, it struck me as odd that



1 we don't ask the question.

2 Q And you testified earlier that the  
3 Secretary is the first person who raised it to  
4 you?

5 A In my employment at the Department of  
6 Commerce, yes.

7 Q Do you recall discussing it before you  
8 worked at the Commerce Department?

9 A Probably sometime in the last 30-odd  
10 years, I'm in -- you know, in political science  
11 and politics, so I'm sure I discussed at.

12 Q But the first time in 2017 that you  
13 recall considering this issue is when the  
14 Secretary raised it with you?

15 A Correct.

16 Q And this memo says the Secretary began  
17 considering it soon after his appointment?

18 A Correct.

19 Q And his appointment was February 28th  
20 we've established --

21 A That's correct.

22 Q -- of 2017?

1 Census Bureau's processes for changing statistical  
2 instruments when you formed a view that the  
3 citizenship question should be added?

4 MR. GARDNER: Objection. Form.

5 BY MR. COLANGELO:

6 Q You can answer.

7 A Okay. Well, again, I think you need to  
8 separate this out. My decision or my belief that  
9 a -- a citizenship question should be included  
10 does not in any way change the process by which it  
11 might get included. So they're two separate  
12 things. I can hold the belief that a certain  
13 action might be warranted or should be taken  
14 independent of any analysis of whether or not that  
15 should be done. That's two separate things. So I  
16 think you're conflating the two.

17 The fact that I may think that as an  
18 objective, hypothetical question should one be  
19 added, I can form that belief quite quickly and  
20 hold that. That's, then, separate from is that  
21 the right decision to make for a variety of  
22 reasons, including some of the issues that you

1 just outlined.

2 Q And so in forming your view that a  
3 citizenship question should be added --

4 A Again, you're characterizing it in a way  
5 that I'm not. In forming my view that a  
6 citizenship question would be appropriate to  
7 include in a census, that's one thing.

8 Q Okay.

9 A Should be added is a separate --

10 Q Hang on a second. I haven't added a  
11 question yet.

12 The Secretary's memo says my staff and I  
13 thought reinstating a citizenship question could  
14 be warranted, right? And you've testified that  
15 you were among the people he was referring to when  
16 he says my staff and I.

17 A Right.

18 Q So you were of the view that the  
19 citizenship -- adding a citizenship question could  
20 be warranted?

21 A Yes.

22 Q And I'm asking in forming the view that

1 adding a citizenship question could be warranted,  
2 you relied only on common sense; is that what you  
3 testified?

4 MR. GARDNER: Objection.

5 Mischaracterizes the witness's prior testimony.

6 BY MR. COLANGELO:

7 Q What did you rely on in forming that  
8 view?

9 A So, again, the key word is could. Could  
10 be warranted, meaning it is worthy of  
11 investigating further. That is what the document  
12 says.

13 Q What did you rely on in forming that  
14 view?

15 A The fact that other countries ask this  
16 information; the fact that we ask it on the ACS of  
17 a percentage of the population every year; the  
18 fact that as a citizen, most people wouldn't be  
19 concerned with answering that question. All of  
20 those things are relevant.

21 Q Did you research the statistical  
22 practices of other countries in the spring of

1 2017?

2 A No.

3 Q When did you -- did there come a time  
4 when you researched the statistical practices of  
5 other countries?

6 A Why would that be relevant?

7 Q Mr. Comstock, you just testified that in  
8 forming the view that adding a citizenship  
9 question could be warranted, among the things you  
10 considered was that other countries do. So I'm  
11 asking you --

12 A Okay.

13 Q -- did you research the practices of  
14 other countries?

15 A By that, you mean did I -- did I  
16 determine that other countries ask the question?  
17 Yes.

18 Q In the spring of 2017?

19 A Yeah. I think we did a quick Google  
20 search, you know.

21 Q So you Googled the census practices of  
22 other countries in order to determine that adding

1 a citizenship question could be warranted?

2 A Again, my formulation of a -- of a  
3 decision that it could be warranted is largely  
4 based on common sense.

5 Q Okay. I just want to make sure that I  
6 understand. That as to the part of your answer  
7 that related to the practices of other countries,  
8 in the spring of 2017, you formed that view by  
9 Googling it?

10 A I may have asked if other countries did  
11 it or I may have gotten online and looked. I  
12 don't recall.

13 Q Who would you have asked if you asked?

14 A I likely would have asked somebody from  
15 Census or I might have asked David Langdon.

16 Q And if you asked, would that be reflected  
17 in your -- in your email or your memo somewhere?

18 A If it was, you could have found the  
19 email. So I, obviously, did not send an email if  
20 I asked that question.

21 Q Okay. The --

22 MR. GARDNER: Matt, I'm sorry. I didn't

1 Q Who are those other senior administration  
2 officials?

3 A You'd have to ask the Secretary.

4 Q You don't know yourself?

5 A I don't.

6 Q You have no idea which other senior  
7 administration officials raised this question,  
8 other than the Secretary?

9 A No.

10 Q You never asked him where the idea came  
11 from?

12 A Nope.

13 Q He never told you where the idea came  
14 from?

15 A Nope.

16 Q You spent a lot of time on this issue?

17 A Not relative to a lot of other things I  
18 work on, no.

19 Q How would you characterize the amount of  
20 time you spent on this issue?

21 A One one-hundredth of my time.

22 Q You agree that it's an important issue?

1 A Correct.

2 Q It was important to the Secretary?

3 A Correct.

4 Q He was motivated to get this done?

5 A He was working on a lot of different  
6 issues at the time.

7 Q But this one was important to him?

8 A Yes. Absolutely.

9 Q Okay. And when you saw the draft of this  
10 memo before June 21st and it refers to other  
11 senior administration officials, you didn't  
12 yourself have any view or understanding of who  
13 those other administration officials were?

14 A I did not, no.

15 Q You didn't ask the secretary who those  
16 other administration officials were?

17 A No.

18 Q Okay. When recommending that he sign the  
19 memo, he didn't say to you who are the other  
20 senior -- who the other senior administration  
21 officials were?

22 A We did not discuss that, no.



1 Q And you said this came over from the  
2 Justice Department?

3 A Correct.

4 Q Who sent it over, do you remember?

5 A I don't know.

6 Q Let's mark Exhibit 6.

7 (Plaintiffs' Exhibit 6, Email, was  
8 marked.)

9 MR. COLANGELO: The witness has been  
10 handed document stamped 2561. This has been  
11 marked Exhibit 6.

12 BY MR. COLANGELO:

13 Q Do you have Exhibit 6 in front of you?

14 A I do.

15 Q Have you seen this email before?

16 A I'm not on the email, so, no.

17 Q So this is the first time you've seen  
18 this message?

19 A Yeah. I -- I don't recall seeing this  
20 when it was sent.

21 Q Is today the first time you've seen this  
22 email?

1 talk to.

2 Q Did the Secretary speak with Mr. Bannon  
3 that night?

4 A I don't know.

5 MR. GARDNER: Objection. Calls for  
6 speculation. Lack of foundation.

7 THE WITNESS: I do not know.

8 BY MR. COLANGELO:

9 Q Did the Secretary speak with Kris Kobach  
10 on April 7, 2017?

11 A No idea.

12 Q Did you join a call with the Secretary  
13 regarding the census on April 5th of 2017?

14 A I have no idea.

15 Q You don't know if you joined the call  
16 with the Secretary on April 5th of 2017?

17 A I don't know what I was doing on  
18 April 5, 2017 without looking at a calendar or  
19 something else that would remind me. I'd have to  
20 go through my emails that day. I could not tell  
21 you what I was doing on that day.

22 Q Do you know who Kris Kobach is?

1           A    I believe he's somebody with State of  
2   Kansas maybe.

3           Q    And have you spoken to Mr. Kobach before?

4           A    I've never spoken to Mr. Kobach.

5           Q    Have you emailed with Mr. Kobach?

6           A    I've never emailed with Mr. Kobach.

7           Q    And after the call that's referred to in  
8   this email, did the Secretary tell you what he  
9   discussed?

10          A    No.

11               MR. GARDNER:  Objection.  Lack of  
12   foundation.

13               THE WITNESS:  No.

14          BY MR. COLANGELO:

15          Q    Who would know what was discussed on this  
16   phone call?

17               MR. GARDNER:  Objection.  Calls for  
18   speculation.  Also, lack of foundation.

19          BY MR. COLANGELO:

20          Q    You can answer.

21          A    The parties to the call.

22          Q    You were working on the census in the

1 spring of 2017, correct?

2 A Yes.

3 Q And the Secretary frequently asked you  
4 for updates on the census-related matters in the  
5 spring of 2017, right?

6 A I wouldn't characterize it as frequently.

7 Q Did the Secretary ever ask you for  
8 updates on census matters in the spring of 2017?

9 A Yes, he did.

10 Q Did he ever update you on developments  
11 that he was aware of regarding the census in the  
12 spring of 2017?

13 A It's unusual for the Secretary to update  
14 me on anything.

15 Q Would the Secretary have told you if he  
16 had a conversation with Steven Bannon about the  
17 census?

18 A Not necessarily.

19 Q Would he have told you if he had a  
20 conversation about the census with Kris Kobach?

21 A Not necessarily.

22 Q Why not?

1 MR. GARDNER: Objection. Form.

2 THE WITNESS: I wouldn't speculate, but  
3 he's the Secretary. He makes his own decisions.

4 BY MR. COLANGELO:

5 Q So has the Secretary ever told you about  
6 a conversation he had with someone else?

7 MR. GARDNER: Objection. Form.

8 THE WITNESS: Yes. He reports to me  
9 sometimes if he feels that it's essential that I  
10 know the substance of conversation.

11 BY MR. COLANGELO:

12 Q Okay.

13 MR. COLANGELO: Can we mark this  
14 Exhibit 7?

15 (Plaintiffs' Exhibit 7, Email, was  
16 marked.)

17 THE WITNESS: Thank you very much.

18 BY MR. COLANGELO:

19 Q Handed the witness a document stamped 763  
20 and marked Exhibit 7.

21 Mr. Comstock, do you have Exhibit 7 in  
22 front of you?

1 A I do.

2 Q Have you seen this email before?

3 A No, I haven't.

4 Q This is the first you've ever seen this  
5 email?

6 A Yes.

7 Q Okay. If you turn to the second page --

8 A I'm sorry. I'm just reading the  
9 document.

10 Okay.

11 Q Do you see at the bottom of page -- of  
12 the first page of this exhibit, Mr. Comstock,  
13 there's an email from Kris Kobach to  
14 Wendy Teramoto --

15 A Right.

16 Q -- on July 21, 2017; is that right?

17 A That's what it says.

18 Q And the email says, "Wendy, nice meeting  
19 you on the phone this afternoon. Below is the  
20 email that I sent to Secretary Ross. He and I had  
21 spoken briefly on the phone about this issue at  
22 the direction of Steven Bannon a few months

1 earlier."

2 Do you see that?

3 A I see that.

4 Q Okay. That was the call on April 5th  
5 that we were just talking about, right?

6 MR. GARDNER: Objection. Lack of  
7 foundation. Calls for speculation.

8 THE WITNESS: Doesn't specify when the  
9 phone call took place.

10 BY MR. COLANGELO:

11 Q And did Wendy tell you she got this email  
12 from Kris Kobach in July of 2017?

13 A No.

14 Q You've never spoken to Wendy about  
15 Kris Kobach, at all?

16 A Not that I recall.

17 Q Is there anyone else that you're aware of  
18 that Steven Bannon directed the Secretary to talk  
19 to about the census, other than Kris Kobach?

20 MR. GARDNER: Objection. Lack of  
21 foundation.

22 THE WITNESS: I have no knowledge of any

1 conversations with Steven Bannon, so I wouldn't  
2 know who he might have suggested the Secretary  
3 talk to.

4 BY MR. COLANGELO:

5 Q Have you ever spoken to Steven Bannon  
6 yourself?

7 A I have never spoken to Steven Bannon  
8 myself.

9 MR. COLANGELO: Can we have this marked  
10 Exhibit 8?

11 (Plaintiffs' Exhibit 8, Email, was  
12 marked.)

13 BY MR. COLANGELO:

14 Q This is document stamped 3709.

15 A Uh-huh.

16 Q Do you have Exhibit 8 in front of you?

17 A Uh-huh.

18 Q Who's Mark Neuman?

19 A Mark Neuman is a former -- I think he was  
20 formally chair of a census advisory committee, and  
21 he was a member of the transition -- I don't know  
22 which aspect of transition but, basically,



1 THE WITNESS: Again, if we were  
2 considering changing the questions, it would be  
3 important to know.

4 BY MR. COLANGELO:

5 Q And if you're considering adding a  
6 citizenship question, it would also be important  
7 to know the response rates on all demographic  
8 questions; is that right?

9 A That would be one of the questions you  
10 would ask, yes.

11 Q Okay. Did the Secretary discuss the  
12 citizenship question with Mr. Newman in the spring  
13 of 2017?

14 A You'd have to ask the Secretary.

15 MR. GARDNER: Objection. Lack of  
16 foundation.

17 BY MR. COLANGELO:

18 Q I'm sorry. You were both speaking at the  
19 same time.

20 MR. GARDNER: Objection. Lack of  
21 foundation.

22 BY MR. COLANGELO:

1 Q And now please answer.

2 A I would say you'd have to ask the  
3 Secretary.

4 Q Did he ever tell you that he spoke with  
5 Mr. Newman about the citizenship question?

6 A I'm fairly certain he was -- he did talk  
7 to him at some point.

8 Q Okay. When was that?

9 A I couldn't tell you.

10 Q Did Mr. Newman ever say to you that he  
11 had spoken to the Secretary about adding a  
12 citizenship question?

13 A It's possible, yeah.

14 Q Okay. When did he tell you?

15 A Again, I don't recall the exact date.

16 Q Try to place it, roughly.

17 A To your question, was there discussion of  
18 the possibility of adding a citizenship question  
19 in the spring? Yes. That does not mean any firm  
20 decision had been made. We were exploring the  
21 opportunity.

22 Q I'm not asking you about decisions. I'm

1 information, so, clearly, at some point, it was  
2 asked. I cannot tell you.

3 Q Can you tell me what you mean by decision  
4 memo?

5 A The memo that the Secretary produced  
6 documenting his decision. There was a reference  
7 to other response rates and demographic. So,  
8 clearly, at some point, the information became  
9 available.

10 Q And you're referring to the  
11 March 26, 2018 from the Secretary to Karen  
12 Dunn Kelley?

13 A Yes.

14 Q But you don't recall seeing that  
15 information -- strike that.

16 MR. COLANGELO: Let's mark Exhibit 9.

17 (Plaintiffs' Exhibit 9, Email, was  
18 marked.)

19 BY MR. COLANGELO:

20 Q We have marked a document stamped 3694 as  
21 Exhibit 9. Do you have this email in front of  
22 you?

1 A I do.

2 Q Have you seen this email before?

3 A Yes.

4 Q Before today, when is the last time you  
5 saw this email?

6 A Yesterday.

7 Q And this is an email from  
8 Brooke Alexander to you with a copy to  
9 Wendy Teramoto; is that right?

10 A Correct.

11 Q Dated April 20, 2017?

12 A Yep.

13 Q And did you understand this to be a  
14 message from the Secretary?

15 A That's what Brooke's message says.

16 Q Brooke has access to the Secretary's  
17 email?

18 A Yes.

19 Q And is it -- okay. Withdrawn.

20 Are you familiar with the National  
21 Advisory Committee on Racial, Ethnic and Other  
22 Populations?

1 A No.

2 Q You have no idea what the National  
3 Advisory Committee is?

4 A I mean, I know it's an advisory committee  
5 to Census, but outside of that, I -- I couldn't  
6 tell you what they do, other than what their title  
7 suggests that they do.

8 Q So you're aware that there's a National  
9 Advisory Committee on Racial, Ethnic and Other  
10 Populations that advises the Census Bureau?

11 A I take that from this email that's  
12 correct, yes.

13 Q And what do you understand the role of  
14 the advisory committee to be?

15 A To provide advice to the Census Bureau.

16 Q Okay. The message from Brooke speaking  
17 for the Secretary to you says, "Earl, Census  
18 director has on April 29th a meeting of the  
19 National Advisory Committee. We must get our  
20 issue resolved before this" -- exclamation point,  
21 and the must is underlined.

22 Do you see that?

1           A    I see that.

2           Q    What is our issue?

3           A    I couldn't tell you.

4           Q    Our issue is the citizenship question,  
5 right?

6           MR. GARDNER:  Objection.  Calls for  
7 speculation.  Lack of foundation.

8           THE WITNESS:  I would say likely not,  
9 actually, given there's no reason to believe the  
10 National Advisory Committee on Racial, Ethnic and  
11 Other Populations would be advising on a  
12 citizenship question.

13          BY MR. COLANGELO:

14          Q    Were there other issues that you'd been  
15 talking about with the Secretary involving the  
16 census in the spring of 2017 that would relate to  
17 the National Advisory's mandate?

18          A    Certainly the SOGI question would, and  
19 the MENA question would.

20          Q    But the notification date for the SOGI  
21 question was at the end of March in 2017 -- for  
22 the SOGI topics, I should say, correct?

1 A Correct.

2 Q So that was already resolved by April,  
3 right?

4 A I'm not certain of the timing, but MENA,  
5 I think, was not resolved until sometime in the  
6 spring or summer.

7 Q And sticking with the SOGI question --  
8 and for the record, that' S-O-G-I. SOGI stands  
9 for sex orientation and gender identity.

10 A Correct.

11 Q Would you conclude if the Secretary  
12 referred to a National Advisory Committee on  
13 Racial and Ethnic, Populations that the SOGI  
14 question would be what he had in mind?

15 A I would guess. Again, this is  
16 speculation, but my best guess, based on this  
17 reference, is probably more like the MENA issue is  
18 what was in front of us.

19 Q Okay. And describe the MENA issue?

20 A The Middle Eastern North African  
21 question. There's a question as to whether you  
22 ask two questions or you ask one question. And

1 it's not a topic I spent a tremendous amount of  
2 time on, but it was something that the Census was  
3 very much discussing at the time.

4 Q And had you discussed that issue with the  
5 Secretary?

6 A We had a conversation or two about it.  
7 And, again, it was largely in the context of which  
8 way to go on that question.

9 Q And why would the Secretary have said  
10 that that issue must be resolved by April 29th?

11 MR. GARDNER: Objection. Calls for  
12 speculation. Lack of foundation.

13 BY MR. COLANGELO:

14 Q You can answer.

15 A You know, again, at that point -- this is  
16 shortly before a -- if I recall correctly, a  
17 Congressional hearing that was going to go into  
18 the census and probably wanted to have a position  
19 to recommend to Director Thompson as to what he  
20 should say to the advisory group. Again, I don't  
21 recall this reference or precisely what he was  
22 speaking to.



1 Q Okay. This isn't a topic you'd spent a  
2 lot of time on, right, the Middle Eastern  
3 North African question?

4 A Correct.

5 Q There's no reason the Secretary would  
6 have referred to it as our issue, is there?

7 MR. GARDNER: Objection. Calls for  
8 speculation. Lack of foundation.

9 THE WITNESS: Again, depending on if his  
10 perception was that there was an administration  
11 policy call to make on it, he would refer to it as  
12 our issue.

13 BY MR. COLANGELO:

14 Q He could also have referred to the  
15 citizenship issue as your issue, right?

16 MR. GARDNER: Objection. Calls for  
17 speculation. Lack of foundation.

18 THE WITNESS: Again, I would say looking  
19 at the context of the email, I would say that's an  
20 unlikely connection.

21 BY MR. COLANGELO:

22 Q And by April 20th of 2017, how many times

1 had you discussed the citizenship question with  
2 Secretary Ross?

3 A I have no idea.

4 Q More than a handful?

5 A Possibly.

6 Q Okay. Would you say he was extremely  
7 interested in the issue?

8 A Certainly, when he raised it, he was  
9 interested in it.

10 Q Okay. You wouldn't say he was extremely  
11 interested in the MENA question, right?

12 A When we discussed it, he was equally  
13 interested in that.

14 Q He didn't raise it with you with the same  
15 frequency he raised the citizenship question,  
16 right?

17 A That's correct.

18 Q Why was Wendy Teramoto copied on this  
19 email?

20 MR. GARDNER: Objection. Calls for  
21 speculation.

22 THE WITNESS: Couldn't tell you.

1 BY MR. COLANGELO:

2 Q Did you speak with her about this issue  
3 after you got this message?

4 A It's possible. I don't recall.

5 MR. COLANGELO: Can we mark this  
6 Exhibit 10?

7 (Plaintiffs' Exhibit 10, Email, was  
8 marked.)

9 BY MR. COLANGELO:

10 Q Handed the witness a document stamped  
11 3710 and we've marked it as Exhibit 10.

12 A Okay.

13 Q Have you read this email?

14 A Yep.

15 Q Okay. You've seen this email before?

16 A I have.

17 Q When's the last time you saw this email?

18 A Yesterday.

19 Q When you saw this email yesterday, was it  
20 redacted as it is in the form I've shown it to you  
21 now or was it unredacted?

22 A It was redacted.

1 Q Okay. And you see that the Secretary has  
2 written you an email on May 2, 2017 that says,  
3 quote, worst of all, they emphasize they have  
4 settled with Congress on the questions to be  
5 asked. I am mystified why nothing has been done  
6 in response to my months' old request that we  
7 include the citizenship question. Why not?

8 Do you see that?

9 A I see that.

10 Q When did the Secretary make his months'  
11 old request to include the citizenship question?

12 A Again, sometime in the spring.

13 Q Probably on March 10th when you emailed  
14 him the Wall Street Journal blog post?

15 A Potentially. I don't recall.

16 Q Who does the "they" refer to in the line  
17 I just read you from the Secretary's email?

18 MR. GARDNER: Objection. Calls for  
19 speculation.

20 THE WITNESS: I don't know.

21 BY MR. COLANGELO:

22 Q You mentioned a minute ago the Census

1 director in the -- this time period, had an  
2 upcoming House appropriation hearing; is that  
3 right?

4 A I believe I said the Secretary had an  
5 upcoming House appropriation hearing.

6 Q Do you remember the date of that hearing?

7 A I don't.

8 MR. COLANGELO: Can we mark this Exhibit  
9 Number 11?

10 (Plaintiffs' Exhibit 11, Email, was  
11 marked.)

12 BY MR. COLANGELO:

13 Q Okay. This is -- have you had a chance  
14 to look at this email?

15 A Lot of black spots on it. Okay.

16 Q Have you seen this email before?

17 A Apparently I must have seen it when I  
18 wrote it.

19 Q When's the last time before today you saw  
20 this email?

21 A Probably May 1, 2017.

22 Q Okay. And does this email reflect that

1 you sent the Secretary, Director Thompson's House  
2 appropriation subcommittee written testimony?

3 A Yes.

4 Q And his testimony was for, quote, this  
5 Wednesday?

6 A Right. That's what it appears.

7 Q And if I told you that -- oh, if you look  
8 at the subject line it says, Wednesday, May 3rd;  
9 is that right?

10 A That's correct.

11 Q Okay. So let's refer back to Exhibit 10.

12 A Yep.

13 Q Now that you see the day before you had  
14 sent the Secretary Mr. Thompson's written  
15 testimony for the House appropriation subcommittee  
16 hearing --

17 A Right.

18 Q -- what do you understand, worst of all  
19 they emphasize they have settled with Congress to  
20 mean?

21 MR. GARDNER: Same objection. Calls for  
22 speculation.

1 THE WITNESS: Again, I'm not sure without  
2 further context who they is. He could be  
3 referring to that advisory committee that you had  
4 had in a previous email. He could be referring to  
5 Census.

6 BY MR. COLANGELO:

7 Q Does the advisory committee establish the  
8 content for the census?

9 A Again, the context of this email is that  
10 somebody appears to be emphasizing that they've  
11 settled with Congress on the questions. That  
12 clearly is not the case, because questions aren't  
13 due until March of 2018. So they couldn't have  
14 settled on the questions.

15 Q And you see that at the top of  
16 Exhibit 10, you email the Secretary saying, "On  
17 the citizenship question, we will get that in  
18 place"?

19 A Uh-huh.

20 Q Do you see that?

21 A Yep.

22 Q What did you mean by that?

1           A   Well, it means that we're, as instructed,  
2 going to continue to work on developing a  
3 citizenship question, and that process -- again,  
4 it's probably helpful at this point to explain on  
5 the policy side, right, you formulate -- you  
6 formulate something that you think you would like  
7 to do, and then you go explore that. That's my  
8 job, is to go. Secretary says, I think this might  
9 be a good idea, you run it down, and you track  
10 down the issues, and you say -- you know, first  
11 question I usually ask is, okay, is this something  
12 that Department of Commerce does? Do we have  
13 legal authority to do this? Once you clear those  
14 two thresholds, now you get to work.

15           But I don't spend a lot of time chasing  
16 down things that people are not planning on doing.

17           Q   So you --

18           A   So there has to be some initial threshold  
19 decision that this is worth pursuing.

20           Q   Now, let me stop you there, because you  
21 said a minute ago, as instructed. And you're  
22 referring to instructions from the Secretary,



1 correct?

2 A To pursue, exploring the question.

3 Q This was instructions to add the question  
4 in response to my months' old request that we  
5 include the citizenship question, correct?

6 A This would be instructions to review and  
7 consider and present to him information that would  
8 allow him to make a decision on whether or not to  
9 take final action.

10 Q Mr. Comstock, I'm just asking you what  
11 you understood on May 2nd --

12 A And that's what I'm telling you I  
13 understood on May 2nd.

14 Q Hold on one second. Let me finish the  
15 question.

16 A Uh-huh.

17 Q The Secretary wrote, "I am mystified why  
18 nothing has been done in response to my months'  
19 old request that we include the citizenship  
20 question."

21 And you responded, "On the citizenship  
22 question, we will get that in place"?

1 A Correct.

2 Q Okay. So my question is: By we will get  
3 that in place, what did you mean?

4 A I meant that I will present to you the  
5 information and the process necessary for you to  
6 decide if you would like to pursue this question.

7 Q Your email says we will get that in  
8 place, correct?

9 A I mean, we will get in front of you the  
10 necessary information for you to make a decision.  
11 Part of my role in this process is explaining to  
12 people who have never worked in government before  
13 that there are processes that you have to follow  
14 in order to make an action happen. You're dealing  
15 with people who are used to being able to make a  
16 decision and it simply goes into effect.

17 Q Okay.

18 A That's not the way the U.S. government  
19 works.

20 Q So the process that you then go on to  
21 tell the Secretary he has to follow is later in  
22 your message; is that right?

1 A That part of the process, yes.

2 Q And that email says we need to work with  
3 Justice to get them to request that citizenship be  
4 added back as a census question; is that right?

5 A That's right.

6 Q Why would you say you needed to work with  
7 the Justice Department to get them to request that  
8 citizenship be added back?

9 A Because based on a very preliminary  
10 review, they appeared to be the most likely  
11 government body that would have a specific need  
12 for the information that would support adding a  
13 citizenship question to the decennial census.

14 Q Who conducted that preliminary review?

15 A We were told by the Census Bureau that  
16 the Justice Department was the person that had  
17 requested the citizenship question on the ACS and  
18 that they utilized the ACS data for Voting Rights  
19 Act information.

20 Q Who in the Census Bureau told you that?

21 A I couldn't tell you.

22 Q And why did you need a request from

1 Justice?

2 A Again, based on the preliminary review,  
3 the understanding we had was questions are added,  
4 based on requests from a government agency. There  
5 is such a thing as the Paperwork Reduction Act  
6 where you have to justify to OMB why do I need  
7 this information? That has to get cleared. So  
8 there are certain hurdles you have to get through.  
9 So if at the end of the day the Secretary decided  
10 to pursue this question, we would need to clear  
11 certain legal thresholds.

12 Q Why not just tell the Census Bureau to  
13 add the citizenship question and say the Secretary  
14 wanted it?

15 A Because I'm not sure that that would be  
16 the process they would necessarily agree to  
17 follow.

18 Q So you had to have it come from DOJ in  
19 order for the Census Bureau to agree to follow it?

20 A Again, that was a preliminary conclusion  
21 based on a cursory analysis.

22 Q Your email then says, "We have the court

1 cases to illustrate that DOJ has a legitimate need  
2 for the question to be included."

3 What court cases were your referring?

4 A I don't recall the exact court cases.

5 Q Did you research those court cases?

6 A I did research a court case where there  
7 was a scenario in which you would need -- it would  
8 be important to have Citizen Voting Age Population  
9 data in order to make a Voting Rights Act claim.

10 Q How did you identify that case?

11 A By a legal research.

12 Q What do you mean by legal research?

13 A Well, I think I talked to -- I'm trying  
14 to think -- I think Mark Neuman may have provided  
15 a case name. I talked to James Uthmeier, who  
16 looked at some cases. Basically said, okay, if  
17 this is the question -- I mean, it's what you do  
18 as an attorney all day long, is to go find cases  
19 to support what you're looking for.

20 Q So Mark Neuman identified for you a case  
21 that would support DOJ's need for this  
22 information?

1           A    Yeah.   I said I may have spoken to  
2   Mark Neuman on that.   I think he may have provided  
3   it.   I don't recall.   I know James Uthmeier looked  
4   at some cases.

5           Q    Would he have provided that case for you  
6   on a phone call or by email?

7           A    James?

8           Q    Pardon me?

9                I'm sorry.   Withdraw that question.

10            Would Mr. Newman have provided that case  
11   to you by email or on the phone?

12           A    Well, if he provided it by email, you'd  
13   have it.   I don't have the emails in front of me,  
14   so I can't tell you.

15           Q    So by May of 2017, you'd come to the view  
16   that you needed another agency to request a  
17   citizenship question on the census?

18           A    That was based on the preliminary  
19   analysis, yes.

20           Q    You then say in your email, "I will  
21   arrange a meeting with DOJ staff this week to  
22   discuss."

1 Do you see that?

2 A Yes.

3 Q Okay. So before May 2, 2017, you had not  
4 had any discussions with the Department of Justice  
5 about the citizenship question, right?

6 A Not to my knowledge.

7 Q What did you do to arrange a meeting with  
8 DOJ staff to discuss?

9 A I asked Eric Branstad for a name over at  
10 DOJ, and he provided me the name of  
11 Mary -- Mary Jane [sic] Hankey I think it was,  
12 whom I then contacted.

13 Q Okay. Your email refers to the court  
14 cases to illustrate that DOJ has a legitimate need  
15 for the question to be included.

16 A That's what it says, yes.

17 Q What were the other needs that you had  
18 talked about for including the citizenship  
19 question?

20 A I don't recall.

21 Q Okay. And by legitimate need, were you  
22 concerned that other needs that didn't come from

1 DOJ would not be legitimate needs?

2 A No. I think that's just an  
3 imprecise -- the use of the term legitimate,  
4 something to say that it would be a need that  
5 would be considered a government need for the  
6 information.

7 MR. COLANGELO: Counsel, five-minute  
8 break. Let's go off the record.

9 VIDEOGRAPHER: Going off the record. The  
10 time on the video is 11:31 a.m.

11 (Off the record.)

12 VIDEOGRAPHER: This begins Media Unit  
13 Number 3. The time on the video is 11:45 a.m. We  
14 are on the record.

15 BY MR. COLANGELO:

16 Q Okay. Let's mark as Exhibit 11 --

17 MR. GARDNER: No. I think 12.

18 MR. COLANGELO: 12. Sorry. Thank you.

19 (Plaintiffs' Exhibit 12, Email, was  
20 marked.)

21 BY MR. COLANGELO:

22 Q This is document stamped 3699.



1 Q Why would the Secretary's concern about  
2 the citizenship question prompt Wendy to bring up  
3 Mark Neuman?

4 MR. GARDNER: Objection. Lack of  
5 foundation. Calls for speculation.

6 THE WITNESS: Again, he was the primary  
7 transition team person advising us on Census.

8 BY MR. COLANGELO:

9 Q Okay. And the email also says, "Do you  
10 want me to set up another meeting?"

11 Do you see that?

12 A I see that.

13 Q What's the earlier meeting that she's  
14 referring to?

15 MR. GARDNER: Objection. Calls for  
16 speculation.

17 THE WITNESS: I don't know.

18 BY MR. COLANGELO:

19 Q Had you attended the meetings with the  
20 Secretary and Mr. Neuman on the citizenship  
21 question before May 2, 2017?

22 A I don't know. I had attended meetings

1 with the Secretary and Mr. Newman on the census.

2 Q Before May 2017?

3 A Yes.

4 Q How many times?

5 A I don't know. Two times, three times.

6 I'd -- you'd have to check his count.

7 Q Okay. And the citizenship question was  
8 discussed in those earlier meetings?

9 A I don't recall.

10 Q And you see the Secretary writes back and  
11 says, "Let's try to stick him in there for a few  
12 days to fact find."

13 A Yes.

14 Q Do you see that?

15 Were you aware of that request?

16 A I was aware that the Secretary was  
17 distressed with Director Thompson who had just  
18 told us that he had massively overrun the CEDCaP  
19 budget and failed to warn us that that was coming.  
20 So the Secretary was not happy with the Census  
21 leadership at the time and was trying to find  
22 someone who could be -- provide us better

1 May 4th early in the morning.

2 BY MR. COLANGELO:

3 Q Saying, "Thanks, Eric. Earl."

4 Correct?

5 A Yes.

6 Q So on May 2nd, the Secretary asked you  
7 why nothing had been done in response to his  
8 months' old request. You told him you needed to  
9 get the Justice Department to request the  
10 question. You also told him that you would set up  
11 meetings with the Justice Department to discuss.  
12 And then after that, you asked Eric Branstad to  
13 get you a point of contact at the Justice  
14 Department and he did, right?

15 MR. GARDNER: Objection. Form.

16 THE WITNESS: That appears to be the  
17 sequence.

18 BY MR. COLANGELO:

19 Q Okay. And you testified earlier that you  
20 hadn't ever spoken to the Justice Department  
21 before that on the citizenship issue?

22 A That's correct.

1 MR. COLANGELO: Let's mark Exhibit 14.

2 (Plaintiffs' Exhibit 14, Email, was  
3 marked.)

4 BY MR. COLANGELO:

5 Q Exhibit 14 is document stamped 2462. You  
6 have Exhibit 14 in front of you?

7 A I do.

8 Q And why were you contacting Mary Blanche?  
9 Her surname is redacted on this email, I assume  
10 for personal privacy reasons. But this is Mary  
11 Blanche Hankey, correct?

12 A Yes.

13 Q Why were you contacting Mary Blanche  
14 Hankey?

15 A That was the name that Eric Branstad said  
16 he'd provide me.

17 Q Okay. And do you know where in the  
18 White House -- strike that.

19 Do you know where in the  
20 Justice Department she worked?

21 A She was advisor for -- to  
22 Attorney General Sessions.

1 Q So she worked for the Attorney General?

2 A Correct.

3 Q And you reached out to her to talk about  
4 the citizenship question, right?

5 A Amongst other things, yes.

6 Q And you reached out to her and asked her  
7 for times for a call that day, right?

8 A That's what I'm asking for, yes.

9 Q Okay. Is that because this was an urgent  
10 priority for the Secretary?

11 A I think you can divine from his prior  
12 email that he was hoping I might take a quick  
13 action on this, so I was trying to be responsive.

14 Q So the answer is yes?

15 A I'm not going to speculate as to whether  
16 he thought it was urgent or not, but he was  
17 conveying he would like me to get moving.

18 Q You were treating it as an urgent matter?

19 A Correct.

20 Q And then you -- did you speak to  
21 Ms. Hankey?

22 A I did speak to Ms. Hankey.

1 Q How many times?

2 A I met with her -- I think I spoke with  
3 her by phone and then met with her in her office.

4 Q When did you speak with her by phone?

5 A I couldn't tell you.

6 Q Was it on May 4th?

7 A It's possible.

8 Q And then you met with her in her office,  
9 you said?

10 A Yes.

11 Q When was that meeting?

12 A I don't know the exact date.

13 Q When you spoke to her on the phone, was  
14 anyone else on the call with you?

15 A No.

16 Q Was anyone else on the call on her end?

17 A Not that I was aware of, no.

18 Q When you met with her in person, did  
19 anyone from the Commerce Department go with you?

20 A No.

21 Q Did anyone from the Census Bureau go with  
22 you?

1 A No.

2 Q Was there anyone else in the meeting that  
3 she brought?

4 A No.

5 Q What did you say to her when you spoke to  
6 her on the phone?

7 A That I'd like to come over and discuss  
8 what issues the Justice Department might have with  
9 Commerce that I could be helpful on and talk to  
10 her about an issue that we were interested in.

11 Q And that issue was the citizenship  
12 question?

13 A Correct.

14 Q And what did she say about that?

15 A Let's get together and meet.

16 Q So then you went over to meet with her.  
17 Did she have any issues that she wanted to raise  
18 with you?

19 A I don't recall that Justice had any  
20 particular Commerce issues, no.

21 Q So this was a meeting about the  
22 citizenship question?

1 A I'd say that was the primary topic.

2 Q Okay. And what did you say to her when  
3 you met with her in person?

4 A That we -- the Secretary had asked us to  
5 look into the possibility of adding a citizenship  
6 question, and that since the Justice Department  
7 was the agency that had sponsored the question for  
8 the ACS, it seemed that that was a logical place  
9 to start, and was there someone in the  
10 Justice Department with whom I should speak about  
11 that.

12 Q And what did she say?

13 A Let me look into it.

14 Q How long was the meeting?

15 A Well, we met for about 20 minutes.

16 Q Did you explain why the Secretary wanted  
17 the citizenship question?

18 A No.

19 Q Did you have an understanding at that  
20 point as to why the Secretary wanted the  
21 citizenship question?

22 A I've never asked the Secretary why he



1) wanted a citizenship question.

2 Q Did she ask you why it was important to  
3 Commerce Department to add a citizenship question?  
4 She being Ms. Hankey.

5 A No.

6 Q You mentioned earlier that you did some  
7 legal research or that Mark Neuman or others may  
8 have identified cases for you. Did you identify  
9 those cases to Ms. Hankey in that conversations?

10 A I don't recall.

11 Q Did you bring any paper with you to that  
12 meeting?

13 A Not that I recall.

14 Q Did you take notes?

15 A No.

16 Q After the meeting, did you update anyone  
17 at the Commerce Department and your discussion?

18 A I don't recall.

19 Q Did you speak to the Secretary to tell  
20 him that -- on an issue that you understand to be  
21 a priority, you'd gone over to the  
22 Justice Department to make some progress on his

1 A Not that I recall.

2 Q And after you met with Ms. Hankey and she  
3 said she'd look into it, what was the next that  
4 you heard from the Justice Department on this  
5 issue?

6 A I think when she contacted me, provided a  
7 name.

8 Q How long after your meeting did she  
9 contact you and provide a name?

10 A There's an email that documents it, you  
11 could tell from that, but otherwise, I have no  
12 idea.

13 Q Okay.

14 A I mean, it was sometime in the next  
15 couple weeks, but --

16 Q And what name did she give you?

17 A I -- I know I put it in a memo to the  
18 Secretary later on, so you'd have to look at that  
19 memo.

20 Q Is it James McHenry?

21 A That sounds like the right name.

22 Q When she spoke to you to pass along

1 James McHenry's name, what did she say about why  
2 she was directing you to him?

3 A She didn't say much. Just said this  
4 would be the best guy to talk to.

5 Q Okay. Had you spoken to James McHenry  
6 before?

7 A Never talked to him before.

8 Q Did she tell you what his position was in  
9 the Department of Justice?

10 A She might have.

11 Q What was his position?

12 A I don't know, actually.

13 Q After she gave you Mr. McHenry's name,  
14 what did you do next to contact him?

15 A I called him on the phone.

16 Q And when you spoke to him on the phone  
17 what did you say?

18 A I outlined that we were interested in  
19 seeing what kind of level of interest the  
20 Justice Department would have in requesting the  
21 citizenship question be asked -- added to the  
22 decennial census.

1 Q And did you tell him why the  
2 Commerce Department wanted the Justice Department  
3 to make that request?

4 A Because that was our understanding of the  
5 process. They were the people that needed it for  
6 ACS, and our understanding was that it might be  
7 useful for them to have it at a more granule  
8 level, which would be needed -- you'd need to put  
9 it on the decennial census to do that.

10 Q So you were -- you told him that the  
11 Commerce Secretary wanted the question and wanted  
12 to know if DOJ would ask for the Census Bureau to  
13 add the question; is that right?

14 A Those are your words.

15 Q Well, I'm asking you to tell me yes or  
16 no.

17 A Well, if the question is yes or no, then  
18 the answer is no.

19 Q Okay. How would you put it in your  
20 words?

21 A In my words, what I told him was that we  
22 were exploring the possibility and wanting to know

1 the level of interest at the Justice Department in  
2 making such a request, would this be information  
3 they could use?

4 Q So this is the shortly -- this is shortly  
5 after the Secretary of Commerce emailed you and  
6 said I am mystified why nothing had been done in  
7 response to my months' old request?

8 A Right.

9 Q But your testimony is that you conveyed  
10 to the Justice Department that you were exploring  
11 the issue?

12 A As I explained before, when -- when the  
13 Secretary says he would like to do something,  
14 there's a presumption that we will attempt to do  
15 that. That's subject to revision as more  
16 information is made available. So I'm exploring  
17 what is necessary to follow through on the  
18 Secretary's request. That request may be modified  
19 or changed, based on the information that I  
20 provide.

21 Q Okay. How many times did you speak to  
22 Mr. McHenry?

1           A     I think three or four times.

2           Q     And what was the next time you spoke to  
3     him after the initial phone call?

4           A     Maybe a week later.

5           Q     Okay. And what did he say when he -- did  
6     he call you or did you call him?

7           A     I don't recall.

8           Q     And what did you discuss on that  
9     conversation?

10          A     That he was still exploring the question.

11          Q     How long was that conversation?

12          A     Five minutes.

13          Q     Okay. So he didn't have anything new to  
14     report?

15          A     Right.

16          Q     Okay. And you said you spoke to him at  
17     least a couple more times; is that right?

18          A     Again, I don't recall the exact number of  
19     times, but somewhere in the vicinity of three or  
20     four times.

21          Q     So after the second call where he said he  
22     was still exploring it, tell me about the next

1 conversation?

2 A Memory serves, I think the next  
3 conversation was a similar one. He was still  
4 looking into the matter and then -- and then the  
5 last conversation he and I had, he directed me to  
6 somebody at the Department of Homeland Security.

7 Q Okay. And over what period of time were  
8 you talking to Mr. McHenry on the phone?

9 A Probably over the course of a month.

10 Q So this was primarily in May of 2017?

11 A I honestly don't recall, but sometime in  
12 May, early June.

13 Q And who did he direct you to at the  
14 Department of Homeland Security?

15 A I don't remember the person's name.

16 Q Was it Gene Hamilton?

17 A Again, I know I prepared a memo for the  
18 Secretary that had the name. So if that's the  
19 name that was on the memo, then, yes, that would  
20 be the person I spoke with.

21 Q How many times did you speak to your  
22 point of contact at the Department of

1 Homeland Security?

2 A Again, I think it was -- I think this was  
3 like two or three times.

4 Q And what did you say when you first spoke  
5 to Mr. Hamilton?

6 A Same -- same basic message, we're looking  
7 into the -- exploring the possibility of putting a  
8 census question on -- a citizenship question on  
9 the decennial census, would this be information  
10 that the Department of Homeland Security would  
11 need or use, and could he answer that, and his  
12 response was, let me look into it.

13 Q Now, the Department of Homeland Security  
14 wasn't the original requester for the ACS  
15 citizenship question, to your understanding,  
16 correct?

17 A Correct.

18 Q Was it your view that the Department of  
19 Homeland Security would also be a legitimate  
20 requester of this information?

21 A Legitimate is not the right word, but  
22 the -- I think my view was, let me see if



1 there's -- what their explanation would be, but  
2 they were obviously not our first choice.

3 Q So you were looking for an agency to make  
4 this ask?

5 A Again, my understanding of the process,  
6 based on the research I've been able to do, and  
7 consequently was advising the Secretary was an  
8 agency needed to make the request; therefore, you  
9 have to find an agency that would have a reason to  
10 be using this information. And Justice,  
11 obviously, was the primary recipient of the CVAP  
12 data from the ACS, so they were the logical place  
13 to start. Justice then says go to  
14 Homeland Security, and I say, okay, maybe there's  
15 something about Homeland Security that I don't  
16 know about that might justify this data. So you  
17 follow up on a call, get more information, informs  
18 your decision, you might change it.

19 Q And so my question was: So you were  
20 looking for an agency to make this ask and --

21 A Correct. In order to implement the  
22 process that had been outlined to us, you needed

1 an agency. So that was my task at the time.

2 Q Thank you.

3 MR. COLANGELO: Let's mark this

4 Exhibit --

5 MR. GARDNER: 15.

6 MR. COLANGELO: -- 15.

7 (Plaintiffs' Exhibit 15, Memo, was  
8 marked.)

9 THE WITNESS: The very memo I was  
10 speaking of.

11 BY MR. COLANGELO:

12 Q Exhibit 15 is document stamped 9834.

13 Mr. Comstock, do you have Exhibit 15 if  
14 front of you?

15 A I do.

16 Q Is this the very memo you were just  
17 speaking about?

18 A It's the very memo I was just speaking  
19 about.

20 Q And what's the date on this memo?

21 A September 8th.

22 Q And you see in the second paragraph of

1 this memo, the sentence that says, "James directed  
2 me to Gene Hamilton at the Department of  
3 Homeland Security."

4 A Correct.

5 Q So the person you were speaking to at DHS  
6 was Gene Hamilton, right?

7 A Apparently so, yes.

8 Q The -- in that paragraph -- strike that.  
9 This is a memo from you to the Secretary  
10 dated September 8th of 2017, correct?

11 A Correct.

12 Q Why did you prepare this memo?

13 A Because the Secretary was asking about  
14 the lack of progress and said he was prepared to  
15 call the Attorney General, and so he needed the  
16 timeline of who I had spoken to.

17 Q Okay. What do you mean by lack of  
18 progress?

19 A Well, obviously, we're now September 8th,  
20 and he inquired on May -- May whatever the date  
21 was, 2nd, 5th, whatever it was, saying how come we  
22 haven't made more progress? Three months later we

1 don't have any response from the

2 Justice Department, so --

3 Q In his May 2nd email it said, why has  
4 nothing been done in response to my months' old  
5 request?

6 A That is what it says, yes.

7 Q So the Secretary had been asking about  
8 this since the early spring of 2017?

9 A Yes.

10 Q And you testified and this memo says you  
11 met in person with Mary Blanche and she said what?

12 A Well, as I said, she directed me to  
13 James McHenry.

14 Q And then after speaking with Mr. McHenry,  
15 he told you what?

16 A He directed me to Gene Hamilton.

17 Q Okay. And then after several phone calls  
18 with Gene Hamilton, according to this memo, he  
19 relayed that, "After discussion, DHS really felt  
20 it was best handled by the Justice Department."

21 Do you see that?

22 A I see that.

1 Q Why did Mr. Hamilton feel this was best  
2 handled by the Justice Department?

3 A As relayed to me, DHS felt the agency  
4 that would most utilize this data was  
5 Department of Justice, which was our  
6 original conclusion.

7 Q So DHS said they were not going to make  
8 this request, right?

9 A Well, Gene never made a commitment, one  
10 way or the other, for the department. He simply  
11 directed me back to the other department. It's  
12 not an uncommon experience in the federal  
13 government.

14 Q Tell me what's not uncommon in the  
15 federal government.

16 A Being directed to somebody.

17 Q Your memo then says at that point the  
18 conversation ceased.

19 A Correct.

20 Q What do you mean by that?

21 A Means that I did not talk to  
22 Mary Blanche, James McHenry or Gene Hamilton after

1 that point in time.

2 Q You didn't, at this point, have a request  
3 from the Justice Department, right?

4 A That's correct.

5 Q Okay. And what did you ask  
6 James Uthmeier after that point?

7 MR. GARDNER: Objection. Calls for  
8 information --

9 (Thereupon, the court reporter  
10 clarified.)

11 MR. GARDNER: Sorry. I have a cold.

12 Objection. Calls for information that's  
13 subject to privilege. I'll instruct the witness  
14 not to answer.

15 MR. GERSCH: What privilege?

16 MR. GARDNER: Attorney -- thank you. I  
17 thought we were doing one at a time.

18 Attorney-client privilege.

19 MR. GERSCH: Sorry.

20 BY MR. COLANGELO:

21 Q Did you identify any facts for  
22 Mr. Uthmeier?

1 MR. GARDNER: Objection to form.

2 THE WITNESS: To my knowledge, the first  
3 time I interacted with James, he was in the  
4 Office of General Counsel.

5 MR. COLANGELO: Okay. Okay. Let's mark  
6 Exhibit 16.

7 (Plaintiffs' Exhibit 16, Memo, was  
8 marked.)

9 BY MR. COLANGELO:

10 Q Exhibit 16 is document stamped 2458.

11 Do you have Exhibit 16 in front of you,  
12 Mr. Comstock?

13 A I do.

14 Q Have you seen this email before?

15 A Not since I've sent it to Wendy on  
16 Saturday the 16th of September.

17 Q Why did you send Ms. Teramoto your  
18 September 8th memo on September 16, 2017?

19 A I don't recall exactly, but, likely,  
20 because she may have been setting up the call with  
21 the Attorney General.

22 Q And which call with the Attorney General

1 was that?

2 A A call from the Secretary to talk to the  
3 Attorney General about whether or not Justice  
4 would be interested in a citizenship question.

5 Q And why was the Secretary talking to the  
6 Attorney General about whether or not Justice  
7 would be interested in the citizenship question?

8 A Again, if -- if the -- if the  
9 Justice Department was not going to request the  
10 question, had no use for the information, then  
11 that would probably put an end to the citizenship  
12 question.

13 Q And the Secretary wanted the citizenship  
14 question?

15 A I think he felt -- well, I don't know  
16 what he felt. Yes. He was continuing to explore  
17 that possibility.

18 MS. BOUTIN: I'm sorry. Can you speak  
19 up?

20 THE WITNESS: I don't know what he felt,  
21 but he was continuing to explore the possibility.

22 BY MR. COLANGELO:



1 MR. COLANGELO: This is Exhibit -- no. I  
2 was thinking of Exhibit 10.

3 BY MR. COLANGELO:

4 Q How did you come to the view before ever  
5 talking to DOJ that DOJ should request this  
6 information?

7 A Again, if DOJ was the governmental  
8 organization that had questioned the information  
9 on the ACS, then it would stand to reason that  
10 they would be the people that would also be  
11 interested in the information on the decennial,  
12 and they're also the party responsible for  
13 enforcing the voting rights.

14 Q And how did you come to the view before  
15 ever talking to DOJ that DOJ had a legitimate need  
16 for the question to be included?

17 A If they enforced the Voting Rights Act --  
18 if you're going to make a Voting Rights Act case,  
19 then they would be the people that would  
20 have -- need the information.

21 Q And you researched those Voting Rights  
22 Act cases or that Voting Rights case on your own?

1           A    Again, I think in doing some basic  
2   research on it, it was pointed out there was a  
3   case where the Court had said you could -- you  
4   would need more granule information to answer this  
5   question, which would then support a citizenship  
6   question.

7           Q    And you told me before that you're not a  
8   voting rights lawyer, right?

9           A    Again, what do you mean by a voting  
10   rights lawyer?

11          Q    Have you ever practiced voting rights  
12   law?

13          A    No.

14          Q    Have you ever tried a voting rights case?

15          A    No.

16          Q    Have you ever advised a client on a  
17   voting rights matter?

18          A    No.

19          Q    Have you ever practiced redistricting  
20   law, tried a redistricting case --

21          A    No.

22          Q    -- or advised a client on a redistricting

1 matter?

2 A No.

3 MR. GARDNER: Make sure he finishes his  
4 question before you answer.

5 THE WITNESS: No.

6 BY MR. COLANGELO:

7 Q Have you ever litigated a case under the  
8 Voting Rights Act?

9 A No.

10 Q Have you ever litigated a redistricting  
11 case?

12 A No.

13 MR. COLANGELO: Let's mark as Exhibit 17  
14 a document Bates-stamped 3705.

15 (Plaintiffs' Exhibit 17, Meeting  
16 notification, was marked.)

17 BY MR. COLANGELO:

18 Q Mr. Comstock, do you have 3705 in front  
19 of you?

20 A I do.

21 Q And what is this?

22 A It appears to be some kind of meeting

1 I would instruct the witness not to answer.

2 Can you answer the question without  
3 disclosing confidential communications?

4 THE WITNESS: I have no recollection of  
5 this meeting, so I couldn't tell you what we  
6 discussed.

7 MR. GARDNER: Problem solved.

8 BY MR. COLANGELO:

9 Q Easy enough.

10 Was this your first interaction with the  
11 Office of General Counsel on this issue?

12 A Again, I have no idea.

13 Q As you were talking to Ms. Hankey at the  
14 Justice Department, Mr. McHenry at the  
15 Justice Department and Mr. Hamilton at DHS --

16 A Yeah.

17 Q -- in the spring of 2017, were you  
18 keeping the Secretary informed of those  
19 conversations?

20 A I might have mentioned them.

21 Q In what context would you have mentioned  
22 them?

1           A     Mr. Secretary, I contacted the  
2     Justice Department today. I would not have  
3     given -- I mean, there was nothing to report. So  
4     I hadn't made any progress.

5           Q     Well, he was frustrated there was no  
6     request yet?

7           A     Right.

8           Q     So one of the things to report might have  
9     been --

10          A     That I contacted them, yes.

11          Q     Okay. And did you keep Ms. Teramoto  
12     informed during that time period?

13          A     Again, I might have. At that time  
14     period, we operated in bullpens, so we were  
15     all -- there were five people in the same room.  
16     So it's entirely possible I might have mentioned I  
17     was going to the Justice Department or I had  
18     spoken with the Justice Department, yes.

19          Q     I'm sorry. If you were not finished.

20          A     Nope.

21          Q     Who was sitting in the bullpen with you?

22          A     Wendy Teramoto, Eric Branstad,

1 James Rockas, me, and occasionally Izzy Hernandez.

2 Q Who is James Rockas?

3 A He was acting press secretary at the  
4 time.

5 Q And who is Izzy Hernandez?

6 A Israel Hernandez, he was the acting -- or  
7 I'm not sure what his formal title was. I think  
8 he was deputy chief of staff.

9 Q And where was the bullpen you referred  
10 to?

11 A It was the -- what is now the chief of  
12 staff.

13 Q And there were five of you working in the  
14 office?

15 A Correct.

16 Q How long were the five of you working in  
17 that office together?

18 A Maybe nine months.

19 Q So from January of 2018 through the  
20 end -- strike that.

21 From January 2017 through the end of  
22 the --

1           A     No.

2           Q     -- summer --

3           A     No.   The bullpen was set up, I think, in  
4   March through the end of the year.

5           Q     Why did you work in a bullpen?

6           A     Because that was the form that the  
7   Secretary and Ms. Teramoto felt was most  
8   effective.

9           Q     And was it near the Secretary's office?

10          A     It's located -- there's the Secretary's  
11   office, there's the anteroom to the Secretary's  
12   office, and it's located right next to that.

13          Q     And at some point, you stopped working in  
14   a bullpen?

15          A     Yes.

16          Q     Did it become less effective?

17          A     I think that was the chief of staff's  
18   determination, yes.

19                MR. COLANGELO:   Let's mark Document 3702  
20   as Exhibit 18.

21                (Plaintiffs' Exhibit 18, Email, was  
22   marked.)

1 A Just a minute.

2 Yes.

3 Q Okay. And Exhibit 7 is the email  
4 exchange with Kris Kobach; is that right?

5 A It's an email exchange between  
6 Kris Kobach and Wendy Teramoto.

7 Q And the Secretary, correct, on the second  
8 page?

9 A Yes. Appears to be one to the Secretary  
10 on the second page.

11 Q Okay.

12 A Though it's blanked out as to who it goes  
13 to.

14 Q If I represent to you that the government  
15 has represented to us that this was an email to  
16 the Secretary and that they've blanked out his  
17 name for personal privacy reasons, can we agree  
18 that it's an email to the Secretary on July 14th?

19 A I'll stipulate to that, yes.

20 Q And Mr. Gardner will tell me after lunch  
21 if that's wrong.

22 The -- so you see that the -- that



1 Mr. Kobach, who identifies himself as the Kansas  
2 Secretary of State, emailed the Secretary on  
3 July 14, 2017, correct?

4 A Correct.

5 MR. GARDNER: Objection. Lack of  
6 foundation.

7 BY MR. COLANGELO:

8 Q And you'll see that it says I'm following  
9 up on our telephone discussion from a few months  
10 ago, correct?

11 MR. GARDNER: Objection. Lack of  
12 foundation.

13 THE WITNESS: And you're reading from the  
14 email. So I have no idea if the email is correct  
15 or not.

16 BY MR. COLANGELO:

17 Q Did the Secretary ever tell you that he  
18 spoke to Kris Kobach?

19 MR. GARDNER: Objection. Asked and  
20 answered.

21 BY MR. COLANGELO:

22 Q You can still answer.

1 A No.

2 Q Sorry. We were speaking at the same  
3 time.

4 A I don't recall him ever telling me that  
5 he spoke to Kris Kobach.

6 Q This email reads, "As you may recall, we  
7 talked about the fact that the U.S. Census does  
8 not currently ask respondents their citizenship."

9 Do you see that?

10 A I see that.

11 Q The email also reads, "It also leads to  
12 the problem that aliens who do not actually reside  
13 in the United States are still counted for  
14 Congressional apportionment purposes."

15 Do you see that?

16 A I see that.

17 Q Did the Secretary ever tell you he was  
18 concerned about the problem that aliens who do not  
19 reside in the United States are still counted for  
20 Congressional apportionment purposes?

21 A He never expressed an opinion on that.

22 Q And when the Secretary asked you on

1 March 10, 2017 about the census and the  
2 citizenship question, did he ask you in the  
3 context of whether noncitizens should be included  
4 for Congressional apportionment purposes?

5 A He discussed Congressional apportionment  
6 purposes. If asked were the noncitizens counted,  
7 and we answered the question, which is they are  
8 counted.

9 Q Well, you testified the link you sent him  
10 was the link to the Census Bureau's web page on  
11 whether noncitizens are counted for apportionment?

12 A That's correct. Well, I don't believe  
13 you can find a web page on the Census that doesn't  
14 speak to it in that context, whether noncitizens  
15 are counted other than for apportionment. That's  
16 the question that we asked. Do we count  
17 noncitizens? The answer is yes. What is the  
18 Census used for? It's used for apportionment.  
19 That's its primary function.

20 Q And you'll see that -- going back to the  
21 first page of Exhibit 7, Ms. Teramoto has written  
22 to Mr. Kobach, "Kris, can you do a call with the

1 Secretary and Izzy tomorrow at 11:00 a.m.?"

2 A Correct.

3 Q And that's Izzy Hernandez, correct?

4 A I would believe that's the reference  
5 she's making, yes.

6 Q And he's copied at the top of this page,  
7 correct?

8 A Yes, he is.

9 Q Did you ever discuss with Izzy Hernandez  
10 a call with Mr. Kobach and the Secretary?

11 A I did not.

12 Q Did you ever discuss the citizenship  
13 question with Mr. Hernandez, at all?

14 A I think we discussed it once or twice.

15 Q And when were those conversations?

16 A I don't recall exactly.

17 Q Was it in the summer of 2017?

18 A It was sometime in the spring/summer of  
19 2017.

20 Q Okay. So you had been working on the  
21 citizenship question for some number of months by  
22 late July of 2017; is that right?

1           A     Correct.

2           Q     Okay. But your testimony is that the  
3     Secretary had a phone call with Kris Kobach on  
4     that issue and nobody told you about it?

5           MR. GARDNER: Objection.  
6     Mischaracterizes the witness's testimony.

7           THE WITNESS: My testimony is he did not  
8     discuss it with me.

9     BY MR. COLANGELO:

10          Q     Did anyone tell you that the Secretary  
11     spoke to Kris Kobach about this issue?

12          A     Wendy might have mentioned it.

13          Q     And what do you remember Wendy said about  
14     it?

15          A     That the Secretary had a conversation  
16     with Kris Kobach.

17          Q     What did she describe about that phone  
18     call?

19          A     She didn't.

20          Q     And did you ask for any other information  
21     on it?

22          A     I didn't.

1 A Well, obviously, when I wrote it.

2 Q Okay. This is an email from the  
3 Secretary to you on August 8, 2017, and the  
4 Secretary asks were you on the call this morning  
5 about census?

6 Do you see that?

7 A Uh-huh.

8 Q What call is he referring to?

9 A I don't know. I'm not sure I was on it.

10 Q Okay. Did you hear from anybody about a  
11 call on the census on August 8th?

12 A I have no idea.

13 Q And you'll see that later in the email,  
14 the Secretary says, "Where is the DOJ in their  
15 analysis? If they still have not come to a  
16 conclusion, please let me know your contact person  
17 and I will call the AG. Wilbur Ross."

18 Do you see that?

19 A I see that.

20 Q And what analysis is the Secretary  
21 referring to?

22 A Again, this pre-dates the memo I wrote

1 outlining my contacts with the DOJ. So this is a  
2 question about where are we with the DOJ?

3 Q Okay. And you wrote back that evening  
4 saying, "We'll be back shortly with an update on  
5 the census question."

6 A Yes.

7 Q I have two attorneys in the DOC's general  
8 counsel's office working on it?

9 A Yes.

10 Q And you testified one of those two  
11 attorneys was James Uthmeier; is that right?

12 A That's correct.

13 Q And who was the other?

14 A I don't recall.

15 Q Okay. Going back to the Secretary's  
16 email where he says, "If they still have not come  
17 to a conclusion, please let me know your contact  
18 person and I will call the AG."

19 A Yes.

20 Q Did you understand that to mean that the  
21 Secretary was concerned this was not done yet?

22 A He was concerned that we had not made

1 more progress.

2 Q Okay. How did he communicate that  
3 concern to you?

4 A By saying let me know who your contact  
5 person is and I will call the AG.

6 Q This email that you sent in your response  
7 doesn't identify your contact person; is that  
8 right?

9 A That -- well, at least not in the part  
10 that's not blacked out.

11 Q Okay. Do you recall identifying for the  
12 Secretary before the September 8, 2017 memo who  
13 your contact person was at DOJ?

14 A I might have. I probably would have had  
15 to go back and look and see who I spoke to.

16 Q Okay.

17 MR. COLANGELO: Let's mark Document 3984  
18 as Exhibit 20.

19 (Plaintiffs' Exhibit 20, email, was  
20 marked.)

21 THE WITNESS: Thank you.

22 BY MR. COLANGELO:



1 Q Mr. Comstock, have you seen this email  
2 before?

3 A It's to me, so, yes.

4 Q Okay. And this is in further response to  
5 the Secretary's August 8th question; is that  
6 right?

7 A Would appear to be, yes.

8 Q Okay. And it says, "Mr. Secretary, we  
9 are preparing a memo and full briefing for you on  
10 the citizenship question. The memo will be ready  
11 by Friday, and we can do the briefing whenever you  
12 are back in the office."

13 Do you see that?

14 A Yes.

15 Q And at this point, you had not received  
16 any information from the Justice Department; is  
17 that right?

18 A That's correct.

19 Q Okay. So the memo that you're referring  
20 to is a memo on the citizenship question that  
21 includes no input from DOJ; is that right?

22 A I -- I don't know. I had not spoken to

1 DOJ, no.

2 Q You're not aware that anyone else had  
3 spoken to DOJ on it?

4 A Actually, I believe counsel might have  
5 been talking to DOJ, but I don't know who they  
6 were talking to.

7 Q And which counsel is that?

8 A James Uthmeier.

9 Q And did he tell you he was talking to  
10 DOJ?

11 A I don't recall.

12 Q So you're not aware that anybody had been  
13 in touch with DOJ in order to get information for  
14 this memo going to the Secretary?

15 A I -- I'm not sure exactly the contents of  
16 the memo to which you're referring, so I don't  
17 know if it contained information from DOJ or not.

18 Q And the Secretary responded by saying, "I  
19 would like to be briefed on Friday by phone."

20 A Yes.

21 Q So it's fair to say that this reflects  
22 the Secretary's continued impatience about getting

1 an answer to his question?

2 A I would say he clearly wanted to keep  
3 moving forward.

4 MR. COLANGELO: Let's mark as 21  
5 Document 3983.

6 (Plaintiffs' Exhibit 21, email, was  
7 marked.)

8 THE WITNESS: Thank you very much.

9 BY MR. COLANGELO:

10 Q Do you have Exhibit 21 in front of you?

11 A Yes.

12 Q Okay. And this is an email from you to  
13 the Secretary passing along the draft memo on the  
14 citizenship question?

15 A Correct.

16 Q Okay. And you'll see that Wendy Teramoto  
17 responded a few days later saying, "Peter Davidson  
18 and Karen Dunn Kelley will both be here Monday.  
19 Let's spend 15 minutes together and sort this  
20 out."

21 A Right.

22 Q And who is Peter Davidson?

1 Q And we just saw an email from a few weeks  
2 earlier where Ms. Teramoto says let's keep  
3 Mr. Davidson and Ms. Kelley involved in a  
4 conversation about this, right?

5 A I wouldn't say keep, but --

6 Q Introduce them to this conversation?

7 A Introduce, yes.

8 Q So to your understanding, this was a  
9 meeting to discuss the citizenship question?

10 A Again, my understanding of this was to  
11 discuss key legal issues regarding the census.

12 Q Do you remember this meeting?

13 A Not specifically, no.

14 Q Do you remember any meetings with the  
15 Secretary and with this group on the census?

16 A Again, not specifically, no.

17 MR. COLANGELO: Okay. Let's have this  
18 marked as Exhibit 23. It's Document 2424.

19 (Plaintiffs' Exhibit 23, Email, was  
20 marked.)

21 BY MR. COLANGELO:

22 Q Do you have Exhibit 23 in front of you,

1 Mr. Comstock?

2 A I do.

3 Q And do you recognize this document?

4 A Again, it's an email from the Secretary  
5 to me, so presumably I saw it then. There's a lot  
6 blanked out.

7 Q And you understand that the  
8 Justice Department has applied those redactions,  
9 correct?

10 A I do.

11 Q And in this email dated September 1,  
12 2017, the Secretary says, "I have received no  
13 update, nor has there been an updated," -- blocked  
14 out -- "nor the issue of the census question, nor  
15 whether KDB thinks we have our arms around the  
16 census cost data."

17 Do you see that?

18 A Yes.

19 Q And by KDB, do you think he meant KDK?

20 A I believe that would be who he would be  
21 referring to, yes.

22 Q Referring to Karen Dunn Kelley?

1 A Yes.

2 Q And did you understand this to be a  
3 request for information on the status of the  
4 citizenship question?

5 A Well, I understood this to be a request  
6 for information on a whole series of information  
7 that were presented in the census.

8 Q Including the citizenship question?

9 A Including the citizenship. He mentions  
10 that.

11 Q And the Secretary is frustrated, right?

12 A That would appear so, yes.

13 Q He's frustrated because he's asked for it  
14 repeatedly and hasn't seen anything yet telling  
15 him that it's done; is that right?

16 A Well, I would not agree with your  
17 characterization. I think what this memo -- this  
18 email shows is that there were a tremendous number  
19 of issues connected to Census. At this time, we  
20 were working a tremendous amount on the lifecycle  
21 cost estimate.

22 So we -- I mean, we had a huge issue.

1 They were \$3 billion -- basically, 25 percent of  
2 their budget off, which is a shocking figure --

3 Q Does the Secretary --

4 MR. GARDNER: Let him finish his answer.

5 THE WITNESS: -- that does not inspire  
6 confidence in the Census Bureau or its current  
7 leadership at the time. So we were dealing with  
8 quite a few issues connected with Census,  
9 primarily related to the budget, trying to find  
10 people to run the Census that we could count on.  
11 So, yes, citizenship was one small piece  
12 of this, but it was by no means the driving piece.

13 Q Thank you.

14 MR. COLANGELO: Let's mark Document 2034  
15 as Exhibit 24.

16 (Plaintiffs' Exhibit 24, Email, was  
17 marked.)

18 BY MR. COLANGELO:

19 Q Mr. Comstock, do you have Exhibit 24 with  
20 you?

21 A I do.

22 Q Have you seen this email before?

1 it appears there might have been.

2 BY MR. COLANGELO:

3 Q And why would the Secretary have asked  
4 for an update by the next day?

5 MR. GARDNER: Objection. Calls for  
6 speculation.

7 THE WITNESS: As I've mentioned before,  
8 we like to get things done. We're not here to do  
9 this all year long. So I was asked similar  
10 questions on numerous other issues I was working  
11 on.

12 BY MR. COLANGELO:

13 Q But it's fair to say the Secretary wanted  
14 an answer quickly?

15 A He always wants an answer quickly.

16 MR. COLANGELO: Let's mark Document 2395  
17 as Exhibit 25.

18 (Plaintiffs' Exhibit 25, Email, was  
19 marked.)

20 BY MR. COLANGELO:

21 Q Mr. Comstock, do you have Exhibit 25?

22 A I do.



1 Q Okay. Have you seen this document  
2 before?

3 A Yes.

4 Q When's the last time you saw it before  
5 today?

6 A Yesterday counsel pointed it out to me.

7 Q And did you review a version yesterday  
8 that was redacted like this or unredacted?

9 A I did.

10 Q Pardon me?

11 A It was redacted.

12 Q Okay. Like this?

13 A Exactly like this.

14 Q And this is an email from Mr. Uthmeier to  
15 you on the evening of September 7th saying, "Earl,  
16 I touched base with Peter," redacted, "He spoke  
17 with Kassinger this evening."

18 Do you see that?

19 A Yes.

20 Q Who is Kassinger?

21 A That would be Ted Kassinger, former  
22 general counsel for the Department of Commerce.

1 Q And where does Mr. Kassinger work now?

2 A He works at O'Melveny & Myers.

3 Q A law firm?

4 A Correct.

5 Q In Washington?

6 A Yes.

7 Q And what did Mr. Davidson and

8 Mr. Kassinger discuss?

9 MR. GARDNER: Objection -- sorry.

10 Restate that one more time.

11 BY MR. COLANGELO:

12 Q What did Mr. Davidson and Mr. Kassinger

13 discuss?

14 A I don't know.

15 Q Did Mr. Davidson tell you what he and

16 Mr. Kassinger discussed?

17 A Not to my knowledge.

18 Q Did Mr. Uthmeier tell you what he and

19 Mr. Kass- -- what Mr. Davidson and Mr. Kassinger

20 discussed?

21 A Well, it appears he might have, but it's

22 blanked out.

1 Q And Mr. Kassinger doesn't work for the  
2 government, correct?

3 A Correct.

4 Q And did not at the time, correct?

5 A Correct.

6 I would just observe, based on the all  
7 blanked out here, we really have no idea what this  
8 email is referring to. It says a Census matter,  
9 but it could have been any number of things,  
10 including the numerous budget issues we were  
11 talking about. So let's make clear I don't know  
12 what this email was in reference to.

13 Q Okay. Let's take a look at Exhibit 24.

14 A Uh-huh.

15 Q So this appears to be an unredacted  
16 version --

17 A Of the last part.

18 Q -- of the last part --

19 A Right.

20 Q -- which appears to be redacted on 2396;  
21 is that correct?

22 A That certainly seems to be the case, yes.

1 Q They're both dated the same date,  
2 correct?

3 A Same date, same time.

4 Q So --

5 A Just to be precise.

6 Q Thank you. Same date and same time, to  
7 be precise.

8 So on an email chain that you commenced  
9 by saying the Secretary would like an update on  
10 progress since the discussion yesterday regarding  
11 the citizenship question. Is it your  
12 understanding that the reference to the Census  
13 matter in the subject line, in fact, refers to the  
14 citizenship question?

15 A That would appear to be the case.

16 Q Okay. So it would also be your  
17 conclusion that Mr. Davidson and Mr. Kassinger  
18 were talking about the citizenship question; is  
19 that right?

20 A No. It would not.

21 Q Why not?

22 A Because I get lots of email that start on

1 one chain that go to another matter. So it's  
2 possible, but it's also possible it was discussing  
3 something else.

4 Q And did the general counsel talk to  
5 Mr. Kassinger about a lot of issues you were  
6 updated on?

7 A I have no idea what Mr. Davidson and  
8 Mr. Kassinger discussed.

9 Q Do you see the email below the Kassinger  
10 reference?

11 A Uh-huh.

12 Q There's a message from you to  
13 Mr. Davidson, Mr. Uthmeier and Ms. Teramoto that  
14 says, "I suggest setting up a call for tomorrow.  
15 The Secretary is asking for progress on this."

16 A Correct.

17 Q And that's a reference to the citizenship  
18 question, correct?

19 A Without seeing the blanked out matter  
20 below that from Peter Davidson, I don't know if  
21 the email chain switched subjects or not.

22 Q Okay. So your -- your testimony is that

1           A     Again, I think -- I would agree that I  
2     sent an email on the 7th asking for an update on  
3     progress regarding the citizenship question, and I  
4     would agree that I sent a memo to the Secretary  
5     updating him on who I had spoken to at Justice.  
6     But that's all I would know about what the  
7     substance of the conversations were.

8           Q     And then after that exchange, did there  
9     come a time when the Secretary and Attorney  
10    General spoke about this issue?

11          A     Correct.

12          Q     And about how long after was that?

13          A     I don't recall.

14          Q     Was it about a week after?

15          A     Possibly. I would imagine it was on the  
16    Secretary's calendar.

17          Q     And after the Secretary spoke with the  
18    Attorney General, was the substance of that  
19    conversation relayed to you?

20          A     Beyond -- beyond the fact that they had  
21    spoken and that the Attorney General was going to  
22    look into the matter, no.

1 Q Okay. What did you say to the Secretary  
2 about the December 2017 letter when it came in?

3 A Justice Department has requested this, so  
4 now we can start the formal process.

5 Q And what formal process are you referring  
6 to?

7 A Well, as I've outlined before, in order  
8 for the government to take an action, you have to,  
9 basically, create a record and make your decision  
10 on the basis of that record. So without a request  
11 from an agency to ask for the inclusion of  
12 citizenship, you were -- this was, basically, a  
13 hypothetical question.

14 Q Okay. But you had told the Secretary in  
15 May, we will get the Justice Department to request  
16 the question?

17 A I am going to do everything I can to  
18 carry out the Secretary's wishes, if they are  
19 legal, and so I will do my best. I can't promise  
20 things.

21 Q You mentioned in reference to your  
22 May 2nd email that you'd identified a case or

1 Q Ah. If I said --

2 A The prior questions were very focused on  
3 March 2017, so I want to be clear we're now  
4 talking about the following year.

5 Q Absolutely. Sorry. Yes. These  
6 questions -- the question I'm going to ask you now  
7 is about 2018.

8 You recall there was a time,  
9 March 26, 2018, when the Secretary issued a  
10 decisional memorandum regarding his decision to  
11 add a citizenship question?

12 A Yes.

13 Q You worked on that memorandum?

14 A Yes.

15 Q Okay. Were you the principal drafter?

16 A I was one of the principal drafters.

17 Q Who were the other principal drafters?

18 A James Uthmeier was the primary other  
19 drafter.

20 Q Did you have a division of responsibility  
21 between the two of you?

22 A No. I believe he did the first draft.



1 Q He did the first draft?

2 A Well, the Secretary actually probably  
3 made -- indicated what he wanted in a draft and  
4 then James would have put it together.

5 Q And then you would have worked on it  
6 after James?

7 A Correct.

8 Q All right. Was that a typical way in  
9 which the two of you worked?

10 A Sure. I edit lots of documents.

11 Q I mean --

12 (Thereupon, the court reporter  
13 clarified.)

14 THE WITNESS: I edit lot of documents.

15 BY MR. COLANGELO:

16 Q I meant with you and Mr. Uthmeier?

17 A Yeah. It would be unusual for me to  
18 prepare the first draft and him to edit it, yes.

19 Q That's what I'm getting at. All right.  
20 Thank you.

21 And did anyone else work on the draft  
22 besides you, the Secretary and Mr. Uthmeier?

1           A    Yes.   I think numerous other people  
2   reviewed the draft, and --

3           Q    How about people who contributed to the  
4   language?

5           A    Again, without seeing various drafts, it  
6   would be hard to say who contributed to which  
7   language.

8           Q    Okay.   Okay.   Couple more questions  
9   before we take our break.

10                  You were shown earlier today a supplement  
11   to the decisional memorandum --

12           A    Yes.

13           Q    -- issued by Secretary Ross in June of  
14   this year.

15                  You recall that?

16           A    Right.   You're referring to Exhibit 5?

17           Q    Yes.   And there's language in  
18   Exhibit 5 -- get the exact language -- there's  
19   language in Exhibit 5 that says referring to  
20   fundamental issues regarding the upcoming 2020  
21   census, "part of these considerations included  
22   whether to reinstate a citizenship question which

1 MR. GARDNER: Objection.

2 Mischaracterizes the witness's previous testimony.

3 THE WITNESS: My previous testimony was  
4 the Department of Justice sent to the  
5 Department of Commerce, from the Justice  
6 Department to the Office of General Counsel, a  
7 draft document suggesting that the Secretary  
8 needed to sign this. That document was reviewed  
9 by the Office of General Counsel and myself, edits  
10 were made, the document produced, and the  
11 Secretary then signed it.

12 BY MR. GERSCH:

13 Q Yeah. My question was a little  
14 different.

15 My understanding of your testimony this  
16 morning was you recommended that the Secretary  
17 sign this supplemental memorandum based on advice  
18 you received from the Department of Justice; is  
19 that correct?

20 MR. GARDNER: Objection.

21 Mischaracterizes the witness's previous testimony.

22 THE WITNESS: Once again, the

1 Department of Justice, who are our counsel,  
2 suggested that a supplemental memorandum was  
3 needed. This was not something Department of  
4 Commerce generated. This was something the  
5 Department of Justice, as our counsel, recommended  
6 be provided. Following up on that advice, we  
7 worked on the document and then had the Secretary  
8 sign it. We were following advice of counsel.

9 BY MR. GERSCH:

10 Q Well, again, I'm not sure I've got an  
11 answer to my question.

12 My understanding -- well, I'll put it --  
13 without respect to what you testified to this  
14 morning, is it correct that you advised the  
15 Secretary to sign the supplemental memorandum  
16 based, in part, on advice from the  
17 Department of Justice?

18 A Again, I'm not sure I'm following the  
19 logic of your question. But, once again, this  
20 document was produced initially by the  
21 Department of Justice, who sent it to the  
22 Department of Commerce with the recommendation

1 A That's correct.

2 Q Okay.

3 MR. GERSCH: Let's take our short break  
4 here.

5 MR. GARDNER: How long?

6 MR. GERSCH: Ten minutes or so.

7 VIDEOGRAPHER: This is the end of Media  
8 Unit Number 4. The time on the video is 1:58 p.m.  
9 We are off the record.

10 (Off the record.)

11 VIDEOGRAPHER: This begins Media Unit 4.  
12 The time on the video is 2:14 p.m. We are on the  
13 record.

14 BY MR. GERSCH:

15 Q Mr. Comstock, we're back on the record.  
16 Before the break, I was asking some questions  
17 about 2018. Now I want to go back to 2017.

18 A Okay.

19 Q You with me?

20 A I'm with you.

21 Q All right. I want to go back to the  
22 spring of 2017 when Secretary Ross requests the

1 inclusion of a citizenship question on the census.  
2 At that point in time, the Department of Justice  
3 had made no request to Commerce for the addition  
4 of a citizenship question, correct?

5 A That's correct.

6 Q And they certainly hadn't  
7 asked -- withdrawn.

8 The Department of Justice certainly  
9 hadn't asked Commerce to add a citizenship  
10 question because of the VRA. That's also correct;  
11 isn't it?

12 A Well, they didn't ask us to add a  
13 citizenship question at that point. So  
14 speculating as to why they would ask is  
15 irrelevant.

16 Q I'm not asking you to speculate. The one  
17 thing we can be sure of is they didn't ask about  
18 the VRA is because they didn't ask at all?

19 A Correct.

20 Q All right. And when Secretary Ross says  
21 to you in the spring, in whatever words he used,  
22 that he wants a citizenship question added to the

1 census, wouldn't you have had a discussion with  
2 him at the time about why he wants that?

3 MR. GARDNER: Objection. Asked and  
4 answered.

5 THE WITNESS: Again, the answer is no, I  
6 would not have a discussion. My boss, if he asked  
7 me to investigate something, I investigate it and  
8 report back the results.

9 BY MR. GERSCH:

10 Q Is your testimony you did not have a  
11 discussion?

12 A I did not.

13 Q And you're not saying -- well, withdrawn.  
14 Wouldn't it be helpful to you in your job  
15 to assist the Secretary to have an understanding  
16 of why he wanted the citizenship question?

17 MR. GARDNER: Objection. Form.

18 BY MR. GERSCH:

19 Q You can answer.

20 A Again, I didn't have any particular  
21 doubts about why a citizenship question would be  
22 useful, so, no, it would not have hurt me to ask.

1 Q I'm not asking whether you had doubts.  
2 My question to you is a little bit --

3 A I understand your question.

4 Q My question, sir, is: Wouldn't it be  
5 helpful to you in your job of assisting the  
6 Secretary to have a complete understanding of why  
7 the Secretary wants to add a citizenship question?

8 MR. GARDNER: Objection. Form.

9 THE WITNESS: Again, it's not relevant to  
10 the question of whether or not he needs -- of  
11 whether or not a question should be added, so, no.

12 BY MR. GERSCH:

13 Q Is it your testimony that why he wants a  
14 citizenship question to be added is not relevant  
15 to whether it should be added? Did I -- did I  
16 hear that right?

17 MR. GARDNER: Objection.  
18 Mischaracterizes the witness's prior testimony.

19 THE WITNESS: My test- --

20 MR. COLANGELO: That's exactly what he  
21 said, Counsel.

22 THE WITNESS: No. My testimony is: The



1 rationale for why he would want it added is not  
2 relevant to my initial inquiry as to whether or  
3 not a question can be added.

4 BY MR. GERSCH:

5 Q Yeah. My question was a little  
6 different. The question I am trying to get you to  
7 focus on is: In your work for the Secretary,  
8 wouldn't it be helpful to you to understand as  
9 fully as possible why he thinks it's a good idea  
10 to add a citizenship question?

11 A And let --

12 MR. GARDNER: Objection. Asked and  
13 answered.

14 THE WITNESS: And let me get you to  
15 understand my answer, which is, no, it would not  
16 make a difference, because I don't need that  
17 information to investigate the question.

18 BY MR. GERSCH:

19 Q Anyone ever say anything to you about why  
20 the Secretary thought it was a good  
21 idea -- withdrawn.

22 Am I right that your testimony is that

1           Q    No one says the reason the Secretary  
2           wants to add a citizenship question is whatever  
3           the reason is, no one ever said anything like  
4           that?

5           A    No.

6                   MR. GARDNER:  Objection to form.

7                   THE WITNESS:  Not to my recollection.

8           BY MR. GERSCH:

9           Q    Okay.  Did you ever have a discussion  
10           with people from the Office of General Counsel at  
11           Commerce about why the Secretary wanted to add a  
12           citizenship question?

13           A    No.

14           Q    And in your time there, did you never see  
15           a document analyzing why it was a good idea for  
16           Census to add a citizenship question?

17           A    Again, you're -- we have a fundamental  
18           disagreement on the premises of your question.  
19           Your premise is that somehow a reason needs to be  
20           provided.  The question before us is the Secretary  
21           has the legal authority to add questions to the  
22           census.  Is there a governmental need?  And if

1     there is, then you're off to the races.

2           Q     My question was a little different. My  
3     question was --

4           A     I understand your question.

5           Q     Sir, I'll repeat it for you.

6                     My question is: In all the time you're  
7     there, did you never see a document spelling out  
8     the reasons why it would be a good idea to add a  
9     citizenship question? Why it would be good from  
10    Commerce's perspective?

11                   MR. GARDNER: Objection. Form.

12                   THE WITNESS: Again, that's not the  
13     question. Commerce --

14     BY MR. GERSCH:

15           Q     Excuse me, sir. That is my question.  
16     Could you answer my question?

17           A     Okay. No.

18           Q     Not even a scrap of paper, right?

19           A     Nope.

20           Q     No memoranda, right?

21           A     No.

22           Q     No emails?

1           A    Not that I recall.

2           Q    And I just want to be straight on my  
3   understanding.   I think I got you correctly, but I  
4   just want to make sure and test that I'm right.

5                It couldn't possibly assist you in your  
6   work, in any way, to know why the Secretary wanted  
7   to add a citizenship question?   Do I understand  
8   that correctly?

9           A    It's not relevant to my analysis.

10          Q    And so it couldn't possibly help you in  
11   any way in your work?

12          A    I'm not going to agree with your  
13   statement that way, no.

14          Q    Well, that's my question -- withdrawn.

15                Well, is there any way in which knowing  
16   what the Secretary's reason was for wanting to add  
17   a citizenship question, is there any way that  
18   could assist you in your work at  
19   Department of Commerce?

20          A    Assist me on my work at the Department of  
21   Commerce, no.

22          Q    Is there any way that it could help you

1 help the Secretary add a citizenship question?

2 A If I had found it difficult or  
3 challenging, yes. Knowing more about why he  
4 wanted it would have been helpful, but I didn't  
5 say that there was an issue. It had been asked  
6 for hundreds of years, and it had been asked on  
7 the ACS. So, clearly, there's a need for it. And  
8 so, no, that was not a particularly troublesome  
9 aspect of the question I was being asked to look  
10 into.

11 Q When you said if I had found it difficult  
12 or challenging, what did you mean? What's the it?

13 A If -- if what I had been requested to do  
14 seemed to have significant legal obstacles to the  
15 ability to do that question or take that action,  
16 then I would probably inquire more fully to see if  
17 there's an alternative way to address what the  
18 Secretary is trying to get to. In this particular  
19 case, you have something that has been on the  
20 decennial census before that is currently being  
21 asked on the ACS. There's clear legal authority  
22 for him to add the question. So, frankly, the

1 reasons that he wants to add it doesn't add  
2 anything to the analysis. There is a governmental  
3 need for this information. That's a question  
4 that's already established, so I don't need to  
5 inquire further as to what his personal beliefs  
6 regarding this question might be.

7 Q What's the governmental need for the  
8 question?

9 A Enforcement to the Voting Rights Act,  
10 determining how many undocumented citizens there  
11 are. You name it, there's a whole bunch of  
12 reasons. That's why every government in the world  
13 collects this information.

14 Q Well, correct me if I'm wrong, we're  
15 talking about at a period in the spring of 2017  
16 when the Voting Rights Act hadn't come up, the  
17 Department of Justice hadn't made a request for  
18 it. What does the Voting Rights Act got to do  
19 with it in the spring of 2017?

20 A When you inquire as to what does the  
21 Department of Justice use the citizenship data  
22 on --

1 Q That wasn't my question. My question  
2 is --

3 A I'm answering your --

4 Q -- why is it a good idea, why does the  
5 government need it back in the spring of 2017?

6 A Finished with your question?

7 Q That's my question.

8 A The answer is for the same reason they've  
9 been collecting it for the last 200-plus years.

10 Q What's the government need in the spring  
11 of 2017?

12 A I already answered that question. If  
13 they collect the data under the ACS for Voting  
14 Rights Act enforcement, that is one of the primary  
15 reasons they collect the data.

16 Q Okay. It's on the ACS. What's the  
17 need -- governmental need for it to be on the  
18 census?

19 MR. GARDNER: Objection. Asked and  
20 answered.

21 THE WITNESS: The governmental need is,  
22 again, if you're going to get more detailed

1 information, then you need that information.

2 BY MR. GERSCH:

3 Q Who said in the spring of 2017 that the  
4 government needed more detailed information?

5 A Again, I'm presented with a request by  
6 the Secretary to say, can we add this question to  
7 the census? I inquire about that, and I looked at  
8 it. One of the reasons you would need it is  
9 voting rights. If you're going to do voting  
10 allocations on the basis of census allocations,  
11 that's the reason it's perfectly sufficient.

12 Q Who said that in the spring of 2017?

13 A That was -- that was determined after  
14 taking a quick look at the issue. I don't need  
15 more than that to continue to pursue the question.

16 Q Who told you that the government needed,  
17 in the spring of 2017, more detailed information  
18 about citizenship than was contained in the ACS?

19 A Nobody.

20 Q You came to that decision on your own; is  
21 that right?

22 A Correct.



1 Q But you're not a voting rights lawyer,  
2 right?

3 A Irrelevant to the question.

4 Q That's not my question. You're not a  
5 voting rights lawyer, right?

6 A I've already said that.

7 Q So you decided on your own in the spring  
8 of 2017 that it would be a good idea for the  
9 government to have more information than was  
10 available from the ACS about citizenship to  
11 enforce the Voting Rights Act, even though you're  
12 not a voting rights lawyer?

13 A I don't agree with that characterization,  
14 at all. I decided that there was sufficient  
15 information for me to pursue the Secretary's  
16 request to consider placing a citizenship question  
17 on the decennial census and that there was  
18 sufficient potential reason to collect that  
19 information to warrant moving forward. If I'd  
20 come to an opposite conclusion that there was not  
21 sufficient potential reason or that there was some  
22 insurmountable legal bar, then I would have

1 reported back to the Secretary, I'm sorry,  
2 Mr. Secretary, it does not appear we can  
3 accomplish this objective.

4 Q Why did you need to come up with a reason  
5 for asking the question, separate and apart from  
6 whatever reason the Secretary had in his own head?

7 A Again, my job is to figure out how to  
8 carry out what my boss asks me to do. So you go  
9 forward and you find a legal rationale. Doesn't  
10 matter what his particular personal perspective is  
11 on it. It's not -- it's not going to be the basis  
12 on which a decision is made.

13 Q That's your understanding, that the way  
14 you should do it, is come up with a rationale that  
15 has nothing to do with what's in the Secretary's  
16 mind as to why he wants it; is that your  
17 understanding of how it's supposed to work?

18 A No. Again, you continue to characterize  
19 things in a way that you believe may be correct,  
20 but not the way I believe to be correct. My job,  
21 as a person who has been doing this for 30-plus  
22 years for clients and people in the government, is

1 if they would like to accomplish an objective, I  
2 see if there's a way to do that. And, again, if  
3 it's not legal, you tell them that. If it can't  
4 be done, you tell them that. If there's a way to  
5 do it, then you help them find the best rationale  
6 to do it. That's what a policy person does.

7 And so, again, if I came up with a  
8 rationale that the Secretary didn't agree with or  
9 didn't support, then he was going to tell me that.  
10 I have no doubt about that. But in the meantime,  
11 he doesn't -- I don't need to know what his  
12 rationale might be, because it may or may not be  
13 one that is -- that is something that's going to a  
14 legally-valid basis.

15 So, again, he's got -- he's asked, can we  
16 put -- can we put a question on? The job of a  
17 policy person is go out and find out how you do  
18 that. Whether that decision is going to be made  
19 ultimately to do it or not, that's up to the  
20 decision-maker.

21 Q Are you saying you're better off not  
22 knowing what the Secretary's own rationale is for

1 A That's correct.

2 Q Counsel asked you about contact you made  
3 with the Department of Justice --

4 A Correct.

5 Q -- starting with a Ms. Haney [sic], I  
6 believe.

7 Do you recall that?

8 A Yes. I believe her name is Hankey,  
9 but --

10 Q Hankey. I apologize.

11 What was the full name? I can get it out  
12 if you don't know it offhand.

13 A Mary Blanche, but --

14 Q I'll find it in here.

15 A It's in one of these exhibits, the memo  
16 that I wrote. Here.

17 Q Mary Blanche --

18 A Yep.

19 Q -- Hankey; is that right?

20 A Yeah.

21 Q All right. So you went -- you called

22 Mary Blanche Hankey --

1 A Correct.

2 Q -- with regard to adding a citizenship  
3 question to the census, right?

4 A Correct.

5 Q And you wanted to see if the  
6 Department of Justice would sponsor the question?

7 A Correct.

8 Q And you had a phone call with her, and  
9 you had at least a meeting with her, right?

10 A Right.

11 Q So at least two contacts?

12 A Three, when she called me back with  
13 somebody else's name.

14 Q Fair enough.

15 Didn't -- didn't Ms. Hankey say, why do  
16 you want to have a citizenship question?

17 A No, she didn't.

18 Q Didn't come up, at all?

19 A Nope.

20 Q She referred you to a Mr. McHenry; is  
21 that right?

22 A Correct.

1 Q And he's not a voting rights guy, right?

2 A I don't actually know what his background  
3 is.

4 Q Well, you went ahead, back and forth with  
5 him over about a month; is that right?

6 A I mean, we spoke on the phone probably  
7 three or four times, yeah.

8 Q Going from, I think, the period you  
9 mentioned was --

10 A Yeah. It was --

11 Q -- early May to early June, roughly?

12 A Approximately a month, yeah.

13 Q And didn't you learn in that time that  
14 he's not a voting rights guy?

15 A No.

16 Q Never came up?

17 A We didn't get into great detail on the  
18 rationale.

19 Q You did ask him would you sponsor a  
20 census question for -- I'm sorry. Withdrawn.

21 You did ask Mr. McHenry if he would be  
22 willing to sponsor a request for the addition of a

1 citizenship question on the census, right?

2 A I didn't ask Mr. McHenry if he would. I  
3 asked if the Department of Justice would be  
4 inclined to send a letter asking us to add the  
5 citizenship question.

6 Q Fair enough.

7 And when you did that, you didn't explain  
8 to Mr. McHenry why the Secretary wanted a  
9 citizenship question?

10 A I would have no reason to.

11 Q And Mr. McHenry never asked, hey, you  
12 want me to do this? Why do you need it? He never  
13 asked you that?

14 A I think I explained at the outset that  
15 the department currently got a report from the ACS  
16 on citizenship level -- I mean, on  
17 census -- certain census size, Citizen Voting Age  
18 Population, and if they were to get it from the  
19 decennial, that would allow them a greater  
20 granularity and would that be useful to them, and  
21 he said he would inquire.

22 Q You asked Mr. McHenry if the

1 Department of Justice would find it useful to have  
2 more granularity about citizenship?

3 A Correct.

4 Q But at no point did Mr. McHenry say,  
5 look, if we want it, we'll ask for it, but how  
6 come you want it? Didn't he ask you something  
7 like that?

8 A No.

9 Q When people call you and say, hey, will  
10 the Department of Commerce do this or do that,  
11 don't you say, why do you want that, why do you  
12 need that?

13 A I usually say is there a reason that you  
14 think the Department of Commerce would need  
15 that -- and if they have a reason, then I'll look  
16 into it. I don't say, hey, why does your boss  
17 want this? That's not part of lexicon.

18 Q No. No. If another agency calls and  
19 says --

20 A I don't --

21 Q Let me finish the question and you can  
22 answer any way you want.



1           If another agency calls and says, will  
2     the Department of Commerce do such and such,  
3     whatever it is --

4           A     Right.

5           Q     -- don't you say to them in some form or  
6     another, why do you want this?

7           MR. GARDNER:  Objection.  Hypothetical.

8     BY MR. GERSCH:

9           Q     Why does your agency need this?

10          MR. GARDNER:  Objection.  Hypothetical.

11          THE WITNESS:  Again, I don't question why  
12     their boss might want it.  I might say, what is it  
13     you think we can provide or why do you think the  
14     Department of Commerce is the right agency for  
15     this?  But if they say we need this data because  
16     we're negotiating a trade agreement, whatever,  
17     that's fine.  I don't question their basis.

18     BY MR. GERSCH:

19           Q     Okay.  But if I understood your last  
20     answer, you added something important, you said,  
21     if they call and say we need this for the trade  
22     ag- -- trade agreement, you say I don't question

1 them. But if they don't give a reason, sir, don't  
2 you say to them, why do you want it?

3 MR. GARDNER: Objection. Calls for a  
4 hypothetical.

5 THE WITNESS: Again, I already provided  
6 the reason for Department of Justice. I said,  
7 would it be useful for you to have more granular  
8 voting data at the census lock level? He said he  
9 would inquire. That answers your question. I'd  
10 already provided the answer.

11 BY MR. GERSCH:

12 Q Mr. McHenry comes back at some point and  
13 he says he's not interested, right, in words or  
14 substance?

15 A He suggested that I contact the  
16 Department of Homeland Security.

17 Q But I take it he makes it clear to you in  
18 some fashion -- withdrawn.

19 Let's start with this. What did he say  
20 to you?

21 A He suggested I talk to the Department of  
22 Homeland Security.

1 Q Did he also say, listen, I don't really  
2 need that information, or my guys don't need that  
3 information, or my department doesn't need that  
4 information or something like that?

5 MR. GARDNER: Objection to form.

6 THE WITNESS: Again, no, he did not  
7 indicate that they did not need the information.  
8 He simply suggested that they were rather busy and  
9 why don't I talk to the Department of  
10 Homeland Security.

11 BY MR. GERSCH:

12 Q It's your testimony that he said they  
13 were too busy to do it?

14 A Unfortunately, that's not an uncommon  
15 response from other agencies. They don't  
16 necessarily look for extra work.

17 Q Okay. So they were too busy to ask for  
18 it, that's what you understood them to say?

19 A Yeah. Their inclination was they weren't  
20 inclined to do the work, to ask for it, yeah.

21 Q Okay. Okay. So Mr. McHenry let's you  
22 know he's not inclined or the department is not

1 inclined to do the work, to ask for it, and he  
2 refers you to Homeland Security, correct?

3 A Correct.

4 Q And you speak to a Mr. Hamilton, right?

5 A Right.

6 Q And Mr. Hamilton, he's not a VRA guy,  
7 right?

8 A I have no idea what his background is.

9 Q Certainly, it's your understanding that  
10 the Department of Homeland Security has nothing to  
11 do with enforcing the Voting Rights Act?

12 A It would not normally be something I  
13 would think they would do, no.

14 Q And you talked to Mr. Hamilton how many  
15 times?

16 A I don't know, three or four times.

17 Q Over what period?

18 A Again, two weeks. I don't know.

19 Q And don't you say to Mr. Hamilton, here's  
20 why we want the information, here's why we want  
21 you to ask for the citizenship question?

22 A Again, it was the same explanation as I

1 gave the Department of Justice. And as you  
2 pointed out, DHS doesn't really do that. So I was  
3 simply following up on the suggestion that  
4 Mr. McHenry had made, and perhaps there was  
5 something that DHS did that I was unaware of that  
6 would have them -- have the need for this  
7 information. Turns out they didn't, so back to  
8 Square 1.

9 Q Yeah. My question is -- and maybe I  
10 didn't phrase it exactly right.

11 Did you explain to Mr. McHenry [sic] in  
12 any of these several calls, here's why it's  
13 important to the Department of Commerce, or your  
14 boss or whomever, here's why it's important  
15 that -- to get a citizenship question added?

16 MR. GARDNER: I think you mean  
17 Mr. Hamilton. You said Mr. McHenry.

18 MR. GERSCH: Withdrawn. Let me rephrase.  
19 Thank you, Counsel.

20 BY MR. GERSCH:

21 Q In any of these several calls, you say to  
22 Mr. Hamilton, here's why it's important to

1 Department of Commerce to have you folks request  
2 the addition of a citizenship question.

3 A No. I never explained that to him.

4 Q And is it your testimony that in your  
5 several conversations with Mr. Hamilton, he never  
6 says, hey, why do you want this?

7 A That's correct.

8 Q He never says, why do you want a  
9 citizenship question added?

10 A Again, when somebody calls up and says --  
11 my boss, you know, Secretary Ross, AG Sessions,  
12 whomever has asked us to pursue this, I don't  
13 typically question back and say, well, why do you  
14 think -- does your boss think this is needed? I  
15 just don't do that. It's kind of discourteous to  
16 other staff. So no, he took me at face value.  
17 I'm calling to inquire, would they find this  
18 useful? He gets back to me, no.

19 Q I just want to make sure I caught part of  
20 what you're saying correctly.

21 Are you saying it would have been  
22 discourteous for Mr. Hamilton at Homeland Security

1 to say, hey, why do you guys at Commerce want us  
2 to ask for a citizenship question?

3 A For him to challenge why my boss might  
4 ask for it.

5 Q I didn't say challenge.

6 Is it your testimony it would be  
7 discourteous for him to say, hey, you're asking me  
8 to do something --

9 A Uh-huh.

10 Q -- something which involves some work --

11 A Uh-huh.

12 Q -- would you just explain to me why it's  
13 important for you to have me ask for a citizenship  
14 question?

15 MR. GARDNER: Objection. Form.

16 THE WITNESS: No such conversation  
17 occurred.

18 BY MR. GERSCH:

19 Q Yeah. My question is: Would that have  
20 been discourteous for him to say that to you?

21 A Depends on how he phrased it.

22 Q He could have phrased it in a way that

1 was properly respectful, right?

2 A Theoretically, yes.

3 Q In the time that you were dealing with

4 Mr. McHenry or getting ready to deal with

5 Mr. McHenry -- this is back at the Justice

6 Department now -- did you ever learn that he was

7 director of the Executive Office of Immigration

8 Review?

9 A I never learned that, no.

10 Q How about Ms. Hankey, did she say why she

11 was going to refer you to Mr. McHenry?

12 A No, she didn't.

13 Q Is it common for you to call people like

14 Mr. McHenry without knowing what their position

15 is?

16 A Certainly at that time, yes.

17 Q What was it about that time?

18 A Well, it was shortly into the

19 administration, and titles are not necessarily

20 informative of what people do, so --

21 Q Did you have an understanding of what

22 Mr. McHenry's portfolio was, independent of his



1 title?

2 A No.

3 Q About what his expertise was independent  
4 of his title?

5 A No.

6 Q You didn't know -- withdrawn.

7 You're trying to accomplish something for  
8 your boss, right?

9 A Correct.

10 Q And you're calling another agency and  
11 you're going to ask them to do some work, right?

12 A Right.

13 Q And you know from your vast experience  
14 that sometimes people just say no because they  
15 just don't want to do the work, right?

16 A Correct.

17 Q That's not uncommon, right?

18 A It's been my experience.

19 Q So in order to have the best possible  
20 chance of persuading a person like Mr. McHenry,  
21 don't you want to do a little research beforehand?

22 A Again, I was dealing with, literally,

1 hundreds of issue, as well as clearing  
2 correspondence, clearing Federal Register notices,  
3 no. I did not have time to research this guy's  
4 background. That's why I went through  
5 Eric Branstad to say, hey, get me somebody over at  
6 DOJ who I can talk to. I want to Hankey -- and I  
7 don't know her from Adam, but relying on the fact  
8 that she was recommended by folks over at the  
9 White House as somebody who was connected with  
10 AG Sessions, I'm assuming she's going to steer me  
11 in the right direction. So I take on faith who  
12 she suggested I talked to. Turned out they  
13 weren't the right person, so we didn't get  
14 anywhere.

15 Q Did you have an assistant during this  
16 period?

17 A No.

18 Q Any staff?

19 A I had my OPSP staff.

20 Q Who's that?

21 A Office of Policy and Strategic Planning.  
22 They were the detailees I discussed earlier.

1 Q Got it.

2 You couldn't ask one of them, hey, I'm  
3 supposed to have a call with Mr. McHenry, can one  
4 of you figure out what he is and why --

5 A No.

6 Q Excuse me. I got to -- just a second.  
7 I've got to finish the question. You can answer  
8 it any way you want.

9 Didn't you want to call -- talk to one of  
10 your staff people and say, listen, I got a call  
11 with Mr. McHenry, I got to persuade him to do some  
12 work he's not going to want to do, to help out our  
13 boss, Mr. Ross, Secretary Ross, and can one of  
14 your look up and tell me who he is and what levers  
15 we might be able to pull to persuade him to do  
16 this work for us?

17 MR. GARDNER: Objection.

18 BY MR. GERSCH:

19 Q You didn't want to ask someone on your  
20 staff to do some work like that for you?

21 MR. GARDNER: Objection. Form.

22 THE WITNESS: Again, that's a view of

1 both the workload I was under and the workload  
2 that they're under that I think is misinformed.

3 In fact, several of my calls with  
4 Mr. McHenry were made while I was driving into  
5 work, so there was no opportunity to call somebody  
6 and do that research.

7 And, besides, this wasn't about getting  
8 leverage on Mr. McHenry. This was simply to  
9 ask -- following up on the person I'd been  
10 directed to, who, based on the fact that it was  
11 recommended by an assistant to the AG, I'm  
12 assuming is going to at least be somewhat  
13 receptive. Probably an error on my part, but  
14 that's -- I've got a dozen other things I'm  
15 dealing with at the same time. So, no, I'm not  
16 going to spend a lot of time researching this guy.

17 BY MR. GERSCH:

18 Q You didn't spend any time researching  
19 this guy?

20 A Correct. I didn't.

21 Q Secretary Ross certainly knows why he  
22 wanted a citizenship question back in the spring

1 of 2017, right?

2 A You'd have to ask him.

3 Q Is there anyone besides Secretary Ross  
4 who we could go to who would have that  
5 information?

6 MR. GARDNER: Objection. Lack of  
7 foundation. Calls for speculation.

8 THE WITNESS: I'm not aware of anybody.

9 BY MR. GERSCH:

10 Q Do you have any reason to believe that  
11 Secretary Ross's rationale for wanting to add a  
12 citizenship question is some kind of supersecret?

13 A No.

14 Q Doesn't involve national security, right?

15 MR. GARDNER: Objection. Lack of  
16 foundation. Calls for speculation.

17 THE WITNESS: I don't know what the  
18 Secretary's rationale is. You'd have to ask him.

19 BY MR. GERSCH:

20 Q But you don't think it involves national  
21 security?

22 MR. GARDNER: Same objections.

1 THE WITNESS: I'm not going to speculate  
2 on that.

3 BY MR. GERSCH:

4 Q You heard about this suit back when it  
5 was filed, right, this lawsuit?

6 A Yeah.

7 Q Okay. And there's several lawsuits,  
8 right?

9 A Lost count, but yes.

10 Q And you've known that you were going to  
11 sit for a deposition for a while, also?

12 A Maybe for two weeks or so.

13 Q Okay. Well, at any time since these  
14 lawsuits started to get filed, did you have a  
15 discussion with anyone about why it is the  
16 Secretary wanted a citizenship question added?

17 A No.

18 Q Secretary Ross gave Congressional  
19 testimony in March of 2018 in advance of his  
20 decisional memorandum. Do you remember that?

21 A I'll take your word for it.

22 Q Testified before committees of both --

1 both House, right?

2 A Again, I'd have to look at a calendar to  
3 refresh my memory as to when he testified. But,  
4 yes, he testified to Congress during the course of  
5 the year.

6 Q Fair enough.

7 And he was asked questions about a  
8 citizenship question?

9 A I believe that's correct.

10 Q Who prepared him to testify on that  
11 subject?

12 A He -- he does a lot of his own hearing  
13 prep, but we would have -- I would have been  
14 involved, as well as James Uthmeier,  
15 Peter Davidson, of course, Karen Dunn Kelley. I  
16 mean, this was not a hearing specifically on the  
17 citizenship question, so we mostly would have been  
18 preparing for the broad range of questions on  
19 whatever the topic was. We were going up and  
20 testifying on the steel tariffs. We were going up  
21 and testifying on the lifecycle cost estimate, a  
22 whole series of things, so --

1 Q Sure. You want to get him prepped on  
2 everything, though, right?

3 A Yeah.

4 Q And one of the things that you  
5 anticipated would come up was the question about  
6 the citizenship question, right?

7 A Seems reasonable if that was the time  
8 frame, yes.

9 Q And were you the one who worked with  
10 Secretary Ross on how he was going to answer those  
11 questions?

12 A I would have been one of the people, yes.

13 Q Was there a division of responsibility  
14 between the folks you mentioned just a minute ago,  
15 the people who helped prepare him?

16 A Not per se. I think he's fairly open to  
17 suggestions from staff of what to consider. So if  
18 somebody had an idea, he would consider it.

19 Q Did you tell the Secretary, listen, you  
20 can expect that someone is going to ask  
21 whether -- whether you're going to add a  
22 citizenship question? Did you have that



1 discussion with him? That would have been normal,  
2 right?

3 A Well, again, if this is in the time  
4 period after we received the DOJ letter and while  
5 he was considering making his decision, then, yes,  
6 we might have anticipated. But the answer would  
7 have been fairly straightforward, which is we have  
8 that matter under review, and I'm considering  
9 all -- all information. So there would have been  
10 very little we're prepping for on that.

11 Q Didn't you discuss with the  
12 Secretary -- withdrawn.

13 First of all, I'll represent that he  
14 did -- the Secretary did, in fact, testify before  
15 multiple committees after the  
16 Department of Justice request came in in December  
17 of 2017 and before the issuance of the March  
18 decisional memorandum.

19 A Okay.

20 Q And my question to you is: In those  
21 discussions that you had with the Secretary to  
22 prepare him, wasn't it discussed whether the

1 Secretary was going to reveal the reasons he had  
2 wanted to the addition of a citizenship question?

3 A No.

4 Q Subject never came up?

5 A Never came up.

6 Q Didn't it come up whether the Secretary  
7 would reveal that the reason that Commerce had  
8 received a request from DOJ to add a citizenship  
9 question is because Commerce had gone to DOJ and  
10 asked DOJ to make that request?

11 A No.

12 Q Never came up?

13 A Never came up.

14 (Conference call interruption.)

15 THE WITNESS: In case we were falling  
16 asleep.

17 BY MR. GERSCH:

18 Q You testified with respect to the  
19 citizenship question; isn't that right?

20 A That's correct.

21 Q You gave testimony before the House  
22 Committee on Oversight and Government Reform?

1 Voting Rights Act was not available."

2 That's the testimony you gave, correct?

3 A Again, this is not the official  
4 transcript, but presuming your person transcribed  
5 this correctly, that appears to be what I said.

6 Q And this squares with your memory of what  
7 you said, right?

8 A Correct.

9 Q And when she says, why did this question  
10 get added, and you say, we received a request from  
11 the Department of Justice, that's not the whole  
12 truth; is it?

13 A That's a -- that's a factual statement.

14 Q It's a factual statement that you  
15 received a request from Department of Justice,  
16 right?

17 A Correct.

18 Q But the reason the Department of Justice  
19 made the request is because you guys at the  
20 Department of Commerce put them up to it; isn't  
21 that right?

22 A I don't agree with that characterization.

1 But, again, the Department of Justice decided that  
2 this was information they could use and they made  
3 the request. That starts the formal process for  
4 us to review the question. Had they decided they  
5 did not need that information and not made the  
6 request, then the Commerce Department would have  
7 had to decide if there was some rationale that the  
8 Commerce Department needed this information.

9 Q Sure. But the reason the  
10 Department of Justice made this request of the  
11 Department of Commerce was that the Department of  
12 Commerce went to the Justice Department and said,  
13 will you please make this request of us, right?

14 A We asked them if they could use this  
15 information. That was an independent decision on  
16 their part.

17 Q You asked them if they could use  
18 information from a citizenship question, right?

19 A At the block level, which is not  
20 currently available.

21 Q And you asked them if they would be  
22 willing to request that from the

1 Department of Justice [sic]?

2 A If that was information that they found  
3 useful, then they could request it, yes.

4 Q You asked them to request it from the  
5 Department of Justice, correct?

6 A Again, what we asked them was if they  
7 could use this information, and if so, then they  
8 would need to request it.

9 Q Do you deny that you personally went to  
10 representatives in the Department of Justice and  
11 asked them if they would request the addition of a  
12 citizenship question?

13 MR. GARDNER: Objection. Asked and  
14 answered.

15 THE WITNESS: To answer, once again, I  
16 went to representatives of the  
17 Department of Justice and asked them if this would  
18 be information that they would find useful, and if  
19 so, they could request it.

20 BY MR. GERSCH:

21 Q Yeah. I got that part, and I'm asking a  
22 slightly different question now.

1           A     Okay.

2           Q     Didn't you say to the  
3     Department of Justice when you were talking to  
4     them, in words or substance, we would appreciate  
5     it if you would ask us to include a citizenship  
6     question?

7           A     I never made such a request.

8           Q     And I take it, based on your prior  
9     testimony, you don't know what conversation  
10    occurred between the Secretary and the Attorney  
11    General?

12          A     That's correct.

13          Q     Did you understand that Ms. Teramoto was  
14    on that call between the Secretary and the  
15    Attorney General?

16          A     I don't know who was on the call.

17          Q     In any case, however we word it, you  
18    didn't tell Representative Norton when she asked  
19    why is this question being added, that you had  
20    gone to the Department of Justice and suggested  
21    that this might be something they'd be interested  
22    in?

1 Q Let me put a different question to you.

2 A Sure.

3 Q When Representative Norton asks you the  
4 why question, don't you think it's responsive to  
5 the why question that the Secretary of Commerce  
6 wanted to add a citizenship question independent  
7 of the Department of Justice's request?

8 A No. I don't think it's relevant. His  
9 decisional memo laid out very clearly the  
10 rationale that was the basis of his decision.  
11 Whatever his personal feelings may have been are  
12 irrelevant to that decision.

13 Q It laid out a rationale. We can agree on  
14 that, right?

15 A That's what he's required to do under the  
16 law, is lay out a rationale. That is the  
17 rationale for his decision and that's what he's  
18 standing on.

19 Q Okay. He laid out a rationale. Is it  
20 your understanding, under the law, that if the  
21 rationale is not his real reason for doing it, we  
22 should ignore the real reason, and we should only

1 focus on the pretextual reasons that he offers up?

2 MR. GARDNER: Objection. Calls for a  
3 legal conclusion.

4 THE WITNESS: The Secretary's decision  
5 memo lays out a valid reason that's consigned to  
6 his discretion under the law, and that is the  
7 rationale he provided to staff, and that is the  
8 rationale that we placed in the record. So that  
9 is his reason for having the question.

10 BY MR. GERSCH:

11 Q My question is a little different. If  
12 the Secretary's real rationale is something  
13 different than the rationale he lays out in his  
14 decisional memo, is it your understanding, under  
15 the law, that we're to ignore the real reason and  
16 only focus on what's in the decisional memorandum?

17 MR. GARDNER: Objection. Calls for a  
18 legal decision.

19 THE WITNESS: Your hypothetical is  
20 premised on the false conclusion that there is  
21 some illegal rationale that would be provided and  
22 be exposed and be referenced. There is none.



1 It's committed to his discretion to add a  
2 question, as long as you make it through the other  
3 things, Paperwork Production Act, et cetera. So  
4 it's -- I don't understand the basis for your  
5 question. But there's -- at the base of your  
6 question is this hypothetical that there's some  
7 supposed illegal reason that would be -- that  
8 would nullify a perfectly valid decision. I don't  
9 agree with that assessment.

10 BY MR. GERSCH:

11 Q Mr. Comstock, I want you to listen to my  
12 question carefully, because there was no reference  
13 to any illegal rationale, and I'm going to put it  
14 to you again and there will be no reference to an  
15 illegal rationale. And my only question -- and,  
16 by the way, I'm happy if you want to take this as  
17 a hypothetical.

18 My only question is: If the Secretary  
19 lays out a rationale in his decisional memorandum  
20 which is different than his real rationale, is it  
21 your understanding that we're supposed to ignore  
22 the real rationale and only focus on what's in the

1 decision memo?

2 MR. GARDNER: Given your introductory  
3 clause, objection. Calls for a hypothetical.  
4 Objection. Calls for a legal conclusion.

5 THE WITNESS: Again, a decision is valid  
6 if a valid reason has been spelled out, and that  
7 is what we did.

8 BY MR. GERSCH:

9 Q Could you answer my question?

10 A Again, I don't accept the premise of your  
11 question, which is that there's some other reason  
12 besides what was provided in the memo.

13 Q It's a hypothetical question, sir. The  
14 question is --

15 A I'm not going to answer a hypothetical on  
16 that basis.

17 Q I'm asking you to answer it, and you're  
18 here to answer questions, and I think I'm fairly  
19 following up on your testimony.

20 My question to you is real simple: If  
21 the Secretary lays out a rationale in his  
22 decisional memorandum and it's not his real

1 rationale, is it your understanding that what  
2 we're supposed to focus on is what's in the  
3 decisional memorandum and we're not supposed to  
4 look at the rationale?

5 MR. GARDNER: Objection. Calls for  
6 hypothetical. Objection. Calls for legal  
7 conclusion.

8 THE WITNESS: Again, we're at loggerheads  
9 here because you keep spelling out something that  
10 is -- that presupposes there is some other  
11 rationale that would be sufficient to outweigh a  
12 legitimate rationale and, therefore, must be  
13 noticed and taken care of. I mean, the government  
14 makes decisions all the time and spells out a  
15 rationale. Do some of decision-makers have,  
16 perhaps, other reasons, maybe, but it's not  
17 relevant to the legal analysis.

18 Q We shouldn't know what Secretary --  
19 withdrawn.

20 We shouldn't know what the real rationale  
21 is; is that testimony?

22 A I --

1 MR. GARDNER: Objection. Calls for a  
2 legal conclusion.

3 THE WITNESS: Again, I have no reason to  
4 believe that the rationale is anything other than  
5 what's in the memo.

6 BY MR. GERSCH:

7 Q Well, sir, actually, you testified  
8 previously that the Secretary had a rationale for  
9 asking this question, which he didn't reveal to  
10 you and had nothing to do with the  
11 Department of Justice's request.

12 A I disagree with that statement.

13 Q Let's try this one other way. You don't  
14 disagree with the proposition that a  
15 decision-maker could have a rationale that is  
16 different than what he chooses to spell out in his  
17 decisional memorandum, right?

18 MR. GARDNER: Objection. Calls for  
19 hypothetical.

20 THE WITNESS: Again, I don't know -- I  
21 don't -- it's impossible to answer that question,  
22 because you -- I'm not sure where you're going

1 with it.

2 BY MR. GERSCH:

3 Q I'm not asking you to know where I'm  
4 going with it. I'm asking you to answer the  
5 question. I'll put it to you again.

6 You don't disagree with the proposition  
7 that it's possible for the decision-maker to have  
8 one rationale which he puts in the decisional  
9 memorandum and a completely different rationale  
10 which is the real reason he wants the decision  
11 done?

12 MR. GARDNER: Objection. Calls for a  
13 hypothetical.

14 THE WITNESS: Again, in the context we're  
15 dealing with, I don't agree with that statement.

16 BY MR. GERSCH:

17 Q It's not possible for that to happen,  
18 it's not possible for the decision-maker to put  
19 one rationale in the decisional memo and have a  
20 completely different rationale for why he wants  
21 the decision?

22 MR. GARDNER: Objection. Calls for a

1 hypothetical.

2 THE WITNESS: In my experience with the  
3 federal government service across 30 years, both  
4 Democrat and Republican, I'm not aware of  
5 decision-makers who would do such a thing.

6 BY MR. GERSCH:

7 Q This would never happen, in your view,  
8 right?

9 A I'm not going to use the word never.  
10 Clearly, in the course of human history, things  
11 like that do happen. That's not been my  
12 experience that it generally is the case.

13 Q That's fine. Put aside your experience.  
14 I'm just asking you conceptually, you don't have  
15 difficulty understanding that a decision-maker  
16 could say I'm doing this for one reason without  
17 revealing that he is actually doing it for a  
18 different reason. You understand that concept,  
19 right?

20 MR. GARDNER: Objection. Calls for a  
21 hypothetical.

22 THE WITNESS: Yeah. It's a hypothetical

1 to which the answer is always going to be yes. So  
2 to the extent that makes you happy, sure.

3 BY MR. GERSCH:

4 Q Okay. So you do understand that concept.  
5 So when that occurs, when it is the case that the  
6 decision-maker puts forth a stated rationale,  
7 which is, in fact, not his real rationale, is it  
8 your understanding that we should pay no attention  
9 to his real rationale and focus only on his stated  
10 rationale?

11 MR. GARDNER: Objection. Calls for  
12 hypothetical objection. Calls for a legal  
13 conclusion.

14 THE WITNESS: I'm not going to answer  
15 that question.

16 MR. GARDNER: Would now be a good time  
17 for a break? We've been going about an hour.

18 VIDEOGRAPHER: This concludes Media Unit  
19 Number 5. The time on the video is 3:11 p.m. We  
20 are off to record.

21 (Off the record.)

22 VIDEOGRAPHER: This begins Media Unit

1 Number 6. The time on the video is 3:37 p.m. We  
2 are on the record.

3 (Plaintiffs' Exhibit 28, Memo, was  
4 marked.)

5 BY MR. GERSCH:

6 Q Mr. Comstock, we're back on the record.

7 After the Department of Justice made  
8 their formal request for the addition of a  
9 citizenship question in December of 2017, you  
10 understand that the Census Bureau did some  
11 analysis with respect to that request, right?

12 A Correct.

13 Q All right. And one of the things that  
14 the Census Bureau produced is a document that's  
15 been marked Exhibit 28.

16 A Okay.

17 Q Is that fair to say?

18 A It appears to be a memo from John Abowd  
19 to the Secretary, so will -- oh, it's marked  
20 draft, so --

21 Q Dated January 19, 2018, as you say, from  
22 John Abowd, Chief Scientist at the Census Bureau,



1 to Secretary Ross through Karen Dunn Kelley.

2 You've seen this before, haven't you?

3 A I don't know that I've seen this  
4 particular draft. It's marked draft, so I don't  
5 know that this document ever made it up to the  
6 Secretary's office.

7 Q Did you see a form of this document,  
8 whether it was this one or not?

9 A I saw some form of this document, yes.

10 Q I want to direct your attention to the  
11 one, two, three -- third full paragraph, last  
12 sentence, and in it Mr. Abowd addresses  
13 Alternative B -- and, by the way, you understand  
14 Alternative B is adding a citizenship question to  
15 the census, right?

16 A That appears to be what the memo says,  
17 yeah.

18 Q So what Mr. Abowd reports is  
19 Alternative B -- that is adding a citizenship  
20 question -- is, quote, very costly, harms the  
21 quality of the census count, and would use  
22 substantially-less active citizenship status data

1 that are available from administrative sources.

2 You knew that that is what the

3 Census Bureau had concluded, right?

4 A Well, again, that's a -- this is a draft  
5 pre-decisional memo. So I'm not sure if this was  
6 the final document that was sent to us or not.

7 Q I'll represent to you that this  
8 is -- that the record made in this case so far is  
9 that this is the last draft produced. Does that  
10 help you --

11 A Is that -- okay.

12 Q I'm happy if you want to consult with  
13 your counsel.

14 MR. GARDNER: If you -- you can answer  
15 the question, yes.

16 THE WITNESS: Sure. Assuming this is the  
17 final version, then that's what the document says,  
18 yes.

19 BY MR. GERSCH:

20 Q That's not my question. You came to  
21 understand, isn't that right, that the view of the  
22 Census Bureau was that asking the citizenship

1 question is very costly, harms the quality of the  
2 census count and would use substantially-less  
3 citizenship status than are available from  
4 administrative sources?

5 A I would agree that that's the summary  
6 statement here. That it overstates the case they  
7 made further in the document. But that is not an  
8 accurate representation of what's actually  
9 reflected in the document.

10 Q I want to make sure I understand your  
11 testimony. You're saying you disagree with their  
12 conclusion?

13 A I disagree with that characterization as  
14 being the final conclusion of the Census Bureau,  
15 yes.

16 Q Ah. Okay. So you think that what I just  
17 read to you doesn't fairly reflect the view of the  
18 Census Bureau; is that right?

19 A I think that reflects the view of  
20 Dr. Abowd and that it's very imprecisely stated.  
21 If you read the rest of the memo, it provides more  
22 detail, and so I would not agree with the

1 statement, because it's not backed up in the  
2 document that it would be very costly. That's a  
3 relative term. And that it would use  
4 substantially-less accurate, I disagree with those  
5 statements.

6 Q Yeah. I understand, and I stipulate that  
7 you disagree with them. My question is a little  
8 different. I'm asking if you understand this is  
9 the position of the Census Bureau, whether you  
10 agree with it or not, and I stipulate that you  
11 don't.

12 A And just, again, I'm being very clear  
13 that this sentence taken out of context, I would  
14 say is not the position of the Census Bureau. The  
15 position of the Census Bureau is reflected in this  
16 full memo, which provides greater detail, which is  
17 not, I would say, accurately characterized in this  
18 summary statement at the front.

19 Q Did you ever meet with the folks at the  
20 Census Bureau about this analysis?

21 A Yes, we did.

22 Q Okay. When did you do that?

1 A I couldn't tell you the exact date.

2 Q Who did you meet with?

3 A Dr. Abowd, Dr. Jarmin. It was a large  
4 meeting.

5 Q And Dr. Abowd and Dr. Jarmin, they stood  
6 by this analysis, right, the analysis in  
7 Exhibit 28?

8 A I'd say that, yeah, they stood by the  
9 entire analysis, not necessarily that statement.

10 Q And the entire analysis includes the  
11 statement that I read to you, right?

12 A Again, you're -- I think you're taking a  
13 single statement out of context.

14 Q My question is a little different. I'm  
15 saying when you said, they stood by the entire  
16 analysis, that includes the statement that I read  
17 you?

18 A And, again, I will say that I think  
19 you're trying to get me to say that particular  
20 statement represents the view of the  
21 Census Bureau, and that is not my understanding.

22 Q Okay. When you say it's not your

1 understanding, at no point did Dr. Jarmin or  
2 Dr. Abowd say, no, we don't believe that  
3 Alternative B is very costly, harms the quality of  
4 the census count and would use substantially-less  
5 accurate citizenship status data that are  
6 available from administration sources; isn't that  
7 right? They never took it back?

8 A We never asked them to take it back.

9 Q And they never did?

10 A I don't know if they took it back or not.

11 Q In your presence, sir.

12 A Again, they were never asked, to my  
13 knowledge, to take that statement back, so there  
14 would be no reason for them to take it back.

15 Q And they didn't take it back, did they?

16 A I don't know whether they took it back.

17 Q In your presence, they didn't take it  
18 back?

19 A Again, I look at their entire memo, not  
20 that statement.

21 Q I'm not asking that question. They  
22 didn't take this statement back that I just read

1 to you three times?

2 A Again, my point is, they were never asked  
3 to take it back, so there would be no reason for  
4 them to take it back.

5 Q I just want there to be no  
6 misunderstanding, Mr. Abowd [sic], if at trial  
7 you're going to say they took it back, I want to  
8 hear that right now.

9 MR. GARDNER: He's not Mr. Abowd.

10 BY MR. GERSCH:

11 Q I'm sorry, Mr. Comstock. It's late in  
12 the day.

13 Mr. Comstock, if you're going to say at  
14 trial that Dr. Abowd or Dr. Jarmin took this  
15 statement back, I want to hear that right now.  
16 Can we agree on that, that you'll tell me right  
17 now?

18 A I will agree -- I will agree that I would  
19 say that is not representative of the data that  
20 was presented to us in the course of extensive  
21 discussions. That that statement is an early  
22 statement that mischaracterizes the final

1 conclusions that we understood.

2 Q When you say earlier, it's the statement  
3 as of the January 19th memo, you don't disagree  
4 with that?

5 A Again, I'm not contesting they provided  
6 this investigation.

7 Q Focus on timing. You said this was an  
8 early statement and you don't think it was  
9 reflective of their final conclusions.

10 My question is: You're not saying it  
11 doesn't reflect their position as of January 19th,  
12 are you?

13 A I am saying, again, that I think you're  
14 taking a single statement out of context and  
15 trying to represent it has the position of the  
16 Bureau as conclusive, and I'm saying I disagree  
17 with that statement.

18 Q Let me show you -- let's mark this as  
19 Exhibit 29.

20 (Plaintiffs' Exhibit 29, Memo, was  
21 marked.)

22 BY MR. GERSCH:



1 Q You see what's been marked as Comstock  
2 Exhibit 29, it is a March 1, 2018 memo from  
3 Dr. Abowd for Secretary Ross, Bates stamp first  
4 Page 001308.

5 Do you have that in front of you?

6 A I do.

7 Q Have you seen this document before?

8 A I believe I've seen this document.

9 Q Okay. And this document relates to an  
10 Alternative D, right?

11 A Correct. But I'll note, again, it's  
12 marked draft, and I'm just mystified as to why we  
13 keep getting draft documents as opposed to finals.  
14 Certainly draft documents don't normally come to  
15 us.

16 MR. WALSH: Counsel, would it be possible  
17 to hand out --

18 MR. GERSCH: Oh, I'm sorry.

19 MR. WALSH: Thanks.

20 BY MR. GERSCH:

21 Q This is about Alternative D; is that  
22 right?

1           A    That's correct.   But I'm still asking a  
2   question, why am I getting a draft version of this  
3   instead of a final?

4           Q    I don't get to testify.   All I can do is  
5   ask the questions.

6                   And Alternative D was the idea of  
7   Secretary Ross, that perhaps you could combine  
8   Alternative B, which is asking the citizenship  
9   question of every household in the decennial  
10   census, and Alternative C, which was don't ask the  
11   question but use administration data to figure out  
12   citizenship status, correct?

13          A    Correct.

14          Q    And at the back of this memo, the last  
15   sentence says, "In sum, Alternative D would result  
16   in poorer quality citizenship data than  
17   Alternative C.   It would still have all the  
18   negative cost and quality implications of  
19   Alternative B outlined in the draft January 19th  
20   memo to the Department of Commerce."

21                   You saw this at the time, right?

22          A    Again, I can't say that this was the

1 document I saw, because I did not see something  
2 marked draft pre-decisional V10.

3 Q You think you saw a version of it that  
4 didn't have draft on it?

5 A I have no idea. But we don't typically  
6 see documents that say draft.

7 Q I'll represent that we've never seen a  
8 version of either of these documents that aren't  
9 marked draft. If there is one -- if there are  
10 versions, I would like them right now.

11 MR. GARDNER: I represent we've produced  
12 what we have.

13 BY MR. GERSCH:

14 Q Regardless of the format, you became  
15 acquainted with the views of Census that  
16 Alternative B would result in poorer quality  
17 citizenship data than Alternative C and still have  
18 all the cost and quality implications of  
19 Alternative B outlined in the draft January 19th  
20 memo to the Department of Commerce; you became  
21 acquainted with that conclusion of theirs, right?

22 A I did.

1 Q Okay. By the way, you'll notice it  
2 says -- this refers to the January 19th memo as  
3 being a draft.

4 A Okay. Like I said --

5 Q Do you see that?

6 A I see it. That it says that, yes.  
7 Perhaps that is what they provided to us. I don't  
8 know. We produced whatever is in the record, so  
9 if this is what's in the record -- as long as I'm  
10 being given the final version, then okay.

11 Q All right. You're not saying that the  
12 Census Bureau took back the conclusion reflected  
13 in this last paragraph that I've read you from  
14 Exhibit 29, are you?

15 A Again, I think there was iterative  
16 exchange in which the conclusions of the  
17 Census Bureau to staff and some of their  
18 assertions did not hold up under  
19 cross-examination.

20 Q Whether you think they held up or not, my  
21 question to you is: Did the Census Bureau ever  
22 take back the conclusion that's in the last

1 paragraph of this March 1 memo?

2 A You'd have to ask them.

3 Q In your presence, did they say any such  
4 thing?

5 A I didn't ask them to take it back.

6 Q I'm not asking whether you asked them.  
7 I'm asking -- withdrawn.

8 There were other people in the meeting  
9 besides you, right?

10 A There were a series of meetings, so --

11 Q How many meetings did you have about this  
12 memo, this March 1 memo?

13 A I couldn't tell you.

14 Q About?

15 A Might have met once or twice. I really  
16 couldn't tell you.

17 Q And who did you remember being there  
18 besides Dr. Abowd and Dr. Jarmin?

19 A Again, I don't know if it was  
20 specifically on this memo or this presentation or  
21 whether they sent it to us. There were multiple  
22 meetings on the question. Who was at each

1 meeting, I couldn't tell you.

2 Q I think it would be fair to say there  
3 were multiple meetings about Census Bureau's  
4 analysis of the citizenship question, right?

5 A Yes.

6 Q Okay. And what's your best recollection  
7 of how many meetings there were?

8 A I don't know. Two or three.

9 Q And if this memo is dated March 1 and the  
10 decisional memo is dated March 26th. What's your  
11 best recollection about when the last -- the last  
12 meeting was, the last of these two or three  
13 meetings?

14 A Probably somewhere in the vicinity of  
15 March 20th.

16 Q Okay. And my question simply to you is,  
17 sir: Did the Census Bureau people ever say we're  
18 taking it back, you've convinced us, we don't  
19 agree with the conclusion we put forth in the last  
20 paragraph?

21 A No.

22 Q And did you ever have -- withdrawn.

1 Did you have a meeting about the wording  
2 of the March 26th memo with the Census Bureau?

3 A I don't believe so.

4 Q You didn't have a meeting with Dr. Abowd  
5 with Secretary Ross there on the morning of the  
6 26th or thereabouts?

7 A No, not to my recollection. But it's  
8 entirely possible.

9 Q So it's your -- and all I can ask for is  
10 your best recollection.

11 It's your best recollection that you  
12 never had a meeting with the Census Bureau about  
13 the wording of the March 26 decisional memo?

14 A Not that I recall, no.

15 Q Did you ever have any analysis of the  
16 citizenship question prepared by experts other  
17 than the folks at the Census Bureau?

18 A Not that I know of, no.

19 Q Did you ever get any input from somebody  
20 with technical expertise with respect to the  
21 Census Bureau's analysis of the citizenship  
22 question who was not from the Census Bureau?

1 A No.

2 Q Did anyone review the Census Bureau's  
3 analysis of what was wrong with the citizenship  
4 question who was not a lawyer?

5 A The Secretary.

6 Q Other than the Secretary?

7 A Karen Dunn Kelley.

8 Q Other than the Secretary and Karen Dunn  
9 Kelley?

10 A Obviously, Dr. Jarmin, Dr. Abowd.

11 Q I'm talking about people outside the  
12 Census Bureau.

13 A Census Bureau.

14 Well, let's see -- well, Wendy Teramoto  
15 might have. But, no, primarily would have been  
16 Office of General Counsel doing the review.

17 Q And you?

18 A And me.

19 Q And you're a lawyer?

20 A Yes, I am a lawyer.

21 Q All right. Let's mark the decisional  
22 memorandum as Exhibit 30.



1 Q -- those are empirical analyses, right,  
2 they count?

3 MR. GARDNER: Objection. Form.

4 THE WITNESS: You'd have to ask the  
5 Census Bureau how they do their analysis.

6 BY MR. GERSCH:

7 Q Right. But you understand what empirical  
8 means, right?

9 A I understand the use of the term, but I  
10 don't know if all of their analyses are based on  
11 empirical or some other method.

12 Q Certainly, some of their analyses are  
13 empirical, right?

14 A Sure. And some are sampling and some of  
15 them are imputation. They use a variety of  
16 statistical methods.

17 Q Just a few more questions. Now, turn to  
18 Exhibit 30 if you would and turn to Page 7.

19 A Yeah.

20 Q Last paragraph, first sentence reads,  
21 "The Department of Commerce is not able to  
22 determine definitively how inclusion of a

1 citizenship question on the decennial census will  
2 impact responsiveness."

3 You saw that, right?

4 A Yep.

5 Q It says the Department of Commerce is not  
6 able to determine definitively. What does that  
7 mean, determine definitively?

8 A What it says. In other words, the  
9 evidence presented to us was not determinative,  
10 and it was not definitive that there would be a  
11 drop in response rate. There was a widely-held  
12 belief that there would be a drop in response, but  
13 many of those same people that they were not  
14 answering the citizenship question, were already  
15 not answering the census because of distrust of  
16 government, because of whatever the other reasons  
17 may be.

18 So they could not identify with any  
19 specificity that the addition of a citizenship  
20 question would, in fact, cause a decrease in  
21 response rate. They estimated there could be a  
22 decrease of a certain number of households, which

1 was less than half a percent. And based on the  
2 size and volume of the exercise we were  
3 undertaking, that is not sufficient to say it's an  
4 insurmountable obstacle.

5 MR. GERSCH: I'll move to strike it as  
6 nonresponsive.

7 BY MR. GERSCH:

8 Q My question --

9 A It was responsive.

10 Q What do you mean by definitively?

11 MR. GARDNER: Objection. Asked and  
12 answered.

13 THE WITNESS: What I mean by definitive  
14 is they did not provide evidence that you could  
15 draw a straight line and say if you do this, this  
16 will happen. They speculated it, and they drew  
17 some conclusions based on other information, but  
18 logical people can look at that information and  
19 say, yes, but that's not a necessary conclusion  
20 that, in fact, as was pointed out, the same  
21 hard-to-count populations who were already not  
22 responding to the census were likely the very same

1 ones that might not answer the census.

2 And just to your point, just to  
3 illustrate this, we do know from the ACS that  
4 70 percent of the people who are presented with  
5 the citizenship question answer it correctly, who  
6 are, in fact, noncitizens and 30 percent don't.  
7 So it doesn't necessarily mean that you add a  
8 citizenship question and people refuse to answer.  
9 We have a population that does answer.

10 I know that's not the answer you wanted.)

11 BY MR. GERSCH:

12 Q Mr. Comstock, we're missing each other,  
13 so let me try it a little differently.

14 I'm not asking you whether you didn't  
15 think the Census Bureau's answer was definitive.  
16 I'm asking what is -- what would be -- let's try  
17 it this way, what would you consider to be  
18 definitive evidence?

19 A If they had evidence that showed that the  
20 addition of a citizenship question would cause a  
21 number of people that otherwise would have  
22 responded to the census to not respond.

1 Q And what would they need to show you  
2 that?

3 A They would problem have to put the  
4 question on the decennial census and compare it to  
5 prior decennial censuses and eliminate for the  
6 errors. And, unfortunately, they don't have that  
7 data from when they were asking that question, so  
8 they couldn't make the comparisons.

9 Q Well, they could have done it on a test  
10 basis for the 2020 census, right?

11 A They already asked the ACS to 43 million  
12 households. So we'd asked and answered that  
13 question already.

14 Q My question --

15 A It's been well tested.

16 Q My question is: They could do it on the  
17 2020 census on a trial basis, right?

18 A And that's, basically, what the Secretary  
19 has determined to do.

20 Q No. The Secretary has not decided to do  
21 it on a trial basis. He wants everyone asked,  
22 right?

1           A     Well, that would be a trial basis.

2           Q     Let me do it differently.   You could do  
3     it on the 2020 census as a test where it's being  
4     asked as a sample of the people, right?

5           A     That would not give you -- actually, that  
6     would give you no more information than you get  
7     from the ACS, so we already have that information.

8           Q     You think asking the question on the  
9     decennial census is the same thing as asking on  
10    the ACS?

11          A     No, I don't.

12          Q     Okay.   How about a randomized control  
13    study of some kind, randomized controlled testing?

14          A     We already have that.

15          Q     You think you already have that?

16          A     Sure, through the ACS.

17          Q     Okay.   Was a proposal to do a randomized  
18    controlled test in May of this year from the  
19    Census Bureau?

20               MR. GARDNER:   Objection.   Lacks  
21    foundation.

22               THE WITNESS:   Not that I'm aware of.

1 Q The initial impetus for putting the  
2 citizenship question on the 2020 census was not  
3 DOJ's idea; is that correct?

4 A That's correct.

5 Q It was Secretary Ross's idea, I think  
6 you've testified to that, correct?

7 A He was the one who asked me to  
8 investigate it, yes.

9 Q He told you sometime shortly after he was  
10 confirmed that he wanted the question on the 2020  
11 census, correct?

12 A He asked me to explore putting it on,  
13 yes.

14 Q Well, he actually said he requests the  
15 question be put on the census, correct?

16 A That was the way he phrased it, yes.

17 Q You said you would make that happen,  
18 correct?

19 A I said I would do my best.

20 Q And you would get the citizenship  
21 question in place, I think was -- were your words?

22 A I said I would work to get that in place.

1           A     You'd have to ask the Justice Department  
2     redactors.

3           Q     Do you -- without saying what is said  
4     there, do you know what you wrote there that's  
5     been blocked out?

6           A     I don't recall.

7           Q     You did not ask her for legal advice, did  
8     you?

9           A     No.

10          Q     Do you have any reason to believe there  
11     is some privileged information in what's been  
12     blocked out?

13               MR. GARDNER:  Objection.  Calls for a  
14     legal conclusion.

15               MR. ROSENBERG:  He's always the client,  
16     and the client holds the privilege.

17               THE WITNESS:  I don't know what it says,  
18     so I trust the folks who redacted it believe  
19     there's a conclusion of some kind that is relevant  
20     to the investigation.

21     BY MR. ROSENBERG:

22           Q     Anyone at Commerce who was more involved



1 in the citizenship question other than you during  
2 the period from the time you came to Commerce  
3 until the citizenship question issue was resolved?

4 A Probably not, no.

5 Q Let me -- take a look at C5 that's been  
6 marked, which is the supplemental memorandum.

7 A Uh-huh. I've got it somewhere. It's a  
8 supplemental memorandum.

9 Q It's dated June 21 --

10 MR. GARDNER: You want to look at my  
11 copy?

12 THE WITNESS: Okay. All right. Go  
13 ahead.

14 BY MR. ROSENBERG:

15 Q When did you first hear that this  
16 document was going to be created?

17 A Sometime shortly before June 21st.

18 Q Do you recall approximately how many days  
19 before June 21st?

20 A I don't.

21 Q But before you got a copy of the  
22 document; is that correct?

1 Q Are you going to follow counsel's advice?

2 A I'll follow my counsel's advice, yes.

3 Q By the way -- by the way, I think you  
4 testified that you made some edits to C5, the June  
5 21st supplemental memorandum; is that correct?

6 A I think I may have suggested a wording  
7 change or two.

8 Q Do you know what wording change or two  
9 you made?

10 A I have no recollection of that.

11 Q Did you maintain the original draft of  
12 the June 21st memorandum?

13 A I imagine I made it -- my edits in  
14 electronic form, but that would be, probably,  
15 privileged, under the administrative record.

16 Q Let's turn to C30, which is the  
17 March 26th memo. Now, is it stated anywhere in  
18 this memorandum that the Secretary had begun,  
19 considering the question of adding the citizenship  
20 question to the census almost a year prior or more  
21 than a year prior to the March 26th memorandum?

22 A It wouldn't be relevant to the

1 memorandum.

2 Q So you don't think that's important  
3 information?

4 A The government has lots of processes  
5 where -- and I've been involved in lots of  
6 processes throughout the government where things  
7 have been under consideration for months, years,  
8 decades, even, prior to an administrative record,  
9 and that's not usually included in the decision.

10 The question is once you began the formal  
11 action of considering this decision and in which  
12 you're presented with a situation where you need  
13 to make a decision, you document at how you arrive  
14 at your conclusion.

15 Q It's your testimony that the formal  
16 action is when?

17 A When we received the letter from the  
18 Department of Justice. Because prior to that,  
19 this was all speculation.

20 Q Well, but prior to that, you had been  
21 directed by the Secretary of the Commerce to put  
22 the citizenship question on the census --

1 A I'd --

2 Q -- isn't that correct?

3 A I'd been directed to explore putting a  
4 citizenship question on the census.

5 Q He said he wanted it on the census,  
6 correct?

7 A That was certainly his expressed  
8 interest.

9 Q It was an expressed statement, was it  
10 not?

11 A That's the way he phrased it. But,  
12 again, he can't put something on the census  
13 without having the legal authority or process in  
14 place to do so.

15 Q You agree it would have been more  
16 accurate if the first sentence of C30 said, as you  
17 know, pursuant to my request on December 12, 2017,  
18 the Department of Justice requested that the  
19 Census Bureau reinstate a citizenship question;  
20 isn't that more accurate?

21 A I wouldn't agree that's more accurate.

22 Q Isn't that what happened?

1           A    Again, the Department of Justice decision  
2   to ask -- send a letter requesting this is a  
3   decision they made independently.   We cannot  
4   compel them to make that request.

5           Q    By the way, what does Section 2 of the  
6   Voting Act provide?

7           A    Well, my understanding of it -- and,  
8   again, it's been established that I'm not a Voting  
9   Rights Act expert -- is that there are cases in  
10   which you might have a population where as they  
11   set up a district, you have two minority  
12   populations.   If one of those minority  
13   populations, for example, Hispanics population,  
14   has a large under of undocumented people, they  
15   might appear on paper to have a majority.   When,  
16   in fact, they can never actually execute that  
17   majority because they don't have enough Citizen  
18   Voting Age Population people to carry that out.

19           Now, under the census, we already ask  
20   about age and we ask about race, so we can  
21   determine those two questions.   What you can't  
22   determine is how many people of that population

1 are, in fact, eligible to vote.

2 Now, using the ACS data, the census  
3 provides estimates that the Justice Department  
4 uses for that very purpose. We know, in fact, as  
5 a result of this analysis, in the Census Bureau's  
6 efforts to promote Alternative C, they, in fact,  
7 did an analysis of that ACS data, and lo and  
8 behold, it came back that the data that we've been  
9 providing to the Justice Department is, in fact,  
10 at a fairly significant error. It's off by a  
11 factor of about a third. And so in light of that  
12 information, you'd absolutely want to go forward  
13 with this.

14 Q But the Census Bureau, nevertheless,  
15 recommended from a standpoint of accurate and  
16 completeness and quality of the census that there  
17 should not be a citizenship question added to the  
18 census, as opposed to continuing to rely on ACS  
19 data supplemented by the administrative records?

20 A No. In the process of this memorandum,  
21 back and forth, they could not articulate a  
22 rationale to support their belief that there would

1 be this decline in this response rate. Their  
2 entire analysis relied on the assumption that  
3 there would be this decline in response rate of a  
4 certain percentage and that that would, therefore,  
5 make the data less reliable.

6 What they couldn't refute was the fact  
7 that under their proposed approach, they would  
8 have had to impute -- again, based on statistical  
9 models -- the citizenship of 25 million voting age  
10 citizens. That was not a complete and accurate  
11 picture as far as the Secretary was concerned. So  
12 the Secretary said this is why we need to look at  
13 combining the two approaches, B and C, to come up  
14 with Alternative D. Because in the absence of  
15 that, we don't have good enough data on which to  
16 build the formula to impute those people that we  
17 would have to because we don't have answers on  
18 what their citizenship is. So that's the  
19 rationale that's laid out in this memo, and as far  
20 as I know, that's been the rationale that's been  
21 the Secretary's all along.

22 Q But not the rationale that was accepted

1 by the Census Bureau, which nevertheless, rejected  
2 as -- from a technical perspective, the  
3 Secretary's rationale; isn't that correct?

4 A I disagree that they rejected it from a  
5 technical perspective. They made some assumptions  
6 in making their recommendation -- and that's  
7 exactly what it is, it's a recommendation -- that  
8 this would be the case.

9 Q Let me turn your attention to C30,  
10 Page 001314, which is Page 2 of the March 26th  
11 memo. And turning your attention to the Option A,  
12 the third line in the sentence that says,  
13 "Additionally, the block group levels CVAP data  
14 currently obtained through the ACS has associated  
15 margins of error" --

16 A Correct.

17 Q -- "because the ACS is extrapolated based  
18 on the sample servers of the population."

19 A That's correct.

20 Q Do you know what the margins of errors  
21 are that are referred to in this sentence?

22 A I think you go on and see, you'll see it



1 described later in the same memo, which is that  
2 they have an error of approximately 30 percent, 28  
3 to 34, I believe, is the range.

4 Yeah. If you look on Page 4,  
5 "Census Bureau analysis showed that between 28 and  
6 34 percent of citizenship self-responses for  
7 persons with administrative records show are  
8 noncitizen were inaccurate. In other words, when  
9 noncitizens respond to long form or ACS questions  
10 on citizenship, they inaccurately mark citizen  
11 about 30 percent of the time. However, the  
12 Census Bureau is still evolving its use of  
13 administrative records. The Bureau does not have"  
14 --

15 (Thereupon, the court reporter  
16 clarified.)

17 THE WITNESS: This is in the -- under  
18 Option C of Page 4.

19 MR. GARDNER: You're going to have to  
20 slow down for the court reporter.

21 THE WITNESS: "So they inaccurately mark  
22 noncitizen about 30 percent of the time. However,

1 the Census Bureau is still evolving its use of  
2 administrative records, and the Bureau does not  
3 yet have a complete administrative record set for  
4 the entire population. Thus, using administrative  
5 records alone would provide DOJ data with CVAP  
6 data that was not a" -- "that would provide an  
7 incomplete picture."

8 BY MR. ROSENBERG:

9 Q And that's your understanding of what  
10 margins of error means as used on Page 01314?

11 A Well, yes. They're referring to that --  
12 that margin of error they're referring to is the  
13 28 to 34 percent they were off.

14 Q Do you know whether the data that would  
15 be provided to DOJ if a citizenship question were  
16 added to the 2020 census would also have margins  
17 of error associated with that data?

18 A It would almost certainly have some small  
19 margin of error, yes.

20 Q When you say a small margin of error, can  
21 you quantify that?

22 A Well, yeah. I think if you look at the

1 decision memo, it spells out that by providing the  
2 question on the census, you'll give 100 percent of  
3 the population to answer that question. For  
4 90 percent of the people that are citizens, that  
5 is not a problem. For the remaining 10 percent,  
6 approximately, again, based on -- again, on the  
7 ACS error rate, you can expect that approximately  
8 70 percent of those people will also answer that  
9 data correctly. So you're looking at, basically,  
10 what is the situation with the remaining  
11 30 percent? And based of the data we get from the  
12 actual responses, comparing that with the  
13 administrative records, which we're also working  
14 to improve, so that that 88.6 from the 2010 census  
15 is expected to go up, should be closer to 90 to  
16 95, we'll be able to narrow to down to about a 5  
17 percent of the population that we'll have to  
18 impute. It's a much smaller number than the  
19 number that's being --

20 Q And that's your understanding of how the  
21 phrase margins of error is used in the Secretary's  
22 memo?

1 A Well, I'm not sure -- you're focused on  
2 the words margins of error.

3 Q Right. All of my questions had to do  
4 with the phrase margins of error.

5 A And you're saying --

6 Q I'm just trying to get your understanding  
7 of the phrase.

8 A No. I was focusing on the ACS. I mean,  
9 you're isolating the term margins of error.

10 Q Yes.

11 A When you do sampling or other things,  
12 there is a margin of error associated with that,  
13 and that margin of error can be larger or it can  
14 be smaller. And so they would provide, typically,  
15 a confidence interval connected with their data,  
16 and, again, depending on how the survey is  
17 conducted, it could be large or small.

18 Q Well, that sounds a little bit different  
19 than what you testified to earlier, when I asked  
20 you about the phrase margins of error as used in  
21 the sentence I read to you from C003134.

22 A You'll have to remind me what the

1 sentence is again --

2 Q Sure. "The Census was additionally" --

3 A -- because I focused on the ACS.

4 Q -- "block group level CVAP data currently  
5 obtained through the ACS has associated margins of  
6 error because the ACS is extrapolated, based on  
7 sample surveys of the population."

8 A And I believe that reference in the  
9 context of this memo may be scientifically  
10 incorrect, but it's referring to the fact that  
11 there's this error in the data of roughly  
12 30 percent. So this was not drafted by, quote,  
13 scientists. So we may have inaccurately used the  
14 term margin of error. But what the Secretary was  
15 referring to was the fact that we had now learned  
16 that the ACS data was fairly significantly  
17 inaccurate.

18 Q Do you know whether the Census Bureau's  
19 use of margins of error, quote, end quote, is the  
20 same as you have just described?

21 A I have no idea. I mean, I would guess  
22 that in other context, that the Census Bureau uses

1 the term margin of error differently. I'm saying  
2 in the context of this memo, I think the reference  
3 of margin of error is referring to that margin of  
4 inaccurate information in the ACS. That is what  
5 the Secretary was focused on in making his  
6 decision.

7 Q I'd like to turn your attention to  
8 001315, Page 3, the second full paragraph that  
9 begins "the Census Bureau."

10 A Uh-huh.

11 Q And the Census -- I'm sorry -- the  
12 sentence that reads, "However, neither the  
13 Census Bureau, nor the concerned stakeholders  
14 could document that the response rate would, in  
15 fact, decline materially."

16 Do you see that?

17 A I see that.

18 Q Can you tell me what you understand the  
19 word materially to mean?

20 A Yes. In that context, it's, basically,  
21 saying they could not, as I explained earlier,  
22 demonstrate that the decline because of the

1 addition of a citizenship question would be any  
2 greater than the decline that we already  
3 anticipated we would face because of the current  
4 political climate and people's concerns about  
5 government.

6 And, frankly, the folks bringing this  
7 lawsuit are contributing to that. We already  
8 anticipated this was going to be -- this census  
9 was going to be more difficult than other  
10 censuses, and that was a lot of the reasons behind  
11 some of the changes that were made in the  
12 lifecycle cost estimate. So we anticipated there  
13 were going to be hard-to-count populations, and  
14 many -- many of the same hard-to-count populations  
15 would have been disinclined to answer the census  
16 with or without a citizenship question.

17 Q When you say that the -- when you talk  
18 about the material decline, are you talking about  
19 the decline overall or are you talking about a  
20 differential decline depending on what demographic  
21 group is being discussed?

22 A If the data had shown conclusively that

1 the addition of a citizenship question would cause  
2 a material -- in other words, significant and  
3 major decline in any particular group, I'm sure  
4 the Secretary would have considered that quite  
5 carefully.

6 Q When the Secretary used the word material  
7 or phrase material decline, was he referring to  
8 any decline of any demographic group or was he  
9 referring to a decline across the board?

10 A Again, based on the subject of the  
11 discussion here, would there be a significant  
12 increase in the number of nonresponse follow-ups  
13 that we had to go do because people failed to  
14 respond? The data that was being presented did  
15 not isolate the citizenship question as being a  
16 material source of potential decline. There were  
17 a lot -- there was a lot of speculation that  
18 would, there was a lot of assertions it would.  
19 And upon review and analysis, it appears that many  
20 of the same populations that were already going to  
21 be difficult to count for lots of other reasons  
22 would be the same people who might be disinclined



1 because of citizenship. So you cannot say that  
2 adding citizen is going to materially increase the  
3 nonresponse follow-up rate.

4 Q Can you quantify what you mean by a  
5 material decline?

6 A Well, I mean, the Census Bureau,  
7 basically, under their best analysis, was saying  
8 that there might be a decline that would cause an  
9 increase of \$27 and a half million. In a  
10 \$15.6 billion budget, that is -- I mean, that's so  
11 far within the margin of error it's not even a  
12 fact.

13 Q Well --

14 A We could have a bad snow day that would  
15 cause bigger damage than that.

16 Q Was -- do you consider an undercount  
17 resulting from the addition of any question to the  
18 census of a quarter of a percentage point in a  
19 specific population to be material?

20 A I have no reason to believe the addition  
21 of a citizenship question would cause such a  
22 thing.

1 response of a demographic group a material decline  
2 in your estimation?

3 A Again, without context, I can't give you  
4 an answer. If that demographic group is composed  
5 of 100 people, it may not be --

6 Q What if the demographic is Hispanics?

7 A I don't know that -- well, again, no.  
8 That's a weighing question that the decision-maker  
9 is free to make.

10 Q Again, you're going back to weighing.  
11 I'm talking about the phrase declining material --  
12 materially. I'm not weighing it yet. You can  
13 weigh it later if you want. I'm just talking  
14 about one side of the balance that I think you're  
15 suggesting is being applied.

16 Is a quarter decline in response to the  
17 census among Hispanics a material decline in your  
18 estimation?

19 A The -- the -- I think the short answer  
20 is, the decline identified by -- the potential  
21 decline identified by the Census Bureau was not  
22 material enough to outweigh the benefits the

1 Secretary saw in adding the question.

2 Q It still doesn't answer my question.

3 A You're asking me to answer in a  
4 hypothetical, which I'm not going to do because I  
5 don't have the number of Hispanic voters. I don't  
6 know what 4 percent decline would represent. I --  
7 it's impossible for me to evaluate. I've never  
8 looked at the population numbers of Hispanics  
9 versus any other.

10 Q Well, you know that the number of  
11 Hispanics in American is in the tens of millions;  
12 is that correct?

13 A I honestly haven't really given it much  
14 thought.

15 Q Do you know if it's more than a million?

16 A I think it safe to say it's more than a  
17 million.

18 Q More than five million?

19 A I think so.

20 Q More than ten million?

21 A Let's see. If the population of the  
22 United States is 360 million, and I believe

1 Hispanic are somewhere in the 10, 12, 15 percent  
2 range, they're, obviously, well above that.  
3 They're like -- I don't know, like -- 79 million.

4 Q Of how many did you say?

5 A 70 -- I can't do the math that quickly,  
6 so let's say, whatever, 70 million. I don't know.

7 Q Let's use 70 million. So if there  
8 were -- let's make it easier, for my head. Let's  
9 say there was a 1 percent decline in response rate  
10 among Hispanics due to the inclusion of a question  
11 on the census, would you consider that a material  
12 decline?

13 A I would consider that a factor that you  
14 need to take into account.

15 Q And if it were a 3 percent decline, would  
16 you consider that even more of a factor?

17 A Three percent is greater than 1 percent,  
18 so, presumably, it would be greater. But, again,  
19 it depends on, again, what I'm deciding against.

20 Q Would you consider that material?

21 A That depends on the context.

22 Q The context of adding a question to the

1 census resulting in a 3 percent decline in  
2 responsiveness among Hispanics?

3 A All of the factors outlined in this memo  
4 are material. It's a question for the  
5 decision-maker to decide which are -- which to  
6 give greater or lesser weight to.

7 Q But the phrase here was material  
8 decline --

9 A And, again --

10 Q -- correct?

11 A -- in the context of conducting a  
12 nationwide census, the half percent change in  
13 response rates for NRFU was not something we  
14 considered material because there were lots of  
15 other factors that would cause an even greater  
16 decline.

17 Q And if the response rate was shown to be  
18 greater than a half percent decline, if it was  
19 shown to be a 3 percent decline?

20 MR. GARDNER: Objection. Calls for  
21 hypothetical.

22 THE WITNESS: I understand you're trying

1 to get a certain answer, but I'm just telling you  
2 in the context of this, in the context of this  
3 memo, the half percent increase in NRFU response  
4 rate was not material.

5 BY MR. ROSENBERG:

6 Q By the way, earlier you said that 30  
7 percent of noncitizen citizens answering the ACS  
8 citizenship question responded accurately. Do you  
9 recall that?

10 A That was data provided by the Census  
11 Bureau.

12 Q Okay. What, if any, evidence is there  
13 that noncitizens would respond to a citizenship  
14 question on the 2020 census questionnaire at a  
15 more accurate rate than they currently do on the  
16 ACS?

17 A That's -- I think we assumed in doing  
18 this that they would continue at that potential  
19 rate.

20 Q At a 30 percent inaccurate rate?

21 A Which is why you have to do both  
22 administrative records and put the question on.

1 You can't do just one or the other.

2 Q But the administrative records could be  
3 used with ACS; isn't that correct?

4 A No, they couldn't.

5 Q They could not be used --

6 A Because you can't extrapolate from the  
7 ACS to the whole population.

8 Q No. That wasn't my question.

9 The administrative records could be used  
10 in conjunction with the information from ACS?

11 A Again, you don't get an accurate sampling  
12 because you're extrapolating from the ACS to the  
13 larger population, so you can't apply your  
14 administrative records across in the same way.  
15 That's why the census was proposing to just use  
16 administrative records and they were prepared,  
17 apparently, to have to impute 25 million voting  
18 age citizen citizenship records. Now, on what  
19 basis, they would do that, we weren't sure.

20 Q But both Options C and D require some  
21 imputation; isn't that correct?

22 A Potentially, to get a complete and

1 accurate count, because we don't have 100 percent  
2 matching between the administrative records and  
3 the respondents. Yes. That's correct.

4 Q Let me draw your attention to the period  
5 around January 2018. Do you recall taking part in  
6 the signing of the list of 35 questions to the  
7 Census Bureau to answer?

8 A Yes. I helped prepare that list.

9 Q Do you -- who else helped prepare that  
10 list?

11 A The Secretary, Karen Dunn Kelley,  
12 James Uthmeier, myself. There may have been  
13 others.

14 Q Were you the prime drafter?

15 A Of that particular list, I may have been  
16 the prime assembler. I was not necessarily the  
17 prime drafter of all the questions.

18 Q And what was your purpose -- what was the  
19 purpose in proposing those questions?

20 A Basically, it has -- I think it was  
21 pointed out earlier we got an analysis from the  
22 Census Bureau that seemed to have a particular



1 viewpoint, and it wasn't well supported in some  
2 cases. So those are the questions that arose  
3 after reviewing their memo.

4 Q And when you -- after the questions were  
5 formulated, whom did you send them to?

6 A I believe they were sent to the  
7 Census Bureau.

8 Q And the idea was the Census Bureau would  
9 answer the questions; is that correct?

10 A They would provide that input, yes.

11 Q And you gave them a deadline, did you  
12 not?

13 A I imagine we did, yeah.

14 Q Four days; is that correct?

15 A I don't recall.

16 Q Was it your understanding that the  
17 answers were going to be provided solely by the  
18 Census Bureau to those questions?

19 A I believe all the questions were directed  
20 to the Census Bureau, but if they were directed to  
21 somebody else, then, obviously, they would provide  
22 them.

1 Q But it was your understanding that the  
2 Census Bureau would answer them; is that correct?

3 A Again, without going back and looking at  
4 the documents and the accompanying emails, I can't  
5 tell you exactly who it was. But my understanding  
6 was, yes, they were drafted for the Census Bureau.

7 Q Did there come a time when you reviewed  
8 the answers for the questions?

9 A I imagine there was.

10 Q Well, was there?

11 A Again, I know all of you are focused on  
12 this case and everything else. This was one small  
13 fraction of the work I was doing at that time. So  
14 I'm quite certain I reviewed the answers. Exactly  
15 when, I can't tell you. But, clearly, they  
16 went -- the responses to those questions were  
17 considered in the decision memo. So I, obviously,  
18 reviewed them at some point.

19 Q Do you recall whether you reviewed those  
20 responses all at once or some kind of rolling  
21 basis?

22 A If memory serves, I believe the Census

1 responded back to some, and then provided  
2 follow-up answers to others that took more time.

3 Q Do you recall whether in connection with  
4 any of the questions the Census Bureau was asked  
5 to change their answers to any questions?

6 A I believe -- well, I believe in one case,  
7 they provided a response that indicated that there  
8 was a very set format for putting questions on the  
9 census. And we went back to them and said, how  
10 can that be? You haven't -- there hasn't been a  
11 question added to the long form? They went back  
12 and reviewed and said, yes, that's correct. This  
13 was the process we used for the ACS.

14 Q Let me -- let's have this marked as 31.

15 (Plaintiffs' Exhibit 31, Questions on  
16 draft Census memo, was marked.)

17 BY MR. ROSENBERG:

18 Q Showing you what's been marked as --

19 MR. GARDNER: Ezra, we need a --

20 MR. ROSENBERG: Can you give me one more  
21 copy?

22 I just need one. Thank you.

1 BY MR. ROSENBERG:

2 Q Showing you what's been marked as  
3 Exhibit 31, have you ever seen this document  
4 before?

5 A Again, I'd have to go back and check  
6 emails. It appears to be an incomplete response  
7 to the 35 questions.

8 Q And when you say it's an incomplete  
9 response to the 35 questions, why do you say that?

10 A Well, Question 4 is not answered.  
11 Question 9 is not answered. Question 11 is not  
12 answered. Question 15 is not answered.  
13 Question 20 is not answered. Question 27 is not  
14 answered. It appears to be -- I'm not sure that's  
15 the entire list, but some of that -- some of  
16 these -- obviously, it's not a final, because at  
17 least five questions are unanswered, so --

18 Q Let's have this marked as -- one question  
19 on that. Turning our attention to Question 31 --

20 A Okay.

21 Q -- is that the question you were  
22 referring to before as a question whose answer was

1 changed at some point?

2 A Yeah. Because this was -- as I said,  
3 when we explored the question further, it became  
4 evident that this was not, in fact, an accurate  
5 representation for the process for the decennial.

6 Q Do you know when that answer was changed?

7 A I don't.

8 Is there a date on this?

9 Q We just give you them as we got them.

10 A No. Well, no, unfortunately nobody dated  
11 this. So I don't know -- is there a -- do you  
12 have a final --

13 Q Well --

14 A -- with all the questions answered?

15 Q You're going to have to tell me.

16 A I believe there was one where they  
17 managed to answer all the questions.

18 Q Okay. Let's have this marked as the next  
19 exhibit.

20 (Plaintiffs' Exhibit 32, Memo, was  
21 marked.)

22 BY MR. ROSENBERG:

1 a general knowledge of the issue, but no specific  
2 interests. The Department of Commerce doesn't do  
3 immigration enforcement, so --

4 Q Did you believe at the time of the DOJ  
5 letter to the Census Bureau that the  
6 Attorney General was committed to the enforcement  
7 of the Voting Rights Act but that his hindrance or  
8 the hindrance of the DOJ was the availability of  
9 data?

10 MR. GARDNER: I'm sorry. Can you repeat  
11 that question?

12 MS. SENTENO: Yeah.

13 BY MS. SENTENO:

14 Q Did you believe at the time of the DOJ  
15 letter, that the Attorney General was committed to  
16 the enforcement of the Voting Rights Act but that  
17 what was holding them up was -- were data issues?

18 A Their letter communicated that they could  
19 use census block-level data, which they currently  
20 don't get for that, and if, therefore, we would  
21 add a question to the decennial census that would  
22 provide that data.

1 MR. GARDNER: Objection. Form.

2 THE WITNESS: I'm not aware of any  
3 conversations regarding adding a citizenship  
4 question for immigration enforcement.

5 BY MS. SENTENO:

6 Q How about voter fraud?

7 A No.

8 Q Congressional apportionment?

9 A No.

10 Q Redistricting?

11 A No.

12 I mean, I will note there was an earlier  
13 conversation about that Wall Street Journal  
14 article that mentioned -- that referenced  
15 apportionment. So outside of that response with  
16 the Secretary, there's never been a discussion of  
17 it.

18 Q Have you spoken to anyone at  
19 Department of Justice's voting rights section?

20 A Not to my knowledge.

21 Q So you were never referred to anyone or  
22 you never inquired from anyone, a contact within

1 the voting rights section, to discuss this  
2 request --

3 MR. GARDNER: Objection. Form.

4 BY MS. SENTENO:

5 Q -- for a citizenship question?

6 MR. GARDNER: Sorry. Objection to form.

7 THE WITNESS: No. Again, as I think we  
8 established in the earlier testimony, I was  
9 referred to Mary Blanche Hankey by someone in the  
10 Department of Commerce, by Eric Branstad, who I  
11 think got her name from a contract of his at the  
12 White House. She referred me to -- I'm already  
13 blanking on his name -- John McHenry. I did not  
14 investigate John McHenry's position in the  
15 department. I just took it on face value he would  
16 be the right person to talk to and those are the  
17 two people I spoke to at Department of Justice,  
18 so -- outside of litigation counsel, obviously.

19 BY MS. SENTENO:

20 Q You testified earlier in the memo that  
21 you drafted for the Secretary that stated that  
22 once you had been told by DHS that your request



1 would be more appropriately handled by the  
2 Department of Justice, you said that the  
3 interaction ceased; is that correct?

4 A Well --

5 Q From you?

6 A My efforts at that point to track down  
7 somebody ceased because they had run into a dead  
8 end. I mean, our initial conclusion was that  
9 Department of Justice was the right place to go.  
10 They seemed occupied on other matters, so they  
11 referred us to DHS. DHS referred us back, so now  
12 I'm back to where I started.

13 Q So once you were referred back to DOJ,  
14 you didn't ask another follow-up as to who in the  
15 voting section would be more appropriate to talk  
16 about this particular issue?

17 A Again, I was working on literally dozens  
18 of issues that consumed a lot of time. And so I  
19 had put the time into it that I could afford to  
20 put into it and had come up empty. So I reported  
21 that to my boss, and basically, said if absent  
22 some instruction from higher up, it appears that

1 the DOJ staff is not particularly interested in  
2 expending resources on this right now.

3 Q Did you or Secretary Ross consider having  
4 anyone else, any other governmental department or  
5 any other jurisdiction make a request to the  
6 Census Bureau to add a citizenship question --

7 MR. GARDNER: Objection.

8 BY MS. SENTENO:

9 Q -- other than the DOJ and DHS?

10 MR. GARDNER: Objection. Form. And  
11 objection. Foundation.

12 THE WITNESS: Again, nobody would make a  
13 request to the Census Bureau to add it because the  
14 statute commits that discretion to the Secretary,  
15 not the Census Bureau. So it's not their decision  
16 to make. It's the Secretary's decision to make.  
17 So we would not seek someone else to contact the  
18 Census Bureau about the question, no.

19 BY MS. SENTENO:

20 Q But the DOJ letter was directed to the  
21 Census Bureau requesting an addition of the  
22 question?

1           A    I did not draft that letter, so I -- but  
2   their choice of who to send the request to was  
3   dictated by the Department of Justice, not by us.

4           Q    Did you or Secretary Ross consider having  
5   anyone else make -- anyone else, other than the  
6   DOJ to DHS, to make that request to Commerce?

7           MR. GARDNER:  Objection.  Lack of  
8   foundation.

9           THE WITNESS:  No.  I think upon further  
10   analysis, we determined that the Secretary  
11   probably could determine that Commerce had a need  
12   for it, but that was not before us at the time,  
13   so --

14   BY MS. SENTENO:

15          Q    Can you explain your subsequent research?

16          A    Well, as I mentioned, the United Nations  
17   recommends that all countries ask, frankly, rather  
18   detailed questions about citizenship,  
19   naturalization, et cetera.  So it's considered  
20   good practice, good demographic information to  
21   have.  It was asked for 150-plus years without any  
22   problem.  So -- and every other major democracy

1 inquires of all their citizens on a regular basis  
2 of it. So it's -- I think there's a perception  
3 out there -- where it came from, I don't know --  
4 that somehow asking a citizenship question is a  
5 problem.

6 And I would, again, refer you back to the  
7 fact that 70 percent of the noncitizens in the ACS  
8 actually answer the question correctly. So,  
9 apparently, those people don't consider it a  
10 problem. So it appears to be a rather small  
11 demographic that is concerned about this. And  
12 again, I would point out that when you understand  
13 that the data that is being protected by law,  
14 cannot be used for any enforcement purpose, cannot  
15 be used to identify an individual, there's  
16 absolutely no reason I can think of why someone  
17 would not answer the census honestly on that,  
18 citizen or noncitizen. It's demographic  
19 information.

20 Q So based on that, was it your  
21 understanding that if the DOJ did not make this  
22 request to the Department of Commerce or the

1 speculate on that.

2 BY MS. SENTENO:

3 Q Okay. Are you aware of any VRA cases  
4 that the Department of Justice declined to bring,  
5 only because they needed block-level citizenship  
6 data?

7 A I'm not aware of that, but I didn't  
8 research that either.

9 Q So no -- neither yourself or anyone else  
10 at the Department of Commerce asked DOJ for this  
11 information?

12 A I did not. I can't say whether anybody  
13 else did.

14 Q So -- just a couple more questions.  
15 The ACS is not a head count, correct?

16 A That's right. It's a sample.

17 Q But the decennial census is a head count,  
18 correct?

19 A That's correct. Counts all persons.

20 Q And a decrease in the response rate in  
21 the citizen question on the 2016 ACS caused an  
22 underestimate of the percent of noncitizens; is

1 that correct?

2 A No. That's not correct.

3 Q Can you explain?

4 A Well, you're asserting that it's because  
5 of the citizenship question, and I'm not sure that  
6 the data supports that statement.

7 Q What are you -- what do you believe the  
8 data supports?

9 A Again, without the data sitting in front  
10 of me, it would be hard to make an analysis. But  
11 basically, the Census Bureau has reported that  
12 certain number of people may drop off at certain  
13 questions. It's not dissimilar for citizenship  
14 versus other questions. There was not a major  
15 statistical variation. So, yes, a certain percent  
16 of people do not complete the 45, 48 or 70  
17 questions that are on the ACS or the long form,  
18 and they have various break-off rates under the  
19 Internet thing to tell where they stopped.

20 But, again, whether citizenship was a  
21 determinative factor in any of those cases, it's  
22 hard to determine.

1 Q But the data suggests -- the data that  
2 the Census Bureau provided suggests that the  
3 break-off rate for noncitizens was higher with  
4 respect to a citizen question; is that correct?

5 A Higher than noncitizen?

6 Q Yes.

7 A Yes. That's true.

8 Q Okay. So if the same people who did not  
9 respond to the citizen question on the ACS also  
10 didn't respond to the short form of the decennial  
11 census, that would cause a drop in the total head  
12 count, correct?

13 A No. It would not.

14 Q Could you explain?

15 A Secretary Ross placed the question at the  
16 end of the census so they would be able to not  
17 answer that and still complete the census. We  
18 also have administrative records and  
19 Secretary Ross directed we use administrative  
20 records, which we're actively doing for a variety  
21 of reasons, not just citizenship.

22 So we have every confidence between the

1 increased outreach that's planned, the additional  
2 money and resources that are to be put into the  
3 advertising and other things, that we will more  
4 than compensate -- in fact, our objection is to  
5 have a complete and accurate count above and  
6 beyond the count that was done in 2010.

7 Q But every individual is required to  
8 answer the census fully and completely, including  
9 all questions; is that not right?

10 A That's correct. Yes.

11 Though I would note, we've never  
12 prosecuted anybody for failure to do so.

13 MS. SENTENO: Okay. Go off the record.

14 VIDEOGRAPHER: We're going off the  
15 record. The time on the record is 5:46 p.m.

16 (Off the record.)

17 VIDEOGRAPHER: We're back on the record.  
18 The time on the video is 5:43 p.m.

19 EXAMINATION BY MS. BOUTIN:

20 Q Sir, I'd like to talk about the time  
21 period between the December 12th DOJ letter  
22 requesting the citizenship question and before



1 Secretary Ross issued the March 26 memo --  
2 decision memo.

3 A I'm sorry. Could you tell me who you're  
4 with?

5 Q Sure. My name is Gabrielle Boutin. I'm  
6 with the Attorney General's of the State of  
7 California, and I represent plaintiffs, the  
8 State of California -- excuse me -- State of  
9 California v. Ross in the Northern District of  
10 California.

11 A Okay. Thank you.

12 Q So during the time period between the  
13 December 12th DOJ letter and the issuance of  
14 Secretary Ross's March 26th memorandum, that's  
15 what we're talking about.

16 A I understand.

17 Q Do you understand?

18 A So far so good.

19 Q Good.

20 During that time period, did the  
21 Department of Commerce ever inform the  
22 Department of Justice that the Census Bureau

1 recommended using administrative records alone to  
2 meet Justice's December 12th request rather than  
3 adding the citizenship question to the census?

4 A I believe that was part of the purposes  
5 of the meeting they were seeking with the -- the  
6 Census Bureau was seeking with the  
7 Justice Department.

8 Q Okay. My question is: Did the  
9 Commerce Department ever inform DOJ that the  
10 Census Bureau recommended using administrative  
11 records alone to meet their requests, rather than  
12 adding a citizenship question to the census?

13 A Again, I'm not privy to all the  
14 conversations with the Justice Department, so --

15 Q Do you --

16 A -- I was not --

17 Q -- know --

18 A I was not involved in such a discussion,  
19 no.

20 Q Okay. But you were one of the primary  
21 people working on this at Commerce; isn't that  
22 right?

1 A Yes.

2 Q Do you think you would have known if  
3 someone from Commerce conveyed that information to  
4 the Department of Justice?

5 MR. GARDNER: Objection. Calls for  
6 speculation.

7 BY MS. BOUTIN:

8 Q Do you think it's likely you would have  
9 known?

10 A It's possible, yes.

11 Q Did the Department of Commerce ever  
12 transmit to the Department of Justice any of the  
13 Census Bureau memos analyzing options for  
14 providing block-level -- excuse me -- block-level  
15 citizenship data to the Department of Justice?

16 MR. GARDNER: Objection. Lack of  
17 foundation.

18 BY MS. BOUTIN:

19 Q That was repetitive. Let me rephrase.

20 A All right.

21 Q Did Commerce ever transmit to  
22 Department of Justice any of the Census Bureau's

1 memos that analyzed the options for providing to  
2 DOJ block-level citizenship data?

3 MR. GARDNER: Objection. Lack of  
4 foundation.

5 THE WITNESS: I would just note it's the  
6 Secretary of Commerce's decision as to whether  
7 this goes forward. His focus is on a complete and  
8 accurate count.

9 And as explained earlier, the Option C  
10 alternative, which was to use the administrative  
11 records only, would have inquired us to impute --  
12 so, in other words, fill in the blanks -- for 25  
13 million voting age citizens. That was not  
14 something Secretary Ross was prepared to have the  
15 department do.

16 BY MS. BOUTIN:

17 Q Mr. Comstock, I understand that. Your  
18 counsel is -- wants us to limit the amount or time  
19 that we're here today, and the best way to do that  
20 is if you would answer my questions directly. So  
21 I'll ask you again.

22 Did the Department of Justice ever --

1 A Not to my knowledge.

2 Q Okay. Thank you.

3 And again, we're talking about between  
4 December 12th and the March 26th.

5 A Right.

6 Q Did the Department of Commerce ever  
7 inform DOJ that the Census Bureau believed that  
8 administrative records alone would be more  
9 complete -- would create more complete and  
10 accurate citizenship data than asking a  
11 citizenship question on the census and then  
12 combining the data from that question with  
13 administrative records?

14 MR. GARDNER: Objection. Form.  
15 Objection. Lack of foundation.

16 BY MS. BOUTIN:

17 Q Do you want me to re-ask that question?

18 A Sure.

19 Q Did the Department of Commerce ever  
20 inform Justice that the Census Bureau believes  
21 that admin -- using administrative records alone  
22 would provide more complete and accurate data than

1 instead of doing that asking the citizenship  
2 question on the census and then combining that  
3 with the use of administrative records?

4 MR. GARDNER: Same objection.

5 THE WITNESS: Again, I think you  
6 mischaracterize the Census Department's -- Census  
7 Bureau's analysis. But, again, it's the  
8 Secretary of Commerce's decision as to what to  
9 make, and so he would only transmit to the  
10 Justice Department what he considered that would  
11 provide complete and accurate data.

12 BY MS. BOUTIN:

13 Q But the Commerce Department did inform  
14 the Department of Justice about that belief by the  
15 Census Bureau?

16 MR. GARDNER: Same objections.

17 THE WITNESS: Again, not to my knowledge.

18 BY MS. BOUTIN:

19 Q Okay. But did the Commerce Department  
20 ever inform Justice that the Census Bureau  
21 believed that 30 percent of responses by  
22 noncitizens as to citizen status are incorrect?

1 full paragraph, but I also want you to understand  
2 the context, so let's start at the top of the  
3 first paragraph.

4 A Okay.

5 Q It says, "In my judgment that Option D  
6 will product DOJ with the most complete and  
7 accurate CVAP" -- excuse me. Let me start again.

8 "It is my judgment that Option D will  
9 provide DOJ with the most complete and accurate  
10 CVAP data in response to its request."

11 The paragraph then goes on to give a few  
12 reasons why Option D would be the best option in  
13 his opinion and then about in the middle of the  
14 paragraph, it gives one final reason starting with  
15 the word "finally," so I'm going to read that  
16 portion.

17 A Okay.

18 Q It says, "Finally placing the question on  
19 the decennial census and directing the  
20 Census Bureau to determine the best means to  
21 compare the decennial census responses with  
22 administrative records will permit the

1 Census Bureau to determine the inaccurate response  
2 rate for citizens and noncitizens alike using the  
3 entire population. This will enable the  
4 Census Bureau to establish, to the best of its  
5 ability, the accurate ratio of citizen to  
6 noncitizen responses to impute for that small  
7 percentage of cases where it is necessary to do  
8 so."

9 A Yes.

10 Q So with respect to those two sentences  
11 starting with the word finally, who wrote that  
12 language?

13 A I couldn't say for certain, but I likely  
14 had a hand in drafting that.

15 Q Okay. Can you explain, how does adding a  
16 citizenship question to the census and determining  
17 the incorrect response rate for citizens and  
18 noncitizens help the Census Bureau impute with  
19 respect to people who did not respond at all and  
20 did not have administrative records?

21 A I mean, you could ask the Census Bureau  
22 for a fuller explanation of imputation, but



1 basically, they do a formula that looks at data  
2 that they have. And so if they know for the  
3 people -- let's say 95 percent of the population  
4 that they have accurate records for and which they  
5 have responses for, if they discover that -- pick  
6 a number -- it's now 10 percent of the people who  
7 aren't citizens, are, in fact, noncitizens, then  
8 they would probably apply that to 5 percent  
9 remaining. So they would take whatever number of  
10 people who are citizens, multiply that by that 5  
11 percent, and then they would take the noncitizens  
12 and say, okay, we now know the accurate count,  
13 based on the entire population of what we have,  
14 there's a 10 percent error rate, 10 percent of the  
15 people that might say they're citizens are  
16 noncitizens, so we're going to multiply that  
17 number out. That's going to give you the most  
18 accurate count that you can get.

19 Q So what's your source of that  
20 explanation?

21 A Based on the briefings.

22 Q So you're saying that the Census Bureau

1 supports this statement here?

2 A This is the Secretary's statement.

3 Whether the --

4 Q But did the Census Bureau explain,  
5 say -- explanation you just offered me -- did  
6 they -- did they explain it that way to you?

7 A More or less, yeah.

8 Q And do you believe they support this  
9 statement in this memo?

10 A I'm going to make no representations  
11 about what the Census Bureau would or would not  
12 support.

13 Q Would it surprise you if you learned that  
14 they did not support that statement, that they did  
15 not ever represent to you or the Secretary that  
16 establishing that ratio would help impute for  
17 nonresponders?

18 A I would not be surprised if that was the  
19 opinion of Dr. Abowd, no.

20 Q Do you believe that Dr. Abowd wrote this  
21 memos on his own?

22 A I believe he had the help of lots of

1 staff. I have no --

2 Q Do you believe he acted against the  
3 opinions of his staff when he wrote the memos?

4 A I have no idea.

5 Q So -- but you believe that it was his  
6 opinion alone that contributed to -- that was  
7 reflected in those memos?

8 A No. Dr. Abowd is the head of the  
9 division that does that, so at the end of the day,  
10 he gets the final call, so --

11 And, again, just to be clear, do I think  
12 that there may be other opinions in the  
13 Census Bureau? Absolutely.

14 Q So do you have any source, other than the  
15 Census Bureau, for believing in the scientific  
16 empirical accuracy of these last two sentences of  
17 this paragraph?

18 MR. GARDNER: Objection. Form.

19 THE WITNESS: Yes. My experience, my  
20 knowledge and other people who also, including the  
21 Secretary, who is a very smart man, who also came  
22 to a similar conclusion.

1 BY MS. BOUTIN:

2 Q Do you believe you have more expertise in  
3 the science of imputation than the experts at the  
4 Census Bureau?

5 A I'm not going to get caught in making  
6 such a statement, but I'm perfectly capable of  
7 looking at the analysis they provided and deciding  
8 whether or not I agreed with that analysis.

9 Q What's your background in statistical  
10 imputation?

11 A I --

12 (Conference call interruption.)

13 BY MS. BOUTIN:

14 Q What is your background in statistical  
15 imputation?

16 A I don't have one.

17 Q Okay. Switching gears. Did you ever ask  
18 anyone at the Census Bureau whether placing the  
19 citizenship question on the census could affect  
20 the apportionment of the Congressional  
21 representatives to the state?

22 A I never asked that question.

1 Q Are you aware of whether anyone else at  
2 Commerce ever asked that question to the  
3 Census Bureau?

4 A Not to my knowledge.

5 Q Okay.

6 MS. BOUTIN: I believe that's all I have.

7 MS. GOLDSTEIN: Let's go off the record.

8 MS. BOUTIN: Yeah. Let's go off the  
9 record.

10 VIDEOGRAPHER: We're going off the  
11 record. The time on the video is 5:56 p.m.

12 (Off the record.)

13 VIDEOGRAPHER: We're back on the record.  
14 The time on the video is 6:02 p.m.

15 MS. BOUTIN: We have completed our  
16 questions for today. However, based on the fact  
17 that there are still outstanding discovery  
18 responses and discovery documents, we are keeping  
19 the deposition open at this time.

20 MR. GARDNER: We oppose that, of course.  
21 You had the option to put this off, if you wanted  
22 to, knowing there were outstanding issues and

## ACKNOWLEDGEMENT OF DEPONENT

I, EARL COMSTOCK, do hereby acknowledge I have read and examined the foregoing pages of testimony, and the same is a true, correct and complete transcription of the testimony given by me, and any changes or corrections, if any, appear in the attached errata sheet signed by me.

\_\_\_\_\_  
Date\_\_\_\_\_  
EARL COMSTOCK

Joshua E. Gardner, Esquire

U.S. DEPARTMENT OF JUSTICE

20 Massachusetts Avenue

Washington, D.C. 20530

IN RE: New York Immigration Coalition, et al., v.  
United States Department of Commerce, et al.

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E R R A T A S H E E T

Case Name: New York Immigration Coalition, et  
al., v. United States Department of Commerce, et  
al.,

Witness Name: EARL COMSTOCK

Deposition Date: Thursday, August 30, 2018

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