

THE WHITE HOUSE

WASHINGTON

April 18, 2019

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

Dear Chairman Cummings:

I write in response to the Committee's April 2, 2019 subpoena to Carl Kline, the former head of the White House Personnel Security Office. The subpoena seeks Mr. Kline's testimony for a deposition on April 23, 2019, concerning the White House security clearance process.

Throughout our discussions on this matter, we have been clear that we will provide information concerning the processes and procedures used by the White House Personnel Security Office in adjudicating security clearances, but that under no circumstance will we provide information about the specific background investigation files and adjudications of individual public servants. You have insisted upon obtaining this deeply personal and private information. Nonetheless, we have worked to accommodate the Committee's requests by providing information that relates to its legitimate legislative interests. We made confidential White House documents concerning the security clearance process available to the Committee. On March 20, 2019, the White House Chief Security Officer briefed the Committee's staff on the White House security clearance process and answered numerous questions, staying well beyond the previously negotiated time limit. Finally, on April 1, 2019, the White House offered to have Mr. Kline testify voluntarily before the Committee. *See* Letter from Michael M. Purpura, Deputy Counsel to the President, to Chairman Elijah E. Cummings (Apr. 1, 2019).

You have previously explained that a "[c]ongressional subpoena . . . should be used only when attempts to reach an accommodation with a witness have reached an impasse." Statement of Chairman Elijah E. Cummings, Comm. on Oversight & Reform, Chairman Colloquy on Subpoenas, *available at* <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Chairman%20Subpoena%20Colloquy%20Transcript.pdf>. In this instance, however, the Committee ignored that principle, rejected our offer of a voluntary appearance, and issued a premature subpoena the next day. The Committee has indicated that it intends to question Mr. Kline about individual security clearance files and adjudications. These questions would be inappropriate.

Although lawyers from the Office of Counsel to the President attended the March 20, 2019 briefing provided by the White House Chief Security Officer, we understand that the Committee now intends to apply Committee Rule 15(e) to bar any representative from our office from attending Mr. Kline's deposition. If the Committee goes forward with the deposition, a representative from the Office of Counsel to the President must attend and represent the interests of the Executive Office of the President. This is consistent with the position of past Administrations. See *Representation of White House Employees*, 4B Op. O.L.C. 749, 754 (1980). We agree with and adopt the Department of Justice's views on this issue, as articulated in its April 9, 2019 letter to the Committee. See Letter from Stephen E. Boyd, Assistant Attorney General, to Chairman Elijah E. Cummings (Apr. 9, 2019).

The analysis provided by the Department of Justice is equally applicable here. Whenever the Committee takes the deposition of a current or former White House employee, the White House "has a strong interest in ensuring that the questioning is limited to the proper scope, the information provided on its behalf is accurate and complete, and any ambiguity or confusion is promptly resolved." *Id.* at 2. More importantly, without attending the deposition, this office cannot "protect the constitutional equities of the Executive Branch," *id.*, or ensure that the disclosure of any information subject to executive privilege is properly authorized. Further, the Executive Branch "has a fundamental interest in ensuring that its officials are not pressed into revealing privileged information . . . or pressed into responding to inquiries that are beyond Congress's oversight authority[.]" *Id.*; see *Authority of Agency Officials to Prohibit Employees from Providing Information to Congress*, 28 Op. O.L.C. 79, 80–82 (2004) (discussing Executive Branch authority to supervise employee disclosures of privileged and other information to Congress).

Congress cannot require the President, in exercising his constitutional authority, to rely on Mr. Kline's "ability to assert executive privilege during live testimony in response to hostile questioning." *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. 1, 4 (2014). Rather, the President (acting through this office) has the independent authority and right to raise executive privilege concerns as appropriate, at any point during the deposition. This may occur only if counsel from this office accompanies Mr. Kline. Finally, preventing a representative of the Office of Counsel to the President from appearing at Mr. Kline's deposition would raise the specter that the Committee was inappropriately seeking to pressure Mr. Kline into an "inadvertent or coerced disclosure of confidential material"—material to which the Committee is not entitled. *Id.*; see also *Barenblatt v. United States*, 360 U.S. 109, 111–12 (1959). As correctly stated by the Department of Justice, "[t]here is no legitimate legislative interest served by prohibiting [Executive Branch] counsel from attending congressional depositions." Apr. 9, 2019 Boyd Letter at 2. Indeed, such a rule "undermines, rather than enhances, [congressional] oversight, and unconstitutionally encroaches on fundamental Executive Branch interests." *Id.* at 3.

Given that Committee Rule 15(e) does not bind the Executive Branch or displace the Committee's obligation to accommodate the Executive Branch's legitimate interest in protecting privileged information, we request that the Committee allow a representative of this office to appear with Mr. Kline in order to preserve and protect Executive Branch confidentiality interests. See *United States v. Ballin*, 144 U.S. 1, 5 (1892) (Congress "may not by its rules ignore constitutional restraints[.]"); *INS v. Chadha*, 462 U.S. 919, 956 n.21 (1983) (Congress's rulemaking power "only empowers Congress to bind itself[.]"); *accord* Consent Mtn. to Withdraw


The Honorable Elijah E. Cummings

Page 3

Pending Mtns., *In re Subpoena of James Comey*, No. 1:18-mc-174, ECF No. 12 (D.D.C. filed Dec. 2, 2018) (permitting Mr. Comey to testify in a private hearing with agency counsel present). Otherwise, Mr. Kline will not appear on April 23.

Please let us know by Monday, April 22 whether the Committee will permit a representative from the Office of Counsel to the President to appear with Mr. Kline at his deposition.

Sincerely,



Michael M. Purpura

Deputy Counsel to the President

cc: The Honorable Jim Jordan, Ranking Member