Congress of the United States
House of Representatives
Washington, DC 20515

February 21, 2019

Pat A. Cipollone
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1600 Pennsylvania Avenue, N.W.
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The Honorable William P. Barr
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Mr. Cipollone and Attorney General Barr:

This letter is a response to the Department of Justice letter I received on February 7, 2019 concerning executive privilege and related issues.[1] I am writing to you in order to express my strong concerns with some of the claims made in that letter, and to ask that you provide the Committee with some clarification about a legal position that departs from decades of precedent.

As you well know, the House Committee on the Judiciary has a constitutional responsibility to conduct oversight of the Department of Justice. Among the questions of utmost concern to the Committee is whether President Trump and other White House officials may have violated longstanding administration policies limiting communications with the Department of Justice relating to law enforcement matters or may have otherwise engaged in improper interference in the work of the Department. To seek answers, the Committee has requested—and will continue to request—information about communications between Department officials and the White House.

The importance of these questions is even more salient in light of a recent *New York Times* article describing a two-year effort by the White House to interfere with and possibly obstruct investigations concerning the President and his associates. Among other things, the article describes how the President contacted then Acting Attorney General Whitaker to inquire "whether Geoffrey S. Berman, the United States attorney for the Southern District of New York

[1] A copy of the letter (referred to for citation purposes as the "Boyd Letter") is enclosed.

and a Trump ally, could be put in charge of the widening investigation" involving "President Trump's role in silencing women with hush payments during the 2016 campaign" even though Mr. Berman had previously recused himself from the matter.[2]

The Committee has an obligation to ask the Department about communications like these. The Committee is also aware that, in extraordinary circumstances, the President may choose to assert executive privilege in order to protect the secrecy of those communications. However, the February 7 letter I received from the Department's Office of Legislative Affairs expresses positions that appear fundamentally incompatible with established law and with the executive branch's own policies.

The Department's letter, signed by Assistant Attorney General Stephen Boyd, was sent to me the day before former Acting Attorney General Matthew Whitaker testified before the Committee. It responded to a letter that I had written to Mr. Whitaker on January 22, 2019. In my letter, I described specific questions that the Committee planned to ask Mr. Whitaker about his communications with President Trump and other White House officials. My intention was to provide Mr. Whitaker with ample time to review these questions and to determine, after consultation with Mr. Cipollone, whether the President in fact wished to invoke executive privilege and preclude Mr. Whitaker from answering.

I had hoped that Mr. Whitaker would follow the executive branch's own policies regarding the assertion of executive privilege, as outlined in a 1982 memorandum by President Reagan ("the Reagan Memorandum").[3] The Reagan Memorandum, which administrations of both parties have followed for decades, outlines a clear process for asserting executive privilege: first, executive branch officials must comply with congressional requests for information "as promptly and as fully as possible, unless it is determined that compliance raises a substantial question of executive privilege"; second, if there is a substantial question about executive privilege, the head of the relevant department must consult with the Attorney General and the White House Counsel; third, these officials can either waive privilege or present the issue to the President; and fourth, the President—and only the President—must ultimately authorize any invocation of executive privilege. Consistent with that policy, I asked that Mr. Whitaker notify me no later than 48 hours before the February 8 hearing whether the President had chosen to invoke executive privilege with respect to any particular questions.

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[2] Mark Mazzetti et al., *Intimidation, Pressure, and Humiliation: Inside Trump's Two-Year War on the Investigations Encircling Him*, N.Y. TIMES, Feb. 19, 2019.

[3] Mem. from President Ronald Reagan, *Procedures Governing Responses to Congressional Requests for Information* (Nov. 4, 1982); *see also* William P. Barr, Office of Legal Counsel, *Congressional Requests for Confidential Executive Branch Information*, 13 Op. O.L.C. 153, 161 (1989) (describing the Reagan Memorandum as "set[ting] forth the longstanding executive branch policy for this area").

Instead, the Department gave no response to my letter until midday February 7, just hours before Mr. Whitaker's scheduled hearing. The letter indicated that the Department would refuse to obtain a decision from the President about invoking executive privilege in advance of the hearing, and that Mr. Whitaker would nonetheless refuse to answer questions about his communications with the President. The letter cited no legal authority for these dual refusals. Nor—despite characterizing its stance as a "long-standing policy and practice of Executive Branch officials"[4]—did the Department describe any instance in which an administration official refused to answer questions from Congress when the President has not invoked executive privilege and the official has expressly refused to give the President the opportunity to do so.[5]

The Department's position appears sharply at odds with the Reagan Memorandum's guidance. Rather than placing ultimate responsibility for asserting executive privilege with the President, the Department evidently decided to shield the President from having to invoke privilege at all. Thus, when Mr. Whitaker ultimately appeared before the Committee the next day, he announced that he would refuse to disclose "information that *may* be subject to executive privilege"[6]—despite having had more than two weeks to determine if the President in fact wished to invoke privilege. The Department's stance and Mr. Whitaker's conduct suggest a disturbing conclusion: that the Department is determined to allow Trump Administration officials to stonewall when asked about their communications with the President or other White House officials, no matter how much time those officials are given to resolve potential privilege issues. Indeed, the Department's letter presumed to inform me that questions about such communications do not constitute "appropriate oversight."[7]

I emphatically disagree. The questions I outlined in my January 22 letter pertain to the core integrity of the Justice Department. Any efforts by the President to engage in improper communications with the Department or otherwise interfere in ongoing criminal investigations in order to protect his personal interests—and any efforts by Mr. Whitaker to assist him in doing so—would flatly contradict the Department's core mission and are potentially unlawful. In ordinary circumstances, no Attorney General would need to be asked such questions. In any circumstance, the Attorney General should be expected to answer with a prompt and unequivocal "No."

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[4] Boyd Letter at 2.

[5] The letter misleadingly quotes a *New York Times* article for the proposition that "previous executive branch officials of both parties have withheld information requested by Congress in the same manner." Boyd Letter at 2. That article explained that "[i]nternal executive branch information is *not* legally shielded from Congress by default; rather, the president chooses whether to invoke it in a particular instance." Charlie Savage, *Explaining Executive Privilege and Sessions's Refusal to Answer Questions*, N.Y. TIMES, June 15, 2017 (emphasis added).

[6] *Oversight of the Department of Justice*, Hrg. before the H. Comm. on the Judiciary, Feb. 8, 2019 (opening statement of Acting Attorney General Whitaker).

[7] Boyd Letter at 2.

The Department's letter also mistakenly assumes that any and all communications between Mr. Whitaker and the President would be subject to executive privilege. Yet the Department itself has concluded that executive privilege "should not be invoked to conceal evidence of wrongdoing or criminality on the part of executive officers."[8] In fact, the Department has previously recommended that officials responding to a congressional request for a large set of documents "review[] [the documents] for any evidence of misconduct which would render the assertion of privilege inappropriate."[9] Likewise, it would be fundamentally wrong for the President to assert privilege with respect to any conversation between himself and Mr. Whitaker that involved improper and potentially unlawful efforts to interfere with ongoing criminal investigations. After all, it can hardly be "fundamental to the operation of Government"[10] for the President to be assured of confidentiality while engaging in illegal activities.

I was further confounded by the Department's reaction to the Committee's decision to authorize the issuance of a subpoena for Mr. Whitaker's appearance. In the course of five pages, the Department appeared to take three different positions. First, the letter contended that a subpoena was unnecessary because Mr. Whitaker had already agreed to appear voluntarily.[11] Second, the Department appeared to state that it would refuse to ask the President to make a determination about whether to assert executive privilege *unless and until* the Committee issued a subpoena.[12] Third, the Department gave the head-spinning ultimatum that Mr. Whitaker would refuse to attend the hearing scheduled for the next day unless the Committee promised *not* to subpoena him.[13]

Needless to say, the Department's contradictory positions will leave the Committee with difficult choices going forward. If the Department is determined to avoid clarifying its stances regarding executive privilege absent a subpoena—and if Department officials persist in threatening at the eleventh hour to cancel their voluntary appearances when related issues arise—then the Committee may have little choice but to resort more frequently to compulsory process going forward.

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[8] Robert B. Shanks, Office of Legal Counsel, *Congressional Subpoenas of Department of Justice Investigative Files*, 8 Op. O.L.C. 252, 267 (1984).

[9] *Id.*

[10] *United States v. Nixon*, 418 U.S. 683, 708 (1974).

[11] Boyd Letter at 1.

[12] *Id.* at 4-5.

[13] *Id.* at 5.

Finally, the Department's letter accused the Committee of having failed to engage in adequate negotiations before pressing the Department for a decision about whether or not the President planned to invoke executive privilege. Of course, as the Reagan Memorandum notes, disputes between Congress and the executive branch regarding potentially privileged materials can and should be settled through an informal accommodation process, where possible. The Committee is well aware of the obligation of both the executive and legislative branches to engage in good-faith negotiations on such matters, as the U.S. Court of Appeals for the D.C. Circuit explained in *United States v. AT&T*.[14] It was precisely in that spirit that my staff had begun communicating with Department staff in November 2018 about arranging a hearing with Mr. Whitaker.

Unfortunately, for several weeks in late 2018 and early 2019, Department staff took the position that Mr. Whitaker might refuse to appear for a hearing at all because of the government shutdown. This threat was despite the Department's own prior conclusion that "[t]he Department's officers and employees may . . . participate in a hearing despite an appropriations lapse" so long as Congress has enacted its own funding authorization "and the Department's participation is necessary for the hearing to be effective."[15] When at last Mr. Whitaker committed in mid-January to a date for his appearance, I sent him a letter memorializing that agreement. One week later, I followed up with my letter describing anticipated questions. I did so based in part on Trump Administration officials' own stated rationales for their previous refusals to discuss conversations with the President. For example, former Attorney General Sessions described his refusal to answer questions about conversations with President Trump as "protecting the President's constitutional right [to invoke privilege] by not giving it away *before he has a chance to view it and weigh it*."[16]

Mr. Whitaker received my questions 17 days before his hearing. At the hearing, he acknowledged that he had never shared my questions with the President or even with anyone in the White House.[17] Had the Department wished to engage in good-faith negotiations, it could have sought accommodations by contacting me or my staff. The Department might have indicated, for example, that Mr. Whitaker could answer some questions while providing legitimate bases for declining to answer others. It could have offered to provide answers in a closed setting. It could, at the very least, have consulted with the White House Counsel in an

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[14] 567 F.2d 121, 128 (D.C. Cir. 1977).

[15] Walter Dellinger, Office of Legal Counsel, *Participation in Congressional Hearings During an Appropriations Lapse*, 19 Op. O.L.C. 301, 303 (1995).

[16] Savage, *supra* note 4 (emphasis added).

[17] *Oversight of the Department of Justice*, Hrg. before the H. Comm. on the Judiciary, Feb. 8, 2019 (exchange with Rep. Cicilline).

effort to identify and narrow potential areas of disagreement.[18] The Department did none of those things. Instead, without apparent irony, it sent its February 7 letter in which it both threatened to cancel the next day's hearing and stated that any disagreements between our two branches should "be resolved through good-faith negotiations."[19]

The Department has failed thus far to engage in those negotiations. Moreover, to the extent the Department is relying on *AT&T* and certain historical precedents as rationales for engaging in months-long delays, it is mistaken. *AT&T* involved a request for hundreds of records and memoranda relating to sensitive national security surveillance practices. As the court noted, the parties had been able to narrow their dispute by substituting some records for others and allowing for certain types of redactions.[20] Likewise, this Committee has worked frequently with the Department to tailor its requests involving large volumes of Department records and to accommodate legitimate concerns raised by the Department about the scope and sensitivity of those documents.

The nature of the information that the Committee sought from Mr. Whitaker is fundamentally different from the information sought in *AT&T* and other similar instances. The Committee has not yet sought voluminous records of Mr. Whitaker's communications or those of individuals with whom he may have been in contact. Rather, we sought honest and direct answers to a tailored series of questions. At bottom, nearly all these questions concern whether the White House has improperly interfered with ongoing investigations into the President and his associates, or has otherwise engaged in improper communications regarding these matters.

* * *

The Committee will continue to exercise its oversight responsibilities going forward, including by holding hearings in which Administration officials will be expected to testify. My good-faith approach for resolving potential privilege issues by providing relevant questions to the witness in advance appears to have been rejected by the Department. As such, I now request that you provide answers to the following questions so that we may address these issues more productively in future hearings:

1. Does the White House or the Department of Justice plan to instruct all Department witnesses to categorically refuse to answer questions about their communications with the President? With anyone at the White House?

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[18] In suggesting these potential steps, I do not intend to indicate that any particular step (absent more context) would have resolved all disagreements.

[19] Boyd Letter at 3.

[20] *See* 567 F.2d at 123-25, 130-32.

a. Does the White House or the Department plan to instruct witnesses from other departments and agencies to categorically refuse to answer questions regarding such communications?

b. Will the Department conduct a review of whether those communications involved wrongdoing or illegality, consistent with its earlier guidance, such that those communications should not be shielded by privilege?

c. What rule or principle explains Mr. Whitaker's willingness to inform the Committee that he "ha[s] not talked to the President of the United States about the special counsel's investigation," but his refusal to say whether he and the President have discussed ongoing cases involving Michael Cohen?[21]

2. If this Committee provides anticipated questions to Department officials in advance of a hearing, will the Department commit to work with the Committee on a good-faith basis to resolve disagreements about which questions the official may answer?

3. Does the Department require the Committee to issue a subpoena in order to seek a determination from the President about whether he will invoke executive privilege? Is that the policy of other departments and agencies as well?

4. The Reagan Memorandum states that department heads, the Attorney General, and the White House Counsel may exercise their discretion to "determine that executive privilege shall not be invoked."[22] Does the Department require the Committee to issue a subpoena in order for officials to determine whether to exercise their discretion to waive privilege? Additionally, please explain the factors that will guide this Administration's exercise of any such discretion.

The Committee anticipates holding hearings with Department and other government witnesses in the near future. As such, please respond no later than March 7, 2019. Alternatively, my staff would be happy to arrange for an in-person briefing to discuss these issues.

Sincerely,

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[21] *Oversight of the Department of Justice*, hearing before the H. Comm. on the Judiciary, Feb. 8, 2019 (exchanges with Chairman Nadler and Rep. Demings).

[22] Reagan Memorandum at 2.

Jerrold Nadler
Chairman
House Committee on the Judiciary

cc: The Hon. Doug Collins
Ranking Member, House Committee on the Judiciary