Congressional Demand for Deposition of Counsel to the President Fred F. Fielding.

July 23, 1982

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A Congressional demand for testimony from a close adviser to the President directly implicates a basic concern underlying the Executive privilege, "the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties." United States v. Nixon, 418 U.S. 683, 705 (1974). There is no doubt that the Counsel to the President is an official included within the ambit of "high Government officials." See, e.g., Nixon v. Administrator of General Services, 443 U.S. 425, 446 n. 10 (1977) (discussing "legitimate governmental interests in the confidentiality of communications between high officials, e.g., those who advise the President") (emphasis supplied). Although Congress is authorized to inquire into any subject "on which legislation could be had," McGrain v. Daugherty, 273 U.S. 135, 177 (1927), "the occasions upon which Congress may demand information [from the Executive] are virtually unlimited." Cox, Executive Privilege, 122 U. Pa. L. Rev. 1383, 1426 (1974). The danger is great, therefore, that agreeing to this particular Congressional demand to depose one of the highest and most intimate of Presidential advisers will erode a central foundation of Executive privilege and severely chill internal deliberations among Executive Branch advisers in the future.

It is important at the outset to recognize three characteristics of the application of Executive privilege to a demand for oral testimony, as distinguished from a document request. First, application of Executive privilege in a document context is uniformly limited to those specific documents which would impair the privilege. Testimonial privileges, on the other hand, come in two varieties: those which exempt a witness absolutely from testifying, and those which provide only qualified protection. For example, a criminal defendant is absolutely immune from being sworn as a witness at his trial; clergy, attorneys, doctors, and spouses, on the other hand, have only qualified privileges to decline to answer specific questions. As discussed below, I believe the Counsel to the President possesses an absolute privilege not to testify with regard to any matters relating to his official duties as legal adviser to the President.

A second characteristic of the application of Executive privilege in a testimonial, as opposed to documentary, context is that "the furnishing of a document to a Congressional committee involves little, if any, inconvenience to the Executive Branch or to the President and his advisers. The requirement of personal attendance of a witness at a hearing, on the other hand, does involve some degree of inconvenience . . . ." 1/

Finally, a demand for testimony is inherently more intrusive and chilling in its effect on the deliberative process than is a document request. A witness before a Congressional committee may be asked -- under threat of contempt -- a wide range of unanticipated questions about highly sensitive deliberations and thought processes. He therefore may be unable to confine his remarks only to those which do not impair the deliberative process. A request for documents, however, permits the Executive Branch more carefully to consider which information may be divulged consistent with its independent, coordinate status in our structure of government.

The earliest, but inconclusive, precedent in this area arose during the trial of Aaron Burr for treason before Chief Justice John Marshall, sitting as a Circuit Judge. Marshall issued a subpoena for certain documents to President Jefferson. The President responded with a letter stating, in effect, that if the courts could summon the President from place to place throughout the United States, he would be at their mercy in a manner incompatible with the coordinate status of the Executive Branch in our government. Although President

1/ Memorandum for Hon. John D. Ehrlichman from William H. Rehnquist (February 5, 1971) ("Rehnquist Memorandum").

Jefferson did not appear, Chief Justice Marshall continued to maintain his position that the President was subject to subpoena, but conceded, "in no case of this kind would a court be required to proceed against the President as against an ordinary individual. The objections to such a course are so strong and so obvious that all must acknowledge them." 2/ Notwithstanding Marshall's position, it appears that from the time of Jefferson until 1974, when the Nixon tapes case was decided, every President (and Attorney General) took the position that the President was absolutely immune from subpoena.3/

Examples of the actual practice regarding White House staff testifying before Congress is somewhat inconsistent, as is the practice of Executive Branch compliance generally with Congressional demands for information. 4/ During Franklin D. Roosevelt's Administration, for example, Jonathan Daniels, Administrative Assistant to the President, refused to respond to a Senate subcommittee subpoena demanding his testimony on alleged attempts to compel the resignation of the Rural Electrification Administrator. Daniels justified his refusal to testify on the basis of his confidential relationship with the President. Following the subcommittee's unanimous recommendation that he be cited for contempt, Daniels wrote the Chairman that although he still believed that a Congressional committee could not require either the President or his Administrative Assistant to testify, the President felt that in this particular instance his testimony would not adversely affect the public interest. Daniels therefore agreed to answer the subcommittee's questions.

In the Truman Administration, John R. Steelman, Assistant to the President, returned a House subcommittee subpoena with a letter stating that "the President directed me, in view of my duties as his Assistant, not to appear before your subcommittee." Another individual, however, Donald Dawson, Administrative Assistant to the President, was "reluctantly" permitted by President Truman to testify in order to clear his name of alleged wrongdoing before a Senate subcommittee investigating the Reconstruction Finance Corporation.

2/ 2 Roberson, Report of the Trials of Aaron Burr, 233, 236 (Statement at Burr's misdemeanor prosecution), quoted in Rehnquist Memorandum, supra, at 2.

3/ See Rehnquist Memorandum at 3.

4/ The following historical summary relies upon the Rehnquist Memorandum, supra, at 4-6.

During the Eisenhower Administration, Sherman Adams refused to testify before a Congressional committee on the basis of his confidential relationship with the President. Later during the same Administration, however, Adams volunteered to testify with respect to another matter.

Finally, during hearings on the nomination by President Johnson of Abe Fortas to be Chief Justice, the Senate Judiciary Committee requested W. DeVier Pierson, Associate Special Counsel to the President, to testify regarding the help which Fortas was alleged to have provided in drafting certain legislation while serving as Associate Justice. Pierson declined the invitation to testify, stating:

> As Associate Special Counsel to the President . . . , I have been one of the "immediate Staff Assistants" provided to the President by law (3 U.S.C. 105, 106). It has been firmly established, as a matter of principle and precedents, 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. This limitation, which has been recognized by the Congress as well as the Executive, is fundamental to our system of Government. I must, therefore, respectfully decline the invitation to testify in the hearings.5/

The opinions of this Office which I have found relevant to this question are unanimous in holding that individuals serving in a capacity such as Counsel to the President must be absolutely protected from coerced testimony before Congress. Assistant Attorney General Rehnquist, for example, has stated:

> The President and his immediate advisers -- that is, those who customarily meet with the President on a regular or frequent basis -- should be deemed absolutely immune from testimony or compulsion by a Congressional committee. They not only may not be examined with respect to their official duties, but they may not even be compelled to appear before a Congressional committee. They are presumptively available to the President 24 hours a day, and the necessity of either accommodating a Congressional committee or persuading a court to

5/ Rehnquist Memorandum at 6.

arrange a more convenient time, could impair that availability.6/

A similar position is found in a 1974 OLC background memorandum:

> [T]he following requests should be routinely declined and, if pressed, be met with assertions of Executive privilege: (1) requests for testimony by immediate Presidential staff concerning their official activities.7/

Finally, in 1977 Assistant Attorney General Harmon wrote:

> If no . . . compromise can be reached [with Congress], the decision whether Executive privilege will be asserted is largely dependent on the particular circumstances involved in the Congressional demand. This determination may depend on such varying factors as the nature and confidentiality and the information sought and the strength of the forces in Congress that are seeking the information. To the extent that any generalizations may be drawn, they are necessarily tentative and sketchy. It has been the position of the Executive branch that the President and his immediate advisers are absolutely immune from testimonial compulsion by a Congressional committee. Lower-level White House officials have been deemed subject to a Congressional subpoena, but might refuse to testify with respect to any matter arising in the course of their official position of advising or formulating advice for the President. 8/

6/ Rehnquist Memorandum, supra, at 7. Rehnquist went on to note, however, that he did not believe this principle "can or ought to be extended to all 'members' of the White House Staff . . ." Id. at 8.

7/ Memorandum (unsigned, undated; drafted for background in December, 1974).

8/ Memorandum to all Heads of Offices, Divisions, Bureaus and Boards of the Department of Justice, from Acting Assistant Attorney General John M. Harmon at 5 (May 23, 1977)(emphasis supplied).