May 17, 2019

VIA EMAIL AND U.S. MAIL

The Hon. Adam B. Schiff
The Hon. Devin Nunes
c/o Nicholas A. Mitchell
c/o Daniel Goldman
House Permanent Select Committee on Intelligence
HVC-304, The Capitol
Washington, D.C. 20515

Re: Congressional Request for Documents and Interview Dated March 14, 2019

Dear Representatives Schiff and Nunes:

We write in response to the Committee’s letter of May 3, regarding its requests for documents and interviews from our respective clients—the lawyers who represent President Donald J. Trump, Ivanka Trump, Donald J. Trump Jr., Jared Kushner, and The Trump Organization ("Respondents"). Although we recognize the Committee’s legitimate interest in intelligence-related activities, your letter fails to articulate any legitimate legislative purpose for your requests to these lawyers. To the contrary, the letter confirms that your inquiry is an attempt to pursue a law-enforcement investigation which is outside the constitutional authority of the legislative branch.

Moreover, we find the Committee’s outright, blanket refusal to recognize the attorney-client privilege—a bedrock principle of common law dating back centuries—to be stunning, unwise, and unwarranted. Congress has never tested its ability to ignore the privilege in court, and commentators widely agree that any effort to do so would fail. Courts are unlikely to give Congress the ability to violate the confidential relationship between lawyer and client or countenance a decision by Congress to arrogate unto itself the unilateral authority to make the critical call as to when and under what circumstances the privilege is waived or invalid. Respondents respect this Committee’s important mission. But these attorneys cannot betray their clients’ confidences, and we are confident that a court would not require otherwise.

Finally, a close review of the individual requests further betrays the impropriety of the Committee’s efforts. The few requests that would not require our clients to violate their duties as attorneys or implicate other privileges ask for documents that (if they are not already in the Committee’s hands) are overbroad and burdensome and, in most instances, more appropriately obtained directly from other sources—such as the Department of Justice—with their own interests to assert.
I. The Committee fails to explain how the requests at issue relate to a legitimate legislative purpose within the Committee’s jurisdiction.

Our initial letter questioned whether your requests are pertinent to a legitimate legislative purpose within the Committee’s jurisdiction. Your reply goes on at length about your investigation into “Russian active measures campaign targeting the 2016 election.” Ltr. 5-7. But, of course, our clients have never been implicated in that interference. When all is said and done, the sole focus of your inquiry is the one articulated at the outset of your letter: potential “efforts to obstruct investigations of foreign influence in the U.S. political process, including the Committee’s own investigation.” Ltr. 2.

But investigations into potential obstruction of investigations, including of congressional inquiries, are quintessentially law-enforcement functions. If you believe there are grounds for an obstruction investigation, then the proper course is for the Committee to make a referral to the executive branch, as you would ordinarily do.

As we explained, and you did not dispute, Congress’ power to investigate is “justified solely as an adjunct to the legislative process.” Watkins v. United States, 354 U.S. 178, 197 (1957). “The subject of any inquiry always must be one ‘on which legislation could be had.’” Eastland v. U. S. Servicemen’s Fund, 421 U.S. 491, 504 n.15 (1975). This means, among other things, that “the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary.” Quinn v. United States, 349 U.S. 155, 161 (1955). In other words, Congress cannot use investigations to act as “a law enforcement … agency.” Watkins, 354 U.S. at 187.

Your only response to this serious objection—an objection that is well-established in the precedent and grounded in the constitutional separation of powers—is to call it “absurd.” Ltr. 8. Congress must be able to “investigate obstruction of its own investigation,” you say, but the only authorities you cite for this proposition are cases where the executive branch cooperated with the congressional investigation (Morrison) or where the executive branch and Congress settled their dispute (Sessions). See Ltr. 8-9. And the letter’s attempt to distinguish United States v. Icardi, 140 F. Supp. 383 (D.D.C. 1956), falls far short. You suggest that you are investigating obstruction, not “solely to lay the foundation for a criminal prosecution,” but because obstruction could itself constitute evidence of the “foreign leverage, compromise, or coercion” that you are investigating. See Ltr. 9, n.6. With all due respect, that is plainly not your purpose. By all accounts, then, the Committee has “confused” the “power to investigate” with “the powers of law enforcement.” Quinn, 349 U.S. at 161.

II. The Committee’s refusal to recognize the attorney-client privilege is misguided.

Beyond the legitimate-legislative-purpose issue, we are stunned that the Committee would announce—in contravention to centuries of our common-law and constitutional tradition—that “it has elected not to” recognize any attorney-client or work-product privilege with respect to the information it seeks from Respondents, one of whom represents the President of the United States. Ltr. 4. During the nearly two years our clients have been
responding to requests for information and interviews from various House and Senate Committees—including from this Committee—not once has any member or staff questioned the applicability of the privilege. Furthermore, we find it non-sensical for the Committee to wholly reject the application of the privilege, but at the same time demand the production of a privilege log.

As you are no doubt aware, “The attorney-client privilege is the oldest privilege protecting confidential communications” and “is also one of the most sacred and absolute.” Coleman v. American Broadcasting Companies, Inc., 106 F.R.D. 201, 204 (D.C. 1985); see also International Telephone and Telegraph Corporation v. United Telephone Company of Florida, 60 F.R.D. 177, 180 (M.D. Fla. 1973) (“Once the elements of the attorney-client privilege are established, that privilege has, in the past, been as absolute as any known in law.”). “An independent judiciary and a sacrosanct confidential relationship between lawyer and client are the bastions of an ordered liberty.” Edna Selan Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 2 (3rd ed. 1997). It is professional misconduct for lawyers to violate these duties of confidentiality to their clients. ABA Model Rules of Professional Conduct §§ 1.6, 8.4. Indeed, confidentiality of attorney-client communications is recognized in some form by all but the most barbaric countries on earth because, without it, there can be no meaningful attorney-client relationship.

Although some Members have in the past asserted the right to determine when common-law privileges apply to congressional proceedings, no court has ever held that Congress can compel the disclosure of materials protected by attorney-client privilege. It cannot. The legislative history of the contempt statute reveals that Congress meant to leave the attorney-client privilege intact, and commentators have long doubted whether Congress could judicially enforce an order requiring a witness to invade the privilege: “The attorney-client privilege is an established substantive right under common law and was codified by Congress as recently as 2008 in the new Rule 502 of the Federal Rules of Evidence; therefore, nothing within Congress’s powers should allow it to abrogate this long-standing right.” Bradley J. Bondi, No Secrets Allowed: Congress’s Treatment and Mistreatment of the Attorney-Client Privilege and Work Product Protections in Congressional Investigations and Contempt Proceedings, 25 J.L. & Pol. 145, 178 (2009); see also James Hamilton, Robert F. Muse & Kevin R. Amer, Congressional Investigations: Politics and Process, 44 Am. Crim. L. Rev. 1115, 1118-19 (2007) (rejecting arguments that Congress can ignore the privilege and concluding that “it appears likely that a court would recognize the attorney-client privilege if confronted with such a claim”).

As you note, both Michael Cohen and the Special Counsel acknowledged that Respondents were part of a joint-defense agreement during the relevant time periods. Ltr. 2-3. Any waiver of the joint-defense privilege requires the consent of all co-parties. See, e.g., John Morrell & Co. v. Local Union 304A, 913 F.2d 544, 556 (8th Cir. 1990). Plus, “[a]ny member of a common-interest agreement may invoke the privilege against third persons, even if the communication in question was not originally made by or addressed to the objecting member.” Restatement (Third) of the Law Governing Lawyers § 76 cmt. g (2000). An attorney breaches her fiduciary duty if she uses information obtained in a joint-defense meeting
against a codefendant or a co-party. See Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1319 (7th Cir. 1978). As a result, Michael Cohen’s breach of the ethics rules cannot alter the privileged nature of the underlying communications.

Nor does the so-called “crime-fraud” exception apply here. To begin with, this is the type of determination presented to and made by an Article III court. Even in criminal investigations, law-enforcement agencies do not have the authority to determine and self-enforce a view that such an exception to the privilege exists. They must litigate that issue before a neutral arbiter. A congressional committee cannot be the accuser, the trier of facts and law, and the decisionmaker on this issue. Then, the burden of demonstrating that the exception applies is on “the party seeking to overcome the privilege,” In re Sealed Case, 107 F.3d 46, 49 (D.C. Cir. 1997), and you have not identified any evidence sufficient to meet that burden here. Michael Cohen was represented by his own counsel when he prepared his statement to the Committee, and the Special Counsel specifically observed that “the substance of the four principal false statements” for which he later pled guilty “were contained in an early draft prepared by Cohen and his counsel.” 2 Report of Special Counsel 141 n.971. Comments made by Cohen’s new counsel at the time of his recent testimony reiterated that point. Certainly, the Special Counsel—who (unlike this Committee) was specifically authorized to bring criminal charges and did, in fact, charge Michael Cohen with lying to Congress—rejected the view that the privilege was somehow inapplicable. Id. at 139 n. 958, 141 n. 971, 154.

Contrary to your assertions, we have not made a “blanket” assertion of privilege. We instead have tried to engage with the Committee as to why it feels the need to pursue matters beyond its jurisdiction and legitimate legislative purposes; why it has taken the highly unusual step of requesting that attorneys produce documents that belong to their clients; why it has targeted plainly privileged materials and asked us to undertake the substantial effort of creating a privilege log when it has already “blanketly” rejected any privilege claims; and why it is pursuing an inquiry that the Special Counsel already explored and addressed.

III. The particular requests to Respondents call for documents that are privileged or freely available elsewhere.

A review of the various documents you seek confirms the impropriety of your requests:

- The vast majority of your requests seek drafts, communications, comments, and other documents that were exchanged among lawyers and clients, all of which are squarely protected by the attorney-client, work-product, and joint-defense privileges. See, e.g., Request Nos. 1-10.¹ Setting aside our serious concerns about this Committee’s jurisdiction and legitimate legislative purpose, our clients cannot, consistent with their ethical duties, provide you drafts exchanged among attorneys in a JDA,

¹ These numbers correspond to the Committee’s requests to Respondent Alan Garten.
communications about legal matters, communications about anticipated testimony, communications concerning responses to other document requests, and the like.

- To the extent your requests seek non-privileged, public documents, those documents are freely available from other sources. See, e.g., Request Nos. 1 (seeking copies of Michael Cohen’s statement to Congress); 8 (copies of search warrants related to Michael Cohen); 9 (copies of criminal charges filed against Michael Cohen).

- To the extent your requests call for the production of non-privileged documents that belong to Respondents’ clients, the requests should be withdrawn and submitted to those clients. There is a reason why courts hold that “[d]iscovery from attorneys is always problematic.” Judin v. United States, 34 Fed. Cl. 483, 488 (1995), vacated on other grounds, 110 F.3d 780 (Fed. Cir. 1997). Discovery makes an attorney act as “an ordinary witness” instead of “an officer of the court,” ensuring that “[t]he standards of the profession ... thereby suffer.” Hickman v. Taylor, 329 U.S. 495, 513 (1947). And it “adds to the already burdensome time and costs of litigation,” detracting from the quality of client representation by diverting the attorney’s “time and efforts” from this client and by creating a “chilling effect” on client-attorney communications. Shelton v. Am. Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986).

- Your requests for communications related to potential pardons (Request No. 6) asks for documents that, if they exist, would be protected by attorney-client privilege and possibly the deliberative-process and presidential-communications privileges.

- To the extent your requests seek documents provided to other state or federal law-enforcement agencies (Request No. 11), we reiterate that such requests fall well outside the Committee’s jurisdiction and have no legitimate legislative purpose. The Committee has no power to duplicate a law-enforcement inquiry. And these requests are particularly unwarranted, since the Committee has access to the Special Counsel’s comprehensive and detailed report—and, indeed, relies on it extensively. See Ltr. 3-4. It would of course be improper for the Committee to redo the Special Counsel’s investigation, in search of a different conclusion. If the Committee wants materials in the possession of law-enforcement agencies, it should ask those agencies directly. That procedure would allow the executive branch to assert its important interests in protecting materials associated with law-enforcement investigations.2

By targeting Respondents, the Committee has exceeded its jurisdiction, has contravened long-standing American legal principles protecting the sacrosanct relationship between lawyer and client, and has threatened to chill the willingness of counsel and their clients to provide information in response to legitimate and important congressional

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2 The Committee’s requests for materials provided to the Special Counsel are particularly offensive and inappropriate in light of the May 3 letter which, quite remarkably, acknowledges that your inquiry is explicitly designed to circumvent the attorney-client privilege—the same privilege that was recognized by the Special Counsel and relied on by Respondents when they agreed to produce their clients’ documents and sit for voluntary interviews. Ltr. 5.
inquiries. We respectfully ask the Committee to reevaluate its requests in light of these important concerns.

Sincerely,

Carol Elder Bruce
Counsel for Abbe Lowell

Stefan Passantino
Counsel for Alan Futerfas and Alan Garten

Patrick Strawbridge

Jane Serene Raskin
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