

Congress of the United States
Washington, DC 20515

January 21, 2020

Pat A. Cipollone
Counsel to the President
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20002

Dear Mr. Cipollone:

In preparation for the trial of Donald J. Trump before the Senate, we write to notify you that evidence received by the House of Representatives during its impeachment inquiry indicates that you are a material witness to the charges in both Articles of Impeachment for which President Trump now faces trial.

The first Article of Impeachment charges the President with engaging in a scheme to withhold vital American military and diplomatic assistance to pressure the government of Ukraine to announce it would open sham investigations to help President Trump's reelection. The second Article of Impeachment charges President Trump with obstructing the impeachment inquiry in the House of Representatives that followed. Evidence indicates that, at a minimum, you have detailed knowledge of the facts regarding the first Article and played an instrumental role in the conduct charged in the second Article. The ethical rules generally preclude a lawyer from acting as an advocate at a trial in which he is likely also a necessary witness. *See e.g.*, ABA Model Rule of Professional Conduct 3.7; D.C. Rule of Professional Conduct 3.7.¹ As the Supreme Court has observed, "tradition, as well as the ethics of our profession, generally instruct counsel to avoid the risks associated with participating as both advocate and witness in the same proceeding."²

These risks are so serious that they can require a lawyer's disqualification.³ Most importantly, "when one individual assumes the role of both advocate and witness it may so blur

¹ Specifically, Rule 3.7(a) of the Rules of Professional Conduct for the District of Columbia states that a "lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness," providing for limited exceptions where, *inter alia*, the lawyer's factual testimony relates only to uncontested issues of fact or where disqualification "would work substantial hardship on the client."

² *Kalina v. Fletcher*, 522 U.S. 118, 130 (1997).

³ *See, e.g.*, 3 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING, & ORIN S. KERR, CRIMINAL PROCEDURE §11.9(c) (4th ed.).

the line between argument and evidence that the [factfinder's] ability to find facts is undermined.”⁴

Even if the advocate does not take the witness stand, his status as an unsworn witness risks seriously damaging the fairness of the trial. As one court has explained: “The problem arises when an attorney was a participant in events to be explored at trial. In that circumstance the attorney might convey first-hand knowledge of the events without having to swear an oath or be subject to cross examination.”⁵ Importantly, the risks of an attorney serving as an unsworn witness have little to do with whether his representation creates a conflict of interest. To the contrary: “An attorney providing ‘unsworn testimony’ is not at odds with his client—there is no conflict of interest. Rather, the detriment is to the [opposing party], since the defendant gains an unfair advantage, and to the court, since the factfinding process is impaired.”⁶

These issues are directly implicated by your involvement in the events underlying the Articles of Impeachment. As to the first Article, multiple witnesses have testified that they raised concerns about the President’s scheme with John Eisenberg, the Deputy Counsel to the President for National Security Affairs. Mr. Eisenberg reports directly to you in your capacity as White House Counsel.

One part of this scheme involved conveying the terms of President Trump’s solicitation to Ukrainian officials. Multiple witnesses testified that they reported these incidents to Mr. Eisenberg, sometimes repeatedly, over a course of several months. On July 10, 2019, Dr. Fiona Hill, the Deputy Assistant to the President and Senior Director for European and Russian Affairs, reported one such incident to Mr. Eisenberg involving a meeting between Ambassador Gordon Sondland and several Ukrainian officials. According to Dr. Hill, Mr. Eisenberg became “very concerned” when he learned that Rudolph Giuliani, the President’s personal lawyer, was involved.⁷ Likewise, Lt. Col. Alexander Vindman told House investigators that he reported the same July 10, 2019 incident to Mr. Eisenberg.⁸ Timothy Morrison, who succeeded Dr. Hill on the National Security Council, testified that he reported two additional incidents to Mr. Eisenberg in early September 2019.⁹

⁴ *Ramey v. Dist. 141, Int’l Ass’n of Machinists & Aerospace Workers*, 378 F.3d 269, 283 (2d Cir. 2004) (internal quotation marks and citations omitted).

⁵ *United States v. Evanson*, 584 F.3d 904, 909 (10th Cir. 2009) (internal quotation marks and citations omitted).

⁶ *Id.*

⁷ Hill Dep. Tr. at 159.

⁸ Vivian Salama, *Top National Security Council Lawyer Fielded Officials’ Ukraine Complaints*, WALL ST. J., (Nov. 18, 2019), https://www.wsj.com/articles/top-national-security-council-lawyer-fielded-officials-ukraine-complaints-11574116916?mod=article_inline.

⁹ Morrison Dep. Tr. at 182; Morrison Dep. Tr. at 237-238.

Lt. Col. Vindman and Mr. Morrison also both immediately went to Mr. Eisenberg to report President Trump's July 25, 2019 call with President Zelensky.¹⁰

Mr. Eisenberg appears to have informed you of at least some, if not all, of these incidents. Dr. Hill testified that after she spoke with Mr. Eisenberg about her concerns regarding Ambassador Sondland's July 10, 2019 meeting, she understood that Mr. Eisenberg later discussed the issue with you as his reporting authority.¹¹ Public reporting indicates that Mr. Eisenberg also shared Lt. Col Vindman's concerns with you.¹²

Part of President Trump's scheme involved unlawfully withholding federal security assistance until the Ukrainians agreed to his demands. Government officials repeatedly raised concerns about the legality of freezing these funds.¹³ House investigators received testimony that two OMB officials resigned in part over concerns about the freeze, including an attorney in the Office of General Counsel.¹⁴ As you know, the Government Accountability Office (GAO) recently concluded that the Trump Administration violated the Impoundment Control Act by withholding the security assistance after it had already been appropriated by Congress.¹⁵ Your office declined to cooperate with GAO's inquiry.¹⁶

Your office was also directly involved in potential efforts to conceal President Trump's scheme from Congress and the public. Mr. Morrison and Lt. Col. Vindman both testified that Mr. Eisenberg authorized restricting access to the summary of the July 25, 2019 call, which was sequestered on a server reserved for highly classified information.¹⁷

Furthermore, there is evidence that you were directly involved in briefing President Trump about the whistleblower complaint submitted to the Inspector General for the Intelligence Community and in the decision to withhold that complaint from Congress in violation of the law.

¹⁰ Vindman Dep. Tr. at 96, 153; Volker-Morrison Hearing Tr. at 37-38.

¹¹ Hill Dep. Tr. at 269-70.

¹² Vivian Salama, *Top National Security Council Lawyer Fielded Officials' Ukraine Complaints*, WALL ST. J. (Nov. 18, 2019), https://www.wsj.com/articles/top-national-security-council-lawyer-fielded-officials-ukraine-complaints-11574116916?mod=article_inline.

¹³ Kate Brannen, *Exclusive: Unredacted Ukraine Documents Reveal Extent of Pentagon's Legal Concerns*, Just Security (Jan. 2, 2020), <https://www.justsecurity.org/67863/exclusive-unredacted-ukraine-documents-reveal-extent-of-pentagons-legal-concerns/>.

¹⁴ Sandy Dep. Tr. at 152.

¹⁵ U.S. GOV'T ACCOUNTABILITY OFF., B-331564, OFFICE OF MANAGEMENT AND BUDGET – WITHHOLDING OF UKRAINE SECURITY ASSISTANCE (Jan. 16, 2020), <https://www.gao.gov/assets/710/703909.pdf>.

¹⁶ *Id.* at 2.

¹⁷ Vindman Dep. Tr. at 123-24; Morrison Dep. Tr. at 121-122.

According to public reporting, you and Mr. Eisenberg briefed the President about the complaint in August and decided that the complaint could be withheld from Congress.¹⁸

With regard to the second Article of Impeachment charging obstruction of Congress, you are the signatory of the White House's October 8, 2019 letter announcing Mr. Trump's refusal to cooperate with all aspects of the House's impeachment inquiry.¹⁹ You also authored multiple letters in which you directed witnesses subpoenaed by Committees of the House to refuse to testify.²⁰ Furthermore, given your authorship of the October 8, 2019 letter and the nature of your role as Counsel to the President, there is reason to believe you were involved in other actions implementing the President's directive to obstruct the House's impeachment inquiry.

In light of your extensive knowledge of these key events, your personal representation of President Trump threatens to undermine the integrity of the pending trial. You may be a material witness to the charges against President Trump even though you are also his advocate. As one court has explained, "a lawyer's serving in a dual role of witness and advocate is unseemly" and jeopardizes "the public interest in continued respect for the legal profession."²¹ This ethical rule is "routinely enforce[d]" because "a violation of the advocate-witness rule infects the truth-finding process by confusing the fact-finder, whether judge or jury."²² When an attorney serves as both an advocate and a witness, there is a substantial risk of "introduction of . . . impermissible testimony from counsel table."²³

For all these reasons, to the extent you plan to serve as the President's legal advocate during the Senate trial proceedings, at a minimum, you must disclose all facts and information as

¹⁸ See Michael C. Bender, *Trump Was Briefed on Whistleblower Complaint Before Ukraine Aid Released*, WALL ST. J. (Nov. 26, 2019), <https://www.wsj.com/articles/trump-was-briefed-on-whistleblower-complaint-before-ukraine-aid-released-11574827150>; Michael S. Schmidt, Julian E. Barnes & Maggie Haberman, *Trump Knew of Whistleblower Complaint When He Released Aid to Ukraine*, N.Y. TIMES (Nov. 26, 2019), <https://www.nytimes.com/2019/11/26/us/politics/trump-whistle-blower-complaint-ukraine.html>.

¹⁹ Letter from Pat A. Cipollone, Counsel to the President, to Nancy Pelosi, Speaker of the House, et al. (Oct. 8, 2019), <https://perma.cc/5P57-773X>.

²⁰ See, e.g., Letter from Pat A. Cipollone, Counsel to the President, to William Pittard (Nov. 8, 2019) (directing Acting Chief of Staff Mick Mulvaney to defy his subpoena for testimony); Letter from Pat A. Cipollone, Counsel to the President, to William Burck (Nov. 3, 2019) (directing Mr. Eisenberg to defy his subpoena for testimony).

²¹ *Rosen v. Nat'l Labor Relations Bd.*, 735 F.2d 564, 574-75 (D.C. Cir. 1984).

²² *Queen v. Schultz*, No. 11-cv-871, 2015 WL 13680823, at *1 (D.D.C. May 7, 2015) (quoting LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROF'L RESPONSIBILITY § 3.7-5 (2013-2014 ed.)); see also *S.S. v. D.M.*, 597 A.2d 870, 877 (D.C. 1991) (having counsel serve as "both attorney and witness . . . may prejudice the opposing party, when the attorney's testimony is given undue weight by the fact-finder as a result of his dual role"); *Headfirst Baseball LLC v. Elwood*, 999 F. Supp. 2d 199, 213-14 (D.D.C. 2013) ("The plain language of Rule 3.7(a) suggests that [attorneys] are precluded from serving as trial counsel . . . , because the nature of their involvement in the events preceding th[e] litigation is in dispute.").

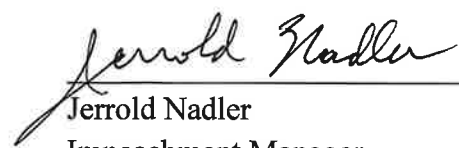
²³ Restatement (Third) of the Law Governing Lawyers § 108 (2000).

to which you have first-hand knowledge that will be at issue in connection with evidence you present or arguments you make in your role as the President's legal advocate so that the Senate and Chief Justice can be apprised of any potential ethical issues, conflicts, or biases.

Sincerely,



Adam Schiff
Lead Impeachment Manager



Jerrold Nadler
Impeachment Manager



Zoe Lofgren
Impeachment Manager



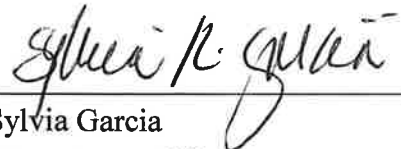
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