United States Department of State

Washington, D.C. 20520

November 4, 2019

Ronald J. Tenpas
Vinson & Elkins
2200 Pennsylvania Avenue NW
Suite 500 West
Washington, DC 20037

Dear Mr. Tenpas:

On October 10, 2019 the Department of State forwarded to your client, Mr. Brechbuhl, the attached instruction relating to the invitation he received to appear before the House Permanent Select Committee on Intelligence. The Department of Justice, after taking into account subsequent developments, sent the attached November 1, 2019 letter to the White House Counsel, confirming that the legal basis for the instruction and guidance in the Department of State's October 10, 2019 letter continues to remain in effect.

As noted in the attached letters, should circumstances change, we stand ready to update this guidance as warranted.

Sincerely yours,

Brian Bulatao
Under Secretary of State

United States Department of State

Washington, D.C. 20520

October 10, 2019

Ronald J. Tenpas
Vinson & Elkins
2200 Pennsylvania Avenue NW
Suite 500 West
Washington, DC 20037

Dear Mr. Tenpas:

On October 8, 2019, Counsel to the President Pat Cipollone sent the attached letter to the Speaker of the House, Chairman Schiff, Chairman Engel, and Chairman Cummings concerning various demands, including various types of demands for the testimony by State Department employees as part of the so-called "impeachment inquiry."

In that letter, Mr. Cipollone identified several procedural, legal, and constitutional infirmities in the process by which the Committees have purported to pursue an impeachment inquiry. As a threshold matter, the Committees have refused to allow counsel from the Department of State to be present during the testimony of current and former employees, a practice that the Executive Branch has previously recognized to be unconstitutional. *See Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees*, 43 Op. O.L.C. __ (May 23, 2019), available at https://www.justice.gov/olc/file/1171671/download. Refusing to permit the attendance of counsel from the employees' agency impermissibly hobbles the ability of the Executive Branch to protect constitutionally-based confidentiality interests and privileges. More broadly, Mr. Cipollone noted that the Committees have no authority to pursue an impeachment in the first place, because the House of Representatives has not authorized them to pursue such an inquiry. He further explained that the Committees' purported inquiry is completely bereft of the procedures historically provided by the House in past impeachment inquiries.

In light of these defects, Mr. Cipollone wrote: "Consistent with the duties of the President of the United States, and in particular his obligation to preserve the rights of future occupants of his office, President Trump cannot permit his Administration to participate in this partisan inquiry under these circumstances." As Mr. Cipollone noted in his letter, "[c]urrent and former State Department officials are duty bound to protect the confidentiality interests of the Executive Branch." Accordingly, in accordance with applicable law, I write on behalf of the Department of State, pursuant to the President's instruction reflected in Mr. Cipollone's letter, to instruct your client (as a current employee of the Department of State), consistent with Mr. Cipollone's letter, not to appear before the Committees under the present circumstances.

This instruction likewise applies to the Committees' request that your client produce documents or other records, irrespective of their format or the device on which they may be stored. As stated in the October 1, 2019 letter from Secretary Pompeo to the Chairmen of the three

Committees, "the requested records constitute the property of the Department of State and are subject to restrictions on the unauthorized disclosure of classified information and various Executive Branch privileges." *See, e.g.*, 5 FAM 414.8, 5 FAM 474.1(a), and 12 FAM 543. Moreover, these document requests duplicate the subpoena that was previously served on the Secretary. The Department is the legal custodian of these records and is responsible for determining whether and what to produce in response to the subpoena. The Department is in the process of collecting such records and will respond to the Committees, as appropriate and consistent with Mr. Cipollone's letter. In this regard, it is important to remind your client of the responsibility under the Federal Records Act to ensure that all Department records currently in your client's possession, in whatever format, are transferred into the control and possession of the Department as soon as possible, to the extent such action has not already been undertaken.

As noted in Mr. Cipollone's letter, should the present circumstances change we stand ready to update this guidance as warranted.

Sincerely yours,

Brian Bulatao

Brian Bulatao
Undersecretary of State

THE WHITE HOUSE

WASHINGTON

October 8, 2019

The Honorable Nancy Pelosi
Speaker
House of Representatives
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 Foreign Affairs Committee
Washington, D.C. 20515

The Honorable Elijah E. Cummings
Chairman
House Committee on Oversight and Reform
Washington, D.C. 20515

Dear Madam Speaker and Messrs. Chairmen:

I write on behalf of President Donald J. Trump in response to your numerous, legally unsupported demands made as part of what you have labeled—contrary to the Constitution of the United States and all past bipartisan precedent—as an "impeachment inquiry." As you know, you have designed and implemented your inquiry in a manner that violates fundamental fairness and constitutionally mandated due process.

For example, you have denied the President the right to cross-examine witnesses, to call witnesses, to receive transcripts of testimony, to have access to evidence, to have counsel present, and many other basic rights guaranteed to all Americans. You have conducted your proceedings in secret. You have violated civil liberties and the separation of powers by threatening Executive Branch officials, claiming that you will seek to punish those who exercise fundamental constitutional rights and prerogatives. All of this violates the Constitution, the rule of law, and ***every past precedent.*** Never before in our history has the House of Representatives—under the control of either political party—taken the American people down the dangerous path you seem determined to pursue.

Put simply, you seek to overturn the results of the 2016 election and deprive the American people of the President they have freely chosen. Many Democrats now apparently view impeachment not only as a means to undo the democratic results of the ***last*** election, but as a strategy to influence the ***next*** election, which is barely more than a year away. As one member of Congress explained, he is "concerned that if we don't impeach the President, he will get reelected."[1] Your highly partisan and unconstitutional effort threatens grave and lasting damage to our democratic institutions, to our system of free elections, and to the American people.

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[1] Interview with Rep. Al Green, MSNBC (May 5, 2019).

For his part, President Trump took the unprecedented step of providing the public transparency by declassifying and releasing the record of his call with President Zelenskyy of Ukraine. The record clearly established that the call was completely appropriate and that there is no basis for your inquiry. The fact that there was nothing wrong with the call was also powerfully confirmed by Chairman Schiff's decision to create a false version of the call and read it to the American people at a congressional hearing, without disclosing that he was simply making it all up.

In addition, information has recently come to light that the whistleblower had contact with Chairman Schiff's office before filing the complaint. His initial denial of such contact caused *The Washington Post* to conclude that Chairman Schiff "clearly made a statement that was false."[2] In any event, the American people understand that Chairman Schiff cannot covertly assist with the submission of a complaint, mislead the public about his involvement, read a counterfeit version of the call to the American people, and then pretend to sit in judgment as a neutral "investigator."

For these reasons, President Trump and his Administration reject your baseless, unconstitutional efforts to overturn the democratic process. Your unprecedented actions have left the President with no choice. In order to fulfill his duties to the American people, the Constitution, the Executive Branch, and all future occupants of the Office of the Presidency, President Trump and his Administration cannot participate in your partisan and unconstitutional inquiry under these circumstances.

I. Your "Inquiry" Is Constitutionally Invalid and Violates Basic Due Process Rights and the Separation of Powers.

Your inquiry is constitutionally invalid and a violation of due process. In 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. Here, House leadership claims to have initiated the gravest inter-branch conflict contemplated under our Constitution by means of nothing more than a press conference at which the Speaker of the House simply announced an "official impeachment inquiry."[3] Your contrived process is unprecedented in the

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[2] Glenn Kessler, *Schiff's False Claim His Committee Had Not Spoken to the Whistleblower*, Wash. Post (Oct. 4, 2019).

[3] Press Release, Nancy Pelosi, Pelosi Remarks Announcing Impeachment Inquiry (Sept. 24, 2019).

history of the Nation,[4] and lacks the necessary authorization for a valid impeachment proceeding.[5]

The Committees' inquiry also suffers from a separate, fatal defect. Despite Speaker Pelosi's commitment to "treat the President with fairness,"[6] the Committees have not established any procedures affording the President even the most basic protections demanded by due process under the Constitution and by fundamental fairness. Chairman Nadler of the House Judiciary Committee has expressly acknowledged, at least when the President was a member of his own party, that "[t]he power of impeachment . . . demands a rigorous level of due process," and that in this context "due process mean[s] . . . the right to be informed of the law, of the charges against you, the right to confront the witnesses against you, to call your own witnesses, and to have the assistance of counsel."[7] All of these procedures have been abandoned here.

These due process rights are not a matter of discretion for the Committees to dispense with at will. To the contrary, they are constitutional requirements. The Supreme Court has recognized that due process protections apply to all congressional investigations.[8] Indeed, it has been recognized that the Due Process Clause applies to impeachment proceedings.[9] And precedent for the rights to cross-examine witnesses, call witnesses, and present evidence dates back nearly 150 years.[10] Yet the Committees have decided to deny the President these elementary rights and protections that form the basis of the American justice system and are protected by the Constitution. No citizen—including the President—should be treated this unfairly.

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[4] Since the Founding of the Republic, under unbroken practice, the House has never undertaken the solemn responsibility of an impeachment inquiry directed at the President without first adopting a resolution authorizing a committee to begin the inquiry. The inquiries into the impeachments of Presidents Andrew Johnson and Bill Clinton proceeded in multiple phases, each authorized by a separate House resolution. *See, e.g.*, H.R. Res. 581, 105th Cong. (1998); H.R. Res. 525, 105th Cong. (1998); III Hinds' Precedents §§ 2400-02, 2408, 2412. And before the Judiciary Committee initiated an impeachment inquiry into President Richard Nixon, the Committee's chairman rightfully recognized that "a[n] [inquiry] resolution has always been passed by the House" and "is a necessary step." III Deschler's Precedents ch. 14, § 15.2. The House then satisfied that requirement by adopting H.R. Res. 803, 93rd Cong. (1974).

[5] Chairman Nadler has recognized the importance of taking a vote in the House before beginning a presidential impeachment inquiry. At the outset of the Clinton impeachment inquiry—where a floor vote was held—he argued that even limiting the time for *debate* before that vote was improper and that "an hour debate on this momentous decision is an insult to the American people and another sign that this is not going to be fair." 144 Cong. Rec. H10018 (daily ed. Oct. 8, 1998) (statement of Rep. Jerrold Nadler). Here, the House has dispensed with any vote and any debate *at all*.

[6] Press Release, Nancy Pelosi, Transcript of Pelosi Weekly Press Conference Today (Oct. 2, 2019).

[7] *Examining the Allegations of Misconduct Against IRS Commissioner John Koskinen (Part II): Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 3 (2016) (statement of Rep. Jerrold Nadler); *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 17 (1998) (statement of Rep. Jerrold Nadler).

[8] *See, e.g.*, *Watkins v. United States*, 354 U.S. 178, 188 (1957); *Quinn v. United States*, 349 U.S. 155, 161 (1955).

[9] *See Hastings v. United States*, 802 F. Supp. 490, 504 (D.D.C. 1992), *vacated on other grounds by Hastings v. United States*, 988 F.2d 1280 (D.C. Cir. 1993).

[10] *See, e.g.*, III Hinds' Precedents § 2445.

To comply with the Constitution's demands, appropriate procedures would include—at a minimum—the right to see all evidence, to present evidence, to call witnesses, to have counsel present at all hearings, to cross-examine all witnesses, to make objections relating to the examination of witnesses or the admissibility of testimony and evidence, and to respond to evidence and testimony. Likewise, the Committees must provide for the disclosure of all evidence favorable to the President and all evidence bearing on the credibility of witnesses called to testify in the inquiry. The Committees' current procedures provide ***none*** of these basic constitutional rights.

In addition, the House has not provided the Committees' Ranking Members with the authority to issue subpoenas. The right of the minority to issue subpoenas—subject to the same rules as the majority—has been the standard, bipartisan practice in all recent resolutions authorizing presidential impeachment inquiries.[11] The House's failure to provide co-equal subpoena power in this case ensures that any inquiry will be nothing more than a one-sided effort by House Democrats to gather information favorable to their views and to selectively release it as only they determine. The House's utter disregard for the established procedural safeguards followed in past impeachment inquiries shows that the current proceedings are nothing more than an unconstitutional exercise in political theater.

As if denying the President basic procedural protections were not enough, the Committees have also resorted to threats and intimidation against potential Executive Branch witnesses. Threats by the Committees against Executive Branch witnesses who assert common and longstanding rights destroy the integrity of the process and brazenly violate fundamental due process. In letters to State Department employees, the Committees have ominously threatened—without any legal basis and before the Committees even issued a subpoena—that "[a]ny failure to appear" in response to a mere letter ***request*** for a deposition "shall constitute evidence of obstruction."[12] Worse, the Committees have broadly threatened that if State Department officials attempt to insist upon the right for the Department to have an agency lawyer present at depositions to protect legitimate Executive Branch confidentiality interests—or apparently if they make any effort to protect those confidentiality interests ***at all***—these officials will have their salaries withheld.[13]

The suggestion that it would somehow be problematic for anyone to raise long-established Executive Branch confidentiality interests and privileges in response to a request for a deposition is legally unfounded. Not surprisingly, the Office of Legal Counsel at the Department of Justice has made clear on multiple occasions that employees of the Executive Branch who have been instructed not to appear or not to provide particular testimony before Congress based on privileges or immunities of the Executive Branch cannot be punished for

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[11] H.R. Res. 581, 105th Cong. (1998); H.R. Res. 803, 93rd Cong. (1974).

[12] Letter from Eliot L. Engel, Chairman, House Committee on Foreign Affairs, et al., to George P. Kent, Deputy Assistant Secretary, U.S. Department of State 1 (Sept. 27, 2019).

[13] *See* Letter from Eliot L. Engel, Chairman, House Committee on Foreign Affairs, et al., to John J. Sullivan, Deputy Secretary of State 2-3 (Oct. 1, 2019).

following such instructions.[14] Current and former State Department officials are duty bound to protect the confidentiality interests of the Executive Branch, and the Office of Legal Counsel has also recognized that it is unconstitutional to exclude agency counsel from participating in congressional depositions.[15] In addition, any attempt to withhold an official's salary for the assertion of such interests would be unprecedented and unconstitutional.[16] The Committees' assertions on these points amount to nothing more than strong-arm tactics designed to rush proceedings without any regard for due process and the rights of individuals and of the Executive Branch. Threats aimed at intimidating individuals who assert these basic rights are attacks on civil liberties that should profoundly concern all Americans.

II. The Invalid "Impeachment Inquiry" Plainly Seeks To Reverse the Election of 2016 and To Influence the Election of 2020.

The effort to impeach President Trump—without regard to any evidence of his actions in office—is a naked political strategy that began the day he was inaugurated, and perhaps even before.[17] In fact, your transparent rush to judgment, lack of democratically accountable authorization, and violation of basic rights in the current proceedings make clear the illegitimate, partisan purpose of this purported "impeachment inquiry." The Founders, however, did not create the extraordinary mechanism of impeachment so it could be used by a political party that feared for its prospects against the sitting President in the next election. The decision as to who will be elected President in 2020 should rest with the people of the United States, exactly where the Constitution places it.

Democrats themselves used to recognize the dire implications of impeachment for the Nation. For example, in the past, Chairman Nadler has explained:

> The effect of impeachment is to overturn the popular will of the voters. We must not overturn an election and remove a President from office except to defend our system of government or our constitutional liberties against a dire threat, and we must not do so without an overwhelming consensus of the American people. There must never be a narrowly voted impeachment or an impeachment supported by one of our major political parties and opposed by another. Such an impeachment will produce divisiveness and bitterness in our

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[14] *See, e.g., Testimonial Immunity Before Congress of the Former Counsel to the President*, 43 Op. O.L.C. __, *19 (May 20, 2019); *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 102, 140 (1984) ("The Executive, however, must be free from the threat of criminal prosecution if its right to assert executive privilege is to have any practical substance.")

[15] *Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees*, 43 Op. O.L.C. __, *1-2 (May 23, 2019).

[16] *See* President Donald J. Trump, Statement by the President on Signing the Consolidated Appropriations Act, 2019 (Feb. 15, 2019); *Authority of Agency Officials To Prohibit Employees From Providing Information to Congress*, 28 Op. O.L.C. 79, 80 (2004).

[17] *See* Matea Gold, *The Campaign To Impeach President Trump Has Begun*, Wash. Post (Jan. 21, 2017) ("At the moment the new commander in chief was sworn in, a campaign to build public support for his impeachment went live . . . .").

> politics for years to come, and will call into question the very legitimacy of our political institutions.[18]

Unfortunately, the President's political opponents now seem eager to transform impeachment from an extraordinary remedy that should rarely be contemplated into a conventional political weapon to be deployed for partisan gain. These actions are a far cry from what our Founders envisioned when they vested Congress with the "important trust" of considering impeachment.[19] Precisely because it nullifies the outcome of the democratic process, impeachment of the President is fraught with the risk of deepening divisions in the country and creating long-lasting rifts in the body politic.[20] Unfortunately, you are now playing out exactly the partisan rush to judgment that the Founders so strongly warned against. The American people deserve much better than this.

III. There Is No Legitimate Basis for Your "Impeachment Inquiry"; Instead, the Committees' Actions Raise Serious Questions.

It is transparent that you have resorted to such unprecedented and unconstitutional procedures because you know that a fair process would expose the lack of any basis for your inquiry. Your current effort is founded on a completely appropriate call on July 25, 2019, between President Trump and President Zelenskyy of Ukraine. Without waiting to see what was actually said on the call, a press conference was held announcing an "impeachment inquiry" based on falsehoods and misinformation about the call.[21] To rebut those falsehoods, and to provide transparency to the American people, President Trump secured agreement from the Government of Ukraine and took the extraordinary step of declassifying and publicly releasing the record of the call. That record clearly established that the call was completely appropriate, that the President did nothing wrong, and that there is no basis for an impeachment inquiry. At a joint press conference shortly after the call's public release, President Zelenskyy agreed that the call was appropriate.[22] In addition, the Department of Justice announced that officials there had reviewed the call after a referral for an alleged campaign finance law violation and found no such violation.[23]

Perhaps the best evidence that there was no wrongdoing on the call is the fact that, after the actual record of the call was released, Chairman Schiff chose to concoct a false version of the call and to read his made-up transcript to the American people at a public hearing.[24] This

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[18] 144 Cong. Rec. H11786 (daily ed. Dec. 18, 1998) (statement of Rep. Jerrold Nadler).

[19] The Federalist No. 65 (Alexander Hamilton).

[20] *See id.*

[21] Press Release, Nancy Pelosi, Pelosi Remarks Announcing Impeachment Inquiry (Sept. 24, 2019).

[22] *President Trump Meeting with Ukrainian President*, C-SPAN (Sept. 25, 2019).

[23] Statement of Kerri Kupec, Director, Office of Public Affairs, Dept. of Justice (Sept. 25, 2019) ("[T]he Department's Criminal Division reviewed the official record of the call and determined, based on the facts and applicable law, that there was no campaign finance violation and that no further action was warranted.").

[24] *See Whistleblower Disclosure: Hearing Before the H. Select Comm. on Intel.*, 116th Cong. (Sept. 26, 2019) (statement of Rep. Adam Schiff).

powerfully confirms there is no issue with the actual call. Otherwise, why would Chairman Schiff feel the need to make up his own version? The Chairman's action only further undermines the public's confidence in the fairness of any inquiry before his Committee.

The real problem, as we are now learning, is that Chairman Schiff's office, and perhaps others—despite initial denials—were involved in advising the whistleblower before the complaint was filed. Initially, when asked on national television about interactions with the whistleblower, Chairman Schiff unequivocally stated that "[w]e have not spoken directly with the whistleblower. We would like to."[25]

Now, however, it has been reported that the whistleblower approached the House Intelligence Committee with information—and received guidance from the Committee—*before* filing a complaint with the Inspector General.[26] As a result, *The Washington Post* concluded that Chairman Schiff "clearly made a statement that was false."[27] Anyone who was involved in the preparation or submission of the whistleblower's complaint cannot possibly act as a fair and impartial judge in the same matter—particularly after misleading the American people about his involvement.

All of this raises serious questions that must be investigated. However, the Committees are preventing anyone, including the minority, from looking into these critically important matters. At the very least, Chairman Schiff must immediately make available all documents relating to these issues. After all, the American people have a right to know about the Committees' own actions with respect to these matters.

* * *

Given that your inquiry lacks any legitimate constitutional foundation, any pretense of fairness, or even the most elementary due process protections, the Executive Branch cannot be expected to participate in it. Because participating in this inquiry under the current unconstitutional posture would inflict lasting institutional harm on the Executive Branch and lasting damage to the separation of powers, you have left the President no choice. Consistent with the duties of the President of the United States, and in particular his obligation to preserve the rights of future occupants of his office, President Trump cannot permit his Administration to participate in this partisan inquiry under these circumstances.

Your recent letter to the Acting White House Chief of Staff argues that "[e]ven if an impeachment inquiry were not underway," the Oversight Committee may seek this information

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[25] Interview with Chairman Adam Schiff, MSNBC (Sept. 17, 2019).

[26] Julian Barnes, et al., *Schiff Got Early Account of Accusations as Whistle-Blower's Concerns Grew*, N.Y. Times (Oct. 2, 2019).

[27] Glenn Kessler, *Schiff's False Claim His Committee Had Not Spoken to the Whistleblower*, Wash. Post (Oct. 4, 2019).

as a matter of the established oversight process.[28] Respectfully, the Committees cannot have it both ways. The letter comes from the Chairmen of three different Committees, it transmits a subpoena "[p]ursuant to the House of Representatives' impeachment inquiry," it recites that the documents will "be collected as part of the House's impeachment inquiry," and it asserts that the documents will be "shared among the Committees, as well as with the Committee on the Judiciary as appropriate."[29] The letter is in no way directed at collecting information in aid of legislation, and you simply cannot expect to rely on oversight authority to gather information for an unauthorized impeachment inquiry that conflicts with all historical precedent and rides roughshod over due process and the separation of powers. 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 bipartisan constitutional protections and a respect for the separation of powers enshrined in our Constitution.

For the foregoing reasons, the President cannot allow your constitutionally illegitimate proceedings to distract him and those in the Executive Branch from their work on behalf of the American people. The President has a country to lead. The American people elected him to do this job, and he remains focused on fulfilling his promises to the American people. He has important work that he must continue on their behalf, both at home and around the world, including continuing strong economic growth, extending historically low levels of unemployment, negotiating trade deals, fixing our broken immigration system, lowering prescription drug prices, and addressing mass shooting violence. We hope that, in light of the many deficiencies we have identified in your proceedings, you will abandon the current invalid efforts to pursue an impeachment inquiry and join the President in focusing on the many important goals that matter to the American people.

Sincerely,

Pat A. Cipollone
Counsel to the President

cc: Hon. Kevin McCarthy, Minority Leader, House of Representatives
Hon. Michael McCaul, Ranking Member, House Committee on Foreign Affairs
Hon. Devin Nunes, Ranking Member, House Permanent Select Committee on Intelligence
Hon. Jim Jordan, Ranking Member, House Committee on Oversight and Reform

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[28] Letter from Elijah E. Cummings, Chairman, House Committee on Oversight and Government Reform, et al., to John Michael Mulvaney, Acting Chief of Staff to the President 3 (Oct. 4, 2019).

[29] *Id.* at 1.

U.S. Department of Justice
Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

November 1, 2019

Pat A. Cipollone
Counsel to the President
Washington, D.C. 20500

Dear Mr. Cipollone:

On October 31, 2019, the House of Representatives voted to authorize certain committees to investigate "whether sufficient grounds exist for the House of Representatives to exercise its Constitutional power to impeach" President Trump. H.R. Res. 660, 116th Cong. (2019). Although the House resolution directs the House Permanent Select Committee on Intelligence ("HPSCI") to conduct "open and transparent investigative proceedings" in connection with this inquiry, *id.* § 2 (title), we understand that HPSCI nonetheless insists that executive branch employees appear next week for closed-door depositions from which agency counsel would be excluded.

You have asked whether HPSCI or the other committees involved in the impeachment inquiry may validly compel an executive branch witness to appear at such depositions. The HPSCI impeachment inquiry seeks information concerning presidential communications, internal executive branch deliberations, and diplomatic communications arising in connection with U.S. foreign relations with Ukraine. As a result, the depositions seek testimony from executive branch employees concerning matters potentially protected by executive privilege. Consistent with our prior advice, we conclude that the congressional committees participating in the impeachment investigation authorized by the resolution may not validly require an executive branch witness to appear without the assistance of agency counsel in connection with such depositions. *See Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees*, 43 Op. O.L.C. __, *7–13 (May 23, 2019) ("*Exclusion of Agency Counsel*"). HPSCI could address this separation of powers problem by allowing agency counsel to assist the employee during the deposition. Should the committee not do so, however, a subpoena purporting to require a witness to appear without such assistance would be invalid and not subject to civil or criminal enforcement. *See id.* at *13–14.

We have previously advised, in the context of legislative oversight investigations, that Congress may not prohibit agency counsel from accompanying employees called to testify about matters that potentially involve information protected by executive privilege. As we explained, "the exclusion of agency counsel impairs the President's ability to exercise his constitutional authority to control privileged information of the Executive Branch" and "his constitutional authority to supervise the Executive Branch's interactions with Congress." *Id.* at *8. The President has the constitutional authority to protect privileged information from disclosure in response to congressional investigations, and to do so effectively, he must be able to designate a representative to protect this interest at congressional depositions. *Id.* at *8–11. In addition, the

President has the constitutional authority to control the activities of subordinate officials within the Executive Branch, which includes the power to control communications with, and information provided to, Congress on the Executive Branch's behalf. *Id.* at *11–13. Adherence to these principles ensures that executive branch employees called to testify before Congress do not improperly disclose privileged information, and that the information provided is consistent with the scope of Congress's investigative authority.

We believe that these same principles apply to a congressional committee's effort to compel the testimony of an executive branch official in an impeachment inquiry. Executive privilege protects the confidentiality and integrity of sensitive executive branch information absent a showing of sufficient legislative "need" in the context of an oversight investigation. *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 730–31 (D.C. Cir. 1974) (en banc). The privilege has also been recognized to protect information in connection with other kinds of proceedings, including criminal trials and grand-jury investigations.

As the Supreme Court recognized in *United States v. Nixon*, 418 U.S. 683 (1974), executive privilege "is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Id.* at 708. While the privilege may yield to the "legitimate needs of the judicial process" in connection with a criminal trial, the Court recognized that "it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch." *Id.* at 707. The D.C. Circuit has applied the same principle in connection with a grand-jury investigation, observing that privileged presidential communications "should not be treated as just another source of information" in such an inquiry, but should instead be provided to a grand jury only upon a demonstration of "why it is likely that evidence contained in presidential communications is important to the ongoing grand jury investigation and why this evidence is not available from another source." *In re Sealed Case*, 121 F.3d 729, 755–57 (D.C. Cir. 1997).

We believe that a congressional committee must likewise make a showing of need that is sufficient to overcome the privilege in connection with an impeachment inquiry. Although no judicial decision is directly on point, the D.C. Circuit suggested as much in *Senate Select Committee*, in which it contrasted the Senate committee's "oversight need" in support of "legislative tasks" with "the responsibility of a grand jury, *or any institution engaged in like functions*." 498 F.2d at 732 (emphasis added). The latter phrase referred to the House Committee on the Judiciary, which had "begun an inquiry into presidential impeachment." *Id.* The D.C. Circuit's recognition that an impeachment inquiry is similar to a grand-jury investigation implies the requirement of a similar showing of need. We need not settle on the precise standard in order to address your current inquiry, because we think it sufficient to recognize that a qualified executive privilege remains available, and a congressional committee must therefore make some showing of need to overcome the privilege. This conclusion follows from the Supreme Court's recognition that a dispute involving information subject to executive privilege should be resolved in a manner that "preserves the essential functions of each branch." *Nixon*, 418 U.S. at 707.[1]

[1] In a 1974 effort to summarize the then-available precedents, a "working paper prepared by the staff" of this Office observed that "[p]recedents relating to the subject of executive privilege in presidential impeachment are

While HPSCI may be able to establish an interest justifying its requests for information, the Executive Branch also has legitimate interests in confidentiality, and the resolution of these competing interests requires a careful balancing of each branch's need in the context of the particular information sought. *See United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977) ("[E]ach branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation."). Although HPSCI is willing to allow witnesses to appear with *personal* counsel, the accommodation process presupposes participation by appropriate representatives of the Executive Branch, which cannot occur when a committee seeks to exclude *agency* counsel from the room. *See Exclusion of Agency Counsel*, 43 Op. O.L.C. at *17 (explaining the differences between private counsel's and agency counsel's obligations and abilities). Accordingly, where, as here, a committee deposition is likely to inquire into privileged communications, the committee may not validly prevent an executive branch witness from receiving the assistance of agency counsel. *See id.* at *7–13.

Because the committee may not bar agency counsel from assisting an executive branch witness without contravening the legitimate prerogatives of the Executive Branch, a HPSCI subpoena requiring such a result would exceed the committee's lawful authority and thus could not be enforced. As we concluded in the oversight context, "it would be unconstitutional to enforce a subpoena against an agency employee who declined to appear before Congress, at the agency's direction, because the committee would not permit an agency representative to accompany him." *Id.* at *14. This conclusion followed from many earlier precedents of this Office, which recognized that "the Constitution does not permit Congress to make it a crime for an official to assist the President in asserting a constitutional privilege that is an integral part of the President's responsibilities under the Constitution." *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 140 (1984).[2] An executive branch employee does not violate the criminal contempt-of-

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meager, confused and inconclusive." Office of Legal Counsel, U.S. Dep't of Justice, *Legal Aspects of Impeachment: An Overview* app. 3, at 1 (Feb. 1974). Where executive branch officials have addressed the issue, they have typically done so outside the context of a particular impeachment inquiry. While they have sometimes acknowledged that Congress's interest in information in connection with impeachment may be stronger than in the oversight context, they have not identified a consistent standard for evaluating such requests. *See id.* at 6–15, 22–32 (describing statements of past Presidents and Attorneys General); *see also, e.g.*, *Assertion of Executive Privilege by the Chairman of the Atomic Energy Commission*, 1 Op. O.L.C. Supp. 468, 485 (1956) ("Even in [impeachment] there is no precedent to the effect that the executive privilege cannot validly be invoked."); *Position of the Executive Department Regarding Investigative Reports*, 40 Op. Att'y Gen. 45, 51 (1941) (identifying impeachment proceedings as a situation in which "the public interest" can justify disclosure of "pertinent" information "for the good of the administration of justice"). Subsequent judicial decisions, as discussed above, are consistent with our recognition that a qualified privilege applies in the context of an impeachment investigation, just as it does in a grand-jury investigation.

[2] *See also Testimonial Immunity Before Congress of the Former Counsel to the President*, 43 Op. O.L.C. __, *20 (May 20, 2019) ("The constitutional separation of powers bars Congress from exercising its inherent contempt power in the face of a presidential assertion of executive privilege."); *Whether the Department of Justice May Prosecute White House Officials for Contempt of Congress*, 32 Op. O.L.C. 65, 65–69 (2008) (concluding that the Department cannot take "prosecutorial action, with respect to current or former White House officials who . . . declined to appear to testify, in response to subpoenas from a congressional committee, based on the President's assertion of executive privilege"); *Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350, 356 (1995) ("the criminal contempt of Congress statute does not apply to the President or presidential subordinates who assert executive privilege").

Congress statute by declining to appear before a congressional committee based upon an instruction to protect the confidentiality interests of the Executive Branch and the separation of powers. HPSCI, of course, may readily avoid this problem by allowing the employee to receive the assistance of agency counsel during the deposition.

You have also asked whether the House's adoption of a resolution authorizing an impeachment inquiry would have any effect on existing subpoenas. As we have previously advised you, prior to October 31, 2019, the House had not vested any committee in the current Congress with the authority to issue subpoenas in connection with an impeachment inquiry. As a result, subpoenas issued before that date purporting to be "pursuant to" an impeachment inquiry were not properly authorized. Although House Resolution 660 "direct[s]" HPSCI and other committees to "continue their ongoing investigations," it does not purport to ratify any previously issued subpoena. Accordingly, while the Executive Branch may, and regularly does, accommodate congressional requests for information in the absence of a subpoena, the relevant committees would have to issue new subpoenas to impose any compulsory effect on recipients.

Please let us know if we may be of further assistance.

Steven A. Engel
Assistant Attorney General