

United States Senate

WASHINGTON, DC 20510

December 23, 2019

The Honorable Gene L. Dodaro
Comptroller General
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Dodaro,

I am writing to follow up on the questions regarding the Impoundment Control Act (ICA) that I asked you at the Budget Committee hearing on October 30, especially with regard to the withholding of assistance to Ukraine. In response to my questions, you indicated that the Government Accountability Office (GAO) would be doing a legal analysis of the Administration's withholding and issue an opinion regarding its legality under the ICA.¹ I am writing to request that GAO now provide that legal opinion.

The House Permanent Select Committee on Intelligence (HPSCI) has concluded – and I agree – that the facts lead to the inescapable conclusion that the Administration illegally impounded the funds for Ukraine.² Throughout the time that the Executive Branch withheld funds for Ukraine, numerous officials repeatedly raised concerns about violating the ICA.³

The evidence we have seen to date shows that the President of the United States abused his power and betrayed the trust of the American people by pressuring Ukraine to intervene in the 2020 election on his behalf. His violation of the ICA was just one part of this illegal scheme, and the President engaged in other corrupt actions in furtherance of this scheme that did not implicate the ICA.

The Constitution vests Congress with the power of the purse, and states that the President, “shall take care that the laws be faithfully executed.”⁴ If the Executive Branch violates the ICA with impunity, then Congress loses its power to direct the expenditure of federal funds and any program authorized in law could be defunded by Executive fiat. Since the Office of Management and Budget (OMB) recently made their argument public for why withholding aid to Ukraine did not violate the ICA, this letter explains why the withholding did violate the ICA based on my understanding of the facts, the law, and prior GAO legal opinions.

¹ Senate Budget Committee. 2019. *Questions for the Record From Senator Chris Van Hollen For the Honorable Gene L. Dodaro*.

² House Permanent Select Committee on Intelligence. 2019. *The Trump-Ukraine Impeachment Report*.

³ House Permanent Select Committee on Intelligence. 2019. *The Trump-Ukraine Impeachment Report*.

⁴ *Constitution of the United States of America*, Article II, Section 3.

The Executive Branch may legally withhold funds only in very limited circumstances

Congress passed the ICA to address situations in which funding is provided in law but the Executive Branch withholds it from being spent.⁵ The ICA allows the Executive Branch to withhold funding only under very limited circumstances, covered in the law's rescission and deferral provisions, and requires the President to notify Congress when doing so.

The President may not permanently rescind funding without legislation passed by Congress, but the ICA allows the President to propose rescissions to Congress and to withhold funds for a limited period of time while Congress considers the proposal. The President may not withhold funds through their date of expiration, even if they are subject to a rescission proposal.⁶

The ICA also allows the President to defer budget authority temporarily, but never through the end of the fiscal year and only in limited circumstances enumerated in the law: "(1) to provide for contingencies; (2) to achieve savings made possible by or through changes in requirements or greater efficiency of operations; or (3) as specifically provided by law."⁷ The ICA requires the President to notify Congress when deferring funds in this manner.

GAO has found that the ICA does not apply to funding delays that occur for programmatic reasons, rather than an intentional withholding. GAO defines this as a situation, "when an agency is taking necessary steps to implement a program, but because of factors external to the program funds temporarily go unobligated."⁸ Importantly, GAO further states that, "This presupposes that an agency is making reasonable efforts to obligate funds and that the delay is, even with such efforts, unavoidable."⁹ GAO distinguishes these situations from cases in which the Executive Branch has "an intention to withhold budget authority," since intentionally withholding funds is not consistent with making a reasonable effort to obligate them.¹⁰

When Congress appropriates funds for a definite period, such as a fiscal year, federal law directs the Executive Branch to apportion those funds to prevent a deficiency or the need for a supplemental appropriation during that period.¹¹ This limited authority to prevent overspending does not authorize the withholding of funds for any additional reasons not discussed above. The apportionment law is crystal clear on this point. It restates that the Executive Branch can only hold funds in reserve under the same limited circumstances enumerated in the ICA's deferral provision, and directs the Executive Branch to follow the ICA's rescission provision for funds that are no longer required.¹²

⁵ House Committee on the Budget. 2019. *The Impoundment Control Act of 1974: What Is It? Why Does It Matter?*

⁶ Government Accountability Office. 2018. *Impoundment Control Act—Withholding of Funds through Their Date of Expiration.*

⁷ 2 U.S.C. § 684.

⁸ Government Accountability Office. 1992. *B-246096.10.*

⁹ Government Accountability Office. 1991. *B-241514.5.*

¹⁰ Government Accountability Office. 1989. *B-229326.*

¹¹ 31 U.S.C. § 1512. Funds appropriated for an indefinite period (i.e. without an expiration date) must be apportioned, "to achieve the most effective and economical use." This does not apply to any of funds at issue in this case.

¹² 31 U.S.C. § 1512(c).

The Administration concedes that the President intentionally withheld Ukraine aid

Even without a finding of fact, GAO could conclude that withholding Ukraine security assistance violated the ICA as a matter of law. The Executive Branch's stated pretext for withholding the funds – which is refuted by the evidence – would violate the ICA even if it was true. This means that GAO could rule that the Executive Branch violated the ICA even if GAO is concerned about delving into the questions at the heart of the Congressional impeachment inquiry and trial. And President Trump's actual reason for withholding the funds – substantiated with overwhelming evidence gathered during the impeachment inquiry – is also a clear violation of the ICA.

There is no dispute that the President intentionally withheld security assistance funding for Ukraine. In its response to GAO's inquiry, OMB acknowledges using the apportionment process to withhold funds for the Department of Defense (DOD) Ukraine Security Assistance Initiative from July 25 to September 12, and withholding State Department funds for the Ukrainian military until sending a Congressional notification on September 11 that was legally required 15 days before spending the funds.¹³ OMB states that the delay arose from a "Presidential direction."¹⁴

Withholding Ukraine aid was illegal under the ICA even if all funds were fully obligated prior to their scheduled expiration – which they were not

For both rescissions and deferrals, the only valid withholdings under the ICA, the President is required to notify Congress by transmitting a special message pursuant to the ICA.¹⁵ Since there is no dispute that the President did not transmit such a special message with regard to Ukraine security assistance, the withholding of these funds cannot be valid under the ICA as either a rescission proposal or a deferral.¹⁶

The initial OMB order to withhold Ukraine security assistance included an assurance that "based on OMB's communication with DOD on July 25th, 2019, OMB understands from the Department that this brief pause in obligations will not preclude DOD's timely execution of the final policy direction."¹⁷ Even if true and all of the Ukraine security assistance funds were obligated before the end of the fiscal year – which they were not – the temporary delay would still constitute an illegal deferral under the ICA. GAO recently reported that the Department of Energy violated the ICA when it withheld funds for the Advanced Research Projects Agency-Energy, even though Congress provided this funding without any expiration date.¹⁸

¹³ Mark R. Paoletta. 2019. *RE: B-331564, Office of Management and Budget – Withholding of Ukraine Security Assistance.*

¹⁴ Mark R. Paoletta. 2019. *RE: B-331564, Office of Management and Budget – Withholding of Ukraine Security Assistance.*

¹⁵ 2 U.S.C. §§ 283-84.

¹⁶ Senate Budget Committee. 2019. *Questions for the Record From Senator Chris Van Hollen For the Honorable Gene L. Dodaro.*

¹⁷ House Permanent Select Committee on Intelligence. 2019. *Deposition of Mark Sandy, 94-95.*

¹⁸ Government Accountability Office. 2017. *Impoundment of the Advanced Research Projects Agency-Energy Appropriation Resulting from Legislative Proposals in the President's Budget Request for Fiscal Year 2018.*

Beginning on August 20, however, the OMB orders to withhold Ukraine funds no longer included the assurance that the delay would not prevent the timely obligation of the funds, because DOD could not provide this assurance anymore.¹⁹ Furthermore, the Executive Branch recently released heavily redacted documents to the Center for Public Integrity under a court order that show DOD officials raised concerns to OMB that the holds posed a “risk to execution” of the program.²⁰ Indeed, \$35 million of DOD funding for the Ukraine Security Assistance Initiative was not obligated by the end of the fiscal year.²¹

Therefore, what began as an illegal deferral of funds for Ukraine ultimately became a de facto rescission of those funds, because the delay prevented a portion of the funds from being spent prior their scheduled expiration. Congress had to pass new legislation to extend the availability of these funds to prevent this rescission, but this does not absolve the Executive Branch. Otherwise, the Executive Branch could take advantage of any number of political changes in Congress that undermine support for extending previously appropriated funds, because there is no guarantee that Congress will agree to such an extension.

Not only did the President not notify Congress of a deferral or rescission, but pursuant to the DOD appropriations act for FY 2019, DOD notified Congress on February 28, 2019 and May 23, 2019 that the funds *would* be obligated.²² The Executive Branch did not update those notifications following the decision to withhold the funds, nor did it notify Congress about any action to withhold funding under the procedures mandated by the ICA.

Even the Administration’s stated pretext of withholding Ukraine aid to conduct a “policy review” would not be legal under the ICA

Since the withholding cannot be justified as a rescission or deferral, OMB is forced to argue that it was a programmatic delay, contrary to both the law and the evidence. The evidence is overwhelming that President Trump withheld Ukraine security assistance funds to pressure Ukraine to intervene on his behalf in the 2020 presidential election. But the Executive Branch has asserted – without evidence – that the funds were withheld “to engage in a policy process regarding those funds.”²³ Even if this were true, it would still violate the ICA.

Having already publicly characterized the Ukraine withholding as a “policy review,” OMB is constrained to argue that a policy review is a programmatic delay.²⁴ However, GAO has unambiguously stated that, “the Impoundment Control Act does not authorize deferrals for policy reasons.”²⁵

¹⁹ House Permanent Select Committee on Intelligence. 2019. *Deposition of Mark Sandy*, 127-28.

²⁰ Center for Public Integrity. 2019. *CPI v DoD Dec 20, 2019 Release*.

²¹ Mark R. Paoletta. 2019. *RE: B-331564, Office of Management and Budget – Withholding of Ukraine Security Assistance*. According to OMB, \$20 million remains unobligated as of November 29, 2019.

²² P.L. 115-245; Adam B. Schiff, Eliot L. Engel, Elijah E. Cummings. October 7, 2019. *Letter to the Honorable Russell T. Vought*.

²³ Mark R. Paoletta. 2019. *RE: B-331564, Office of Management and Budget – Withholding of Ukraine Security Assistance*.

²⁴ Josh Dawsey, et al. 2019. *White House review turns up emails showing extensive effort to justify Trump’s decision to block Ukraine military aid*. The Washington Post.

²⁵ Government Accountability Office. 1991. *B-241514.5*.

OMB cites the GAO-recognized reasons for programmatic delays, and then asserts without citation that, “Another form that programmatic delay may take is when the Executive branch needs time to develop or change policy.”²⁶ OMB provides no precedents in which GAO has found Executive Branch policy considerations to be programmatic delays. To the contrary, GAO expressly rejected programmatic delays driven by policy considerations in a case where GAO ruled that the delay was actually an illegal deferral.²⁷

OMB attempts to distinguish between a “programmatic delay due to policy development,” which it claims is legal under the ICA, and “policy deferrals” that violate the ICA.²⁸ This is a distinction without a difference. One of GAO’s characteristics for a programmatic delay is that the factor causing the delay is external to the program. It is hard to conceive of a less external factor than a self-directed Executive Branch “policy review.”

OMB claims that a policy reason is an acceptable programmatic delay when it is “consistent with the intent of the statute,” but GAO has only recognized this in very limited cases where the policy conditions are clearly stated in law or in a directive from congressional committees.²⁹ In direct contrast, OMB concedes that the policy review was necessary to avoid delivering the aid to Ukraine, “in a manner that could conflict with the President’s foreign policy.”³⁰ During the Reagan Administration, GAO ruled that lapses in funding were “de facto rescissions” that the President should have reported under the ICA when the funding was going to lapse due to, “executive actions based on policy directives of the new administration.”³¹

Congress wrote the ICA to prevent exactly what OMB describes with regard to aid for Ukraine: The President withholding legally mandated funding for his own policy reasons. As GAO has found, the Executive Branch violates the ICA when it withholds funds in, “an attempt to replace the policy decision already made by the Congress with its own.”³²

The Administration’s “policy review” was irrelevant to programmatic issues

OMB is attempting to conflate its policy review with the routine processes necessary to efficiently and effectively carry out a program. But as OMB official Mark Sandy testified, carrying out a hold in this manner was “unusual” and “unique” in his 12 years of OMB experience.³³ In the midst of this hold, a political appointee named Michael Duffey took from Mr. Sandy the responsibility for signing the apportionments to continue the hold, an unusual

²⁶ Government Accountability Office. 2016. *Principles of Federal Appropriations Law*; Mark R. Paoletta. 2019. *RE: B-331564, Office of Management and Budget – Withholding of Ukraine Security Assistance*.

²⁷ Government Accountability Office. 1991. *B-241514.5*.

²⁸ Mark R. Paoletta. 2019. *RE: B-331564, Office of Management and Budget – Withholding of Ukraine Security Assistance*.

²⁹ Government Accountability Office. 2016. *Principles of Federal Appropriations Law*; Mark R. Paoletta. 2019. *RE: B-331564, Office of Management and Budget – Withholding of Ukraine Security Assistance*.

³⁰ Mark R. Paoletta. 2019. *RE: B-331564, Office of Management and Budget – Withholding of Ukraine Security Assistance*.

³¹ Government Accountability Office. 1984. *Lapsed Budget Authority/Fiscal Year 1981*.

³² Government Accountability Office. 1991. *B-241514.5*.

³³ House Permanent Select Committee on Intelligence. 2019. *Deposition of Mark Sandy*, 94-95.

arrangement that Mr. Sandy testified raised concerns for OMB staff.³⁴ Mr. Duffey sought to keep this hold secret from the outset, emailing Mr. Sandy and senior DOD officials on July 25 — the same day that President Trump spoke on the phone with President Zelensky and OMB began formally holding the funds — that, “Given the sensitive nature of the request, I appreciate your keeping that information closely held to those who need to know to execute the direction.”³⁵

GAO already rejected an argument last year that was very similar to the one OMB is trying to make now. The Department of Homeland Security claimed that withholding funds pending the conclusion of a legal review was, “not materially different from the prior and valid administrative activities undertaken by agencies in program execution (e.g. planning, design, market research, drafting of specifications, advertising requests for proposals, etc.).”³⁶ But GAO found the delay was not programmatic and that it violated the ICA, because the legal review was not an activity related to the execution of the program itself.

OMB effectively concedes that its policy review was not related to the processes underlying the delivery of aid to Ukraine, when it stresses that its hold did not prevent DOD from undertaking “any needed activities up to the point of obligation.”³⁷ In other words, none of the activities necessary to deliver the aid to Ukraine were the cause of the delay, and these would be the only permissible reasons for a programmatic delay.

President Trump’s stated pretexts for a policy review of Ukraine aid further demonstrate that this was not a programmatic delay

While OMB did not even state what elements of Ukraine policy were subject to this supposed review, President Trump has asserted two pretexts for the hold: because Ukraine “is considered a corrupt country,” and because he, “wanted to know why nearby European countries weren’t putting up money also.”³⁸ Even if these reasons were true, they would still not constitute reasons for a valid programmatic delay under the ICA.

Regarding President Trump’s assertion that Ukrainian corruption caused the delay, the Department of Defense, in coordination with the Department of State, had already certified that Ukraine was making sufficient progress on defense institutional reforms, including regarding corruption.³⁹ This certification was made on May 23, well before OMB began formally holding the funds on July 25. Given that the Executive Branch had already conducted a policy review that included the issue of corruption, pursuant to the congressionally mandated certification, a duplicative policy review was not a necessary step for providing the funds to Ukraine.

³⁴ House Permanent Select Committee on Intelligence. 2019. *Deposition of Mark Sandy*, 64.

³⁵ Center for Public Integrity. 2019. *CPI v DoD Dec 20, 2019 Release*.

³⁶ Government Accountability Office. 2018. *U.S. Department of Homeland Security—Impoundment Control Act and Appropriations for the Tenth National Security Cutter*.

³⁷ Mark R. Paoletta. 2019. *RE: B-331564, Office of Management and Budget – Withholding of Ukraine Security Assistance*.

³⁸ President Donald Trump. November 26 2019. *Twitter*.

³⁹ John C. Rood, May 23, 2019. *Letter to Congressional Committees*.

Congress required this certification as a condition for releasing the second half of the DOD Ukraine Security Assistance Initiative funds.⁴⁰ The fact that Congress recognized corruption might be an issue with Ukraine, but appropriated the funds anyway, indicates that corruption is not a valid programmatic reason not to spend the funds. GAO used the same logic to determine that withholding funds for the V-22 Osprey violated the ICA, notwithstanding DOD's technical concerns about the program that were known to Congress when the funds were appropriated.⁴¹

In fact, DOD could have spent the first half of the funds for the Ukraine Security Assistance Initiative prior to this legally mandated certification. The first half of the funds was not contingent on this certification – a clear indication that Congress viewed these funds as urgently needed to support Ukraine in an active armed conflict with Russia, and wanted this half of the funds to be provided even without the certification of progress on defense institutional reforms and anti-corruption efforts. Even without the certification, Congress still made the second half of the funds available for other purposes to defend our allies, “against Russian aggression.”⁴²

President Trump's questions about contributions to Ukraine from other countries were also not a valid reason for a programmatic delay. Congress did not condition the Ukraine funding on the levels of assistance provided by other countries.⁴³ President Trump can certainly ask questions and gather information on contributions from other countries, but answering those questions does not necessitate withholding the aid to Ukraine that Congress appropriated and President Trump signed into law. Any alleged lack of support from other countries for Ukraine does not make a delay in US-provided security assistance unavoidable.

Furthermore, the evidence is clear that the Executive Branch was not making reasonable efforts to address either of these issues, because they were not the true reasons for the delay. OMB continued to withhold the funds even after an interagency discussion about the President's concerns wrapped up in July.⁴⁴ Multiple OMB officials involved in the process did not even know the reason for the hold.⁴⁵ President Trump also received answers to his questions about Ukraine security assistance by the end of June, before OMB withheld the Ukraine funds.⁴⁶ OMB received additional requests for information on this issue more than two months later, in early September.⁴⁷ Not only are these questions not a valid reason for delaying the funds, but the long delay is not consistent with making reasonable efforts to answer them.

⁴⁰ National Defense Authorization Act for Fiscal Year 2016, As Amended Through P.L. 115-232.

⁴¹ Government Accountability Office. 1991. *B-241514.5*.

⁴² National Defense Authorization Act for Fiscal Year 2016, As Amended Through P.L. 115-232.

⁴³ House Permanent Select Committee on Intelligence. 2019. *The Trump-Ukraine Impeachment Report*. The United States has provided \$1.5 billion for Ukraine security assistance since 2014, while the European Union has provided €15 billion during the same period.

⁴⁴ House Permanent Select Committee on Intelligence. 2019. *Deposition of Laura Katherine Cooper*, 89-93.

⁴⁵ Center for Public Integrity. 2019. *CPI v DoD Dec 20, 2019 Release*; House Permanent Select Committee on Intelligence. 2019. *Deposition of Mark Sandy*, 178.

⁴⁶ House Permanent Select Committee on Intelligence. 2019. *Deposition of Laura Katherine Cooper*, 33-38; House Permanent Select Committee on Intelligence. 2019. *Deposition of Mark Sandy*, 25-28.

⁴⁷ House Permanent Select Committee on Intelligence. 2019. *Deposition of Mark Sandy*, 44.

Even if a policy review could be a programmatic delay, the Executive Branch has not substantiated that this actually caused the delay

Even if GAO finds as a matter of law that the policy review described by OMB could constitute a programmatic delay, OMB has failed to show clear and compelling evidence to substantiate that this supposed policy review was the actual reason for the delay. OMB does not even vouch for the truthfulness of this claim directly, instead characterizing it as, “OMB’s understanding” of the reason for the hold.⁴⁸

The Executive Branch has offered none of the information or evidence required to even make a case that this supposed policy review was a programmatic delay. These required elements include what external factor necessitated a policy review, what reasonable efforts the Executive Branch undertook to carry it out, and why conducting it made a delay in providing aid to Ukraine unavoidable.

OMB argues that providing any details or evidence to substantiate the Executive Branch’s stated intent when it withholds funds would violate the Constitutional separation of powers.⁴⁹ If GAO accepts OMB’s position that the Executive Branch should not have to substantiate its stated reasons for delaying the expenditure of appropriated funds, then it would be impossible in many cases for GAO to enforce the ICA. The OMB position would enable a President to withhold funding from any program for any reason by simply asserting without evidence that it is a programmatic delay.

Fortunately, GAO has not accepted this position. GAO has required the Executive Branch to prove that its reasons for withholding funds do not violate the ICA, and concluded that the Executive Branch violated the ICA in cases where this proof was lacking.⁵⁰

The President’s actual reason for withholding Ukraine aid was illegal under the ICA

In this case, there is overwhelming evidence to show why President Trump withheld aid for Ukraine. The House impeachment inquiry, “uncovered a months-long effort by President Trump to use the powers of his office to solicit foreign interference on his behalf in the 2020 election.”⁵¹ The President’s actions have damaged our national security, attempted to undermine the integrity of the next election, and violated his oath of office. President Trump’s continued solicitation of foreign interference in a U.S. election presents a clear and present danger that the President will continue to use the power of his office for his personal political gain.

President Trump’s withholding of military assistance was just one part of that scheme. The President also leveraged the promise of a White House meeting to pressure Ukraine to intervene in the 2020 election. President Trump invited foreign interference in our elections, and indicated

⁴⁸ Mark R. Paoletta. 2019. *RE: B-331564, Office of Management and Budget – Withholding of Ukraine Security Assistance.*

⁴⁹ Mark R. Paoletta. 2019. *RE: B-331564, Office of Management and Budget – Withholding of Ukraine Security Assistance.*

⁵⁰ Government Accountability Office. 1992. *B-246096.10.*

⁵¹ House Permanent Select Committee on Intelligence. 2019. *The Trump-Ukraine Impeachment Report.*

to Ukraine that as President he would reward such interference. These actions would constitute a flagrant abuse of power whether or not they violated the ICA. The White House offered no evidence to the House impeachment inquiry to refute these charges. They will have an opportunity to do so during the Senate trial.

It should be clear that the corrupt purposes identified by the House impeachment inquiry for withholding Ukraine aid violated the ICA. After extensive hearings, HPSCI concluded that President Trump withheld military assistance to Ukraine in an effort to compel Ukraine to, “publicly announce investigations into his political rival, former Vice President Joe Biden, and into the debunked conspiracy theory that Ukraine, not Russia, interfered in the 2016 U.S. election.”⁵²

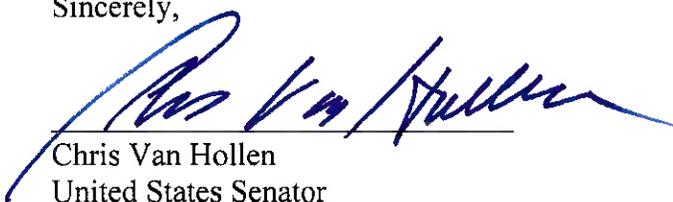
Acting White House Chief of Staff Mick Mulvaney confirmed at a press conference that the President tied his hold on Ukraine assistance directly to political investigations.⁵³ President Trump’s Ambassador to the European Union, Gordon Sondland, was one of the key individuals who carried out this policy, and he testified that it was indeed a “quid pro quo.”⁵⁴ We also know that in a call with Ukrainian President Volodymyr Zelensky on July 25, President Trump responded to President Zelensky’s discussion of the military assistance with a request to investigate former Vice President Biden and Ukrainian interference in the 2016 election.⁵⁵

This corrupt purpose for withholding Ukraine aid does not come close to meeting the definition of a programmatic delay. Ukraine announcing investigations for the purposes of boosting President Trump’s political prospects is, of course, not a necessary step for providing Ukraine with military assistance. Furthermore, there is certainly no reason that President Trump’s desire for Ukraine to announce these investigations made a delay in providing the aid unavoidable.

Conclusion

The Administration has failed to even state a legal reason under the ICA for its withholding of security assistance for Ukraine, and the evidence refutes the Administration’s stated reasons. The Administration must be held accountable for its violations of the ICA, or we will open the floodgates for this and future Administrations to violate the ICA with impunity. I am glad that GAO is looking into this matter, and look forward to your response.

Sincerely,



Chris Van Hollen
United States Senator

⁵² House Permanent Select Committee on Intelligence. 2019. *The Trump-Ukraine Impeachment Report*.

⁵³ Press Briefing by Acting Chief of Staff Mick Mulvaney. October 17, 2019.

⁵⁴ Testimony of Gordon Sondland before the House Permanent Select Committee on Intelligence, November 20, 2019.

⁵⁵ President Trump to President Zelensky of Ukraine. July 25, 2019. Declassified by order of the President September 24, 2019.