

THE WHITE HOUSE

WASHINGTON

October 8, 2019

The Honorable Nancy Pelosi
Speaker
House of Representatives
Washington, D.C. 20515

The Honorable Eliot L. Engel
Chairman
House Foreign Affairs Committee
Washington, D.C. 20515

The Honorable Adam B. Schiff
Chairman
House Permanent Select Committee on
Intelligence
Washington, D.C. 20515

The Honorable Elijah E. Cummings
Chairman
House Committee on Oversight and Reform
Washington, D.C. 20515

Dear Madam Speaker and Messrs. Chairmen:

I write on behalf of President Donald J. Trump in response to your numerous, legally unsupported demands made as part of what you have labeled—contrary to the Constitution of the United States and all past bipartisan precedent—as an “impeachment inquiry.” As you know, you have designed and implemented your inquiry in a manner that violates fundamental fairness and constitutionally mandated due process.

For example, you have denied the President the right to cross-examine witnesses, to call witnesses, to receive transcripts of testimony, to have access to evidence, to have counsel present, and many other basic rights guaranteed to all Americans. You have conducted your proceedings in secret. You have violated civil liberties and the separation of powers by threatening Executive Branch officials, claiming that you will seek to punish those who exercise fundamental constitutional rights and prerogatives. All of this violates the Constitution, the rule of law, and *every past precedent*. Never before in our history has the House of Representatives—under the control of either political party—taken the American people down the dangerous path you seem determined to pursue.

Put simply, you seek to overturn the results of the 2016 election and deprive the American people of the President they have freely chosen. Many Democrats now apparently view impeachment not only as a means to undo the democratic results of the *last* election, but as a strategy to influence the *next* election, which is barely more than a year away. As one member of Congress explained, he is “concerned that if we don’t impeach the President, he will get reelected.”¹ Your highly partisan and unconstitutional effort threatens grave and lasting damage to our democratic institutions, to our system of free elections, and to the American people.

¹ Interview with Rep. Al Green, MSNBC (May 5, 2019).

For his part, President Trump took the unprecedented step of providing the public transparency by declassifying and releasing the record of his call with President Zelenskyy of Ukraine. The record clearly established that the call was completely appropriate and that there is no basis for your inquiry. The fact that there was nothing wrong with the call was also powerfully confirmed by Chairman Schiff's decision to create a false version of the call and read it to the American people at a congressional hearing, without disclosing that he was simply making it all up.

In addition, information has recently come to light that the whistleblower had contact with Chairman Schiff's office before filing the complaint. His initial denial of such contact caused *The Washington Post* to conclude that Chairman Schiff "clearly made a statement that was false."² In any event, the American people understand that Chairman Schiff cannot covertly assist with the submission of a complaint, mislead the public about his involvement, read a counterfeit version of the call to the American people, and then pretend to sit in judgment as a neutral "investigator."

For these reasons, President Trump and his Administration reject your baseless, unconstitutional efforts to overturn the democratic process. Your unprecedented actions have left the President with no choice. In order to fulfill his duties to the American people, the Constitution, the Executive Branch, and all future occupants of the Office of the Presidency, President Trump and his Administration cannot participate in your partisan and unconstitutional inquiry under these circumstances.

I. Your "Inquiry" Is Constitutionally Invalid and Violates Basic Due Process Rights and the Separation of Powers.

Your inquiry is constitutionally invalid and a violation of due process. In the history of our Nation, the House of Representatives has never attempted to launch an impeachment inquiry against the President without a majority of the House taking political accountability for that decision by voting to authorize such a dramatic constitutional step. Here, House leadership claims to have initiated the gravest inter-branch conflict contemplated under our Constitution by means of nothing more than a press conference at which the Speaker of the House simply announced an "official impeachment inquiry."³ Your contrived process is unprecedented in the

² Glenn Kessler, *Schiff's False Claim His Committee Had Not Spoken to the Whistleblower*, Wash. Post (Oct. 4, 2019).

³ Press Release, Nancy Pelosi, Pelosi Remarks Announcing Impeachment Inquiry (Sept. 24, 2019).

history of the Nation,⁴ and lacks the necessary authorization for a valid impeachment proceeding.⁵

The Committees' inquiry also suffers from a separate, fatal defect. Despite Speaker Pelosi's commitment to "treat the President with fairness,"⁶ the Committees have not established any procedures affording the President even the most basic protections demanded by due process under the Constitution and by fundamental fairness. Chairman Nadler of the House Judiciary Committee has expressly acknowledged, at least when the President was a member of his own party, that "[t]he power of impeachment . . . demands a rigorous level of due process," and that in this context "due process mean[s] . . . the right to be informed of the law, of the charges against you, the right to confront the witnesses against you, to call your own witnesses, and to have the assistance of counsel."⁷ All of these procedures have been abandoned here.

These due process rights are not a matter of discretion for the Committees to dispense with at will. To the contrary, they are constitutional requirements. The Supreme Court has recognized that due process protections apply to all congressional investigations.⁸ Indeed, it has been recognized that the Due Process Clause applies to impeachment proceedings.⁹ And precedent for the rights to cross-examine witnesses, call witnesses, and present evidence dates back nearly 150 years.¹⁰ Yet the Committees have decided to deny the President these elementary rights and protections that form the basis of the American justice system and are protected by the Constitution. No citizen—including the President—should be treated this unfairly.

⁴ Since the Founding of the Republic, under unbroken practice, the House has never undertaken the solemn responsibility of an impeachment inquiry directed at the President without first adopting a resolution authorizing a committee to begin the inquiry. The inquiries into the impeachments of Presidents Andrew Johnson and Bill Clinton proceeded in multiple phases, each authorized by a separate House resolution. *See, e.g.*, H.R. Res. 581, 105th Cong. (1998); H.R. Res. 525, 105th Cong. (1998); III Hinds' Precedents §§ 2400-02, 2408, 2412. And before the Judiciary Committee initiated an impeachment inquiry into President Richard Nixon, the Committee's chairman rightfully recognized that "a[n] [inquiry] resolution has always been passed by the House" and "is a necessary step." III Deschler's Precedents ch. 14, § 15.2. The House then satisfied that requirement by adopting H.R. Res. 803, 93rd Cong. (1974).

⁵ Chairman Nadler has recognized the importance of taking a vote in the House before beginning a presidential impeachment inquiry. At the outset of the Clinton impeachment inquiry—where a floor vote was held—he argued that even limiting the time for *debate* before that vote was improper and that "an hour debate on this momentous decision is an insult to the American people and another sign that this is not going to be fair." 144 Cong. Rec. H10018 (daily ed. Oct. 8, 1998) (statement of Rep. Jerrold Nadler). Here, the House has dispensed with any vote and any debate *at all*.

⁶ Press Release, Nancy Pelosi, Transcript of Pelosi Weekly Press Conference Today (Oct. 2, 2019).

⁷ *Examining the Allegations of Misconduct Against IRS Commissioner John Koskinen (Part II): Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 3 (2016) (statement of Rep. Jerrold Nadler); *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 17 (1998) (statement of Rep. Jerrold Nadler).

⁸ *See, e.g., Watkins v. United States*, 354 U.S. 178, 188 (1957); *Quinn v. United States*, 349 U.S. 155, 161 (1955).

⁹ *See Hastings v. United States*, 802 F. Supp. 490, 504 (D.D.C. 1992), *vacated on other grounds by Hastings v. United States*, 988 F.2d 1280 (D.C. Cir. 1993).

¹⁰ *See, e.g., III Hinds' Precedents* § 2445.

To comply with the Constitution's demands, appropriate procedures would include—at a minimum—the right to see all evidence, to present evidence, to call witnesses, to have counsel present at all hearings, to cross-examine all witnesses, to make objections relating to the examination of witnesses or the admissibility of testimony and evidence, and to respond to evidence and testimony. Likewise, the Committees must provide for the disclosure of all evidence favorable to the President and all evidence bearing on the credibility of witnesses called to testify in the inquiry. The Committees' current procedures provide *none* of these basic constitutional rights.

In addition, the House has not provided the Committees' Ranking Members with the authority to issue subpoenas. The right of the minority to issue subpoenas—subject to the same rules as the majority—has been the standard, bipartisan practice in all recent resolutions authorizing presidential impeachment inquiries.¹¹ The House's failure to provide co-equal subpoena power in this case ensures that any inquiry will be nothing more than a one-sided effort by House Democrats to gather information favorable to their views and to selectively release it as only they determine. The House's utter disregard for the established procedural safeguards followed in past impeachment inquiries shows that the current proceedings are nothing more than an unconstitutional exercise in political theater.

As if denying the President basic procedural protections were not enough, the Committees have also resorted to threats and intimidation against potential Executive Branch witnesses. Threats by the Committees against Executive Branch witnesses who assert common and longstanding rights destroy the integrity of the process and brazenly violate fundamental due process. In letters to State Department employees, the Committees have ominously threatened—without any legal basis and before the Committees even issued a subpoena—that “[a]ny failure to appear” in response to a mere letter *request* for a deposition “shall constitute evidence of obstruction.”¹² Worse, the Committees have broadly threatened that if State Department officials attempt to insist upon the right for the Department to have an agency lawyer present at depositions to protect legitimate Executive Branch confidentiality interests—or apparently if they make any effort to protect those confidentiality interests *at all*—these officials will have their salaries withheld.¹³

The suggestion that it would somehow be problematic for anyone to raise long-established Executive Branch confidentiality interests and privileges in response to a request for a deposition is legally unfounded. Not surprisingly, the Office of Legal Counsel at the Department of Justice has made clear on multiple occasions that employees of the Executive Branch who have been instructed not to appear or not to provide particular testimony before Congress based on privileges or immunities of the Executive Branch cannot be punished for

¹¹ H.R. Res. 581, 105th Cong. (1998); H.R. Res. 803, 93rd Cong. (1974).

¹² Letter from Eliot L. Engel, Chairman, House Committee on Foreign Affairs, et al., to George P. Kent, Deputy Assistant Secretary, U.S. Department of State 1 (Sept. 27, 2019).

¹³ See Letter from Eliot L. Engel, Chairman, House Committee on Foreign Affairs, et al., to John J. Sullivan, Deputy Secretary of State 2-3 (Oct. 1, 2019).

following such instructions.¹⁴ Current and former State Department officials are duty bound to protect the confidentiality interests of the Executive Branch, and the Office of Legal Counsel has also recognized that it is unconstitutional to exclude agency counsel from participating in congressional depositions.¹⁵ In addition, any attempt to withhold an official's salary for the assertion of such interests would be unprecedented and unconstitutional.¹⁶ The Committees' assertions on these points amount to nothing more than strong-arm tactics designed to rush proceedings without any regard for due process and the rights of individuals and of the Executive Branch. Threats aimed at intimidating individuals who assert these basic rights are attacks on civil liberties that should profoundly concern all Americans.

II. The Invalid "Impeachment Inquiry" Plainly Seeks To Reverse the Election of 2016 and To Influence the Election of 2020.

The effort to impeach President Trump—without regard to any evidence of his actions in office—is a naked political strategy that began the day he was inaugurated, and perhaps even before.¹⁷ In fact, your transparent rush to judgment, lack of democratically accountable authorization, and violation of basic rights in the current proceedings make clear the illegitimate, partisan purpose of this purported "impeachment inquiry." The Founders, however, did not create the extraordinary mechanism of impeachment so it could be used by a political party that feared for its prospects against the sitting President in the next election. The decision as to who will be elected President in 2020 should rest with the people of the United States, exactly where the Constitution places it.

Democrats themselves used to recognize the dire implications of impeachment for the Nation. For example, in the past, Chairman Nadler has explained:

The effect of impeachment is to overturn the popular will of the voters. We must not overturn an election and remove a President from office except to defend our system of government or our constitutional liberties against a dire threat, and we must not do so without an overwhelming consensus of the American people. There must never be a narrowly voted impeachment or an impeachment supported by one of our major political parties and opposed by another. Such an impeachment will produce divisiveness and bitterness in our

¹⁴ See, e.g., *Testimonial Immunity Before Congress of the Former Counsel to the President*, 43 Op. O.L.C. __, *19 (May 20, 2019); *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 102, 140 (1984) ("The Executive, however, must be free from the threat of criminal prosecution if its right to assert executive privilege is to have any practical substance.")

¹⁵ *Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees*, 43 Op. O.L.C. __, *1-2 (May 23, 2019).

¹⁶ See President Donald J. Trump, Statement by the President on Signing the Consolidated Appropriations Act, 2019 (Feb. 15, 2019); *Authority of Agency Officials To Prohibit Employees From Providing Information to Congress*, 28 Op. O.L.C. 79, 80 (2004).

¹⁷ See Matea Gold, *The Campaign To Impeach President Trump Has Begun*, Wash. Post (Jan. 21, 2017) ("At the moment the new commander in chief was sworn in, a campaign to build public support for his impeachment went live . . .").