

Congress of the United States
Washington, DC 20515

October 30, 2019

Mr. John Eisenberg, Esq.
Deputy Counsel to the President for National Security Affairs and
Legal Advisor to the National Security Council
Eisenhower Executive Office Building
Washington, D.C. 20504

Dear Mr. Eisenberg:

Pursuant to the House of Representatives' impeachment inquiry, we write to request your appearance at a deposition on **November 4, 2019, at 9:30 a.m. at The Capitol, HVC-304.**

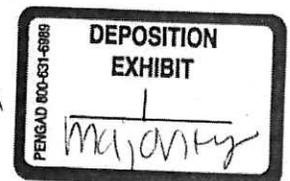
This deposition will be conducted jointly by the Permanent Select Committee on Intelligence, the Committee on Foreign Affairs, and the Committee on Oversight and Reform. The deposition transcript shall be part of the impeachment inquiry and shared among the Committees. Your failure or refusal to appear at the deposition, including at the direction or behest of the President or the White House, shall constitute evidence of obstruction of the House's impeachment inquiry and may be used as an adverse inference against the President.

The Committees are investigating the extent to which President Trump jeopardized U.S. national security by pressing Ukraine to interfere with our 2020 election and by withholding a White House meeting with the President of Ukraine and military assistance provided by Congress to help Ukraine counter Russian aggression, as well as any efforts to cover up these matters.

Based upon public reporting and evidence gathered as part of the impeachment inquiry, we believe you have information relevant to these matters.

If you have any questions, please contact staff for the Permanent Select Committee on Intelligence at (202) 225-7690.

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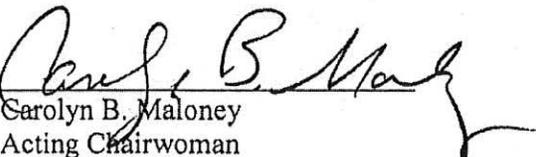


Mr. John Eisenberg, Esq.
Page 2

Sincerely,


Eliot L. Engel
Chairman
House Committee on Foreign Affairs


Adam B. Schiff
Chairman
House Permanent Select Committee
on Intelligence


Carolyn B. Maloney
Acting Chairwoman
House Committee on Oversight and Reform

Enclosure

cc: The Honorable Michael McCaul, Ranking Member
House Committee on Foreign Affairs

The Honorable Devin Nunes, Ranking Member
House Permanent Select Committee on Intelligence

The Honorable Jim Jordan, Ranking Member
House Committee on Oversight and Reform

Congress of the United States
Washington, DC 20515

November 1, 2019

Mr. John Eisenberg, Esq.
Deputy Counsel to the President for National Security Affairs and
Legal Advisor to the National Security Council
Eisenhower Executive Office Building
Washington, D.C. 20504

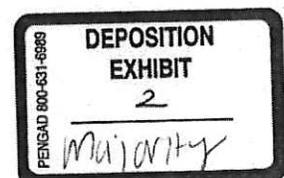
Dear Mr. Eisenberg:

Pursuant to the House of Representatives' impeachment inquiry, we are hereby transmitting a subpoena that compels you to appear at a deposition on **November 4, 2019, at 9:00 a.m. at The Capitol, HVC-304.**

This deposition will be conducted jointly by the Permanent Select Committee on Intelligence, the Committee on Foreign Affairs, and the Committee on Oversight and Reform. The deposition transcript shall be part of the impeachment inquiry and shared among the Committees. Your failure or refusal to appear at the deposition, including at the direction or behest of the President or the White House, shall constitute evidence of obstruction of the House's impeachment inquiry and may be used as an adverse inference against the President.

On October 30, 2019, the Committees sent a letter to you requesting that you voluntarily appear for a deposition on November 4, 2019. We did not receive any response. The Committees, therefore, have no choice but to issue a subpoena compelling your mandatory appearance.

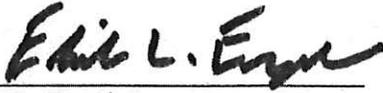
If you have any questions, please contact staff for the Permanent Select Committee on Intelligence at (202) 225-7690.



kmi

Mr. John Eisenberg, Esq.
Page 2

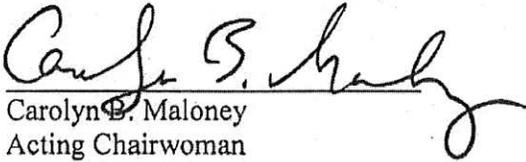
Sincerely,



Eliot L. Engel
Chairman
House Committee on Foreign Affairs



Adam B. Schiff
Chairman
House Permanent Select Committee
on Intelligence



Carolyn D. Maloney
Acting Chairwoman
House Committee on Oversight and Reform

Enclosure

cc: The Honorable Michael McCaul, Ranking Member
House Committee on Foreign Affairs

The Honorable Devin Nunes, Ranking Member
House Permanent Select Committee on Intelligence

The Honorable Jim Jordan, Ranking Member
House Committee on Oversight and Reform

SUBPOENA

**BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE
CONGRESS OF THE UNITED STATES OF AMERICA**

To JOHN EISENBERG

You are hereby commanded to be and appear before the
Permanent Select Committee on Intelligence

of the House of Representatives of the United States at the place, date, and time specified below.

- to produce the things identified on the attached schedule touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of production: _____
Date: _____ Time: _____

- to testify at a deposition touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: Permanent Select Committee on Intelligence, HVC-304, U.S. Capitol
Date: NOVEMBER 4, 2019 Time: 9:00 AM

- to testify at a hearing touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____
Date: _____ Time: _____

To The U.S. Marshals Service, or any authorized Member or congressional staff

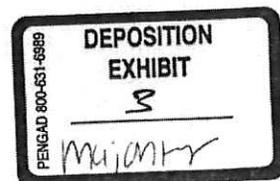
_____ to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at
the city of Washington, D.C. this 1ST day of November 2019.

[Signature]
Chairman or Authorized Member

Attest
[Signature]
Clerk

[Signature]
Deputy Clerk



KMI

PROOF OF SERVICE

Subpoena for JOHN EISENBERG, ESQ.

Address NATIONAL SECURITY COUNCIL, EISENHOWER EXECUTIVE
OFFICE BLDG., WASHINGTON D.C. 20504

before the Permanent Select Committee on Intelligence

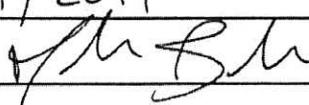
U.S. House of Representatives
116th Congress

Served by (print name) Maher Bitar

Title General Counsel

Manner of service Electronic Mail

Date 11/01/2019

Signature of Server 

Address Permanent Select Committee on Intelligence, HVC-304, U.S. Capitol

quinn emanuel trial lawyers | washington, dc

1300 I Street NW, Suite 900, Washington, District of Columbia 20005-3314 | TEL (202) 538-8000 FAX (202) 538-8100

WRITER'S DIRECT DIAL NO.

(202) 538- [REDACTED]

WRITER'S EMAIL ADDRESS

November 4, 2019

VIA EMAIL

The Honorable Eliot L. Engel
The Honorable Adam B. Schiff
The Honorable Carolyn B. Maloney
United States House of Representatives
Washington DC, USA

Re: Subpoena for Deposition of John A. Eisenberg

Dear Chairmen Engel and Schiff and Acting Chairwoman Maloney,

This firm represents John A. Eisenberg. As you are aware, Mr. Eisenberg is Assistant to the President, Deputy Counsel for National Security Affairs, and Legal Advisor to the National Security Council. In those roles, he serves as a senior advisor to the President.

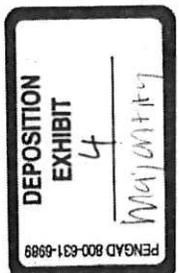
We are in receipt of the subpoena from the United States House of Representatives commanding that Mr. Eisenberg appear for testimony by deposition this morning at 9:00 AM EST. The subpoena was first emailed to Mr. Eisenberg on Friday evening, November 1, 2019, giving him not even a single business day to prepare for testimony. This is insufficient and unreasonable notice and imposes an undue burden on Mr. Eisenberg, especially in light of his legal and national security responsibilities in the White House.

Even if Mr. Eisenberg had been afforded a reasonable amount of time to prepare, the President has instructed Mr. Eisenberg not to appear at the deposition. Enclosed with this letter is the President's instruction as relayed by Pat A. Cipollone, Counsel to the President, in a letter dated November 3, 2019. We also enclose a letter, also dated November 3, 2019, from Steven A. Engel, Assistant Attorney General for the Office of Legal Counsel at the Department of Justice, to Mr. Cipollone advising that Mr. Eisenberg is "absolutely immune from compelled congressional testimony in his capacity as a senior advisor to the President." Under these circumstances, Mr. Eisenberg has no other option that is consistent with his legal and ethical obligations except to follow the direction of his client and employer, the President of the United States. Accordingly, Mr. Eisenberg will not be appearing for a deposition at this time.

In closing, we note that the relevant legal and constitutional questions underlying the congressional demand for Mr. Eisenberg's testimony are currently pending in the United States District Court for the District of Columbia in *Charles M. Kupperman v. United States House of*

quinn emanuel urquhart & sullivan, llp

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LONDON | TOKYO | MANNHEIM | HAMBURG | PARIS | MUNICH | SYDNEY | HONG KONG | BRUSSELS | ZURICH | SHANGHAI | PERTH | STUTTGART



RM

Representatives et al., Civil Action No. 19-3224 (J. Leon). Mr. Eisenberg, as a lawyer and officer of the court, will abide by whatever final decision the federal judiciary reaches on the dispute between the Executive and Congress.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'W. A. Burck', with a long horizontal flourish extending to the right.

William A. Burck

cc: Derek Shaffer (Quinn Emanuel Urquhart & Sullivan LLP, counsel to Mr. Eisenberg)

THE WHITE HOUSE

WASHINGTON

November 3, 2019

Bill Burck, Esq.
Quinn Emanuel Urquhart & Sullivan, LLP
1300 I Street, N.W., Suite 900
Washington, D.C. 20005

Dear Mr. Burck:

I write in response to your request regarding the subpoena issued to your client, John A. Eisenberg, by the Permanent Select Committee on Intelligence of the United States House of Representatives (the "Committee") on November 1, 2019. The subpoena directs Mr. Eisenberg to appear to testify at a deposition at 9:00 a.m. on Monday, November 4, 2019.

The Department of Justice (the "Department") has advised me that Mr. Eisenberg is absolutely immune from compelled congressional testimony with respect to matters related to his service as a senior adviser to the President. See Letter to Pat A. Cipollone, Counsel to the President, from Steven A. Engel, Assistant Attorney General, Office of Legal Counsel (Nov. 3, 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 it extends to Mr. Eisenberg due to his position as a senior adviser to the President, specifically Assistant to the President, Deputy Counsel to the President for National Security Affairs, and Legal Advisor to the National Security Council.

As the Department's letter states, Mr. Eisenberg qualifies as a senior presidential adviser entitled to immunity. The Department's opinions on this topic have consistently recognized that this immunity extends to immediate advisers "'who customarily meet with the President on a regular or frequent basis,' and upon whom the President relies directly for candid and sound advice." *Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach from Congressional Subpoena*, 38 Op. O.L.C. ___, at *2 (June 15, 2014) (quoting Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Re: *Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff"* at 7 (Feb. 5, 1971)). Accordingly, Mr. Eisenberg cannot be compelled to appear before the Committee because "[s]ubjecting a senior presidential adviser to the congressional subpoena power would be akin to requiring the President himself to appear before Congress on matters

Bill Burck, Esq.

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relating to the performance of his constitutionally assigned executive functions.” *Assertion of Executive Privilege with Respect to Clemency Decision*, 23 Op. O.L.C. at 5. 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 Reno, “may not be overborne by competing congressional interests.” *Id.*

Accordingly, in order to protect the prerogatives of the Office of President today and in the future, and in response to your request, the President directs Mr. Eisenberg not to appear at the Committee’s deposition on Monday, November 4, 2019. This long-standing principle is firmly rooted in the Constitution’s separation of powers and protects the core functions of the Presidency, and this office is adhering to this well-established precedent in order to allow future Presidents to effectively execute the responsibilities of the Office of President. I also attach the letter opinion provided by the Department regarding Mr. Eisenberg’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 fluid and cursive, with the first name "Pat" being particularly prominent.

Pat A. Cipollone

Counsel to the President



U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

November 3, 2019

Pat A. Cipollone
Counsel to the President
The White House
Washington, DC 20500

Dear Mr. Cipollone:

On November 1, 2019, the Permanent Select Committee on Intelligence of the House of Representatives issued a subpoena seeking to compel John Eisenberg to testify at a deposition on Monday, November 4. Mr. Eisenberg serves as Assistant to the President, Deputy Counsel to the President for National Security Affairs, and Legal Advisor to the National Security Council. The Committee subpoenaed Mr. Eisenberg as part of its impeachment inquiry into the conduct of the President. *See* H.R. Res. 660, 116th Cong. (2019). You have asked whether the Committee may compel Mr. Eisenberg to testify. We conclude that he is absolutely immune from compelled congressional testimony in his capacity as a senior adviser to the President.

The Committee has made clear that it seeks to question Mr. Eisenberg about matters related to his official duties at the White House. The Committee informed him that it is investigating the President's conduct of foreign relations with Ukraine and that it believes, "[b]ased upon public reporting and evidence gathered as part of the impeachment inquiry," that Mr. Eisenberg has "information relevant to these matters." Letter for John Eisenberg from Adam B. Schiff, Chairman, House Permanent Select Committee on Intelligence, et al. at 1 (Oct. 30, 2019); *see also* Letter for John Eisenberg from Adam B. Schiff, Chairman, House Permanent Select Committee on Intelligence, et al. at 1 (Nov. 1, 2019).

The Executive Branch has taken the position for decades that "Congress may not constitutionally compel the President's senior advisers to testify about their official duties." *Testimonial Immunity Before Congress of the Former Counsel to the President*, 43 Op. O.L.C. ___, at *1 (May 20, 2019) ("*Immunity of the Former Counsel*"). This testimonial immunity is rooted in the separation of powers and derives from the President's status as the head of a separate, co-equal branch of government. *See id.* at *3-7. Because the President's closest advisers serve as his alter egos, compelling them to testify would undercut the "independence and autonomy" of the Presidency, *id.* at *4, and interfere directly with the President's ability to faithfully discharge his constitutional responsibilities. Absent immunity, "congressional committees could wield their compulsory power to attempt to supervise the President's actions, or to harass those advisers in an effort to influence their conduct, retaliate for actions the committee disliked, or embarrass and weaken the President for partisan gain." *Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach From Congressional Subpoena*, 38 Op. O.L.C. ___, at *3 (July 15, 2014) ("*Immunity of the Assistant to the President*"). Congressional questioning of the President's senior advisers would also

undermine the independence and candor of executive branch deliberations. *See Immunity of the Former Counsel*, 43 Op. O.L.C. at *5–7. For these reasons, the Executive Branch has long recognized the immunity of senior presidential advisers to be critical to protecting the institution of the Presidency.

This testimonial immunity applies in an impeachment inquiry just as it applies in a legislative oversight inquiry. As our Office recently advised you, executive privilege remains available when a congressional committee conducts an impeachment investigation. *See* Letter for Pat A. Cipollone, Counsel to the President, from Steven A. Engel, Assistant Attorney General, Office of Legal Counsel at 2 & n.1 (Nov. 1, 2019). The testimonial immunity of senior presidential advisers is “broader” than executive privilege and exists in part to prevent the inadvertent disclosure of privileged information, *Immunity of the Former Counsel*, 43 Op. O.L.C. at *4, *6, so it follows that testimonial immunity also continues to apply in the impeachment context. More importantly, the commencement of an impeachment inquiry only heightens the need to safeguard the separation of powers and preserve the “independence and autonomy” of the Presidency—the principal concerns underlying testimonial immunity. *Id.* at *4. Even when impeachment proceedings are underway, the President must remain able to continue to discharge the duties of his office. The testimonial immunity of the President’s senior advisers remains an important limitation to protect the independence and autonomy of the President himself.

We do not doubt that there may be impeachment investigations in which the House will have a legitimate need for information possessed by the President’s senior advisers, but the House may have a legitimate need in a legislative oversight inquiry. In both instances, the testimonial immunity of the President’s senior advisers will not prevent the House from obtaining information from other available sources. The immunity of those immediate advisers will not itself prevent the House from obtaining testimony from others in the Executive Branch, including in the White House, or from obtaining pertinent documents (although the House may still need to overcome executive privilege with respect to testimony and documents to which the privilege applies). In addition, the President may choose to authorize his senior advisers to provide testimony because “the benefit of providing such testimony as an accommodation to a committee’s interests outweighs the potential for harassment and harm to Executive Branch confidentiality.” *Immunity of the Assistant to the President*, 38 Op. O.L.C. at *4 n.2. Accordingly, our recognition that the immunity applies to an impeachment inquiry does not preclude the House from obtaining information from other sources.

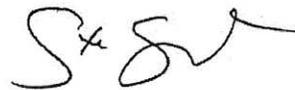
We next consider whether Mr. Eisenberg qualifies as a senior presidential adviser. The testimonial immunity applies to the President’s “immediate advisers—that is, those who customarily meet with the President on a regular or frequent basis.” Memorandum for John D. Ehrlichman, Assistant to the President for Domestic Affairs, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Power of Congressional Committee to Compel Appearance or Testimony of “White House Staff”* at 7 (Feb. 5, 1971). We believe that Mr. Eisenberg meets that definition. Mr. Eisenberg has served as an adviser to the President on sensitive legal and national security matters since the first day of the Administration, and his direct relationship with the President has grown over time. Your office has informed us that he regularly meets with the President multiple times each week, frequently in very small groups, and often communicates with the President multiple times per day. He is one of a small number of advisers who are authorized to contact the President directly, and the President directly seeks

his advice. Mr. Eisenberg is therefore the kind of immediate presidential adviser that the Executive Branch has historically considered immune from compelled congressional testimony.

Mr. Eisenberg's eligibility for immunity is particularly justified because his duties concern national security. The Supreme Court held in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), that senior presidential advisers do not enjoy absolute immunity from civil liability—a holding that, as we have previously explained, does not conflict with our recognition of absolute immunity from compelled congressional testimony for such advisers, *see Immunity of the Assistant to the President*, 38 Op. O.L.C. at *5–9. Yet the *Harlow* Court recognized that “[f]or aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy,” even absolute immunity from suit “might well be justified to protect the unhesitating performance of functions vital to the national interest.” 457 U.S. at 812; *see also id.* at 812 n.19 (“a derivative claim to Presidential immunity would be strongest in such ‘central’ Presidential domains as foreign policy and national security, in which the President could not discharge his singularly vital mandate without delegating functions nearly as sensitive as his own”).

Moreover, the Committee seeks Mr. Eisenberg's testimony about the President's conduct of relations with a foreign government. The President has the constitutional responsibility to conduct diplomatic relations, *see Assertion of Executive Privilege for Documents Concerning Conduct of Foreign Affairs with Respect to Haiti*, 20 Op. O.L.C. 5, 7 (1996) (A.G. Reno), and as a result, the President has the “exclusive authority to determine the time, scope, and objectives of international negotiations.” *Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011*, 35 Op. O.L.C. ___, at *4 (Sept. 19, 2011) (quotation marks omitted). Compelling testimony about these sensitive constitutional responsibilities would only deepen the very concerns—about separation of powers and confidentiality—that underlie the rationale for testimonial immunity. *See New York Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) (“[I]t is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy.”).

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



Steven A. Engel
Assistant Attorney General