

VIA EMAIL

October 13, 2019

Michael M. Purpura, Esq.
Patrick F. Philbin, Esq.
Deputy Assistants to the President and Deputy Counsels to the President
The White House
1600 Pennsylvania Avenue NW
Washington, D.C.

Dear Messrs. Purpura and Philbin:

I write to follow-up on our telephone conversation on Friday, October 11, 2019. During that conversation, I confirmed that our client, Dr. Fiona Hill, will attend a transcribed deposition on October 14 to be taken by the House of Representatives' Permanent Select Committee on Intelligence, Committee on Foreign Affairs, and Committee on Oversight and Reform (the "Committees").

As I told you by phone, Dr. Hill is mindful of her legal obligations with regard to any classified information she possesses or has knowledge of, and she intends to strictly abide by those obligations.

You also raised the issue of executive privilege. While you represented on the phone call that the White House does not believe that the entirety of Dr. Hill's testimony is subject to executive privilege, you noted your position that certain areas of her potential testimony may be subject to that privilege. The first area consisted of "direct communications with the President". The second area consisted of "diplomatic communications," such as "meetings with other heads of state" or "staffing the President on calls with foreign heads of state". After the call, you sent us four documents supporting your view.

We have reviewed those documents and are mindful of the discussion therein. We understand that executive privilege is a qualified privilege that may be overcome by an adequate showing of need. *See, e.g., In re Sealed Case*, 121 F.3d 729, 737, 745 (D.C. Cir. 1997). We also understand that executive privilege likely does not apply to information which is no longer confidential and has come within the sphere of public knowledge through broad disclosures. *See Nixon v. Sirica*, 487 F.2d 700, 761 n.128 (D.C. Cir. 1973) ("Naturally, if a document or a tape is no longer confidential because it has been made public, it would be nonsense to claim that it is privileged" (quoting Prof. Alexander Bickel, *Wretched Tapes (Cont.)*, N.Y. Times, Aug. 15, 1973, at 37, <https://www.nytimes.com/1973/08/15/archives/wretched-tapes-cont-wretched-tapes.html>)).

The White House has publicly released the Memorandum of Telephone Conversation of President Trump's July 25, 2019 phone call with President Zelensky of Ukraine. And President

Trump has extensively and publicly discussed that call. *See, e.g.*, Remarks by President Trump and President Niinistö of the Republic of Finland Before Bilateral Meeting, The White House (Oct. 2, 2019), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-president-niinisto-republic-finland-bilateral-meeting/>. The August 12, 2019 whistleblower complaint and information discussed therein are also now a matter of public record, having been affirmatively declassified and thrust into the public domain by the White House itself. Michael D. Shear, *Complaint Asserts a White House Cover-Up*, N.Y. Times, Sept. 27, 2019, at A1, <https://www.nytimes.com/2019/09/26/us/politics/whistleblower-complaint-released.html>. President Trump has extensively and publicly discussed that report. *See, e.g.*, Remarks by President Trump Before Marine One Departure, The White House (Oct. 3, 2019), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-67/>. It is our view that these and other matters which have been made public through affirmative actions of White House and/or media reports are likely not protected as confidential by executive privilege because they are, by their very nature, no longer confidential.

Finally, we understand that deliberative process privilege “disappears altogether when there is any reason to believe government misconduct occurred.” *Sealed Case*, 121 F.3d at 746. And as lawyers with the Justice Department’s Office of Legal Counsel have previously written, prior presidents have largely agreed that executive privilege operates differently in the context of an impeachment inquiry. *See* Office of Legal Counsel, U.S. Dep’t of Justice, *Legal Aspects of Impeachment: An Overview*, app. 3, 22-32 (1974). This appears to be a foundational principle of our nation’s constitutional system of governance. For example, President James K. Polk stated in 1846 that “[i]f the House of Representatives is the grand inquest of the Nation and should at any time have reason to believe that there has been malversation in office and should think proper to institute an investigation into the matter, all the archives, public or private, would be subject to the inspection and control of a committee of their body and every facility in the power of the Executive afforded them to prosecute the investigation.” *Id.* at 12-13, 23-24.

We understand and are mindful that there may be disagreement on these legal issues. To that end, we would welcome your views, including any potential areas of disagreement you may have with our analysis.

Finally, during our call, I noted that any discussion regarding the possible attendance of agency counsel at Dr. Hill’s interview is a matter for resolution between the White House and the Committees. Please keep us advised of any developments in that regard.

Thank you,

/s/ Lee S. Wolosky

Lee S. Wolosky
