AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers

*Karl R. Thompson*, **Immunity of the Assistant to the President from Congressional Subpoena** (2014)[[1]](#footnote-1)

*The New Deal era Hatch Act prohibits executive branch employees from engaging in political activity intended to influence election outcomes. Accusations that members of the executive branch have violated the Hatch Act are not uncommon. After repeated complaints from Democrats that the Obama administration was failing to work effectively with legislators or bolster the overall prospects of the Democratic Party, the White House responded by creating an Office of Political Strategy and Outreach (OPSO) in anticipation of the 2014 midterm elections. The president named the pollster and political consultant David Simas to head the office and advise the president. Soon Republicans in Congress were complaining that members of the Obama administration were violating the Hatch Act, and in the summer of 2014 the House Committee on Oversight and Government Reform opened hearings on whether the actions of the staff in the new White House office were consistent with the Hatch Act. The committee issued a subpoena to Simas compelling him to testify in an open hearing. Simas declined to do so, and the Office of Legal Counsel issued an opinion arguing that the director of OPSO is constitutionally immune from a congressional subpoena. The Republican majority on the committee formally voted to reject the White House immunity claim, but did not take further action.*

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The Executive Branch’s longstanding position, reaffirmed by numerous Administrations of both political parties, is that the President’s immediate advisers are absolutely immune from congressional testimonial process. . . This immunity is rooted in the constitutional separation of powers, and in the immunity of the President himself from congressional compulsion to testify. As this Office has previously “[t]he President is the head of one of the independent Branches of the federal government. If a congressional committee could force the President’s appearance” to testify before it, “fundamental separation of powers principles – including the President’s independence and autonomy from Congress – would be threatened.” Immunity of Formal Counsel to the President from Compelled Congressional Testimony, 31 Op. O.L.C. \_ (July 10, 2007). In the words of one President [Truman], “[t]he doctrine [of separation of powers] would be shattered, and the President, contrary to our fundamental theory of constitutional government, would become a mere arm of the Legislative Branch of the Government if he would feel during his term of office that his every act might be subject to official inquiry and possible distortion for political purpose.” . . .

For the President’s absolute immunity to be fully meaningful, and for these separation of powers principles to be adequately protected, the President’s immediate advisors must likewise have absolute immunity from congressional compulsion to testify about matters that occur during the course of discharging their official duties. . .

In particular, a congressional power to compel the testimony of the President’s immediate advisors would interfere with the President’s discharge of his constitutional functions and damage the separation of powers in at least two important respects. . . . Absent immunity for a President’s closest advisers, 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. . . .

Second, a congressional power to subpoena the President’s closest advisors to testify about matters that occur during the course of discharging their official duties would threaten executive branch confidentiality, which is necessary (among other things) to ensure that the President can obtain the type of sound and candid advice that is essential to the effective discharge of his constitutional duties. The Supreme Court has recognized “the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking.” *United States v. Nixon* (1974). . . . The prospect of compelled interrogation by a potentially hostile congressional committee about confidential communications with the President or among the President’s immediate staff could chill presidential advisers from providing unpopular advice or from fully examining an issue with the President or others.

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This longstanding Executive Branch position is consistent with the relevant Supreme Court case law. The Court has not yet considered whether Congress may secure the testimony of an immediate presidential adviser through compulsory process. But in an analogous context, the Court did conclude that legislative aides are entitled to immunity under the Speech and Debate Clause that is co-extensive with an immunity afforded Members of Congress themselves. See *Gravel v. United States* (1972). . . .

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To be sure, in *Harlow v. Fitzgerald* (1982), the Court rejected a claim of absolute immunity by senior presidential advisers. But it did so in the context of a civil suit against those advisers for money damages. In our view, *Harlow*’s holding that presidential advisers are generally entitled to only qualified immunity in suits for money damages should not be extended to the context of congressional subpoenas for the testimony of immediate presidential advisers, because the separation of powers concerns that underlie the need for absolute immunity from congressional testimonial compulsion are not present to the same degree in civil lawsuits brought by third parties. . . .

. . . . It is true that such a suit involves a judicially supervised inquiry into the actions of presidential advisers, and that the threat of financial liability from such a suit may chill the conduct of those advisers. But, in civil damages actions, the Judiciary acts as a disinterested arbiter of a private dispute, not as a party in interest to the very lawsuit it adjudicates. Indeed, the court is charged with impartially administering procedural rules designed to protect witnesses from irrelevant, argumentative, harassing, cumulative, privileged, and other problematic questions. . . . In contrast, in the congressional context . . ., the subpoenaing committee is both the interested party and the presiding authority, asking questions that further its own interests and setting the rules for the proceeding and judging whether a witness has failed to comply with those rules. . . .

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. . . [T]he prospect of compelled congressional testimony by a President’s immediate advisers would, as a general matter, be significantly more damaging to the separation of powers than the prospect of compelled testimony by a Cabinet official. As a Department head, a Cabinet officer is confirmed by the Senate, and her authority and functions are generally established by statute. It may be a significant part of her regular duties to testify before Congress about the implementation of laws that Congress has passed. By contrast, an immediate presidential adviser is appointed solely by the President, without Senate confirmation, and his role is to advise and assist the President in the performance of the President’s constitutionally assigned functions. . . .

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. . . . In *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C.Cir. 1974), in the context of a presidential assertion of executive privilege against a congressional subpoena for tape recordings of conversations between the President and his Counsel, the court held that the Committee could overcome the assertion only by showing that “the subpoenaed evidence is demonstrably critical to the responsible fulfillment of [its] functions. . . .

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In applying this standard, it would be important to bear in mind the “implicit constitutional mandate” that the coordinate branches of government “seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.” Through this accommodation, which has been followed for decades, the political branches strive to avoid the “constitutional confrontation” that erupts when the President must make an assertion of privilege. . . . Accordingly, before an immediate presidential adviser’s compelled testimony could be deemed demonstrably critical to the responsible fulfillment of a congressional committee’s legislative function, a congressional committee would, at a minimum, need to demonstrate why information available to it from other sources was inadequate to meet its legitimate needs. . . .

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The Committee has not adequately explained why, despite the information it has already received concerning the OPSO’s activities and the White House’s efforts to ensure compliance with relevant statutes, it requires Mr. Simas’s public testimony in order to satisfy the legitimate aims of its oversight investigation. . .

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1. Excerpt taken from Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach from Congressional Subpoena (July 15, 2014) 38 Op. OLC (2014). [↑](#footnote-ref-1)