

Congress of the United States
Washington, DC 20515

October 26, 2019

Michael W. Kirk, Esq. & Charles J. Cooper, Esq.
Cooper & Kirk PLLC
1523 New Hampshire Avenue N.W.
Washington, DC 20036

Dear Messrs. Kirk and Cooper:

On October 16, 2019, the House Permanent Select Committee on Intelligence, the Committee on Foreign Affairs, and the Committee on Oversight and Reform requested that your client, Dr. Charles M. Kupperman, appear voluntarily for a deposition pursuant to the House of Representatives' impeachment inquiry.

You subsequently informed the Committees that Dr. Kupperman would not appear at a deposition on Monday, October 28, 2019, if he did not receive a subpoena by Friday, October 25, 2019. The Committees served your client, through you as counsel, with a duly authorized subpoena yesterday afternoon compelling his appearance for a deposition on Monday, October 28, 2019, at 9:30 a.m.

Shortly thereafter, you informed the Committees that you had filed a 17-page complaint in federal court on behalf of Dr. Kupperman seeking a declaratory judgment as to whether he should comply with the subpoena—even though such a complaint cannot be decided by a court and is legally without merit.¹ The complaint references an opinion from the Department of Justice Office of Legal Counsel (OLC) to White House Counsel Pat Cipollone claiming that Dr. Kupperman is “absolutely immune” from compelled congressional testimony, as well as a letter from Cipollone in which he states that the President directs your client take the extraordinary step of defying a lawful congressional subpoena.²

Dr. Kupperman's lawsuit—lacking in legal merit and apparently coordinated with the White House—is an obvious and desperate tactic by the President to delay and obstruct the lawful constitutional functions of Congress and conceal evidence about his conduct from the impeachment inquiry. Notwithstanding this attempted obstruction, the duly authorized subpoena remains in full force and Dr. Kupperman remains legally obligated to appear for the deposition on Monday. The deposition will begin on time and, should your client defy the subpoena, his absence will constitute evidence that may be used against him in a contempt proceeding.

In light of the direction from the White House, which lacks any valid legal basis, the Committees shall consider your client's defiance of a congressional subpoena as additional evidence of the President's obstruction of the House's impeachment inquiry. Such willful

¹ See Compl., *Kupperman v. U.S. House of Representatives et al.*, No. 19 Civ. 3224 (D.D.C. filed Oct. 25, 2019).

² See *id.* ¶ 18 & Ex. B.

defiance of a duly authorized subpoena may cause the Committees to draw an adverse inference against the President, including that your client's testimony would have corroborated other evidence gathered by the Committees showing that the President abused the power of his office by attempting to press another nation to assist his own personal political interests, and not the national interest.

The Complaint is Invalid, as is the White House Attempt to Assert "Absolute Immunity"

Based on substantial evidence gathered in our inquiry, and your client's former role as Deputy and Acting National Security Advisor to the President, we have strong reason to believe that Dr. Kupperman has first-hand knowledge and information that pertain to allegations of President Trump's abuse of power, including Dr. Kupperman's reported participation in the President's July 25, 2019, call with Ukrainian President Volodymyr Zelensky and awareness of a separate, irregular channel of misinformation flowing to the President on Ukraine matters.

The lawsuit, and the legal argument advanced by the White House and the Justice Department upon which it relies, are unavailing.

Such a lawsuit is not a proper or valid legal mechanism to challenge or defy a duly authorized congressional subpoena, particularly in an impeachment inquiry.³ The Speech or Debate Clause is a complete bar to any litigation attempt to interfere with the House's impeachment inquiry. As the Supreme Court has recognized, the Clause applies to all activities "within the 'legislative sphere,'" which includes all activities that implicate, like impeachment, "other matters which the Constitution places within the jurisdiction of either House."⁵

The House of Representatives does not recognize the White House Counsel's blanket assertion of "absolute immunity" to prohibit a senior advisor to the President—much less a *former* senior advisor, like your client—from complying with a duly authorized subpoena—particularly one issued pursuant to an impeachment inquiry into the President's own abuse of power.

The asserted absolute immunity claim is without legal basis as it is "entirely unsupported by existing case law," as recognized over a decade ago in *Committee on the Judiciary v. Miers*.⁶ The White House Counsel relies solely on the Executive Branch's own OLC opinions—including the one rejected by the Court in *Miers*. OLC opinions are not law and are not binding outside the Executive Branch, including on Congress and the courts.⁷ As the *Miers* court found,

³ See *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503–07 (1975) (holding that the Speech or Debate Clause of the U.S. Constitution provides "an absolute bar to judicial interference" with compulsory congressional process).

⁴ *Doe v. McMillan*, 412 U.S. 306, 312-13 (1973) (quoting *Gravel v. United States*, 408 U.S. 606, 624-25 (1972)).

⁵ *Gravel v. United States*, 408 U.S. at 625; accord *Eastland*, 421 U.S. at 504.

⁶ 558 F. Supp. 2d 53, 99-105 (D.D.C. 2008)

⁷ See, e.g., *Trump v. Vance*, No. 19 Civ. 8694 (VM), Slip Op. 47 (S.D.N.Y. Oct. 7, 2019) (reaffirming that OLC opinions "do not constitute authoritative judicial interpretation of the Constitution").

the OLC opinions on which the White House Counsel relies are largely “conclusory and recursive” and fail to cite “a single judicial opinion recognizing the asserted absolute immunity.”⁸

The White House and Department of Justice cite no authority allowing the President to direct *private citizens*, like your client, to disobey a congressional subpoena. The Supreme Court has held that the “President’s authority to act ... ‘must stem either from an act of Congress or from the Constitution itself,’” and the White House can point to no such authority for the President’s directive to your client.⁹

The OLC opinion’s incorrect position—that *Congress* lacks authority to compel your client’s testimony—does not establish that the *President* has affirmative authority to order your client, as a private citizen, not to testify. Neither the Constitution nor any statute grants the President general authority to direct the conduct of private citizens who are no longer his subordinates—much less to direct them to defy a lawful command from a coequal branch of government.

The White House’s categorical position that current or former senior Presidential advisors may never be compelled to testify before Congress flies in the face of the historical record, which is replete with congressional testimony by active and former senior advisors to Presidents of both parties.¹⁰

If such an abuse of authority by the President to muzzle current and former officials from disclosing to Congress evidence of his own misconduct were to stand, it would inflict obvious and grave damage to the House’s capacity to carry out its core Article I functions under the Constitution, including its impeachment inquiry into the President’s actions.¹¹ This would fundamentally alter the separation of powers that forms the bedrock of American democracy. The White House’s overbroad assertion of “absolute immunity,” at its core, is another example of the President’s stonewalling of Congress and concerted efforts to obstruct the House’s impeachment inquiry.

Dr. Kupperman has a Legal Obligation to Comply with Congressional Subpoena

Filing this lawsuit does not alter the status quo: Dr. Kupperman’s legal obligation to comply with the October 25 subpoena remains unchanged. As the Supreme Court has stated, “[i]t is unquestionably the duty of all citizens to cooperate with Congress in its efforts to obtain the

⁸ 558 F. Supp. 2d at 104.

⁹ *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)).

¹⁰ See, e.g., Committee on Government Reform, Democratic Staff, *Congressional Oversight of the Clinton Administration* (Jan. 17, 2006) (online at <https://wayback.archive-it.org/4949/20141031200116/http://oversight-archive.waxman.house.gov/documents/20060117103516-91336.pdf>) (citing congressional depositions of White House Chief of Staff Mack McLarty, White House Chief of Staff Erskine Bowles, White House Counsel Bernard Nussbaum, White House Counsel Jack Quinn, and many others).

¹¹ See *In re Application of the Comm. on the Judiciary*, No. 19 GJ 48 (BAH), Slip Op. 47-62 (D.D.C. Oct. 25, 2019) (acknowledging that the House is engaged in a valid impeachment inquiry).

facts needed” for the exercise of its constitutional functions.¹² More specifically, “[i]t is [all citizens’] unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigations.”¹³

The subpoena issued by the Committees on Friday remains in full force and effect, and we expect Dr. Kupperman to appear and answer questions at the deposition on Monday, October 28, 2019 at 9:30 a.m. in HVC-304 at the Capitol. We urge Dr. Kupperman to fulfill his obligation to comply with the duly authorized subpoena—and the oath that he took to protect and defend the U.S. Constitution—rather than aid and abet the President’s unlawful efforts to obstruct Congress.

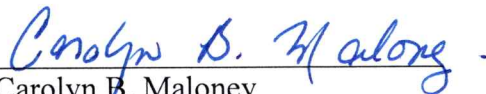
Sincerely,



Adam B. Schiff
Chairman
House Permanent Select Committee
on Intelligence



Eliot L. Engel
Chairman
House Committee on Foreign Affairs



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

cc:

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

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

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

¹² *Watkins v. United States*, 354 U.S. 178, 187-88 (1957); *see also United States v. Bryan*, 339 U.S. 323, 331 (1950) (“A subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase. If that were the case, then, indeed, the great power of testimonial compulsion, so necessary to the effective functioning of courts and legislatures, would be a nullity.”).

¹³ *Watkins*, 354 U.S. at 187-88; *see also Bryan*, 339 U.S. at 331 (“We have often iterated the importance of this public duty [to comply with Congressional subpoenas], which every person within the jurisdiction of the Government is bound to perform[.]”).