



U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

November 3, 2019

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

Dear Mr. Cipollone:

On November 1, 2019, the Permanent Select Committee on Intelligence of the House of Representatives issued a subpoena seeking to compel John Eisenberg to testify at a deposition on Monday, November 4. Mr. Eisenberg serves as Assistant to the President, Deputy Counsel to the President for National Security Affairs, and Legal Advisor to the National Security Council. The Committee subpoenaed Mr. Eisenberg as part of its impeachment inquiry into the conduct of the President. *See* H.R. Res. 660, 116th Cong. (2019). You have asked whether the Committee may compel Mr. Eisenberg to testify. We conclude that he is absolutely immune from compelled congressional testimony in his capacity as a senior adviser to the President.

The Committee has made clear that it seeks to question Mr. Eisenberg about matters related to his official duties at the White House. The Committee informed him that it is investigating the President's conduct of foreign relations with Ukraine and that it believes, "[b]ased upon public reporting and evidence gathered as part of the impeachment inquiry," that Mr. Eisenberg has "information relevant to these matters." Letter for John Eisenberg from Adam B. Schiff, Chairman, House Permanent Select Committee on Intelligence, et al. at 1 (Oct. 30, 2019); *see also* Letter for John Eisenberg from Adam B. Schiff, Chairman, House Permanent Select Committee on Intelligence, et al. at 1 (Nov. 1, 2019).

The Executive Branch has taken the position for decades 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 constitutional 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) ("*Immunity of the Assistant to the President*"). 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. For these reasons, the Executive Branch has long recognized the immunity of senior presidential advisers to be critical to protecting the institution of the Presidency.

This testimonial immunity applies in an impeachment inquiry just as it applies in a legislative oversight inquiry. As our Office recently advised you, executive privilege remains available when a congressional committee conducts an impeachment investigation. *See* Letter for Pat A. Cipollone, Counsel to the President, from Steven A. Engel, Assistant Attorney General, Office of Legal Counsel at 2 & n.1 (Nov. 1, 2019). The testimonial immunity of senior presidential advisers is “broader” than executive privilege and exists in part to prevent the inadvertent disclosure of privileged information, *Immunity of the Former Counsel*, 43 Op. O.L.C. at *4, *6, so it follows that testimonial immunity also continues to apply in the impeachment context. More importantly, the commencement of an impeachment inquiry only heightens the need to safeguard the separation of powers and preserve the “independence and autonomy” of the Presidency the principal concerns underlying testimonial immunity. *Id.* at *4. Even when impeachment proceedings are underway, the President must remain able to continue to discharge the duties of his office. The testimonial immunity of the President’s senior advisers remains an important limitation to protect the independence and autonomy of the President himself.

We do not doubt that there may be impeachment investigations in which the House will have a legitimate need for information possessed by the President’s senior advisers, but the House may have a legitimate need in a legislative oversight inquiry. In both instances, the testimonial immunity of the President’s senior advisers will not prevent the House from obtaining information from other available sources. The immunity of those immediate advisers will not itself prevent the House from obtaining testimony from others in the Executive Branch, including in the White House, or from obtaining pertinent documents (although the House may still need to overcome executive privilege with respect to testimony and documents to which the privilege applies). In addition, the President may choose to authorize his senior advisers to provide testimony because “the benefit of providing such testimony as an accommodation to a committee’s interests outweighs the potential for harassment and harm to Executive Branch confidentiality.” *Immunity of the Assistant to the President*, 38 Op. O.L.C. at *4 n.2. Accordingly, our recognition that the immunity applies to an impeachment inquiry does not preclude the House from obtaining information from other sources.

We next consider whether Mr. Eisenberg qualifies as a senior presidential adviser. 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). We believe that Mr. Eisenberg meets that definition. Mr. Eisenberg has served as an adviser to the President on sensitive legal and national security matters since the first day of the Administration, and his direct relationship with the President has grown over time. Your office has informed us that he regularly meets with the President multiple times each week, frequently in very small groups, and often communicates with the President multiple times per day. He is one of a small number of advisers who are authorized to contact the President directly, and the President directly seeks

his advice. Mr. Eisenberg is therefore the kind of immediate presidential adviser that the Executive Branch has historically considered immune from compelled congressional testimony.

Mr. Eisenberg's eligibility for immunity is particularly justified because his duties concern 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 *Immunity of the Assistant to the President*, 38 Op. O.L.C. at *5–9. 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”).

Moreover, the Committee seeks Mr. Eisenberg'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.”).

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



Steven A. Engel
Assistant Attorney General