THE WHITE HOUSE

WASHINGTON

October 14, 2019

BY EMAIL

Lee S. Wolosky, Esq.
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New York, New York 10001

Dear Mr. Wolosky:

Thank you for speaking with us this past Friday and for your follow-up letter this afternoon. We understand that your client, Dr. Fiona Hill, former Senior Director for European and Russian Affairs for the National Security Council ("NSC"), plans to appear on Monday, October 14, 2019, for a non-public deposition conducted by the U.S. House of Representatives Permanent Select Committee on Intelligence, Committee on Oversight and Reform, and Committee on Foreign Affairs (the "House Committees").

We appreciate that Dr. Hill is aware of her continuing obligation not to reveal classified information or information subject to executive privilege. As we discussed, that information includes but is not limited to the content of communications between the President and foreign heads of state and other diplomatic communications.

It has been the longstanding position of Administrations of both political parties—indeed, dating back to the very first presidential administration[1]—that such diplomatic communications are protected by executive privilege. As Attorney General Reno explained during the Clinton Administration:

> History is replete with examples of the Executive's refusal to produce to Congress diplomatic communications and related documents because of the prejudicial impact such disclosure could have on the President's ability to conduct foreign relations. It is equally well established that executive privilege applies to communications to and from the President and Vice President and to White House and NSC deliberative communications.[2]

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1 *See History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress*, 6 Op. O.L.C. 751, 753 (1982) (noting that in response to a request for documents relating to negotiation of the Jay Treaty with Great Britain, President Washington sent a letter to Congress stating, "[t]o admit, then, a right in the House of Representatives to demand, and to have, as a matter of course, all the papers respecting a negotiation with a foreign Power, would be to establish a dangerous precedent.") (citation omitted).

2 *Assertion of Executive Privilege for Documents Concerning Conduct of Foreign Affairs with Respect to Haiti*, 20 Op. O.L.C. 5, 6 (1996) (citation and paragraph break omitted).

Two points in your letter suggesting that there may be exceptions to executive privilege with respect to Dr. Hill's testimony merit some response.

First, you note that executive privilege does not apply to otherwise privileged matters that the White House itself has made public, thereby waiving the privilege. It is true that the President has authorized the public disclosure of the contents of the July 25, 2019 telephone call with President Zelenskyy and thus that call is not privileged. The privilege has not been waived, however, with respect to any other diplomatic communications or to deliberative processes related to the call. The subject-matter waiver doctrine does not apply to executive privilege; thus, matters not expressly disclosed remain privileged.[3] Moreover, other than the July 25 call, the President has not authorized the public disclosure of any other of his conversations with foreign leaders, and therefore executive privilege continues to apply to all of those communications. In addition to the protection of executive privilege, calls and discussions with foreign heads of states are almost always classified, as Dr. Hill is aware, and she should treat them as such.

Second, with respect to the component of executive privilege protecting deliberative processes, Dr. Hill may not discuss privileged communications based on the assertions of certain members of the House of Representatives that her deposition will occur as part of an "impeachment inquiry." As the White House Counsel has explained, there is no valid impeachment inquiry underway.[4] The House of Representatives as a whole delegates authority to each standing committee in the House.[5] Yet the House has not authorized any committee to conduct an impeachment inquiry. The three committees that seek Dr. Hill's testimony have jurisdiction solely under House Rule X, which does not provide the power to initiate or investigate impeachment to any of them.[6] Absent a delegation by House Rule or a resolution of the House, none of these committees has been delegated jurisdiction to conduct an investigation pursuant to the impeachment power under Article I, Section 2 of the Constitution. Thus, even if it were the case that executive privilege operates differently in connection with an impeachment inquiry, there is no ground for Dr. Hill to believe that she may disclose privileged information on

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3 As the D.C. Circuit explained in *In re Sealed Case*:

> It is true that voluntary disclosure of privileged material subject to the attorney-client privilege to unnecessary third parties in the attorney-client privilege context waives the privilege, not only as to the specific communication disclosed but often as to all other communications relating to the same subject matter. But this all-or-nothing approach has not been adopted with regard to executive privileges generally, or to the deliberative process privilege in particular. Instead, courts have said that release of a document only waives these privileges for the document or information specifically released, and not for related materials. This limited approach to waiver in the executive privilege context is designed to ensure that agencies do not forego voluntarily disclosing some privileged material out of the fear that by doing so they are exposing other, more sensitive documents.

121 F.3d 729, 741 (D.C. Cir. 1997) (internal citations and quotations omitted).

4 *See* Letter from Pat A. Cipollone, Counsel to the President, to Nancy Pelosi, Speaker, House of Representatives, *et al.* (Oct. 8, 2019).

5 *See* H. Res. 6, 116th Cong. (2019).

6 *See* H. Rule X, cl. 1(i), (n); cl. 11.

that basis to the House Committees.

It is likewise incorrect to suggest that the deliberative process prong of executive privilege may "disappear[] altogether" based on a belief that government misconduct has occurred. As the D.C. Circuit noted in *In re Sealed Case*: "In regard to both [the deliberative process and presidential communications privileges], courts must balance the public interests at stake in determining whether the privilege should yield in a particular case, and must specifically consider the need of the party seeking privileged evidence."[7] Any showing of the House's need for access to privileged information must be addressed through the constitutionally required accommodations process between authorized representatives of the Executive Branch (the holder of the privilege) and the House Committees. It is not up to an individual employee or former employee to undertake that analysis herself and to disclose privileged information based on her own individual assessments. Indeed, that is what makes it especially unfortunate that Chairman Schiff has demanded that Dr. Hill appear and testify on matters that will undoubtedly touch on privileged information without allowing her the benefit of having Administration counsel present, who may raise objections to ensure that she does not breach her obligations with respect to privileged and classified material.[8]

Because the House Committees are refusing to allow counsel from the Executive Office of the President to attend Dr. Hill's deposition to protect core Executive Branch confidentiality interests, it is incumbent on Dr. Hill and you, as her counsel, to guard against unauthorized disclosure. To be clear, Dr. Hill is not authorized to reveal or release any classified information or any information subject to executive privilege.

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7 121 F.3d at 746. The Obama Administration has similarly explained that "the D.C. Circuit already has decided that … a claim of 'misconduct' does not invalidate an assertion of Executive Privilege." Mem. in Supp. of Def.'s Mot. for Summ. J. at 36 (Jan. 21, 2014), *Comm. on Oversight & Gov't Reform v. Holder*, No. 12-1332, 2014 WL 298660 (quoting *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc)). The privilege asserted by the Obama Administration, despite a claim of misconduct, was one of deliberative process.

8 The House Committees have made clear, in writings and in meetings and discussions with Administration counsel, that they will not permit counsel from the agencies or offices at which witnesses were employed to be present during their depositions, despite the determination by the Department of Justice that it is unconstitutional to exclude them. *See, e.g.*, 116th Congress Regulations for Use of Deposition Authority, Congressional Record, H1216 (Jan. 25, 2019); Letter from Eliot L. Engel, Chairman, House Committee on Foreign Affairs, *et al.*, to John J. Sullivan, Deputy Secretary of State at 2 (Oct. 1, 2019) (citing 116th Congress Regulations for Use of Deposition Authority); *Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees*, 43 Op. O.L.C. _, * 1-2 (May 23, 2019).

Please do not hesitate to contact me if you have any further questions or would like to discuss this matter further. We would be happy to speak with you at your convenience.

Sincerely,

Michael M. Purpura
Deputy Counsel to the President