# Congress of the United States
## Washington, DC 20515

November 3, 2019

Whitney C. Ellerman
Ellerman Enzinna PLLC
1050 30th Street, N.W.
Washington, D.C. 20007

Dear Mr. Ellerman:

Pursuant to the House of Representatives' impeachment inquiry, we are hereby transmitting a subpoena that compels your client, Robert B. Blair, to appear at a deposition on **Monday, November 4, 2019, at 9:00 a.m. at The Capitol, HVC-304.**

This subpoena is being issued by the Permanent Select Committee on Intelligence under the Rules of the House of Representatives in exercise of its oversight and legislative jurisdiction and after consultation with the Committee on Foreign Affairs and the Committee on Oversight and Reform. The deposition transcript shall be collected as part of the House's impeachment inquiry and shared among the Committees, as well as with the Committee on the Judiciary as appropriate.[1] Mr. Blair's failure or refusal to comply with the subpoena, including at the direction or behest of the President or the White House, shall constitute further evidence of obstruction of the House's impeachment inquiry and may be used as an adverse inference against Mr. Blair and the President. Moreover, Mr. Blair's failure to appear shall constitute evidence that may be used against him in a contempt proceeding.

**Baseless White House Order to Block Witness Testimony**

On October 24, 2019, the Committees sent a letter requesting that Mr. Blair appear voluntarily for a deposition, as we have with many other witnesses.[2] On November 2, 2019, you informed us that Mr. Blair would not appear because the White House now takes issue with agency counsel being excluded from congressional depositions—a procedure that is enshrined in House Rules and has been used by both Republicans and Democrats for decades. You wrote:

> Mr. Blair has been directed by the White House not to appear and testify at the Committees' proposed deposition, based on the Department of Justice's advice that the

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[1] *See* Letter from Chairman Jerrold Nadler, House Committee on the Judiciary, to Chairman Adam B. Schiff, House Permanent Select Committee on Intelligence; Chairwoman Maxine Waters, House Committee on Financial Services; Chairman Elijah E. Cummings, House Committee on Oversight and Reform; and Chairman Eliot L. Engel, House Committee on Foreign Affairs (Aug. 22, 2019) (online at https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/FiveChairsLetter8.22.pdf).

[2] Letter from Chairman Eliot L. Engel, House Committee on Foreign Affairs, Chairman Adam B. Schiff, House Permanent Select Committee on Intelligence, and Acting Chairwoman Carolyn B. Maloney, House Committee on Oversight and Reform, to Robert B. Blair, Assistant to the President and Senior Advisor to the Chief of Staff, The White House (Oct. 24, 2019).

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> Committees may not validly require an executive branch witness to appear at such a deposition without the assistance of agency counsel. In light of the clear direction he has been given by the Executive Branch, Mr. Blair must respectfully decline to testify, as you propose, on Monday, November 4, 2019.[3]

This argument has no merit. Instead, it is the latest in a long line of baseless procedural challenges to the House of Representatives' authority to fulfill one of its most solemn responsibilities under the Constitution. The deposition rule that excludes agency counsel is intended for exactly these types of circumstances—to prevent agency officials who are directly implicated in the abuses we are investigating from trying to prevent their own employees from coming forward to tell the truth to Congress. This rationale applies with the same force to the Executive Office of the President as it does to any other Executive Branch agency.

The White House's frivolous challenge to the House deposition rules contradicts decades of precedent in which Republicans and Democrats have used exactly the same procedures to depose Executive Branch officials without agency counsel present, including some of the most senior aides to multiple previous Presidents.

These are the same deposition procedures that were supported by Acting White House Chief of Staff Mick Mulvaney when he served as a Member of the Oversight Committee and by Secretary of State Mike Pompeo when he served as a Member of the Benghazi Select Committee. In fact, some of the same Members and staff currently conducting depositions as part of the present impeachment inquiry participated directly in depositions without agency counsel during the Clinton, Bush, and Obama Administrations. There should not be a different standard now because Donald Trump is in the White House.

**Chairman Dan Burton**

When Republican Rep. Dan Burton served as Chairman of the Committee on Government Reform, the Committee deposed 141 Clinton Administration officials without agency counsel present—including the following top advisors to President Bill Clinton:

- White House Chief of Staff Mack McLarty;
- White House Chief of Staff Erskine Bowles;
- White House Counsel Bernard Nussbaum;
- White House Counsel Jack Quinn;
- Deputy White House Counsel Bruce Lindsey;
- Deputy White House Counsel Cheryl Mills;
- Deputy White House Chief of Staff Harold Ickes;
- Chief of Staff to the Vice President Roy Neel; and
- Chief of Staff to the First Lady Margaret Williams.[4]

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[3] Letter from Whitney Ellerman, Counsel to Robert B. Blair, to Chairman Eliot L. Engel, House Committee on Foreign Affairs, Chairman Adam B. Schiff, House Permanent Select Committee on Intelligence, and Acting Chairwoman Carolyn B. Maloney, House Committee on Oversight and Reform (Nov. 2, 2019).

[4] Committee on Government Reform, Democratic Staff, *Congressional Oversight of the Clinton*

**Chairman Henry Waxman**

When Democratic Rep. Henry Waxman became Chairman, the Committee on Oversight and Government Reform continued conducting depositions without agency counsel during the George W. Bush Administration. For example, the Committee deposed five White House officials, including the White House Political Director, during investigations of the White House Office of Political Affairs and the use of private email accounts;[5] eight State Department officials, including a U.S. Ambassador, during investigations of misconduct by the Inspector General and others;[6] two Justice Department Officials during investigations into lobbying contacts by Jack Abramoff;[7] and an EPA official during an investigation of EPA's decision to deny California's request to regulate greenhouse gases.[8]

**Chairman Darrell Issa**

When Rep. Darrell Issa became Chairman, the Oversight Committee continued conducting depositions without agency counsel present during the Obama Administration. For example, during the investigation of the attacks in Benghazi, the Committee conducted depositions of Ambassador Thomas Pickering and a diplomatic security agent, both of which were personally attended by Rep. Jim Jordan.[9] The Committee also conducted a deposition of John C. Beale, a former senior official at the Office of Air and Radiation at the EPA.[10]

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*Administration* (Jan. 17, 2006) (online at https://wayback.archive-it.org/4949/20141031200116/http://oversight-archive.waxman.house.gov/documents/20060117103516-91336.pdf).

[5] House Committee on Oversight and Government Reform, Deposition of Matthew Aaron Schlapp (Aug. 27, 2007); House Committee on Oversight and Government Reform, Deposition of Sara Taylor (July 27, 2007); House Committee on Oversight and Government Reform, Deposition of Mindy McLaughlin (Apr. 3, 2008); House Committee on Oversight and Government Reform, Deposition of Monica V. Kladakis (Apr. 14, 2008); House Committee on Oversight and Government Reform, Deposition of Jennifer Farley (Jan. 9, 2008).

[6] House Committee on Oversight and Government Reform, Deposition of Mark Duda, Assistant Inspector General for Audits, Department of State (Sept. 26, 2007); House Committee on Oversight and Government Reform, Deposition of Erich Hart (Oct. 3, 2007); House Committee on Oversight and Government Reform, Deposition of Gail Voshell (Oct. 5, 2007); House Committee on Oversight and Government Reform, Deposition of Terry Heide, Director of Congressional and Public Affairs for the Office of the Inspector General, Department of State (Nov. 8, 2007); House Committee on Oversight and Government Reform, Deposition of Robert Peterson, Assistant Inspector General, Department of State (Sept. 27, 2007); House Committee on Oversight and Government Reform, Deposition of William Edward Todd, Deputy Inspector General, Department of State (Oct. 12, 2007); House Committee on Oversight and Government Reform, Deposition of Elizabeth Koniuszkow, Department of State (Nov. 2, 2007); House Committee on Oversight and Government Reform, Deposition of Ambassador John L. Withers, Department of State (Aug. 20, 2008).

[7] House Committee on Oversight and Government Reform, Deposition of Susan Johnson (Oct. 4, 2007); House Committee on Oversight and Government Reform, Deposition of Tracy Henke (June 20, 2007).

[8] House Committee on Oversight and Government Reform, Deposition of Jason Burnett, Associate Deputy Administrator, Environmental Protection Agency (May 15, 2008).

[9] House Committee on Oversight and Government Reform, Deposition of Ambassador Thomas R. Pickering, Department of State (June 4, 2013); House Committee on Oversight and Government Reform, Deposition of Diplomatic Security Agent #3, Department of State (Oct. 8, 2013).

[10] House Committee on Oversight and Government Reform, Deposition of John Beale (Dec. 19, 2013).

**Chairman Jason Chaffetz**

When Rep. Jason Chaffetz became Chairman, the Oversight Committee continued conducting depositions during the Obama Administration without agency counsel present. For example, the Committee conducted a deposition of Dr. William Thompson, a senior scientist at the Centers for Disease Control and Prevention, during an investigation of the safety of vaccines,[11] as well as a deposition of Stephen Siebert, a program manager at the State Department, during an investigation of embassy construction and security.[12]

**Chairman Trey Gowdy**

When Rep. Trey Gowdy became Chairman, the Oversight Committee continued conducting depositions without agency counsel present during the Obama Administration. For example, the Committee conducted a deposition of Joseph Maher, the Principal Deputy General Counsel for the Department of Homeland Security, during an investigation of the Department's policies for addressing whistleblower investigations by the Office of Special Counsel.[13]

**Benghazi Select Committee**

House Republicans felt so strongly during the Obama Administration about conducting depositions of Executive Branch officials without agency counsel present that they extended this authority to the Benghazi Select Committee, which was also chaired by Rep. Gowdy. On May 8, 2014, the House passed a resolution establishing the Benghazi Select Committee, and the accompanying regulations issued by the Rules Committee provided: "No one may be present at depositions except members, committee staff designated by the chair or ranking minority member, an official reporter, the witness, and the witness's counsel. Observers or counsel for other persons, or for agencies under investigation, may not attend."[14]

**Expansion of Deposition Authority to Other Committees**

The following year, also during the Obama Administration, House Republicans expanded this deposition authority to additional committees. In January 2015, the House voted to approve H. Res. 5, which, along with the accompanying regulations from the Committee on Rules, authorized the Committee on Financial Services, the Committee on Energy and Commerce, the

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[11] House Committee on Oversight and Government Reform, Deposition of William W. Thompson, Centers for Disease Control and Prevention, Department of Health and Human Services (Nov. 22, 2016).

[12] House Committee on Oversight and Government Reform, Deposition of Stephen W. Siebert, Department of State (May 26, 2016).

[13] House Committee on Oversight and Government Reform, Deposition of Joseph P. Maher, Department of Homeland Security (Sept. 25, 2018).

[14] Deposition Procedures for the Select Committee on the Events Surrounding the 2012 Terrorist Attack in Benghazi, Congressional Record, H4056 (May 9, 2014) (online at www.congress.gov/113/crec/2014/05/09/CREC-2014-05-09-pt1-PgH4056.pdf).

Committee on Ways and Means, and the Committee on Science, Space, and Technology to conduct depositions without agency counsel present.[15]

Pursuant to this authority, under Chairman Kevin Brady, the Committee on Ways and Means conducted a deposition of David Fisher, the Chief Risk Officer of the Internal Revenue Service, without allowing agency counsel to attend.[16] The Committee later reported: "The answers this witness provided in a compelled deposition—without Treasury counsel present—provided more insight into the Administration's decision-making process than did any other individual."[17]

Similarly, under Chairman Jeb Hensarling, the Committee on Financial Services conducted depositions of 12 witnesses from the Consumer Financial Protection Bureau without agency counsel present.[18]

**Authority for Deposition Rule**

The Constitution authorizes Congress to "determine the Rules of its Proceedings."[19] The regulations that govern House depositions state:

> Witnesses may be accompanied at a deposition by personal, nongovernmental counsel to advise them of their rights. Only members, Committee staff designated by the chair or ranking minority member, an official reporter, the witness, and the witness's counsel are permitted to attend. Observers or counsel for other persons, including counsel for

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[15] H. Res. 5, 114th Cong. (online at www.congress.gov/bill/114th-congress/house-resolution/5).

[16] House Committee on Ways and Means, Deposition of David Fisher, Internal Revenue Service (May 11, 2016).

[17] House Committee on Energy and Commerce and House Committee on Ways and Means, *Joint Investigative Report into the Source of Funding for the ACA's Cost Sharing Reduction Program* (July 2016) (online at https://gop-waysandmeans.house.gov/wp-content/uploads/2016/07/20160707Joint_Congressional_Investigative_Report-2.pdf).

[18] House Committee on Financial Services, Deposition of James Keegan, Consumer Financial Protection Bureau (May 31, 2017); House Committee on Financial Services, Deposition of Melissa Heist, Consumer Financial Protection Bureau (June 6, 2017); House Committee on Financial Services, Deposition of J. Anthony Ogden, Consumer Financial Protection Bureau (June 14, 2017); House Committee on Financial Services, Deposition of Brian Patrick O'Brien, Consumer Financial Protection Bureau (June 27-28, 2017); House Committee on Financial Services, Deposition of Jacqueline Becker, Consumer Financial Protection Bureau (July 11, 2017); House Committee on Financial Services, Deposition of Julia Lynn Szybala, Consumer Financial Protection Bureau (July 17-18, 2017 and Oct. 11, 2017); House Committee on Financial Services, Deposition of Greg Evans, Consumer Financial Protection Bureau (July 21, 2017); House Committee on Financial Services, Deposition of Anne Harden Tindall, Consumer Financial Protection Bureau (July 27-28, 2017); House Committee on Financial Services, Deposition of Catherine D. Galicia, Consumer Financial Protection Bureau (July 31, 2017); House Committee on Financial Services, Deposition of Mary E. McLeod, Consumer Financial Protection Bureau (Aug. 3, 2017 and Oct. 18, 2017); House Committee on Financial Services, Deposition of Stephen Bressler, Consumer Financial Protection Bureau (Oct. 23, 2017 and Oct. 25, 2017); House Committee on Financial Services, Deposition of Stephen Bressler, Consumer Financial Protection Bureau (Nov. 6, 2017 and Nov. 7, 2017).

[19] U.S. Const., Art. I, sec. 5, cl. 2.

government agencies, may not attend.[20]

The basis for this process is straightforward: it ensures that the Committees are able to depose witnesses in furtherance of our investigation without having in the room representatives of the agency or office under investigation. The rule nevertheless protects the rights of witnesses by allowing them to be accompanied in the deposition by personal counsel, and you will be permitted to accompany Mr. Blair in his deposition on Monday.

Your letter does not indicate that the President has asserted any valid constitutional privilege to direct Mr. Blair to defy this subpoena. To the extent the White House believes that an issue could be raised at the deposition that may implicate a valid privilege, the White House may seek to assert that privilege with the Committee. To date, the White House has not done so.

Instead, your letter asserts only that Mr. Blair plans to comply with the White House's order not to participate in the deposition, despite the failure of the President to assert any valid privilege. This is not a valid basis to defy the Committee's subpoena.

For all of the reasons set forth above, the enclosed subpoena compels Mr. Blair to appear tomorrow for his deposition. Please contact staff for the Permanent Select Committee on Intelligence at (202) 225-7690 with any questions.

Sincerely,

Adam B. Schiff
Chairman
House Permanent Select Committee
on Intelligence

Carolyn B. Maloney
Acting Chairwoman
House Committee on Oversight and Reform

Eliot L. Engel
Chairman
House Committee on Foreign Affairs

Enclosure

[20] 116th Congress Regulations for Use of Deposition Authority, Congressional Record, H1216 (Jan. 25, 2019) (online at www.congress.gov/116/crec/2019/01/25/CREC-2019-01-25-pt1-PgH1216-2.pdf).

cc: The Honorable Devin Nunes, Ranking Member
House Permanent Select Committee on Intelligence

The Honorable Jim Jordan, Ranking Member
House Committee on Oversight and Reform

The Honorable Michael McCaul, Ranking Member
House Committee on Foreign Affairs