



9/25/74

Phil:

Quick and dirty. But I hope
good enough for your present purposes.

Nino

*cut to Areeda, Wh. Hse.
9/25/74 @ 2:45 pm*

Is a Presidential Adviser required to appear and to testify before a Congressional Committee?

Precedent indicates that the President may direct a close Presidential Adviser not to appear before a Congressional Committee. This is particularly the case where the Committee seeks to investigate official activities performed by the Adviser on behalf of the President. Presidential Advisers are usually permitted to appear before Committees in connection with matters related to their private conduct.

A. Instances in which White House staff members declined to appear before congressional committees.

1. During the Truman Administration, a subcommittee of the House Committee on Education and Labor investigating the manner in which the Taft-Hartley Act was administered during a strike against Government Services, Inc., caused subpoenas to be served on Presidential Assistant John R. Steelman directing him to appear before the subcommittee on two separate occasions. H. Rept. 1595, 80th Cong., 2d Sess., p. 3. The committee apparently sought to interrogate him

with respect to statements made to him by the President with respect to the strike. *Id.*, at p. 12. Mr. Steelman did not comply with the subpoenas but returned both of them with a letter stating inter alia that "the President directed me, in view of my duties as his assistant, not to appear before your subcommittee." *Id.*, at p. 3. See also Investigation of the GSI Strike, Hearings before a Special Subcommittee of the Committee on Education and Labor, House of Representatives, 80th Cong., 2d Sess., pp. 347-353.

2. During the investigation of the Dixon-Yates contract, which occurred in the Eisenhower Administration, a subcommittee of the Senate Judiciary Committee twice invited Presidential Assistant Sherman Adams to testify with respect to his request to the Securities and Exchange Commission that it postpone a hearing relating to the financing of the contract. Mr. Adams declined to comply with those invitations because of "his official and confidential relationship with the President." Power Policy, Dixon-Yates Contract, Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 84th Cong.,

1st Sess., pp. 676, 779. He did, however, as shown infra, appear and testify subsequently with respect to another subject matter.

3. During the Johnson Administration the Senate Committee on the Judiciary invited Mr. DeVier Pierson, Associate Special Counsel to the President, to testify with respect to the question whether Mr. Justice Fortas had taken part in the drafting of legislation authorizing Secret Service protection for Presidential candidates. Mr. Pierson declined the invitation on the ground that it has been firmly established "that members of the President's immediate staff shall not appear before a Congressional committee to testify with respect to the performance of their duties on behalf of the President."

Nominations of Abe Fortas and Homer Thornberry, Hearings

before the Committee on the Judiciary, United States Senate, 90th Cong., 2d Sess., pp. 1347, 1348.

~~There have been several~~ instances where members of the immediate White House staff appeared and testified before congressional committees. With a single exception the

testimony related to the witness' private conduct.

1. In 1944, in the course of an investigation into the administration of the Rural Electrification Administration during the administration of President Franklin Roosevelt, Jonathan W. Daniels, Administrative Assistant to the President, appeared before a subcommittee of the Senate Committee on Agriculture and Forestry in compliance with a subpoena served on him. Administration of the Rural Electrification Administration Act, Hearing before a Subcommittee of the Committee on Agriculture and Forestry, United States Senate, 78th Cong., 1st Sess., pp. 611, 659, 691. He refused, however, to answer most of the questions addressed to him on the ground of his confidential relationship to the President. Id., pp. 612-629. When the subcommittee indicated that it might initiate contempt proceedings against Mr. Daniels (id., p. 694), President Roosevelt ~~xxx~~ authorized him to testify (id., p. 740), and Mr. Daniels did so. Id., pp. 695-739.

Donald S. Dawson testified in 1951 before the Subcommittee of the Senate Committee on Banking and Currency, with the specific approval of President Truman, to answer charges that he had accepted gratuities from persons who sought favors from government agencies. Study of the Reconstruction Finance Corporation, Hearings before a Subcommittee of the Senate Committee on Banking and Currency, United States Senate, 82d Cong., 1st Sess., pp. 1709, 1795, 1810. According to newspaper reports President Truman believed that the subcommittee's request that Mr. Dawson testify constituted a violation of the principle of the separation of powers. Nevertheless, he "reluctantly" authorized Mr. Dawson to testify in order to give him an opportunity to clear his name. New York Times, May 5, 1951, p. 15; May 11, 1951, pp. 1, 20; May 12, 1951, pp. 1, 12.

3. Presidential Assistant Sherman Adams testified in 1958 with respect to his personal relations to Bernard Goldfine and the favors he had received from him. Investigation of Regulatory Commissions and Agencies, Hearings before

Commerce, House of Representatives, 85th Cong., 2d Sess.,

pp. 3711-3740.

It thus appears that at least since the Truman Administration Presidential Assistants have appeared before congressional committees only where the inquiry related to their own private affairs or where they had received Presidential permission. In the Dawson case both conditions were met.

Similar incidents occurred during the Nixon Administration in connection with attempts of Congressional Committees to obtain the testimony of Dr. Kissinger and Mr. Flanigan. In view of the shortness of the time we have not been able to document those instances.

II.

Is Executive privilege waived if witness testifies to part of occurrence?

An affirmative answer to this question would be inconsistent with the nature of Executive privilege. That privilege is based on the notion that the President has the responsibility to withhold information the disclosure of which would be inconsistent with the public interest. This purpose would

be jeopardized if harmful information had to be disclosed merely because the President permitted the release of related information which could be revealed safely. A waiver theory would have the effect of requiring the concealment of much information which would be released, merely because it was connected with sensitive information.

A pertinent incident arose during the Army-McCarthy hearings. During that investigation Secretary of the Army Adams had testified that a cabinet level meeting had been held in the office of the Attorney General. Special Senate Investigation, etc., Hearing before the Special Subcommittee on Investigations of the Committee on Government Operations, United States Senate, 83d Cong., 2d Sess., 1059. Secretary Adams discussed some of the matters discussed at that meeting. However, when Senator Symington asked for further particulars (Id., pp. 1169-70), President Eisenhower claimed Executive privilege. Id., p. 1249. Chairman Mundt upheld the claim (Id., p. 1256), in spite of the objections by Senator Symington and Senator Jackson that the privilege had been lost as

the result of the partial disclosure of the discussion at that conference. Id., pp. 1169-1170, 1257, 1259.

III.

Can the Counsel to the President claim an Attorney-Client privilege?

See Senate
Judiciary
Committee
Hearings
97th Cong.
Vol. 10,
p. 333
Letter
Mitchell
to Bayh

It is our recollection that Mr. Justice Rehnquist claimed that privilege during his confirmation hearing. In the short time at our disposal it has not been possible to locate that incident in the nearly 500 pages of Committee hearings.

On the other hand it is well-established that any advice to the President, not merely legal advice, is privileged. Thus, during the investigation into the circumstances surrounding the dismissal of General MacArthur held by the Senate Committees on Armed Services and Foreign Relations in 1951, General Bradley refused to testify about a conversation with President Truman in which he had acted as the President's confidential adviser. The late Senator Russell, the Committee Chairman, recognized that claim of privilege. When that ruling was challenged, the Committee upheld it by a vote of

eighteen to eight. Military Situation in the Far East, Hearings before the Committee on Armed Services and the Committee on Foreign Relations, United States Senate, 82d Cong., 1st Sess., pp. 763, 832-872.