

1 4 APR 1981

MEMORANDUM FOR FRED F. FIELDING
Counsel to the President

Re: Congressional Testimony by Presidential Assistants

This responds to an inquiry which H. P. Goldfield of your Office made to Geoffrey Miller of this Office regarding the legal implications of an Assistant to the President testifying voluntarily before a Senate Committee. Given the time constraints, we have not researched the subject anew. However, as requested by Mr. Goldfield, I am forwarding herewith certain materials prepared by this Office which bear on the general question of congressional testimony by close presidential assistants.

These materials reflect the consistent view that immediate advisors to the President -- that is, those who customarily meet with the President on a regular or frequent basis -- are absolutely immune from any obligation to testify before a congressional committee. The immunity may be waived, and close presidential assistants have from time to time appeared before congressional committees. However, this Office has suggested that there are several strong reasons for eschewing such voluntary appearances. First, such appearances tend to create, regardless of disclaimers, the impression among some Representatives or Senators that such testimony is a matter of legislative right rather than executive grace. As a result, Congress or individual Members of Congress might become more vigorous in asserting authority to compel the appearance and testimony of presidential assistants. Second, because legal issues of this nature are so rarely submitted to the courts for adjudication, executive and legislative practices take on a degree of precedential value. Thus, each appearance before a congressional committee by a close presidential assistant, even if explicitly made under waiver, has some potential to undermine the legal basis of the immunity. Finally, a practice of appearing before congressional committees might leave the President open to the charge, however unfounded, that when he does assert the immunity it is because he has something to hide.

This Office is, of course, happy to research the matter in greater depth at your request. I have attached the following materials for your information:

1. Memorandum of Assistant Attorney General Erickson
re: "Appearance of Presidential Assistant Peter M.
Flanigan before a Congressional Committee";
2. Memorandum of Assistant Attorney General Rehnquist
re: "Power of Congressional Committee to Compel
Appearance or Testimony of 'White House Staff'";
3. Letter of the Associate Special Counsel to the
President dated September 16, 1968 (reprinted in
Senate Judiciary Hearing on the Nomination of
Abe Fortas to be Chief Justice (1968).

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

Attachments

bcc: H. P. Goldfield
White House Counsel's Office