



U.S. Department of Justice  
Office of Legal Counsel

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Office of the  
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Washington, D.C. 20530

Bennett  
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Retrieval

SEP 8 1986

MEMORANDUM FOR PETER J. WALLISON  
Counsel to the President

You have asked whether you may legally adopt a policy within the White House that would require an attorney from the Counsel's Office to be present during interviews of White House staff by congressional investigators. The role of the attorney would be to represent the institutional interests of the executive branch -- including the interest in asserting any applicable privileges -- rather than to provide private representation for the White House staff member. As set forth below, adoption of the proposed policy is supported by sound policy considerations and is entirely consistent with applicable legal standards.

We assume that interviews covered by the proposed policy would be rare. Although members of the White House staff routinely deal with members of Congress and congressional staffers in connection with ongoing government business, a formal congressional investigation into the conduct of White House staff inevitably raises sensitive inter-branch concerns, because those staff members are among the President's closest advisers. Presidents have generally resisted demands for congressional testimony from their immediate advisers with respect to the performance of their official duties. On the few occasions when presidential advisers have testified, it has generally been in connection with their private affairs or conduct.<sup>1</sup> A request for an interview by congressional investigators, while perhaps not quite as intrusive as a demand for testimony, raises many of the same concerns, and ordinarily we would expect that such requests would be refused. Nonetheless we recognize that in some

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<sup>1</sup> I attach a memorandum prepared in 1971 by former Assistant Attorney General Rehnquist on the subject of Congress's power to compel appearance or testimony by members of the White House staff. Although dated, this memorandum provides a useful and sound overview of the entire subject, including a summary of the historical record.

- instances the Executive may have good and sufficient reasons to accede to such a request.<sup>2</sup>

In those instances, you propose to have a representative from White House Counsel's Office present during the interview for the primary purposes of protecting the confidentiality of privileged information and of ensuring that any restrictions on the scope of the interview are observed by all parties. Presumably counsel would not actually assert executive privilege for any information. The need to assert executive privilege vis-a-vis Congress does not arise unless and until a subpoena is duly authorized and issued.<sup>3</sup> Counsel would, however, be in a position to advise the White House employee about the sensitivity of particular information and, if need be, to terminate the interview in order to avoid disclosure of privileged information.

Congress may well object to this policy on the ground that the presence of a representative from White House Counsel's Office will affect the willingness of the interviewee to discuss matters freely and without fear of retaliation. Although those objections could be taken into account in formulating the policy or applying it in particular cases, we do not believe Congress can legally insist on interviewing members of the White House staff without counsel present to represent the President's interests. Permission to allow the interview at all is wholly discretionary, and the President therefore can insist on the presence of counsel as a precondition to his consent. It is almost inconceivable that a private employer would voluntarily permit its employees to be interviewed by government officials without the company's legal counsel present, and it is hardly unreasonable for the Executive to do likewise. If Congress objects, its legal remedy is to attempt to compel testimony by issuing a subpoena.

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<sup>2</sup> For example, White House employees were questioned by the Senate Judiciary Committee as part of its investigation into the relationship and activities of President Carter's brother with respect to the Government of Libya. At that time, this Office rendered advice to the Counsel to the President about the propriety of providing legal representation for those employees. Although the opinion does not address the particular question you have asked here, it provides a useful overview of representation problems, and we therefore attach a copy for your use.

<sup>3</sup> In any event, under the terms of President Reagan's November 4, 1982, directive, only he can authorize a claim of executive privilege.

<sup>4</sup> In practice, congressional committees generally allow government attorneys to accompany witnesses during their testimony, for the purpose of representing official government interests.

It is also likely that the employee will appreciate the presence of a representative from your Office during an interview, particularly if the investigator attempts to exceed the limits, if any, placed on the scope of the interview. In the unlikely event that the employee objects to the presence of a member of your Office during the interview, your recourse would be to take administrative action against the employee. Since White House staff members are generally not covered by the "whistleblower" provisions of the Civil Service Reform Act, 5 U.S.C. 2302(b)(8),<sup>5</sup> we believe adverse personnel action could be taken against<sup>6</sup> an employee who refuses to comply with the proposed policy.

The proposed policy would clearly serve substantial governmental interests, and we see no legal bar to its implementation. We recommend, however, that in outlining the policy to White House employees you make clear that your representative will provide only official representation, and cannot provide private representation on behalf of the employee. (The employee may, of course, request private counsel of his own choosing to be present at the interview to protect those interests.)

Please let us know if we can be of further assistance.

Charles J. Cooper  
Assistant Attorney General  
Office of Legal Counsel

#### Attachments

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<sup>5</sup> The definition of "covered position" under the Act specifically excludes "a position which is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character." 5 U.S.C. 2302(a)(2)(B). To our knowledge most, if not all, positions in the White House Office fall within the terms of this exclusion.

<sup>6</sup> Even if the "whistleblower" provisions covered White House staff, they would not necessarily provide any protection for a refusal to allow counsel to be present in order to guard against disclosure of privileged material. Consistent with our view that Congress cannot override executive privilege by statutory enactment, we do not believe the "whistleblower" provisions allow an employee to escape sanctions for disclosure of material covered by executive privilege.