



U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

September 16, 2019

Pat A. Cipollone
Counsel to the President
The White House
Washington, DC 20500

Dear Mr. Cipollone:

On August 14, 2019, the Committee on the Judiciary of the House of Representatives issued a subpoena seeking to compel Robert Porter, former Assistant to the President and Staff Secretary, to testify on September 17 at a hearing entitled “Presidential Obstruction of Justice and Abuse of Power.” You have asked whether the Committee may compel Mr. Porter to testify. We conclude that he is absolutely immune from compelled congressional testimony in his capacity as a former senior adviser to the President.

Soon after service of the subpoena, the Committee Chairman, Jerrold Nadler, announced that Mr. Porter had been subpoenaed because he “was prominently featured” in volume II of the report issued by Special Counsel Robert S. Mueller, III, particularly in descriptions of President Trump allegedly “directing then-White House Counsel Don McGahn to fire the Special Counsel.” Press Release, House Judiciary Committee Subpoenas Rob Porter (Aug. 26, 2019); *see also* Press Release, House Judiciary to Consider Procedures Regarding Whether to Recommend Impeachment (Sept. 9, 2019) (stating that the Committee subpoenaed Mr. Porter in connection with the President’s alleged “efforts to obstruct the Special Counsel’s investigation”). The subpoena plainly seeks testimony concerning matters occurring during and relating to Mr. Porter’s service as a presidential aide.

The Committee’s subpoena is one of several that House committees have recently issued to current and former senior presidential aides. The Department of Justice has for decades taken the position, and this Office recently reaffirmed, that “Congress may not constitutionally compel the President’s senior advisers to testify about their official duties.” *Testimonial Immunity Before Congress of the Former Counsel to the President*, 43 Op. O.L.C. __, *1 (May 20, 2019) (“*Immunity of the Former Counsel*”). This testimonial immunity is rooted in the separation of powers and derives from the President’s status as the head of a separate, co-equal branch of government. *See id.* at *3–7. Because the President’s closest advisers serve as his alter egos, compelling them to testify would undercut the “independence and autonomy” of the Presidency, *id.* at *4, and interfere directly with the President’s ability to faithfully discharge his responsibilities. Absent immunity, “congressional committees could wield their compulsory power to attempt to supervise the President’s actions, or to harass those advisers in an effort to influence their conduct, retaliate for actions the committee disliked, or embarrass and weaken the President for partisan gain.” *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. __, *3

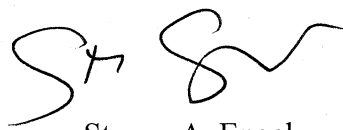
(July 15, 2014) (“*Immunity of the Assistant to the President*”). Congressional questioning of the President’s senior advisers would also undermine the independence and candor of executive branch deliberations. See *Immunity of the Former Counsel*, 43 Op. O.L.C. at *5–7. Administrations of both political parties have insisted on the immunity of senior presidential advisers, which is critical to protect the institution of the Presidency. *Assertion of Executive Privilege with Respect to Clemency Decision*, 23 Op. O.L.C. 1, 5 (1999) (A.G. Reno).

Mr. Porter qualifies as a senior presidential adviser entitled to immunity. Our opinions have recognized that this immunity extends to “those trusted members of the President’s inner circle ‘who customarily meet with the President on a regular or frequent basis,’ and upon whom the President relies directly for candid and sound advice.” *Immunity of the Assistant to the President*, 38 Op. O.L.C. at *2 (quoting Memorandum for John D. Ehrlichman, Assistant to the President for Domestic Affairs, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Power of Congressional Committee to Compel Appearance or Testimony of “White House Staff”* at 7 (Feb. 5, 1971)). Your office has informed us that Mr. Porter served as one of the President’s closest aides during his tenure at the White House. He spent substantial amounts of time with the President on a daily basis and traveled with him regularly. Mr. Porter was also substantively involved in policy areas that are high priorities for the President. Indeed, Mr. Porter’s close relationship with the President was recognized in the media as well. See, e.g., Julie Hirschfeld Davis & Maggie Haberman, *Ex-Aide Is Called in Trump Inquiry*, N.Y. Times, Aug. 27, 2019, at A16 (Mr. Porter’s “job as staff secretary, which included controlling every piece of official paper the president saw, entailed near-constant presence around Mr. Trump”); Maggie Haberman, *Trump Pines for an Aide Who Resigned*, N.Y. Times, Mar. 27, 2018, at A13 (“Mr. Porter also served as a de facto deputy chief of staff for policy, playing a key role on issues like tariffs, and Mr. Trump spent as much as two hours a day with him.”). In short, Mr. Porter was an important member of the President’s inner circle of immediate advisers.

It is inconsequential that Mr. Porter is now a private citizen. In *Immunity of the Former Counsel*, we reaffirmed that for purposes of testimonial immunity, there is “no material distinction” between “current and former senior advisers to the President,” and therefore, an adviser’s departure from the White House staff “does not alter his immunity from compelled congressional testimony on matters related to his service to the President.” 43 Op. O.L.C. at *16; see also *Immunity of the Former Counsel to the President from Compelled Congressional Testimony*, 31 Op. O.L.C. 191, 192–93 (2007). It is sufficient that the Committee clearly seeks Mr. Porter’s testimony on matters related to his official duties at the White House.

For these reasons, we conclude that Mr. Porter may not be compelled to testify before the Committee about the events described in the Special Counsel’s report. The President may lawfully direct him not to appear on September 17, and he may not be penalized for following such a direction. See *Immunity of the Former Counsel*, 43 Op. O.L.C. at *19–21.

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



Steven A. Engel
Assistant Attorney General