March 7, 2019

The Honorable Jerrold Nadler
Chairman
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

In an unprecedented exercise of this Committee’s oversight authority, on Monday you unveiled a sprawling investigation into all corners of President Trump’s life, sending letters to 81 individuals and entities related to the president demanding documents and information. A press release from your office announcing this investigation notes you will be investigating “a number of actions that threaten . . . the rule of law,” as well as probing “public corruption, and other abuses of power.”¹ It is ironic, however, given the procumbent nature of your investigation, that you are in fact the one who may be engaging in all three of these activities.

Your investigation is an abuse of Congress’s oversight power. Such an investigation serves only one of two possible purposes: either you intend to impeach the president, for alleged crimes that have yet to be discovered, or you intend to embarrass him. The first of these purposes does not comport with the will of the American people—or of the newly-elected Members of the Democratic caucus, who want to “restor[e] a sense of integrity to the work of the U.S. Congress” and “prioritize action on topics such as . . . immigration, gun safety . . . and criminal justice reform,” all of which reside within the Committee’s jurisdiction.² The second of these purposes does not comply with either Supreme Court precedent or the rule of law.

The depth and breadth of your initial investigative requests are astounding. Even more alarming, however, is the constitutional insufficiency of this exercise. As you well know from your nearly three decades in Congress, congressional oversight authority is broad—yet, as the

Supreme Court has repeatedly affirmed, it is not unlimited. Congress can only exercise its oversight power with a valid legislative purpose in sight. Congress should not—and, according to the Supreme Court, cannot—conduct oversight for the sake of exposure alone. Absent a formal impeachment inquiry—which you have been clear your nascent investigation is not—oversight for the sake of exposure is exactly what your investigation appears to be doing.

Your Investigation Threatens to Upend the Rule of Law

In Watkins v. United States, the Supreme Court said “[t]here is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress.” The Watkins Court also wrote a congressional inquiry “must be related to, and in furtherance of, a legitimate task of Congress.” Your 81 letters appear to be little more than a deep-sea fishing expedition with the purpose of exposing private matters and airing alleged dirty laundry rather than legislating.

The American people have a right to know your true goal in this exercise. Your first foray as chairman into oversight and investigations fails to meet basic constitutional requirements. In Wilkinson v. United States, the Supreme Court articulated a three-part test which congressional demands must meet. This test indicates:

- The Committee’s investigation of the broad subject matter must be authorized by Congress;
- The Committee must have a “valid legislative purpose;” and
- The demand must be pertinent to a subject matter authorized by Congress.

Your requests fail at least two of these prongs. With the exception of impeachment, no valid legislative purpose is served by your inquiry, and your overreaching demands lack pertinence to a subject matter authorized by Congress.

Each of the 81 individuals or entities in your crosshairs received a boilerplate letter from you explaining this Committee is “investigating a number of actions . . . and other abuses of power.” Each target received an individualized document request void of any narrative whatsoever. Your requests do not in any way connect the recipient of the letter to the documents and information demanded. There is zero explanation of how each individual or entity is best-positioned to provide information to advance your investigative goal—whatever that may be. The pertinence of your requests is not stated, and you have lobbed so many allegations at the president it is unclear what requested documents will inform each charge.

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3 Kilbourn v. Thompson, 103 U.S. 168 (1881).
6 Id. at 187.
7 Id.
9 Id.
To that end, certain functions—namely trial, prosecution, and adjudication—are reserved for the executive and judicial branches of government. Your investigation treads on these reservations. Indeed, the Watkins court explained Congress is not “a law enforcement or trial agency,” and your actions in sending the 81 requests are an impermissible exercise of congressional oversight authority.

In Kilbourn v. Thompson, the House began investigating a real estate pool that may have defrauded a creditor. The Court sided with the target of the House’s investigation. Specifically, “[t]he Court held that the investigation into the real estate pool was not undertaken by the committee pursuant to one of Congress’s constitutional responsibilities, but rather was an attempt to pry into the personal finances of private individuals, a subject that could not conceivably result in the enactment of valid legislation.” The court reasoned “because Congress was acting beyond its constitutional responsibilities, Mr. Kilbourn [the defendant] was not legally required to answer the questions asked of him. In short, the Court said that ‘no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen.’” Because you have not yet begun a formal impeachment inquiry, your investigation runs afoul of Congress’ constitutional duties.

In Quinn v. United States, the Supreme Court reiterated the parameters of congressional oversight and investigations. The Court said:

But the power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose. . . . Similarly, 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. Still further limitations on the power to investigate are found in the specific individual guarantees of the Bill of Rights, such as the Fifth Amendment’s privilege against self-incrimination which is in issue here.

The Court discusses the genesis of the Fifth Amendment privilege and reminds readers “of the horror of Star Chamber proceedings [sic].” Those proceedings led to the fundamental individual

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11 Watkins, 354 U.S. at 137.
12 See Kilbourn v. Thompson, 103 U.S. 168 (1881).
14 Id.
16 Id.
protections guaranteed in our Constitution. It is my hope that your draconian inquisitions are not returning this Committee to the dark days of sixteenth-century England.

Congress, unlike the executive and judicial branches, may only gather facts to advance a legislative purpose. Congress may not inquire for the purpose of prosecution. In *Icardi v. United States*, the U.S. District Court for the District of Columbia stated:

While a committee or subcommittee of the Congress has the right to inquire . . . this authority cannot be extended to sanction a legislative trial and conviction of the individual toward whom the evidence points the finger of suspicion.17

Here again the Court acknowledges certain functions are reserved to the other two co-equal branches of government. In *Icardi* the Court declined to allow an individual to be prosecuted for perjury, reasoning that based on the totality of the Committee’s conduct, the Committee’s only purpose in calling him as a witness was to trap him for perjury.18 The court held “that if the committee is not pursuing a bona fide legislative purpose when it secures the testimony of any witness, it is not acting as a ‘competent tribunal’, even though that very testimony be relevant to a matter which could be the subject of a valid legislative investigation.”19 Such precedent can be imputed to include asking for documents from witnesses, as well.

These cases—some over a century old—are instructive and illustrative of how dangerously off-course congressional investigations can proceed. Congress is not a prosecutorial body—it is a legislative one. Were Congress to usurp the executive function of prosecuting crimes, this government would be on the cusp of a constitutional crisis. The provenance of your investigation, launched on the eve of the conclusion of the Special Counsel’s work, and your request for documents already submitted to multiple prosecutorial bodies threatens to place this Committee in the untenable position of conducting public show trials for individuals not prosecuted by the special counsel’s office.

**Your Requests Are an Abuse of the Committee’s Power**

While the Judiciary Committee serves as the vehicle in the House of Representatives to amend the U.S. Constitution, the Committee does not have the power to simply run roughshod over the Constitution at the chairman’s discretion. That is exactly what your investigation promises to do, as many of your 81 document requests infringe on the First Amendment rights of individuals you have targeted.

Congressional investigations are “part of lawmaking” and are subject to the First Amendment’s command that “the Congress shall make no law abridging freedom of speech” or

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18 *Id.*
19 *Id.* at 388.
Because they serve no valid legislative purpose, these requests infringe on both the recipients’ protected speech rights and right to associate. Instead, your requests are part of a concerted effort to target and punish associates of the president. This effort to intimidate those who choose to associate with the president “through actual or threatened imposition of government power or sanction” violates the First Amendment.\(^2\)

Congressional oversight expert Morton Rosenberg agrees the First Amendment is a limit on Congress’ broad oversight authority. He wrote:

> The Supreme Court has held that the First Amendment restricts Congress in conducting investigations. In *Barenblatt v. United States*, the Court held that “[w]here First Amendment rights are asserted [by a witness] to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.”\(^2\)

In 2016, constitutional law expert and scholar Jonathan Turley cautioned against requests infringing on First Amendment rights of an individual or entity. He told Congress that, in addition to *NAACP v. Alabama*, the case *Sweezy v. New Hampshire* provides a First Amendment basis for curtailing congressional inquiries. Professor Turley testified:

> Likewise, in *Sweezy v. New Hampshire*, the Court curtailed investigations of academics to protect academic freedom and free speech. *Sweezy* is particularly interesting because it involved Paul Sweezy who was being investigated for un-American and communist activities in New Hampshire. He appeared under subpoena in New Hampshire and testified. However, he drew a line at questions regarding his lectures at the University of New Hampshire. The state supreme court ultimately agreed that his free speech and associational rights were being abridged, but the court upheld the contempt order based on his being declared a subversive by the New Hampshire Attorney General. A plurality of the United States Supreme Court reversed on the grounds that the questions violated Sweezy’s First Amendment rights.\(^2\)

Since this area is mired in legal questions—what Professor Turley deems a “gray zone”—the likelihood for litigation related to your actions is high. Professor Turley testified:


\(^{21}\) *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230 (7th Cir. 2015).


Congress is allowed to gather information. It is constrained, however, in punishing citizens on the basis of their exercise of free speech. This obviously creates a gray zone where the disclosure of information can chill speech and associational speech—a line that Congress is wise to avoid.24

In addition to using this Committee’s power to infringe on the First Amendment rights of individuals, your burdensome requests constitute an additional abuse of this Committee’s power by requiring dozens of innocent Americans to hire lawyers to respond to your requests. While this may be a financial boon to big city lawyers at prestigious firms, your onerous requests promise to touch on the lives of many individuals who have never before dealt with Congress. In order to properly respond to your requests—lest they receive public criticism, a subpoena, or even potential contempt charges if you are unsatisfied with their compliance—many of these individuals will likely need to hire expensive lawyers to help them navigate the complex landscape of a congressional inquiry.

That is a dangerous precedent to set, especially for individuals not involved with our government. Congress should not be going down the road of hauling in anybody and everybody associated with a political campaign or our nation’s chief executive. Such heavy-handed tactics are reminiscent of Eastern regimes during the Cold War, and not reflective of twenty-first-century American values.

Beyond the sheer abuse of power your requests demonstrate, your requests deviate from traditional norms of congressional oversight practice. Many of the 81 individuals and entities receiving your demands are likely protected by attorney-client privilege. Though Congress is not required to recognize this common-law privilege, it is customarily treated with heightened care. Morton Rosenberg summarized the state of congressional oversight vis-a-vis attorney-client privilege:

In congressional proceedings, a committee may determine, on a case-by-case basis, whether to accept common law testimonial privileges. It can deny a witness’s request to invoke privilege when the committee concludes it needs the information sought to accomplish its legislative functions. In practice, however, congressional committees have followed the courts’ guidance in assessing the validity of a common law privilege claim.25

By sending letters and demands to numerous attorneys who are ethically obligated to protect communications with their clients, you risk signaling that Congress will no longer treat these relationships as a special classification. It is my sincere hope you are not launching this dragnet simply to embarrass the president or play a game of “gotcha” when targets of your investigation

24 Id. at 5.
cannot comply with your requests due to ethical obligations they have towards their clients. As your fellow chairman, Elijah Cummings, frequently notes, “we are better than that.”

Your Investigation Already Smacks of Corruption

On February 12, 2019, you announced the hiring of Barry Berke to assist the Majority staff on a consulting basis as a special oversight counsel. As part of Mr. Berke’s consultant arrangement with the Committee, he is receiving a special perk by which you will pay Mr. Berke’s travel accommodations to and from New York City, where he maintains his partnership at the law firm Kramer Levin. It is unfathomable that taxpayer money would need to be spent on such an arrangement given Mr. Berke’s financial status—which you are further shielding from the American taxpayer because you are intentionally paying him slightly below the amount of money needed to trigger a mandatory financial disclosure under Congressional ethics rules.

On February 13, 2019, I wrote to you expressing concern that Mr. Berke’s recent writings will not make him an unbiased arbiter of facts presented to the Committee. Upon further reflection, however, perhaps this is exactly why you hired him in the first place. This past Sunday you publicly prejudged the outcome of your investigation, stating “[i]t’s very clear the president obstructed justice.” The following day you launched an investigation designed to prove your conclusion.

I also expressed concern in my February 13 letter that anything Mr. Berke touches moving forward will be tainted. This concern has proven true regarding your newest investigation, as Mr. Berke appears to be playing a prominent role in its architecture and execution.

Perhaps most concerning is Mr. Berke’s conflict of interest, having worked at a law firm that has represented The Trump Organization for over 25 years. Given Mr. Berke’s involvement with your current inquiry, it stands to reason Mr. Berke could further financially benefit from the investigation once he leaves the Committee and continues his outside writings and involvement with Kramer Levin. Additionally, the sheer number of lawyers required to represent individuals targeted by your investigation could financially benefit Kramer Levin if an individual seeks representation from that firm.

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26 See, e.g., With Michael Cohen, Former Attorney to President Donald Trump, Hearing Before the H, Comm. on Oversight and Reform, 116th Cong., Feb. 27, 2019.
29 Rosalind Helderman and Rachael Bade, “Former Trump adviser says he does not plan to cooperate with House Judiciary inquiry,” WASH. POST, Mar. 5, 2019 (“A person familiar with the exchange said there was no formal request for Caputo’s testimony but only a casual conversation between Caputo’s lawyer and committee attorney Barry Berke.”).
On two occasions, I have written to you regarding ethical issues surrounding Mr. Berke’s hiring. In those letters, I asked you 21 questions regarding Mr. Berke’s employment at the Committee. You have not responded. Your withholding of information surrounding Mr. Berke’s employment raises additional questions regarding your staff, conflicts of interest, and ethical challenges.

The underlying message of Mr. Berke’s behind-the-scenes orchestration of your overbearing investigation boils down to this: Be a friend of mine and donate tens of thousands of dollars to Democrat politicians, and you can get a job at the Committee in Washington while maintaining your day job at a prestigious law firm. There could not be a more duplicitous message to send to the American public at the same time you claim to be investigating the alleged public corruption of others.

**Conclusion**

The zealousness with which you have launched your investigation and have avoided linking it to impeachment should be commended. However, the severe overreach of your inquisition runs afoul of nearly 150 years of Supreme Court precedent and over 200 years of oversight conducted by this Committee.

As chairman of the House Committee on the Judiciary, you, more than any other Member of Congress, should respect the rule of law and stay within the confines of existing legal precedent. To simply ignore these pillars of American jurisprudence and cave to outside forces demanding impeachment of the president at all costs is an affront to the 53 chairmen who have served before you.

I look forward to working with you, in a bipartisan manner, on future oversight and legislative initiatives within the proper parameters of the law and jurisdiction of the Committee.

Sincerely,

![Signature]

Doug Collins
Ranking Member