

THE WHITE HOUSE

WASHINGTON

October 18, 2019

The Honorable Carolyn Maloney
Acting Chairwoman
House Committee on Oversight and Reform
Washington, D.C. 20515

The Honorable Adam B. Schiff
Chairman
House Permanent Select Committee on Intelligence
Washington, D.C. 20515

The Honorable Eliot L. Engel
Chairman
House Committee on Foreign Affairs
Washington, D.C. 20515

Dear Acting Chairwoman Maloney, Chairman Schiff, and Chairman Engel:

I write with respect to the subpoena issued by the Committee on Oversight and Reform (“Oversight Committee”) of the United States House of Representatives, in consultation with the Permanent Select Committee on Intelligence and the Committee on Foreign Affairs (collectively “Committees”), to Acting White House Chief of Staff Mick Mulvaney on October 4, 2019. The subpoena directs the production of documents and other materials by October 18, 2019.

The subpoena suffers from several legal defects. Although the Committees’ subpoena transmittal letter states that the subpoena has issued “[p]ursuant to the House of Representatives’ impeachment inquiry,” the House has not authorized your committees to conduct any such inquiry or to subpoena information in furtherance of it. The Constitution vests the “sole Power of Impeachment” in the House of Representatives. U.S. Const. Art. I, § 2, cl. 5. For that reason, the House itself must authorize a committee to move from routine oversight to an impeachment inquiry, as the House has done in every prior instance involving the potential impeachment of an executive official.

The Oversight Committee has not identified any valid basis for claiming that the full House has delegated authority to compel the production of documents in furtherance of the House’s impeachment power under Article I, Section 2 of the Constitution. The Supreme Court has made clear that the first step in assessing the validity of a subpoena from a congressional committee is determining “whether the committee was authorized” to issue the subpoena, which requires “constru[ing] the scope of the authority which the House of Representatives gave to” the committee. *United States v. Rumely*, 345 U.S. 41, 42-44 (1953); *see also Watkins v. United States*, 354 U.S. 178, 201 (“Those instructions are embodied in the authorizing resolution. That document is the committee charter.”); *Exxon Corp. v. FTC*, 589 F.2d 582, 592 (D.C. Cir. 1978) (“To issue a

valid subpoena, . . . a committee or subcommittee must conform strictly to the resolution establishing its investigatory powers.”).

Here, none of your Committees has identified any House rule or House resolution that authorized the Committees to begin an inquiry pursuant to the impeachment power. As explained in my October 8, 2019 letter, in marked contrast with historical precedents, the House has not expressly adopted any resolution authorizing an impeachment investigation. Letter from Pat A. Cipollone, Counsel to the President, to Nancy Pelosi, Speaker of the House of Representatives, et al. 2 (October 8, 2019) (“October 8 Cipollone Letter”). The House also has not delegated such authority to any of your Committees by rule. *See* H. Res. 6, 116th Cong. (2019). To the contrary, House Rule X is currently the only source of your Committees’ jurisdiction, and that rule does not provide any of the Committees the power to initiate an impeachment inquiry. Indeed, the rule does not mention impeachment at all. *See* H. Rule X, cl. 1(i), (n); cl. 11. Absent a delegation by House rule or a resolution of the House, none of your Committees has been delegated jurisdiction to conduct an investigation pursuant to the impeachment power under Article I, Section 2 of the Constitution.

As explained in my October 8 letter, “[i]n the history of our Nation, the House of Representatives has never attempted to launch an impeachment inquiry against the President without a majority of the House taking political accountability for that decision by voting to authorize such a dramatic constitutional step.” October 8 Cipollone Letter at 2. In addition, again in contrast to longstanding historical precedents, the Committees have not established any procedures affording the President even the most basic procedural rights in this purported impeachment inquiry. *Id.* at 3. There can be no legitimate reason why the House would deprive President Trump of the procedural protections that have been repeatedly provided to Presidents and other officials in connection with past impeachment inquiries. *See, e.g., Jefferson’s Manual*, H. Doc. 114-192 § 606, at 322 (2017) (recognizing that in modern practice, “the sentiment of the committees has been in favor of permitting the accused to explain, present witnesses, cross-examine . . . , and be represented by counsel”). As a result of these and other legal and procedural defects, my letter explained that the Executive Branch cannot be expected to participate in your inquiry under the current circumstances.


The Committees’ October 4 transmittal letter also asserts that “[e]ven if an impeachment inquiry were not underway,” the Oversight Committee could still seek the information requested in the subpoena under a different authority—its oversight authority pursuant to Congress’s power to legislate—and that Acting Chief of Staff Mulvaney should respond to the subpoena on that basis. With respect, we disagree. As detailed in my October 8 letter, the Committees cannot have it both ways. The Committees seek this information “[p]ursuant to the House of Representatives’ impeachment inquiry,” and the letter comes jointly from all three Committees. The information sought in the subpoena “will be shared among the Committees, as well as with the Committee on the Judiciary as appropriate.” There can be no genuine dispute here that the Committees seek this information for the purpose of advancing a purported impeachment inquiry—not for the purpose of routine oversight. The Committees cannot rely on traditional oversight authority to gather information as part of an unauthorized impeachment inquiry.

The Committees' letter separately claims that "failure or refusal to comply with the subpoena, including at the direction or behest of the President or others at the White House, shall constitute evidence of obstruction of the House's impeachment inquiry and may be used as an adverse inference against [the Acting Chief of Staff] and the President." Invoking legal defenses to a subpoena, including invoking privileges that are held by the President, in no way manifests evidence of obstruction or otherwise warrants any adverse inference. Indeed, the very idea that asserting legal rights is itself somehow evidence of wrongdoing turns fundamental notions of fairness on their head and is inconsistent with the rule of law.

Finally, the information sought by your Committees implicates significant Executive Branch confidentiality interests and executive privilege. The subpoena seeks a vast amount of material, all of which would have to be reviewed in light of the important constitutionally based confidentiality interests and privileges that would likely apply to most of the requested materials. As a result, even if the subpoena were otherwise valid, the White House could not be expected to provide a detailed response in a mere two weeks.

For the foregoing reasons, and the reasons explained in further detail in my letter of October 8, the White House cannot comply with the October 4 subpoena to Acting Chief of Staff Mulvaney. As I stated in my letter of October 8, if the Committees wish to return to the regular order of oversight requests, we stand ready to engage in that process as we have in the past, in a manner consistent with well-established constitutional protections and a respect for the separation of powers enshrined in our Constitution.

Please do not hesitate to contact me if you have any questions.

Sincerely,

P. A. Cipollone
Counsel to the President

cc: The Honorable Jim Jordan, Ranking Member, House Committee on Oversight and Reform
The Honorable Devin Nunes, Ranking Member, House Permanent Select Committee on Intelligence
The Honorable Michael McCaul, Ranking Member, House Committee on Foreign Affairs