



U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

October 25, 2019

Pat A. Cipollone
Counsel to the President
The White House
Washington, DC 20500

Dear Mr. Cipollone:

Today, the Permanent Select Committee on Intelligence of the House of Representatives issued a subpoena seeking to compel Charles Kupperman, former Assistant to the President and Deputy National Security Advisor, to testify on Monday, October 28. The Committee subpoenaed Mr. Kupperman as part of its purported impeachment inquiry into the conduct of the President. The Administration has previously explained to the Committee that the House has not authorized an impeachment inquiry, and therefore, the Committee may not compel testimony in connection with the inquiry. Setting aside the question whether the inquiry has been lawfully authorized, you have asked whether the Committee may compel Mr. Kupperman to testify even assuming an authorized subpoena. We conclude that he is absolutely immune from compelled congressional testimony in his capacity as a former senior adviser to the President.

The Committee seeks Mr. Kupperman's testimony about matters related to his official duties at the White House. We understand that Committee staff informed Mr. Kupperman's private counsel that the Committee wishes to question him about the telephone call between President Trump and the President of Ukraine that took place on July 25, 2019, during Mr. Kupperman's tenure as a presidential adviser, and related matters. See "*Urgent Concern*" *Determination by the Inspector General of the Intelligence Community*, 43 Op. O.L.C. __, at *1-3 (Sept. 3, 2019) (discussing the July 25 telephone call).

The Department of Justice has for decades taken the position, and this Office recently reaffirmed, that "Congress may not constitutionally compel the President's senior advisers to testify about their official duties." *Testimonial Immunity Before Congress of the Former Counsel to the President*, 43 Op. O.L.C. __, at *1 (May 20, 2019) ("*Immunity of the Former Counsel*"). This testimonial immunity is rooted in the separation of powers and derives from the President's status as the head of a separate, co-equal branch of government. See *id.* at *3-7. Because the President's closest advisers serve as his alter egos, compelling them to testify would undercut the "independence and autonomy" of the Presidency, *id.* at *4, and interfere directly with the President's ability to faithfully discharge his responsibilities. Absent immunity, "congressional committees could wield their compulsory power to attempt to supervise the President's actions, or to harass those advisers in an effort to influence their conduct, retaliate for actions the committee disliked, or embarrass and weaken the President for partisan gain." *Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach From Congressional Subpoena*, 38 Op. O.L.C. __, at *3 (July 15, 2014).

Congressional questioning of the President's senior advisers would also undermine the independence and candor of executive branch deliberations. See *Immunity of the Former Counsel*, 43 Op. O.L.C. at *5–7. Administrations of both political parties have insisted on the immunity of senior presidential advisers, which is critical to protect the institution of the Presidency. *Assertion of Executive Privilege with Respect to Clemency Decision*, 23 Op. O.L.C. 1, 5 (1999) (A.G. Reno).

Mr. Kupperman qualifies as a senior presidential adviser entitled to immunity. The testimonial immunity applies to the President's "immediate advisers—that is, those who customarily meet with the President on a regular or frequent basis." Memorandum for John D. Ehrlichman, Assistant to the President for Domestic Affairs, from William 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). Your office has informed us that Mr. Kupperman served as the sole deputy to National Security Advisor John R. Bolton, and briefly served as Acting National Security Advisor after Mr. Bolton's departure. As Deputy National Security Advisor, Mr. Kupperman generally met with the President multiple times per week to advise him on a wide range of national security matters, and he met with the President even more often during the frequent periods when Mr. Bolton was traveling. Mr. Kupperman participated in sensitive internal deliberations with the President and other senior advisers, maintained an office in the West Wing of the White House, traveled with the President on official trips abroad on multiple occasions, and regularly attended the presentation of the President's Daily Brief and meetings of the National Security Council presided over by the President.

Mr. Kupperman's immunity from compelled testimony is strengthened because his duties concerned national security. The Supreme Court held in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), that senior presidential advisers do not enjoy absolute immunity from civil liability—a holding that, as we have previously explained, does not conflict with our recognition of absolute immunity from compelled congressional testimony for such advisers, see, e.g., *Immunity of the Former Counsel*, 43 Op. O.L.C. at *13–14. Yet the *Harlow* Court recognized that "[f]or aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy," even absolute immunity from suit "might well be justified to protect the unhesitating performance of functions vital to the national interest." 457 U.S. at 812; see also *id.* at 812 n.19 ("a derivative claim to Presidential immunity would be strongest in such 'central' Presidential domains as foreign policy and national security, in which the President could not discharge his singularly vital mandate without delegating functions nearly as sensitive as his own").

Immunity is also particularly justified here because the Committee apparently seeks Mr. Kupperman's testimony about the President's conduct of relations with a foreign government. The President has the constitutional responsibility to conduct diplomatic relations, see *Assertion of Executive Privilege for Documents Concerning Conduct of Foreign Affairs with Respect to Haiti*, 20 Op. O.L.C. 5, 7 (1996) (A.G. Reno), and as a result, the President has the "exclusive authority to determine the time, scope, and objectives of international negotiations." *Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011*, 35 Op. O.L.C. ___, at *4 (Sept. 19, 2011) (quotation marks omitted). Compelling testimony about these sensitive constitutional responsibilities would only deepen the very concerns—about

separation of powers and confidentiality—that underlie the rationale for testimonial immunity. See *New York Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) (“[I]t is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy.”).

Finally, it is inconsequential that Mr. Kupperman is now a private citizen. In *Immunity of the Former Counsel*, we reaffirmed that for purposes of testimonial immunity, there is “no material distinction” between “current and former senior advisers to the President,” and therefore, an adviser’s departure from the White House staff “does not alter his immunity from compelled congressional testimony on matters related to his service to the President.” 43 Op. O.L.C. at *16; see also *Immunity of the Former Counsel to the President from Compelled Congressional Testimony*, 31 Op. O.L.C. 191, 192–93 (2007). It is sufficient that the Committee seeks Mr. Kupperman’s testimony on matters related to his official duties at the White House.

Please let us know if we may be of further assistance.

A handwritten signature in black ink that reads "Steven Engel" followed by a date "1/26/16".

Steven A. Engel
Assistant Attorney General