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ONE HUNDRED SIXTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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May 10, 2019

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

Dear Attorney General Barr:

I write to reply to the Department of Justice's letters sent Tuesday night, May 7, 2019, and Wednesday morning, May 8, 2019, regarding the subpoena that the House Judiciary Committee served on the Department on April 18, 2019. In the middle of the negotiations between the Committee and the Department regarding the outstanding disputes over the subpoena, the Department responded to the Committee's latest counteroffer by putting an end to the negotiations and indicating the Department's intent to request that the President assert executive privilege with respect to all the materials covered by the subpoena.

We are surprised by your precipitous end to our active accommodation discussions. We are concerned that the Department's abrupt shift in negotiating posture and threat to invoke executive privilege if the Committee did not cancel the contempt report markup may have been an 11th hour change of strategy unrelated to the actual negotiations – that seemed to be progressing positively. Instead, that shift appears to reflect the President's declaration that he is "fighting *all* the subpoenas."

Regardless, we note that the full House has not yet taken action on this matter. The Committee stands ready to resume the accommodation process to attempt to reach a compromise.

The Committee's Prior Accommodation Attempts

As you know, we and other Committees have sought to engage the Department in discussions regarding our requests for the unredacted Special Counsel report and the underlying evidence and materials since February, when we first wrote to the Department indicating our expectation that these materials would be made available.¹ We received no response to that letter; nor to our March 25, 2019 letter requesting to begin the negotiation process²; or to our April 1, 2019 letter explaining the basis and legal authority supporting those requests.³ We again offered on April 11 to work together to discuss the Department's production of the unredacted report and underlying evidence, to which no response was provided.⁴ Similarly, in its May 1 letter responding to our subpoena, the Department did not address the Committee's requests for underlying evidence and investigatory materials, which included specific demands for the materials referenced in the Special Counsel's report.

The only attempted accommodation we received from the Department was its April 18, 2019 offer for a few members of Congress and their staff to review certain redacted portions of the report on terms that were unacceptable for the reasons discussed in our April 19 letter.⁵ In that same letter, we again expressed that "we are open to discussing a reasonable accommodation with the Department."

¹ Letter to Hon. William Barr, Attorney General, U.S. Dep't of Justice, from Hon. Jerrold Nadler, Chairman, H. Comm. on the Judiciary; Hon. Adam Schiff, Chairman, H. Permanent Select Comm. on Intelligence; Hon. Elijah Cummings, Chairman, H. Comm. on Oversight and Reform; Hon. Elliot Engel, Chairman, H. Comm. on Foreign Affairs; Hon. Maxine Waters, Chairwoman, H. Comm. on Financial Services; & Hon. Richard Neal, Chairman, H. Comm. on Ways and Means (Feb. 22, 2019).

² Letter from Chairpersons Jerrold Nadler, H Comm. on the Judiciary, Elijah Cummings, H. Comm. on Oversight & Reform, Adam Schiff, H. Perm. Select. Comm. on Intelligence, Maxine Waters, H. Comm. on Fin. Servs., Richard Neal, House Comm. on Ways & Means, and Eliot Engel, H. Comm. on Foreign Affairs, to Att'y Gen. William P. Barr (March 25, 2019).

³ Letter from Chairpersons Jerrold Nadler, H Comm. on the Judiciary, Elijah Cummings, H. Comm. on Oversight & Reform, Adam Schiff, H. Perm. Select. Comm. on Intelligence, Maxine Waters, H. Comm. on Fin. Servs., Richard Neal, House Comm. on Ways & Means, and Eliot Engel, H. Comm. on Foreign Affairs, to Att'y Gen. William P. Barr (April 1, 2019).

⁴ Letter from Speaker of the House Nancy Pelosi, Senate Democratic Leader Charles E. Schumer, House Comm. on the Judiciary Chairman Jerrold Nadler, Senate Comm. on the Judiciary Ranking Member Dianne Feinstein, H. Perm Select Comm. On Intelligence Chairman Adam Schiff, and Senate Select Comm. on Intelligence Comm. Ranking Member Mark Warner (April 11, 2019).

⁵ Letter from Speaker of the House Nancy Pelosi, Senate Democratic Leader Charles E. Schumer, House Comm. on the Judiciary Chairman Jerrold Nadler, Senate Comm. on the Judiciary Ranking Member Dianne Feinstein, H. Perm Select Comm. On Intelligence Chairman Adam Schiff, and Senate Select Comm. on Intelligence Comm. Ranking Member Mark Warner (April 19, 2019).

In light of this history, the Committee sent its May 3, 2019 letter offering for the fifth time in writing to attempt to reach a reasonable accommodation on all of these issues, including production of the referenced evidence and materials, in addition to the other efforts by the Committee to engage with your staff to discuss the issues.⁶ The Committee requested a response by the morning of May 6, 2019, and indicated that it would move to contempt proceedings if the Department did not comply with its subpoena.

The Department did not respond until after the Committee had already noticed a meeting regarding contempt for Wednesday, May 8, 2019 to address the Attorney General's failure to produce any of the materials compelled by the subpoena (other than the redacted report that was released to the public on April 18). With respect to the underlying evidence and investigatory materials, the Department's response was only an offer to meet for a discussion.

The Committee's Most Recent Accommodation Efforts

Contrary to the description in your May 8 letter, the Committee responded to your offer that would have allowed only 12 of the 535 members of Congress to review certain redacted portions of the report. Taking into account the Department's concerns, we reduced our original request from access by all the members of Congress to the original 12 members offered by the Department plus the other members of the Judiciary and Intelligence committees (this offer was meant as an initial proposal to allow the most immediately interested Members to see the "less redacted" version of the report quickly so that more informed decisions could next be made by the House on how to proceed thereafter to appropriate wider access by the House). These are the two committees that even the Department recognizes have a special need to review the report. In addition, although the Committee has yet to receive a single page of the underlying evidence and materials requested, the Committee also agreed to postpone the contempt resolution markup if the Department simply agreed to discuss producing only the underlying evidence and materials referenced in the report that are a priority for our Committee under item two of the subpoena. Rather than responding to the Committee's counteroffer Tuesday afternoon, the Department abruptly cut off all discussions at 10 p.m. on May 7 and made the threat of a blanket assertion of executive privilege, which was executed by the President the following morning.

The Committee's Willingness to Engage in Further Accommodation Efforts

The President's recent declaration that he is "fighting *all* the subpoenas" issued by Congress raises concerns that the Department abruptly terminated the constitutionally mandated accommodation process because of the unprecedented posture by the President to refuse

⁶ The Speaker of House, Nancy Pelosi, also wrote a letter to the Attorney General on May 1, 2019, seeking to encourage further dialogue and mutually acceptable accommodations.

compliance with any congressional subpoena or investigation.⁷ Nevertheless, the Committee continues to be willing to have further discussions to see if an acceptable accommodation can be reached.

While the Committee moved to a markup of a contempt report on Wednesday, a House vote on this matter has not yet been scheduled, allowing ample time for further negotiations if the Department has any interest in engaging in an accommodation process. As my staff has repeatedly communicated to yours, the door is still open for the Department to present us with a reasonable counteroffer to our most recent offer of May 6, or to otherwise continue meaningful discussions.

With regard to the specific issues raised by the Department's May 7 letter, the concerns expressed are difficult to square with the Department's previously expressed desire to attempt to reach an accommodation regarding the subpoena.

First, as to the underlying materials and evidence, we offered in our May 3 letter, as well as in our April 18 subpoena itself, to prioritize a specific, defined set of underlying investigative and evidentiary materials referenced in the report for immediate production. As we previously noted, these materials are documents that are publicly cited and described in the Mueller report, and there can be no question about the Committee's need for and right to these documents in order to independently evaluate the facts that Special Counsel Mueller uncovered and fulfill our legislative, oversight and constitutional duties. While on May 7 the Department indicated it was prepared to discuss this offer, the Department has not yet produced or indicated a willingness to produce any of the underlying evidence or materials. Our offer stands to limit our request for underlying evidence to those materials referenced in the report and to prioritize a discrete and readily identifiable set of the documents so referenced in the report – such as witness interviews reports and contemporaneous notes taken by witnesses of relevant events – if the Department is ready to resume the accommodation process.

Second, as to redacted portions of the report that are not subject to Federal Rule of Criminal Procedure 6(e), the Committee remains willing to negotiate a reasonable accommodation with the Department. Congress has ample means of providing for safe storage of these materials just as it is routinely entrusted with the responsibility to protect classified and other sensitive information. As you know, the Department's proposed conditions are a departure from accommodations made by previous Attorneys General of both parties (as is our proposed compromise). As recently as last Congress, the Department produced hundreds of thousands of pages of sensitive investigative materials pertaining to its investigation of Hillary Clinton, as well as much other material relating to the then-ongoing Russia investigation. That production

⁷ Charlie Savage, *Trump Vows Stonewall of 'All' House Subpoenas*, N.Y. Times, Apr. 24, 2019 (emphasis added).

included highly classified material, notes from FBI interviews, internal text messages, and law enforcement memoranda.

Despite the Department's departure from that precedent, the Committee has nevertheless offered to limit, as an initial matter, review of redacted portions of the report to the Judiciary and Intelligence Committees and appropriate staff, subject to the condition that the Department has insisted on – that they cannot discuss what they have seen with anyone else (except that the Committee has requested the ability for counsel to share the materials with a court under seal). The Committee remains willing to accept this compromise—concurrent with an agreement to produce materials referenced in the report—and we urge you to reconsider it.

Third, we do not understand the Department's claim that working with the Committee to seek a court order permitting disclosure of materials in the report that are subject to Rule 6(e) would "force the Department to ignore existing law." We have a fundamental disagreement about the Committee's rights under the law to these materials; and, in any event, the Committee has never asked the Department to do anything contrary to law. Regardless, the Committee remains willing to discuss these issues with the Department. Absent an agreement, we would seek a court order permitting the Committee to receive those portions of the report redacted on these grounds and related underlying material.

Importantly, the dispute over the redactions on Rule 6(e) grounds provides no basis for the Department to refuse to produce *any* of the evidence and investigatory materials required by the subpoena. In fact, if the Department had engaged in a good faith accommodation process and produced the limited set of documents and materials prioritized by the Committee, other than those for which the Department believed it could not because of Rule 6(e) or a court order, it would not have been necessary to begin the contempt process.

The President's Blanket Assertions

The President's blanket executive privilege assertion over every document responsive to the subpoena appears to be part and parcel of the President's unprecedented declaration that he will fight all congressional subpoenas, regardless of the legal merits or constitutional requirements. The President's pronouncement amounts to a direct assault on the constitutional order and on Congress's constitutional, oversight and legislative interest with regard to the President and his Administration.

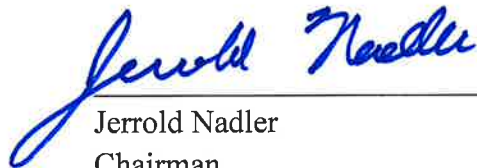
The Department's reliance on the actions of President Clinton in 1996 are misplaced. In that case, the White House had been producing relevant documents to Congress on a rolling basis for nearly a year but required a limited amount of time to review certain additional documents

before a scheduled deadline.⁸ Just fifteen days later, the White House completed its review and created a privilege log identifying specific documents to be withheld⁹; it then provided 1,000 pages of remaining documents to Congress.¹⁰ In addition, the documents withheld were not created contemporaneously to the matter under investigation¹¹—and the White House had not already waived executive privilege as it has here.¹² Moreover, the assertion was not a product of a Presidential declaration to fight all congressional subpoenas. The Department’s attempt to frustrate Congress’s efforts to enforce its subpoena by asserting executive privilege as to all documents is not proper. As the court held in *Committee on Oversight & Government Reform v. Lynch*, a “blanket assertion of privilege over all records generated after a particular date . . . [will not] pass muster,” without a “showing . . . that any of the individual records satisf[y] the prerequisites for the application of the privilege.”¹³

* * * *

Notwithstanding the President’s admitted intent to block all congressional subpoenas, the Committee remains prepared to meet with the Department to ascertain if an accommodation can be reached that is consistent with the prerogatives of the Committee and the Department. My staff is ready, willing and able to meet with your staff in an effort to achieve a suitable compromise.

Sincerely,



Jerrold Nadler
Chairman
House Committee on the Judiciary

⁸ See *Investigation of the White House Travel Office Firings and Related Matters*, H. Rep. No. 104-849, at 155-58 (Sept. 26, 1996) (describing timeline of relevant events); *Protective Assertion of Executive Privilege Regarding White House Counsel’s Office Documents*, 20 Op. O.L.C. 1 (May 8, 1996).

⁹ *Assertion of Executive Privilege Regarding White House Counsel’s Office Documents*, 20 Op. O.L.C. 2 (May 23, 1996).

¹⁰ H. Rep. No. 104-849, at 158.

¹¹ *Assertion of Executive Privilege Regarding White House Counsel’s Office Documents*, 20 Op. O.L.C. at 4.

¹² Attorney General William Barr, April 18, 2019 Press Conference (the President confirmed that “he would not assert privilege over the Special Counsel’s report . . . [and] no material has been redacted based on executive privilege.”).

¹³ *Committee on Oversight & Gov’t Reform v. Lynch*, 156 F. Supp. 3d 101, 104 (D.D.C. 2016).

cc: Doug Collins
Ranking Member
House Committee on the Judiciary