

Judge says he will likely uphold House subpoenas in investigation of census citizenship question

Spencer S. Hsu

Jan. 30, 2020 at 7:11 p.m. EST

https://www.washingtonpost.com/local/legal-issues/us-judge-says-he-will-likely-uphold-house-subpoenas-in-investigation-of-census-citizenship-question/2020/01/30/ee688668-4394-11ea-b5fc-eefa848cde99_story.html

A U.S. judge said Thursday he is inclined to uphold House subpoenas for key documents in an investigation into the Trump administration's failed bid to add a citizenship question to the 2020 Census, giving the sides two weeks to negotiate a compromise.

U.S. District Judge Randolph D. Moss said he would rule quickly after a three-hour hearing in Washington, D.C., in which he said courts should not micromanage disputes between the other two branches of government. Moss rejected the White House's sweeping constitutional claim that Congress cannot sue to enforce its subpoena powers and that it can indefinitely withhold communications between federal agency officials through a "protective assertion" of executive privilege.

"A subpoena is something that ultimately has to be enforced [by a court], otherwise it is only a request," Moss said. "I think everyone in this room can see where I'm going."

Moss asked if the administration would allow him to review 11 key disputed records in private, giving it until 5 p.m. Friday to answer.

Justice Department attorney James Burnham argued that the House can use its impeachment power, among other political tools such as withholding appropriations, to enforce its demands. Finding otherwise, he said "would be a revolutionary change in our history. . . . These cases will multiply like rabbits."

Moss responded that if impeachment becomes the standard tool for executive branch oversight, "That is really not a great state of affairs for this country."

The House Oversight Committee sued Attorney General William P. Barr and Commerce Secretary Wilbur Ross in November, going to court to enforce subpoenas issued in April. The House issued the orders after launching an investigation in January into whether asking people to identify whether they were citizens on the 2020 Census was designed to intimidate immigrants and minorities from participating and to manipulate the population count for President Trump and the Republican Party's political gain.

Several U.S. courts last year upheld Congress's legislative and oversight authority to subpoena Trump's financial and tax records from private banks and his accountants, and to compel former White House counsel Donald McGahn's testimony despite White

House claims that top aides are “absolutely immune” from such requests. The cases are pending appeal.

Thursday’s Justice Department argument that Congress can use impeachment to enforce its subpoenas drew scorn in Trump’s Senate impeachment trial Thursday. Rep. Adam B. Schiff (D-Calif.), the lead House impeachment manager, said Trump’s lawyers have simultaneously argued the opposite on Capitol Hill — that Congress must use the courts to enforce its demands.

“You can’t make this up,” Schiff said.

It was the third time Democratic lawmakers tried to show inconsistencies between the position of Trump’s impeachment attorneys in the Senate and Justice Department lawyers defending the administration in court.

In court, Moss noted attorneys for both Congress and the executive branch have argued both sides of the issue when it served their purposes, leading Burnham to chuckle, “We’re all hypocrites, I guess.”

In the census case, departments have turned over some 30,000 pages of documents, with an unknown number to go. Many are heavily redacted for unspecified reasons. Production was halted after the House voted in July on party lines to hold Barr and Ross in contempt for refusing to provide the materials.

The once-a-decade survey functions as a linchpin for the fair distribution of \$1.5 trillion in federal spending each year across states and the drawing of lines for congressional districts. The Supreme Court in June called the administration’s rationale for the question “contrived.”

House Associate General Counsel Adam Grogg urged the court to prevent administration “stonewalling,” and allow lawmakers to gather information needed “to protect the integrity of the census.”

His colleague, Megan Barbero, said a Manhattan federal judge found Ross sought to “avoid disclosure of, if not conceal,” the real reason for his earlier decision to add the citizenship question in 2018 testimony to Congress. Ross had testified that the Justice Department requested the query to aid in the enforcement of the Voting Rights Act.

Lawmakers must understand the “extent of that dishonesty” to assess whether it can rely on department statements or impose additional verification requirements, Barbero argued.

Among the 11 high-priority documents in dispute are a legal analysis of the citizenship question drafted by senior Commerce Department attorney James Uthmeier and hand-delivered to then-Acting Assistant Attorney General John P. Gore at the Justice Department, who was tasked with requesting to add the question. Other documents

reflect communications between top Commerce Department officials about messaging to Congress and the public regarding what the Supreme Court later found was a “pretextual rationale” for proposing the question.

Burnham argued that courts are required to stay out of interbranch disputes; that the House failed to exhaust legally required processes of negotiation with the executive branch to narrow down its blanket request for related communications; and that the Oversight Committee should state a “particularized need” for each document it wants.

Moss agreed in part, saying the House probably had no idea what was in the more than 30,000 pages of documents found so far and he had little interest in sifting through them as referee. Still he urged both sides to resume talks, saying he was inclined not to toss out the case. While courts have found that claims of executive privilege are at their “zenith” when it comes to a president’s communications with top aides, that claim diminishes the further outside the White House one goes, and when it conflicts with Congress’s competing constitutional duties, Moss said.

Mike DeBonis and Ann Marimow contributed to this report.