Immunity of the Counsel to the President from Compelled Congressional Testimony

Executive privilege is assertable in response to a congressional subpoena seeking the testimony of the Counsel to the President because the Counsel serves as one of the President's immediate advisers and is therefore immune from compelled congressional testimony.

September 3, 1996

LETTER OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked whether it would be consistent with precedent and governing legal principles to assert executive privilege should a subpoena be issued by a congressional committee to you, in your capacity as Counsel to the President, to compel your testimony at a committee hearing concerning the performance of your official duties. We believe that executive privilege would be assertable on the basis that you serve as an immediate adviser to the President and are therefore immune from compelled congressional testimony.

It is the longstanding position of the executive branch that "the President and his immediate advisers are absolutely immune from testimonial compulsion by a Congressional committee." 1 This position is constitutionally based:

The President is a separate branch of government. He may not compel congressmen to appear before him. As a matter of separation of powers, Congress may not compel him to appear before it. The President’s close advisors are an extension of the President.

Accordingly, "[n]ot only can the President invoke executive privilege to protect [his personal staff] from the necessity of answering questions posed by a congres-
sional committee, but he can also direct them not even to appear before the com-
mittee." 3

An often-quoted statement of this position is contained in an opinion by Assistant
Attorney General William Rehnquist:

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 testimonial
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. 4

There is no question that the Counsel to the President falls within Assistant
Attorney General Rehnquist’s description of the type of Presidential advisers who
are immune from testimonial compulsion.

CHRISTOPHER H. SCHROEDER
Acting Assistant Attorney General
Office of Legal Counsel

3 Memorandum for Margaret McKenna, Deputy Counsel to the President, from John M. Harmon, Assistant Attorney
General, Office of Legal Counsel, Re: Dual-purpose Presidential Advisers, Appendix at 7 (Aug. 11, 1977).

4 Memorandum for the Honorable John D. Ehrlichman, Assistant to the President for Domestic Affairs, from Wil-
liam 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).