



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

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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 includes H.Amdt. 49 to H.R. 3170; H.R. 3226; H.R. 3569; H.Con.Res. 185; H.R. 3613; H.Res. 778; S.Amdt. 2440 to H.R. 2996; S.Amdt. 2498 to H.R. 2996; S.Amdt. 2548 to S.Amdt. 2440 to H.R. 2996; and S.Amdt. 2549 to H.R. 2996.

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. An Appendix provides tables showing selected appointments in the Administration of President Obama, the membership of the President’s Cabinet, and selected legislation, introduced in the 111th Congress, 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

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 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.

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. Hereafter 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.

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; Senator Russell Feingold, September 15, 2009, at http://feingold.senate.gov/pdf/ltr_091509_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>. On October 6, 2009, the Senate Committee on the Judiciary’s Subcommittee on the Constitution conducted a hearing on “Examining the History and Legality of Executive Branch ‘Czars.’” To view copies of the written statements, see <http://judiciary.senate.gov/hearings/hearing.cfm?id=4098>.

Background³

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,"⁴ 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."⁵ 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."⁶ 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.⁷ Some components, such as the White House Office (WHO),⁸ Office 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.⁹

³ Barbara L. Schwemle, Analyst in American National Government in the Government and Finance Division (7-8655), wrote this section.

⁴ 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. Hereafter 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.

⁵ *Ibid.*, p. 46.

⁶ Reorganization Act of 1939, April 3, 1939, ch. 36, 53 Stat. 561 (1939).

⁷ 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).

⁸ The term "White House" is used in common parlance to denote various groupings of entities (e.g., the White House 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.

⁹ 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 RL34523, *Financial Services and General Government (FSGG): FY2009 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 R40685, *Interior, Environment, and Related Agencies: FY2010 Appropriations*, coordinated by Carol Hardy Vincent, and CRS Report R40644, *Commerce, Justice, Science, and* (continued...)

Notwithstanding these continuing functions, a President may have need for special assistance that a new White House office or position may provide.¹⁰ 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.¹¹

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.¹² Succeeding Presidents 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 1998.¹³

(...continued)

Related Agencies: FY2010 Appropriations, coordinated by Nathan James, Oscar R. Gonzales, and Jennifer D. Williams.

¹⁰ 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.

¹¹ 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. Hereafter 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.

¹² The description of the cartoon is taken from the catalog card: U.S. Library of Congress, Prints and Photographs Division, Cartoon Collection, Call number CD 1-Berryman (C.K.), no. 182 (A size)<P&P>[P&P], and Zimmer on Czars.

¹³ 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. Hereafter referred to as Czar Wars.

In the current Administration, President Obama has 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 are not subject to Senate confirmation, the incumbents of which have been 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.”¹⁴ Further, the incumbents of some other positions which 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, are also being referred to as “czars.” Several Special Envoy or Special Representative positions, such as the Special Envoy for the Middle East, are being similarly described.

Selected Views on Special Assistants and Their Roles¹⁵

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.”¹⁶ 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 would not constitute either an additional institution or certainly not an independent one, but rather an extension of the Presidency itself.¹⁷

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.’”¹⁸

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

¹⁴ 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.

¹⁵ Barbara L. Schwemle, Analyst in American National Government in the Government and Finance Division (7-8655), wrote this section.

¹⁶ Overview of Presidential Staffing, pp. 46, 55.

¹⁷ *Ibid.*, p. 56.

¹⁸ Arthur M. Schlesinger, Jr., *The Cycles of American History* (New York: Houghton Mifflin, 1986), pp. 333-334, quoting the executive order. Hereafter referred to as *Cycles of American History*.

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.¹⁹

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).²⁰

The title of special assistant conveys “a sense of action” and the individual is frequently announced, sometimes with considerable fanfare,²¹ as one who will “knock heads,” “cut red tape,” and “ensure coordinated effort.”²² Whether such an appointee ultimately performs his or 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.²³

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:

¹⁹ 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.

²⁰ 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.

²¹ 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.

²² White House Staff, p. 264.

²³ Alexis Simendinger, “Agents of Change,” *National Journal*, January 10, 2009, pp. 18-19.

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.²⁴

More generally, the size of the White House staff is sometimes raised as a concern when presidential appointments are discussed.²⁵ Some caution that too many advisors may insulate the President, diminishing his “direct influence and dilut[ing] the impact of his personal leadership.”²⁶ 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.”²⁷

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.²⁸

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.²⁹ 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.³⁰ 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

²⁴ Czar Wars, p. 18.

²⁵ 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.

²⁶ *Cycles of American History*, p. 334.

²⁷ *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.”

²⁸ John Mead Flanagan, “Less is More: A New Staff Structure for the White House,” *Presidential Studies Quarterly*, vol. 25, issue 2 (Spring 1995), pp. 212-213.

²⁹ Overview of Presidential Staffing, p. 68.

³⁰ 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).

exceptions, a collection of faceless clerks.”³¹ 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.³²

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.”³³

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 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.³⁴

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.”³⁵ 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

³¹ Cycles of American History, p. 334.

³² 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.

³³ 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.”

³⁴ 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.

³⁵ Overview of Presidential Staffing, p. 56.

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.”³⁶ 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.”³⁷

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.”³⁸ Several options for congressional oversight of presidential advisors are discussed later, below.

Pay and Reporting Requirements for White House Staff³⁹

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 (\$177,000, as of January 2009) and 25 employees at salaries that may not exceed Executive Schedule Level III (\$162,900, as of January 2009).⁴⁰

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-16⁴¹ of the General Schedule (GS) but which is less than

³⁶ 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.

³⁷ 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.

³⁸ CRS Report RL30240, *Congressional Oversight Manual*, by Frederick M. Kaiser et al..

³⁹ Barbara L. Schwemle, Analyst in American National Government in the Government and Finance Division (7-8655), wrote this section.

⁴⁰ 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.

⁴¹ References in laws to the rates of pay for GS-16, 17, or 18, or to maximum rates of pay under the General Schedule, (continued...)

- 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 by the committees. President Obama submitted the most recent report to Congress on July 1, 2009, and had it posted on the White House website.⁴²

Vetting of Appointees⁴³

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

(...continued)

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 (\$117,787, as of January 2009) to either EX Level III (\$162,900, as of January 2009) or EX Level II (\$177,000, as of January 2009), depending on whether an agency’s performance management system has been certified by the Office of Personnel Management.

⁴² The White House, “Annual Report to Congress on White House Staff,” July 1, 2009; <http://www.whitehouse.gov/blog/Annual-Report-to-Congress-on-White-House-Staff-2009/>. Hereafter referred to as Annual Report on White House Staff.

⁴³ Henry B. Hogue, Analyst in American National Government in the Government and Finance Division (7-0642), wrote this section.

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,⁴⁴ 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. Some of the 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 Investigations⁴⁵

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.⁴⁶

⁴⁴ 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.whitehouse.gov/the_press_office/PressBriefingbyPressSecretaryRobertGibbs. The lengthy questionnaire adopted by the then-incoming Obama Administration contains 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) are 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."

⁴⁵ Frederick M. Kaiser, Specialist in American National Government in the Government and Finance Division (7-8682), wrote this section.

⁴⁶ 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.

*Suitability Checks and Security Clearances*⁴⁷

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.⁴⁸ Consequently, each follows its own set of 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*⁴⁹

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.⁵⁰ 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.⁵¹

*EOP Background Checks*⁵²

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.⁵³ It provides not only for background investigations and completion of an appropriate questionnaire but also empowers the President to exempt individuals from its demands:

⁴⁷ Frederick M. Kaiser, Specialist in American National Government in the Government and Finance Division (7-8682), wrote this section.

⁴⁸ 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>.

⁴⁹ Frederick M. Kaiser, Specialist in American National Government in the Government and Finance Division (7-8682), wrote this section.

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

⁵¹ P.L. 103-329, 108 Stat. 2425.

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

⁵³ P.L. 103-329, 108 Stat. 2425; 3 U.S.C. prec. § 101.

(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.⁵⁴

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.⁵⁵ E.O. 13467 includes a determination of who is covered:

“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.⁵⁶

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).⁵⁷ 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

⁵⁴ 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>.

⁵⁵ 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.

⁵⁶ Sec. 1.3(g), *ibid*.

⁵⁷ 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.

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.⁵⁸

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.⁵⁹ 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.”⁶⁰ 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.”⁶¹

Financial Disclosure⁶²

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.⁶³ 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.”⁶⁴ 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.⁶⁵

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.⁶⁶ This financial disclosure statement is filed

⁵⁸ Sec. 1.3(b), *ibid.*

⁵⁹ 60 *Federal Register*, 40245, August 7, 1995.

⁶⁰ *Ibid.*

⁶¹ “Security Requirements for Government Employment,” 18 *Federal Register* 2489, April 27, 1953.

⁶² Jack H. Maskell, Legislative Attorney in the American Law Division (7-6972), wrote this section.

⁶³ 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.

⁶⁴ 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).

⁶⁵ 5 U.S.C. § 105(b)(1).

⁶⁶ 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 (continued...)

with the designated agency ethics officer of the agency in which the nominee will serve,⁶⁷ and copies of the report are transmitted by the agency to the Director of the Office of Government Ethics (OGE).⁶⁸ The Director of OGE then transmits a copy to the Senate committee which is considering the nomination of that individual.⁶⁹

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.⁷⁰ Generally speaking, the 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.⁷¹ 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.”⁷² 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.”⁷³ 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.⁷⁴

Outside Employment Limitations⁷⁵

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.⁷⁶ The term “Presidential appointee to a full-time noncareer position” is defined in the ethics regulations issued by OGE as follows:

(...continued)

Executive Office of the President. 5 C.F.R. § 2634.605(c)(1).

⁶⁷ 5 C.F.R. § 2634.602(a).

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

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

⁷⁰ 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).

⁷¹ 5 C.F.R. § 2634.904(a).

⁷² 5 C.F.R. § 2634.903(a).

⁷³ 5 C.F.R. § 2634.904(b).

⁷⁴ *Id.*

⁷⁵ Jack H. Maskell, Legislative Attorney in the American Law Division (7-6972), wrote this section.

⁷⁶ E.O. 12674 (modified by E.O. 12731), April 12, 1989, Section 102. See now 5 C.F.R. §§ 2635.804, 2636.302.

(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.⁷⁷

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 1989.⁷⁸ 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.⁷⁹ 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.⁸⁰

⁷⁷ 5 C.F.R. § 2635.804(c)(2).

⁷⁸ P.L. 101-194, Title VI, 103 Stat. 1760, November 30, 1989; see now 5 U.S.C. app. §§ 501 *et seq.*

⁷⁹ 5 U.S.C. app. § 501(a). As of January 2009, the compensation for a Level II of the Executive Schedule was \$177,000, and 15% of that amount was \$26,550.

⁸⁰ 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.

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 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.⁸¹

⁸¹ 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.

- *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.⁸²

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.⁸³

Appointed by the President to White House Office Positions

*Assistant to the President and Deputy National Security Advisor for Counterterrorism and Homeland Security*⁸⁴

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.”⁸⁵ The appointment has 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.”⁸⁶ During remarks at the 45th Munich Conference on Security Policy, on

⁸² 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.

⁸³ 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.

⁸⁴ Barbara L. Schwemle, Analyst in American National Government in the Government and Finance Division (7-8655), wrote this section.

⁸⁵ “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/.

⁸⁶ 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.

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.”⁸⁷ 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,

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.⁸⁸

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.⁸⁹

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.

Mr. Brennan’s salary, as of July 1, 2009, is \$172,200. The FY2010 budget justification for the EOP that accompanied the submission of the President’s budget to Congress includes funding for

⁸⁷ 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/.

⁸⁸ 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.

⁸⁹ CRS Report RL30840, *The National Security Council: An Organizational Assessment*, by Richard A. Best Jr., pp. 23-24.

various components within the EOP, including the White House Office and the National Security Council. The justification does not provide specific budget and staff data for the HSC; the only specific mention of the HSC is that program increases for the NSC will fund “*Presidential Study Directive 1* recommendations with respect to the NSC and [HSC] integration.”⁹⁰ Included under the HSC are some 56 staff positions, 10 of which are vacant, according to a spring 2009 listing.⁹¹

*Assistant to the President for Energy and Climate Change*⁹²

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. As of October 1, 2009, 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, 2009.⁹³ 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.”⁹⁴ 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.⁹⁵

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

⁹⁰ U.S. Executive Office of the President, *Fiscal Year 2010 Congressional Budget Submission* (Washington: 2009), p. NSC-3.

⁹¹ *Federal Directory Executive, Legislative, Judicial*, (Bethesda: Carroll Publishing, Spring 2009), pp.107-108. Hereafter referred to as Federal Directory.

⁹² Barbara L. Schwemle, Analyst in American National Government in the Government and Finance Division (7-8655), wrote this section.

⁹³ 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.

⁹⁴ “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/.

⁹⁵ Margaret Kriz, “Power Player,” *National Journal*, January 31, 2009, p. 23. Hereafter 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."⁹⁶

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."⁹⁷

Ms. Browner's salary, as of July 1, 2009, is \$172,200. The FY2010 budget justification for the EOP that accompanied the submission of the President's budget to Congress, does not provide specific budget and staff data for her office. Included under the office are five staff members.⁹⁸

*Deputy Assistant to the President and Director, White House Office of Urban Affairs*⁹⁹

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."¹⁰⁰ 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;

⁹⁶ 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.

⁹⁷ Andrew C. Revkin, "Obama Aide Concedes Climate Law Must Wait," *New York Times*, October 3, 2009, p. A11.

⁹⁸ Federal Directory, p. 105, and Annual Report on White House Staff.

⁹⁹ Barbara L. Schwemle, Analyst in American National Government in the Government and Finance Division (7-8655), wrote this section.

¹⁰⁰ 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/.

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.¹⁰¹

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.”¹⁰² 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.”¹⁰³

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, CO, Los Angeles, CA, and Atlanta, GA, among other cities, as part of the President’s sustainable cities initiative.

Mr. Carrion’s salary, as of July 1, 2009, is \$158,500. The FY2010 budget justification for the EOP that accompanied the submission of the President’s budget to Congress, does not provide specific budget and staff data for his office. Included under the office are two staff members.¹⁰⁴

¹⁰¹ 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.

¹⁰² 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.

¹⁰³ 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-at-Urban-and-Metropolitan-Roundtable/.

¹⁰⁴ Federal Directory, p. 105, and Annual Report on White House Staff.

*Counselor to the President and Director, White House Office of Health Reform*¹⁰⁵

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.¹⁰⁶ 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.”¹⁰⁷ During a press briefing on that day, the President characterized Ms. DeParle as an “excellent partner at the White House” to 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.”¹⁰⁸ 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;

¹⁰⁵ Barbara L. Schwemle, Analyst in American National Government in the Government and Finance Division (7-8655), wrote this section.

¹⁰⁶ 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.

¹⁰⁷ 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/.

¹⁰⁸ 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.

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.¹⁰⁹

President Obama stated that Ms. DeParle would be interacting with Governors "on a regular basis" as the health care agenda moved forward.¹¹⁰ Reportedly, she "has a standing biweekly meeting with [Senator Max] Baucus."¹¹¹ On April 15, 2009, the Kaiser Family Foundation featured her in a newsmaker briefing.¹¹² 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; written 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.

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."¹¹³ A September 28, 2009, post on the White House blog responded to conflict of interest concerns.¹¹⁴

¹⁰⁹ 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.

¹¹⁰ 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.

¹¹¹ David D. Kirkpatrick, "Obama Taking an Active Role in Health Talks," *New York Times*, August 13, 2009, p. A1.

¹¹² The video of the briefing may be viewed at <http://www.kff.org/healthreform/hr041509video.cfm>.

¹¹³ 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.

¹¹⁴ 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/>.

Ms. DeParle's salary is \$158,500, as of July 1, 2009. The FY2010 budget justification for the EOP that accompanied the submission of the President's budget to Congress, does not provide specific budget and staff data for her office. Included under the office are two staff members.¹¹⁵

Chief Performance Officer and Deputy Director for Management, Office of Management and Budget(OMB)¹¹⁶

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.¹¹⁷ 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.¹¹⁸ 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.¹¹⁹ 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.¹²⁰ 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.¹²¹ On June 10, 2009, the Senate Committee on Homeland Security and Governmental Affairs held a confirmation hearing for Mr. Zients for the DDM position.¹²² By this time, the White House

¹¹⁵ Federal Directory, p. 105, and Annual Report on White House Staff.

¹¹⁶ Clinton T. Brass, Analyst in Government Organization and Management in the Government and Finance Division (7-4536), wrote this section.

¹¹⁷ 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/.

¹¹⁸ 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.

¹¹⁹ U.S. President (Obama), "Letter from Nancy Killefer to President Obama," February 3, 2009, at http://www.whitehouse.gov/the_press_office/LetterfromNancyKilleferToPresidentObama/.

¹²⁰ 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/.

¹²¹ U.S. Office of Management and Budget, "OMB Leadership Bios," at http://www.whitehouse.gov/omb/organization_office/.

¹²² 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 (continued...)

website had dropped references to the CPO as being a White House position that reports directly to the President.¹²³ On June 19, 2009, the Senate confirmed Mr. Zients's nomination to be DDM by unanimous consent.¹²⁴ On July 1, 2009, the White House released a listing of White House Office employees.¹²⁵ 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.¹²⁶

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."¹²⁷ In addition, the CPO would "work with federal agencies to set tough performance targets and hold managers responsible for progress."¹²⁸ In turn, the President would meet "regularly with cabinet officers to review the progress their agencies are making toward meeting performance improvement targets."¹²⁹ 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.¹³⁰ Among other things, agencies were directed to identify

(...continued)

CPO position is not statutory in nature and therefore is not subject to Senate confirmation.

¹²³ 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 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>.

¹²⁴ "Executive Calendar," Executive Session, *Congressional Record*, daily edition, vol. 155, part 93 (June 19, 2009), pp. S6840-S6841.

¹²⁵ 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)).

¹²⁶ 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.

¹²⁷ 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.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ 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/assets/memoranda_fy2009/m09-20.pdf.

“high-priority performance goals.” The memorandum also instructed agencies to include certain performance information and termination proposals in FY2011 budget submissions.

The DDM position was established by statute in 1990, and appointees to the position are subject to Senate confirmation.¹³¹ The DDM reports to the Director of OMB.¹³² The position’s pay is set statutorily at Level II of the Executive Schedule.¹³³ 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.¹³⁴ 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,”¹³⁵ 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*¹³⁶

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.”¹³⁷ 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).¹³⁸ 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.¹³⁹

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

¹³¹ 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).

¹³² 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.

¹³³ 5 U.S.C. § 5313.

¹³⁴ 31 U.S.C. § 503.

¹³⁵ 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.

¹³⁶ Curtis W. Copeland, Specialist in American National Government in the Government and Finance Division (7-0632), wrote this section.

¹³⁷ 44 U.S.C. 3503.

¹³⁸ *Ibid.*

¹³⁹ 44 U.S.C. 3504(a) and (c), respectively.

final rule to OMB before publication in the *Federal Register*.¹⁴⁰ The order authorized OMB to 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.¹⁴¹ 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.¹⁴² 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.¹⁴³ The George W. Bush Administration amended Executive Order 12866 somewhat, but the Obama Administration reversed those amendments shortly after taking office.¹⁴⁴

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.

¹⁴⁰ 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.

¹⁴¹ E.O. 12498, “Regulatory Planning Process,” 50 *Federal Register* 1036, January 8, 1985.

¹⁴² 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.

¹⁴³ 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.

¹⁴⁴ 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.

*Federal Chief Information Officer and Administrator, Office of Electronic Government, OMB*¹⁴⁵

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.¹⁴⁶ 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 William 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.¹⁴⁷ Several years later, mixed results from the agency-level CIOs rejuvenated debate over whether a single, federal CIO position should be instituted.¹⁴⁸

From the outset of the George W. Bush Administration, information technology issues were an integral part of the President's 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,"¹⁴⁹ 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 would also "lead the development and implementation of federal information technology policy."¹⁵⁰

The E-Government Act of 2002 established the Office of Electronic Government within OMB, and this office was to be headed by the Administrator for E-Government and Information Technology.¹⁵¹ The act provided that the position was to be filled through appointment by the President alone, and Mr. Forman was so appointed on April 16, 2003.¹⁵² Statutory duties of the Administrator include assisting 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."¹⁵³ Among those relevant OMB responsibilities were prescribing guidelines and regulations for agency implementation of the Privacy Act,¹⁵⁴ the Clinger-Cohen Act, IT acquisition pilot programs, and the Government Paperwork Elimination

¹⁴⁵ Wendy R. Ginsberg, Analyst in Government Organization and Management in the Government and Finance Division (7-3933), wrote this section.

¹⁴⁶ For example, see S. 946 (104th Congress).

¹⁴⁷ E.O. 13011, "Federal Information Technology," 61 *Federal Register* 37657, July 19, 1996.

¹⁴⁸ 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.

¹⁴⁹ U.S. Office of Management and Budget, "News Release: Mark Forman Named Associate Director for Information Technology and E-Government," June 14, 2001, at <http://www.whitehouse.gov/omb/rewrite/pubpress/2001-13.html>.

¹⁵⁰ *Ibid.*

¹⁵¹ P.L. 107-347, §101, December 17, 2002; 116 Stat. 2901; 44 U.S.C. §3602.

¹⁵² See Forman biography at <http://georgewbush-whitehouse.archives.gov/government/forman-bio.html>.

¹⁵³ P.L. 107-347.

¹⁵⁴ 5 U.S.C. §552a.

Act.¹⁵⁵ 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, issued by then-President William Clinton. 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.¹⁵⁶

The Deputy Director of OMB serves as the chair of the council.¹⁵⁷

In September 2003, Karen Evans was appointed the Administrator for E-government and Information Technology, serving until President Bush left office.¹⁵⁸

The position was vacant until March 5, 2009, when President Barack Obama appointed Vivek Kundra, former chief technology officer in Washington, DC's city government, to serve as the federal CIO.¹⁵⁹ 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 press release announcing Mr. Kundra's appointment, 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.¹⁶⁰

¹⁵⁵ 112 Stat. 2681-749.

¹⁵⁶ P.L. 107-347.

¹⁵⁷ Currently, 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>.

¹⁵⁸ 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, at http://www.nextgov.com/nextgov/ng_20090305_9385.php?oref=search.

¹⁵⁹ On March 12, Mr. Kundra reportedly took temporary leave of his position when the Federal Bureau of Investigation (FBI) raided his former Washington, DC, office. Mr. Kundra was reinstated when it was clear 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, at <http://www.federaltimes.com/federal-times-blog/2009/03/12/breaking-former-office-of-federal-cio-raided/>.

¹⁶⁰ The White House, Office of the Press Secretary, "President Obama Names Vivek Kundra Chief Information Officer," press release, March 5, 2009, at http://www.whitehouse.gov/the_press_office/President-Obama-Names-Vivek-Kundra-Chief-Information-Officer/.

President Obama's FY2010 budget recommendations included few comments about the Chief Information Officer. The *Analytical Perspectives* budget document said "Leadership for IT management is assigned to the Federal Chief Information Officer (CIO) in [OMB]."¹⁶¹ 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. According to *Analytical Perspectives*, 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)."¹⁶²

During his April 18, 2009, radio address, President Obama announced his selection of two additional components of his technology team: Jeffrey Zients to serve as Chief Performance Officer¹⁶³ and Aneesh Chopra as Chief Technology Officer. When announcing these selections 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.¹⁶⁴

No further details have been released that describe how the CIO, Chief Performance Officer, and Chief Technology Officer are to interact. It is unclear how each position reports or relates to the others. The Administration has also not explicitly clarified how the responsibilities of the CIO position in the Obama Administration differ from or augment those of the statutorily established Administrator for E-Government and Information Technology.

In his first few months as the federal CIO, Mr. Kundra has contributed to the White House blog on issues related to federal IT investments and cloud computing, among other initiatives.¹⁶⁵ On June 30, 2009, Mr. Kundra held an online forum answering questions related to the newly created IT Dashboard (<http://it.usaspending.gov/>), which "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."¹⁶⁶ 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."¹⁶⁷

¹⁶¹ U.S. Office of Management and Budget, *Analytical Perspectives: Budget of the U.S. Government, Fiscal Year 2010* (Washington: GPO, March 2009), p. 155, at <http://www.whitehouse.gov/omb/budget/fy2010/assets/spec.pdf>.

¹⁶² *Ibid.*

¹⁶³ For more on the Chief Performance Officer, see above.

¹⁶⁴ 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, at http://www.whitehouse.gov/the_press_office/Weekly-Address-President-Obama-Discusses-Efforts-to-Reform-Spending/.

¹⁶⁵ 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, September 15, 2009, at <http://www.whitehouse.gov/blog/Streaming-at-100-In-the-Cloud/>.

¹⁶⁶ "IT Dashboard: FAQ, For Public," at <http://it.usaspending.gov/?q=content/faq>.

¹⁶⁷ Vivek Kundra, *Streaming at 1:00: In the Cloud*, The White House, September 15, 2009.

Appointed by Agency Heads

*Assistant Secretary for International Affairs and Special Representative for Border Affairs, Department of Homeland Security*¹⁶⁸

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.¹⁶⁹

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.¹⁷⁰ 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 coordinator that can be directly responsible to Secretary Napolitano and ultimately directly accountable to me."¹⁷¹

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."¹⁷²

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:

¹⁶⁸ Henry B. Hogue, Analyst in American National Government in the Government and Finance Division (7-0642), wrote this section.

¹⁶⁹ 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.

¹⁷⁰ 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/document/display.do?dockey=cqonline/prod/data/docs/html/news/111/news111-000003097214.html@allnews&metapub=CQ-NEWS&searchIndex=0&seqNum=2>.

¹⁷¹ U.S. President (Obama), *Daily Compilation of Presidential Documents*, (April 15, 2009), p. 3.

¹⁷² 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/.

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 [sic] 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 [sic] of Customs and Border Protection. Do you have any concerns about having another individual with 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 don't. My understanding of Mr. Bersin's role is that, as you say, he is an adviser. His principle [sic] responsibility is one of facilitation and coordination among the many components within the department that have some responsibilities along the border, but that it is not an operational one. The secretary fully intends and expects that whomever is confirmed as the assistant secretary for Immigrations [sic] 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's exactly what I plan to do....

Senator Collins followed with an additional question:

I'm 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 principle [sic] policy advisor to the secretary on those matters within the jurisdiction of the agency. I wouldn't have taken—you know accepted the nomination if I felt otherwise.

Senator Collins stated the following:

Thank you. That's 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.¹⁷³

The position to which Bersin was appointed seemingly comprises 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

¹⁷³ U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, hearing on nominations to positions in the Federal Emergency Management Agency and U.S. Immigration and Customs Enforcement, 111th Cong., 1st sess., April 22, 2009. Transcript obtained, by subscription, from *CQ.com* (further information available from author).

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.”¹⁷⁴

The position of Assistant Secretary for International Affairs is descended from a position that was established at the time the DHS was created. The Office of International Affairs was originally mandated by Section 879 of the Homeland Security Act.¹⁷⁵ Under the act, this office, which was part of the Office of the Secretary, was headed by a director appointed by the Secretary. The 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.”¹⁷⁶ 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.¹⁷⁷ 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.”¹⁷⁸ 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.¹⁷⁹ Alan Bersin was appointed in the same manner.¹⁸⁰

¹⁷⁴ 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>.

¹⁷⁵ 116 Stat. 2245; 6 U.S.C. § 459.

¹⁷⁶ U.S. Department of Homeland Security, “Statement by Secretary of Homeland Security Michael Chertoff before the House Appropriations Homeland Security Subcommittee,” testimony, March 2, 2005, at http://www.dhs.gov/xnews/testimony/testimony_0032.shtm. 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.

¹⁷⁷ 116 Stat. 2243; 6 U.S.C. § 452.

¹⁷⁸ 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).

¹⁷⁹ Telephone conversation between Henry B. Hogue and a DHS representative, December 22, 2005.

¹⁸⁰ 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 (continued...)

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."¹⁸¹

On September 22, 2009, the White House announced the President's intention to nominate Bersin to be Commissioner of U.S. Customs and Border Protection at the Department of Homeland Security. An appointment to this position would be subject to the advice and consent of the Senate.

*Special Master for TARP Executive Compensation, Department of the Treasury*¹⁸²

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.¹⁸³ 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.¹⁸⁴

(...continued)

the President with the advice and consent of the Senate.

¹⁸¹ U.S. Department of Homeland Security, "Office of International Affairs" at http://www.dhs.gov/xabout/structure/editorial_0874.shtm. This website was last updated on October 10, 2008.

¹⁸² Henry B. Hogue, Analyst in American National Government in the Government and Finance Division (7-0642), wrote this section.

¹⁸³ 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.treas.gov/press/releases/tgl65.htm>.

¹⁸⁴ 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),¹⁸⁵ which, among other things, amended Section 111 of the Emergency Economic Stabilization Act of 2008 (EESA).¹⁸⁶ Section 111, as amended, provides for restrictions on the compensation of executives of companies that have received TARP funds during the time this financial assistance remains outstanding.¹⁸⁷ The section directs 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.¹⁸⁸ This rule directs 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.¹⁸⁹

The interim final rule also lays out the authorities and responsibilities of the special master. The supplementary information preceding the rule describes 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

¹⁸⁵ P.L. 111-5; 123 Stat. 115. See Div. B, Title VII; 123 Stat. 516.

¹⁸⁶ P.L. 110-343; 122 Stat. 3765; 12 U.S.C. 5221.

¹⁸⁷ 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.

¹⁸⁸ U.S. Department of the Treasury, “TARP Standards for Compensation and Corporate Governance, Interim Final Rule,” 79 *Federal Register* 28394, June 15, 2009.

¹⁸⁹ *Ibid.*, p. 28420.

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.¹⁹⁰

Feinberg reportedly has been serving in this position without pay.¹⁹¹

*Special Advisor for Green Jobs, Enterprise, and Innovation, Council on Environmental Quality*¹⁹²

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.¹⁹³

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.¹⁹⁴ Under this statute, the council comprises three members, appointed by the President, with the advice and consent of the Senate.¹⁹⁵ 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 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."¹⁹⁶

Soon after CEQ was established, the Environmental Quality Improvement Act of 1970¹⁹⁷ 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

¹⁹⁰ *Ibid.*, p. 28404.

¹⁹¹ 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.

¹⁹² Henry B. Hogue, Analyst in American National Government in the Government and Finance Division (7-0642), wrote this section.

¹⁹³ 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, at http://www.whitehouse.gov/administration/eop/ceq/press_releases/march_10_2009/.

¹⁹⁴ P.L. 91-190, Title II; 83 Stat. 854.

¹⁹⁵ 42 U.S.C. § 4342.

¹⁹⁶ P.L. 111-8, Division E, Title III; 123 Stat. 739.

¹⁹⁷ P.L. 91-224, Title II, 84 Stat. 114.

and OEQ are collectively referred to as the Council on Environmental Quality, and the CEQ chair ... serves as the Director of OEQ.”¹⁹⁸

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
8. to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.¹⁹⁹

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

¹⁹⁸ United States National Archives and Records Administration, Office of the Federal Register, *United States Government Manual 2008/2009* (Washington: GPO, 2008), p. 91.

¹⁹⁹ 42 U.S.C. § 4344.

- 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.²⁰⁰

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*.²⁰¹ The Director of OEQ has similar authority.²⁰²

According to an agency representative, the position of Special Advisor for Green Jobs was established under these authorities.²⁰³ The responsibilities delegated to this position were derived from those laid out in the provisions detailed above. The incumbent of this position oversees a staff of five; one paid staff, three detailees from other agencies, and one Presidential Management Fellow. He or she reports to the chief of staff of the council.

Jones reportedly resigned on September 6, 2009, subsequent to public controversy related to past statements and political affiliations.²⁰⁴ Although Jones had not been replaced as of September 28, 2009, the council reportedly plans to refill the position.²⁰⁵

*Special Envoys or Special Representatives*²⁰⁶

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

²⁰⁰ 42 U.S.C. § 4372(d).

²⁰¹ 42 U.S.C. § 4343.

²⁰² 42 U.S.C. § 4372(c).

²⁰³ Telephone communication between Henry B. Hogue and a CEQ representative, September 28, 2009.

²⁰⁴ 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.

²⁰⁵ Telephone communication between Henry B. Hogue and a CEQ representative, September 28, 2009.

²⁰⁶ 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.

- 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;
- Richard Holbrooke, Special Representative for Afghanistan and Pakistan, announced January 22, 2009, by Secretary of State Clinton;
- George Mitchell, Special Envoy for the Middle East, announced January 22, 2009, by Secretary of State Clinton;
- Dennis Ross, Special Advisor for the Persian Gulf and Southwest Asia, announced February 23, 2009, by Secretary of State Clinton;²⁰⁷ and
- Todd Stern, Special Envoy for Climate Change, announced January 26, 2009, by Secretary of State Clinton.²⁰⁸

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.²⁰⁹

Appointments Clause and Presidential Advisors²¹⁰

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.²¹¹ The Appointments Clause establishes that the President

²⁰⁷ Mr. Ross transferred to the National Security Council on July 4, 2009. According to the Department of State, his salary, while at the department, was \$177,000. President Obama appointed a Special Envoy: Major General J. Scott Gration, U.S. Special Envoy for Sudan, announced on March 18, 2009.

²⁰⁸ The salary for the positions held by Mr. Bosworth, Mr. Fried, Mr. Holbrooke, Mr. Mitchell, and Mr. Stern is \$177,000.

²⁰⁹ See 22 U.S.C. §2731.

²¹⁰ Vivian S. Chu, Legislative Attorney in the American Law Division (7-4576), wrote this section.

²¹¹ 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,” Wash. Post, September 13, 2009; (4) “President Obama’s ‘Czars,’” Politico, September 4, 2009).

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.²¹²

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.²¹³ Thus, it seems evident that the President cannot establish executive offices.²¹⁴ 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.²¹⁵ 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.²¹⁶ Accordingly, because the Appointments Clause has been deemed “among the significant structural safeguards of the constitutional scheme,”²¹⁷ Congress is to ensure that it

²¹² U.S. Const., art. II, § 2, cl. 2.

²¹³ 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).

²¹⁴ Saikrishna B. Prakash, “Fragmented Features of the Constitution’s Unitary Executive,” 45 Willamette L. Rev. 701, 719 (2009).

²¹⁵ 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).

²¹⁶ See e.g., *Buckley*, 424 U.S. 1 (Congress may not appoint executive officials performing substantial functions under 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).

²¹⁷ *Edmond v. United States*, 520 U.S. 651, 659 (1997).

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,²¹⁸ 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.²¹⁹

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.”²²⁰ 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.”²²¹

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 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.²²² 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.²²³ Given the nature of the duties assigned by law to the FEC, the Court concluded that the FEC was

²¹⁸ See, e.g. 3 U.S.C. § 105 *et seq.*

²¹⁹ As mentioned above, Congress may choose to make the appointments of those considered inferior officers also subject to Senate confirmation.

²²⁰ *Buckley*, 424 U.S. at 126, n. 162.

²²¹ *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”).

²²² *Buckley*, 424 U.S. at 113.

²²³ *Id.* at 137.

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."²²⁴ 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.²²⁵ 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).²²⁶ 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.²²⁷ 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."²²⁸ 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 principal and inferior officer for Appointments Clause purposes, but rather, as we said in *Buckley*, the line between officer and non-officer."²²⁹

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.²³⁰

²²⁴ *Id.* at 138.

²²⁵ *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)).

²²⁶ *Id.* at 126.

²²⁷ *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).

²²⁸ *Id.* at 269-70 (J. White concurring).

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

²³⁰ 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

A subsequent OLC opinion discusses two essential elements of an office subject to the Appointments Clause.²³¹ 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.”²³² 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.”²³³

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.”²³⁴ 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.²³⁵

In other words, “the nature of the delegated sovereign authority will affect whether a temporary position is an office.”²³⁶ For example, although the special independent counsel position in *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.”²³⁷

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

²³¹ See *Officers of the United States Within the Meaning of the Appointments Clause*, 2007 WL 1405459 at *3 (OLC) (April 16, 2007).

²³² *Id.* at *10.

²³³ *Id.* at *17 (internal quotations omitted, quoting *Opinion of the Justices*, 3 Greenl. at 482).

²³⁴ *Id.* at *30 (internal quotations omitted).

²³⁵ *Id.*

²³⁶ *Id.* (“The Constitution requires an examination of ‘the nature of the functions devolved upon’ a position by legal authority.”) *Id.* at *35.

²³⁷ *Id.* at *32.

Appointments Clause, and conversely, a position that does not satisfy either of these elements need not be filled pursuant to the clause.²³⁸

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,²³⁹ it has acknowledged that its “cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes.”²⁴⁰ 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.”²⁴¹ 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.²⁴² 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.”²⁴³ 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 is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.”²⁴⁴ 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.²⁴⁵

²³⁸ *Id.* at *39.

²³⁹ 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).

²⁴⁰ *Edmond*, 520 U.S. at 661.

²⁴¹ *Morrison v. Olson*, 487 U.S. 654, 671 (1988) (finding that the independent counsel clearly falls on the inferior side of the line).

²⁴² *Id.* at 671-672.

²⁴³ *Silver v. United States Postal Service*, 951 F.2d 1033, 1040 (9th Cir. 1991).

²⁴⁴ *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., *dissenting*).

²⁴⁵ See Dellinger Memo at *30.

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.²⁴⁶ 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).²⁴⁷ 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.²⁴⁸ Additionally, the Director has the power to “select, appoint, employ, and fix compensation of the officers and employees that may be necessary to carry out the functions of the Office.”²⁴⁹ 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.²⁵⁰

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

²⁴⁶ 21 U.S.C. § 1702(a).

²⁴⁷ 21 U.S.C. § 1703(a)(1).

²⁴⁸ 21 U.S.C. § 1703(b).

²⁴⁹ 21 U.S.C. § 1703(d).

²⁵⁰ 21 U.S.C. § 1714.

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.²⁵¹ 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 American 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.²⁵²

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 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.²⁵³

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,²⁵⁴ the Director

²⁵¹ Exec. Order No. 13503, 74 Fed. Reg. 8139, 8140 (February 24, 2009).

²⁵² Exec. Order No. 13503, 74 Fed. Reg. 8139 (February 24, 2009).

²⁵³ Exec. Order No. 13503, 74 Fed. Reg. 8140 (February 24, 2009).

²⁵⁴ 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 (continued...)

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)²⁵⁵ 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),²⁵⁶ 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.”²⁵⁷ 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
- perform other such duties as the Secretary may delegate from time to time relating to executive compensation issues under TARP.²⁵⁸

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.²⁵⁹ The regulations also provide that in the case of any final determination that a

(...continued)

in Exec. Order Nos. 13499 and 13500.

²⁵⁵ P.L. 110-343; 123 Stat. 3767

²⁵⁶ 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).

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 28404.

²⁵⁹ *Id.* at 28420.

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.”²⁶⁰

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.²⁶¹ 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 exercised then the position and appointment is to be made in accordance with the strictures of the Appointments Clause.

²⁶⁰ *Id.* at 28432.

²⁶¹ 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.

Congressional Oversight of Presidential Advisors²⁶²

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.²⁶³ 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."²⁶⁴ 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."²⁶⁵ The Court went on to note that the first Congresses held "inquiries dealing with suspected corruption or mismanagement of government officials."²⁶⁶ 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."²⁶⁷ 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."²⁶⁸

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."²⁶⁹ 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 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

²⁶² Todd B. Tatelman, Legislative Attorney in the American Law Division (7-4697), wrote this section.

²⁶³ 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); *Barenblatt 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).

²⁶⁴ 354 U.S. at 187.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 182.

²⁶⁷ *Id.* at 200, n.33.

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

²⁶⁹ *Eastland v. United States Servicemen's Fund*, 421 U.S. at 504.

employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it.²⁷⁰

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”²⁷¹ 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.²⁷²

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.²⁷³ 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”²⁷⁴ from congressional oversight and “wholly unaccountable”²⁷⁵ 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,²⁷⁶ while congressional oversight has, as discussed above, been repeatedly considered by the Supreme

²⁷⁰ *McGrain*, 273 U.S. at 175; see also *Buckley v. Valeo*, 424 U.S. 1, 138 (1976), *Eastland*, 421 U.S. at 504-505.

²⁷¹ *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

²⁷² *Watkins v. United States*, 354 U.S. at 187.

²⁷³ *United States v. Rumely*, 345 U.S. 41, 42, 44 (1953); see also *Watkins*, 354 U.S. at 198.

²⁷⁴ 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.

²⁷⁵ Congressman Eric Cantor, Op-Ed., *Obama’s 32 Czars*, WASH. POST, July 30, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/29/AR2009072902624.html?referrer=emailarticle>.

²⁷⁶ 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 Law: ...”)

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.²⁷⁷

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 that, since 1975, at least one committee or subcommittee has voted in contempt of Congress for failing to produce subpoenaed documents.²⁷⁸ 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.²⁷⁹

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.

²⁷⁷ 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.").

²⁷⁸ 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 et al.

²⁷⁹ CRS Report RL31351, *Presidential Advisers' Testimony Before Congressional Committees: An Overview*, by Henry B. Hogue and Todd B. Tatelman.

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.²⁸⁰ 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.²⁸¹

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.²⁸² 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,²⁸³ three have directly involved Congress and the Executive, but only one of these

²⁸⁰ See generally, CRS Report 95-464, *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry*, by Morton Rosenberg.

²⁸¹ See, e.g., *In Re Sealed Case (Espy)*, 121 F. 3d 729 (D.C. Cir. 1997).

²⁸² See Neil Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal-Do Nothing*, 48 Adm. L. Rev. 109 (1996).

²⁸³ *United States v. Nixon*, 418 U.S. 683 (1974); *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973); *Senate Select* (continued...)

resulted in a judicial decision on the merits.²⁸⁴ 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.²⁸⁵

Taken together, the holdings in several Watergate-era lower court decisions,²⁸⁶ the Supreme Court's decision in *United States v. Nixon*,²⁸⁷ 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."²⁸⁸ The privilege, however, is qualified, not absolute, and can be overcome by an adequate showing of need.²⁸⁹ 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.²⁹⁰

However, until the District of Columbia Circuit's 1997 ruling in *In re Sealed Case*,²⁹¹ and its 2004 ruling in *Judicial Watch Inc. v. Department of Justice*,²⁹² 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 it confined to presidential decision making and, if so, is it 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 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.²⁹³

(...continued)

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).

²⁸⁴ *Senate Select Committee*, 498 F.2d 725 (D.C. Cir. 1974).

²⁸⁵ *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

²⁸⁶ *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).

²⁸⁷ *United States v. Nixon*, 418 U.S. 683 (1974).

²⁸⁸ *Nixon v. Sirica*, 487 F.2d 750, 757 (D.C. Cir. 1973).

²⁸⁹ *Nixon*, 418 U.S. 706.

²⁹⁰ *United States v. AT&T*, 551 F.2d 384 (D.C. Cir. 1976), *appeal after remand*, 567 F.2d 121 (D.C. Cir. 1977)

²⁹¹ 121 F.3d 729 (D.C. Cir. 1997).

²⁹² 365 F.3d 1108 (D.C. Cir. 2004).

²⁹³ Neither case, however, involved congressional access to information.

In Re Sealed Case (Espy)

In *In re Sealed Case (Espy)*,²⁹⁴ 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."²⁹⁵

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."²⁹⁶ 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."²⁹⁷ The presidential privilege

²⁹⁴ 121 F.3d 729 (D.C. Cir. 1997).

²⁹⁵ *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.'").

²⁹⁶ *Id.* at 745, 752-53 ("... these communications nonetheless are ultimately connected with presidential decisionmaking").

²⁹⁷ *Id.* at 754, 757.

applies to all documents in their entirety²⁹⁸ and covers final and post-decisional materials as well as pre-deliberative ones.²⁹⁹

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.”³⁰⁰ 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.”³⁰¹

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”

²⁹⁸ 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.

²⁹⁹ *Id.* at 745.

³⁰⁰ *Id.* at 752.

³⁰¹ *Id.*

presidential advisers, the government bears the burden of proving that the communications occurred in conjunction with the process of advising the President.³⁰²

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."³⁰³ 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."³⁰⁴ 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.³⁰⁵

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*,³⁰⁶ 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."³⁰⁷ 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

³⁰² *Id.* (internal citations and footnotes omitted).

³⁰³ *Id.* at 752.

³⁰⁴ *Id.* at 752-53.

³⁰⁵ 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).

³⁰⁶ 418 U.S. 683 (1974).

³⁰⁷ 121 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.”³⁰⁸ 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.”³⁰⁹

Judicial Watch, Inc. v. Department of Justice

The District of Columbia Circuit’s 2004 decision in *Judicial Watch, Inc. v. Department of Justice*³¹⁰ 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.³¹¹ 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.³¹² 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.”³¹³

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.”³¹⁴ *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

³⁰⁸ *Id.* at 750.

³⁰⁹ *Id.* at 752.

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

³¹¹ 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.

³¹² 365 F.3d at 1109-12.

³¹³ *Id.* at 1112, 1114, 1123.

³¹⁴ *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.³¹⁵

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 swath of the executive branch a privilege that is bottomed on a recognition of the unique role of the President.³¹⁶

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.”³¹⁷ 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.”³¹⁸

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

³¹⁵ *Id.* at 1117.

³¹⁶ *Id.* at 1121-22.

³¹⁷ *Id.* at 1116.

³¹⁸ *Id.* at 1116-117.

advisors to be protected. The court conceded that functionally those officials were performing a 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.³¹⁹

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.”³²⁰ 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.³²¹

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

³¹⁹ *Id.* at 1118-24.

³²⁰ *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.

³²¹ 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).

advisors within the EOP, such as the Assistant to the President for Energy and Climate Change, 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 Consideration³²²

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

³²² Vivian S. Chu (7-4576) and Todd B. Tatelman (7-4697), Legislative Attorneys in the American Law Division, wrote this section.

additional accounting or justification to Congress about how those positions are filled or salary levels determined.³²³ 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.³²⁴

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*.³²⁵ In other words, Congress’s action needs to comply with the Constitution’s requirements for bicameralism and presentment.³²⁶ 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.

³²³ See 3 U.S.C. § 105 (2006).

³²⁴ *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).

³²⁵ 462 U.S. 919 (1983).

³²⁶ *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.”

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 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.³²⁷ 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).³²⁸ 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.³²⁹ 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.”³³⁰

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 3³³¹ 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,

³²⁷ See note 7 on the Office of Science and Technology Policy and the Office of National Drug Control Policy.

³²⁸ 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).

³²⁹ 1973 Congressional Quarterly Almanac at 712 (*citing* March 1, 1973 letter from Roy Ash to the House Government Operations subcommittee).

³³⁰ 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).

³³¹ 3 U.S.C. § 105 *et seq.*

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 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.³³² 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.³³³ 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.”³³⁴

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 Options³³⁵

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

³³² S. 590, 93d Cong., 1st Sess. (1973).

³³³ S.Rept. 93-47, at 7.

³³⁴ *Id.*

³³⁵ 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.

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 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.

Appendix.

Table A-1. Selected Legislation Introduced in the 111th Congress Related to Selected Appointments in the Administration of Barack Obama, as of October 1, 2009

Legislation	Sponsor	Date Introduced
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	7/15/2009
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

Source: Legislative Information System (LIS) at <http://www.congress.gov>. Prepared by Jerry W. Mansfield.

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.

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