U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

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MEMORANDUM TO EDWARD C. SCHMULTS
DEPUTY ATTORNEY GENERAL

This summarizes the reasons why I believe that Counsel to the President Fred F. Fielding should not submit to a subpoena or a request to testify before the Senate Labor and Human Resources Committee relative to the performance of his duties on behalf of the President relative to the investigation of Raymond J. Donovan prior to and during the confirmation process.

A. Historical Precedents.

1. As far as can be determined, the President and his close advisers have generally not testified before Congressional Committees with respect to the performance of their official duties. As Assistant Attorney General for the Office of Legal Counsel William H. Rehnquist expressed it in 1971, "The President and his immediate advisers, that is, those who customarily meet with him on a regular or frequent basis - should be deemed absolutely immune from testimonial compulsion by a congressional committee." (emphasis added.) On the few occasions when presidential advisers have testified, it has been in connection with their private affairs.

2. President Jefferson rejected a subpoena issued by John Marshall sitting as circuit justice (for documents, Aaron Burr trial).

3. 1806. Three cabinet members rejected a judicial subpoena.

4. 1905. A.G. Opinion rejected a judicial subpoena to a Cabinet officer.

5. President Roosevelt yielded to one congressional subpoena addressed to an Administrative Assistant.

6. President Truman rejected a congressional subpoena to an Assistant to the President. (On another occasion he reluctantly yielded to a subpoena to an Administrative Assistant, although it related to alleged wrongdoing on the part of the individual subpoenaed.

7. President Eisenhower rejected a congressional subpoena to Sherman Adams. (Adams testified voluntarily on another occasion with respect to alleged personal wrongdoings.)

8. Associate Special Counsel to President rejects invitation to testify during Johnson administration relative to Fortas appointment. ("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.")

B. Reasons why appearance by presidential advisers unwise.

1. Generally

(a) 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.

(b) Such appearances tend to create, regardless of disclaimers, the impression among Congressmen that such testimony is a matter of legislative right, not executive grace. As a matter of experience, yielding once tends to ultimately produce subsequent, more frequent, more vigorous demands.

(c) As a legal matter, there are no clear, fully applicable judicial precedents (although decisions on the subject of Executive privilege are strongly supportive of the President's position in this regard). Therefore, custom or practice tends to become a legal precedent when, as and if such an issue is submitted to the courts. Thus an appearance in response to a subpoena or request would tend to create damaging legal precedent.

(d) Appearances by a Presidential adviser before Congressional committees on some occasions will leave the President open to the charge, however unfounded, that a subsequent refusal to provide testimony is because there is something to hide.

(e) Other Presidents have resisted such testimony. A capitulation by this President will be perceived by many - including members of Congress who are aware of the historical practice - as a sign of weakness.

2. ~~-~~Specifically

(a) There is a substantial possibility that this Committee investigation will not stop with Fred Fielding and will move on to Ed Meese or Jim Baker as well (perhaps, although surely unlikely, the President himself).

(b) This Committee (and its leadership) has shown a propensity towards public gestures, leaks and efforts to embarrass the Administration.

(c) The reason for the request for the testimony is a sham. This Committee knew of and considered allegations of organized crime allegations regarding Secretary Donovan during the confirmation process. Even if a particular specific detailed unsubstantiated allegation was not furnished to the Committee, that would not have affected the hearings. All charges against the Secretary have been fully explored. All White House and FBI documents generated during the confirmation process have been furnished. A detailed chronology of events has been supplied.

(d) The deposition process - particularly as contemplated to be conducted by the individual selected - is unsatisfactory for a variety of reasons.

C. Possible Compromises.

1. Before going further, let the Committee examine Mullen and Adamski at a public hearing (or in a private briefing). Thereafter, if, but only if, the Committee can articulate serious, unanswered questions, additional measures will be considered.

2. Confidential, off the record briefing by Fielding for Committee leadership.

3. Let the Committee prepare written factual questions, if there are any, and submit them to the Administration for response.

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