

March 15, 1972

MEMORANDUM FOR THE HONORABLE JOHN W. DEAN III
Counsel to the President

Re: Appearance of Presidential Assistant Peter M. Flanigan before a Congressional Committee.

This is in response to your request for my opinion as to whether Mr. Peter M. Flanigan, Assistant to the President, may properly decline to appear before the Senate Committee on the Judiciary in response to the Committee's invitation. It is my opinion that this question is to be answered in the affirmative.

The question is not one of executive privilege as it is commonly known but rather one of the power of a congressional committee to call for the appearance of the President or a member of his immediate staff before a committee. Both concepts are grounded on the doctrine of separation of powers.

Mr. Flanigan is one of the Assistants to the President provided for in sections 105 and 106, title 3, United States Code. As such he occupies a close and confidential relationship with the President and shares the President's immunity from congressional process. Consequently it has been firmly established that members of the President's immediate staff may not appear before a congressional committee to testify with respect to the performance of their duties.

There have been the following refusals of Presidential Assistants to appear before congressional committees:

1. In the Truman Administration, during an investigation into the manner in which the Taft-Hartley Act was administered during a strike against Government Services, Inc., in 1948, a subcommittee of the House Committee on

Education and Labor caused a subpoena to be served on Presidential Assistant John R. Steelman. The nature of the testimony to be elicited from him does not appear from the transcript of the hearings, but appears to have been related to his official functions. Mr. Steelman did not comply with the subpoena. Investigation of the GSI Strike, Hearings before a Special Subcommittee of the Committee on Education and Labor, House of Representatives, 80th Cong., 2d Sess., pp. 347-353.

2. During the investigation of the Dixon-Yates contract, a subcommittee of the Senate Judiciary Committee invited Presidential Assistant Sherman Adams to testify with respect to his request that the Securities and Exchange Commission postpone a hearing relating to the financing of the contract. Mr. Adams declined to comply with this invitation because of "his official and confidential relationship with the President." Power Policy, Dixon-Yates Contract, Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 84th Cong., 1st Sess., pp. 676, 779. He did, however, appear and testify subsequently, as indicated below.

3. During the Johnson Administration, this Committee invited Mr. DeVier Pierson, Associate Special Counsel to the President, to testify with respect to the issue whether Mr. Justice Fortas had taken part in the drafting of legislation authorizing Secret Service protection for Presidential candidates. Mr. Pierson declined the invitation on the ground that it has been firmly established "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." Nominations of Abe Fortas and Homer Thornberry, Hearings before the Committee on the Judiciary, United States Senate, 90th Cong., 2d Sess., pp. 1347, 1348.

There have been instances in which Presidential Assistants have appeared and testified before congressional committees, but when they did so the inquiry related to

their private affairs. Thus, Presidential Assistant Donald S. Dawson testified in 1951 before the Subcommittee of the Senate Committee on Banking and Currency, significantly with the specific approval of the President, to answer charges that he had accepted gratuities from persons who sought favors from government agencies. Study of the Reconstruction Finance Corporation, Hearings before a subcommittee of the Senate Committee on Banking and Currency, United States Senate, 82d Cong., 1st Sess., pp. 1709, 1795, 1810. Similarly, Presidential Assistant Sherman Adams testified in 1958 with respect to his personal relations to one Bernard Goldfine and the gratuities he had received from him. Investigation of Regulatory Commissions and Agencies, Hearings before a subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 85th Cong., 2d Sess., pp. 3711-3740.

It follows that the doctrine of the separation of powers precludes Presidential Assistants from appearing before congressional committees unless the inquiry is related to their private conduct.

Here, as we understand it, the inquiry is directed at the manner in which Mr. Flanigan performed his duties. Consequently, it would be inappropriate for him to comply with the Committee's invitation to testify.

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