

THE WHITE HOUSE

WASHINGTON

September 16, 2019

The Honorable Jerrold Nadler
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Chairman Nadler:

I write concerning the subpoenas issued by the Committee on the Judiciary (the “Committee”) to Rick Dearborn and Robert Porter on August 14, 2019. The subpoenas direct Mr. Dearborn and Mr. Porter to testify before the Committee on Tuesday, September 17, 2019. As you are aware, Mr. Dearborn and Mr. Porter were senior advisers to the President in the White House, holding the titles of Assistant to the President and Deputy Chief of Staff for Policy Implementation, and Assistant to the President and Staff Secretary, respectively. Based on the title of the Committee’s hearing, and a press release you issued, it has long been clear that the purpose of the subpoenas is to seek testimony from Mr. Dearborn and Mr. Porter concerning their service in the White House. *See* Press Release, Rep. Jerrold Nadler (Aug. 15, 2019). As you know, and as explained further below, in accordance with long-standing, bipartisan precedent, senior advisers to the President such as Mr. Dearborn and Mr. Porter may not be compelled to testify before Congress with respect to matters related to their service as senior advisers to the President. Accordingly, in keeping with settled precedent and to protect the prerogatives of the Office of President for the future, the President has directed Mr. Dearborn and Mr. Porter not to appear at the hearing scheduled for Tuesday, September 17, 2019. *See, e.g., Testimonial Immunity Before Congress of the Former Counsel to the President*, 43 Op. O.L.C. __ (May 20, 2019). Nothing in the Committee’s eleventh-hour attempt to expand the scope of the hearing without proper notice to include questions for Mr. Dearborn related to his role during the 2016 campaign alters Mr. Dearborn’s immunity from being compelled to appear under the existing subpoena.

The Department of Justice (the “Department”) has advised me that Mr. Dearborn and Mr. Porter are absolutely immune from compelled congressional testimony with respect to matters related to their service as senior advisers to the President. *See* Letters to Pat A. Cipollone, Counsel to the President, from Steven A. Engel, Assistant Attorney General, Office of Legal Counsel (September 16, 2019). The Department has long taken the position—across administrations of both political parties—that “the President and his immediate advisers are absolutely immune from testimonial compulsion by a Congressional committee.” *Immunity of the Former Counsel to the President from Compelled Congressional Testimony*, 31 Op. O.L.C. 191, 191 (2007) (quoting *Assertion of Executive Privilege with Respect to Clemency Decision*, 23 Op. O.L.C. 1, 4 (1999) (opinion of Attorney General Janet Reno)); *Immunity of the Counsel to the President from Compelled Congressional Testimony*, 20 Op. O.L.C. 308, 308 (1996). That immunity arises from the President’s position as head of the Executive Branch and from Mr. Dearborn’s and Mr. Porter’s

former positions as senior advisers to the President, specifically Deputy Chief of Staff for Policy Implementation and Staff Secretary, respectively.

As the Department has recognized, “[w]hile a senior presidential adviser, like other executive officials, could rely on executive privilege to decline to answer specific questions at a hearing, the privilege is insufficient to ameliorate several threats that compelled testimony poses to the independence and candor of executive councils.” *Testimonial Immunity Before Congress of the Former Counsel to the President*, 43 Op. O.L.C. ___, *6 (May 20, 2019). “[C]ompelled congressional testimony ‘create[s] an inherent and substantial risk of inadvertent or coerced disclosure of confidential information,’ despite the availability of claims of executive privilege with respect to the specific questions asked during such testimony.” *Id.* (quoting *Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach from Congressional Subpoena*, 38 O.L.C. Op. at *4). In addition, the threat of compelled interrogation about confidential communications with the President or his senior staff “could chill presidential advisers from providing unpopular advice or from fully examining an issue with the President or others.” *Id.* Furthermore, given the frequency with which testimony of a senior presidential adviser would fall within the scope of executive privilege, compelling such an adviser’s appearance is unlikely to promote any valid legislative interests. *Id.* at *6-7. Compelling senior presidential advisers to testify in situations where they must repeatedly cite executive privilege and decline to provide answers would be inefficient and contrary to good-faith governance. *See id.* at *7. Finally, the constitutional immunity of current and former senior advisers to the President exists to protect the institution of the Presidency, and as stated by former Attorney General Janet Reno, “may not be overborne by competing congressional interests.” *Assertion of Executive Privilege with Respect to Clemency Decision*, 23 Op. O.L.C. at 5.

As noted above, the title of the hearing scheduled for September 17, along with the press release issued on the same day as the subpoenas, has long made clear that the purpose of the hearing was to seek testimony from Mr. Dearborn and Mr. Porter concerning their service as senior advisers to the President. *See* Press Release, Rep. Jerrold Nadler (Aug. 15, 2019). Accordingly, the immunity principles described above apply, and the Department has concluded that Mr. Dearborn and Mr. Porter are immune from being compelled to testify.

A last-minute maneuver by the Committee purporting to change the scope of testimony sought from Mr. Dearborn does not change that analysis. I understand that, late on Friday, September 13, 2019—two business days before the hearing—you contacted Mr. Dearborn’s counsel and informed him for the first time that the Committee also intended to question Mr. Dearborn about his work on the presidential campaign of 2016. In fact, based on conversations my staff has had with Mr. Dearborn’s counsel, I understand that in communications prior to September 13, Committee staff repeatedly emphasized to Mr. Dearborn’s counsel that the subpoena to Mr. Dearborn sought information concerning Mr. Dearborn’s service in the White House and never mentioned anything about the 2016 campaign until September 13. In any event, this cannot alter the fact that the primary purpose of the subpoena is, and always has been, securing testimony from Mr. Dearborn concerning his time as a senior adviser to the President. The Department has determined that, despite the Committee’s eleventh-hour effort to expand the scope of the hearing, under the facts presented here, Mr. Dearborn remains immune from compelled testimony.

Because of the constitutional immunity that protects senior advisers to the President from compelled congressional testimony, and in order to protect the prerogatives of the Office of President, the President has directed Mr. Dearborn and Mr. Porter not to appear at the Committee's scheduled hearing on Tuesday, September 17, 2019. The long-standing principle of immunity for senior advisers to the President is firmly rooted in the Constitution's separation of powers and protects the core functions of the Presidency. We are adhering to this well-established precedent in order to ensure that future Presidents can effectively execute the responsibilities of the Office of President. I also attach the letter opinions provided by the Department regarding Mr. Dearborn's and Mr. Porter's immunity.

Thank you for your attention to this matter. Please do not hesitate to contact me or Mike Purpura if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Pat A. Cipollone". The signature is written in a cursive, flowing style with a large initial "P".

Pat A. Cipollone

Counsel to the President

cc: The Honorable Doug Collins, Ranking Member