

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND REFORM

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July 23, 2019

The Honorable William P. Barr
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20230

The Honorable Wilbur L. Ross, Jr.
Secretary
U.S. Department of Commerce
1401 Constitution Avenue, N.W.
Washington D.C. 20230

Dear Attorney General Barr and Secretary Ross:

In accordance with 2 U.S.C. § 194 and House Resolution 497, which was adopted by the House of Representatives on July 17, 2019, Speaker Nancy Pelosi sent a certification advising the United States Attorney for the District of Columbia, Jessie K. Liu, of your refusal to produce documents in compliance with bipartisan subpoenas issued by the Committee on Oversight and Reform on April 2, 2019.

Under section 194, Ms. Liu is now required “to bring the matter before the grand jury for its action.”¹ The appropriate grand jury action is a criminal charge for violation of 2 U.S.C. § 192, which provides:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.²

¹ 2 U.S.C. § 194.

² 2 U.S.C. § 192.

As described in the attached report, this criminal referral for contempt of Congress was made necessary by your refusal to produce documents required by the Committee's bipartisan subpoenas. These documents are critical to the Committee's ongoing investigation into how and why the Trump Administration sought to add a citizenship question to the 2020 Census based on a pretext. The Committee's investigation may lead Congress to pursue legislation pursuant to its broad Constitutional authority to carry out the Census "in such manner as they shall by law direct."³

On July 17, 2019, you wrote to Speaker Pelosi that you "strongly oppose" the criminal contempt resolution adopted by the House of Representatives.⁴ Your letter misstated several facts, which are addressed below.

Your letter asserted that the Departments of Justice and Commerce have "records of cooperation with the Committee" in this investigation. On the contrary, you have produced thousands of pages of documents that are redacted, already publicly available, or not responsive to the Committee's subpoenas. You have refused to produce unredacted documents that are specifically identified in the Committee's subpoenas, despite numerous accommodations and follow-up requests from the Committee and our staff. Secretary Ross refused my request to meet personally to seek to resolve this matter without moving to criminal contempt. That is a record of obstruction, not of cooperation.

Your letter called the House's criminal contempt vote "premature." If anything, this vote was long overdue. I first sent document requests to your Departments more than a year ago, in April and May 2018, in my capacity as Ranking Member of the Committee. Your Departments did not produce a single responsive document. This year, I renewed those requests in my capacity as Chairman, but you still refused to produce key documents. On April 2, 2019, the Committee voted on a bipartisan basis to authorize subpoenas, which significantly narrowed the Committee's previous requests. You failed to produce any of the specific unredacted documents identified in the subpoenas. On June 12, 2019, the Committee held a second bipartisan vote to hold you in contempt. Five weeks later, on July 17, 2019, the full House voted to hold you in contempt. At each stage in this process, the Committee sought to negotiate a resolution, but you consistently refused. As recently as July 15, 2019, Committee staff contacted both of your staffs to seek to avoid the need for a contempt vote, but you still refused to produce any additional documents or offer to do so.

³ U.S. Const., Art. 1, sec. 2. Examples include, but are not limited to, Congress pursuing legislation to reform the process used to add questions to the Census, change the requirements for congressional notifications or testing of topics and questions, require the disclosure of Census questions proposed by third parties, add further protections regarding the use of Census data by federal agencies or others, mandate additional non-response follow-up procedures to prevent undercounts, alter funding levels, or prohibit the inclusion of a citizenship question.

⁴ Letter from Attorney General William P. Barr, Department of Justice, and Secretary Wilbur L. Ross, Jr., Department of Commerce, to Speaker Nancy Pelosi, House of Representatives (July 17, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019%2007%2017%20Barr%20and%20Ross%20to%20Pelosi.pdf>).

Your letter asked Speaker Pelosi to postpone the House's contempt vote less than an hour and a half before it was set to occur, but even in that letter, you did not offer to produce a single additional document or propose any alternative accommodation. Instead, your letter incorrectly argued that you had "already accommodated numerous Committee requests" and that the priority documents sought by the Committee are "firmly protected from disclosure." Your letter suggested vaguely that the accommodation process should "continue," but it did not propose any concrete path forward or even agree to meet, as the Committee has previously offered. Rather than a good-faith offer to negotiate, your letter appears to be another delaying tactic.

Your letter claimed that the documents subpoenaed by the Committee "are subject to a number of legal privileges that have been upheld in the pending litigation." That argument is unavailing. First, the "legal privileges" mentioned in your letter, including deliberative process privilege and attorney-client privilege, are common law privileges. These may apply to private litigants, but they do not limit the reach of a subpoena from Congress, which draws its authority from Article I of the Constitution.⁵ Even if a common law privilege did apply, it is outweighed when Congress has a need for the information, as the Committee does in this investigation, and the deliberative process privilege "disappears altogether when there is any reason to believe government misconduct occurred."⁶ In this case, the misconduct is clear: the Trump Administration advanced a demonstrably false pretext—including in Secretary Ross' sworn testimony before Congress. The Supreme Court ruled that the "sole stated reason" that Secretary Ross gave for adding the citizenship question was "contrived" and "is incongruent with what the record reveals about the agency's priorities and decision-making process."⁷

Your letter argued that the documents subpoenaed by the Committee are subject to "the President's assertion of executive privilege." This claim is also invalid. The President asserted executive privilege on June 12, 2019, over certain key documents identified by the Committee based on the same common law privileges addressed above—even though none of these is a valid reason to withhold documents from Congress.⁸ Moreover, the use of executive privilege here is inconsistent with the White House's own claim that the decision to add the citizenship question was "made at the department level."⁹ The President's privilege assertion also included a broad "protective assertion of executive privilege" over every other document covered by the

⁵ *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997) (holding that the deliberative process privilege is "primarily a common law privilege" and distinguishing it from the presidential communications privilege that is "rooted in constitutional separation of powers principles and the President's unique constitutional role").

⁶ *Id.*

⁷ *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019).

⁸ See Letter from Assistant Attorney General Steven Boyd, Department of Justice, to Chairman Elijah E. Cummings, Committee on Oversight and Reform (June 12, 2019) ("These documents are protected from disclosure by the deliberative process, attorney-client communications, or attorney work product components of executive privilege.") (online at https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-06-12%20Census%20Documents%20Notification%20of%20Assertion%20-%20Cummings_AS%20DISTRIBUTED.pdf).

⁹ *White House Daily Press Briefing*, C-SPAN (Mar. 27, 2018) (online at www.c-span.org/video/?443176-1/white-house-backs-citizenship-question-2020-census).

Committee's subpoenas, despite the fact that the Department of Justice acknowledged that some of those documents are not privileged. The Department argued that this blanket and overbroad assertion was needed to give the President time to "make a final decision" on whether to assert executive privilege. However, more than a month has now passed, but no "final decision" has been communicated to the Committee and no additional documents have been produced.

Your letter asserted that you are continuing to withhold responsive documents "to avoid compromising the ongoing litigation." As the Committee has repeatedly explained, that argument is invalid. The Supreme Court has ruled definitively that Congress has the authority to conduct investigations and obtain documents regardless of separate, ongoing litigation.¹⁰ Moreover, the litigation that you have previously claimed could be compromised is now over.¹¹ The Supreme Court ruled against the Trump Administration on June 27, 2019, and the President conceded defeat on July 11, 2019. Simply put, there is no good-faith argument that "ongoing litigation" bars the production of these documents to Congress.

Congress has a constitutional responsibility to conduct oversight of the Executive Branch. The Committee has worked tirelessly to carry out this oversight while accommodating the Executive Branch's legitimate interests. Rather than cooperate, you have both responded with obstruction, delay, and baseless legal claims. The House of Representatives was left with no choice but to hold you in contempt. Nevertheless, the Committee remains open to further discussions, and I strongly urge you to reconsider your position and comply with the Committee's subpoenas. If you fail to do so, we expect Ms. Liu to fulfill her statutory duties unencumbered and present this matter to the grand jury in the District of Columbia.

Sincerely,



Elijah E. Cummings
Chairman

¹⁰ *Hutcheson v. United States*, 369 U.S. 599 (1962) ("But surely a congressional committee which is engaged in a legitimate legislative investigation need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding ... or when crime or wrongdoing is disclosed, *McGrain v. Daugherty*, 273 U.S. 135, 179-180."); *Sinclair v. United States*, 279 U.S. 263 (1929) ("It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits.").

¹¹ See, e.g., Letter from Charles Kolo Rathburn, Performing the Duties of the Assistant Secretary for Legislative and Intergovernmental Affairs, Department of Commerce, to Chairman Elijah E. Cummings, Committee on Oversight and Reform (June 3, 2019) ("The Department is disappointed that the Committee will not agree to the condition that transcribed interviews remain private until after the Supreme Court publishes its opinion in the case concerning reinstatement of the citizenship question to the 2020 Decennial Census.") (online at https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Letter%20to%20Chairman%20Cummings%20%5B6-3-2019%5D_0.pdf).