The Debate Over Selected Presidential Assistants and Advisors: Appointment, Accountability, and Congressional Oversight

Barbara L. Schwemle
Analyst in American National Government

Todd B. Tatelman
Legislative Attorney

Vivian S. Chu
Legislative Attorney

Henry B. Hogue
Analyst in American National Government

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Summary

A number of the appointments made by President Barack Obama to his Administration or by Cabinet secretaries to their departments have been referred to, especially by the news media, as "czars." For some, the term is being used to quickly convey an appointee's title (e.g., climate "czar") in shorthand. For others, it is being used to convey a sense that power is being centralized in the White House or certain entities. When used in the political-science literature, the term generally refers to White House policy coordination or an intense focus by the appointee on an issue of great magnitude. Congress has taken note of these appointments; several Members have introduced legislation or sent letters to President Obama to express their concerns. Legislation introduced in the 112th Congress includes H.R. 59, the Sunset All Czars Act, and H.Con.Res. 3, expressing the Sense of Congress on "czars." Section 2262 of P.L. 112-10, the Department of Defense and Full-Year Continuing Appropriations Act, 2011, enacted on April 15, 2011, prohibits the use of funds to pay the salaries and expenses for the Director of the White House Office of Health Reform; Assistant to the President for Energy and Climate Change; Senior Advisor to the Secretary of the Treasury assigned to the Presidential Task Force on the Auto Industry and Senior Counselor for Manufacturing Policy; and White House Director of Urban Affairs. On June 22, 2011, Senator David Vitter introduced an amendment (S.Amdt. 499) to S. 679, the Presidential Appointment Efficiency and Streamlining Act of 2011, that would have ended the appointments of presidential czars who have not been subject to the advice and consent of the Senate and prohibited the use of funds for any salaries and expenses for appointed czars. The amendment was not agreed to on a vote of 47-51 (Record No. 95) on June 23, 2011. Section 632 of H.R. 2434, the Financial Services and General Government Appropriations Act, 2012, as reported by the House Committee on Appropriations on July 7, 2011, would prohibit the use of funds to pay the salaries and expenses for the White House Director of the Office of Health Reform, or any substantially similar position; Assistant to the President for Energy and Climate Change, or any substantially similar position; Senior Advisor to the Secretary of the Treasury assigned to the Presidential Task Force on the Auto Industry and Senior Counselor for Manufacturing Policy, or any substantially similar position; and White House Director of Urban Affairs, or any substantially similar position. The Senate Subcommittee on the Constitution of the Committee on the Judiciary, and the Senate Committee on Homeland Security and Governmental Affairs conducted hearings on the "czar" issue in the 111th Congress on October 6, 2009, and October 22, 2009, respectively. A summary of the hearings is included in this report.

One issue of interest to Congress may be whether some of these appointments (particularly some of those to the White House Office), made outside of the advice and consent process of the Senate, circumvent the Constitution. A second issue of interest may be whether the activities of such appointees are subject to oversight by, and accountable to, Congress. This report provides brief background information and selected views on the role of some of these appointees and discusses selected appointments in the Obama Administration. Additionally, it discusses some of the constitutional concerns that have been raised about presidential advisors. These include, for example, the kinds of positions that qualify as the type that must be filled in accordance with the Appointments Clause, with a focus on examining a few existing positions established by statute, executive order, and regulation. The report also reviews certain congressional oversight processes and assesses the applicability of these processes to presidential advisors. Legislative and non-legislative options for congressional consideration are presented. **Table A-1** in the Appendix lists selected legislation introduced in the 111th and 112th Congresses that is related to the issues discussed in this report. This report will be updated as circumstances dictate.

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Introduction

A number of the appointments made by President Barack Obama to his Administration or by Cabinet Secretaries to their departments have been referred to, especially by the news media, as "czars."[1] For some, the term is being used to quickly convey an appointee's title (e.g., climate "czar") in shorthand. For others, it is, perhaps, being used to convey a sense that power is being centralized in the White House or certain entities. When used in the political-science literature, the term generally refers to White House policy coordination or an intense focus by the appointee on an issue of great magnitude. Congress has taken note of these appointments; several Members have introduced legislation (see **Table A-1** in the Appendix) or sent letters to President Obama to express their concerns.[2] The Senate Subcommittee on the Constitution of the Committee on the Judiciary, and the Senate Committee on Homeland Security and Governmental Affairs conducted hearings on the "czar" issue in the 111th Congress on October 6, 2009, and October 22, 2009, respectively. A summary of the hearings is included in this report.

In the 112th Congress, Representative Steve Scalise introduced H.R. 59, the Sunset All Czars Act, "To define advisors often characterized as Czars and to provide that appropriated funds may not be used to pay for any salaries and expenses associated with such advisors," and Representative Marsha Blackburn introduced H.Con.Res. 3, "Expressing the sense of Congress that the President should issue, and Congress should hold hearings on, a report and a certification regarding the responsibilities, authorities, and powers of his 'czars.'" Both bills were introduced on January 5, 2011, and referred to the House Committee on Oversight and Government Reform.[3]

Section 2262 of P.L. 112-10, the Department of Defense and Full-Year Continuing Appropriations Act, 2011, enacted on April 15, 2011, prohibits the use of funds to pay the salaries and expenses for the Director of the White House Office of Health Reform; Assistant to the President for Energy and Climate Change; Senior Advisor to the Secretary of the Treasury assigned to the Presidential Task Force on the Auto Industry and Senior Counselor for Manufacturing Policy; and

[1] The use of the term "czar" to refer to government officials is not new. In the 19th century, for example, these officials had that moniker attached to their names: Nicholas Biddle, President of the Bank of the United States, during the "bank wars"; Andrew Johnson, President of the United States, during Reconstruction; and Thomas Reed, Speaker of the House of Representatives, during disputes over the rules for the consideration of legislation. see Ben Zimmer, "Czar Wars," *Slate*, December 29, 2008. Hereinafter referred to as Zimmer on Czars. Additionally, in the 20th century, President Calvin Coolidge appointed Herbert Hoover, the Secretary of Commerce, and gave him "near-absolute authority to organize and oversee" the federal government response to the Flood of 1927. See CRS Report RL33126, *Disaster Response and Appointment of a Recovery Czar: The Executive Branch's Response to the Flood of 1927*, by Kevin R. Kosar. See also, a CRS Memorandum dated July 14, 2011, entitled "Selected Presidential Assistants and Advisors in the Administration of President Barack H. Obama," by Barbara L. Schwemle and Henry B. Hogue.

[2] Senator Robert C. Byrd, February 25, 2009, at http://byrd.senate.gov/mediacenter/view_article.cfm?ID=331; Senator Susan Collins, September 15, 2009, at http://collins.senate.gov/public/continue.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=C2F7DDA9-802A-23AD-4371-ECB6A1C8D2EB&CFID=15502805&CFTOKEN=17636098, and the Senator's list of 18 "czars," October 23, 2009, at http://hsgac.senate.gov/public/index.cfm?FuseAction=Press.MinorityNews&ContentRecord_id=8326a740-5056-8059-769b-e32aa7828f95; Senator Russell Feingold, September 15, 2009, at http://feingold.senate.gov/pdf/ltr_091509_czars.pdf, and the White House response from Gregory B. Craig, Counsel to the President, October 5, 2009, at http://feingold.senate.gov/pdf/ltr_100509_czars.pdf; and Representatives Darrell Issa and Lamar Smith, September 15, 2009, at http://republicans.judiciary.house.gov/Media/PDFs/2009-09-15%20DEI%20%20Smith%20to%209-15-09%20DEI%20and%20Smith%20Letter%20to%20Craig%20-%20Czars.pdf.

[3] See also, Jennifer Rubin, "Czar Legislation," *Washington Post* blog post, January 7, 2011, at http://voices.washingtonpost.com/right-turn/2011/01/czar_legislation.html.

White House Director of Urban Affairs. In the statement accompanying the signing of H.R. 1473, issued on April 15, 2011, President Obama stated the following:

> The President has well-established authority to supervise and oversee the executive branch, and to obtain advice in furtherance of this supervisory authority. The President also has the prerogative to obtain advice that will assist him in carrying out his constitutional responsibilities, and do so not only from executive branch officials and employees outside the White House, but also from advisers within it. Legislative efforts that significantly impede the President's ability to exercise his supervisory and coordinating authorities or to obtain the views of the appropriate senior advisers violate the separation of powers by undermining the President's ability to exercise his constitutional responsibilities and take care that the laws be faithfully executed. Therefore, the executive branch will construe section 2262 not to abrogate these Presidential prerogatives.[4]

On June 22, 2011, Senator David Vitter introduced an amendment (S.Amdt. 499) to S. 679, the Presidential Appointment Efficiency and Streamlining Act of 2011, that would have ended the appointments of presidential czars who have not been subject to the advice and consent of the Senate and prohibited the use of funds for any salaries and expenses for appointed czars. The amendment was not agreed to on a vote of 47-51 (Record No. 95) on June 23, 2011.

Section 632 of H.R. 2434, the Financial Services and General Government Appropriations Act, 2012, as reported by the House Committee on Appropriations on July 7, 2011, would prohibit the use of funds to pay the salaries and expenses for the White House Director of the Office of Health Reform, or any substantially similar position; Assistant to the President for Energy and Climate Change, or any substantially similar position; Senior Advisor to the Secretary of the Treasury assigned to the Presidential Task Force on the Auto Industry and Senior Counselor for Manufacturing Policy, or any substantially similar position; and White House Director of Urban Affairs, or any substantially similar position.[5] The Office of Management and Budget's *Statement of Administration Policy* for the bill, stated that

> Section 632 would prohibit the use of funds for several positions that involve providing advice directly to the President. It also would deny funding for any "substantially similar positions." As the President indicated in an April 15, 2011 statement regarding virtually identical provisions in prior legislation, the President has well-established authority to supervise and oversee the Executive Branch, and to obtain advice in furtherance of this supervisory authority. The President also has the prerogative to obtain advice that will assist him in carrying out his constitutional responsibilities, and do so not only from Executive Branch officials and employees outside the White House, but also from advisors within it.[6]

Article II, Section 2 of the U.S. Constitution provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme court, and all other

[4] The White House, Office of the Press Secretary, "Statement by the President on H.R. 1473," April 15, 2011, available at http://www.whitehouse.gov/the-press-office/2011/04/15/statement-president-hr-1473.

[5] U.S. Congress, House Committee on Appropriations, *Financial Services and General Government Appropriations Bill, 2012*, report to accompany H.R. 2434, 112th Cong., 1st sess., H.Rept. 112-136 (Washington: GPO, July 7, 2011), p. 73, available at http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt136/pdf/CRPT-112hrpt136.pdf.

[6] U.S. Executive Office of the President, Office of Management and Budget, *Statement of Administration Policy, H.R. 2434, Financial Services and General Government Appropriations Act, 2012*, July 13, 2011, pp. 4-5, available at http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr2434r_20110713.pdf.

> Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

One issue of interest to Congress may be whether some of these appointments (particularly some of those to the White House Office), made outside of the advice and consent process of the Senate, circumvent the Constitution. A second issue of interest may be whether the activities of such appointees are subject to oversight by, and accountable to, Congress.

This report provides brief background information and selected views on the role of some of these appointees, discusses selected appointments in the Obama Administration, provides legal analyses of the appointments clause and oversight by Congress of presidential advisors, and discusses options to enhance the accountability of such appointees to Congress.

Background[7]

Every American President, since George Washington, has needed advice and assistance. The President's Committee on Administrative Management (commonly referred to as the Brownlow Commission), which had been established by President Franklin D. Roosevelt (FDR), closely examined this need. The committee's charge, "A careful study of the organization of the Executive branch of the Government ... with the primary purpose of considering the problem of administrative management,"[8] resulted in a report that was submitted to the President and then released to Congress on January 12, 1937. Stating that, "The President needs help," the committee recommended that the President "should be given a small number of executive assistants who would be his direct aides in dealing with the managerial agencies and administrative departments of the Government."[9] The Reorganization Act of 1939 "empowered the President to propose plans of reorganization, subject to a veto by a majority of both houses of Congress, and to also appoint six administrative assistants."[10] On September 8, 1939, FDR issued Executive Order (E.O.) 8248, to create the enclave of federal agencies known as the Executive Office of the President (EOP). Many, if not most, of the President's closest advisors and assistants on matters of policy, politics, administration, and management are within the EOP. Over time, some of the EOP's components have been created by the President and others have been established by Congress.[11] Some components, such as the White House Office (WHO),[12] Office

[7] Barbara L. Schwemle, Analyst in American National Government in the Government and Finance Division (7-8655), wrote this section.

[8] U.S. Congress, House Committee on Post Office and Civil Service, Subcommittee on Employee Ethics and Utilization, *Presidential Staffing-A Brief Overview*, committee print, 95th Cong., 2nd sess., July 25, 1978, 95-17 (Washington: GPO, 1978), p. 42. Hereinafter referred to as Overview of Presidential Staffing. Staff of the Congressional Research Service at the Library of Congress prepared the document, with Harold C. Relyea, formerly Specialist in American National Government, (now retired) as the lead author.

[9] Ibid., p. 46.

[10] Reorganization Act of 1939, April 3, 1939, ch. 36, 53 Stat. 561 (1939).

[11] Two such components, the Office of National Drug Control Policy and the Office of Science and Technology Policy, that are now authorized by statute (P.L. 100-690, November 18, 1988; 21 U.S.C. §1702(b)(1); P.L. 94-282, May 11, 1976; 42 U.S.C. §6612), began as EOP staff positions: the Special Assistant to the President for Science and Technology (1957) and the Director, Special Action Office for Drug Abuse Prevention and Special Consultant to the President for Narcotics and Dangerous Drugs (1971).

[12] The term "White House" is used in common parlance to denote various groupings of entities (e.g., the White House (continued...)

of Management and Budget (OMB, formerly the Bureau of the Budget), the Council of Economic Advisers, and the National Security Council, have endured to the present day, appearing to hold permanent status.[13]

Notwithstanding these continuing functions, a President may have need for special assistance that a new White House office or position may provide.[14] As described by one scholar,

> No president is confined by the organization charts of the past.... A president's priorities change—as do his views of the nation's priorities—and may well expand in new directions. The White House, as the support center for furthering those priorities, will be flexible and will adapt to those changes. Its organizational structure will jump beyond the "continuing" arrangements. If a president wants to begin important new initiatives, to dramatize the extent of his personal commitment, to respond quickly to today's crisis or tomorrow's threat, he will be pressed to create new organizational forms to support his efforts.[15]

The "czar" moniker has been attached to some of these special assistant positions since at least the Administration of FDR. A cartoon drawn by Clifford Kennedy Berryman and published on September 7, 1942, probably in the *Evening Star* (Washington, DC), showed three of FDR's appointees—"czar" of prices, Leon Henderson; "czar" of production, Donald Nelson; and "czar" of ships, Emory S. Land—crowded together on one throne, wearing crowns and ermine-trimmed robes, and wondering where the new economic "czar" would sit.[16] Succeeding Presidents

(...continued)

Office alone, the EOP, the Administration, or the President and his top advisors). The term "White House Office" is generally used to refer to a specific organizational unit within the EOP. See CRS Report 98-606, *The Executive Office of the President: An Historical Overview*, by Barbara L. Schwemle.

[13] For a history of the Executive Office of the President, see Harold C. Relyea, *The Executive Office of the President A Historical, Biographical, and Bibliographical Guide* (Westport, CT: Greenwood Press, 1997). The Financial Services and General Government appropriations bill provides funding for all but three offices under the EOP. See "Executive Office of the President and Funds Appropriated to the President," by Barbara L. Schwemle in CRS Report R41340, *Financial Services and General Government (FSGG): FY2011 Appropriations*, coordinated by Garrett Hatch. Of the three exceptions, the Council on Environmental Quality and the Office of Environmental Quality are funded in the Interior, Environment, and Related Agencies Appropriations Act, and the Office of Science and Technology Policy and the Office of the United States Trade Representative are funded in the Commerce, Justice, Science, and Related Agencies Appropriations Act. See CRS Report R41258, *Interior, Environment, and Related Agencies: FY2011 Appropriations*, coordinated by Carol Hardy Vincent, and CRS Report R41161, *Commerce, Justice, Science, and Related Agencies: FY2011 Appropriations*, coordinated by Nathan James, Oscar R. Gonzales, and Jennifer D. Williams.

[14] The President is not alone in seeking ways to address important public policy issues that cut across department and agency boundaries. Congress has established a range of interagency coordinative mechanisms for this purpose, including a number of officers that are charged with coordinating among multiple organizations. Among these are the Office of the Director of National Intelligence, the Office of National Drug Control Policy, and the newly created Intellectual Property Enforcement Coordinator (15 U.S.C. §8111). See also CRS Report RL31357, *Federal Interagency Coordinative Mechanisms: Varied Types and Numerous Devices*, by Frederick M. Kaiser. This report does not address the position of Director of National Intelligence (DNI) nor its predecessor position, the Director of Central Intelligence (DCI). The former was established by the Intelligence Reform and Terrorism Prevention Act of 2004; the latter by the National Security Act of 1947. By statute the DNI is responsible for coordinating national intelligence activities throughout the federal government and his work is overseen by the two congressional intelligence committees (among others). For additional information, see CRS Report RL34231, *Director of National Intelligence Statutory Authorities: Status and Proposals*, by Richard A. Best Jr. and Alfred Cumming.

[15] Bradley H. Patterson, Jr., "First Magnitude Czars: Special Assistants for Special Purposes," Chapter 17 in *The White House Staff Inside the West Wing and Beyond* (Washington, DC: Brookings Institution Press, 2000), p. 263. Hereinafter referred to as White House Staff. Mr. Patterson served on the White House staff during the Administrations of Dwight Eisenhower, Richard Nixon, and Gerald Ford.

[16] The description of the cartoon is taken from the catalog card: U.S. Library of Congress, Prints and Photographs (continued...)

appointed special assistants who were similarly, at times, referred to by the news media as "czars." As examples, President Richard Nixon appointed John Love, the so-called energy "czar," as the Director of the Office of Energy Policy in 1973, and President Clinton appointed John Koskinen, the so-called Y2K "czar," as the chairman of the President's Council on Y2K Conversion in 1998.[17]

Early in his Administration, President Obama created several new positions, including the Assistant to the President for Energy and Climate Change, the Deputy Assistant to the President and Director of Urban Affairs, and the Director, White House Office of Health Reform, that were not subject to Senate confirmation, the incumbents of which were dubbed "czars." Additionally, several sub-Cabinet-level positions that require Senate confirmation have similarly been termed "czars." For example, David Hayes, Deputy Secretary at the Department of the Interior, has been referred to by some in the news media as the "water czar."[18] Further, the incumbents of some other positions that are authorized in statute and subject to Senate confirmation, such as the Administrator of the Office of Information and Regulatory Affairs at the Office of Management and Budget, have also been referred to as "czars." Several Special Envoy or Special Representative positions, such as the Special Envoy for the Middle East, have been similarly described.

Selected Views on Special Assistants and Their Roles[19]

As envisioned by the Brownlow Commission, which had recommended a few ("probably not exceeding six") additional executive assistants to the President, the aides were to have "no power to make decisions or issue instructions in their own right" and be "possessed of high competence, great vigor, and a passion for anonymity."[20] An analysis of the commission's suggestion for such staff observed that

> These men were to act as anonymous servants exercising no initiative independently of the President's wishes. No authority was delegated to them. Their function was to extend the President's power to listen wherever useful information could be gathered and to see whatever needed to be seen to provide the information required for decisions. In order to give them the utmost responsibility, to presidential will, as well as ultimate flexibility, their functions were not to be defined except as the President saw fit to define them. As such they

(...continued)

Division, Cartoon Collection, Call number CD 1-Berryman (C.K.), no. 182 (A size)<P&P>[P&P], and Zimmer on Czars.

[17] William W. Hogan, "Energy Modeling for Policy Studies," *Operations Research*, vol. 50, issue 1 (January/February 2002), p. 89. According to this source, Mr. Love was "the first of a string of energy czars ... down through the Federal Energy Regulatory Administration and then the Department of Energy." Today, Mr. Koskinen is referred to as the Y2K "czar," but during the time that he served, the news media generally referred to him by his title, with just the headlines of several articles dubbing him the "Y2K guru" or the "millennium man." Will Englund, "Czar Wars," *National Journal*, February 14, 2009, pp. 21-22. Hereinafter referred to as Czar Wars.

[18] The Senate confirmed Mr. Hayes by voice vote on May 20, 2009. Senator Dianne Feinstein has stated her view that the "czar" moniker is inappropriate for Mr. Hayes: "If you look over certain people [who] have real titles and real authority, I don't think it's quite fair to call, for example, David Hayes at the Department of Interior a czar." Manu Raju, "Democrats Join GOP Czar Wars," *Politico*, September 17, 2009, p. 26.

[19] Barbara L. Schwemle, Analyst in American National Government in the Government and Finance Division (7-8655), wrote this section.

[20] Overview of Presidential Staffing, pp. 46, 55.

> would not constitute either an additional institution or certainly not an independent one, but rather an extension of the Presidency itself.[21]

Indeed, FDR's executive order stated that the administrative assistants should have "'no authority over anyone in any department or agency' and should 'in no event be interposed between the President and the head of any department or agency.'"[22]

Since this beginning, Presidents have continued, at times, to appoint special assistants as a way to reassure the public that immediate and sustained attention is being devoted and a broad viewpoint is being applied to crisis situations or problems that cut across departments and agencies. One scholar has noted that, "the expectations surrounding presidential performance far outstrip the institutional capacity of presidents to perform," and therefore

> This gives presidents a strong incentive to enhance their capacity by initiating reforms and making adjustments in the administrative apparatus surrounding them—but here too there is a fundamental imbalance: the resources for acting upon this strong incentive are wholly inadequate, constrained by political and bureaucratic opposition, institutional inertia, inadequate knowledge, and time pressures. It is this imbalance that channels presidential effort into areas of greatest flexibility and generates the major institutional developments we observe, politicization and centralization.[23]

Describing a subset of special assistants in the Administration of President Dwight Eisenhower as "Very Special Assistants for Very Special Problems," another scholar stated this rationale for them:

> From time to time every President is presented with a public policy issue of extraordinary messiness: an aroused public demanding action, many departments involved, political opponents charging that he is asleep when he should be grabbing the wheel. Substantive responses may require billions; thoroughgoing reorganizations will take years—and the President has neither. He does, however, have an instant option which will portray himself as taking charge and as jolting stodgy governmental machinery to move faster: he can appoint a White House "Czar." No Senate confirmation is needed and a suite can always be found in the Executive Office Building next door. It is a legitimate presidential gambit; the "czar" sometimes achieves real success (although often being a pain in the side to the Cabinet).[24]

The title of special assistant conveys "a sense of action" and the individual is frequently announced, sometimes with considerable fanfare,[25] as one who will "knock heads," "cut red tape," and "ensure coordinated effort."[26] Whether such an appointee ultimately performs his or

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[21] Ibid., p. 56.

[22] Arthur M. Schlesinger, Jr., *The Cycles of American History* (New York: Houghton Mifflin, 1986), pp. 333-334, quoting the executive order. Hereinafter referred to as Cycles of American History.

[23] Terry M. Moe, "The Politicized Presidency," Chapter Nine in John E. Chubb and Paul E. Peterson, eds., *The New Direction in American Politics* (Washington: The Brookings Institution, 1985), p. 269.

[24] Bradley H. Patterson, Jr., "Teams and Staff: Dwight Eisenhower's Innovations in the Structure and Operations of the Modern White House," *Presidential Studies Quarterly*, vol. 24, issue 2 (Spring 1994), article begins on p. 277.

[25] In an address before a joint session of Congress on September 20, 2001, President George W. Bush announced that he was creating a new Cabinet-level Office of Homeland Security in the White House and appointing Governor Tom Ridge as his Assistant to the President for Homeland Security. Governor Ridge later became the first Secretary of Homeland Security at the Department of Homeland Security, established by P.L. 107-296, enacted on November 25, 2002.

[26] White House Staff, p. 264.

her role in this manner is uncertain at the outset. As one reporter wrote with regard to two of the current Administration's appointees,

> The new White House Office of Urban Policy might work in lockstep with the Domestic Policy Council, the National Economic Council, and a host of departments and agencies. Or maybe not.
>
> Obama's new White House office for energy and climate change ... may work companionably with the White House Council on Environmental Quality, the president's national security adviser, the president's science adviser, the NEC [National Economic Council], the new administrator at EPA [Environmental Protection Agency], and the Ph.D. physicist chosen to lead the Energy Department. Or maybe not.[27]

According to another reporter, a "czar" "has to drive those he's working with toward a plan to present to the president," but some aspects of the role are undefined:

> Budgetary power? Not clear. Accountability? Not to Congress. The capacity to dictate policy? Umm, probably not. The ability to impose solutions through sheer force of personality? In some cases, most likely yes.[28]

More generally, the size of the White House staff is sometimes raised as a concern when presidential appointments are discussed.[29] Some caution that too many advisors may insulate the President, diminishing his "direct influence and dilut[ing] the impact of his personal leadership."[30] In his book entitled *The Cycles of American History*, the historian Arthur M. Schlesinger, Jr., observed that "The larger the staff grows, the more endless meetings the staff calls, the more useless paper the staff generates, the more the President will hunker up behind it; the less he will know what is going on. The staff becomes the shock absorber, shielding the President against the facts of life."[31]

Lines of authority may also be more difficult to discern, as another scholar asserts:

> The historical record suggests that czars generally fail to find solutions to the problems they are commissioned to confront. Instead, czars confuse matters. They disrupt lines of authority and accountability and they compromise bureaucratic discipline. They sometimes foment suspicion on Capitol Hill and rivalries within the Executive branch. The mere presence of policy "czardoms" undermines the morale of officials in the standing table of organization who retain responsibility for developing and implementing policy while their authority and credibility are eclipsed by the czar.[32]

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[27] Alexis Simendinger, "Agents of Change," *National Journal*, January 10, 2009, pp. 18-19.

[28] Czar Wars, p. 18.

[29] For a review and analysis of selected literature on White House staffing, see Charles E. Walcott and Karen M. Hult, "White House Structure and Decision Making: Elaborating the Standard Model," *Presidential Studies Quarterly*, vol. 35, no. 2 (June 2005), pp. 303-318.

[30] Cycles of American History, p. 334.

[31] Ibid., p. 335. Similar views are expressed by Stephen Hess, *Organizing the Presidency* (Washington: Brookings Institution Press, 2002), p. 208: "The presidents' solution so far-salvation by staff-is self-defeating. An enlarged White House staff overprotects presidents in a political environment where their greatest need is the need to know. Sycophancy can replace independent judgment. By extending the chain of command, presidents have built additional delay and distortion into the system."

[32] John Mead Flanagin, "Less is More: A New Staff Structure for the White House," *Presidential Studies Quarterly*, vol. 25, issue 2 (Spring 1995), pp. 212-213.

The decline of the Cabinet "as a useful instrument of presidential counsel or assistance" is often mentioned as a consequence of concentrating power in White House assistants.[33] A document published by the Center for the Study of the Presidency expressed the view that "the Cabinet has been subordinated to the Presidential staff" since the Administration of President John F. Kennedy.[34] Mr. Schlesinger described the effect of concentrated power in the White House of President Richard Nixon, for example, as enfeebling the cabinet, which "became, with few exceptions, a collection of faceless clerks."[35] This lessening of the cabinet's role was described in a May 1971 speech by Senator Ernest F. Hollings, when he remarked that

> It used to be that if I had a problem with food stamps, I went to see the Secretary of Agriculture, whose Department had jurisdiction over that program. Not any more. Now, if I want to learn the policy, I must go to the White House and consult John Price. If I want the latest on textiles, I won't get it from the Secretary of Commerce, who has the authority and responsibility. No, I am forced to go to the White House and see Mr. Peter Flanigan. I shouldn't feel too badly. Secretary Stans [Secretary of Commerce] has to do the same thing.[36]

John Podesta, a former White House Chief of Staff, who headed President Obama's transition team, believes that "the very strong or important role that Cabinet secretaries play" is not being displaced by the current Administration. As quoted in a *National Journal* article, he emphasized, however, that, "when you have problems that really cut across a swath of agencies, it's very important with respect to the president's priorities to have a strong central place within the White House where people can get on the same strategy and that actions are keyed up and accountability exists."[37]

An expert on government and organization, however, believes that, in the end, the efficient operation of government that is sought through such approaches to management as creating czars may not be the outcome that is achieved:

> Presidents, not caring about management, tend to rely on political personnel to overcome what they believe to be bureaucratic resistance and incompetence. Instead of properly reconstructing the institutional capacity of the presidency, they are lured by 'shortcuts.' ... Therefore, among other things, they tend to create 'czars' who are deemed, at least initially, to be close to the president and thus can get around the departments and agencies to achieve

[33] Overview of Presidential Staffing, p. 68.

[34] Bradley D. Nash with Milton S. Eisenhower, R. Gordon Hoxie, and William C. Spragens, *Organizing and Staffing the Presidency*, Center for the Study of the Presidency (Washington: 1980), p. 156. This document, while acknowledging that special assistants "are indeed a reflection of the President's concern with matters of major urgency," recommended that "a number of these positions might be encompassed within the Cabinet Departments, to the substantial upbuilding of each Cabinet Officer's standing before the Congress, the public and the Executive Branch" (p. 169).

[35] Cycles of American History, p. 334.

[36] Overview of Presidential Staffing, pp. 60-61, quoting Dom Bonafede, "Ehrlichman Acts As Policy Broker in Nixon's Formalized Domestic Council," *National Journal*, June 12, 1971, p. 1240.

[37] Czar Wars, p. 19. For an analysis of presidential management, see Andrew Rudalevige, *Managing the President's Program Presidential Leadership and Legislative Policy Formulation* (Princeton, N.J.: Princeton University Press, 2002). As stated by the author, "the book develops a theory of 'contingent centralization' predicting when presidents will rely on White House staff as opposed to departmental resources; traces the formulation of presidential legislative proposals from 1949 to 1996, using a wide array of archival sources, and quantitatively tests the conditions under which presidents follow centralized strategies; and also shows how different formulation strategies matter to the proposals' reception in Congress."

> their policy objectives, many of which are not enumerated in law. Presidents are always tempted to bring issues to the White House, but then when they do, they often regret the stress it puts upon themselves and their limited institutional resources.[38]

More than 30 years ago, a study of presidential staffing concluded that, "White House assistants to succeeding presidents, since 1939, have become highly conspicuous, multiple in number, possessed of great power, and virtually unaccountable to anyone but the Chief Executive for their actions."[39] The question of accountability reverberates today. One scholar who questions whether these positions should continue to be outside of the advice and consent of the Senate process has suggested that, "we need to seriously consider requiring Senate approval of senior White House staff positions." He recommends that such a requirement not become effective until January 2017, however, "To allow for thoughtful bipartisan deliberation" and to encourage Congress "to take the long view of whether senatorial confirmation is appropriate in terms of constitutional design."[40] Another viewpoint holds that significant authority can only be conferred by the U.S. Constitution or Congress and that "To subject the qualifications" of special assistants (who "In many respects ... are equivalent to the personal staff of a member of Congress") "to congressional scrutiny—the regular confirmation process—would trench upon the president's inherent right, as the head of an independent and equal branch of the federal government, to seek advice and consent where he sees fit."[41]

Regardless of which viewpoint one subscribes to, "The Constitution grants Congress extensive authority to oversee and investigate executive branch activities" through the "review, monitoring, and supervision of the implementation of public policy."[42] Several options for congressional oversight of presidential advisors are discussed later, below (see "Options for Potential Congressional Consideration").

Pay and Reporting Requirements for White House Staff[43]

Section 105 of Title 3 of the *United States Code* authorizes the President to appoint and fix the pay of employees in the White House Office "who shall perform such official duties as the President may prescribe." With regard to employees at the highest pay grades, the President may appoint 25 employees at salaries that may not exceed Executive Schedule Level II ($179,700, salary became effective in January 2010) and 25 employees at salaries that may not exceed Executive Schedule Level III ($165,300, salary became effective in January 2010).[44]

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[38] Dr. Ronald C. Moe, formerly Specialist in Government Organization and Management at the Library of Congress, Congressional Research Service (now retired), quoted in Czar Wars, p. 24.

[39] Overview of Presidential Staffing, p. 56.

[40] Bruce Ackerman, "A Role for Congress to Reclaim," *Washington Post*, March 11, 2009, p. A15. The writer is a professor of law and political science at Yale University.

[41] David B. Rivkin, Jr. and Lee A. Casey, "Misplaced Fears About the 'Czars,'" *Washington Post*, September 17, 2009, p. A15. The writers are attorneys and served in the Justice Department under Presidents Ronald Reagan and George H.W. Bush.

[42] CRS Report RL30240, *Congressional Oversight Manual*, by Frederick M. Kaiser, Walter J. Oleszek, and Todd B. Tatelman.

[43] Barbara L. Schwemle, Analyst in American National Government in the Government and Finance Division (7-8655), wrote this section.

[44] Sections 106 and 107 of Title 3, *United States Code*, also provide authority for the hiring of close assistants to the President and Vice President.

Section 113 of Title 3 of the *United States Code* requires the President to transmit to the House of Representatives and the Senate, and make available to the public, annual reports containing information in the aggregate and by office on

- the number of employees who are paid at a rate of basic pay equal to or greater than the rate of basic pay then currently paid for Level V of the Executive Schedule (5 U.S.C. 5316) and who are employed in the White House Office, the Executive Residence at the White House, the Office of the Vice President, the Domestic Policy Staff, or the Office of Administration, and the aggregate amount paid to such employees;
- the number of employees employed in such offices who are paid at a rate of basic pay which is equal to or greater than the minimum rate of basic pay then currently paid for GS-16[45] of the General Schedule (GS) but which is less than the rate then currently paid for Level V of the Executive Schedule and the aggregate amount paid to such employees;
- the number of employees employed in such offices who are paid at a rate of basic pay which is less than the minimum rate then currently paid for GS-16, and the aggregate amount paid to such employees;
- the number of individuals detailed under 3 U.S.C. §112 of this title for more than 30 days to each such office, the number of days in excess of 30 each individual was detailed, and the aggregate amount of reimbursement made as provided by the provisions of section 112; and
- the number of individuals whose services as experts or consultants are procured under 3 U.S.C. Chapter 2 for service in any such office, the total number of days employed, and the aggregate amount paid to procure such services.

Each report must be transmitted within 60 days after the close of the fiscal year covered by the report.

Additionally, Section 6 of P.L. 103-270, the Independent Counsel Reauthorization Act of 1994, enacted on June 30, 1994, requires the President to submit an annual report on White House Office personnel to the Senate Committee on Homeland Security and Governmental Affairs and the House Committee on Oversight and Government Reform on July 1. The report is to include a list of each individual employed by or detailed to the White House Office to Congress, including his or her name, position and title, and annual rate of pay. If the President determines that disclosure of any item of information with respect to any particular individual would not be in the interest of the national defense or foreign policy of the United States, he can exclude the individual and state the number of individuals so excluded. At the request of the Senate and House committees, the information that is excluded will be made available for public inspection

[45] References in laws to the rates of pay for GS-16, 17, or 18, or to maximum rates of pay under the General Schedule, are considered to be references to rates payable under 5 U.S.C. 5376 related to senior-level positions. Currently, basic pay for certain senior-level positions—positions classified above GS-15 (SL pay schedule) and scientific or professional positions (ST pay schedule)—ranges from 120% of the minimum rate of basic pay for GS-15 ($119,554, salary became effective in January 2010) to either EX Level III ($165,300, salary became effective in January 2010) or EX Level II ($179,700, salary became effective in January 2010), depending on whether an agency's performance management system has been certified by the Office of Personnel Management.

by the committees. President Obama submitted the most recent report to Congress on July 1, 2011, and had it posted on the White House website.[46]

Vetting of Appointees[47]

As previously noted, the term "czar" has been applied to a variety of positions that are (1) located in various parts of the federal government, (2) filled through various appointment mechanisms, and (3) established under various legal authorities. One characteristic common to these positions is that each is filled by political appointment, rather than through a competitive civil service selection process. Political appointees serve at the pleasure of the appointing authority, usually no longer than the duration of an Administration, rather than for the duration of a career. Consequently, most politically appointed positions must be filled anew at the beginning of an Administration. The process of selecting a candidate for a politically appointed position usually includes vetting, a sometimes lengthy process.

The vetting process for presidential appointees, which is set by each Administration, is designed to examine the background of nominees and other appointees, to determine their suitability for a particular position, assess their professional and personal qualifications, and, in the case of the former, gauge whether they would meet the confirmation demands of the Senate. The current process includes an extensive questionnaire about an individual's career and personal history,[48] an FBI background investigation, and a financial disclosure process and related examination of ethics considerations conducted by the U.S. Office of Government Ethics or the White House Counsel's Office. A separate matter hinges on the honesty of the individual being vetted. The prospective applicant or nominee might intentionally withhold vital information or even deceive federal investigators about his or her activities, including possible criminal conduct.[49] Some of the

[46] The White House, "Annual Report to Congress on White House Staff," July 1, 2009; http://www.whitehouse.gov/briefing-room/disclosures/annual-records/2009. The White House, "Annual Report to Congress on White House Staff," July 1, 2010; http://www.whitehouse.gov/briefing-room/disclosures/annual-records/2010. The White House, "Annual Report to Congress on White House Staff," July 1, 2011, available at http://www.whitehouse.gov/briefing-room/disclosures/annual-records/2011. Hereinafter referred to as Annual Report on White House Staff.

[47] Henry B. Hogue, Analyst in American National Government in the Government and Finance Division (7-0642), wrote this section.

[48] Jackie Calmes, "For a Washington Job, Be Prepared to Tell All," *New York Times*, November 12, 2008, and White House press comments on vetting in *Press Briefing by Press Secretary Robert Gibbs*, on February 3, February 6, and May 26, 2009, available at http://www.presidency.ucsb.edu/press_briefings.php. The lengthy questionnaire adopted by the then-incoming Obama Administration contained 63 questions about an individual's professional background, taxes and finances, criminal or civil matters, family members and cohabitants, residencies, travel, publications, speeches, association memberships, domestic help (hires, pay, and taxes), and physical condition. Several additional inquiries (numbers 61 and 63) were open-ended and somewhat subjective. These include questions regarding "any association with any person, group, or business venture that could be used ... to impugn or attack your character and qualifications for government service ... [and] any other information, including information about other members of your family, that could suggest a conflict of interest or a possible source of embarrassment to you, your family, or the President-elect."

[49] An illustration of this during the vetting process involved Bernard B. Kerik, first, in 2002-2003, as an applicant to serve on an advisory committee in the Office of Homeland Security, and later, in 2004, as a nominee to head the Department of Homeland Security. (He withdrew his nomination in 2004, because of various concerns. See *2005 Congressional Quarterly Almanac*, p. 10-4; and *Congressional Quarterly Weekly*, Jan. 17, 2004, p. 124.) In November of 2009, Mr. Kerik pleaded guilty in federal district court to several counts of "making false statements to the federal government," including directly to White House officials, in emails to the same, on his Personal Data Questionnaire from the White House Counsel, and on Form 450 (Executive Branch Confidential Financial Disclosure Report). The indictments are recorded at United States District Court, Southern District of New York (White Plains), *United States of America v Bernard B. Kerik*, Indictment S1 07 Cr. 1027 (SCR), Dec. 2, 2008; and United States District Court for (continued...)

contours of the vetting process, such as financial disclosure requirements, are set in law. Others, such as the content of the White House questionnaire and the extent of background investigations, vary by Administration.

Background Investigations[50]

Background investigation requirements have been established for determining suitability for government employment, granting an appropriate security clearance, or meeting the protective responsibilities of the U.S. Secret Service. Consequently, the nature of a background investigation will vary according to a prospective appointee's circumstances.

The requirements of background checks are formalized in various executive orders, presidential or administrative directives, and public laws. These requirements differ: they serve different purposes, are issued and amended at different times, and are instituted by different authorities. They range from following up on responses to questionnaires submitted by the prospective appointee; to searches of relevant databases; to interviews with colleagues, neighbors, relatives, and friends.[51]

Suitability Checks and Security Clearances[52]

Suitability checks and security clearances differ from one another. A suitability check is designed to determine whether a person should be hired for government employment, while a security clearance is used to determine eligibility for access to classified national security information. The background investigation resulting from each is governed by its own executive orders, administrative directives, and public laws.[53] Consequently, each follows its own set of

(...continued)

the District of Columbia, *United States v Bernard B. Kerik*, Case 1:09-cr-00142-RMC, filed 05/26/2009, which was later transferred to the Southern District Court. The guilty pleas for the cases titled "USA v. Bernard B. Kerik," are recorded at United States District Court for the Southern District of New York (White Plains), *Criminal Docket for Case #: 7:09-cr-10171-SCR-1*, filed 11/05/2009; and *Criminal Docket for Case #: 7:07-cr-01027-SCR-1*, filed 11/08/2009. For press coverage, see Sam Dolnick, "Kerik Confesses to Cheating I.R.S. and Telling Lies," *New York Times*, Nov. 6, 2009, p. A3; and Jim Fitzgerald, "Kerik pleads guilty to tax crimes, lying to White House; prison time sought," *Washington Post*, Nov. 6, 2009, p. A20.

[50] Frederick M. Kaiser, Specialist in American National Government in the Government and Finance Division (7-8682), wrote this section.

[51] In most cases, background investigations of presidential appointees and nominees are conducted by the Federal Bureau of Investigation (FBI). Other offices are involved in select areas or in times of heavy demand. These include the Office of Personnel Management (OPM), which handles about 90% of all federal background investigations, and the U.S. Secret Service, which has responsibility for the protection of the President and many other designees.

[52] Frederick M. Kaiser, Specialist in American National Government in the Government and Finance Division (7-8682), wrote this section.

[53] Distinctions between the two are spelled out in several executive directives and regulations: 5 C.F.R. 731, 732, and 736; U.S. Department of Homeland Security, *Personnel Security and Suitability Program*, Management Directive 11050.2 (Washington, DHS, 2005); U.S. Department of Health and Human Services, *Personnel Security/Suitability Handbook*, Feb. 1, 2005, available at http://www.hhs.gov/oamp/policies/personnel_security_suitability_handbook/html; and OPM, *Investigations: General Questions and Answers about OPM Background Investigations* and *Investigations Reimbursable Billing Rates for FY 2010*, Federal Investigations Notice 09-05, August 3, 2009, both available at http://www.opm.gov/extra/investigate. Questionnaires for applicants or employees also differ between security and suitability checks: OPM, *Questionnaire for Non-Sensitive Positions* (SF-85) and *Questionnaire for Public Trust Positions* (SF-85P), both for suitability checks; and *Questionnaire for National Security Positions* (SF-86) for security clearances; all available at http://www.opm./gov/forms/html/sf.asp.

requirements. Even though some requirements are the same for both, a security clearance for the higher levels is more extensive and exacting than a suitability check.

Secret Service Protective Responsibilities[54]

The U.S. Secret Service has responsibility for protecting the President; the Vice President; members of their immediate families; many other executive officials, including individuals in the EOP and in various departments and agencies; and representatives of the President traveling abroad.[55] As such, the Secret Service may conduct background investigations of individuals who might be in close proximity to one of its protective assignments. The Secret Service is to have a copy of the background investigation conducted by another agency for each EOP employee.[56]

EOP Background Checks[57]

The background investigation requirements for employment in the EOP and presidential discretion over coverage are recognized in a provision of law regarding executive office personnel background investigations and leaves of absence.[58] It provides not only for background investigations and completion of an appropriate questionnaire but also empowers the President to exempt individuals from its demands:

> (a) Hereafter, the employment of any individual within the Executive Office of the President shall be placed on leave without pay status if the individual has not, within 30 days of commencing such employment, submitted a completed questionnaire for sensitive positions (SF-86) or equivalent form; or has not, within six months of commencing such employment ... had his or her background investigation, if completed, forwarded by the counsel to the President to the United States Secret Service for issuance of the appropriate access pass.
>
> (b) Exemption. Subsection (a) shall not apply to any individual specifically exempted from such subsection by the President or his designee.[59]

Other authorities governing federal employment also support the President's discretion over background checks for certain hires. One is included in Executive Order 13467, issued by President George W. Bush on June 30, 2008, regarding suitability checks and security clearances for federal employees, applicants, and contractors.[60] E.O. 13467 includes a determination of who is covered:

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[54] Frederick M. Kaiser, Specialist in American National Government in the Government and Finance Division (7-8682), wrote this section.

[55] 18 U.S.C. 3056. U.S. Secret Service, "Protective Mission," available at http://www.secretservice.geov/protection.shtml; and CRS Report RL34603, *The U.S. Secret Service: An Examination and Analysis of Its Evolving Missions*, by Shawn Reese.

[56] P.L. 103-329, 108 Stat. 2425.

[57] Frederick M. Kaiser, Specialist in American National Government in the Government and Finance Division (7-8682), wrote this section.

[58] P.L. 103-329, 108 Stat. 2425; 3 U.S.C. prec. §101.

[59] Ibid. SF-86 (Standard Form 86) is the *Questionnaire for National Security Positions* from the U.S. Office of Personnel Management (OPM), discussed further below, available at http://www.opm.gov/forms/html/sf.asp.

[60] E.O. 13467, "*Reforming Processes Relating to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information*," 73 *Federal Register* 38103-38108, July 2, 2008.

> 'Covered individual' means a person who performs work for or on behalf of the executive branch, or who seeks to perform work for or on behalf of the executive branch, but does not include:
>
> (i) the President or (except to the extent otherwise directed by the President) employees of the President under section 105 or 107 of title 3, United States Code; or
>
> (ii) the Vice President or (except to the extent otherwise directed by the Vice President) employees of the Vice President under section 106 of title 3 or annual legislative branch appropriations acts.[61]

The provisions cited in the order refer to sections of law that provide for the appointment of certain EOP personnel. As previously noted, the President is authorized to appoint and fix the pay of a certain number of employees—"without regard to any other provision of law regulating the employment or compensation of persons in Government service"—in the White House Office (Sec. 105) and in the Domestic Policy Staff and Office of Administration (Sec. 107).[62] The Vice President is authorized to do the same, in order "to provide assistance to the President in connection with the performance of functions specifically assigned to the Vice President by the President in the discharge of executive duties and responsibilities" (Sec. 106).

Reinforcing presidential (and vice presidential) discretion is the definition of "agency" in E.O. 13467:

> 'Agency' means any 'Executive agency' as defined in section 105 of title 5, United States Code, including military departments, as defined in section 102 of title 5, United States Code, and any other entity within the executive branch that comes into possession of classified information or has designated positions as sensitive, except such an entity headed by an officer who is not a covered individual.[63]

Along these same lines, an earlier executive order—E.O. 12968, *Access to Classified Information*, issued by President William Clinton, in 1995—exempts the President and Vice President.[64] Section 1.1(e) of the Clinton order states that "'Employee' means a person, other than the President or Vice President, employed by, detailed or assigned to, an agency."[65] A predecessor order—E.O. 10450, *Security Requirements for Government Employment*, issued by President Dwight D. Eisenhower, in 1953—applies only to persons "employed in the departments and agencies of the Government."[66]

[61] Sec. 1.3(g), ibid.

[62] The Office of Administration was created by Sec. 2 of Reorganization Plan No. 1 of 1977, 3 U.S.C. §101, in order to centralize Administration functions in EOP. Further implementation occurred in E.O. 12028, "*Office of Administration in the Executive Office of the President*," 42 *Federal Register 62895-62896*, December 14, 1977, issued by President Jimmy Carter on December 12, 1977.

[63] Sec. 1.3(b), ibid.

[64] 60 *Federal Register*, 40245, August 7, 1995.

[65] Ibid.

[66] "Security Requirements for Government Employment," 18 *Federal Register* 2489, April 27, 1953.

Financial Disclosure[67]

Whether any officer or employee of the federal government is required to file public financial disclosure statements depends on the rate of compensation that the officer or employee receives from the federal government, and the number of days such an individual works for the federal government.

All persons appointed by the President to any positions in the government, including presidential "advisors" or "special assistants" in the White House, and who are compensated above a threshold amount (at a rate equal to or greater than 120% of the base salary of a GS-15) for work on more than 60 days in a calendar year, are required to file *public* financial disclosure reports under the provisions of the Ethics in Government Act of 1978, as amended.[68] Individuals appointed in the federal government who meet the compensation threshold and who work the requisite number of days are to file an "entrance" report within 30 days of assuming the position, and then annually on May 15 of each year, with the "designated agency ethics officer at the agency by which he is employed."[69] White House assistants and advisors in most instances would file with an ethics officer in the White House. These reports are public, and are required by law to be reviewed and then made available to the public within 30 days of filing at the agency where the reports are filed.[70]

If a nominee is required to receive Senate confirmation, then the Ethics in Government Act provides that once the President has transmitted to the Senate the nomination of a person required to be confirmed by the Senate, that nominee must within five days of the President's transmittal (or any time after the public announcement of the nomination—but no later than five days after transmittal), file a financial disclosure statement.[71] This financial disclosure statement is filed with the designated agency ethics officer of the agency in which the nominee will serve,[72] and copies of the report are transmitted by the agency to the Director of the Office of Government Ethics (OGE).[73] The Director of OGE then transmits a copy to the Senate committee which is considering the nomination of that individual.[74]

In addition to *public* reports for more senior officers and employees under the Ethics in Government Act, there are provisions for *confidential* financial disclosure reports for those who do not meet the salary threshold. The confidential reporting requirements are intended to complement the public disclosure system, and apply to those employees who do not have to file under the public reporting provisions of the Ethics in Government Act.[75] Generally speaking, the

[67] Jack H. Maskell, Legislative Attorney in the American Law Division (7-6972), wrote this section.

[68] P.L. 95-521, title I, 92 Stat. 1824 (October 26, 1978), as amended; see now 5 U.S.C. app. §§101 *et seq.*; 5 U.S.C., app. §101(f)(3) as to threshold rate of pay for "each officer or employee in the executive branch"; and 5 U.S.C. app. §101(d) as to 60-day threshold.

[69] Entrance reports: 5 U.S.C. app. §101(a); annual reports: 5 U.S.C. §101(d); place of filing: 5 U.S.C. §103(a).

[70] 5 U.S.C. §105(b)1).

[71] 5 U.S.C. app. §101(b); 5 C.F.R §2634.602(c)(1). The disclosure report form is provided to the nominee by the Executive Office of the President. 5 C.F.R. §2634.605(c)(1).

[72] 5 C.F.R. §2634.602(a).

[73] 5 U.S.C. app. §103(c), 5 C.F.R. §2634.602(c)(1)(vi).

[74] 5 U.S.C. app. §103(c), 5 C.F.R. §2634.602(c)(3).

[75] 5 C.F.R. §2634.901(a), although supplemental information may be requested by an agency even from employees filing public disclosures. 5 C.F.R. §2634.901(c).

confidential reporting requirements apply to certain lower-level or "rank and file" employees, that is, those officers or employees who are compensated below the threshold rate of pay for public disclosures (GS-15 or below, or less than 120% of the basic rate of pay for a GS-15), *and* who are determined by the employee's agency to perform duties or exercise responsibilities in regard to government contracting or procurement, government grants, government subsidies or licensing, government auditing, or other governmental duties which may particularly require the employee to avoid financial conflicts of interest.[76] Such a person may be required to file a confidential report if he or she performs the duties of such a position "for a period in excess of 60 days during the 12 month period ending September 30."[77]Additionally, unless required to file *public* reports, confidential reports are required from all "special Government employees" in the executive branch (those employees who are employed by the government for not more than 130 days in a year), including specifically "those who serve on advisory committees."[78] The disclosure provisions of federal law and regulation, it should be noted, apply only to persons who are "officers or employees" of the federal government, and thus do not apply, for example, to so-called "representatives" of outside, private, or non-federal entities appointed to advisory committees.[79]

Outside Employment Limitations[80]

Executive Order and Regulations. Under an existing executive order, issued by President George H.W. Bush in 1989, a presidential appointee to a "full-time noncareer position" may not receive *any* compensation as outside earned income from any outside employment activities during that presidential appointment.[81] The term "Presidential appointee to a full-time noncareer position" is defined in the ethics regulations issued by OGE as follows:

> (2) *Presidential appointee to a full-time noncareer position* means any employee who is appointed by the President to a full-time position described in 5 U.S.C. 5312 through 5317 [the Executive Schedule] or to a position that, by statute or as a matter of practice, is filled by Presidential appointment, other than:
>
> (i) A position filled under the authority of 3 U.S.C. 105 or 3 U.S.C. 107(a) for which the rate of basic pay is less than that for GS-9, step 1 of the General Schedule;
>
> (ii) A position, within a White House operating unit, that is designated as not normally subject to change as a result of a Presidential transition;
>
> (iii) A position within the uniformed services; or
>
> (iv) A position in which a member of the foreign service is serving that does not require advice and consent of the Senate.[82]

[76] 5 C.F.R. §2634.904(a).

[77] 5 C.F.R. §2634.903(a).

[78] 5 C.F.R. §2634.904(b).

[79] *Id.*

[80] Jack H. Maskell, Legislative Attorney in the American Law Division (7-6972), wrote this section.

[81] E.O. 12674 (modified by E.O. 12731), April 12, 1989, Section 102. See now 5 C.F.R. §§2635.804, 2636.302.

[82] 5 C.F.R. §2635.804(c)(2).

Statutory Limitations. In addition to the complete ban on outside income for "full-time" presidential appointees under the executive order, federal law limits the *amount* of compensation that may be earned by certain other federal officials, and the *types* of paid outside work in which such officials may engage, under provisions of the Ethics Reform Act of 1989.[83] These statutory provisions would be relevant when a presidential appointee is not a "full-time" federal employee, but is more than a "special Government employee," that is, when such employee works for the government on more than 130 days in a year.

The coverage of government officials under these restrictions and limitations is dependent on the rate of federal compensation of the official, the number of days of employment with the government (that is, whether one is a "regular" employee of the government as opposed to a "special Government employee"), and the nature of the appointment and employment as to whether one is a "noncareer officer or employee" as opposed to having a career position.

Under the statutory limitations, a covered officer or employee may not have "outside earned income" (that is, compensation, salaries, wages, or fees for outside, private employment activities) that exceeds 15% of the annual rate of pay for a Level II on the Executive Schedule.[84] Furthermore, such covered noncareer officials may not receive any compensation for affiliating with a firm to provide professional services involving a fiduciary relationship; may not permit their names to be used by any such firm; may not receive any compensation for practicing a profession which involves a fiduciary relationship; may not serve for compensation as an officer or member of the board of any association, corporation, or other entity; and may not receive compensation for teaching without prior notification of and approval by the appropriate supervisory ethics office.[85]

These particular outside employment restrictions apply when all three of the following conditions are met:

- *Government Compensation.* An officer or employee of the government to be covered must, in the first instance, be compensated at a rate of annual pay above a GS-15, or if not on the General Schedule, then compensated at a rate of basic pay equal to or greater than 120% of the minimum rate of base pay for a GS-15. At current rates of pay, as of this writing, the base salary of a GS-15 (excluding locality pay) is $98,156 and thus the threshold pay rate would be $117,787.20 or above.
- *Career v. Noncareer Employee.* An officer or employee is covered only if that person is a "noncareer officer or employee" of the government. The OGE regulations expressly define "covered" noncareer employees as follows:

  (a) Covered noncareer employee means an employee, other than a Special Government employee ... who occupies a position classified above GS-15 of the General Schedule, or, in

[83] P.L. 101-194, Title VI, 103 Stat. 1760, November 30, 1989; see now 5 U.S.C. app. §§501 *et seq*.

[84] 5 U.S.C. app. §501(a). As of January 2010, the compensation for a Level II of the Executive Schedule was $179,700, and 15% of that amount was $26,955.

[85] 5 U.S.C. app. §502. The "honoraria" prohibition of 5 U.S.C. app. §501(b) was declared unconstitutional by the Supreme Court in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), and will not be enforced by the Department of Justice against *any* officer or employee of the federal government. Office of Legal Counsel, U.S. Department of Justice, Memorandum to the Attorney General, "Legality of Honoraria Ban Following U.S. v. National Treasury Employees Union," February 26, 1996.

> the case of positions not under the General Schedule, for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for a GS-15 of the General Schedule, and who is:
>
> (1) Appointed by the President to a position described in the Executive Schedule, 5 U.S.C. 5312 through 5317, or to a position that, by statute or as a matter of practice, is filled by Presidential appointment, other than:
>
> (i) A position within the uniformed services; or
>
> (ii) A position within the foreign service below the level of assistant Secretary or Chief of Mission;
>
> (2) A noncareer member of the Senior Executive Service or of another SES-type system, such as the Senior Foreign Service;
>
> (3) Appointed to a Schedule C position or to a position under an agency-specific statute that establishes appointment criteria essentially the same as those set forth in §213.3301 of this title for Schedule C positions; or
>
> (4) Appointed to a noncareer executive assignment position or to a position under an agency-specific statute that establishes appointment criteria essentially the same as those for noncareer executive assignment positions.
>
> For purposes of applying this definition to an individual who holds a General Schedule position or other position that provides several rates of pay or steps per grade, his rate of basic pay shall be the rate of pay for the lowest step of the grade at which he is employed.[86]

- *Regular v. Special Government Employee*. The term "officer or employee" for the purposes of these particular statutory compensation restrictions expressly *excludes* any "special Government employee," as defined in 18 U.S.C. §202 (that is, an officer or employee of the Government who is compensated to perform duties on no more than 130 days in any period of 365 days).

All officers and employees of the executive branch are also covered by general conflict of interest and ethical standards regarding conflicting or incompatible outside employment activities, as set out in executive branch-wide regulations by the Office of Government Ethics, as well as other statutory restrictions on certain outside activity or compensation.[87]

[86] 5 C.F.R. §2636.303(a). OGE has described the term "covered noncareer employee" to include "a variety of noncareer employees who are in positions 'above GS-15,' including certain Presidential appointees, noncareer members of the Senior Executive Service (SES) or other SES-type systems, and Schedule C or comparable appointees.... The term excludes special Government employees, Presidential appointees to positions within the uniformed services, and Presidential appointees within the foreign service below the level of Assistant Secretary or Chief of Mission." OGE Memorandum, 97-10, May 21, 1997.

[87] See 5 C.F.R. §§2635.801 *et seq*. See also statutory restrictions on certain representational activities before federal agencies, restrictions on private compensation for government work, acting as an agent of a foreign principal, and constitutional restriction on compensation from foreign governments. 18 U.S.C. §§203, 205, 209, 219, Const. Art. I, §9, cl. 8.

Selected Special Assistants and Advisors in the Obama Administration

As noted above, the term "czar" has been used as a shorthand reference to a number of appointments made by President Obama or his Cabinet Secretaries. The discussion that follows presents selected examples of appointments so designated in the news media or elsewhere.[88]

Appointed by the President to White House Office Positions

Assistant to the President and Deputy National Security Advisor for Counterterrorism and Homeland Security[89]

On January 9, 2009, President-elect Obama announced the appointment of John Brennan as "my Homeland Security Advisor and Deputy National Security Advisor for Counterterrorism, serving with the rank of Assistant to the President" and stated that he "has the experience, vision and integrity to advance America's security."[90] The appointment led to speculation about a future merger of the Homeland Security Council (HSC) into the National Security Council (NSC) and placement of policies related to counterterrorism under "a single adviser [Mr. Brennan] reporting to the president."[91] During remarks at the 45th Munich Conference on Security Policy, on February 9, 2009, National Security Advisor General James L. Jones stated that Mr. Brennan is leading the review undertaken by the NSC "to determine how best to unify our efforts to combat terrorism around the world while protecting our homeland."[92] At a February 12, 2009, hearing on "Structuring National Security and Homeland Security at the White House" Senator Joseph Lieberman noted both that Mr. Brennan had been appointed "to serve as both a deputy national security adviser for counterterrorism and as homeland security adviser—so in some sense bringing these functions together" and has been asked to undertake a review related to a possible merger of the HSC and the NSC. Relatedly, at that same hearing, Tom Ridge, who served as the first homeland security advisor in the Administration of President George W. Bush, stated,

[88] This section of the report discusses a sampling of appointments frequently mentioned in the news media. In addition, several "dual-hatted" positions that have been less frequently cited were included for illustrative purposes. See for example, Laura Meckler, "'Czars' Ascend at White House," *Wall Street Journal*, December 15, 2008, p. A6; Peter Baker, "And Now Let the Jockeying Begin," *New York Times*, February 1, 2009, p. WK.1; Amanda Carpenter, "Hot Button," *Washington Times*, June 15, 2009, p. A18; and "What About Our 'Czars,'" *Chattanooga Times Free Press*, September 20, 2009, p. F5. Inclusion of a position does not suggest that it is more "czar"-like than another position. Exclusion of a position does not mean that it is free from any concerns.

[89] Barbara L. Schwemle, Analyst in American National Government in the Government and Finance Division (7-8655), wrote this section.

[90] "Obama Announces Panetta and Blair for Intel Posts; Remarks of President-Elect Barack Obama As Prepared for Delivery, Announcement of Intelligence Team," January 9, 2009, at http://change.gov/newsroom/entry/obama_announces_panetta_and_blair_for_intel_posts/.

[91] Eileen Sullivan and Pamela Hess, "Obama May Cut Bush-era Security Panel; CIA Veteran Tapped as Counterterrorism Policy Faces Review," *Chicago Tribune*, January 9, 2009, p. 13.

[92] White House, Office of the Press Secretary, "Remarks by National Security Advisor Jones at 45th Munich Conference on Security Policy," press release, February 9, 2009, at http://www.whitehouse.gov/the_press_office/RemarksByNationalSecurityAdviserJonesAt45thMunichConferenceOnSecurityPolicy/.

> let's not categorize the Department of Homeland Security's primary mission as counterterrorism. It's not. And having someone such as John Brennan, with the stature and the experience, being a liaison between the National Security Council and the independent Homeland Security Council to make sure that the information that the HSC needs, that the department needs, that the states need, that the locals need, that the private sector needs is transmitted in a timely and appropriate way would be a huge, huge plus-up for the department and for the Homeland Security Council.[93]

According to a Congressional Research Service report on the NSC,

> In May 2009 the Administration announced its intention to integrate the staffs of the National Security Council with the Homeland Security Council into a single National Security Staff, with the goal of ending "the artificial divide between White House staff who have been dealing with national security and homeland security issues." The position of Assistant to the President for Homeland Security, currently filled by John Brennan, will be retained "with direct and immediate access" to the President, but the incumbent would organizationally report to the National Security Advisor. It is anticipated that the changes will be formalized in a new Presidential Policy Directive.[94]

Mr. Brennan participated in the 60-day review of cyberspace policy undertaken by the NSC and the HSC, and in the May 29, 2009, presentation of the review findings to the President. Other activities reportedly involving Mr. Brennan have included participating in a White House briefing on swine flu cases on April 26, 2009, and a briefing on hurricane preparedness at the Federal Emergency Management Agency on May 29, 2009; meeting with the President and several Cabinet members on June 30, 2009, to discuss lessons learned from the 1976 influenza outbreak; hosting an all-day H1N1 Influenza preparedness summit at the National Institutes of Health with representatives from 54 states and territories on July 9, 2009; and presenting a speech on terrorism at the Center for Strategic and International Studies on August 6, 2009. Secretary of State Hillary Clinton's delegation to Mexico in March 2010 to discuss violence emanating from the ongoing drug war included Mr. Brennan.[95] In addition, on April 12, 2010, he participated in a press briefing on the threat of nuclear terrorism at the Washington Convention Center and presented remarks at the Center for Strategic and International Studies on the strategy for securing the homeland on May 26, 2010, in advance of the release of President Obama's National Security Strategy.[96] More recently, Mr. Brennan participated in an October 29, 2010, press briefing on the security alert issued in the wake of the terrorist threat emanating from Yemen as a result of the discovery of suspicious packages on cargo planes bound for the United States. On December 24, 2010, he convened an interagency coordination call with other top officials related

[93] U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, Structuring National Security and Homeland Security at the White House, hearing, 111th Cong., 1st sess., February 12, 2009. Quoted from the *Congressional Quarterly* transcript of the hearing (printout is available from CRS). Mr. Brennan's appointment also was mentioned in passing during the House Committee on Homeland Security's April 2, 2009, hearing on homeland security policymaking.

[94] CRS Report RL30840, *The National Security Council: An Organizational Assessment*, by Richard A. Best Jr., pp. 23-24.

[95] Todd J. Gillman and Alfredo Corchado, "American Officials to visit Mexico, Engage in Talks About Ongoing Violence," *McClatchy-Tribune Business News*, March 18, 2010.

[96] See http://www.whitehouse.gov/the-press-office/briefing-press-secretary-robert-gibbs-and-assistant-president-counterterrorism-and- and http://www.whitehouse.gov/the-press-office/remarks-assistant-president-homeland-security-and-counterterrorism-john-brennan-csi.

to the enhanced security measures and close coordination with foreign partners for the holiday travel period.[97]

Mr. Brennan's salary, as of July 1, 2011, remains at the 2009 level of $172,200.

Assistant to the President for Energy and Climate Change[98]

The President-elect announced the appointment of Carol Browner "to a new post in the White House to coordinate energy and climate policy" on December 15, 2008. The President has not issued an executive order to establish the office, but the position is mentioned in E.O. 13499 related to the National Economic Council and E.O. 13500 related to the Domestic Policy Council, both of which were issued on February 5, 2009.[99] In announcing the appointment, Mr. Obama stated that Ms. Browner "understands that our efforts to create jobs, achieve energy security and combat climate change demand integration among different agencies; cooperation between federal, state and local governments; and partnership with the private sector" and "will be indispensable in implementing an ambitious and complex energy policy."[100] During a January 2009 interview with a reporter for *National Journal*, Ms. Browner described her role in this way:

> Having served as EPA administrator for eight years, I have a real appreciation for professional staff and the public servants who make up EPA and the other departments and agencies. There is a difference between being an assistant to the president and having a statutory responsibility as the Secretary of Energy or the administrator of EPA. And I respect that difference. The president recognizes that to tackle the enormous challenges we face when it comes to energy security and climate change, you have to coordinate across all of these departments and agencies and work closely with the experts. My role is to bring the various players together to reach consensus and to work with the president and formulate policy.[101]

The appointment has raised questions about her role in policymaking, as the following article reported:

> Browner ... told reporters two weeks ago that the administration would soon propose new rules to regulate greenhouse gas emissions from a range of industries. Obama's EPA administrator had hinted at such a possibility but had not made clear how things would unfold. Browner's statement set off a nervous response on Capitol Hill and among

[97] The White House, Office of the Press Secretary, "Press Briefing by Press Secretary Robert Gibbs and Assistant to the President for Homeland Security and Counterterrorism John Brennan," press release, October 29, 2010, at http://www.whitehouse.gov/the-press-office/2010/10/29/press-briefing-press-secretary-robert-gibbs-and-assistant-president-home and The White House, Office of the Press Secretary, "Readout of Inter-Agency Coordination Call to Respond to Holiday Threats," press release, December 24, 2010, at http://www.whitehouse.gov/the-press-office/2010/12/24/readout-inter-agency-coordination-call-respond-holiday-threats.

[98] Barbara L. Schwemle, Analyst in American National Government in the Government and Finance Division (7-8655), wrote this section.

[99] E.O. 13499, "Further Amendments to Executive Order 12835, Establishment of the National Economic Council," 74 *Federal Register*, 6979, February 11, 2009. E.O. 13500, "Further Amendments to Executive Order 12859, Establishment of the Domestic Policy Council," 74 *Federal Register*, 6981, February 11, 2009.

[100] "The Energy and Environment Team, December 16, 2008; Remarks of President-Elect Barack Obama As Prepared for Delivery, Announcement of Energy and Environment Team," December 15, 2008, at http://change.gov/newsroom/entry/the_energy_and_environment_team/.

[101] Margaret Kriz, "Power Player," *National Journal*, January 31, 2009, p. 23. Hereinafter referred to as Power Player.

> Washington interest groups, some of whom objected to executive branch unilaterally taking the lead on regulating a substance as ubiquitous as carbon.... At least one senator wanted to ask Browner about exactly that in a confirmation hearing. As a czar and not a Cabinet secretary though, she never came to Capitol Hill to answer questions. "The overall concern is, Carol Browner has been appointed to coordinate all this energy policy," said Sen. John Barrasso.... "What's her role going to be? She's not going to be going through a confirmation process. While (agency directors) had to come to Congress and answer questions, she didn't."[102]

Among the public activities that Ms. Browner has reportedly participated in since her appointment are these: attended the Washington, DC, Auto Show and wrote an entry about the show for the White House blog on February 4, 2009; participated in the first meeting of the Middle Class Task Force conducted in Philadelphia on February 27, 2009, the President's announcement of a National Fuel Efficiency Policy on May 19, 2009, and the first quarterly meeting of the President's Economic Recovery Advisory Board at the White House on May 20, 2009; joined the President on his trip to the United Nations Climate Change Summit on September 22, 2009, and both wrote an entry for the White House blog on the summit and participated in a briefing following the President's speech on climate change the same day. More recently, Ms. Browner spoke at a conference on politics and history organized by *The Atlantic Magazine*, where she reportedly stated that there "was virtually no chance Congress would have a climate and energy bill ready for him [President Obama] to sign before negotiations on a global climate treaty begin in December in Copenhagen."[103] In January 2010, Ms. Browner hosted an Internet chat to discuss the issue of clean energy.[104] She also participated in a May 27, 2010, briefing with Secretary of the Interior Ken Salazar on the six-month moratorium on deepwater drilling, responded to questions on the British Petroleum (BP) oil spill in the Gulf of Mexico on June 11, 2010, and met with BP executives on June 24, 2010.[105] Ms. Browner wrote a blog post on building a clean energy economy on October 29, 2010.[106]

She had reportedly been under consideration by the President to fill a White House deputy chief of staff position.[107] Ms. Browner reportedly announced her resignation from the White House staff on January 24, 2011.[108] Her salary, prior to her resignation, was $172,200.

[102] Tom Hamburger and Christi Parsons, "White House Czars' Power Stirs Criticism," McClatchy-Tribune News Service, March 9, 2009. For a discussion of the various views surrounding Carol Browner's role, See Power Player, pp. 16-23.

[103] Andrew C. Revkin, "Obama Aide Concedes Climate Law Must Wait," *New York Times*, October 3, 2009, p. A11.

[104] See http://www.whitehouse.gov/photos-and-video/video/open-questions-year-clean-energy.

[105] See http://www.whitehouse.gov/the-press-office/secretary-salazar-and-assistant-president-energy-and-climate-change-carol-browner-h and http://www.whitehouse.gov/photos-and-video/video/open-questions-bp-oil-spill and http://www.whitehouse.gov/the-press-office/readout-carol-browner-s-meeting-with-bp-executives.

[106] See http://www.whitehouse.gov/blog/2010/10/29/solar-panels-white-house-and-desert-36-billion-gallons-biofuels-and-cleaner-trucks.

[107] See Darren Samuelsohn, "Future Uncertain for W.H. Energy Post," *Politico*, December 6, 2010, at http://www.politico.com/news/stories/1210/46029.html.

[108] Laura Meckler, "U.S. News: White House Energy 'Czar' to Depart in Staff Shake-up," *Wall Street Journal*, January 25, 2011, p. A6.

Deputy Assistant to the President and Director, White House Office of Urban Affairs[109]

President Obama announced the appointment of Adolfo Carrion as "White House Director of Urban Affairs" on February 19, 2009, and issued E.O. 13503 to establish the office. According to a White House press release, "President Obama and Vice President Biden created the White House Office of Urban Affairs to develop a strategy for metropolitan America and to ensure that all federal dollars targeted to urban areas are effectively spent on the highest-impact programs." The press release also stated that the Director "will report directly to the President and coordinate all federal urban programs."[110] As stated in the executive order, the principal functions of the office are to

> provide leadership for and coordinate the development of the policy agenda for urban America across executive departments and agencies;
>
> coordinate all aspects of urban policy;
>
> work with executive departments and agencies to ensure that appropriate consideration is given by such departments and agencies to the potential impact of their actions on urban areas;
>
> work with executive departments and agencies, including the Office of Management and Budget, to ensure that Federal Government dollars targeted to urban areas are effectively spent on the highest-impact programs; and
>
> engage in outreach and work closely with State and local officials, with nonprofit organizations, and with the private sector, both in seeking input regarding the development of a comprehensive urban policy and in ensuring that the implementation of Federal programs advances the objectives of that policy.[111]

In a February 20, 2009, article in *The Washington Post*, Mr. Carrion was quoted saying that "he would help coordinate urban policy in traditional areas such as education, health care and public safety" and "look to develop urban neighborhoods in environmentally thoughtful ways, such as by offering incentives for companies to locate in densely populated areas and improving mass transit."[112] Mr. Carrion conducted a roundtable on urban and metropolitan policy at the Eisenhower Executive Office Building on July 13, 2009. During the roundtable, the President said that he had directed OMB, the Domestic Policy Council, the National Economic Council, and the Office of Urban Affairs "to conduct the first comprehensive interagency review in 30 years of how the federal government approaches and funds urban and metropolitan areas."[113]

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[109] Barbara L. Schwemle, Analyst in American National Government in the Government and Finance Division (7-8655), wrote this section.

[110] The White House, Office of the Press Secretary, "President Barack Obama Announces Key White House Posts," press release, February 19, 2009, at http://www.whitehouse.gov/the_press_office/President-Barack-Obama-Announces-Key-White-House-Posts/.

[111] E.O. 13503, "Establishment of the White House Office of Urban Affairs," 74 *Federal Register*, 8139-8140, February 24, 2009. The executive order authorizes such staff and other assistance as may be necessary.

[112] Robin Shulman, "White House Urban Affairs Chief Picked; Bronx Borough President Lays Out Vision For New Policy Office," *The Washington Post*, February 20, 2009, p. A2.

[113] White House, Office of the Press Secretary, "Remarks by the President at Urban and Metropolitan Policy Roundtable," press release, July 13, 2009, at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-(continued...)

Among other public activities, Mr. Carrion has also reportedly participated in a town hall meeting on the future of America's cities and metro areas conducted in Philadelphia on July 23, 2009; written an entry for the White House blog on the subject on August 4, 2009; and participated in a panel discussion on high-speed rail, with the Secretary of Transportation and other officials, conducted in Chicago on September 17, 2009. The group is expected to convene similar panel discussions in Denver, Los Angeles, and Atlanta, among other cities, as part of the President's sustainable cities initiative. Mr. Carrion addressed the National League of Cities' Congressional City Conference held in Washington, DC, on March 16, 2010.[114] He also addressed the American Planning Association's National Conference in New Orleans, LA, on April 13, 2010, and spoke at the launch of the Institute for Comprehensive Community Development in Washington, DC, on April 20, 2010.[115]

Mr. Carrion resigned from his White House position following the May 3, 2010, announcement by the Secretary of Housing and Urban Development (HUD), Shaun Donovan, that he would serve as the HUD Regional Director for New York and New Jersey.[116] A replacement has not been named by the President. The Office of Urban Affairs has established a website that includes news on its activities.[117] Mr. Carrion's salary, prior to his resignation, was $158,500.

Counselor to the President and Director, White House Office of Health Reform[118]

On March 2, 2009, President Obama announced the appointment of Nancy-Ann DeParle as Counselor to the President and Director of the White House Office for Health Reform.[119] A White House press release on the appointment quoted the President as saying that Ms. DeParle, along with the Secretary of Health and Human Services (HHS), would be "critical" to the effort on "[h]ealth care reform that reduces costs while expanding coverage."[120] During a press briefing on that day, the President characterized Ms. DeParle as an "excellent partner at the White House" to

(...continued)

at-Urban-and-Metropolitan-Roundtable/.

[114] See http://www.nlctv.org/events/ccc2010/100313/default.cfm?id=12160&type=flv&test=0&live=0

[115] See http://www.nola.com/politics/index.ssf/2010/04/obama_gets_the_importance_of_p.html.

[116] Department of Housing and Urban Development, press release, "Obama Administration Names Adolfo Carrion as HUD's New York and New Jersey Regional Director," May 3, 2010, at http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2010/HUDNo.10-090.

[117] See http://www.whitehouse.gov/blog/2010/02/24/announcing-white-house-urban-affairs-website. The website is available at http://www.whitehouse.gov/administration/eop/oua/blog.

[118] Barbara L. Schwemle, Analyst in American National Government in the Government and Finance Division (7-8655), wrote this section.

[119] President-elect Barack Obama had announced his selection of Senator Tom Daschle to serve as both Secretary of Health and Human Services and Director of the White House Office of Health Reform on December 11, 2008. In announcing the selection, the President-elect stated that Senator Daschle would not only implement, but be the "lead architect of [his] health care plan" ("President-elect Obama Nominates Senator Daschle as Secretary of HHS; Remarks of President-Elect Barack Obama As Prepared for Delivery, December 11, 2008," available at http://change.gov/newsroom/entry/president_elect_obama_nominates_senator_daschle_as_secretary_of_hhs/. Senator Daschle withdrew from consideration for these posts on February 3, 2009.

[120] The White House, Office of the Press Secretary, "President Obama Will Nominate ... Leading Health Care Expert Nancy-Ann DeParle to Serve as Director of White House Office for Health Reform," press release, March 2, 2009, at http://www.whitehouse.gov/the_press_office/President-Obama-nominates-Governor-Kathleen-Sebelius-Secretary-of-HHS-Announces-Re/.

the HHS Secretary and stated his confidence "in her ability to lead the public and legislative effort to ensure quality, affordable health care for every American."[121] E.O. 13507, issued on April 8, 2009, establishes the White House Office of Health Reform and states that its principal functions, to the extent permitted by law, are to

> provide leadership for and to coordinate the development of the Administration's policy agenda across executive departments and agencies concerning the provision of high-quality, affordable, and accessible health care and to slow the growth of health costs; this shall include coordinating policy development with the Domestic Policy Council, National Economic Council, Council of Economic Advisers, Office of Management and Budget, HHS, Office of Personnel Management, and such other executive departments and agencies as the Director of the Health Reform Office may deem appropriate;
>
> work with executive departments and agencies to ensure that Federal Government policy decisions and programs are consistent with the President's stated goals with respect to health reform;
>
> integrate the President's policy agenda concerning health reform across the Federal Government;
>
> coordinate public outreach activities conducted by executive departments and agencies designed to gather input from the public, from demonstration and pilot projects, and from public-private partnerships on the problems and priorities for policy measures designed to meet the President's goals for improvement of the health care system;
>
> bring to the President's attention concerns, ideas, and policy options for strengthening, increasing the efficiency, and improving the quality of the health care system;
>
> work with State, local, and community policymakers and public officials to expand coverage, improve quality and efficiency, and slow the growth of health costs;
>
> develop and implement strategic initiatives under the President's agenda to strengthen the public agencies and private organizations that can improve the performance of the health care system;
>
> work with the Congress and executive departments and agencies to eliminate unnecessary legislative, regulatory, and other bureaucratic barriers that impede effective delivery of efficient and high-quality health care;
>
> monitor implementation of the President's agenda on health reform; and
>
> help ensure that policymakers across the executive branch work toward the President's health care agenda.[122]

[121] The White House, Office of the Press Secretary, "Remarks by President Obama, HHS Secretary-Designate Kathleen Sebelius, and White House Office of Health Reform Director Nancy-Ann DeParle," press release, March 2, 2009, at http://www.whitehouse.gov/the_press_office/Remarks-by-President-Obama-HHS-Secretary-designate-Kathleen-Sebelius-and-White-Hou/. See also, Marilyn Werber Serafini, "Obama's Health Team," *National Journal*, March 7, 2009, p. 54.

[122] E.O. 13507, "Establishment of the White House Office of Health Reform," 74 *Federal Register*, 17071-17073, April 13, 2009. The executive order authorizes such staff and other assistance as may be necessary.

President Obama stated that Ms. DeParle would be interacting with governors "on a regular basis" as the health care agenda moved forward.[123] Reportedly, she "has a standing biweekly meeting with [Senator Max] Baucus."[124] On April 15, 2009, the Kaiser Family Foundation featured her in a newsmaker briefing.[125] Since her appointment, Ms. DeParle's public activities have also reportedly included the following: participated in the White House Forum on Health Reform on March 5, 2009, and in meetings with health care stakeholders, including those on April 8, 2009, and May 27, 2009; wrote a post for the White House blog on March 30, 2009, provided updates on the White House website at HealthReform.gov and participated in a Facebook discussion on June 29, 2009; and participated in a town hall meeting in Derby, CT, with Representative Rosa DeLauro and Senator Chris Dodd on May 16, 2009. She hosted an Internet chat to discuss the President's health reform proposal on February 24, 2010.[126] Ms. DeParle wrote an April 30, 2010, blog entry on the Affordable Care Act, answered questions on health care reform via Twitter on May 17, 2010, and participated in a White House meeting that announced the release of regulations to implement the Affordable Care Act on June 22, 2010.[127] More recently, she wrote a September 9, 2010, blog entry on the National Health Expenditure Report and answered questions on the implementation of the Affordable Care Act via the Internet on November 23, 2010.[128]

News reports have mentioned both Ms. DeParle's experience in business that "gives her an insider's insight into the machinery of health-care delivery" and conflict-of-interest concerns that arise "particularly given the size and market share" of some of the health care related companies for which she was a board member or private equity portfolio manager. The latter is seen as significant because "as a White House adviser, [she] won't have to undergo the scrutiny of a Senate confirmation."[129] A September 28, 2009, post on the White House blog responded to conflict-of-interest concerns.[130]

On January 27, 2011, White House Chief of Staff William Daley reportedly announced the appointment of Ms. DeParle to a deputy chief of staff position responsible for policy oversight.[131] Ms. DeParle's salary, while in the position of Counselor to the President and Director, White House Office of Health Reform, was $158,500.

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[123] U.S. President (Obama), *Daily Compilation of Presidential Documents*, "Remarks Following a Meeting On Health Care Reform and an Exchange With Reporters," (June 24, 2009), p. 1.

[124] David D. Kirkpatrick, "Obama Taking an Active Role in Health Talks," *New York Times*, August 13, 2009, p. A1.

[125] The video of the briefing may be viewed at http://www.kff.org/healthreform/hr041509video.cfm.

[126] See http://www.whitehouse.gov/photos-and-video/video/open-questions-presidents-health-reform-proposal.

[127] See http://www.whitehouse.gov/blog/2010/04/30/one-month-later-making-health-insurance-reform-a-reality and http://www.whitehouse.gov/blog/2010/05/17/health-care-reform-questions-answered-via-twitter and http://www.whitehouse.gov/the-press-office/background-and-fact-sheet-presidents-event-today-affordable-care-act-and-new-patien.

[128]See http://www.whitehouse.gov/blog/2010/09/09/new-report-national-health-expenditures and http://www.whitehouse.gov/blog/2010/11/24/what-you-missed-tuesday-talk-with-nancy-ann-deparle.

[129] Andrew Zajac, "Health Czar Has Deep Ties to Industry; Some See Potential Conflicts; Others Say Knowledge is Power," *Chicago Tribune*, March 29, 2009, p. 9. On related topics, see, "Financial Disclosure" and "Outside Employment Limitations," above.

[130] White House, The Blog, "Reality Check: Nancy-Ann DeParle's Stellar Record," September 28, 2009, at http://www.whitehouse.gov/blog/Reality-Check-Nancy-Ann-DeParles-Stellar-Record/.

[131] Michael D. Shear and Jackie Calmes, "New White House Press Secretary Part of Makeover," *New York Times*, January 28, 2011, p. A19.

Chief Performance Officer and Deputy Director for Management, Office of Management and Budget(OMB)[132]

On January 7, 2009, President-elect Obama announced at a press conference his intention to establish a new, non-statutory position in the White House Office.[133] The position's title would be Chief Performance Officer (CPO). Consistent with a presidential campaign pledge, the CPO would report directly to the President and would be responsible for helping make the federal government more efficient, effective, and transparent.[134] The President-elect said Nancy Killefer, a senior partner and director of the management consulting firm McKinsey and Company, would take the position. The President-elect also announced his intention to nominate Ms. Killefer to be Deputy Director for Management (DDM) at OMB.

It was not clear from Administration statements whether Ms. Killefer was added to the White House payroll after the President's inauguration. On February 3, 2009, the White House posted on its website a letter from Ms. Killefer to the President.[135] In the letter, Ms. Killefer asked the President to "withdraw my name from consideration," citing a "personal tax issue" that might distract from her duties as CPO. By this date, the President had not yet referred to the Senate her nomination for DDM.

On April 18, 2009, the President said he had named Jeffrey Zients to serve as DDM and CPO.[136] Mr. Zients founded a private equity firm, Portfolio Logic, and previously had been chairman of the board of The Advisory Board Company and The Corporate Executive Board Company.[137] On June 10, 2009, the Senate Committee on Homeland Security and Governmental Affairs held a confirmation hearing for Mr. Zients for the DDM position.[138] By this time, the White House website had dropped references to the CPO as being a White House position that reports directly to the President.[139] On June 19, 2009, the Senate confirmed Mr. Zients's nomination to be DDM

[132] Clinton T. Brass, Analyst in Government Organization and Management in the Government and Finance Division (7-4536), wrote this section.

[133] Office of the President-elect (Obama), "President-elect Names Nancy Killefer as Chief Performance Officer," press release, January 7, 2009, at http://change.gov/newsroom/entry/president-elect_obama_names_nancy_killefer_as_chief_performance_officer; and "New and More Efficient Ways of Getting the Job Done," press release, January 7, 2009, at http://change.gov/newsroom/entry/new_and_more_efficient_ways_of_getting_the_job_done/.

[134] Obama '08, *Blueprint for Change: Obama and Biden's Plan for America*, no date (83 pp.), at http://www.barackobama.com/pdf/ObamaBlueprintForChange.pdf; and Obama Biden, *The Change We Need in Washington: Stop Wasteful Spending and Curb Influence of Special Interests So Government Can Tackle Our Great Challenges*, September 22, 2008, pp. 5-7, at http://obama.3cdn.net/0080cc578614b42284_2a0mvyxpz.pdf.

[135] U.S. President (Obama), "Letter from Nancy Killefer to President Obama," February 3, 2009, at http://www.whitehouse.gov/the_press_office/LetterfromNancyKillefertoPresidentObama/.

[136] U.S. President (Obama), "Weekly Address: President Obama Discusses Efforts to Reform Spending, Government Waste; Names Chief Performance Officer and Chief Technology Officer," press release, April 18, 2009, at http://www.whitehouse.gov/the_press_office/Weekly-Address-President-Obama-Discusses-Efforts-to-Reform-Spending/.

[137] U.S. Office of Management and Budget, "OMB Leadership Bios," at http://www.whitehouse.gov/omb/organization_office/.

[138] U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, *Nominations*, 111th Cong., 1st sess., June 10, 2009, at http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=19476eae-7f0c-403e-a1fe-f06160b2f7e7. A transcript is available at http://www.cq.com (subscription required). The CPO position is not statutory in nature and therefore is not subject to Senate confirmation.

[139] The CPO was depicted as "reporting directly to the President" early in the Administration, at http://www.whitehouse.gov/agenda/ethics (no longer posted online; printout is available from CRS). By July 2009, the (continued...)

by unanimous consent.[140] On July 1, 2009, the White House released a listing of White House Office employees.[141] The list did not include Mr. Zients. The omission suggested DDM Zients may not be considered a White House Office employee for purposes of the document, and left ambiguous whether the CPO position should be considered simply a non-statutory, additional title for OMB's DDM position.[142] Since that time, Mr. Zients appears to have performed in his capacity as DDM, albeit with a focus on the Obama Administration's agenda for the CPO position.

The specific roles for this "dual-hatted" CPO-DDM position have emerged gradually and may be evolving. Aspects of the Obama Administration's plans for the CPO were described in some detail in campaign documents and speeches. Other aspects of the CPO's agenda and duties have been included in subsequent announcements during the presidential transition and after the President's inauguration. In particular, some have been discussed by OMB officials and documents. The DDM position's more general responsibilities are enumerated in law.

When the President announced Mr. Zients's nomination, President Obama said Mr. Zients "will work to streamline processes, cut costs, and find best practices throughout our government." Campaign documents and speeches provided more detail, saying among other things that the CPO would lead a "SWAT team" to "work with agency leaders and the White House Office of Management and Budget to improve results and outcomes for federal government programs while eliminating waste and inefficiency."[143] In addition, the CPO would "work with federal agencies to set tough performance targets and hold managers responsible for progress."[144] In turn, the President would meet "regularly with cabinet officers to review the progress their agencies are making toward meeting performance improvement targets."[145] An OMB memorandum dated June 11, 2009, set in motion some processes that appeared to be related to CPO-DDM responsibilities and previous policy announcements.[146] Among other things, agencies were directed to identify "high-priority performance goals." The memorandum also instructed agencies to include certain performance information and termination proposals in FY2011 budget submissions.

(...continued)

equivalent language on the White House website dropped reference to the CPO's reporting relationship to the President and to the location "within the White House" of a focused team led by the CPO; http://www.whitehouse.gov/issues/fiscal.

[140] "Executive Calendar," Executive Session, *Congressional Record*, daily edition, vol. 155, part 93 (June 19, 2009), pp. S6840-S6841.

[141] The White House, "Annual Report to Congress on White House Staff," July 1, 2009, at http://www.whitehouse.gov/blog/Annual-Report-to-Congress-on-White-House-Staff-2009/. The report is submitted annually by the White House to comply with P.L. 103-270, Section 6 (June 30, 1994; 3 U.S.C. §113 (note)).

[142] Previously, the White House website indicated Nancy Killefer had been nominated for a White House position as CPO, as opposed to an OMB position; The White House, "The Briefing Room: Nominations & Appointments," at http://www.whitehouse.gov/briefing_room/nominations_and_appointments/ (no longer posted online; printout is available from CRS). At some point after Ms. Killefer's withdrawal, the website removed reference to Ms. Killefer and indicated Mr. Zients had been nominated and confirmed for the OMB position as DDM, rather than CPO.

[143] Barack Obama and Joe Biden, *The Change We Need in Washington: Stop Wasteful Spending and Curb Influence of Special Interests So Government Can Tackle Our Great Challenges*, September 22, 2008, p. 5.

[144] Ibid.

[145] Ibid.

[146] OMB, "Planning for the President's Fiscal Year 2011 Budget and Performance Plans," memorandum for the heads of departments and agencies, M-09-20, June 11, 2009, at http://www.whitehouse.gov/omb/memoranda_2009.

The DDM position was established by statute in 1990, and appointees to the position are subject to Senate confirmation.[147] The DDM reports to the Director of OMB.[148] The position's pay is set statutorily at Level II of the Executive Schedule.[149] Subject to the direction and approval of the Director of OMB, the DDM has statutory responsibility to "coordinate and supervise the general management functions of [OMB]" (e.g., OMB's activities relating to information and regulatory affairs, procurement policy) and to establish general management policies for executive agencies across a number of management functions.[150] The functions include financial management, "managerial systems" (including performance measurement), procurement policy, grant management, information and statistical policy, property management, human resources management, regulatory affairs, organizational studies, long-range planning, program evaluation, productivity improvement, and experimentation and demonstration programs. The DDM also chairs or plays roles in a number of interagency councils of "chief officers,"[151] in which the DDM may exert considerable influence over agency activities.

Appointed by the President to EOP Positions

Administrator, Office of Information and Regulatory Affairs, OMB[152]

The Paperwork Reduction Act of 1980 (PRA) established the Office of Information and Regulatory Affairs (OIRA) within OMB, and also established an Administrator to head the office who is "appointed by the President, by and with the advice and consent of the Senate."[153] The PRA assigned numerous duties and responsibilities to the OMB Director, but also required the Director to "delegate to the [OIRA] Administrator the authority to administer all functions under this chapter" (although the OMB Director was not relieved of responsibility for those functions).[154] For example, the PRA made the OIRA Administrator responsible for overseeing the use of information resources to improve the efficiency and effectiveness of government operations, and for reviewing and approving all proposed agency collections of information.[155]

In 1981, OIRA's responsibilities expanded significantly when President Reagan issued Executive Order 12291, which required most federal agencies to send a copy of each draft proposed and final rule to OMB before publication in the *Federal Register*.[156] The order authorized OMB to

[147] The DDM was established by the Chief Financial Officers Act of 1990 (P.L. 101-576; 104 Stat. 2838, at 2839) and is codified at 31 U.S.C. §502(c).

[148] For an overview of OMB, see CRS Report RS21665, *Office of Management and Budget (OMB): A Brief Overview*, by Clinton T. Brass. For OMB's organization chart, see http://www.whitehouse.gov/omb/assets/about_omb/omb_org_chart.pdf.

[149] 5 U.S.C. §5313.

[150] 31 U.S.C. §503.

[151] For an overview of some "chief officers" and related councils, see CRS Report RL32388, *General Management Laws: Major Themes and Management Policy Options*, by Clinton T. Brass.

[152] Curtis W. Copeland, Specialist in American National Government in the Government and Finance Division (7-0632), wrote this section.

[153] 44 U.S.C. 3503.

[154] Ibid.

[155] 44 U.S.C. 3504(a) and (c), respectively.

[156] E.O. 12291, "Federal Regulation," 46 *Federal Register* 13193, February 19, 1981. This and other executive orders discussed in this section included Cabinet departments and independent agencies, but did not include independent regulatory agencies like the Securities and Exchange Commission.

review proposed and final rules and related materials "based on the requirements of this Order," and generally required covered agencies to refrain from publishing any final rules until they had responded to OMB's comments. Although the executive order did not specifically mention OIRA, shortly after its issuance the Reagan Administration decided to integrate OMB's regulatory review responsibilities under the executive order with the responsibilities given to OMB (and ultimately to OIRA) by the PRA.

In 1985, President Reagan extended OIRA's influence over rulemaking even further by issuing Executive Order 12498, which required covered agencies to submit a "regulatory program" to OMB for review each year that covered all of their significant regulatory actions underway or planned.[157] Under this executive order, OIRA could generally return a draft rule to the issuing agency if the office did not have advance notice of the rule's submission, even if the rule was otherwise consistent with the requirements in Executive Order 12291.

In 1993, President Clinton issued Executive Order 12866, which revoked the Reagan executive orders and focused OIRA's regulatory reviews on "significant" draft proposed and final rules.[158] Nevertheless, OIRA retained significant authority to review covered agencies' rules before they were published in the *Federal Register*. Government Accountability Office (GAO) reviews of OIRA's use of that authority indicate that certain agency rules are substantially changed as a result of the office's review, and that the OIRA review process is not always transparent.[159] The George W. Bush Administration amended Executive Order 12866 somewhat, but the Obama Administration reversed those amendments shortly after taking office.[160]

OIRA currently has a staff of about 50, including staff in the office's information and statistical policy branches. The PRA, as amended in 1995 (P.L. 104-13), authorized annual appropriations of $8 million in FY1996 through FY2001, but those authorizations expired in 2001. Since then, OIRA has been funded from OMB's appropriation. The current OIRA Administrator, Cass Sunstein, was nominated by President Obama on April 20, 2009, and was confirmed by the Senate on September 10, 2009.

Federal Chief Information Officer and Administrator, Office of Electronic Government, OMB[161]

In the mid-1990s, Congress debated whether the federal government should have one, overarching chief information officer (CIO), or one CIO in each executive branch agency.[162]

[157] E.O. 12498, "Regulatory Planning Process," 50 *Federal Register* 1036, January 8, 1985.

[158] E.O. 12866, "Regulatory Planning and Review," 58 *Federal Register* 51735, October 4, 1993. The number of rules that OIRA reviewed dropped from between 2,000 and 3,000 per year to between 500 and 700 per year.

[159] U.S. Government Accountability Office, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, GAO-03-929, September 22, 2003; and U.S. Government Accountability Office, *Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews*, GAO-09-205, April 20, 2009.

[160] For example, in January 2007, E.O. 13422 made several changes to E.O. 12866. In January 2009, however, President Obama issued E.O. 13497 revoking those and other changes. As a result, E.O. 12866 is unchanged from how it was issued in 1993.

[161] Wendy R. Ginsberg, Analyst in Government Organization and Management in the Government and Finance Division (7-3933), wrote this section.

[162] For example, see S. 946 from the 104th Congress.

Congress opted for the latter with the passage of the Clinger-Cohen Act of 1995 (P.L. 104-106), which required each agency to have a CIO. The duties assigned to CIOs under the act included providing information management advice and policy to the agency head; developing, maintaining, and facilitating information systems; and evaluating, assessing, and reporting to the agency head on the progress made developing agency information technology systems. On July 19, 1996, then-President Bill Clinton issued Executive Order 13011 which, among other actions, established a federal Chief Information Officer Council (CIO Council) chaired by the Office of Management and Budget (OMB) deputy director for management. Several years later, mixed results from the agency-level CIOs rejuvenated debate over whether a single, federal CIO position should be instituted.[163]

President George W. Bush's information technology initiatives were an integral part of his Presidential Management Agenda, a comprehensive policy and program plan to improve the operations and efficiency of federal government. To help lead and carry out the President's information technology efforts, OMB announced, on June 14, 2001, the appointment of Mark Forman to a newly created position: the Associate Director for Information Technology and E-Government. As "the leading federal e-government executive," the new Associate Director was to be responsible for the e-government fund, to direct the activities of the CIO Council, and to advise on the appointments of agency CIOs. The Associate Director also would "lead the development and implementation of federal information technology policy."

On December 17, 2002, the E-Government Act of 2002 (116 Stat. 2899; P.L. 107-347) was signed into law. Title I of the act statutorily established Mr. Forman's position: Administrator for E-Government and Information Technology. The act placed the administrator at the helm of a newly-created Office of Electronic Government within OMB. The law required the new administrator, Mr. Forman, to assist the Director of OMB, and the OMB Deputy Director for Management, in coordination with the efforts of the Administrator of the Office of Information and Regulatory Affairs (OIRA)—another OMB unit, "in setting strategic direction for implementing electronic Government (P.L. 107-347; 116 Stat 2903)." Among those relevant OMB responsibilities were prescribing guidelines and regulations for agency implementation of the Privacy Act (5 U.S.C. §552a), the Clinger-Cohen Act, IT acquisition pilot programs, and the Government Paperwork Elimination Act (P.L. 105-277, Title XVII). The E-Government Act also required the General Services Administration (GSA) to consult with the Administrator of the Office of Electronic Government on any efforts by GSA to promote e-government.

The E-Government Act also codified the Chief Information Officers Council, originally established by Executive Order 13011.[164] The CIO Council is composed largely of department and agency chief information officers (CIOs) and carries out both coordination and advisory roles for the agency-level CIOs. According to the law, the council serves as:

> the principal interagency forum for improving agency practices related to the design, acquisition, development, modernization, use, operation, sharing, and performance of Federal Government information resources.[165]

[163] For more information on the legislative history of the federal CIO position see CRS Report RL30914, *Federal Chief Information Officer (CIO): Opportunities and Challenges*, by Jeffrey W. Seifert.

[164] Executive Order 13011, "Federal Information Technology," 61 *Federal Register* 37657, July 19, 1996.

[165] P.L. 107-347.

The Deputy Director of OMB serves as the executive chairman of the council.[166]

In September 2003, Karen Evans was appointed the Administrator for E-Government and Information Technology, serving until President Bush left office.[167]

The federal CIO position was vacant until March 5, 2009, when President Barack Obama appointed Vivek Kundra, former chief technology officer in Washington, D.C.'s city government.[168] This appointment marked the first Presidential appointment to a position explicitly entitled federal Chief Information Officer. Similar to the previous administration's e-government administrator position, Kundra's position includes the title of Administrator for E-government and Information Technology at OMB. According to the White House, his responsibilities are as follows:

> The federal Chief Information Officer directs the policy and strategic planning of federal information technology investments and is responsible for oversight of federal technology spending. The Federal CIO establishes and oversees enterprise architecture to ensure system interoperability and information sharing and ensure information security and privacy across the federal government. The CIO will also work closely with the Chief Technology Officer to advance the President's technology agenda.[169]

During his April 18, 2009 radio address, President Obama announced the nomination of two additional components of his technology team: Jeffrey Zients to serve as Chief Performance Officer and Aneesh Chopra as Chief Technology Officer (CTO). When announcing these appointments President Obama said the following:

> Aneesh and Jeffrey will work closely with our Chief Information Officer, Vivek Kundra, who is responsible for setting technology policy across the government, and using technology to improve security, ensure transparency, and lower costs. The goal is to give all Americans a voice in their government and ensure that they know exactly how we're spending their money—and can hold us accountable for the results.[170]

The Senate confirmed Mr. Chopra on May 21, 2009, and Mr. Zients on June 19, 2009.

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[166] Currently, OMB's Deputy Director Jeffrey Zients serves as executive chairman of the council and federal CIO Vivek Kundra serves as the council's director. See "Federal Chief Information Officers Council: Members," at http://www.cio.gov/members/members.cfm.

[167] Some government observers reportedly referred to Evans as the "de facto CIO of the U.S. government." See Jill R. Aitoro, "New Federal CIO Lays Out IT Agenda," *Nextgov.com*, March 5, 2009, http://www.nextgov.com/nextgov/ng_20090305_9385.php?oref=search.

[168] On March 12, Mr. Kundra reportedly took temporary leave of his position when the Federal Bureau of Investigation (FBI) raided his former Washington, D.C. office. Mr. Kundra was reinstated after he was not implicated in bribery charges that stemmed from the raid. See Elise Castelli, "Updated: AP Reports Federal CIO on Leave," *Federal Times*, March 12, 2009, http://www.federaltimes.com/federal-times-blog/2009/03/12/breaking-former-office-of-federal-cio-raided/.

[169] The White House, Office of the Press Secretary, "President Obama Names Vivek Kundra Chief Information Officer," press release, March 5, 2009, http://www.whitehouse.gov/the_press_office/President-Obama-Names-Vivek-Kundra-Chief-Information-Officer/.

[170] White House, Office of the Press Secretary, "Weekly Address: President Obama Discusses Efforts to Reform Spending, Government Waste; Names Chief Performance Officer and Chief Technology Officer," press release, April 18, 2009, http://www.whitehouse.gov/the_press_office/Weekly-Address-President-Obama-Discusses-Efforts-to-Reform-Spending/.

The White House has not released further details describing how the CIO, Chief Performance Officer, and CTO are to interact. It is unclear how each position relates to the others. The administration also has not explicitly clarified how the CIO position in the Obama Administration is different from the e-government administrator position in the previous administration.

President Obama's FY2010 budget recommendations included few comments about the federal CIO. The *Analytical Perspectives* budget document said "Leadership for IT management is assigned to the Federal Chief Information Officer (CIO) in the Office of Management and Budget (OMB)."[171] The budget document continued with a brief history of the CIO position, but did not provide further details on its intended mission or goals in the Obama Administration. The *Analytical Perspectives* did state, however, "[t]he Federal CIO Council is creating Data.gov, an online repository for access to Government data (not otherwise subject to valid privacy, security, or privilege restrictions, consistent with Federal law)."[172] The Administration's FY2011 budget recommendations stated that the federal CIO:

> will continue its efforts to close the gap in effective technology use between the private and public sectors. The Administration will continue to streamline operations, transform customer service, and maximize the return on investment from information technology.[173]

In his first few months as the federal CIO, Mr. Kundra contributed to the White House blog on issues related to federal IT investments and cloud computing, among other initiatives.[174] On June 30, 2009, Mr. Kundra held an online forum to answer questions related to the IT Dashboard (http://it.usaspending.gov/). The website "provides the public with an online window into the details of Federal information technology investments and provides users with the ability to track the progress of investments over time."[175] On September 15, 2009, Mr. Kundra used "The Blog" to launch Apps.gov, "an online storefront for federal agencies to quickly browse and purchase cloud-based IT services, for productivity, collaboration, and efficiency."[176] On May 13, 2010, Mr. Kundra used the blog to announce that Recovery.gov, a website required by statute that allows the public to track the money allocated as part of the American Recovery and Reinvestment Act of 2009 (P.L. 111-5), was moving to cloud computing.[177] Cloud computing allows the federal government to share IT resources across the federal government. According to Mr. Kundra,

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[171] U.S. Office of Management and Budget, *Analytical Perspectives: Budget of the U.S. Government, Fiscal Year 2010*, (Washington, DC, March 2009), p. 155, http://www.whitehouse.gov/omb/budget/fy2010/assets/spec.pdf.

[172] Ibid.

[173] U.S. Office of Management and Budget, *Analytical Perspectives: Budget of the U.S. Government, Fiscal Year 2011* (Washington, DC, February 2010), p. 321, http://www.whitehouse.gov/omb/budget/fy2011/assets/spec.pdf.

[174] According to Mr. Kundra, "Cloud computing is the next generation of IT in which data and applications will be housed centrally and accessible anywhere and anytime by a various devices (this is opposed to the current model where applications and most data is housed on individual devices)." Vivek Kundra, *Streaming at 1:00: In the Cloud*, The White House, Washington, DC, September 15, 2009, http://www.whitehouse.gov/blog/Streaming-at-100-In-the-Cloud/.

[175] "IT Dashboard: FAQ, For Public," at http://it.usaspending.gov/?q=content/faq. The Administration's FY2011 budget recommendations stated: "[i]n May 2009, Data.gov was launched to enhance access to Federal data. Since then, the site has grown to contain over 167,000 data sets and tools for using the data. After the Environmental Protection Agency toxic release data was featured on Data.gov, the frequency of downloads of that data increased over tenfold." See U.S. Office of Management and Budget, *Analytical Perspectives: Budget of the U.S. Government, Fiscal Year 2011* (Washington, DC, February 2010), p. 321, http://www.whitehouse.gov/omb/budget/fy2011/assets/spec.pdf.

[176] Vivek Kundra, *Streaming at 1:00: In the Cloud*, The White House, Office of Social Innovation and Civic Participation, September 15, 2009, http://www.whitehouse.gov/blog/2009/09/15/streaming-100-cloud.

[177] Vivek Kundra, *Moving to the Cloud*, The White House, Open Government Initiative, May 13, 2010, http://www.whitehouse.gov/blog/2010/05/13/moving-cloud.

Recovery.gov was the first government-wide system to move into the cloud.[178] On May 21, 2010, Mr. Kundra blogged about the growth of Data.gov, a website that centralizes access to a variety of government datasets and makes them available to the public.[179] The blog noted the site's 250,000 available datasets and highlighted that the site has garnered 97.6 million "hits," or website visits. Mr. Kundra also said that the site has prompted "hundreds of applications created by third parties, and a global movement to democratize data."[180]

Mr. Kundra announced his resignation on June 16, 2011, stating that he would leave the position in mid-August 2011.

Appointed by Agency Heads

Assistant Secretary for International Affairs and Special Representative for Border Affairs, Department of Homeland Security[181]

On April 15, 2009, the Department of Homeland Security (DHS) announced that Secretary Janet Napolitano had appointed Alan Bersin as Assistant Secretary for International Affairs and Special Representative for Border Affairs. The announcement indicated that

> Bersin's responsibilities at DHS will include improving relationships with the Department's partners in the international community, as well as those at the state and local level including elected officials, law enforcement, community organizations and religious leaders. He will lead the Department's efforts to crack down on violence along the Southwest border … including the deployment of additional personnel and enhanced technology to help Mexico target illegal guns, drugs and cash.[182]

The announcement did not refer to the position or the appointee as a "czar." During an interview on the day the announcement was released, however, President Barack Obama referred to the position as a "border czar," and some news accounts of the Secretary's action used the same language.[183] President Obama stated that "the goal of the border czar is to help coordinate all the various agencies that fall under the Department of Homeland Security, and so that we are confident that the border patrols are working effectively with ICE [U.S. Immigration and Customs Enforcement], working effectively with our law enforcement agencies. So he's really a

[178] Ibid.

[179] Vivek Kundra, *Data.gov: Pretty Advanced for a One-Year-Old*, The White House, Open Government Blog, May 21, 2010, http://www.whitehouse.gov/open/blog?page=1.

[180] Ibid.

[181] Henry B. Hogue, Analyst in American National Government in the Government and Finance Division (7-0642), wrote this section.

[182] U.S. Department of Homeland Security, "Secretary Napolitano Highlights Illegal Immigration Enforcement, Appoints Alan Bersin as Assistant Secretary for International Affairs and Special Representative for Border Affairs," press release, April 15, 2009, at http://www.dhs.gov/ynews/releases/pr_1239820176123.shtm.

[183] U.S. President (Obama), *Daily Compilation of Presidential Documents*, (April 15, 2009), pp. 2-3; Stephen Dinan, "Border Czar to Be Named Ahead of Latin Talks; Obama Set for Mexico and Trinidad," *Washington Times*, April 15, 2009, p. A6; and Matthew M. Johnson, "New 'Border Czar' Appointed," *CQ Today Online News – Homeland Security*, April 15, 2009, at http://www.cq.com/doc/news-3097214.

coordinator that can be directly responsible to Secretary Napolitano and ultimately directly accountable to me."[184]

In a statement prepared for a July 9, 2009, hearing of the House Committee on Oversight and Government Reform, Bersin described his position as follows:

> As Special Representative, I am responsible for: coordinating implementation of DHS efforts on the SWB [southwest border]; developing new proposals for enforcement; serving, in coordination with the DHS components, as the lead on SWB and Mexico law enforcement issues; representing DHS on the Southwest Border-Merida Interagency Policy Committee (IPC); working closely with the Department of State (DOS) and DOJ [Department of Justice] to facilitate our agencies' joint missions; and serving as the principal liaison to DOJ for cooperation on SWB law enforcement initiatives.[185]

In late September 2009, a White House press release referred to the incumbent of this position as "the secretary's lead representative on Border Affairs and Mexico, for developing DHS strategy regarding security, immigration, narcotics, and trade matters affecting Mexico and for coordinating the Secretary's security initiatives on the nation's borders."[186]

The place of this position within DHS and its relationship to other so-called czar positions was addressed during an April 22, 2009, hearing on several DHS nominations before the Senate Committee on Homeland Security and Governmental Affairs. While questioning the nominee to be Assistant Secretary for Immigration and Customs Enforcement, John Morton, Senator Susan M. Collins, the ranking minority member of that committee, stated the following:

> I mentioned in my opening comments my concern about this administration's proliferation of czars and special assistants rather than relying on the people who have the statutory authority and responsibility to carry out the functions. Secretary Napolitano recently appointed a border czar who is going to report directly to the Secretary and advise her on border security and cross-border smuggling. Obviously, this position is not Senate-confirmed, but does have a direct report to the Secretary.
>
> It seems to me that the roles and responsibility of that czar are going to conflict with your responsibilities as well as those of the Commissioner of Customs and Border Protection.
>
> Do you have any concerns about having another individual who is a direct report to the Secretary making it more complicated as far as your ability to carry out your legal responsibilities?

Morton replied:

> Senator, at this point I do not. My understanding of Mr. Bersin's role is that, as you say, he is an adviser. His principal responsibility is one of facilitation and coordination among the

[184] U.S. President (Obama), *Daily Compilation of Presidential Documents*, (April 15, 2009), p. 3.

[185] U.S. Congress, House Committee on Oversight and Government Reform, "Statement of Alan Bersin, Assistant Secretary, Office of International Affairs and Special Representative for Border Affairs, Department of Homeland Security," *The Rise of the Mexican Drug Cartels and U.S. National Security*, hearing, 111th Cong., 1st sess., July 9, 2009, at http://democrats.oversight.house.gov/images/stories/documents/20090708185929.pdf.

[186] U.S. President (Obama), "President Obama Announces More Key Administration Posts," press release, September 22, 2009, at http://www.whitehouse.gov/the_press_office/President-Obama-Announces-More-Key-Administration-Posts-9/22/09/.

> many components within the department that have some responsibilities along the border, but that it is not an operational one, that the Secretary fully intends and expects that whoever is confirmed as the Assistant Secretary for Immigration and Customs Enforcement is going to lead and direct that agency's day-to-day operations. And if I am confirmed, I can tell you that is exactly what I plan to do.

Senator Collins followed with an additional question:

> I am glad to hear that. I would point out to you that I would hope that your role is not just as the operational manager, but I would hope that you are the primary adviser to the Secretary in this area. Do you see yourself as having an advisory role to the Secretary as well as strictly an operational role?

Morton replied:

> Absolutely. I consider myself to be the principal policy adviser to the Secretary on those matters within the jurisdiction of the agency. I would not have accepted the nomination if I felt otherwise.

Senator Collins stated the following:

> Thank you. That is reassuring to hear, and I think you could understand from our perspective, we have oversight, we confirm you, but if another person is going to be developing policy recommendations and giving advice, that also creates confusion in terms of our ability to effectively exercise our oversight responsibility.[187]

The position to which Bersin was appointed seemingly comprised two titles: (1) Assistant Secretary for International Affairs, and (2) Special Representative for Border Affairs. The history of the assistant secretary position is laid out below. A search of the *U.S. Code* found no statutorily specified responsibilities associated with the second title. Bersin's predecessor as Assistant Secretary for International Affairs, Carol Haave, did not carry this additional title. It is worth noting, however, that during the Clinton Administration, Bersin served in a similarly titled position in the Department of Justice: Special Representative for the Southwest Border Region. According to a Department of Justice press release at the time he stepped down, "The position was created in October 1995 after the Attorney General, in consultation with INS [Immigration and Naturalization Service] Commissioner Doris Meissner, decided that the fight against illegal immigration, border crime and drug trafficking would be strengthened by having one person coordinate the efforts of all the Justice Department agencies."[188]

The position of Assistant Secretary for International Affairs is descended from a position that was established at the time DHS was created. The Office of International Affairs was originally mandated by Section 879 of the Homeland Security Act.[189] Under the act, this office, which was part of the Office of the Secretary, was headed by a Director appointed by the Secretary. The

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[187] U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, *Nomination of John T. Morton*, hearing on the nomination of John T. Morton to be Assistant Secretary, U.S. Department of Homeland Security, 111th Cong., 1st sess., April 22, 2009, S.Hrg. 111-573 (Washington: GPO, 2010), p. 8.

[188] U.S. Department of Justice, "Attorney General Appoints New Mexico U.S. Attorney John Kelly as Special Representative for Southwest Border Region," press release, September 16, 1998, at http://www.usdoj.gov/opa/pr/1998/September/427usa.htm.

[189] 116 Stat. 2245; 6 U.S.C. §459.

Director's duties included promoting information and education exchange with friendly nations; identifying homeland security information and training areas where the U.S. was deficient and other friendly nations had expertise; planning and executing "international conferences, exchange programs, and training activities"; and managing the department's international activities in coordination with federal counter-terrorism officials.

Under the leadership of the second Secretary of Homeland Security, Michael Chertoff, this position was moved from the Secretary's office to a newly created Office of Policy, and the title was changed from "Director" to "Assistant Secretary." Upon his appointment, Chertoff initiated a "Second Stage Review" of DHS, consisting of "a comprehensive review of the Department's organization, operations, and policies."[190] After this review, also known as 2SR, the Secretary undertook a number of reorganization actions. Many of these actions were accomplished through the Secretary's reorganization authority under Section 872 of the Homeland Security Act, which permitted him to allocate functions and alter organizational units within DHS, subject to specified limits.[191] One such reorganization entailed the establishment of the new policy office. This office included various "existing organizational units that ... [were] relocated to this new centralized policy office, including the Office of International Affairs, the Special Assistant to the Secretary for Private Sector Coordination, the Border and Transportation Security Policy and Planning Office and elements of the Border and Transportation Security Office of International Enforcement, the Homeland Security Advisory Committee, and the Office of Immigration Statistics.[192] At the time of this reorganization, the incumbent Director of the Office of International Affairs, Cresencio S. Arcos, was appointed, by the Secretary, as a non-career senior executive with the title of Assistant Secretary.[193] Alan Bersin was appointed in the same manner.[194]

It appears that the responsibilities of the office have also changed. According to the department's website, the Office of International Affairs "plays a central role in developing the Department's strategy for pushing the Homeland Security mission overseas and actively engages foreign allies to improve international cooperation for immigration policy, visa security, aviation security, border security and training, law enforcement, and cargo security."[195]

On September 29, 2009, the President nominated Bersin to be Commissioner of Customs at DHS, and the nomination was referred to the Senate Committee on Finance. On March 27, 2010 President Obama recess appointed Bersin to the position.[196] The committee held hearings on the

[190] U.S. Congress, House Committee on Appropriations, Subcommittee on Homeland Security, *Department of Homeland Security Appropriations for FY2006*, 109th Cong., 1st sess., March 2, 2005, S.Hrg. 109-195 (Washington: GPO, 2005), "Statement by Secretary of Homeland Security Michael Chertoff before the House Appropriations Homeland Security Subcommittee," p. 121-133. For more on the 2SR initiative, see CRS Report RL33042, *Department of Homeland Security Reorganization: The 2SR Initiative*, by Harold C. Relyea and Henry B. Hogue.

[191] 116 Stat. 2243; 6 U.S.C. §452.

[192] U.S. Department of Homeland Security, letter from Secretary Michael Chertoff to the Honorable Christopher Cox, Chairman, Committee on Homeland Security, U.S. House of Representatives, Washington, DC, July 13, 2005, p. 2 (identical letter sent to other congressional leaders).

[193] Telephone conversation between Henry B. Hogue and a DHS representative, December 22, 2005.

[194] Telephone conversation between Henry B. Hogue and a DHS representative, May 1, 2009. This Assistant Secretary position is not one of the 12 positions established by the Homeland Security Act that are filled through appointment by the President with the advice and consent of the Senate.

[195] U.S. Department of Homeland Security, "Office of International Affairs" at http://www.dhs.gov/xabout/structure/editorial_0874.shtm. As of February 2, 2011, the most recent update of this website was listed as October 10, 2008.

[196] The recess appointment expires at the end of the first session of the 112th Congress.

Bersin nomination on May 13, but there was no further action on it during the 111th Congress. At the beginning of the 112th Congress, the President again nominated Bersin to this post.

After his recess appointment to be Commissioner of Customs, Bersin left his previous post. It appears that Bersin has not been referred to as a "czar" since taking the new position.

As of July 18, 2011, Mariko Silver was holding the position of Assistant Secretary of International Affairs on an acting basis, according to the DHS website.[197] It appears that Silver does not carry the title of Special Representative for Border Affairs. No news media references to Silver as a "czar" have been identified.

Special Master for TARP Executive Compensation, Department of the Treasury[198]

A June 10, 2009, press release from the Department of the Treasury indicated that Kenneth R. Feinberg was to be appointed as Special Master for TARP (Troubled Asset Relief Program) Executive Compensation.[199] On the same day, White House Press Secretary Robert Gibbs spoke about the appointment during a press briefing. He was asked the following question:

> And on executive compensation, will the administration be naming Kenneth Feinberg as the pay czar to oversee the packages—pay packages for executives and companies that are receiving bailout money? And how much of the decision on these measures was driven by the President's desire to quell public anger about compensation news that has come out recently?

Gibbs responded:

> Well, look, Ken Feinberg is going to assume the role of special master that will allow him to review for soundness, appropriateness, and to limit risk relating to compensation packages for those companies that are either receiving extraordinary assistance or might in the future.
>
> I think obviously this is an individual that has great experience in mediation in things that are—these type of things that are important. And I think—obviously this is a topic that the President has spoken about. I don't know if the factsheets have all gone out from Treasury yet, but there's additional legislative efforts that we will undertake, as you heard the President talk about.[200]

[197] See http://www.dhs.gov/xabout/structure/gc_1157655281546.shtm.

[198] Henry B. Hogue, Analyst in American National Government in the Government and Finance Division (7-0642), wrote this section.

[199] U.S. Department of the Treasury, "Interim Final Rule on TARP Standards for Compensation and Corporate Governance," press release, June 10, 2009, at http://www.treasury.gov/press-center/press-releases/Pages/tg165.aspx. In general, Treasury Department information regarding the special master and his or her activities may be found at http://www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Pages/spcMaster.aspx.

[200] White House, Office of the Press Secretary, "Press Briefing by Press Secretary Robert Gibbs and Secretary of Commerce Gary Locke," June 10, 2009, at http://www.whitehouse.gov/the_press_office/Briefing-by-Secretary-of-Commerce-Gary-Locke-and-Press-Secretary-Robert-Gibbs-6-10-09/.

The establishment of this special master position followed enactment of the American Recovery and Reinvestment Act of 2009 (ARRA),[201] which, among other things, amended Section 111 of the Emergency Economic Stabilization Act of 2008 (EESA).[202] Section 111, as amended, provided for restrictions on the compensation of executives of companies that have received TARP funds during the time this financial assistance remains outstanding.[203] The section directed the Secretary of the Treasury to promulgate regulations to implement the section. On June 15, 2009, the department published an interim final rule pursuant to this instruction, as well as several other sections of EESA.[204] This rule directed the Secretary of the Treasury to establish the special master position. The applicable portion of the rule is as follows:

> The Secretary of the Treasury shall establish the Office of the Special Master for TARP Executive Compensation (Special Master). The Special Master shall serve at the pleasure of the Secretary, and may be removed by the Secretary without notice, without cause, and prior to the naming of any successor Special Master.[205]

The interim final rule also laid out the authorities and responsibilities of the special master. The supplementary information preceding the rule described these:

> The scope of the Special Master's authority and responsibility is limited to compensation and corporate governance matters under section 111 with respect to TARP recipients, and the Special Master has no authority to provide guidance or review any submissions with respect to matters other than compensation or corporate governance matters under section 111, or to provide guidance or review any submissions with respect to compensation or corporate governance matters of employers that are not TARP recipients. The Secretary has delegated to the Special Master the authority to (1) interpret the application of the restrictions on executive compensation and corporate governance requirements for TARP recipient employees under EESA, these regulations, and any other applicable guidance, to specific facts and circumstances; (2) administer section 111(f) of EESA, which requires the Secretary to review bonuses, retention awards, and other compensation paid before February 17, 2009 to employees of each entity receiving TARP assistance, to determine whether any such payments were inconsistent with the purposes of EESA section 111 or the TARP, or otherwise contrary to the public interest, and which further requires that, if the Secretary makes such a determination, the Secretary seek to negotiate with the TARP recipient and the employee for appropriate reimbursements to the Federal Government with respect to compensation or bonuses; (3) approve compensation payments to, and compensation structures for, certain employees of TARP recipients receiving exceptional financial assistance; (4) provide opinions, as requested or otherwise as appropriate, regarding payments to, or compensation structures for, other employees of TARP recipients; and (5) perform such other duties as the Secretary may delegate from time to time to the Special Master relating to executive compensation issues under the TARP, including the specific application of any terms or conditions in a contract between the Treasury and a TARP

[201] P.L. 111-5; 123 Stat. 115. See Div. B, Title VII; 123 Stat. 516.

[202] P.L. 110-343; 122 Stat. 3765; 12 U.S.C. 5221.

[203] For more concerning statutory limitations on executive pay, see CRS Report R40540, *Executive Compensation Limits in Selected Federal Laws*, by Michael V. Seitzinger and Carol A. Pettit.

[204] U.S. Department of the Treasury, "TARP Standards for Compensation and Corporate Governance, Interim Final Rule," 79 *Federal Register* 28394, June 15, 2009.

[205] Ibid., p. 28420. Questions have been raised about the constitutionality of the Special Master for TARP Executive Compensation. See, e.g., Michael W. McConnell, "The Pay Czar Is Unconstitutional," *Wall Street Journal*, October 30, 2009, p. A25; see also "Special Master for TARP Executive Compensation" under "Analyses of Certain Presidential Advisors," in this report.

> recipient. Section 30.16 (Q-16) [of the interim final rule] also outlines a set of principles that the Special Master is required to follow in conducting these reviews.[206]

Reports about Feinberg early in his tenure indicated that he was, at that time, serving in this position without pay.[207]

In September 2010, Feinberg resigned from the special master position.[208] Patricia Geoghegan was named, on an acting basis, as his replacement. She has been identified in some news accounts as "Acting Pay Czar."[209]

Special Advisor for Green Jobs, Enterprise, and Innovation, Council on Environmental Quality[210]

On March 10, 2009, Council on Environmental Quality (CEQ) Chair Nancy Sutley announced the appointment of Anthony (Van) Jones as Special Advisor for Green Jobs. In her announcement, Sutley described Jones' responsibilities in this position:

> Van Jones has been a strong voice for green jobs and we look forward to having him work with departments and agencies to advance the President's agenda of creating 21st century jobs that improve energy efficiency and utilize renewable resources. Jones will also help to shape and advance the Administration's energy and climate initiatives with a specific interest in improvements and opportunities for vulnerable communities.[211]

The announcement indicated that Jones was to begin in this position on March 16, 2009.

The National Environmental Policy Act of 1969, enacted on January 1, 1970, established CEQ as an agency within the Executive Office of the President.[212] Under this statute, the council comprises three members, appointed by the President, with the advice and consent of the Senate.[213] In recent years, however, provisions of annual appropriations measures for the Department of the Interior and other agencies, including CEQ, have, in effect, restructured this

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[206] Ibid., p. 28404.

[207] Louise Story and Stephen Labaton, "Overseer of Big Pay is Seasoned Arbitrator," *New York Times*, June 11, 2009, p. B1, late edition - final. Early in his tenure, he reportedly was supported in his Treasury Department role by employees from his government office as well as his private firm. As of late July, "[r]oughly a dozen Treasury and Feinberg Rozen employees divide[d] their time between the two offices, pulling together documents and holding meetings with representatives of the financial institutions." Phil Mattingly, "For Salary Czar, Conflict Is a Bonus," *CQ Weekly*, July 20, 2009, p. 1688.

[208] U.S. Financial Stability Oversight Board, *Financial Stability Oversight Board Quarterly Report to Congress*, for the quarter ending September 30, 2010, Washington , DC, 2010, p. 43, http://www.treasury.gov/initiatives/financial-stability/about/Oversight/FSOB/Reports/FINSOB Quarterly Report (093010).pdf.

[209] "Acting Pay Czar Named as Feinberg Departs," *Wall Street Journal*, September 10, 2010, online version.

[210] Henry B. Hogue, Analyst in American National Government in the Government and Finance Division (7-0642), wrote this section.

[211] U.S. Council on Environmental Quality, "Nancy Sutley, Chair of the White House Council on Environmental Quality Announces Special Advisor for Green Jobs, Enterprise and Innovation," press release, March 10, 2009. This press release was available at http://www.whitehouse.gov/administration/eop/ceq/press_releases/march_10_2009/ at the time this CRS report was first published. As of March 17, 2010, it could not be located on the White House website. Copies of the original release are available from the author of this section.

[212] P.L. 91-190, Title II; 83 Stat. 854.

[213] 42 U.S.C. §4342.

collegially headed agency as a single-headed agency. The FY2009 funding bill, for example, provides that "notwithstanding section 202 of the National Environmental Policy Act of 1970, the Council shall consist of one member, appointed by the President, by and with the advice and consent of the Senate, serving as chairman and exercising all powers, functions, and duties of the Council."[214]

Soon after CEQ was established, the Environmental Quality Improvement Act of 1970[215] established the Office of Environmental Quality (OEQ). The two organizations overlap; the OEQ was established "to provide professional and administrative support for the Council. The Council and OEQ are collectively referred to as the Council on Environmental Quality, and the CEQ chair … serves as the Director of OEQ."[216]

CEQ has statutorily delineated responsibilities, including

1. to assist and advise the President in the preparation of the Environmental Quality Report required by section 201 [42 USCS §4341];
2. to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in title I of this Act [42 USCS §§4331 et seq.], and to compile and submit to the President studies relating to such conditions and trends;
3. to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in title I of this Act [42 USCS §§4331 et seq.] for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;
4. to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;
5. to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;
6. to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;
7. to report at least once each year to the President on the state and condition of the environment; and

[214] P.L. 111-8, Division E, Title III; 123 Stat. 739.

[215] P.L. 91-224, Title II, 84 Stat. 114.

[216] United States National Archives and Records Administration, Office of the Federal Register, *United States Government Manual 2008/2009* (Washington: GPO, 2008), p. 91.

8. to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.[217]

The statutory duties and functions of the Director of OEQ direct him or her to assist and advise the President on environmental quality related policies and programs of the federal government by

1. providing the professional and administrative staff and support for the Council on Environmental Quality established by Public Law 91-190 [42 USCS §§4321 et seq.];
2. assisting the Federal agencies and departments in appraising the effectiveness of existing and proposed facilities, programs, policies, and activities of the Federal Government, and those specific major projects designated by the President which do not require individual project authorization by Congress, which affect environmental quality;
3. reviewing the adequacy of existing systems for monitoring and predicting environmental changes in order to achieve effective coverage and efficient use of research facilities and other resources;
4. promoting the advancement of scientific knowledge of the effects of actions and technology on the environment and encourage the development of the means to prevent or reduce adverse effects that endanger the health and well-being of man;
5. assisting in coordinating among the Federal departments and agencies those programs and activities which affect, protect, and improve environmental quality;
6. assisting the Federal departments and agencies in the development and interrelationship of environmental quality criteria and standards established through the Federal Government;
7. collecting, collating, analyzing, and interpreting data and information on environmental quality, ecological research, and evaluation.[218]

In carrying out its responsibilities, the statute authorizes the council to "employ such officers and employees as may be necessary to carry out its functions under" the act. The council is also authorized to "employ and fix the compensation of such experts and consultants as may be necessary for the carrying out of its functions" on a temporary basis under applicable provisions of Title 5 of the *U.S.Code*.[219] The Director of OEQ has similar authority.[220]

According to an agency representative, the position of Special Advisor for Green Jobs was established under these authorities.[221] The responsibilities delegated to this position were derived from those laid out in the provisions detailed above.

Jones reportedly resigned on September 6, 2009, subsequent to public controversy related to past statements and political affiliations.[222] According to an agency representative, Nikki Buffa

[217] 42 U.S.C. §4344.

[218] 42 U.S.C. §4372(d).

[219] 42 U.S.C. §4343.

[220] 42 U.S.C. §4372(c).

[221] Telephone communication between Henry B. Hogue and a CEQ representative, September 28, 2009.

succeeded Jones in a differently titled position: associate director for communities, environmental protection, and green jobs.[223] No news media references to Buffa as a "czar" have been identified.

Special Envoys or Special Representatives[224]

Secretary of State Hillary Rodham Clinton has announced several appointments to foreign-policy-related positions, including these:

- Ambassador Stephen W. Bosworth, Special Representative for North Korea Policy, announced February 20, 2009, by Secretary of State Clinton;
- Ambassador Daniel Fried, leading the team addressing the closure of Guantanamo Bay prison, announced March 12, 2009, by Secretary of State Clinton;
- David Hale, Acting Special Envoy for the Middle East, announced May 13, 2011, by Secretary of State Clinton (succeeds George Mitchell who resigned effective May 20, 2011);
- Dennis Ross, Special Advisor for the Persian Gulf and Southwest Asia, announced February 23, 2009, by Secretary of State Clinton;[225]
- Frank Ruggiero, Acting Special Representative for Afghanistan and Pakistan, announced December 14, 2010 (succeeds Richard Holbrooke who died on December 13, 2010); and
- Todd Stern, Special Envoy for Climate Change, announced January 26, 2009, by Secretary of State Clinton.

While the term "Special Envoy," or "Special Representative," recently has been associated with the "czar" idea, the title, according to the Department of State, carries no direct relationship to any particular authority, and the person assumes the responsibilities assigned by the Secretary of State. Special Envoys are not confirmed by the Senate. If a Special Envoy also has the rank of Ambassador, the rank of Ambassador is confirmed by the Senate as required by the U.S. Constitution. Because Special Envoys are not confirmed by the Senate, they are not obligated to testify before Congress but, in practice, they typically do. Congress, however, has also created certain Special Envoys, instructing the Secretary of State to appoint a person to fill such a position with specific authorities, and reporting requirements spelled out in the legislation. An example of a congressionally created Special Envoy is the Special Envoy for Monitoring and Combating Anti-Semitism.[226]

(...continued)

[222] Tom LoBianco and Christina Bellantoni, "Administration Looks Past Jones Controversy; Job Czar's Resignation Caps Series of Missteps," *Washington Times*, September 7, 2009, p. 3.

[223] E-mail communication between Henry B. Hogue and a CEQ representative, March 22, 2010.

[224] Susan B. Epstein, Specialist in Foreign Policy (7-6678) and Kennon H. Nakamura (7-9514), Analyst in Foreign Affairs in the Foreign Affairs, Defense, and Trade Division, wrote this section. Barbara L. Schwemle, Analyst in American National Government (7-8655) updates the section.

[225] Mr. Ross transferred to the National Security Council on July 4, 2009.

[226] See 22 U.S.C. §2731.

Appointments Clause and Presidential Advisors[227]

Concern has been raised that the President's hiring, or use, of various presidential advisors circumvents the requirements of the Appointments Clause of the U.S. Constitution.[228] The Appointments Clause establishes that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[229]

Under the text of the clause, it is "[o]fficers of the United States," whose appointments are established by law that are to be subject to Senate confirmation. Thus, principal officers will be appointed in this manner; however, Congress may choose to vest the appointment of those they consider "inferior [o]fficers" in either the President, the courts of law, or in the heads of departments.

Before delving further into the Appointments Clause, it is first useful to briefly discuss the authority of Congress in relation to the creation and operation of the executive bureaucracy. Although the infrastructure of the executive branch and other entities charged with the execution of the law is not specified by the Constitution, it is clear that the Framers intended to vest the task of creating the governmental structure in Congress alone.[230] Thus, it seems evident that the President cannot establish executive offices.[231] Congress has been generally given wide latitude to use its legislative power to structure the modern administrative state by creating and locating offices, determining qualifications for officeholders, prescribing their appointment, and establishing general standards for the operation of the offices under the Necessary and Proper Clause.[232] The judiciary generally will interfere with this legislative power only in cases where such an exercise clearly constitutes an attempt by Congress at aggrandizement or encroachment.[233] Accordingly, because the Appointments Clause has been deemed "among the

[227] Vivian S. Chu, Legislative Attorney in the American Law Division (7-4576), wrote this section.

[228] *See* Senator Collins, "Push Out the Czars," Senate, *Congressional Record*, daily edition, September 14, 2009, pp. S9306-S9308 (publishing four articles: (1) "Byrd Questions Obama Administration On Role of White House 'Czar' Positions," February 25, 2009; (2) Edmund L. Andrews and David E. Sanger, "U.S. Is Finding Its Role in Business Hard to Unwind," N.Y. Times, September 14, 2009; (3) Kay Bailey Hutchinson, "Czarist Washington," *Washington Post*, September 13, 2009; (4) "President Obama's 'Czars,'" *Politico*, September 4, 2009).

[229] U.S. Const., art. II, §2, cl. 2.

[230] *See, e.g.*, U.S. Const. art. II, §. 2. cl. 2. (the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, *and which shall be established by Law*.") (emphasis added).

[231] Saikrishna B. Prakash, "Fragmented Features of the Constitution's Unitary Executive," 45 Willamette L. Rev. 701, 719 (2009).

[232] U.S. Const., art. I, §8, cl. 18. *See Myers v. United States*, 272 U.S. 52, 129 (1926) ("To Congress under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, and the fixing of the term for which they are to be appointed ... all except as otherwise provided by the Constitution."); *Buckley v. Valeo*, 424 U.S. 1, 134-35 (1976); *Morrison v. Olson*, 487 U.S. 654, 685-93 (1988); *Mistretta v. United States*, 488 U.S. 361 (1989).

[233] *See e.g.*, *Buckley*, 424 U.S. 1 (Congress may not appoint executive officials performing substantial functions under (continued...)

significant structural safeguards of the constitutional scheme,"[234] Congress is to ensure that it adheres to the strictures of the Appointments Clause when prescribing the appointment for certain offices.

Officer/Employee

A key first question is to determine whether a person qualifies as an officer of the United States, or whether a person is a non-officer, or employee, whose "appointment" is not of the kind that invokes the constitutional requirements of the Appointments Clause. If a person is an employee, then the appointing authority, whether it is Congress or the President, need not comply with the requirements of the clause. In the case of Congress, this could mean that it is free to vest the appointment power in itself, for example; in the case of the President, this could mean that he is free to appoint persons, as authorized by statute,[235] into positions that need not have been established as an office by Congress. However, if a person is acting as an officer of the United States then the Appointments Clause must be obeyed. This means that Congress must have established an office to be filled by an officer, who will be subject to Senate confirmation if it is a principal officer. An inferior officer may be appointed in the same manner unless Congress chooses to vest such appointment in the President alone, in the courts, or in heads of departments.[236]

The Supreme Court has long held that "'[o]fficers of the United States' does not include all employees of the United States.... Employees are lesser functionaries subordinate to the officers of the United States."[237] It has stated that office or officer "embraces the ideas of tenure, duration, emolument, and duties, and that the latter [are] continuing and permanent, not occasional or temporary."[238]

To a certain extent, the standard for such determinations was further delineated by the Supreme Court in *Buckley v. Valeo*. There, the Court analyzed provisions of the Federal Election Campaign Act of 1971 (Act), which established an eight-member Federal Election Commission (FEC) to oversee federal elections. Specifically at issue was the congressionally mandated composition of

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the law); *Bowsher v. Synar*, 478 U.S. 714, 732 (1986) (Congress may not retain removal power over an officer performing executive functions); *INS v. Chadha*, 462 U.S. 919 (1983) (Congress may not exercise legislative power without conforming to the constitutionally prescribed lawmaking procedures); *Metropolitan Washington Airports Authority v. CAAN*, 501 U.S. 252 (1991) (Board of Review composed of Members of Congress could not exercise veto power over operational decisions of Airports Authority*); Hechinger v. Metropolitan Washington Airports Authority Board of Review*, 36 F.3d 97 (D.C. Cir 1994), *cert denied*, 513 U.S. 1126 (1995) (Board of Review which could only recommend and delay, but not veto, the operational decisions of the Airports Authority held to be unconstitutional direct exercise of congressional influence); *Federal Election Commission v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir 1993), *cert denied for want of jurisdiction*, 513 U.S. 88 (1994) (congressional appointment of two of its agents as non-voting members of the commission who could attend all business meetings of the agency held unconstitutional).

[234] *Edmond v. United States*, 520 U.S. 651, 659 (1997).

[235] *See, e.g.* 3 U.S.C. §105 *et seq.*

[236] As mentioned above, Congress may choose to make the appointments of those considered inferior officers also subject to Senate confirmation.

[237] *Buckley*, 424 U.S. at 126, n. 162.

[238] *United States v. Germaine*, 99 U.S. 508, 511-12 (1878) (discussing the term "officers") (*citing United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393-94 (1867) (discussing the term "office")).

the FEC, which was to consist of two non-voting *ex-officio* members and six voting members. According to the act, each of the six voting members were required to be confirmed by the majority of both houses of Congress, with two members being appointed by the President *pro tempore* of the Senate, two members by the Speaker of the House of Representatives, and two by the President.[239] The Court looked to the powers and duties of the FEC and described them as falling into three general categories: (1) functions relating to the flow of information—receipt, dissemination, and investigation; (2) functions with respect to promoting the goals of the act—rulemaking and advisory opinions; and (3) functions necessary to ensure compliance with the statute—informal procedures, administrative determinations and hearings, and civil suits.[240] Given the nature of the duties assigned by law to the FEC, the Court concluded that the FEC was exercising executive power, as it found that the FEC's enforcement power "is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress."[241] Through its analysis of the FEC's powers, the Court established that the Appointments Clause applies to agencies that have even a tangential connection to the executive branch.[242] Thus, the Court held that the method of appointment prescribed in the Federal Election Campaign Act violated the Appointments Clause because certain powers of the FEC could only be discharged by "Officers of the United States," who must be appointed in conformity with the Appointments Clause.

In reaching this conclusion, the Court held the term "Officers of the United States," to mean "any appointee exercising *significant authority* pursuant to the laws of the United States" (emphasis added).[243] Such officers, whether principal or inferior, must be appointed in conformity with the Appointments Clause. In its analysis, the Court compared the office of FEC commissioner with lower-level positions that had been identified as "inferior officers" in earlier cases. It determined that the FEC commissioners, at a minimum, were inferior officers whose appointment would be subjected to Senate confirmation or be vested in the President, the courts of law, or heads of department as prescribed by the Appointments Clause.[244] The Court did not engage in a substantive analysis of the meaning of "significant authority" to distinguish principal officers from inferior officers in order to determine what mode of appointment would be appropriate for FEC commissioners.

Justice White, in his concurring opinion, explored further the idea of what constitutes "significant authority" by expounding upon the duties and powers of the FEC, stating that it "is evident from the breadth of their assigned duties and the nature and importance of their assigned functions ... [that] members of the FEC are plainly 'Officers of the United States' as that term is used in Art. II, §2, cl. 2."[245] The Court later declared in *Edmond v. United States* that the exercise of "significant authority pursuant to the laws of the United States marks, not the line between

[239] *Buckley*, 424 U.S. at 113.

[240] *Id.* at 137.

[241] *Id.* at 138.

[242] *Id.* at 127. (*See also* Justice White's concurrence where he noted that the Court had previously recognized that so-called independent agencies intended to be independent of executive authority are not independent of the executive with respect to their appointments. *Id.* at 277 (J. White concurring)).

[243] *Id.* at 126.

[244] *Id.* Subsequent to the decision in *Buckley*, Congress in 1976 amended the appointments of the six voting members so that they are appointed by the President, with the advice and consent of the Senate. P.L. 94-283; 90 Stat. 475 (1976).

[245] *Id.* at 269-70 (J. White concurring).

principal and inferior officer for Appointments Clause purposes, but rather, as we said in *Buckley*, the line between officer and non-officer."[246]

The Department of Justice's Office of Legal Counsel (OLC) has also expounded upon the officer/employee distinction, stating that only "[a]n appointee (1) to a position of employment (2) within the federal government (3) that carries significant authority pursuant to the laws of the United States is required to be an 'Officer of the United States.'" Each of these three conditions is independent, and all three must be met in order for the position to be subject to the requirements of the Appointments Clause.[247]

A subsequent OLC opinion discusses two essential elements of an office subject to the Appointments Clause.[248] OLC stated that it took the phrase "significant authority pursuant to the laws of the United States," and other similar phrases "to be shorthand for the full historical understanding of the essential elements of a public office."[249] The first element is the delegation by legal authority of a portion of the sovereign powers of the federal government. OLC described the "delegation of sovereign authority" as involving "a legal power which may be rightfully exercised, and in its effects will bind the rights of others, and be subject to revision and correction only according to the standing laws of the State, in contrast with a person whose acts have no authority and power of a public act or law absent the subsequent sanction of an officer or the legislature."[250]

The second element is that the position must be "continuing," which OLC described as having two characteristics. The first is that "an office exists where a position that possesses delegated sovereign authority is permanent, meaning that it is not limited by time or by being of such a nature that it will terminate by the very fact of performance."[251] The second characteristic of "continuing" deals with delegated sovereign authority that is temporary. Whether such a temporary position qualifies as "continuing" depends on the presence of three factors. These three factors are

- the position's existence should not be personal, meaning that the duties should continue even though the person is changed;
- the position should not be "transient"; and
- the duties should be more than "incidental" to the regular operations of the government.[252]

In other words, "the nature of the delegated sovereign authority will affect whether a temporary position is an office."[253] For example, although the special independent counsel position in

[246] 520 U.S. at 663 (citing *Buckley*, 424 U.S. at 126) (internal quotations omitted).

[247] *See* The Constitutional Separation of Powers Between President and Congress, 20 Op. Att'y Gen. 124 (1996); 1996 WL 876050 at *27 (OLC) [hereinafter Dellinger Memo]. This OLC memorandum also pointed out that "members of a commission that have purely advisory functions need not be officers of the United States because they possess no enforcement authority or power to bind the Government." *See id.* at *23

[248] *See* Officers of the United States Within the Meaning of the Appointments Clause, 2007 WL 1405459 at *3 (OLC) (April 16, 2007).

[249] *Id.* at *10.

[250] *Id.* at *17 (internal quotations omitted, quoting *Opinion of the Justices*, 3 Greenl. at 482).

[251] *Id.* at *30 (internal quotations omitted).

[252] *Id.*

Morrison v. Olson was arguably temporary, it was found to be an office because the particular position was not personal and not "'transient,' but rather indefinite and expected to last for multiple years, with ongoing duties"; nor was the position "'incidental' [to the regular operations of government], but rather possessed core and largely unchecked federal prosecutorial powers, effectively displacing the Attorney General ... [and] the counsel's court-defined jurisdiction, [] was not necessarily limited to the specific matter that had prompted his appointment."[254]

As delineated by the Court and as characterized by the aforementioned OLC opinion, it appears that an individual who is to occupy a position that has the following two characteristics, (1) delegation of sovereign authority and (2) continuing, must be appointed pursuant to the Appointments Clause, and conversely, a position that does not satisfy either of these elements need not be filled pursuant to the clause.[255]

Principal Officer/ Inferior Officer

If it is determined that one is acting as an officer because he or she is exercising significant authority pursuant to the laws of the United States, the manner of appointment required under the Appointments Clause necessarily requires a determination of whether the officer is a principal officer or an inferior officer. As stated above, the Appointments Clause requires Senate confirmation for principal officers, but gives Congress the discretion to provide for the appointment of inferior officers without advice and consent.

Although the Supreme Court has determined various offices to be inferior,[256] it has acknowledged that its "cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes."[257] In fact, it observed that "[t]he line between 'inferior' and 'principal' officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn."[258] In its analyses, however, the Court has relied on several factors such as whether the officer was subject to removal by a higher officer, that the officer performed only limited duties, that the jurisdiction was narrow, and that the tenure was limited.[259] These characteristics were examined in *Morrison v. Olson* when the Supreme Court held that the special independent counsel was an inferior officer. With regard to examining other positions, "the nature of each government position must be assessed on its own merits."[260] The Court in *Edmond* further stated, "Generally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President ... [and] whose work

(...continued)

[253] *Id.* ("The Constitution requires an examination of 'the nature of the functions devolved upon' a position by legal authority.") *Id* at. *35.

[254] *Id.* at *32.

[255] *Id.* at *39.

[256] *See Ex parte Hennen*, 38 U.S. (13 Pet.) 225, 258 (1839) (a district court clerk); *Ex parte Siebold*, 100 U.S. 371, 397-98 (an election supervisor); *United States v. Eaton*, 169 U.S. 331, 343, (1898) (a vice consul charged temporarily with the duties of the consul); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 252-54 (1931) (a "United States Commissioner" in district court proceedings); *Morrison v. Olson*, 487 U.S. 654 (1988) (an independent counsel).

[257] *Edmond*, 520 U.S. at 661.

[258] *Morrison v. Olson*, 487 U.S. 654, 671 (1988) (finding that the independent counsel clearly falls on the inferior side of the line).

[259] *Id.* at 671-672.

[260] *Silver v. United States Postal Service*, 951 F.2d 1033, 1040 (9th Cir. 1991).

is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."[261] Thus, in analyzing whether one may be an inferior officer, the Court's decisions appear to focus on the extent of the officer's discretion to make autonomous policy choices and the location of the powers to supervise and to remove the officer.[262]

Analyses of Certain Presidential Advisors

Because the advisor positions, which have been of concern to Congress, each have their own characteristics, duties, and functions, one cannot categorically say that all or none of them are the type of positions which would invoke the Appointments Clause. This section will analyze the application of the Appointments Clause to three positions that are illustrative of positions that have been established in statute, by the White House, and via a regulation: They are (1) the Director of the Office of National Drug Control Policy, often referred to as the "Drug Czar"; (2) the Director of the White House Office of Urban Affairs; and (3) the Special Master for TARP Executive Compensation, often referred to as the "Pay Czar."

Director of the Office of National Drug Control Policy

The Office of National Drug Control Policy (ONDCP), established by statute, is charged with the duties of (1) developing national drug control policy, (2) coordinating and overseeing the implementation of the national drug control policy, (3) assessing and certifying the adequacy of National Drug Control Programs (NDCP) and the budget for those programs, and (4) evaluating the effectiveness of the national drug control policy and the NDCP agencies' programs by developing and applying specific goals and performance measurements.[263] ONDCP is headed by a Director, who is required to be appointed by the President with the advice and consent of the Senate, and the rank is to be the same as the head of an executive department (i.e., Cabinet level).[264] The Director's responsibilities include but are not limited to assisting the President in the establishing of the policies, goals, objectives, and priorities for the NDCP; promulgating and submitting to the President the National Drug Control Strategy; coordinating and overseeing the implementation of the described policies and goals of the agencies under the National Drug Control Strategy; making recommendations to the NDCP agency heads with respect to implementation of federal counter-drug programs; making recommendations to the President with respect to organization, management, and budgets of the NDCP agencies; appearing before duly constituted committees and subcommittees of the House of Representatives and of the Senate to represent the drug policies of the executive branch; and notifying any NDCP agency if its policies are not in compliance with the strategy and transmitting such notice to the President and relevant committees of jurisdiction.[265] Additionally, the Director has the power to "select, appoint, employ,

[261] *Edmond*, 520 U.S. at 662-63. This characterization of inferior officers by the Court presumably would not preclude the ability of the Congress to vest the appointment of an inferior officer in the President alone as prescribed by the Appointments Clause. Justice Souter, dissenting in *Edmond*, objected to the majority's general maxim stating, "The mere existence of a 'superior' officer is not dispositive." He further opined that "[w]hat is needed, instead, is a detailed look at the powers and duties ... to see whether reasons favoring their inferior officer status within the constitutional scheme weigh more heavily than those to the contrary." *Id.* at 667-68 (Souter, J., *dissentin*g).

[262] *See* Dellinger Memo at *30.

[263] 21 U.S.C. §1702(a).

[264] 21 U.S.C. §1703(a)(1).

[265] 21 U.S.C. §1703(b).

and fix compensation of the officers and employees that may be necessary to carry out the functions of the Office."[266] The Director is also empowered to make available competitive awards to fund demonstration projects by eligible partnerships for the purpose of reducing the use of illicit drugs by chronic drug users.[267]

In light of the above Appointments Clause discussion, the first question that must be answered is whether the Director qualifies as an officer of the United States. A review of the Director's general responsibilities might lead one to conclude that the Director is not an officer because it is not evident that the position is one where "significant authority" is exercised, given that much of it seems to be coordination and evaluation based. However, in codifying this position, Congress empowered the Director to "select, appoint, employ, and fix compensation of such *officers and employees* of the Office" (emphasis added); distribute appropriated funds to fund demonstration projects; make interagency fund transfers; and distribute a periodic bonus payment to any employee in the office. To the extent that these duties connote the exercise of executive functions, it could be argued that the Director of ONDCP is an officer who exercises significant authority pursuant to the laws of the United States. Furthermore, these duties, combined with the fact that Congress gave the Director a rank equivalent to an agency head and required him to be appointed by the President subject to Senate confirmation, could be taken to support the conclusion that the Director is a principal officer of the United States.

Director of Urban Affairs

As discussed in the previous sections, President Obama issued an executive order that established within the EOP the White House Office of Urban Affairs. The Office of Urban Affairs is to be headed by the Deputy Assistant to the President, Director of Urban Affairs. The Director is required to report to the Assistant to the President for Intergovernmental Affairs and Public Liaison and to the Assistant to the President for Domestic Policy.[268] The executive order states that the principal functions of the Office of Urban Affairs are, to the extent permitted by law,

- to provide leadership for and coordinate the development of the policy agenda for urban America across executive departments and agencies;
- to coordinate all aspects of urban policy;
- to work with executive departments and agencies, including the Office of Management and Budget (OMB), to ensure that federal government dollars targeted to urban areas are effectively spent on the highest-impact programs; and
- to engage in outreach and work closely with state and local officials, with nonprofit organizations, and with the private sector, both in seeking input regarding the development of a comprehensive urban policy and in ensuring that the implementation of federal programs advances the objectives of that policy.[269]

The Office of Urban Affairs is to coordinate with various specified agencies to the extent permitted by law, and nothing in the executive order is to be construed as impairing or affecting

[266] 21 U.S.C. §1703(d).

[267] 21 U.S.C. §1714.

[268] Exec. Order No. 13503, 74 Fed. Reg. 8139, 8140 (February 24, 2009).

[269] Exec. Order No. 13503, 74 Fed. Reg. 8139 (February 24, 2009).

the authority granted by law to a department, agency, or head thereof, or interfere with the functions of the Director of OMB relating to budgetary, administrative, or legislative proposals.[270]

Similar to some of the functions of the ONDCP, the functions to be carried out by this office do not appear to rise to the level that would require the Director to be an officer of the United States. There is arguably no delegation of sovereign authority in the sense that the Director is not exercising a legal power, the effect of which will bind the rights of others. Nor is the Director permitted to carry out any legislative, executive, or judicial function similar to the FEC commissioners, who have been found to be at least inferior officers. In this situation, as is the case with other similar advisor/assistant positions located and created in the EOP,[271] the Director of Urban Affairs appears to, or could, exert great political influence over the various agencies with whom he is required to coordinate because the Director apparently has the "ear of the President" and is taking action pursuant to the President's wishes. However, such political influence does not necessarily amount to the exercise of significant legal authority, which would consequently require that the position be established and filled in accordance with the Appointments Clause.

Special Master for TARP Executive Compensation

Drawing upon the statutory language in the Emergency Economic Stabilization Act of 2008 (EESA)[272] that authorizes the Secretary of the Treasury to establish the Troubled Asset Relief Program (TARP) and to "issue such regulations and other guidance as may be necessary or appropriate to define terms or carry out the authorities or purposes of this Act," the Secretary established via an interim final rule the Special Master for TARP Executive Compensation (Special Master),[273] often referred to as the "Pay Czar." Under the regulation, the Special Master is to serve "at the pleasure of the Secretary, and may be removed by the Secretary without notice, without cause, and prior to the naming of any successor Special Master."[274] The Secretary has delegated to the Special Master the authority to

- interpret the application of the restrictions on executive compensation for TARP recipient employees;
- administer Section 111(f) of EESA, which requires the Secretary to review bonuses, retention awards, and other compensation paid before February 17, 2009, to determine whether any such payments were inconsistent;
- approve compensation payments to, and compensation structures for, certain employees of TARP recipients receiving exceptional financial assistance;
- provide opinions, as requested or as appropriate, regarding payments to or compensation structures for other employees of TARP recipients; and

[270] Exec. Order No. 13503, 74 Fed. Reg. 8140 (February 24, 2009).

[271] E.g. Director, White House Office of Health Reform, Exec. Order No. 13507; President's Economic Recovery Advisory Board, Exec. Order No., 13501; Assistant to President for Energy and Climate Change, Position Mentioned in Exec. Order Nos. 13499 and 13500.

[272] P.L. 110-343; 123 Stat. 3767

[273] TARP Standards for Compensation and Corporate Governance (Interim Final Rule), 74 Fed. Reg. 28394, 29420 (Jun. 15, 2009) (to be codified at 31 C.F.R. pt. 30).

[274] *Id.*

- perform other such duties as the Secretary may delegate from time to time relating to executive compensation issues under TARP.[275]

In delineating the Special Master's interpretative authority, the rule states that the Special Master has the responsibility for interpreting Section 111 of EESA, the regulations, and any other applicable guidance and to determine whether such requirements have been met in any particular circumstance.[276] The regulations also provide that in the case of any final determination that a TARP recipient is required to receive, the final determination of the Special Master "shall be final and binding and treated as the determination of the Treasury."[277]

In examining the functions of this office, one could argue that the Special Master is not merely an employee of the Treasury Department, but rather qualifies as an officer of the United States. The Special Master appears to have been delegated authority that permits him to interpret the law and regulations and decide their applicability to others. Furthermore, although the Special Master serves at the pleasure of the Secretary, the regulation states that his final determinations are to be treated as the determination of the Treasury. It does not appear that those determinations are subject to review by the Secretary. From this, it could be argued that the Special Master is in fact exercising significant authority such that an officer of the United States must carry out the duties of this position; if so, then the establishment of this office through an interim final rule may raise constitutional concerns. One constitutional issue is that Congress did not explicitly establish this office nor did it vest the Secretary with the explicit authority to appoint such an officer, if in fact the Special Master is considered to be an officer. An argument could be made that Congress implicitly authorized the establishment of such an office by vesting the Secretary with the authority to develop the appropriate procedures to implement the provisions of EESA.[278] A related constitutional issue could center on whether the Special Master is exercising significant authority that rises to the level of a principal officer such that he must be appointed by the President subject to Senate confirmation, or whether the Secretary has retained sufficient control of his actions either explicitly or implicitly such that his duties could be characterized as those of an inferior officer.

Summary of Presidential Advisor Analyses

These three cases illustrate that an Appointments Clause analysis is best done on a case-by-case basis. First, one looks at the functions and duties of the particular position in question. This assists in determining whether such position is one where significant authority is exercised, meaning that the position primarily is one where there has been a delegation of sovereign power. Within the narrower context of presidential assistants and advisors, it is important to examine these positions remembering that the exertion of great political influence or authority does not presumptively rise to the level of exercising legal authority pursuant to the laws of the United States. However, if it is determined that the position is one where significant authority is

[275] *Id.* at 28404.

[276] *Id.* at 28420.

[277] *Id.* at 28432.

[278] It is not clear whether a court would be receptive to an argument that congressional enactments can be interpreted as implicitly creating executive office. It should also be noted that there is a possibility that the Special Master may be filling an inferior officer position that already existed within the Department of the Treasury and is simply exercising additional duties delegated to him by the Secretary.

exercised, then the position and appointment is to be made in accordance with the strictures of the Appointments Clause.

Congressional Oversight of Presidential Advisors[279]

Congress's Oversight Authority

Generally, Congress's legal authority to obtain information, including, but not limited to, confidential, sensitive, or deliberative information, is extremely broad. While there is no express provision of the Constitution or specific statute authorizing the conduct of congressional oversight, the Supreme Court has firmly established that such power is essential to the legislative function and can be implied from the general vesting of legislative powers in Congress.[280] In *Watkins v. United States,* for instance, the Court emphasized that the "power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."[281] The Court in *Watkins* further stressed that Congress's power to investigate is at its peak when focusing on alleged waste, fraud, abuse, or maladministration within a government department. Specifically, the Court explained that the investigative power "comprehends probes into departments of the federal government to expose corruption, inefficiency, or waste."[282] The Court went on to note that the first Congresses held "inquiries dealing with suspected corruption or mismanagement of government officials."[283] Given these factors, the Court recognized "the power of the Congress to inquire into and publicize corruption, maladministration, or inefficiencies in the agencies of Government."[284] Moreover, in a more recent decision, *Eastland v. United States Serviceman's Fund*, the Court reiterated that the "scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[285]

As a corollary to this accepted oversight authority, the Supreme Court has likewise determined that the "[i]ssuance of subpoenas ... has long been held to be a legitimate use by Congress of its power to investigate."[286] In particular, the Court has repeatedly cited the principle that

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is

[279] Todd B. Tatelman, Legislative Attorney in the American Law Division (7-4697), wrote this section.

[280] *See, e.g., Nixon v. Administrator of General Services*, 433 U.S. 435 (1977); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *Barnblatt v. United States*, 360 U.S. 109 (1959); *Watkins v. United States*, 354 U.S. 178 (1957); *McGrain v. Daugherty*, 273 U.S. 135 (1927).

[281] 354 U.S. at 187.

[282] *Id.*

[283] *Id.* at 182.

[284] *Id.* at 200, n.33.

[285] 421 U.S. at 504, n. 15 (quoting *Barenblatt, supra*, 360 U.S. at 111).

[286] *Eastland v. United States Servicemen's Fund*, 421 U.S. at 504.

> volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it.[287]

While the congressional power of inquiry is broad, it is not unlimited. The Supreme Court has admonished that the power to investigate may be exercised only "in aid of the legislative function"[288] and cannot be used to expose for the sake of exposure alone. The *Watkins* Court underlined these limitations, stating that

> There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress ... nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress.[289]

Moreover, an investigating committee has only the power to inquire into matters within the scope of the authority delegated to it by its parent body.[290] Once having established its jurisdiction, authority, and the pertinence of the matter under inquiry to its area of authority, however, a committee's investigative purview is substantial and wide ranging.

The Relationship Between Advice and Consent and Congressional Oversight

A recurring criticism of the President's use of special advisors has been that they are not subject to the confirmation process in the Senate and, therefore, are "largely insulated"[291] from congressional oversight and "wholly unaccountable"[292] to the Congress. The connection between the Senate's confirmation power and Congress's more general oversight prerogatives, however, appears to be derived from practice and tradition, rather than being legally or constitutionally grounded.

As a matter of constitutional law, there appears to be no direct connection between the Senate's authority to give "advice and consent" to Presidential appointees and Congress's more general power to conduct oversight and perform investigations of government officials and activities. The Senate's confirmation power is expressly provided for by the text of the Constitution,[293] while

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[287] *McGrain*, 273 U.S. at 175; *see also Buckley v. Valeo*, 424 U.S. 1, 138 (1976), *Eastland*, 421 U.S. at 504-505.

[288] *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

[289] *Watkins v. United States*, 354 U.S. at 187.

[290] *United States v. Rumely*, 345 U.S. 41, 42, 44 (1953); *see also Watkins*, 354 U.S. at 198.

[291] Letter from Senators Susan Collins, Lamar Alexander, Christopher Bond, Mike Crapo, Pat Roberts, and Robert Bennett, to President Barack Obama (Sept. 15, 2009), *available at*, http://collins.senate.gov/public/continue.cfm?FuseAction=PressRoomPressReleases&ContentRecord_id=c2f7dda9-802a-23ad-4371-ecb6a1c8d2eb&Region_id=&Issue_id=&CFID=12784730&CFTOKEN=17344439.

[292] Congressman Eric Cantor, Op-Ed., *Obama's 32 Czars*, *Washington Post*, July 30, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/07/29/AR2009072902624.html?referrer=emailarticle.

[293] U.S. Const., art. II, §2 (stating that "… and he shall nominate, by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other Public Ministers and Counsels, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by (continued...)

congressional oversight has, as discussed above, been repeatedly considered by the Supreme Court to be an implied congressional power. The fact that a special advisor to the President does not receive a confirmation hearing arguably has no legal or constitutional impact on Congress's authority or ability to conduct oversight of that position, its duties and functions, or the individual holding it. As a practical and political matter, however, in recent years, several Senate committees have found that extracting an on-the-record, under-oath commitment from nominees regarding their cooperation in congressional oversight has been helpful in future oversight efforts.[294]

While promises made at confirmation hearings appear to have changed the practical relations between Congress and the executive, they have not changed the legal dynamic. For example, as a result of these on-the-record statements during confirmation hearings, it appears that Congress has been able to exercise many of its oversight responsibilities with a simple request from a committee of jurisdiction to the Secretary. In other words, such a promise from a nominee has, in many cases, obviated the need to use compulsory procedures, such as subpoenas, to obtain routine information and testimony. That said, it is important to note that the executive branch is not legally obligated to respond to congressional committee requests. The fact that the executive branch responds is arguably out of a sense of comity between the branches, or as a political accommodation, or to avoid the political retribution for a failure to comply. A legal obligation to comply attaches only on the issuance of a subpoena by the inquiring committee.

Even by making a commitment during a confirmation hearing to cooperate with congressional oversight, the nominee is not waiving any potential claims of privilege or other legal rights the executive branch may assert to withhold information from the Congress, and may still require the issuance of a subpoena. Nor has Congress, by extracting such a commitment on oversight from the nominee, abdicated any legal rights or abilities that it may have to extract information via the issuance of a subpoena. The continued contentious nature of this relationship is best evidenced by the nine Cabinet-level officials whom, since 1975, at least one committee or subcommittee has voted in contempt of Congress for failing to produce subpoenaed documents.[295] Thus, it is clear that even officials who have obtained the advice and consent of the Senate are not immune from legal disputes between the branches. Moreover, the fact that a special presidential advisor has not been subject to a confirmation hearing has not prevented congressional committees from seeking their testimony on more than 70 documented occasions.[296]

(...continued)

Law:…")

[294] See, e.g., To Consider the Nomination of Ken Salazar to be Secretary of the Interior: Hearing Before the Committee on Energy and Natural Resources of the United States Senate, 111th Cong. 49 (2009) (Response of Ken Salazar to written questions from Senator Dorgan pledging to work with oversight efforts on permit and enforcement programs); To Consider the Nomination of Robert Gates to be Secretary of Defense: Hearing Before the Committee on Armed Services of the United States Senate, 110th Cong. (2006), available at http://media.washingtonpost.com/wp-srv/politics/documents/rgates_hearing_120506.html (pledging, in response to a question from Senator Levin, to make relevant documents available for congressional oversight "to the extent I have the authority.").

[295] The nine officials are as follows: Secretary of State Henry Kissinger (1975); Secretary of Commerce Rogers C. B. Morton (1975); Secretary of Health, Education, and Welfare Joseph A. Califano, Jr. (1978); Secretary of Energy Charles Duncan (1980); Secretary of Energy James B. Edwards (1981); Secretary of the Interior James Watt (1982); EPA Administrator Anne Gorsuch Burford (1983); Attorney General William French Smith (1983); and Attorney General Janet Reno (1998). *See* CRS Report RL30240, *Congressional Oversight Manual*, by Frederick M. Kaiser, Walter J. Oleszek, and Todd B. Tatelman.

[296] CRS Report RL31351, *Presidential Advisers' Testimony Before Congressional Committees: An Overview*, by Todd B. Tatelman and Henry B. Hogue.

Although there is little doubt that the advice and consent process may, as a political and practical matter, make oversight less acrimonious and, therefore, more efficient, the fact that an official has not been confirmed does not have any legal bearing on Congress's ability to exercise its oversight prerogatives.

Potential Legal Bases for the Denial of Access to Presidential Advisors

As the preceding discussion indicates, Congress's oversight authority appears sufficiently broad to conduct inquiries of presidential advisors, regardless of where in the organizational structure of the Administration they are housed.

The Deliberative Process Privilege

That being said, the Administration still retains the ability to claim common law, as well as constitutionally based, privileges with respect to arguably sensitive information, documents, and testimony. For example, the Administration may attempt to assert a claim of "deliberative process" privilege with respect to information directly related to the development of advice to the President, formulation of policy, and the ultimate decisions within a given special assistant's portfolio. Assertions of "deliberative process" privilege by the White House and administrative agencies have not been uncommon in the past. In essence, it is argued that congressional demands for information as to what occurred during the policy development process would unduly interfere, and perhaps "chill," the frank and open internal communications necessary to the quality and integrity of the decisional process. Such a privilege claim may also be grounded on the contentions that it protects against premature disclosure of proposed policies before they are fully considered or actually adopted, and to prevent the public from confusing matters merely considered or discussed during the deliberative process with those on which the decision was based. However, as with other claims of "common law" privileges such as the attorney-client privilege and work product immunity, congressional practice has been to treat their acceptance as discretionary with the committee of jurisdiction.[297] Moreover, appellate court decisions underline the understanding that the "deliberative process" privilege is a common law privilege that is easily overcome by a showing of need by an investigatory body and have recognized the overriding necessity of an effective legislative oversight process.[298]

Executive Privilege

In addition, it would appear possible for the Administration to make the constitutional claim of "executive privilege"—sometimes referred to as "presidential communications privilege"—with respect to the role of certain presidential advisors. In the event of such a claim, it should be noted that the vast majority of these interbranch disputes have been resolved through political negotiation and accommodation; thus, few have reached the courts for substantive resolution.[299]

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[297] *See generally*, CRS Report 95-464, *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry*, by Morton Rosenberg. (Out of print. Available upon request.)

[298] *See, e.g., In Re Sealed Case (Espy)*, 121 F. 3d 729 (D.C. Cir. 1997).

[299] *See* Neil Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal-Do Nothing*, 48 Adm. L. Rev. 109 (1996).

In fact, it was not until the Watergate-related lawsuits in the 1970s—seeking access to President Nixon's audio tapes—that the existence of a presidential confidentiality privilege was judicially established as a necessary derivative of the President's status in the U.S. constitutional scheme of separated powers. Of the seven court decisions involving interbranch information access disputes,[300] three have directly involved Congress and the Executive, but only one of these resulted in a judicial decision on the merits.[301] One other case, involving legislation granting custody of President Nixon's presidential records to the Administrator of the General Services Administration, also determined several pertinent executive privilege issues.[302]

Taken together, the holdings in several Watergate-era lower court decisions,[303] the Supreme Court's decision in *United States v. Nixon*,[304] and other post-Watergate cases established the broad contours of the presidential communications privilege. Under those precedents, the privilege, which is constitutionally rooted, can be invoked by the President when asked to produce documents or other materials or information that reflect presidential decision making and deliberations that he believes should remain confidential. If the President does so, the materials become "presumptively privileged."[305] The privilege, however, is qualified, not absolute, and can be overcome by an adequate showing of need.[306] Finally, while reviewing courts have expressed reluctance to balance executive privilege claims against a congressional demand for information, they have acknowledged they will do so if the political branches have tried in good faith but failed to reach an accommodation.[307]

However, until the District of Columbia Circuit's 1997 ruling in *In re Sealed Case*,[308] and its 2004 ruling in *Judicial Watch Inc. v. Department of Justice*,[309] these judicial decisions had left important gaps in the law of presidential communications privilege, which increasingly became focal points, if not the source, of interbranch confrontations. Among the more significant issues left open included whether the President has to have actually seen or been familiar with the disputed matter; whether the presidential privilege encompasses documents and information developed by, or in the possession of, officers and employees in the departments and agencies of the executive branch; whether the privilege encompasses all communications with respect to which the President may be interested or is confined to presidential decision making and, if so, is limited to any particular type of presidential decision making; and precisely what kind of demonstration of need must be shown to justify release of materials that qualify for the privilege. The unanimous D.C. Circuit panel in *In re Sealed Case* authoritatively addressed each of these

[300] *United States v. Nixon*, 418 U.S. 683 (1974); *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973); *Senate Select Committee v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974); *United States v. AT&T*, 551 F.2d 384 (D.C. Cir. 1976), *appeal after remand*, 567 F.2d 121 (D.C. Cir. 1977); *United States v. House of Representatives*, 556 F.Supp. 150 (D.D.C. 1983); *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997); *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21 (D.D.C. 1998).

[301] *Senate Select Committee*, 498 F.2d 725 (D.C. Cir. 1974).

[302] *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

[303] *See, e.g.*, *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973); *Senate Select Committee v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974).

[304] *United States v. Nixon*, 418 U.S. 683 (1974).

[305] *Nixon v. Sirica*, 487 F.2d 750, 757 (D.C. Cir. 1973).

[306] *Nixon*, 418 U.S. 706.

[307] *United States v. AT&T*, 551 F.2d 384 (D.C. Cir. 1976), *appeal after remand*, 567 F.2d 121 (D.C. Cir. 1977)

[308] 121 F.3d 729 (D.C. Cir. 1997).

[309] 365 F.3d 1108 (D.C. Cir. 2004).

issues in a manner that may have drastically altered the future legal playing field in resolving such disputes. Moreover, the D.C. Circuit's ruling in the *Judicial Watch* case reinforces that likelihood.[310]

In Re Sealed Case (Espy)

In *In re Sealed Case (Espy)*,[311] the appeals court addressed several important issues left unresolved by the Watergate cases: the precise parameters of the presidential privilege; how far down the chain of command the privilege reaches; whether the President has to have seen or had knowledge of the existence of the documents for which he claims privilege; and what showing is necessary to overcome a valid claim of privilege.

The case arose out of an Office of Independent Counsel (OIC) investigation of former Agriculture Secretary Mike Espy. When allegations of improprieties by Secretary Espy surfaced in March of 1994, President Clinton ordered the White House Counsel's Office to investigate and report to him so he could determine what action, if any, he should undertake. The White House Counsel's Office prepared a report for the President, which was publicly released on October 11, 1994. The President never saw any of the underlying or supporting documents to the report. Secretary Espy announced his resignation on October 3, to be effective on December 31. The Independent Counsel was appointed on September 9 and the grand jury issued a subpoena for all documents that were accumulated or used in preparation of the report on October 14, three days after the report's issuance. The President withheld 84 documents, claiming both the executive and deliberative process privileges. A motion to compel was resisted on the basis of the claimed privileges and after *in camera* review the district court quashed the subpoena, but in its written opinion did not discuss the documents in any detail and provided no analysis of the grand jury's need for the documents. The appeals court reversed.

At the outset, the court's opinion carefully distinguishes between the "presidential communications privilege" and the "deliberative process privilege." As previously discussed, the court observed that both privileges are "executive privileges" designed to protect the confidentiality of executive branch decision making. According to the court, however, the "deliberative process" privilege applies generally to executive branch officials, is a common law privilege which requires a lower threshold of need to be overcome, and "disappears altogether when there is any reason to believe government misconduct has occurred."[312]

On the other hand, the court explained, the presidential communications privilege is rooted in "constitutional separation of powers principles and the President's unique constitutional role" and applies only to "direct decisionmaking by the President."[313] The privilege may be overcome only by a substantial showing that "the subpoenaed materials likely contain[] important evidence" and that "the evidence is not available with due diligence elsewhere."[314] The presidential privilege

[310] Neither case, however, involved congressional access to information.

[311] 121 F.3d 729 (D.C. Cir. 1997).

[312] *Id.* at 745-46; *see also id.* at 737-38 ("[W]here there is reason to believe the documents sought may shed light on government misconduct, the [deliberative process] privilege is routinely denied on the grounds that shielding internal government deliberations in this context does not serve 'the public interest in honest, effective government.'").

[313] *Id.* at 745, 752-53 (" ... these communications nonetheless are ultimately connected with presidential decisionmaking").

[314] *Id.* at 754, 757.

applies to all documents in their entirety[315] and covers final and post-decisional materials as well as pre-deliberative ones.[316]

Turning to the chain-of-command issue, the court held that the presidential communications privilege must cover communications made or received by presidential advisors in the course of preparing advice for the President, even if those communications are not made directly to the President. The court rested its conclusion on "the President's dependence on presidential advisors and the inability of the deliberative process privilege to provide advisors with adequate freedom from the public spotlight" and "the need to provide sufficient elbow room for advisors to obtain information from all knowledgeable sources."[317] Thus, the privilege will "apply both to communications which these advisors solicited and received from others as well as those they authored themselves. The privilege must also extend to communications authored or received in response to a solicitation by members of a presidential adviser's staff."[318]

The court, however, was acutely aware of the dangers to open government that a limitless extension of the privilege poses and carefully cabined its reach by explicitly confining it to White House staff, and not staff in the agencies, and then only to White House staff that has "operational proximity" to direct presidential decision making.

> We are aware that such an extension, unless carefully circumscribed to accomplish the purposes of the privilege, could pose a significant risk of expanding to a large swath of the executive branch a privilege that is bottomed on a recognition of the unique role of the President. In order to limit this risk, the presidential communications privilege should be construed as narrowly as is consistent with ensuring that the confidentiality of the President's decisionmaking process is adequately protected. Not every person who plays a role in the development of presidential advice, no matter how remote and removed from the President, can qualify for the privilege. In particular, the privilege should not extend to staff outside the White House in executive branch agencies. Instead, the privilege should apply only to communications authored or solicited and received by those members of an immediate White House advisor's staff who have broad and significant responsibility for investigation and formulating the advice to be given the President on the particular matter to which the communications relate. Only communications at that level are close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisers.
>
> Of course, the privilege only applies to communications that these advisers and their staff author or solicit and receive in the course of performing their function of advising the President on official government matters. This restriction is particularly important in regard to those officials who exercise substantial independent authority or perform other functions in addition to advising the President, and thus are subject to FOIA and other open government statutes. The presidential communications privilege should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President. If the government seeks to assert the presidential communications privilege in regard to particular communications of these "dual hat"

[315] In contrast, the deliberative process privilege does not protect documents that simply state or explain a decision the government has already made or material that is purely factual, unless the material is inextricably intertwined with the deliberative portions of the materials so that disclosure would effectively reveal the deliberations. 121 F.3d at 737.

[316] *Id.* at 745.

[317] *Id.* at 752.

[318] *Id.*

> presidential advisers, the government bears the burden of proving that the communications occurred in conjunction with the process of advising the President.[319]

The appeals court's limitation of the presidential communications privilege to "direct decision making by the President" makes it imperative to identify the type of decision making to which it refers. A close reading of the opinion makes it arguable that it is meant to encompass only those functions that form the core of presidential authority, involving what the court characterized as "quintessential and non-delegable presidential power."[320] In the case before it, the court was specifically referring to the President's Article II appointment and removal power, which was the focal point of the advice he sought regarding Secretary Espy. That said, it is clear from the context of the opinion that the description was meant to be in juxtaposition with the appointment and removal power and in contrast with "presidential powers and responsibilities" that "can be exercised or performed without the President's direct involvement, pursuant to a presidential delegation of authority or statutory framework."[321] The reference the court uses to illustrate the latter category is the President's Article II duty "to take care that the laws are faithfully executed," a constitutional direction that the courts have consistently held not to be a source of presidential power, but rather an obligation on the President to see to it that the will of Congress is carried out by the executive bureaucracy.[322]

The appeals court's decision, then, arguably confines the parameters of the newly formulated presidential communications privilege by tying it to those Article II functions that are identifiable as "quintessential and non-delegable," which would appear to include, in addition to the appointment and removal powers, the commander-in-chief power, the sole authority to receive ambassadors and other public ministers, the power to negotiate treaties, and the power to grant pardons and reprieves. On the other hand, decision making vested by law in agency heads, such as prosecutorial decision making, rulemaking, environmental policy, consumer protection, workplace safety and labor relations, among others, would not necessarily be covered. Of course, the President's role in supervising and coordinating (but not displacing) decision making in the executive branch remains unimpeded. However, his communications would presumably not be cloaked by a constitutionally based privilege.

Such a reading of this critical part of the court's opinion is consonant with the court's view of the source and purpose of the presidential communications privilege and its expressed need to confine it as narrowly as possible. Relying on *United States* v. *Nixon*,[323] the *In re Sealed Case* court identified "the President's Article II powers and responsibilities as the constitutional basis of the presidential communications privilege.... Since the Constitution assigns these responsibilities to the President alone, arguably the privilege of confidentiality that derives from it also should be the President's alone."[324] Again, relying on *Nixon*, the court pinpoints the essential purpose of the privilege: "[T]he privilege is rooted in the need for confidentiality to ensure that

[319] *Id.* (internal citations and footnotes omitted).

[320] *Id.* at 752.

[321] *Id.* at 752-53.

[322] *See, e.g., Kendall ex rel. Stokes v. United States*, 37 U.S. (12 Pet.) 522, 612-613 (1838); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); *Myers v. United States*, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting); *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 604 (D.C. Cir. 1974); *Biodiversity Associates et al. v. Cables*, 357 F.3d 1152, 1161-63 (10th Cir. 2004).

[323] 418 U.S. 683 (1974).

[324] 121 F.3d at 748.

presidential decisionmaking is of the highest caliber, informed by honest advice and knowledge. Confidentiality is what ensures the expression of 'candid, objective, and even blunt or harsh opinions' and the comprehensive exploration of all policy alternatives before a presidential course of action is selected."[325] The limiting safeguard is that the privilege will apparently only apply in those instances where the Constitution provides that the President alone must make a decision. "The presidential communications privilege should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President."[326]

Judicial Watch, Inc. v. Department of Justice

The District of Columbia Circuit's 2004 decision in *Judicial Watch, Inc. v. Department of Justice*[327] appears to lend substantial support to the above-expressed understanding of *Espy*. *Judicial Watch* involved requests for documents concerning pardon applications and pardon grants reviewed by the Justice Department's Office of the Pardon Attorney and the Deputy Attorney General for consideration by President Clinton.[328] Some 4,300 documents were withheld on the grounds that they were protected by the presidential communications and deliberative process privileges. The district court held that because the materials sought had been produced for the sole purpose of advising the President on a "quintessential and non-delegable Presidential power"—the exercise of the President's constitutional pardon authority—the extension of the presidential communications privilege to internal Justice Department documents, which had not been "solicited and received" by the President or the Office of the President, was not warranted.[329] The appeals court reversed, concluding that "internal agency documents that are not solicited and received by the President or his Office are instead protected against disclosure, if at all, by the deliberative process privilege."[330]

Guided by the analysis of the *Espy* ruling, the panel majority emphasized that the "solicited and received" limitation "is necessitated by the principles underlying the presidential communications privilege, and a recognition of the dangers of expanding it too far."[331] *Espy* teaches, the court explained, that the privilege may be invoked only when presidential advisors in close proximity to the President who have significant responsibility for advising him on non-delegable matters requiring direct presidential decision making have solicited and received such documents or communications or the President has received them himself. In rejecting the Government's argument that the privilege should be applicable to all departmental and agency communications related to the Deputy Attorney General's pardon recommendations for the President, the panel majority held that

[325] *Id.* at 750.

[326] *Id.* at 752.

[327] 365 F.3d 1108 (D.C. Cir. 2004). The panel split 2-1, with Judge Rogers writing for the majority and Judge Randolph dissenting.

[328] The President has delegated the formal process of review and recommendation of his pardon authority to the Attorney General who in turn has delegated it to the Deputy Attorney General. The Deputy Attorney General oversees the work of the Office of the Pardon Attorney.

[329] 365 F.3d at 1109-12.

[330] *Id.* at 1112, 1114, 1123.

[331] *Id.* at 1114.

> such a bright-line rule is inconsistent with the nature and principles of the presidential communications privilege, as well as the goal of serving the public interest.... Communications never received by the President or his Office are unlikely to be revelatory of his deliberations ... nor is there any reason to fear that the Deputy Attorney General's candor or the quality of the Deputy's pardon recommendations would be sacrificed if the presidential communications privilege did not apply to internal documents.... Any pardon documents, reports or recommendations that the Deputy Attorney General submits to the Office of the President, and any direct communications the Deputy or the Pardon Attorney may have with the White House Counsel or other immediate Presidential advisers will remain protected.... It is only those documents and recommendations of Department staff that are not submitted by the Deputy Attorney General for the President and are not otherwise received by the Office of the President, that do not fall under the presidential communications privilege.[332]

Indeed, the *Judicial Watch* panel makes it clear that the *Espy* rationale would preclude cabinet department heads from being treated as being part of the President's immediate personal staff or as some unit of the Office of the President:

> Extension of the presidential communications privilege to the Attorney General's delegatee, the Deputy Attorney General, and his staff, on down to the Pardon Attorney and his staff, with the attendant implication for expansion to other Cabinet officers and their staffs, would, as the court pointed out in *In re Sealed Case*, pose a significant risk of expanding to a large swatch of the executive branch a privilege that is bottomed on a recognition of the unique role of the President.[333]

The *Judicial Watch* majority took great pains to explain why *Espy* and the case before it differed from the Nixon and post-Watergate cases. According to the court, "[u]ntil *In re Sealed Case*, the privilege had been tied specifically to direct communications of the President with his immediate White House advisors."[334] The *Espy* court, it explained, was for the first time confronted with the question whether communications that the President's closest advisors make in the course of preparing advice for the President and which the President never saw should also be covered by the presidential privilege. The *Espy* court's answer was to "espouse[ ] a 'limited extension' of the privilege' 'down the chain of command' beyond the President to his immediate White House advisors only," recognizing "the need to ensure that the President would receive full and frank advice with regard to his non-delegable appointment and removal powers, but was also wary of undermining countervailing considerations such as openness in government.... Hence, the [*Espy*] court determined that while 'communications authored or solicited and received' by immediate White House advisors in the Office of the President could qualify under the privilege, communications of staff outside the White House in executive branch agencies that were not solicited and received by such White House advisors could not."[335]

The situation before the *Judicial Watch* court tested the *Espy* principles. While the presidential decision involved—exercise of the President's pardon power—was certainly a non-delegable, core presidential function, the operating officials involved, the Deputy Attorney General and the Pardon Attorney, were deemed to be too remote from the President and his senior White House advisors to be protected. The court conceded that functionally those officials were performing a

[332] *Id.* at 1117.

[333] *Id.* at 1121-22.

[334] *Id.* at 1116.

[335] *Id.* at 1116-117.

task directly related to the pardon decision but concluded that an organizational test was more appropriate for confining the potentially broad sweep that would result from a functional test; under the latter test, there would be no limit to the coverage of the presidential communications privilege. In such circumstances, the majority concluded, the lesser protections of the deliberative process privilege would have to suffice.[336]

Application to Potential Congressional Oversight of Presidential Advisors

Taken together, *Espy* and *Judicial Watch* arguably have effected important qualifications and restraints on the nature, scope, and reach of the presidential communications privilege. As established by those cases, and until reviewed by the Supreme Court, to appropriately invoke the privilege the following elements appear to be essential. First, the protected communication must relate to a "quintessential and non-delegable presidential power."[337] This requirement would arguably not include decision making with respect to laws that vest policymaking and implementation authority in the heads of departments and agencies or which allow presidential delegations of authority. Second, the communication must be authored or "solicited and received" by a close White House advisor (or the President). The judicial test is that an advisor must be in "operational proximity" with the President. This effectively means that the scope of the presidential communications privilege extends only to the boundaries of the White House and the Executive Office complex. Finally, the presidential communications privilege remains a qualified privilege that may be overcome by a showing of need and unavailability of the information elsewhere by an appropriate investigating authority. The *Espy* court found an adequate showing of need by the Independent Counsel; while in *Judicial Watch*, the court found the privilege did not apply and the deliberative process privilege was unavailing.[338]

Applying the law of executive privilege to the potential congressional oversight of presidential advisors will largely need to be done on a case-by-case basis. As the above discussion indicates, these advisors appear to reside both inside the Executive Office of the President (EOP), as well as within several of the agencies or departments, such as Treasury and Homeland Security.

With respect to the advisors contained within the EOP, there appears to be a greater likelihood of claims of executive privilege, specifically the "presidential communications privilege." Based on the position descriptions that are publically available, however, it is unclear whether information sought from any of these advisors would satisfy all three parts of the test established by *Espy* and *Judicial Watch* and qualify to be withheld under a theory of executive privilege. Arguably, given their location inside the EOP, these advisors all meet the "operational proximity" prong of the test. However, even granting that prong of the test, it would still need to be determined that the communications seeking the privilege's protection relates to a "quintessential and non-delegable presidential power." Thus, a presidential advisor such as the National Security Advisor may satisfy this prong, as that advice likely relates to the President's "Commander-in-Chief" and/or authority with respect to the conduct of foreign affairs. Conversely, advice from other presidential advisors within the EOP, such as the Assistant to the President for Energy and Climate Change,

[336] *Id.* at 1118-24.

[337] *Espy* and *Judicial Watch* involved the appointment and removal and the pardon powers, respectively. Other core, direct presidential decision-making powers include the Commander-in-Chief power, the sole authority to receive ambassadors and other public ministers, the power to negotiate treaties, and the power to grant pardons.

[338] *See, e.g.*, *In re Sealed Case (Espy)*, 121 F.3d 729 (D.C. Cir. 1997); *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108 (D.C. Cir. 2004).

the White House Director of Urban Affairs, Director of the White House Office of Health Reform, or the Director of the National Economic Council, arguably do not satisfy this prong of the test, as their functions are not related to "quintessential and non-delegable presidential power," but rather relate to more general law execution authority. Finally, it is important to note that the privilege in all cases is a qualified one and, therefore, can be overcome by a showing of need and unavailability of the information elsewhere. The consideration of legislation by Congress would likely be considered sufficient to satisfy the need requirement. As to unavailability, that will depend on exactly what information the committee is seeking, but seeing as how there are few, if any, alternative sources to discern what takes place inside the EOP, it does not appear that this prong would present much difficulty for an oversight committee with proper jurisdiction.

Turning to those advisors who have been placed inside the various executive agencies, as *Judicial Watch* indicates, the farther from the EOP an advisor resides the more difficult it becomes to justify the use of the presidential communications privilege. Thus, advisors in the administrative agencies are arguably more likely to assert the common law "deliberative process" privilege, rather than the "presidential communications privilege." As noted above, common law privileges are accepted at the discretion of the committee chair and, therefore, raise far more difficult political concerns. Assuming that a claim of "presidential communications privilege" is raised to a request or subpoena to an advisor inside an agency, it would appear difficult to satisfy the requirements of the D.C. Circuit's test. An advisor housed within an agency, like the Pardon Attorney in *Judicial Watch*, is not within "operational proximity" to the President and, thus, is likely not to be considered protected, even if they are dealing with "quintessential and non-delegable presidential powers." Further complicating matters, is the fact that few advisors within an agency are engaged in providing advice with respect to such functions. Thus, if a position such as the Pardon Attorney could not satisfy the D.C. Circuit, it is unlikely that any other advisory position would satisfy the standard.

Options for Potential Congressional Consideration[339]

In examining the concerns surrounding presidential advisors, Congress may decide that no action is needed. However, should it decide otherwise, there are some legislative and non-legislative options.

Legislative Options

Option: Report and Wait Provision

One option that might be considered is a change to the President's authority to hire non-advice and consent persons within the EOP. Currently, as discussed above, federal law permits the President to hire employees within the EOP at specific salary levels and does not require any additional accounting or justification to Congress about how those positions are filled or salary

[339] Vivian S. Chu (7-4576) and Todd B. Tatelman (7-4697), Legislative Attorneys in the American Law Division, wrote this section.

levels determined.[340] One solution to this lack of information would be to adopt language conditioning the use of that authority on the receipt by Congress of information relating to the salaries, expenses, and other budgetary impact of the creation of advisory positions or offices within the EOP. The proposed language could be structured as a "report and wait" provision, which permits the President to select his personnel, but requires those selected to wait for a set amount of time before starting work, so that Congress can review the submitted materials required by the proposed legislation.

So-called "report and wait" provisions have been consistently upheld by federal courts as a constitutional exercise of Congress's oversight functions. As the United States Court of Appeals for the Federal Circuit has noted,

> We take notice that since early in the 19th Century there have been marked differences between the United States Congress and other parliamentary bodies. One is the greater development of the committee system here.... Committee chairmen and members naturally develop interest and expertise in the subjects entrusted to their continuing surveillance. Officials in the executive branch have to take these committees into account and keep them informed, respond to their inquiries, and it may be, flatter and please them when necessary. Committees do not need even the type of "report and wait" provision we have here to develop enormous influence over executive branch doings. There is nothing unconstitutional about this: indeed, our separation of powers makes such informal cooperation much more necessary than it would be in a pure system of parliamentary government.[341]

It should be noted, however, that while "report and wait" provisions are constitutionally valid, by their plain language they do not create a legal obligation for Congress to take any action. Under the terms of this specific provision, if Congress takes no action within the number of days as determined by the bill, the employee can start work. Should Congress decide to act to nullify the President's creation of the position or office, it is obligated to do so in accordance with the Court's holding in *INS v. Chadha*.[342] In other words, Congress's action needs to comply with the Constitution's requirements for bicameralism and presentment.[343] Thus, the only options available to nullify a Presidential action under this provision would be either a bill (H.R. or S.) or a joint resolution of disapproval (H.J. Res. or S.J. Res.), both of which require passage by both houses and the signature of the President. Of course, Congress would retain other mechanisms to make its views on such a position known. These would include, but are not limited to, committee hearings, language in committee reports, or the adoption of sense of the House/Senate resolutions. That said, however, none of those methods would be legally binding or would in any way prevent the employee from beginning work.

Option: Add Advice and Consent Positions in the EOP

Because concern has been raised that President Obama has created new offices within the EOP and has designated presidential advisors or assistants, who are not subject to the advice and

[340] *See* 3 U.S.C. §105 (2006).

[341] *City of Alexandria v. United States*, 737 F.2d 1022, 1025-26 (Fed. Cir. 1984); *see also Armijo v. United States*, 663 F.2d 90 (Cl. Ct. 1981).

[342] 462 U.S. 919 (1983).

[343] *Id.* at 954-955. U.S. Const., art I, §7 states that "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President ... according to the Rules and Limitations prescribed in the Case of a Bill."

consent of the Senate, to be in charge of certain policy portfolios where they have been characterized as exerting political influence and possibly wielding significant legal authority, another option would have Congress codify these positions on a case-by-case basis and make those positions subject to the Senate confirmation process.

In the past, Congress has taken action to codify positions existing within the EOP.[344] For example, during the Nixon Administration, Congress passed legislation requiring Senate confirmation of future Directors and Deputy Directors of the Office of Management and Budget (OMB).[345] This legislation also set four-year terms for the OMB officials and formally transferred to the OMB Director powers held by the President but delegated to OMB. During consideration of the OMB legislation, it was argued by Roy Ash, then Director, that "the OMB director serves as the personal agent of the President in the performance of presidential duties" and that as an advisor he "conducts no programs that directly affect the public, makes no grants and engages in no significant contractual arrangements" and therefore should not be subject to confirmation.[346] However, it was the sense of Congress that the role of the OMB and the decisions made by those in charge had changed since its establishment in 1921 and that Senate confirmation of the Director and Deputy Director was "fully justified and long overdue."[347]

Regarding some of the positions in the EOP that the President created for his presidential assistants to fill, Congress could choose to codify them on a case-by-case basis as it has done in the past. However, this raises the question of whether Congress and the President should make permanent such positions within the White House, many of which appear to have been created to address time-sensitive issues of the present. Moreover, this option still leaves the President the ability to hire assistants pursuant to Title 3,[348] and nothing precludes the President from consulting with these assistants on issues that the codified positions would have jurisdiction over.

Option: Reduce and/or Confirm Presidential Staff

Another option would be to reduce the number of employee-assistants the President is authorized to hire under 3 U.S.C. §105 and/or require these employees to be subject to Senate confirmation, without regard to the policy areas they may cover (and without necessarily making them officers of the United States). If Congress were to reduce the number of employees the President is authorized to hire, this would arguably limit the President in his or her ability to use such assistants as advisors in charge of coordinating various policy areas. Such a provision therefore

[344] See note 7 on the Office of Science and Technology Policy and the Office of National Drug Control Policy.

[345] P.L. 93-250. Before P.L. 93-250 became law, Congress had passed an earlier OMB confirmation bill that was vetoed by President Nixon on grounds that it required confirmation of incumbent as well as future directors (*See* H.R. 3932 and S. 518, 93d Cong., 1st Sess. 1973).

[346] 1973 Congressional Quarterly Almanac at 712 (*citing* March 1, 1973 letter from Roy Ash to the House Government Operations subcommittee).

[347] H.Rept. 93-697, at 10. ("The decisions of the Director of the Office of Management and Budget are in most instances the final Executive Branch decisions on budget requests and on the legislative policy of the Executive Branch. To contend that the Director is nothing more than the President's technician on budgetary matters and that he does not exercise tremendous power and authority on his own [sic] initiative is to blind one's self to the real facts of governmental life and present day realities.... The Office of Management and Budget stands at the center of Federal policy-making with life and death decisions about programs and procedures.... Unlike the situation 50 years ago, when the mix of Federal activities varied little from year to year, the budget now is the 'action forcing' process, involving new program decisions and billions of dollars each year." *See id.* at 6-7).

[348] 3 U.S.C. §105 *et seq*.

may be effective in that the President would turn to existing positions within the agencies to coordinate policy. Alternatively, reducing the number of presidential employee-assistants may be ineffective, as nothing precludes the President from utilizing persons outside the government for the same or similar purposes.

Turning to the idea of confirming presidential staff, Congress, in the past, attempted to require that future appointments of certain positions in the EOP be subject to confirmation by the Senate.[349] One such bill focused on the Executive Secretary of the National Security Council, the Executive Director of the Domestic Council, and the Executive Director of the Council on International Economic Policy, with the Senate Committee on Governmental Affairs stating its opinion that the officers in question have responsibilities well beyond those of personal advisors or consultants to the President."[350] The committee report concluded that "Congressional insistence that the exemption from confirmation be strictly limited to genuine staff assistants to the President will help restore the confirmation process to the role intended by the Constitution."[351]

Thus, while Congress could make these employees/assistants subject to Senate confirmation, it runs the risk of diluting the meaning and weight carried by the advice and consent requirement, as this process is generally reserved for officers of the United States under the text of the Appointments Clause. Furthermore, as discussed above, Congress has recognized that staff assistants are not intended to be subject to the advice and consent process. However, as with any legislative option, either of these two proposals would require the signature of the President, who may not be inclined to enact legislation that arguably interferes with his or her ability to efficiently run the EOP and therefore execute the laws.

Oversight Options[352]

Unlike legislation—which requires either the affirmative consent of the President in the form of his signature or sufficient votes to override his veto—congressional oversight, at least initially, requires that only the legislative branch act.

Congress, especially the committees of jurisdiction or appropriations, might elect to conduct oversight hearings regarding a number of the potential issues related to the positions discussed in this report. For example, although the current statutes already prescribe reporting requirements for White House staff, Congress may want to examine whether additional data might be appropriate. Data that might be informative would include the duties and responsibilities of positions, planned initiatives, staffing limitations, and public accessibility of meetings and documents for each office. Such data could, for example, be included in the report on White House staff required by 3 U.S.C. §113 or in the annual budget justification for the EOP submitted to Congress with the President's budget. Another area that might be the subject of congressional oversight could be the vetting process for high-level appointees. Such oversight might review the

[349] S. 590, 93d Cong., 1st Sess. (1973).

[350] S.Rept. 93-47, at 7.

[351] *Id.*

[352] Vivian S. Chu (7-4576) and Todd B. Tatelman (7-4697), Legislative Attorneys in the American Law Division, wrote this section with contributions from Barbara L. Schwemle (7-8655) and Henry B. Hogue (7-0642), Analysts in American National Government in the Government and Finance Division.

variations in and content of the White House questionnaire, and the processes for background investigations and financial disclosure.

Should it be determined that the increase of presidential advisors that are not subject to advice and consent of the Senate is not adequately addressed by leaving it to the various committees of jurisdiction, Congress may wish to consider the creation of a special or select joint committee to address this particular issue. For example, a joint committee could be created with jurisdiction over only those executive branch employees that are created by executive order, presidential memorandum, regulation, or other non-legislative action and, therefore, not otherwise subject to advice and consent of the Senate. Such a committee could consist of both House and Senate members, because it would be exercising oversight prerogatives held by both chambers and not textually committed functions such as the confirmation power, which rests exclusively with the Senate. Thus, by concurrent resolution (H. Con. Res., S. Con. Res), Congress could establish a committee to review the qualifications, duties, and responsibilities of those persons given positions by the President without the advice and consent of the Senate. Membership could be via appointment by the Speaker and Minority Leader in the House and the Majority and Minority Leaders in the Senate, or it could be left to the political caucuses in both the House and Senate. The committee could be politically balanced with equal number of members from both political parties, or, similar to the existing standing committees, reflect the prevailing partisan ratio of the Congress. To perform its functions, the committee could be delegated the authority to hold hearings, administer oaths to witnesses, issue and enforce subpoenas, and report on its findings. Although the committee activities would be similar to a confirmation hearing, there would be no final vote on the qualifications or fitness of the appointee to hold the job. Nevertheless, such a committee would arguably be in a position to perform oversight of the hiring of presidential advisors and could provide a mechanism for Congress to more consistently review the qualifications of those being given substantial influence over the development of policy within the White House and the executive branch.

Potential advantages to such a committee might include the fact that it would be a single entity dedicated to the sole purpose of vetting non-advice and consent advisors. Such a specialized function would allow the committee to, over time, become well-versed in addressing the numerous legal and political issues that it may face; not the least of which would likely be a recalcitrant executive branch. Moreover, because the committee would have only the one function, it would not be distracted by other more pressing legislative concerns and, thus, would be able to dedicate all of its time to performing oversight.

On the other hand, it might be argued that a thorough vetting of such positions requires underlying knowledge and expertise in the programs and policies that the advisor would likely be working on. Such a body of knowledge already exists among the members and staff of the existing standing committees of jurisdiction. Therefore, the standing jurisdictional committees may be in a better position to conduct the necessary oversight of such influential positions. Moreover, many of the standing committees already perform oversight of the executive branch and may be more familiar with the legal and political nuances that accompany a particular policy issue, implementing White House office, or executive agency.

111th Congress Hearings[353]

Two Senate committees conducted hearings on the issue of the appointment of so-called "czars" in the Executive Branch in October 2009. This section of the report provides a summary of selected viewpoints expressed at each hearing.

Senate Committee on the Judiciary, Subcommittee on the Constitution

The Senate Subcommittee on the Constitution of the Committee on the Judiciary conducted a hearing entitled "Examining the History and Legality of Executive Branch 'Czars'" on October 6, 2009.[354] In his opening statement, the subcommittee chairman, Senator Russell Feingold, noted that

> No one disputes that the president is allowed to hire advisers and aides.... But Congress and the American people have the right to ensure that the positions in our government that have been delegated legal authority are also the positions that are exercising that authority. If—and I am not saying this is the case—individuals in the White House are exercising legal authority or binding the executive branch without having been given that power by Congress, now, that's a problem. And Congress also has the right to verify that any directives given by a White House czar to a cabinet member are directly authorized by the president.[355]

The Ranking Member, Senator Tom Coburn, stated the importance of "open, transparent government" in his opening remarks:

> And the president ought to be about ... re-establish[ing] the confidence ... that everything's above board, that it's transparent, that we can see it's working. And if people truly do have significant authority and are not confirmed by the Senate, then that's a problem. And so I don't know whether that's the case or not.[356]

Two Senators submitted statements for the hearing record. In his statement, Senator Richard Durbin noted the "important principles" of "transparency and accountability to Congress":

> Public officials, including those who work for the President, should be responsive to congressional inquiries. Members of Congress can expect to be fully and timely informed about the activities of executive branch officials who are designated by the president to coordinate policy across executive agencies.

His statement also expressed disagreement "with those who say the Obama Administration is acting differently than past administrations when it comes to the use of czars and presidential

[353] Barbara L. Schwemle, Analyst in American National Government (7-8655), prepared this summary of the hearings.

[354] The opening statements, statements submitted for the record, and witness statements are available, at http://judiciary.senate.gov/hearings/hearing.cfm?id=4098.

[355] Transcript obtained by subscription from *CQ.com* on U.S. Congress, Senate Committee on the Judiciary, Subcommittee on the Constitution, hearing on Executive Branch Czars, 111th Cong., 1st sess., October 6, 2009, p. 2 of the transcript downloaded for printing. (Further information available from author.) Hereinafter referred to as CQ October 6 Transcript.

[356] Ibid., p. 3.

advisers," noted that "there is ample opportunity for congressional oversight over these advisors," and concluded that "President Obama's advisors aren't doing anything more than the law and the Constitution allow."[357]

Senator John Cornyn's statement noted that, "These czars present serious accountability concerns" and included these points:

> First, it seems that some of President Obama's czars may wield a measure of authority usually reserved to principal officers of the United States. In particular, some appear to exercise significant authority and have broad terms of duty, jurisdiction, and tenure.... If these czars are principal officers, they must be subject to Senate confirmation as required by the Constitution.... Second, even if none of the czars are principal officers, their ability to exercise decision-making authority absent congressional oversight is troubling. Controlling access to the President and possessing great responsibilities, czars can act unchecked in ways that significantly influence or duplicate the duties of Senate-confirmed officials.... Third, any distribution of taxpayer funds by unaccountable czars is unacceptable. Because we do not know exactly what the czars do, it is difficult to determine how much influence they have over the granting of federal money.[358]

Five witnesses presented testimony before the subcommittee, each of whom presented an opening statement. Among the viewpoints expressed in those statements were the following.

Bradley H. Patterson, Jr., scholar on the presidency and author of "To Serve the President," discussed the meaning of the term, "czar," and the issues of confirmation for and testimony from White House advisors:

> My definition of czar means, first, that this person reports only to the president.... Public [Law] 95-570 is silent about any requirement for Senate confirmation of these appointments. I interpret this silence as evidencing the intent of Congress to reconfirm in 1978 the historic practice of not requiring Senate approval of White House staff members, whether they're called czars or not. Likewise, White House staffers do not give formal testimony to congressional committees, unless, as in the Watergate instance, criminality is alleged.... White House officers constantly visit the Hill for informal conferences with members and staffs.... White House staff members have no legal responsibility other than to assist and advise the president.... It would be unthinkable that law clerks at the Supreme Court should be in any way accountable to the president or to Congress. It would be unthinkable that the appointments of any of the personal legislative or committee staff here at the Capitol should be approved by the White House, and likewise, vice versa.... The president's personal staff are independently responsible only to the president. And in the end, he [the President] is the only czar that is. And he is accountable to the American electorate.[359]

Matthew Spalding, director, B. Kenneth Simon Center for American Studies, The Heritage Foundation, discussed 'czars' and the bureaucratic state:

> Czar is ... a clever label. It's clearly meant to imply ... certain positions a breadth of authority and leveled status beyond the particulars of the formal title, seemingly beyond the confines of the normal process.... The rise of government by bureaucrats, largely due to the delegation of power from Congress to administrative agencies, combined with the removal of those

[357] Statement of Senator Durbin, p. 1.

[358] Statement of Senator Cornyn, pp. 1-2.

[359] CQ October 6 Transcript, pp. 4-5.

> agencies from the president's control, has given rise to efforts by presidents from both political parties to get the bureaucratic state under control through various mechanisms. The rise of czars in the current administration is merely another manifestation ... of this phenomenon.[360]

Tuan Samahon, associate professor, Villanova University School of Law, discussed the meaning of the term, "officer," under the Constitution:

> This line between non-officer and officer is not defined by the appointments clause, itself, but we do have some authority. Recently, under the Bush administration, the Justice Department's Office of Legal Counsel in April of 2007 issued an opinion that synthesized and harmonized the Supreme Court's opinions on who is an officer for appointments clause purposes ... two requirements that are necessary ... in order to be an officer, you must hold an office, which in turn is defined as a position to which is delegated by legal authority a portion of the sovereign powers of the federal government, what the Supreme Court in Buckley v. Valeo termed significant authority. The second requirement is that this position must be continuing.[361]

John C. Harrison, James Madison Distinguished Professor of Law, University of Virginia School of Law, discussed the requirements that underlie the exercise of legal authority and whether White House staff have such authority:

> There are two governing legal principles.... the first one, the appointments clause. It is a necessary condition for the exercise of actual legal authority in the government for someone in the executive branch, for anyone other than the president to have been appointed to an office pursuant to the appointments clause, to be either a superior officer or an inferior officer. The other necessary condition for the exercise of power by anyone other than the president is some source of statutory authority, because only the president has constitutional power and the president's constitutional powers are essentially non-delegable. The consequence of those two principles is that it is extremely doubtful whether anyone on the White House staff, the sort of person sometimes called a czar, could actually exercise legal authority, at least as a formal matter.... although it is common for there to be a divergence between influence in the government and actual formal legal authority, especially with respect to the White House staff—it is extremely common for members of the White House staff to be extremely influential, even though they cannot take any genuinely legal binding decision—whether that division between legal authority and informal practical influence is a good thing is a difficult question of policy.[362]

TJ Halstead, deputy assistant director, American Law Division, Congressional Research Service, Library of Congress, testified on the application of the Appointments Clause to White House advisors and the viability of any legislative proposal to limit the use of such advisors:

> [T]here's no indication that these advisers—particularly those serving in unconfirmed positions within the executive office of the president—have been vested with any actual executive authority, and that precludes a categorical conclusion that the requirements of the appointments clause apply to their service.... under current jurisprudential principles, it's difficult to discern a basis upon which a review in court would conclude as a legal matter that the existence of these advisers runs contrary to our constitutional system.... Also, it's not

[360] Ibid., pp. 5-6.

[361] Ibid., p. 8.

[362] Ibid., p. 9.

> clear that legislative proposals, even if enacted, would have much, if any, effect on presidential utilization of advisers, as it does not appear possible for Congress to prohibit either implicitly or explicitly a president from relying upon personal advisers irrespective of whether they are confirmed or draw salary.[363]

Mr. Halstead also discussed the oversight authority of Congress:

> Given the limitations that are inherent in any judicial or legislative response to this controversy, it seems that the most effective congressional response may be one that is based simply on persistent and aggressive assertion of the oversight prerogatives of the House and Senate. Longstanding Supreme Court precedent recognizes the power of Congress to engage in oversight of any matter related to its legislative function. And even while there is no explicit provision in the Constitution authorizing congressional oversight, the Supreme Court has declared that that power is so essential as to be implicit in the general vesting of legislative authority in the Congress.... Congress's power in the oversight context certainly extends to the receipt of testimony from presidential advisers. Research conducted by my colleagues at CRS has revealed numerous instances where such advisers have testified before committees, effectively disposing of the argument that separation of powers principles impose a structural bar to the appearance of these advisers before Congress.... [T]he oversight process ... requires sustained and focused effort from members of Congress and their staff ... a robust oversight regime focusing on specific, substantive executive action taken in areas over which such advisers have political influence could be an extremely effective approach and would enable Congress as an institution to more forcefully assert its constitutional prerogatives and to ensure compliance with its enactments.[364]

Following the opening statements, Senator Feingold established for the record that none of the witnesses had appointments clause concerns "for so-called czars that are housed in federal agencies and report to Senate-confirmed officials." Several specific questions were then discussed. First, Senator Feingold asked "what would these [White House] advisers have to be doing ... that would trigger an appointments clause issue? And specifically, how should we analyze the widely reported duty that some of these officers have to ... 'coordinate policy development' ... between two or more departments?"[365] In response, Mr. Harrison replied,

> I think the sort of thing that would be problematic would be if someone like that were to do one of two things: one, to give an order to someone with actual legal authority that did not simply represent carrying forward the president's order, that was not just communicating the president's order; or were that person—and I think this is highly unlikely—to purport to take some actual binding measure himself or herself, for example, issuing a regulation or authorizing an expenditure, an exercise of formal legal authority.[366]

Mr. Spalding stated as an example that he found "to be somewhat troubling ... the climate czar being a chief negotiator, doing automobile emissions standards based on a Supreme Court interpretation of the Clean Air Act ... [Y]ou're now at several stages of separation, getting into some operational regulatory questions, not the EPA administrator, whom you have approved."[367] Responding to a similar question raised by Senator Sheldon Whitehouse later in the hearing, he

[363] Ibid., p. 10.

[364] Ibid., pp. 10-11.

[365] Ibid., p. 11.

[366] Ibid., p. 12.

[367] Ibid., p. 13.

cited as any instance "if an agent of the president is actually doing things that go to the extent of seeming to step on an officer that has been approved by Congress.... given the legislative instructions from Congress to carry out the law, that strikes me as potentially raising a serious issue."[368]

In another question, Senator Feingold queried whether the Senate should "be concerned about the possibility that an NSC [National Security Council] staffer may end up having more ability to influence foreign policy decisions than, say, a Senate-confirmed ... assistant secretary of state," given that "the NSC plays an important role in coordinating the work of different departments and agencies."[369] In response, Mr. Patterson noted that President Obama had not accepted the recommendation of the Project on National Security Reform "that the assistant to the president for national security affairs be confirmed by the Senate and be given a great deal more authority," and he didn't think "any future president would, either."[370] He further stated that recommendations of NSC staff members would be made to the President through the national security advisor.

Senator Coburn quoted the Special Master for TARP Executive Compensation, Kenneth Feinberg's statement that "I have the discretion conferred upon by Congress [sic] to attempt to recover compensation that has already been paid to executives"[371] and then asked for a legal analysis of the special master's position. In response, Mr. Harrison stated that two questions would have to be answered:

> So the question, first, would be whether the secretary of the treasury had the statutory authority to create that office pursuant to his authority under TARP or some other legislation and then whether he has appropriately exercised it so as to constitute Mr. Feinberg an inferior officer.... The second question—because he is an inferior officer, clearly not a principal or superior officer, because the Senate didn't confirm him—... would be whether he receives adequate supervision from a principal officer, someone who is Senate-confirmed, ... and to know that, you would need to know the extent to which he is overseen presumably by the secretary of the treasury, perhaps some other higher officer in the ... Department of the Treasury. There are a number of cases in the Supreme Court, in the lower courts about exactly how much supervision is required.... But the basic principle is that for an inferior officer to operate permissibly, the inferior officer has to be subject to substantial supervision from somebody higher up.... I don't think there's any difficulty with your calling an inferior officer to testify ... [Y]ou can call the secretary of the treasury, so you can find out about the legal nature of the relationship ... [Y]ou could find out about both sides, about whether the secretary thinks he's supervising Mr. Feinberg and how much supervision Mr. Feinberg thinks he's getting .... And I think the Treasury Department would have to take the position that Mr. Feinberg is at least—is an inferior officer, because I believe he is exercising some significant authority pursuant to the laws of the United States.[372]

Mr. Spalding testified that "Congress needs to be more careful in the types of legislative discretion it gives, which in many cases gave rise to the creation of these czars in the first place" and cited the TARP legislation as "a great example of that." He further explained, "do you give

[368] Ibid., pp. 18-19.

[369] Ibid., p. 13.

[370] Ibid.

[371] Ibid., pp. 14-15.

[372] Ibid., pp. 15-16.

too much discretion, which then allows for the type of policy this person is pursuing ... Is that actually violating your legislative direction to the officer, secretary of treasury, in carrying out your legislative intent?"[373] Building on Mr. Spalding's statements, Mr. Samahon reiterated the importance of statutes stating clearly who has the power to appoint, thereby making clear the "judgment of who is actually an inferior officer," and noted that, under the case of *Morrison v. Olson* "you could just be very, very powerful and therefore, deemed not an inferior officer."[374]

Senator Feingold asked Mr. Halstead "if he [Mr. Feinberg] is an inferior officer in the Treasury Department, is there any reason he can't be asked to" testify?[375] Mr. Halstead replied,

> No, not at all ... there are roughly 75 instances since ... the end of the World War II era where presidential advisers, high-level presidential advisers, have appeared before congressional committees. Now the fact that there's no structural separation of powers prohibition against the appearance of these individuals is a much different thing than saying it's going to be easy to get them to appear before Congress .... [when the invitation to testify is declined] at that point, it becomes a question for a committee and Congress as an institution as to whether or not to assert the institutional prerogatives and powers that it has to compel testimony from certain individuals .... [I]t's not uncommon as a practical matter for the Senate to obtain the commitment of a nominee to an advice and consent position that they will affirmatively agree to appear before the committee when requested .... to get a commitment from the secretary of the treasury or to any individual so appointed or to any other position that they would not only adhere to that agreement in relation to their general duties, but also to inquiries from the committee as to the impact that these advisers or other personnel are having on their carrying out or conduct of the legal authorities that are vested specifically in them.[376]

Responding to a question asked by Senator Coburn on a so-called "czar" perhaps exercising authority that he or she doesn't have by statute, Mr. Spalding expressed this viewpoint: "[T]he main question at issue is responsibility and accountability. One of the problems with the modern administrative state is it's not oftentimes clear who's actually responsible and thus who is accountable, especially from a ... congressional or executive point of view.... Congress could write clear laws that make these things known."[377]

Finally, Senator Feingold noted, "as chairman of the African Affairs Subcommittee of the Foreign Relations Committee, I've supported the appointment of a special envoy to Sudan. There's also a Senate-confirmed inferior officer who's the assistant secretary for the bureau of African affairs. Should I be concerned that this special envoy and his staff may unconstitutionally infringe ... or ignore the assistant secretary's authority?"[378] Mr. Harrison responded:

> I doubt an arrangement like that would create a constitutional question, provided that the special envoy was appointed appropriately as an inferior officer ... and the lines of authority were clearly drawn ... both in the statute and in whatever the president and the State Department set up.... the real concern is less constitutional ... and more practical. Any time you have overlapping responsibilities, it's extremely important that people know who ...

[373] Ibid., p. 16.

[374] Ibid., pp. 16-17.

[375] Ibid., p. 21.

[376] Ibid., pp. 21-22.

[377] Ibid., p. 24.

[378] Ibid., pp. 25-26.

> makes what decisions and ultimately ... who is in charge of actually acting for the United States.[379]

Responding to Senator Feingold's follow-up question, "And I take it a legitimate concern for the congressional oversight, regardless of whether it raises legal issues," he stated, "Making sure ... that the government is set up properly ... and is functioning properly is a central role of the Congress."[380]Mr. Samahon stated his view that, "I think there is potentially a problem ...

> [G]oing back to the OLC [Office of Legal Counsel] April 2007 opinion that, if one is exercising diplomatic functions, one would plainly seem to be an officer. What the question would then be is whether being a special envoy is a continuing office such that the second requirement for officerhood is met. If that's the case, then we have someone who should be subject to presidential nomination with Senate advice and consent.[381]

Mr. Halstead noted that, "With regard to congressional oversight prerogatives in such a context, the Supreme Court has stated that the ... oversight prerogatives of Congress are at their peak when looking into allegations of maladministration, governmental inefficiency ... So it would clearly be something that would be very suited for congressional inquiry."[382]

Senator Feingold concluded the hearing by stating that

> Administrations going back decades have created positions with important portfolios that are not subject to Senate approval. This is certainly not an isolated issue with the Obama administration ... Congress may need to act to make sure that, going forward, the proper checks and balances are in place.[383]

Senate Committee on Homeland Security and Governmental Affairs

The Senate Committee on Homeland Security and Governmental Affairs conducted a hearing entitled "Presidential Advice and Consent: The Past, Present, and Future of Policy Czars" on October 22, 2009.[384] In his opening statement, the chairman, Senator Joseph Lieberman, stated that these questions would be examined: "have presidents of both parties, including President Obama, consolidated power excessively in the White House through the appointment of these officials contrary to at least the spirit of the Constitution if not our laws, particularly as against the authority of members of the cabinet," .... "does the growing use of czars in the White House, in the administration this and past ones, frustrate Congress in carrying out its constitutional responsibility to oversee the expenditure of the public's money, which we appropriate,"[385] and

[379] Ibid., p. 26.

[380] Ibid.

[381] Ibid.

[382] Ibid., p. 27.

[383] Ibid.

[384] The opening statements and the witness statements are available, at http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=5b22e173-5b74-46a0-b2ab-d300b6381de4.

[385] Transcript obtained by subscription from *CQ.com* on U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, hearing on the Future of Policy Czars, 111th Congress, 1st sess., October 22, 2009, p. 1 of the transcript downloaded for printing. (Further information available from author.)

what can or should be Congress's response. Senator Susan Collins, the ranking member, expressed these concerns about "czars" in her opening statement:

> The proliferation of czars diminishes the ability of Congress to conduct its oversight responsibilities and to hold officials accountable for their actions. These czars can create confusion about which officials are responsible for various policy decisions. They can duplicate or dilute the statutory authority and responsibilities that Congress has conferred on cabinet officials and other senior executive branch officials .... In addition the proliferation of czars can circumvent the constitutionally mandated process of advice and consent. Czars can exercise considerable power and influence over major policy, and yet they are not required to clear the rigorous Senate confirmation process. Czars bypass this important constitutional protection through a unilateral grant of authority from the president .... Positions subject to Senate confirmation or otherwise recognized by our laws such as the director of national intelligence, the national security advisor and the chairman of the Recovery Accountability and Transparency Board do not raise the same concerns with accountability, transparency and oversight because they are recognized in law and because many of these positions are subject to Senate confirmation.[386]

Later, she provided an example to illustrate her concerns and discussed an amendment that she had offered during the Senate's consideration of the Department of the Interior, Environment, and Related Agencies Appropriations Act for FY2010:

> For example, I think Congress should be able to call the president's climate czar, Carol Browner, the energy and environmental czar, to ask her about the negotiations that she conducted with the automobile industry that led to very significant policy changes with regard to emission standards. I think that's particularly important because the Supreme Court in 2007 held that it was the Environmental Protection Agency that had that very responsibility under the Clean Air Act. And yet these negotiations were not undertaken by the EPA administrator, but rather by the White House czar .... [W]hat I offered on the Senate floor, but it fell to a point of order unrelated to the merits, is that ... the president make available to Congress to testify, upon a reasonable request, individuals who have responsibility for interagency development or coordination of any rule, regulation or policy and that it would apply to only those individuals who are without statutory authority ... the second half of the amendment also called on the president to provide us twice a year with a written summary of the activities of these officers within the White House.[387]

Senator Robert Bennett requested "as a point of personal privilege a few moments in an opening statement" to make remarks, that included the excerpts below, "Because the White House has specifically identified me as being hypocritical on this issue by virtue of my position with respect to a Y2K czar"[388]:

> In November of 1997 I requested that President Clinton appoint a Y2K czar. I was the chairman of the Y2K committee ... in the Congress to deal with a problem that ... cut across the entire government .... [I]n February of 1998 President Clinton appointed a Y2K czar, John Koskinen ... [O]ne of the first things ... [he] did ... was to call me ... and set up a pattern of regular consultation. Every Wednesday afternoon ... [he] called me ... and set up a pattern of regular consultation .... That was a very different situation than the situation described by

[386] Ibid., pp. 2-3.

[387] Ibid., pp. 32-33.

[388] Ibid., p. 4.

> Senator Collins and the letter which I saw .... the kind of circumstance we created then was very different from the kind of circumstance that we see now.[389]

Later, he expressed this observation:

> Congress passed a law creating the Council of Economic Advisers, and yet there is an economic czar, Paul Volcker ... And the question is, who has the president's ear on the economy? And then there's ... Larry Summers. And if you want to influence the president, if you're a member of the Congress, whom do you call? ... the Council of Economic Advisers? ... Larry Summers? Or ... Paul Volcker? ... we do happen to have a Cabinet officer of health and human services with whom I have never had a conversation about health care, not because I have any opposition to her but because it's my perception that Nancy-Ann DeParle is calling the shots rather than the Secretary Sebelius.[390]

Senator Claire McCaskill's opening remarks noted that

> [T]alking about the Y2K czar ... that was not confirmed by the Senate .... how ubiquitous the czar was working with the legislature that he was constantly around. I kept thinking of Nancy-Ann DeParle ... we can't walk down the hall without seeing her. She is in the chairman's offices constantly of the committees, and the ranking members. And she's visited across the aisle time after time ... So I think there is [sic] situations where a special advisor is created and that doesn't mean they're not working closely with Congress in order to solve a problem.[391]

During the discussion on White House advisors and testimony before Congress in the question and answer period, Senator Lieberman read this excerpt from the letter sent by Senator Robert Byrd to President Obama:

> Whether an executive official is confirmed by the full Senate or appointed by the president alone to serve on the White House staff, that official holds the position by virtue of the authority that the Congress has granted to the president. Such White House staffers receive a salary by virtue of the spending authority that Congress has granted to the executive branch. Even presidential assistants and advisors have a constitutional obligation to answer questions before the Congress, if it is necessary for the Congress to fulfill its constitutional oversight and investigative functions.[392]

Four witnesses presented testimony before the subcommittee. Each of the witnesses presented an opening statement. Among the viewpoints expressed in those statements were the following.

Thomas J. Ridge, former assistant to the President for homeland security, and Secretary of Homeland Security, discussed the importance of clear responsibilities for White House advisors:

> [P]residents have the discretion and authority to appoint advisors who can assist them in carrying out their presidential obligations. My interest ... reside[s] in the issues of effective management, transparency, and lines of authority. Who's reporting to whom? How specific is the job description? Does the individual initiate, coordinate or execute policy? To whom does that individual report? Is it the same person to whom the individual is accountable? ....

[389] Ibid., pp. 4-5.

[390] Ibid., p. 20.

[391] Ibid., p. 5.

[392] Ibid., p. 16.

> Some of today's White House czars have come to their positions with little public clarification of duty, and they already have a department of subject authority led by a Senate-approved secretary .... [D]o these individuals - these so-called 'czars' ... direct or develop policy? Are they accountable to the president, to the secretary, or to both? To whom do private constituencies look to provide input, guidance or opinion? Who resolves the conflict between the two? ... [W]ithout a clear delineation of responsibilities and reporting authority, this creates both a huge potential management problem and, clearly, the appearance of potential conflict ... [I]t can diminish the capacity of both advisor and secretary to operate effectively in accordance with the department's mission ... [F]rom time to time, it can cause confusion for those under the chain of command of the secretary, as well as outside the department purview.[393]

James P. Pfiffner, professor, School of Public Policy, George Mason University, discussed the role of White House advisors:

> [S]taff personnel certainly may have considerable power or influence as opposed to authority. But this power is entirely derivative of the president. White House staffers may communicate orders from the president, but they cannot legally give orders themselves ... White House staffers often make important decisions, but the weight of their decisions depend entirely on the willingness of the president to back them up .... White House czars play essential roles that lift the burden of coordination from the president. They help to reduce the range of options. But if the number of czars proliferate, they can clog and confuse presidential authority .... Czars may create layers between the president and Cabinet secretaries .... Members of Congress, as well as national leaders, may be confused as to the locus of authoritative decisions. Foreign leaders may not know who speaks for the president ... [C]zars can pull problems into the White House that could be, and should be, settled at the Cabinet level ... [O]nly those issues that are central to the president's policy agenda should be in the White House .... czars are often frustrated because they're supposed to be in charge of a policy area, but they do not have the authority commensurate with their responsibilities. Czars cannot enforce decisions on departments or agencies ... [They] control neither personnel nor budgets, and for these they must depend on Cabinet secretaries .... White House staffers enjoy proximity to the president ... Cabinet secretaries are often at a disadvantage in securing presidential attention.[394]

He also noted the role of Congress:

> The Framers of the Constitution ... placed Congress in Article I for a reason. In republican governments, the legislature should predominate in policymaking, as James Madison made clear in Federalist 51.[395]

Lee A. Casey, partner, Baker Hostetler, and former attorney-advisor, Office of Legal Counsel, U.S. Department of Justice, discussed the authority of White House advisors:

> [White House] advisors ... have no power beyond the fact that they are close to the president. They cannot transform executive branch policy into the policy of the United States. They can't sign regulations. They can't submit legislation to Congress. Their authority is very limited ... [I]t has been the consistent position of the Justice Department under both Republican and Democratic administrations that people in those advisory roles need not be

[393] Ibid., pp. 6-7.

[394] Ibid., p. 8.

[395] Ibid., p. 9.

> appointed in accordance with the Appointments Clause, that is by and with the advice and consent of the Senate ... [T]hey cannot take action that would create a legal obligation, either on behalf of the government or ... the citizenry at large. The president can implement policy and transform it into government policy, only through officers that have been appointed under the Appointments Clause, and who are responsible through the oversight process to Congress.[396]

During a discussion on testimony and documents from White House advisors, in the question and answer section of the hearing, he stated,

> Whenever you start getting close to advice that is prepared for and given to the president, you start, obviously, getting into some very difficult separation of powers issues. But to the extent that the czars who actually hold offices at the agencies, some of which have been confirmed by the Senate, undertake a policymaking role in addition to the role they serve in their office, that is fine ... so long as they do not attempt to exercise authority that was not otherwise properly delegated to them.[397]

Harold C. Relyea, former specialist in American national government, Congressional Research Service, Library of Congress, discussed the history of the use of policy "cars" by Presidents:

> For war mobilization, [Franklin D.] Roosevelt had at least three successive primary czars: William S. Knudsen at the Office of Production Management ... Donald Nelson, chairman of the War Production Board ... and James F. Byrnes, who led the Office of War Mobilization ... it also appears that these 'czars' were accountable to Congress. An examination of the April 1941 to April 1943 hearings of the ... Senate Special Committee Investigating the National Defense Program ... chaired by Senator Harry S. Truman ... indicate that Knudsen appeared once, his deputy appeared twice, and Nelson thrice.[398]

At the conclusion of his statement, Mr. Relyea suggested several options for Congress to consider:

> When a president prohibits congressional testimony by a czar or other presidential agent, efforts should be made to obtain the desired information in some other way, such as the provision of responsive, factual documents ... a Freedom of Information Act request ... or written answers to interrogatories, testimony by a department or agency official heading the unit in which the czar or presidential agent is located, or a briefing of congressional committee leaders or staff.
>
> The authorization [for the White House Office, Executive Office of the President, and the Office of the Vice President] might be revisited with a view to the adequacy of its allotments, ... reporting requirements and ... scope, should it be extended to other Executive Office entities.[399]

Following the opening statements, Senator Lieberman asked, with regard to White House advisors, what if they "actually begin to act like officers, that they are making decisions, they're forcing decisions on Cabinet secretaries ... What should our response be?"[400] In response, Mr.

[396] Ibid., p. 10.

[397] Ibid., p. 14.

[398] Ibid., p. 12.

[399] Ibid.

[400] Ibid., p. 14.

Casey stated that "to the extent they act like officers, their actions are not valid, their actions are not legally enforceable. A court will not enforce an order or a rule signed by a presidential advisor."[401] As follow-up questions, Senator Lieberman asked about the validity of claims that such advisors "should not be called to testify on their policy coordination" and whether Congress "should legislate to compel" White House advisors "to testify ... about the policy coordination role that they're playing?"[402] Mr. Casey noted that, "the advice someone gives directly to the president ... is clearly privileged" and stated that "it is difficult to think of a system ... regulating the independence of presidential advice ... that would not raise serious separation of powers issues."[403] To Mr. Ridge, "one of the challenges associated with the ability of Congress to even have a basis for inquiry, ... would be resolved, if, in making the appointment, there was public revelation of precisely the function that that advisor was going to play within the White House."[404] He added that he thought that Congress is not "in a position to do that, because ... the president hasn't outlined specifically what those coordinating responsibilities are."[405]

Senator Collins provided an "example of a czar position that I think is very troubling" and then asked the witnesses to comment:

> In 2007, this committee wrote legislation that became law that created within the Executive Office of the President a Senate-confirmed position to be coordinator for the prevention of weapons of mass destruction. And the coordinator's role—which is defined in this law—says that this individual should serve as the principal adviser to the president on all matters relating to the prevention of weapons of mass destruction, proliferation and terrorism .... This was to be a Senate-confirmed coordinator located within the Executive Office of the President. Now, neither President Bush nor President Obama ever filled this statutorily created position, but both of them created and filled a White House policy czar for weapons of mass destruction. That individual, the WMD czar, has exactly the same functions that were set forth in the law .... [T]his is ... a prime example of ... both presidents appointing a White House policy czar, which completely circumvents a statutorily confirmed position created by Congress.[406]

Both Mr. Ridge and Mr. Pfiffner responded that this circumstance is "very troubling." According to Mr. Ridge, "the conditions are ... so evident ... that your claim for this individual to testify before you should be legitimized – since you created the position, they filled it, but they didn't send a name to the Hill." To Mr. Pfiffner, "the fact that that confidential responsibility overlaps or duplicates a position that is supposed to be" a presidential appointment with consent of the Senate "is very troubling."[407] Mr. Casey stated that he did not "find it troubling" and suggested that perhaps, "why the office hasn't been filled" is "because there is a feeling that it's simply too close to the president's own authority," thereby raising "very serious separation of powers concerns."[408] Mr. Relyea noted: "in 1944, with [James] Byrnes at the head ... of the Office of War Mobilization [OWM], that was seen as too powerful in some regards. He was the president's agent ... appointed without Senate confirmation. OWM had been created by executive order. Congress said 'We're

[401] Ibid.

[402] Ibid., p. 15.

[403] Ibid.

[404] Ibid.

[405] Ibid., p. 16.

[406] Ibid.

[407] Ibid., p. 17.

[408] Ibid., p. 18.

going to reconstitute the office,' and they did by statute .... Set it up as a Senate-confirmed, statutorily created entity. I think that might be an answer here; that you eliminate, either by funding or by its role, this White House unit and ... [replace it with] a congressional creation."[409] Senator McCaskill, while noting that the Weapons of Mass Destruction Commission had recommended repeal of the WMD coordinator position because "they don't think it's an appropriate Senate-confirmed position," stated that she tended to agree with Senator Collins that "it would [be] incumbent to fill it, unless and until it is repealed."[410]

Senator Lieberman also queried whether "some of these positions that are now within the White House, that appear to be policy coordinating, not within the inner circle ... of the president" should be made statutory.[411] In response, Mr. Relyea noted that, "even though Congress creates ... a staff authorization for the White House office, provides the funds for the White House office personnel, thus far ... Congress has not seen fit to invade that domain and has left it to the president."[412] Mr. Casey stated: "I think the real question is whether by creating one of these offices, you can then effectively prevent the president from looking to someone else to be his adviser on the issue. And I think that, ... is where the constitutional problem is .... it raises very serious separation of powers issues. I'm not exactly sure what the courts would do."[413] Mr. Pfiffner suggested, as a solution, "comity between the branches from both sides, so the president doesn't keep trying to keep things away from Congress ... And that Congress doesn't get too heavy handed, on the other hand."[414] Mr. Ridge cautioned that, "if you decide to legislate ... don't undermine the credibility and the function of the secretary who, ultimately ... is accountable to you."[415]

Later, during the discussion of Senator Collins' amendment to the Department of the Interior, Environment, and Related Agencies Appropriations Act for FY2010, Mr. Relyea asked whether consideration had been given to "legislation that would overturn the implementation capacity in that executive order," referring to the type of document issued by the President for some of the White House advisor positions.[416]

Senator Lieberman concluded the hearing by stating that "I think we both [he and Senator Collins] share a desire to do something about this to help Congress uphold our constitutional responsibility for oversight. But ... we understand the balance here, as reflected in the Constitution."[417]

[409] Ibid., pp. 18-19.

[410] Ibid., p. 28.

[411] Ibid.

[412] Ibid., p. 30.

[413] Ibid.

[414] Ibid., p. 31.

[415] Ibid.,

[416] Ibid., p. 35.

[417] Ibid., p. 36.

Appendix.

Table A-1. Selected Legislation Introduced in the 112th and 111th Congresses Related to Selected Appointments in the Administration of Barack Obama, as of July 14, 2011

Legislation	Sponsor	Date Introduced
	112th Congress	
H.R. 59	Rep. Steve Scalise	1/5/2011
H.Con.Res. 3	Rep. Marsha Blackburn	1/5/2011
H.R. 1473 (Sec. 2262, P.L. 112-10, 4/15/2011)	Rep. Harold Rogers	4/11/2011
H.R. 2434 (Sec. 632)	Rep. JoAnn Emerson	7/7/2011
S.Amdt. 499 to S. 679	Sen. David Vitter	6/22/2011
	111th Congress	
H.Amdt. 49 to H.R. 3170	Rep. Jack Kingston	7/13/2009
H.R. 3226	Rep. Jack Kingston	7/15/2009
H.R. 3569	Rep. Steve Scalise	9/15/2009
H.Con.Res. 185	Rep. Marsha Blackburn	9/15/2009
H.R. 3613	Rep. Randy Neugebauer	9/22/2009
H.Res. 778	Rep. Jerry Moran	9/24/2009
S.Amdt. 2440 to H.R. 2996	Sen. David Vitter	9/17/2009
S.Amdt. 2498 to H.R. 2996	Sen. Susan Collins	9/22/2009
S.Amdt. 2548 to S.Amdt. 2440 to H.R. 2996	Sen. David Vitter	9/24/2009
S.Amdt. 2549 to H.R. 2996	Sen. David Vitter	9/24/2009
S. 3734	Sen. Russell Feingold	8/5/2010

Source: Legislative Information System (LIS) at http://www.congress.gov. Prepared by Jerry W. Mansfield, with 112th Congress updates prepared by Barbara L. Schwemle.

Note: The legislation is arranged by introduction date in the House of Representatives followed by the Senate. By selecting the bill number in the Legislation column, the current status may be determined.

Author Contact Information

Barbara L. Schwemle
Analyst in American National Government
bschwemle@crs.loc.gov, 7-8655

Vivian S. Chu
Legislative Attorney
vchu@crs.loc.gov, 7-4576

Todd B. Tatelman
Legislative Attorney
ttatelman@crs.loc.gov, 7-4697

Henry B. Hogue
Analyst in American National Government
hhogue@crs.loc.gov, 7-0642

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A team of CRS analysts, attorneys, and information research specialists contributed to the report, as noted in the table on key policy staff. Lorraine H. Tong, Analyst in American National Government, and Maureen Bearden, Information Research Specialist in the Government and Finance Division, also provided support and assistance.

Key Policy Staff

Area of Expertise	Name	Phone	E-mail
Executive Office of the President; White House Appointments	Barbara L. Schwemle	7-8655	bschwemle@crs.loc.gov
Political Appointments in the Federal Government	Henry B. Hogue	7-0642	hhogue@crs.loc.gov
U.S. Constitution, Congressional Oversight	Todd B. Tatelman	7-4697	ttatelman@crs.loc.gov
U.S. Constitution, Appointments Clause	Vivian S. Chu	7-4576	vchu@crs.loc.gov
Background Investigations and Security Clearances	Frederick M. Kaiser	7-8682	fkaiser@crs.loc.gov
Financial Disclosure and Outside Employment Limitations	Jack H. Maskell	7-6972	jmaskell@crs.loc.gov
Office of Management and Budget (OMB); Chief Performance Officer and Deputy Director for Management, OMB	Clinton T. Brass	7-4536	cbrass@crs.loc.gov
Office of Information and Regulatory Affairs(OIRA), OMB; Administrator of OIRA	Curtis W. Copeland	7-0632	cwcopeland@crs.loc.gov
Information Policy; Federal Chief Information Officer and Administrator, Office of Electronic Government, OMB	Wendy R. Ginsberg	7-3933	wginsberg@crs.loc.gov
Foreign Policy; Special Envoys and Special Representatives	Susan B. Epstein	7-6678	sepstein@crs.loc.gov
Information Research Specialist; Knowledge Services Group, Government and Finance Division	Jerry W. Mansfield	7-0106	jmansfield@crs.loc.gov