

5 FCMU 6-12-19  
Roll call vote  
24-15↑

AMENDMENT TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE TO THE COMMITTEE REPORT FOR THE RESOLUTION RECOMMENDING THAT THE HOUSE OF REPRESENTATIVES FIND WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, AND WILBUR L. ROSS, JR., SECRETARY OF COMMERCE, IN CONTEMPT OF CONGRESS FOR REFUSAL TO COMPLY WITH SUBPOENAS DULY ISSUED BY THE COMMITTEE ON OVERSIGHT AND REFORM

Amendment offered by Mr. Cummings

On page 28, before V. THE ADMINISTRATION'S JUSTIFICATIONS FOR DEFYING THE COMMITTEE'S SUBPOENAS ARE NOT VALID, insert the following new subsection and make corresponding changes to the Table of Contents:

**D. The President Has Asserted Executive Privilege**

On the evening before the scheduled date of the Committee's business meeting to consider the resolution holding the Attorney General and Secretary of Commerce in contempt, and while negotiations were ongoing, the Committee received a letter from Assistant Attorney General Stephen E. Boyd that stated, "In the face of the Committee's threatened contempt vote, the Attorney General is now compelled to request that the President invoke executive privilege with respect to the materials subject to subpoena to the Attorney General and the subpoena to the Secretary of the Department of Commerce." The letter requested that the Committee "hold the subpoenas in abeyance and delay any vote on whether to recommend a citation of contempt for noncompliance with subpoenas, pending the President's determination of this question." Although Mr. Boyd clarified that this request was "not itself an assertion of executive privilege," he explained that should the Committee decide "to proceed in spite of this request, the Department will be obliged to advise that the President assert executive privilege with respect to certain of the subpoenaed documents, and to make a protective assertion of executive privilege over the remainder of the documents, which undoubtedly include material covered by executive privilege, while the Department continues to review them."

On the day of the Committee's business meeting, the Committee received letters from the Department of Justice and Department of Commerce stating "that the President has asserted executive privilege" over the subpoenaed documents identified by the Committee in its June 3, 2019, letters to the Attorney General and the Secretary of Commerce. The letters, authored by Mr. Boyd and Charles K. Rathburn, Acting Assistant Secretary for Legislative and Intergovernmental Affairs at the Department of Commerce, stated that the President also made a protective assertion of executive privilege over the remainder of the documents responsive to the Committee's April 2, 2019, subpoenas. Mr. Boyd attached a letter dated the day before the Committee's meeting from Attorney General William P. Barr to the President requesting that the President "make a protective assertion of executive privilege."

The Committee has a number of concerns about the validity of these privilege assertions, including that:

- (1) the blanket “protective assertion of executive privilege” is not a valid claim, in part because it inappropriately blurs the distinction between the constitutionally-based presidential communications privilege and the mere common-law deliberative process, attorney-client, and attorney-work product privileges;
- (2) both the “protective” assertion and the assertion with respect to specific documents are obstructive given that any assertion should have been made months ago to follow Committee Rule 16 (c), which provides the manner in which privilege may be asserted and requires that the assertion be made on or before the scheduled date of testimony or appearance, here, April 16, 2019;
- (3) these assertions are transparently invalid because the Departments of Justice and Commerce have failed to provide any details by which the Committee might evaluate the applicability of the privilege, such as the senders and recipients of the documents or the privilege log and other information called for under the subpoenas;
- (4) even if these assertions of privilege were valid as an initial matter, which they are not, they should be overcome here, because: (i) the Committee has demonstrated a sufficient need for the documents given that they are likely to contain evidence critical to the Committee’s inquiry; and (ii) the documents cannot expeditiously be obtained any other way; and
- (5) without these documents, the Committee cannot fully perform its constitutional duties to legislate and conduct oversight.

The President’s assertions of executive privilege do not change the fact that Attorney General William P. Barr and Secretary of Commerce Wilbur L. Ross are in contempt of Congress for failing to comply with the Committee’s lawfully issued subpoenas.