

U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

September 16, 2019

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

Dear Mr. Cipollone:

On August 14, 2019, the Committee on the Judiciary of the House of Representatives issued a subpoena seeking to compel Rick Dearborn, former Assistant to the President and Deputy Chief of Staff for Policy Implementation, to testify on September 17 at a hearing entitled “Presidential Obstruction of Justice and Abuse of Power.” You have asked whether the Committee may compel Mr. Dearborn to testify. We conclude that he is absolutely immune from compelled congressional testimony in his capacity as a former senior adviser to the President.

At the time of the service of the subpoena, the Committee Chairman, Jerrold Nadler, announced that Mr. Dearborn had been subpoenaed because he was “prominently featured” in volume II of the report issued by Special Counsel Robert S. Mueller, III, particularly in descriptions of President Trump allegedly “directing then-White House Counsel Don McGahn to fire the Special Counsel.” Press Release, Rep. Jerrold Nadler, House Judiciary Committee Subpoenas Two Witnesses to Trump Crimes Detailed in Mueller Report (Aug. 15, 2019); *see also* Press Release, Comm. on the Judiciary, House Judiciary to Consider Procedures Regarding Whether to Recommend Impeachment (Sept. 9, 2019) (stating that the Committee subpoenaed Mr. Dearborn in connection with the President’s alleged “efforts to obstruct the Special Counsel’s investigation”). Chairman Nadler’s announcement included a background section that specifically identified the actions of Mr. Dearborn during his time at the White House that were of interest to the Committee. The subpoena plainly seeks testimony concerning matters occurring during and relating to Mr. Dearborn’s service as a presidential aide, specifically the matters addressed in volume II of the report issued by the Special Counsel.

The Committee’s subpoena is one of several that House committees have recently issued to current and former senior presidential aides. 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. ___, *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. ___, *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. 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. Dearborn qualifies as a senior presidential adviser entitled to immunity. Our opinions have recognized that this immunity extends to “those trusted members of the President’s inner circle ‘who customarily meet with the President on a regular or frequent basis,’ and upon whom the President relies directly for candid and sound advice.” *Immunity of the Assistant to the President*, 38 Op. O.L.C. at *2 (quoting 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. Dearborn was a high-level policy adviser to the President. He came to the White House after serving as executive director of the President-elect’s transition team. In his capacity as Deputy Chief of Staff for Policy Implementation, Mr. Dearborn oversaw several components of the Executive Office of the President, including the Office of Legislative Affairs, and directly advised the President on congressional relations and a wide range of policy areas. In addition, we understand that Mr. Dearborn met with the President on a daily basis, maintained an office in the West Wing, and traveled with the President multiple times. In view of Mr. Dearborn’s responsibilities and his direct relationship with the President, we believe that he satisfies the criteria our Office has applied in assessing whether presidential aides are immune from compelled congressional testimony.

In a recent letter to Mr. Dearborn, Chairman Nadler has asserted that it would be “truly unprecedented” for the President to claim immunity on behalf of Mr. Dearborn. Letter for Rick Dearborn from Jerrold Nadler, Chairman, Committee on the Judiciary, House of Representatives, at 2 (Sept. 13, 2019) (“Sept. 13 Letter”). But that statement is not correct. In 2007, this Office advised that a senior aide serving in the position of Deputy Chief of Staff for Policy was immune. See Letter for Fred F. Fielding, Counsel to the President, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel (Aug. 1, 2007) (recognizing the testimonial immunity of Karl Rove, Senior Advisor to the President and Deputy Chief of Staff for Policy). In 2014, this Office found that the Director of the White House Office of Political Strategy and Outreach was immune as well. *Immunity of the Assistant to the President*, 38 Op. O.L.C. at *1. During Mr. Dearborn’s time working for President Trump, the director of the White House political office actually reported to Mr. Dearborn. Thus, our recognition that Mr. Dearborn served as a senior adviser to the President entitled to testimonial immunity is well grounded in our precedents from prior administrations.

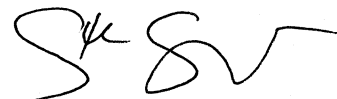
It is inconsequential that Mr. Dearborn is now a private citizen. In *Immunity of the Former Counsel*, we reaffirmed that for purposes of testimonial immunity, there is “no material distinction” between “current and former senior advisers to the President,” and therefore, an adviser’s departure from 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 clearly seeks Mr. Dearborn’s testimony on matters related to his official duties at the White House.

Two business days before the hearing, Chairman Nadler informed Mr. Dearborn that he should nonetheless appear because the Committee plans to ask questions about matters predating the President’s time in office. See Sept. 13 Letter at 2. Chairman Nadler cited the example of Hope Hicks, a former senior adviser to the President who appeared for a transcribed interview before the Committee on June 19, 2019. Because Ms. Hicks qualified for testimonial immunity, she did not answer questions related to her White House service, but she did appear and answer questions about matters related to the 2016 presidential campaign and the presidential transition.

In marked contrast with the case of Ms. Hicks, the Committee here has noticed a public hearing and repeatedly made clear that its interest in Mr. Dearborn stems from his time at the White House. The Committee entitled its hearing “Presidential Obstruction of Justice and Abuse of Power.” There could not be any “*presidential* obstruction” or “*abuse of power*” before President Trump became President and assumed the powers of his office. As discussed above, Chairman Nadler also explained, when he issued the subpoena, that the Committee sought to question Mr. Dearborn about his involvement in particular events during his time in the White House. The Committee’s prior notice concerning the subject of the hearing was not just a matter of convenience, but also served the legal requirement of providing the witness with “fair notice of the scope of the inquiry.” *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. O.L.C. 68, 90 (1986); see also *Barenblatt v. United States*, 360 U.S. 109, 124 (1959) (witness must be “sufficiently apprised of ‘the topic under inquiry’”). In view of these precedents, and the Committee’s prior public statements, we do not believe that the Committee may avert an imminent assertion of testimonial immunity by purporting to alter the subject matter of the public hearing at the last minute.*

For these reasons, we conclude that Mr. Dearborn may not be compelled to testify before the Committee about the events described in the Special Counsel’s report. The President may lawfully direct him not to appear on September 17, and he may not be penalized for following such a direction. See *Immunity of the Former Counsel*, 43 Op. O.L.C. at *19–21.

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



Steven A. Engel
Assistant Attorney General

* In light of this conclusion, we do not address whether or how testimonial immunity would apply had the Committee sought to compel an appearance at a congressional hearing in order to address multiple subjects, only some of which related to a former White House adviser’s official duties.