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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 H. 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 used to 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 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 noticed these appointments and in the 111th Congress examined some of them. The Senate Subcommittee on the Constitution of the Committee on the Judiciary, and the Senate Committee on Homeland Security and Governmental Affairs, for example, conducted hearings on the “czar” issue on October 6, 2009, and October 22, 2009, respectively.

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 requirements of the Appointments Clause of the U.S. Constitution. A second issue of interest may be whether the activities of such appointees are subject to oversight by Congress.

This report provides background information and selected views on the role of some of these appointees. 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.

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Introduction¹

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.

A number of the appointments made by President Barack H. Obama to his Administration or by Cabinet Secretaries to their departments have been referred to, especially by the news media, as “czars.”² For some, the term is being used to convey an appointee’s title (e.g., climate “czar”) in shorthand. For others, it is used to convey a sense that power is being centralized in the White House or certain entities. When used in 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 noticed these appointments and in the 111th Congress examined some of them. The Senate Subcommittee on the Constitution of the Committee on the Judiciary, and the Senate Committee on Homeland Security and Governmental Affairs, for example, conducted hearings on the “czar” issue on October 6, 2009, and October 22, 2009, respectively.³

Legislative action has focused on prohibitions on the use of appropriated funds to compensate certain appointees. P.L. 113-76, the Consolidated Appropriations Act, 2014, enacted on January 17, 2014, prohibits the use of funds to pay the salaries and expenses for the (1) Director, White House Office of Health Reform; (2) Assistant to the President for Energy and Climate Change; (3) Senior Advisor to the Secretary of the Treasury assigned to the Presidential Task Force on the Auto Industry and Senior Counselor for Manufacturing Policy; and (4) White House Director of Urban Affairs.⁴ A similar provision was included in P.L. 112-74, the Consolidated Appropriations Act, 2012, enacted on December 23, 2011.⁵ Division C of the law included the Financial Services and General Government (FSGG) Appropriations Act. The Office of Management and Budget’s

¹ Barbara L. Schwemle, Analyst in American National Government in the Government and Finance Division (7-8655), wrote this section.

² The use of the term “czar” to refer to government officials is not new. In the 19th century, for example, these officials had that moniker attached to their names: Nicholas Biddle, President of the Bank of the United States, during the “bank wars”; Andrew Johnson, President of the United States, during Reconstruction; and Thomas Reed, Speaker of the House of Representatives, during disputes over the rules for the consideration of legislation. see Ben Zimmer, “Czar Wars,” *Slate*, December 29, 2008. Hereinafter referred to as Zimmer on Czars. Additionally, in the 20th century, President Calvin Coolidge appointed Herbert Hoover, the Secretary of Commerce, and gave him “near-absolute authority to organize and oversee” the federal government response to the Flood of 1927. See CRS Report RL33126, *Disaster Response and Appointment of a Recovery Czar: The Executive Branch's Response to the Flood of 1927*, by Kevin R. Kosar.

³ A summary of the hearings is included in this report.

⁴ Division E, §621, the Financial Services and General Government Appropriations Act, statutory citation not yet available.

⁵ Division C, §627, the Financial Services and General Government Appropriations Act, 125 Stat. 786, at 927.

Statement of Administration Policy on this provision reiterated the President’s authority with regard to appointments in stating that,

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

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 requirements of the Appointments Clause of the U.S. 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 background information and selected views on the role of some of these appointees, 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.

Background⁷

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, closely examined this need. The committee’s charge, “A careful study of the organization of the Executive branch of the Government ... with the primary purpose of considering the problem of administrative management,”⁸ resulted in a report that was submitted to the President and then released to Congress on January 12, 1937. Stating that, “The President needs help,” the committee

⁶ U.S. Executive Office of the President, Office of Management and Budget, *Statement of Administration Policy, H.R. 2434, Financial Services and General Government Appropriations Act, 2012*, July 13, 2011, pp. 4-5, available at http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr2434r_20110713.pdf. P.L. 112-10, the Department of Defense and Full-Year Continuing Appropriations Act, 2011, (H.R. 1473) enacted on April 15, 2011, included another similar provision. In the statement accompanying the signing of the bill, President Obama stated the following: Legislative efforts that significantly impede the President’s ability to exercise his supervisory and coordinating authorities or to obtain the views of the appropriate senior advisers violate the separation of powers by undermining the President’s ability to exercise his constitutional responsibilities and take care that the laws be faithfully executed. Therefore, the executive branch will construe section 2262 not to abrogate these Presidential prerogatives. See The White House, Office of the Press Secretary, “Statement by the President on H.R. 1473,” April 15, 2011, available at <http://www.whitehouse.gov/the-press-office/2011/04/15/statement-president-hr-1473>.

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

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

recommended that the President “should be given a small number of executive assistants who would be his direct aides in dealing with the managerial agencies and administrative departments of the Government.”⁹ The Reorganization Act of 1939 “empowered the President to propose plans of reorganization, subject to a veto by a majority of both houses of Congress, and to also appoint six administrative assistants.”¹⁰ On September 8, 1939, President Roosevelt issued Executive Order (E.O.) 8248, to create the enclave of federal agencies known as the Executive Office of the President (EOP). Many, if not most, of the President’s closest advisors and assistants on matters of policy, politics, administration, and management are within the EOP. Over time, some of the EOP’s components have been created by the President and others have been established by Congress.¹¹ Some components, such as the White House Office (WHO),¹² Office of Management and Budget (OMB, formerly the Bureau of the Budget), the Council of Economic Advisers, and the National Security Council, have endured to the present day, appearing to hold permanent status.¹³

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

No president is confined by the organization charts of the past.... A president’s priorities change—as do his views of the nation’s priorities—and may well expand in new directions. The White House, as the support center for furthering those priorities, will be flexible and

⁹ Ibid., p. 46.

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

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

¹² The term “White House” is used in common parlance to denote various groupings of entities (e.g., the White House 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.

¹³ For a history of the Executive Office of the President, see Harold C. Relyea, *The Executive Office of the President A Historical, Biographical, and Bibliographical Guide* (Westport, CT: Greenwood Press, 1997). The Financial Services and General Government appropriations bill provides funding for all but three offices under the EOP. See “Executive Office of the President and Funds Appropriated to the President,” by Barbara L. Schwemle in CRS Report R43352, *Financial Services and General Government (FSGG): FY2014 Appropriations*, coordinated by Baird Webel. Of the three exceptions, the Council on Environmental Quality and the Office of Environmental Quality are funded as a single unit 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 R43142, *Interior, Environment, and Related Agencies: FY2013 and FY2014 Appropriations*, by Carol Hardy Vincent, and CRS Report R43080, *Commerce, Justice, Science, and Related Agencies: FY2014 Appropriations*, coordinated by Nathan James, Jennifer D. Williams, and John F. Sargent Jr.

¹⁴ The President is not alone in seeking ways to address important public policy issues that cut across department and agency boundaries. Congress has established a range of interagency coordinative mechanisms for this purpose, including a number of officers that are charged with coordinating among multiple organizations. Among these are the Office of the Director of National Intelligence, the Office of National Drug Control Policy, and the newly created Intellectual Property Enforcement Coordinator (15 U.S.C. §8111). See also the archived CRS Report RL31357, *Federal Interagency Coordinative Mechanisms: Varied Types and Numerous Devices*, by Frederick M. Kaiser, and CRS Report R41803, *Interagency Collaborative Arrangements and Activities: Types, Rationales, Considerations*, by Frederick M. Kaiser. The latter report discusses the position of Director of National Intelligence (DNI) established by the Intelligence Reform and Terrorism Prevention Act of 2004. 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 the archived CRS Report RL34231, *Director of National Intelligence Statutory Authorities: Status and Proposals*, by Richard F. Grimmett.

will adapt to those changes. Its organizational structure will jump beyond the “continuing” arrangements. If a president wants to begin important new initiatives, to dramatize the extent of his personal commitment, to respond quickly to today’s crisis or tomorrow’s threat, he will be pressed to create new organizational forms to support his efforts.¹⁵

The “czar” moniker has been attached to some of these special assistant positions since at least the Administration of President Roosevelt.¹⁶ A cartoon drawn by Clifford Kennedy Berryman and published on September 7, 1942, probably in the *Evening Star* (Washington, DC), showed three of President Roosevelt’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.¹⁷ 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 1998.¹⁸

Early in his Administration, President Obama created several new positions, including the Assistant to the President for Energy and Climate Change, the Deputy Assistant to the President and Director of Urban Affairs, and the Director, White House Office of Health Reform, that were not subject to Senate confirmation, the incumbents of which were dubbed “czars.” Additionally, several sub-Cabinet-level positions that require Senate confirmation have similarly been termed “czars.” For example, David Hayes was referred to by some in the news media as the “water czar” during his tenure as Deputy Secretary at the Department of the Interior.¹⁹ Further, the incumbents of some other positions that are authorized in statute and subject to Senate confirmation, such as the Administrator of the Office of Information and Regulatory Affairs at the Office of Management and Budget, have also been referred to as “czars.” Several Special Envoy or Special Representative positions, such as the Special Envoy for the Middle East, have been similarly described.²⁰

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

¹⁶ See also, Harold C. Relyea, “The Coming of Presidential Czars and Their Accountability to Congress: The Initial Years: 1937-1945,” *White House Studies*, vol. 11, issue 1, (2011), pp. 1-20. See also, Mitchel A. Sollenberger and Mark J. Rozell, *The President’s Czars Undermining Congress and the Constitution* (Lawrence, Kansas: University of Kansas Press), 2012.

¹⁷ 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.

¹⁸ William W. Hogan, “Energy Modeling for Policy Studies,” *Operations Research*, vol. 50, issue 1 (January/February 2002), p. 89. According to this source, Mr. Love was “the first of a string of energy czars ... down through the Federal Energy Regulatory Administration and then the Department of Energy.” Today, Mr. Koskinen is referred to as the Y2K “czar,” but during the time that he served, the news media generally referred to him by his title, with just the headlines of several articles dubbing him the “Y2K guru” or the “millennium man.” Will Englund, “Czar Wars,” *National Journal*, February 14, 2009, pp. 21-22. Hereinafter referred to as Czar Wars.

¹⁹ 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.

²⁰ These positions were discussed in the section entitled “Selected Special Assistants and Advisors in the Obama (continued...)”

Selected Views on Special Assistants and Their Roles²¹

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.”²² 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.²³

Indeed, President Roosevelt’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.’”²⁴

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

This gives presidents a strong incentive to enhance their capacity by initiating reforms and making adjustments in the administrative apparatus surrounding them—but here too there is a fundamental imbalance: the resources for acting upon this strong incentive are wholly inadequate, constrained by political and bureaucratic opposition, institutional inertia, inadequate knowledge, and time pressures. It is this imbalance that channels presidential

(...continued)

Administration” in the first edition of this report, published on October 9, 2009 (available from CRS, by request). See a CRS Memorandum entitled “Selected Presidential Assistants and Advisors in the Administration of President Barack H. Obama,” by Barbara L. Schwemle and Henry B. Hogue, originally published on December 3, 2009, and updated on December 16, 2013, and a CRS Memorandum entitled “Selected Presidential Assistants and Advisors in the Administrations of Presidents Franklin D. Roosevelt Through Barack H. Obama,” by Barbara L. Schwemle, Henry B. Hogue, and Maureen Bearden, dated December 3, 2009. See also, Aaron J. Saiger, “Obama’s ‘Czars’ for Domestic Policy and the Law of the White House Staff,” *Fordham Law Review*, vol. 79, no. 6, (2011), pp. 2577-2615, and Jonathan D. Puvak, “Executive Branch Czars, Who Are They? Are They Needed? Can Congress Do Anything About Them?” *William and Mary Bill of Rights Journal*, vol. 19, no. 4, (2011), pp. 1091-1117.

²¹ Barbara L. Schwemle, Analyst in American National Government in the Government and Finance Division (7-8655), wrote this section.

²² Overview of Presidential Staffing, pp. 46, 55.

²³ *Ibid.*, p. 56.

²⁴ Arthur M. Schlesinger, Jr., *The Cycles of American History* (New York: Houghton Mifflin, 1986), pp. 333-334, quoting the executive order. Hereinafter referred to as *Cycles of American History*.

effort into areas of greatest flexibility and generates the major institutional developments we observe, politicization and centralization.²⁵

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).²⁶

The title of special assistant conveys “a sense of action” and the individual is frequently announced, sometimes with considerable fanfare,²⁷ as one who will “knock heads,” “cut red tape,” and “ensure coordinated effort.”²⁸ 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.²⁹

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

Budgetary power? Not clear. Accountability? Not to Congress. The capacity to dictate policy? Umm, probably not. The ability to impose solutions through sheer force of personality? In some cases, most likely yes.³⁰

²⁵ 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.

²⁶ 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.

²⁷ 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.

²⁸ White House Staff, p. 264.

²⁹ Alexis Simendinger, “Agents of Change,” *National Journal*, January 10, 2009, pp. 18-19.

³⁰ Czar Wars, p. 18.

More generally, the size of the White House staff is sometimes raised as a concern when presidential appointments are discussed.³¹ Some caution that too many advisors may insulate the President, diminishing his “direct influence and dilut[ing] the impact of his personal leadership.”³² 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.”³³

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.³⁴

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.³⁵ 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.³⁶ Mr. Schlesinger described the effect of concentrated power in the White House of President Richard Nixon, for example, as enfeebling the Cabinet, which “became, with few exceptions, a collection of faceless clerks.”³⁷ 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

³¹ 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.

³² *Cycles of American History*, p. 334.

³³ *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.”

³⁴ 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.

³⁵ Overview of Presidential Staffing, p. 68.

³⁶ 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.

³⁷ *Cycles of American History*, p. 334.

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.³⁸

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."³⁹

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.⁴⁰

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."⁴¹ The question of accountability reverberates today. One scholar who questions whether these positions should continue to be outside of the advice and consent of the Senate process has suggested that, "we need to seriously consider requiring Senate approval of senior White House staff positions." He recommends that such a requirement not become effective until January 2017, however, "To allow for thoughtful bipartisan deliberation" and to encourage Congress "to take the long view of whether senatorial confirmation is appropriate in terms of constitutional design."⁴² 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

³⁸ 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.

³⁹ 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."

⁴⁰ 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.

⁴¹ Overview of Presidential Staffing, p. 56.

⁴² 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.

... 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.”⁴³

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.”⁴⁴ Several options for congressional oversight of presidential advisors are discussed later, below.

Pay and Reporting Requirements for White House Staff⁴⁵

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 (\$181,500, salary became effective in January 2014) and 25 employees at salaries that may not exceed Executive Schedule Level III (\$167,000, salary became effective in January 2014).⁴⁶

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-16⁴⁷ of the General Schedule (GS) but which is less than the rate then currently paid for Level V of the Executive Schedule and the aggregate amount paid to such employees;

⁴³ 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.

⁴⁴ CRS Report RL30240, *Congressional Oversight Manual*, by Todd Garvey et al.

⁴⁵ Barbara L. Schwemle, Analyst in American National Government in the Government and Finance Division (7-8655), wrote this section.

⁴⁶ 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.

⁴⁷ References in laws to the rates of pay for GS-16, 17, or 18, or to maximum rates of pay under the General Schedule, are considered to be references to rates payable under 5 U.S.C. 5376 related to senior-level positions. Currently, basic pay for certain senior-level positions—positions classified above GS-15 (SL pay schedule) and scientific or professional positions (ST pay schedule)—ranges from 120% of the minimum rate of basic pay for GS-15 (\$120,749, salary became effective in January 2014) to either EX Level III (\$167,000, salary became effective in January 2014) or EX Level II (\$181,500, salary became effective in January 2014), depending on whether an agency’s performance management system has been certified by the Office of Personnel Management.

- 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. Section 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, 2013, and had it posted on the White House website.⁴⁸

Vetting of Appointees⁴⁹

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

The vetting process for presidential appointees is designed to examine the background of nominees to advice and consent positions and other appointees, to determine their suitability for a particular position, assess their professional and personal qualifications, and, in the case of the

⁴⁸ The White House, “Annual Report to Congress on White House Staff,” available at <http://www.whitehouse.gov/briefing-room/disclosures/annual-records/2013>. The 2009 through 2012 reports are also available on the website. Hereinafter referred to as Annual Report on White House Staff.

⁴⁹ Henry B. Hogue, Specialist in American National Government in the Government and Finance Division (7-0642), wrote this section.

former, gauge whether they would meet the confirmation demands of the Senate. The current process often includes a background investigation conducted by the Federal Bureau of Investigation (FBI) and a review of financial disclosure materials conducted by the U.S. Office of Government Ethics and an ethics official for the agency to which the candidate is to be appointed. The process might also include the review of a White House Personal Data Statement, or similar materials, by White House officials.⁵⁰ Some of the contours of the vetting process, such as financial disclosure requirements, are set in law. Other aspects of the vetting process, such as the content of White House data statement, if there is one, as well as the extent of background investigations, vary by Administration.

A smooth vetting process hinges, in large part, on the honesty and thoroughness in the response of the individual being vetted. Historically, prospective applicants and nominees have been forthcoming. But in unusual instances, an individual has intentionally withheld vital information or even deceived federal investigators about his or her activities, including possible criminal conduct.⁵¹

Background Investigations⁵²

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

⁵⁰ Additional information about the selection and clearance process for nominees to executive branch advice and consent positions can be found in a November 2012 study that was conducted pursuant to the enactment of P.L. 112-166, the Presidential Appointment Efficiency and Streamlining Act. See Working Group on Streamlining Paperwork for Executive Nominations, *Streamlining Paperwork for Executive Nominations: Report to the President and the Chairs and Ranking Members of the Senate Committee on Homeland Security and Government Affairs and the Senate Committee on Rules and Administration*, November 2012, at <http://www.hsgac.senate.gov/download/report-of-working-group-on-streamlining-paperwork-for-executive-nominations-final>. See also National Academy of Public Administration, *A Survivor's Guide for Presidential Nominees*, Washington, DC, 2013 Edition, at <http://www.napawash.org/wp-content/uploads/2013/05/SurvivorsGuide2013.pdf>.

⁵¹ An illustration of this during the vetting process involved Bernard B. Kerik, first, in 2002-2003, as an applicant to serve on an advisory committee in the Office of Homeland Security, and later, in 2004, as a nominee to head the Department of Homeland Security. (He withdrew his nomination in 2004, because of various concerns. See *2005 Congressional Quarterly Almanac*, p. 10-4; and *Congressional Quarterly Weekly*, January 17, 2004, p. 124.) In November of 2009, Mr. Kerik pleaded guilty in federal district court to several counts of "making false statements to the federal government," including directly to White House officials, in emails to the same, on his Personal Data Questionnaire from the White House Counsel, and on Form 450 (Executive Branch Confidential Financial Disclosure Report). The indictments are recorded at United States District Court, Southern District of New York (White Plains), *United States of America v Bernard B. Kerik*, Indictment S1 07 Cr. 1027 (SCR), December 2, 2008; and United States District Court for the District of Columbia, *United States v Bernard B. Kerik*, Case 1:09-cr-00142-RMC, filed 05/26/2009, which was later transferred to the Southern District Court. The guilty pleas for the cases titled "USA v. Bernard B. Kerik," are recorded at United States District Court for the Southern District of New York (White Plains), *Criminal Docket for Case #: 7:09-cr-10171-SCR-1*, filed 11/05/2009; and *Criminal Docket for Case #: 7:07-cr-01027-SCR-1*, filed 11/08/2009. For press coverage, see Sam Dolnick, "Kerik Confesses to Cheating I.R.S. and Telling Lies," *New York Times*, November 6, 2009, p. A3; and Jim Fitzgerald, "Kerik pleads guilty to tax crimes, lying to White House; prison time sought," *Washington Post*, November 6, 2009, p. A20.

⁵² Henry B. Hogue, Specialist in American National Government in the Government and Finance Division (7-0642), wrote this section.

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.⁵³

Investigations for vetting purposes differ from those for security clearances. The former may be under severe time constraints and secrecy may surround the names of the candidates. The latter may require a longer time frame and have no secrecy surrounding the identity of the individual.

*Suitability Checks and Security Clearances*⁵⁴

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 assessment is governed by its own executive orders, administrative directives, and public laws.⁵⁵ Consequently, each assessment 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.

⁵³ 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.

⁵⁴ Michelle D. Christensen, Analyst in Government Organization and Management (7-0764), and Frederick M. Kaiser, Visiting Scholar and formerly Specialist in American National Government in the Government and Finance Division (7-8682), wrote this section. For background and further information on the security clearance process, see CRS Report R43216, *Security Clearance Process: Answers to Frequently Asked Questions*, by Michelle D. Christensen and Frederick M. Kaiser; and CRS Congressional Distribution Memorandum, "Security Clearance Process: Recent Development and Continuing Challenges," by Michelle D. Christensen and Frederick M. Kaiser. (Copies of this memorandum are available to the congressional community from its authors.)

⁵⁵ Distinctions between the two are spelled out in several regulations, including 5 C.F.R. 731, 732, and 736. Additionally, OPM has developed a Position Designation System (PDS) and an automated Position Designation Tool (PDT) to help agencies determine which type of background investigation is required for each position within an agency. OPM's Position Designation System (PDS) is available at <http://www.opm.gov/investigations/background-investigations/position-designation-tool/oct2010.pdf>. OPM's automated Position Designation Tool (PDT) is available at <http://www.opm.gov/investigations/background-investigations/position-designation-tool/tabs/automated-tool>. The costs for the various background investigations are available in OPM, *Investigations Reimbursable Billing Rates for Fiscal Year (FY) 2014*, Federal Investigations Notice 13-07, August 30, 2013, available at <http://www.opm.gov/investigations/background-investigations/federal-investigations-notices/2013/fin13-07.pdf>. Questionnaires for applicants or employees also differ between security and suitability checks: OPM, Questionnaire for Non-Sensitive Positions (SF-85), at http://www.opm.gov/forms/pdf_fill/sf85.pdf; and Questionnaire for Public Trust Positions (SF-85P), at http://www.opm.gov/forms/pdf_fill/sf85p.pdf, both for suitability checks; and Questionnaire for National Security Positions (SF-86) for security clearances, at http://www.opm.gov/forms/pdf_fill/sf86.pdf. The Electronic Questionnaires for Investigations Processing (e-QIP) system is available at <http://www.opm.gov/investigations/e-qip-application>.

*Investigations Related to Secret Service Protective Responsibilities*⁵⁶

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.⁵⁷ 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.⁵⁸

*EOP Background Checks and Presidential Discretion*⁵⁹

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.⁶⁰ It provides not only for background investigations and completion of an appropriate questionnaire but also empowers the President to exempt individuals from its demands:

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

(b) Exemption. Subsection (a) shall not apply to any individual specifically exempted from such subsection by the President or his designee.⁶¹

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.⁶² E.O. 13467 includes a determination of who is covered:

⁵⁶ Michelle D. Christensen, Analyst in Government Organization and Management (7-0764), and Frederick M. Kaiser, Visiting Scholar and formerly Specialist in American National Government in the Government and Finance Division (7-8682), wrote this section.

⁵⁷ 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: History and Missions*, by Shawn Reese.

⁵⁸ P.L. 103-329, 108 Stat. 2425.

⁵⁹ Michelle D. Christensen, Analyst in Government Organization and Management (7-0764), and Frederick M. Kaiser, Visiting Scholar and formerly Specialist in American National Government in the Government and Finance Division (7-8682), wrote this section.

⁶⁰ P.L. 103-329, 108 Stat. 2425; 3 U.S.C. prec. §101.

⁶¹ Title VI, §632 of P.L. 103-329. 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/Federal-Investigation-Forms/>.

⁶² E.O. 13467, "Reforming Processes Relating to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information," 73 *Federal Register* 38103-38108, July 2, 2008.

“Covered individual” means a person who performs work for or on behalf of the executive branch, or who seeks to perform work for or on behalf of the executive branch, but does not include:

(i) the President or (except to the extent otherwise directed by the President) employees of the President under section 105 or 107 of title 3, United States Code; or

(ii) the Vice President or (except to the extent otherwise directed by the Vice President) employees of the Vice President under section 106 of title 3 or annual legislative branch appropriations acts.⁶³

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 in the White House Office (§105) and in the Domestic Policy Staff and Office of Administration (§107).⁶⁴ 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” (§106).

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

“Agency” means any “Executive agency” as defined in section 105 of title 5, United States Code, including military departments, as defined in section 102 of title 5, United States Code, and any other entity within the executive branch that comes into possession of classified information or has designated positions as sensitive, except such an entity headed by an officer who is not a covered individual.⁶⁵

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.⁶⁶ 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.”⁶⁷ 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.”⁶⁸

⁶³ §1.3(g), *ibid.*

⁶⁴ The Office of Administration was created by §2 of Reorganization Plan No. 1 of 1977 in order to centralize Administration functions in EOP. (3 U.S.C. prec. §101. For full text of Reorganization Plan No. 1 of 1977, see Appendix of Title 5, *U.S. Code*.) 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.

⁶⁵ §1.3(b), *ibid.*

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

⁶⁷ *Ibid.*

⁶⁸ “Security Requirements for Government Employment,” 18 *Federal Register* 2489, April 27, 1953.

Financial Disclosure⁶⁹

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.⁷⁰ 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.”⁷¹ 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.⁷²

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.⁷³ This financial disclosure statement is filed with the designated agency ethics officer of the agency in which the nominee will serve,⁷⁴ and copies of the report are transmitted by the agency to the Director of the Office of Government Ethics (OGE).⁷⁵ The Director of OGE then transmits a copy to the Senate committee which is considering the nomination of that individual.⁷⁶

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.⁷⁷ Generally speaking, the

⁶⁹ Jack H. Maskell, Legislative Attorney in the American Law Division (7-6972), wrote this section.

⁷⁰ 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.

⁷¹ 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).

⁷² 5 U.S.C. §105(b)1).

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

⁷⁴ 5 C.F.R. §2634.602(a).

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

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

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

confidential reporting requirements apply to certain lower-level or “rank and file” employees, that is, those officers or employees who are compensated below the threshold rate of pay for public disclosures (GS-15 or below, or less than 120% of the basic rate of pay for a GS-15), *and* who are determined by the employee’s agency to perform duties or exercise responsibilities in regard to government contracting or procurement, government grants, government subsidies or licensing, government auditing, or other governmental duties which may particularly require the employee to avoid financial conflicts of interest.⁷⁸ 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.”⁷⁹ 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.”⁸⁰ 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.⁸¹

Outside Employment Limitations⁸²

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.⁸³ The term “Presidential appointee to a full-time noncareer position” is defined in the ethics regulations issued by OGE as follows:

(2) *Presidential appointee to a full-time noncareer position* means any employee who is appointed by the President to a full-time position described in 5 U.S.C. 5312 through 5317 [the Executive Schedule] or to a position that, by statute or as a matter of practice, is filled by Presidential appointment, other than:

(i) A position filled under the authority of 3 U.S.C. 105 or 3 U.S.C. 107(a) for which the rate of basic pay is less than that for GS-9, step 1 of the General Schedule;

(ii) A position, within a White House operating unit, that is designated as not normally subject to change as a result of a Presidential transition;

(iii) A position within the uniformed services; or

(iv) A position in which a member of the foreign service is serving that does not require advice and consent of the Senate.⁸⁴

⁷⁸ 5 C.F.R. §2634.904(a).

⁷⁹ 5 C.F.R. §2634.903(a).

⁸⁰ 5 C.F.R. §2634.904(b).

⁸¹ *Id.*

⁸² Jack H. Maskell, Legislative Attorney in the American Law Division (7-6972), wrote this section.

⁸³ E.O. 12674 (modified by E.O. 12731), April 12, 1989, Section 102. See now 5 C.F.R. §§2635.804, 2636.302.

⁸⁴ 5 C.F.R. §2635.804(c)(2).

Statutory Limitations. In addition to the complete ban on outside income for “full-time” presidential appointees under the executive order, federal law limits the *amount* of compensation that may be earned by certain other federal officials, and the *types* of paid outside work in which such officials may engage, under provisions of the Ethics Reform Act of 1989.⁸⁵ 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.⁸⁶ 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.⁸⁷

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

⁸⁵ P.L. 101-194, Title VI, 103 Stat. 1760, November 30, 1989; see now 5 U.S.C. app. §§501 *et seq.*

⁸⁶ 5 U.S.C. app. §501(a). As of January 2014, the compensation for a Level II of the Executive Schedule was \$181,500, and 15% of that amount was \$27,225.

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

the case of positions not under the General Schedule, for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for a GS-15 of the General Schedule, and who is:

(1) Appointed by the President to a position described in the Executive Schedule, 5 U.S.C. 5312 through 5317, or to a position that, by statute or as a matter of practice, is filled by Presidential appointment, other than:

(i) A position within the uniformed services; or

(ii) A position within the foreign service below the level of assistant Secretary or Chief of Mission;

(2) A noncareer member of the Senior Executive Service or of another SES-type system, such as the Senior Foreign Service;

(3) Appointed to a Schedule C position or to a position under an agency-specific statute that establishes appointment criteria essentially the same as those set forth in §213.3301 of this title for Schedule C positions; or

(4) Appointed to a noncareer executive assignment position or to a position under an agency-specific statute that establishes appointment criteria essentially the same as those for noncareer executive assignment positions.

For purposes of applying this definition to an individual who holds a General Schedule position or other position that provides several rates of pay or steps per grade, his rate of basic pay shall be the rate of pay for the lowest step of the grade at which he is employed.⁸⁸

- *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. Section 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.⁸⁹

⁸⁸ 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.

⁸⁹ 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.

Appointments Clause and Presidential Advisors⁹⁰

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.⁹¹ The Appointments Clause establishes that the President

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.⁹²

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.⁹³ Thus, it seems evident that the President cannot establish executive offices.⁹⁴ 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.⁹⁵ 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.⁹⁶

⁹⁰ Vivian S. Chu, Legislative Attorney in the American Law Division (7-4576), wrote this section.

⁹¹ See Senator Collins, “Push Out the Czars,” Senate, *Congressional Record*, daily edition, September 14, 2009, pp. S9306-S9308 (publishing four articles: (1) “Byrd Questions Obama Administration On Role of White House ‘Czar’ Positions,” February 25, 2009; (2) Edmund L. Andrews and David E. Sanger, “U.S. Is Finding Its Role in Business Hard to Unwind,” N.Y. Times, September 14, 2009; (3) Kay Bailey Hutchinson, “Czarist Washington,” *Washington Post*, September 13, 2009; (4) “President Obama’s ‘Czars,’” *Politico*, September 4, 2009).

⁹² U.S. Const., art. II, §2, cl. 2.

⁹³ 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).

⁹⁴ Saikrishna B. Prakash, “Fragmented Features of the Constitution’s Unitary Executive,” 45 Willamette L. Rev. 701, 719 (2009) (“The Constitution assumes that those who will wield executive power will be in offices created by statute by Congress.”).

⁹⁵ 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).

⁹⁶ See e.g., *Buckley*, 424 U.S. 1 (Congress may not appoint executive officials performing substantial functions under (continued...))

Accordingly, because the Appointments Clause has been deemed “among the significant structural safeguards of the constitutional scheme,”⁹⁷ Congress is to ensure that it adheres to the strictures of the Appointments Clause when prescribing the appointment for certain offices.

Officer/Employee

A key first question is to determine whether a person qualifies as an officer of the United States, or whether a person is a non-officer, or employee, whose “appointment” is not of the kind that invokes the constitutional requirements of the Appointments Clause. If a person is an employee, then the appointing authority, whether it is Congress or the President, need not comply with the requirements of the clause. In the case of Congress, this could mean that it is free to vest the appointment power in itself, for example; in the case of the President, this could mean that he is free to appoint persons, as authorized by statute,⁹⁸ 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.⁹⁹

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.”¹⁰⁰ 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.”¹⁰¹

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

(...continued)

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).

⁹⁷ *Edmond v. United States*, 520 U.S. 651, 659 (1997).

⁹⁸ *See, e.g.* 3 U.S.C. §105 *et seq.*

⁹⁹ As mentioned above, Congress may choose to make the appointments of those considered inferior officers also subject to Senate confirmation.

¹⁰⁰ *Buckley*, 424 U.S. at 126, n. 162.

¹⁰¹ *United States v. Germaine*, 99 U.S. 508, 511-12 (1878) (discussing the term “officers”) (*citing* *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393-94 (1867) (discussing the term “office”)).

the FEC, which was to consist of two non-voting ex-officio members and six voting members. According to the act, each of the six voting members were required to be confirmed by the majority of both houses of Congress, with two members being appointed by the President pro tempore of the Senate, two members by the Speaker of the House of Representatives, and two by the President.¹⁰² 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.¹⁰³ Given the nature of the duties assigned by law to the FEC, the Court concluded that the FEC was exercising executive power, as it found that the FEC’s enforcement power “is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress.”¹⁰⁴ 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.¹⁰⁵ 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).¹⁰⁶ 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.¹⁰⁷ 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.”¹⁰⁸ 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

¹⁰² *Buckley*, 424 U.S. at 113.

¹⁰³ *Id.* at 137.

¹⁰⁴ *Id.* at 138.

¹⁰⁵ *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 (White, J., concurring)).

¹⁰⁶ *Id.* at 126.

¹⁰⁷ *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).

¹⁰⁸ *Id.* at 269-70 (White, J., concurring).

principal and inferior officer for Appointments Clause purposes, but rather, as we said in *Buckley*, the line between officer and non-officer.”¹⁰⁹

The Department of Justice’s Office of Legal Counsel (OLC) has also expounded on 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.¹¹⁰

A subsequent OLC opinion discusses two essential elements of an office subject to the Appointments Clause.¹¹¹ 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.”¹¹² 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.”¹¹³

The second element is that the position must be “continuing,” which OLC described as having two characteristics. The first is that “an office [for purposes of the Appointments Clause] 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.”¹¹⁴ 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.¹¹⁵

In other words, “the nature of the delegated sovereign authority will affect whether a temporary position is an office.”¹¹⁶ For example, the special independent counsel position in *Morrison v.*

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

¹¹⁰ See The Constitutional Separation of Powers Between President and Congress, 20 Op. Att’y Gen. 124 (1996); [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 144.

¹¹¹ See Officers of the United States Within the Meaning of the Appointments Clause, 2007 WL 1405459 at *3 (OLC) (April 16, 2007).

¹¹² *Id.* at *10.

¹¹³ *Id.* at *17 (internal quotations omitted, quoting *Opinion of the Justices*, 3 Greenl. at 482).

¹¹⁴ *Id.* at *30 (internal quotations omitted).

¹¹⁵ *Id.*

Olson was an office subject to the Appointments Clause, because the duties assigned to the particular position were 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.”¹¹⁷

As delineated by the Court and as characterized by the aforementioned OLC opinion, it appears that an individual who is to occupy a position that has the following two characteristics, (1) delegation of sovereign authority and (2) continuing, must be appointed pursuant to the Appointments Clause, and conversely, a position of employment that does not satisfy either of these elements need not be filled pursuant to the clause.¹¹⁸

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,¹¹⁹ it has acknowledged that its “cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes.”¹²⁰ 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.”¹²¹ 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.¹²² These particular 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.”¹²³ The Court in *Edmond* further stated, “Generally speaking, the term ‘inferior officer’

(...continued)

¹¹⁶ *Id.* (“The Constitution requires an examination of ‘the nature of the functions devolved upon’ a position by legal authority.”) *Id.* at *35.

¹¹⁷ *Id.* at *32.

¹¹⁸ *Id.* at *39.

¹¹⁹ 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).

¹²⁰ *Edmond*, 520 U.S. at 661.

¹²¹ *Morrison v. Olson*, 487 U.S. 654, 671 (1988) (finding that the independent counsel clearly falls on the inferior side of the line).

¹²² *Id.* at 671-672.

¹²³ *Silver v. United States Postal Service*, 951 F.2d 1033, 1040 (9th Cir. 1991).

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.”¹²⁴ 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.¹²⁵

Analyses of Certain Presidential Advisors

Generally, advisor positions 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 analyzes 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.¹²⁶ 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).¹²⁷ 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

¹²⁴ *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).

¹²⁵ See Dellinger Memo at *150. The reasoning in *Edmond* was again confirmed by the Supreme Court in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3139 (2010), which concluded that the members of the Oversight Board were properly appointed inferior officers because the Securities and Exchange Commission had oversight over the board members actions as well the authority (after the Court’s decision) to remove the board members at will. *Id.* at 3162.

¹²⁶ 21 U.S.C. §1702(a).

¹²⁷ 21 U.S.C. §1703(a)(1).

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.¹²⁸ 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.”¹²⁹ 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.¹³⁰

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

Director of Urban Affairs

As discussed in the previous sections, President Obama issued an executive order that established within the EOP the White House Office of Urban Affairs. The Office of Urban Affairs is to be headed by the Deputy Assistant to the President, Director of Urban Affairs. The Director is required to report to the Assistant to the President for Intergovernmental Affairs and Public Liaison and to the Assistant to the President for Domestic Policy.¹³¹ The executive order states that the principal functions of the Office of Urban Affairs are, to the extent permitted by law,

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

¹²⁸ 21 U.S.C. §1703(b).

¹²⁹ 21 U.S.C. §1703(d).

¹³⁰ 21 U.S.C. §1714.

¹³¹ Exec. Order No. 13503, 74 Fed. Reg. 8139, 8140 (February 24, 2009).

regarding the development of a comprehensive urban policy and in ensuring that the implementation of federal programs advances the objectives of that policy.¹³²

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.¹³³

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,¹³⁴ the Director of Urban Affairs appears to, or could, exert great political influence over the various agencies with whom he is required to coordinate because the Director apparently has the “ear of the President” and is taking action pursuant to the President’s wishes. However, such political influence does not necessarily amount to the exercise of significant legal authority, which would consequently require that the position be established and filled in accordance with the Appointments Clause.

Special Master for TARP Executive Compensation

Drawing upon the statutory language in the Emergency Economic Stabilization Act of 2008 (EESA)¹³⁵ 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 regulation the Special Master for TARP Executive Compensation (Special Master),¹³⁶ often referred to as the “Pay Czar.” Under the regulation, the Special Master serves “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.”¹³⁷ 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;

¹³² Exec. Order No. 13503, 74 Fed. Reg. 8139 (February 24, 2009).

¹³³ Exec. Order No. 13503, 74 Fed. Reg. 8140 (February 24, 2009).

¹³⁴ See, e.g., Director, White House Office of Health Reform, Exec. Order No. 13507; President’s Economic Recovery Advisory Board, Exec. Order No., 13501; Assistant to President for Energy and Climate Change, Position Mentioned in Exec. Order Nos. 13499 and 13500.

¹³⁵ P.L. 110-343; 123 Stat. 3767

¹³⁶ TARP Standards for Compensation and Corporate Governance (Interim Final Rule), 74 Fed. Reg. 28394, 29420 (Jun. 15, 2009), codified at 31 C.F.R. Part 30.

¹³⁷ 31 C.F.R. 30.16.

- approve compensation payments to, and compensation structures for, certain employees of TARP recipients receiving exceptional financial assistance;
- provide advisory 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.¹³⁸

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.¹³⁹ The regulations also provide that in the case of any final determination that a TARP recipient is required to receive, the final determination of the Special Master “shall be final and binding and treated as the determination of the Treasury.”¹⁴⁰

The Special Master could be viewed as an officer of the United States rather than an employee of the Treasury Department, as he 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. These factors could strongly indicate 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, the relevant constitutional issue would center on whether the Special Master is exercising significant authority that rises to the level of a principal officer, which would require him to be appointed by the President subject to Senate confirmation, or whether the Secretary has retained sufficient control of his actions either explicitly or implicitly, which could allow the Special Master to be characterized as an inferior officer. The Special Inspector General for TARP (SIGTARP), a position established by Congress, questioned whether the Special Master is a principal officer because, in his view, “the Secretary appears to be without authority to control the actions of the Special Master in any ... meaningful manner” other than removal.¹⁴¹

OLC issued an opinion concluding that the Special Master is not a principal officer for purposes of the Appointments Clause.¹⁴² Relying on the factors in *Morrison*, OLC stated the Special Master is removable at will, has limited duties that apply only to a particular jurisdiction—namely, “the compensation practices of particular TARP recipients and certain of their employees”—and that his tenure is of limited duration.¹⁴³ OLC disagreed with the SIGTARP’s interpretation that the regulation insulates the Special Master’s decisions from the Secretary’s review. OLC gave deference to Treasury’s view that the Special Master’s “decision remains

¹³⁸ *Id.*

¹³⁹ *Id.* at 30.16(a).

¹⁴⁰ *Id.* at 30.16(c)(2).

¹⁴¹ See Whether the Special Master for the Troubled Asset Relief Program Executive Compensation is a Principal Officer Under the Appointments Clause, 2010 WL 4963118 (OLC) [hereinafter Special Master Memo] (referring to a Letter from the Special Inspector General).

¹⁴² Special Master Memo at *1.

¹⁴³ *Id.* at *7.

subject to further review within the Treasury,”¹⁴⁴ because the “Rule lacks a clear enough preclusion of Secretarial review to overcome the presumption of Secretarial supervisory authority.”¹⁴⁵ More significant is OLC’s conclusion that Supreme Court decisions strongly indicate that an individual may still be an inferior officer even if a principal officer does “not exercise plenary authority over [the] subordinate.”¹⁴⁶ These factors, taken together, illustrate OLC’s view that the Special Master is an officer rather than an employee of the United States, and qualifies as an inferior officer.

However, in accepting that the Special Master is an officer, rather than employee, of the United States, the establishment of this office through a rule may raise additional concerns. In particular, one constitutional issue is that Congress did not explicitly establish the Office of Special Master 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. On the other hand, 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.¹⁴⁷

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.

Congressional Oversight of Presidential Advisors¹⁴⁸

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

¹⁴⁴ *Id.* at *8 (citing Letter for Bryan Saddler, Chief Counsel, Special Inspector General for the Troubled Asset Relief Program, Department of the Treasury, from Timothy G. Massad, Chief Counsel, Office of Financial Stability, at 1 (July 29, 2010)).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at *6 (placing particular emphasis on the language from *Edmond*, which stated that one may be an inferior officer as long as the official “is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate” (emphasis added)).

¹⁴⁷ 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.

¹⁴⁸ Todd Garvey, Legislative Attorney in the American Law Division (7-0174), wrote this section.

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.¹⁴⁹ 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.”¹⁵⁰ 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.”¹⁵¹ The Court went on to note that the first Congresses held “inquiries dealing with suspected corruption or mismanagement of government officials.”¹⁵² 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.”¹⁵³ 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.”¹⁵⁴

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.”¹⁵⁵ 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 employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it.¹⁵⁶

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”¹⁵⁷ and cannot be used to expose for the sake of exposure alone. The *Watkins* Court underlined these limitations, stating that

¹⁴⁹ See, e.g., *Nixon v. Administrator of General Services*, 433 U.S. 435 (1977); *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491 (1975); *Barnblatt v. United States*, 360 U.S. 109 (1959); *Watkins v. United States*, 354 U.S. 178 (1957); *McGrain v. Daugherty*, 273 U.S. 135 (1927).

¹⁵⁰ 354 U.S. at 187.

¹⁵¹ *Id.*

¹⁵² *Id.* at 182.

¹⁵³ *Id.* at 200, n.33.

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

¹⁵⁵ *Eastland v. United States Servicemen’s Fund*, 421 U.S. at 504.

¹⁵⁶ *McGrain*, 273 U.S. at 175; see also *Buckley v. Valeo*, 424 U.S. 1, 138 (1976), *Eastland*, 421 U.S. at 504-505.

¹⁵⁷ *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

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.¹⁵⁸

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.¹⁵⁹ 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"¹⁶⁰ from congressional oversight and "wholly unaccountable"¹⁶¹ to 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,¹⁶² while congressional oversight has, as discussed above, been repeatedly considered by the Supreme Court to be an implied congressional power. The fact that a special advisor to the President does not receive a confirmation hearing arguably has no legal or constitutional impact on Congress's authority or ability to conduct oversight of that position, its duties and functions, or the individual holding it. As a practical and political matter, however, in recent years, several Senate committees have found that extracting an on-the-record, under-oath commitment from nominees regarding their cooperation in congressional oversight has been helpful in future oversight efforts.¹⁶³

¹⁵⁸ *Watkins v. United States*, 354 U.S. at 187.

¹⁵⁹ *United States v. Rumely*, 345 U.S. 41, 42, 44 (1953); see also *Watkins*, 354 U.S. at 198.

¹⁶⁰ 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.

¹⁶¹ Congressman Eric Cantor, Op-Ed., *Obama's 32 Czars*, *Washington Post*, July 30, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/29/AR2009072902624.html?referrer=emailarticle>.

¹⁶² 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:...")

¹⁶³ 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/\(continued...\)](http://media.washingtonpost.com/wp-srv/politics/(continued...))

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 Congress, and may still require the issuance of a subpoena. Nor has Congress, by extracting such a commitment on oversight from the nominee, abdicated any legal rights or abilities that it may have to extract information via the issuance of a subpoena. The continued contentious nature of this relationship is best evidenced by the nine Cabinet-level officials whom, since 1975, at least one committee or subcommittee has voted in contempt of Congress for failing to produce subpoenaed documents.¹⁶⁴ 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.¹⁶⁵

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

Potential Legal Bases for the Denial of Access to Presidential Advisors

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

(...continued)

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.").

¹⁶⁴ 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 Todd Garvey et al..

¹⁶⁵ CRS Report RL31351, *Presidential Advisers' Testimony Before Congressional Committees: An Overview*, by Todd Garvey, Alissa M. Dolan, and Henry B. Hogue.

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.¹⁶⁶ 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.¹⁶⁷

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.¹⁶⁸ 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,¹⁶⁹ three have directly involved Congress and the executive, but only one of these resulted in a judicial decision on the merits.¹⁷⁰ One other case, involving legislation granting

¹⁶⁶ See generally, CRS Report 95-464, *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry*, by Morton Rosenberg. (Out of print. Available upon request.)

¹⁶⁷ See, e.g., *In Re Sealed Case (Espy)*, 121 F. 3d 729 (D.C. Cir. 1997).

¹⁶⁸ See Neil Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal-Do Nothing*, 48 Adm. L. Rev. 109 (1996).

¹⁶⁹ *United States v. Nixon*, 418 U.S. 683 (1974); *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973); *Senate Select Committee v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974); *United States v. AT&T*, 551 F.2d 384 (D.C. Cir. 1976), *appeal after remand*, 567 F.2d 121 (D.C. Cir. 1977); *United States v. House of Representatives*, 556 F.Supp. 150 (D.D.C. 1983); *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997); *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21 (D.D.C. 1998).

¹⁷⁰ *Senate Select Committee*, 498 F.2d 725 (D.C. Cir. 1974).

custody of President Nixon's presidential records to the Administrator of the General Services Administration, also determined several pertinent executive privilege issues.¹⁷¹

Taken together, the holdings in several Watergate-era lower court decisions,¹⁷² the Supreme Court's decision in *United States v. Nixon*,¹⁷³ 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."¹⁷⁴ The privilege, however, is qualified, not absolute, and can be overcome by an adequate showing of need.¹⁷⁵ 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.¹⁷⁶

However, until the District of Columbia Circuit's 1997 ruling in *In re Sealed Case*,¹⁷⁷ and its 2004 ruling in *Judicial Watch Inc. v. Department of Justice*,¹⁷⁸ these judicial decisions had left important gaps in the law of presidential communications privilege, which increasingly became focal points, if not the source, of interbranch confrontations. Among the more significant issues left open included whether the President has to have actually seen or been familiar with the disputed matter; whether the presidential privilege encompasses documents and information developed by, or in the possession of, officers and employees in the departments and agencies of the executive branch; whether the privilege encompasses all communications with respect to which the President may be interested or is confined to presidential decision making and, if so, is limited to any particular type of presidential decision making; and precisely what kind of demonstration of need must be shown to justify release of materials that qualify for the privilege. The unanimous D.C. Circuit panel in *In re Sealed Case* authoritatively addressed each of these 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.¹⁷⁹

In Re Sealed Case (Espy)

In *In re Sealed Case (Espy)*,¹⁸⁰ 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

¹⁷¹ *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

¹⁷² 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).

¹⁷³ *United States v. Nixon*, 418 U.S. 683 (1974).

¹⁷⁴ *Nixon v. Sirica*, 487 F.2d 750, 757 (D.C. Cir. 1973).

¹⁷⁵ *Nixon*, 418 U.S. 706.

¹⁷⁶ *United States v. AT&T*, 551 F.2d 384 (D.C. Cir. 1976), *appeal after remand*, 567 F.2d 121 (D.C. Cir. 1977)

¹⁷⁷ 121 F.3d 729 (D.C. Cir. 1997).

¹⁷⁸ 365 F.3d 1108 (D.C. Cir. 2004).

¹⁷⁹ Neither case, however, involved congressional access to information.

¹⁸⁰ 121 F.3d 729 (D.C. Cir. 1997).

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."¹⁸¹

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."¹⁸² 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."¹⁸³ The presidential privilege applies to all documents in their entirety¹⁸⁴ and covers final and post-decisional materials as well as pre-deliberative ones.¹⁸⁵

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

¹⁸¹ *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.'").

¹⁸² *Id.* at 745, 752-53 ("... these communications nonetheless are ultimately connected with presidential decisionmaking").

¹⁸³ *Id.* at 754, 757.

¹⁸⁴ 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.

¹⁸⁵ *Id.* at 745.

from the public spotlight” and “the need to provide sufficient elbow room for advisors to obtain information from all knowledgeable sources.”¹⁸⁶ 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.”¹⁸⁷

The court, however, was acutely aware of the dangers to open government that a limitless extension of the privilege poses and carefully limited 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” presidential advisers, the government bears the burden of proving that the communications occurred in conjunction with the process of advising the President.¹⁸⁸

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.”¹⁸⁹ 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

¹⁸⁶ *Id.* at 752.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* (internal citations and footnotes omitted).

¹⁸⁹ *Id.* at 752.

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.”¹⁹⁰ 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.¹⁹¹

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*,¹⁹² 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.”¹⁹³ 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 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.”¹⁹⁴ 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.”¹⁹⁵

¹⁹⁰ *Id.* at 752-53.

¹⁹¹ *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).

¹⁹² 418 U.S. 683 (1974).

¹⁹³ 121 F.3d at 748.

¹⁹⁴ *Id.* at 750.

¹⁹⁵ *Id.* at 752.

Judicial Watch, Inc. v. Department of Justice

The District of Columbia Circuit’s 2004 decision in *Judicial Watch, Inc. v. Department of Justice*¹⁹⁶ 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.¹⁹⁷ 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.¹⁹⁸ 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.”¹⁹⁹

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.”²⁰⁰ *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

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

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

¹⁹⁷ 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.

¹⁹⁸ 365 F.3d at 1109-12.

¹⁹⁹ *Id.* at 1112, 1114, 1123.

²⁰⁰ *Id.* at 1114.

received by the Office of the President, that do not fall under the presidential communications privilege.²⁰¹

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.²⁰²

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.”²⁰³ 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.”²⁰⁴

The situation before the *Judicial Watch* court tested the *Espy* principles. While the presidential decision involved—exercise of the President's pardon power—was certainly a non-delegable, core presidential function, the operating officials involved, the Deputy Attorney General and the Pardon Attorney, were deemed to be too remote from the President and his senior White House advisors to be protected. The court conceded that functionally those officials were performing a 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.²⁰⁵

²⁰¹ *Id.* at 1117.

²⁰² *Id.* at 1121-22.

²⁰³ *Id.* at 1116.

²⁰⁴ *Id.* at 1116-117.

²⁰⁵ *Id.* at 1118-24.

Committee on the Judiciary v. Miers

The important 2008 district court opinion in *Committee on the Judiciary v. Miers* has also played a role in defining the outer contours of executive privilege. In 2007, the House Judiciary Committee issued subpoenas to White House Chief of Staff Joshua Bolten, in his role as custodian of White House documents, and to former White House Counsel Harriet Miers as a part of its investigation of the termination and replacement of several U.S. Attorneys. President Bush, through his White House Counsel, asserted executive privilege in response to the subpoenas and ordered Ms. Miers and Mr. Bolten not to produce any documents or appear to give testimony to the committee.²⁰⁶

Throughout negotiations with the committee, the executive branch argued for a broad conception of executive privilege that would not only shield disclosure of White House and executive branch communications but would also provide an absolute immunity from compelled congressional process for senior presidential advisors.²⁰⁷ Following their continued refusal to cooperate, criminal contempt citations and resolutions authorizing civil enforcement of the subpoenas were approved by the House against Ms. Miers and Mr. Bolten.²⁰⁸ After the Department of Justice refused to bring the criminal contempt citation before a grand jury,²⁰⁹ the committee filed a civil action for declaratory judgment and injunctive relief to enforce the subpoenas.²¹⁰ The district court's 2008 opinion rejected the executive's position that present and past senior advisors to the President are absolutely immune from compelled congressional process, which it noted was unsupported by existing case law.²¹¹ It also rejected the executive's claim that requiring testimony would have a "chilling effect" on the candid advice advisers provide to the President, since advisers routinely testify before Congress as part of their jobs. Additionally, the court noted that advisers could assert executive privilege on a question-by-question basis as appropriate during their testimony.²¹² Throughout its analysis, the court reaffirmed Congress's essential, constitutionally based role in conducting oversight and enforcing its own subpoenas.²¹³ However, the court did not address the validity of any specific claims of executive privilege over the documents at issue.

²⁰⁶ Letter dated June 28, 2007 to Chairman Conyers and Leahy from Fred F. Fielding, Counsel to the President, available at <http://www.judiciary.senate.gov/resources/documents/upload/110thCongress-2007Documents.pdf>; Memorandum, dated June 27, 2007, for the President from Paul D. Clement, Solicitor General and Acting Attorney General, available at <http://www.judiciary.senate.gov/resources/documents/upload/110thCongress-2007Documents.pdf> [hereinafter Clement Memo].

²⁰⁷ Memorandum for the Counsel to the President Re: Immunity of Former Counsel to the President from Compelled Congressional Testimony from Principal Deputy Assistant Attorney General, Office Legal Counsel, DOJ, dated July 10, 2007, available at <http://www.justice.gov/olc/2007/miers-immunity-Opinion071007.pdf> [hereinafter OLC Immunity Opinion].

²⁰⁸ See H.Res. 979, 110th Cong. (2008); H.Res. 980, 110th Cong. (2008); H.Res. 982, 110th Cong. (2008). The House only voted on one resolution, H.Res. 982. However, the text of this resolution stated, "Resolved, That House Resolution 979 and House Resolution 980 are hereby adopted." Therefore, the House only recorded one vote, but voted in favor of passing two resolutions. See also H.Rept. 110-423 110th Cong., 1st Sess. (2007).

²⁰⁹ Letter from Attorney General Michael Mukasey to Speaker of the House Nancy Pelosi, Feb. 29, 2008 (on file with the authors).

²¹⁰ Complaint for Declaratory and Injunctive Relief, Comm. on the Judiciary, U.S. House of Representative v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008) (No. 08-0409).

²¹¹ *Miers*, 558 F. Supp. 2d at 99.

²¹² *Id.* at 102.

²¹³ *Id.* at 102-03.

Pending appeal to the U.S. Court of Appeals for the District of Columbia Circuit, the newly arrived Obama Administration negotiated a compromise with the newly elected House. Ultimately, some, but not all, of the requested documents were provided to the committee and Ms. Miers was permitted to testify, under oath, in a closed but transcribed hearing.²¹⁴

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.”²¹⁵ 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.²¹⁶

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

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

²¹⁴ David Johnston, *Top Bush Aides to Testify in Attorneys’ Firings*, N.Y. TIMES, March. 4, 2009. The settlement also permitted Karl Rove to testify under the same conditions.

²¹⁵ *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.

²¹⁶ See, e.g., *In re Sealed Case (Espy)*, 121 F.3d 729 (D.C. Cir. 1997); *Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108 (D.C. Cir. 2004).

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

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

Options for Congressional Consideration

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 Options²¹⁷

Option: Report and Wait Provision

One option that might be considered is a change to the President’s authority to hire non-advice and consent persons within the EOP. Currently, as discussed above, federal law permits the President to hire employees within the EOP at specific salary levels and does not require any additional accounting or justification to Congress about how those positions are filled or salary levels determined.²¹⁸ One solution to this lack of information would be to adopt language

²¹⁷ Vivian S. Chu (7-4576) and Todd Garvey (7-0174), Legislative Attorneys in the American Law Division, wrote this section.

²¹⁸ See 3 U.S.C. §105 (2006).

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.²¹⁹

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*.²²⁰ In other words, Congress’s action needs to comply with the Constitution’s requirements for bicameralism and presentment.²²¹ Thus, the only options available to nullify a presidential action under this provision would be either a bill (H.R. or S.) or a joint resolution of disapproval (H.J. Res. or S.J. Res.), both of which require passage by both houses and the signature of the President. Of course, Congress would retain other mechanisms to make its views on such a position known. These would include, but are not limited to, committee hearings, language in committee reports, or the adoption of sense of the House/Senate resolutions. That said, however, none of those methods would be legally binding or would in any way prevent the employee from beginning work.

Option: Add Advice and Consent Positions in the EOP

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

²¹⁹ *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).

²²⁰ 462 U.S. 919 (1983).

²²¹ *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.”

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.²²² 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).²²³ 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.²²⁴ 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.”²²⁵

Regarding some of the positions in the EOP that the President created for his presidential assistants to fill, Congress could choose to codify them on a case-by-case basis as it has done in the past. However, this raises the question of whether Congress and the President should make permanent such positions within the White House, many of which appear to have been created to address time-sensitive issues of the present. Moreover, this option still leaves the President the ability to hire assistants pursuant to Title 3,²²⁶ 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. Section 105 and/or require these employees to be subject to Senate confirmation, without regard to the policy areas they may cover (and without necessarily making them officers of the United States). If Congress were to reduce the number of employees the President is authorized to hire, this would arguably limit the President in his or her ability to use such assistants as advisors in charge of coordinating various policy areas. Such a provision therefore 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-

²²² See note 11 on the Office of Science and Technology Policy and the Office of National Drug Control Policy.

²²³ 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).

²²⁴ 1973 Congressional Quarterly Almanac at 712 (*citing* March 1, 1973 letter from Roy Ash to the House Government Operations subcommittee).

²²⁵ 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).

²²⁶ 3 U.S.C. §105 *et seq.*

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.²²⁷ 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.”²²⁸ 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.”²²⁹

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 Options²³⁰

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

Congress, especially the committees of jurisdiction or appropriations, might elect to conduct oversight hearings regarding a number of the potential issues related to the positions discussed in this report. For example, although the current statutes already prescribe reporting requirements for White House staff, Congress may want to examine whether additional data might be appropriate. Data that might be informative would include the duties and responsibilities of positions, planned initiatives, staffing limitations, and public accessibility of meetings and documents for each office. Such data could, for example, be included in the report on White House staff required by 3 U.S.C. Section 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.

²²⁷ S. 590, 93d Cong., 1st Sess. (1973).

²²⁸ S.Rept. 93-47, at 7.

²²⁹ *Id.*

²³⁰ Vivian S. Chu (7-4576) and Todd Garvey (7-0174), Legislative Attorneys in the American Law Division, wrote this section with contributions from Barbara L. Schwemle, Analyst in American National Government (7-8655) and Henry B. Hogue, Specialist in American National Government (7-0642), in the Government and Finance Division.

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 numbers of members from both political parties, or, similar to the existing standing committees, reflect the prevailing partisan ratio of Congress. To perform its functions, the committee could be delegated the authority to hold hearings, administer oaths to witnesses, issue and enforce subpoenas, and report on its findings. Although the committee activities would be similar to a confirmation hearing, there would be no final vote on the qualifications or fitness of the appointee to hold the job. Nevertheless, such a committee would arguably be in a position to perform oversight of the hiring of presidential advisors and could provide a mechanism for Congress to more consistently review the qualifications of those being given substantial influence over the development of policy within the White House and the executive branch.

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

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

111th Congress Hearings²³¹

Two Senate committees conducted hearings on the issue of the appointment of so-called “czars” in the Executive Branch in October 2009.²³² This section of the report provides a summary of selected viewpoints expressed at each hearing.

Senate Committee on the Judiciary, Subcommittee on the Constitution

The Senate Subcommittee on the Constitution of the Committee on the Judiciary conducted a hearing entitled “Examining the History and Legality of Executive Branch ‘Czars’” on October 6, 2009.²³³ In his opening statement, the subcommittee chairman, Senator Russell Feingold, noted that

No one disputes that the president is allowed to hire advisers and aides.... But Congress and the American people have the right to ensure that the positions in our government that have been delegated legal authority are also the positions that are exercising that authority. If—and I am not saying this is the case—individuals in the White House are exercising legal authority or binding the executive branch without having been given that power by Congress, now, that’s a problem. And Congress also has the right to verify that any directives given by a White House czar to a cabinet member are directly authorized by the president.²³⁴

The ranking Member, Senator Tom Coburn, stated the importance of “open, transparent government” in his opening remarks:

And the president ought to be about ... re-establish[ing] the confidence ... that everything’s above board, that it’s transparent, that we can see it’s working. And if people truly do have significant authority and are not confirmed by the Senate, then that’s a problem. And so I don’t know whether that’s the case or not.²³⁵

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

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

²³¹ Barbara L. Schwemle, Analyst in American National Government (7-8655), prepared this summary of the hearings.

²³² There have been no hearings on the issue since the 111th Congress.

²³³ The opening statements, statements submitted for the record, and witness statements are available, at <http://judiciary.senate.gov/hearings/hearing.cfm?id=4098>.

²³⁴ Transcript obtained by subscription from *CQ.com* on U.S. Congress, Senate Committee on the Judiciary, Subcommittee on the Constitution, hearing on Executive Branch Czars, 111th Cong., 1st sess., October 6, 2009, p. 2 of the transcript downloaded for printing. (Further information available from author.) Hereinafter referred to as CQ October 6 Transcript.

²³⁵ *Ibid.*, p. 3.

His statement also expressed disagreement “with those who say the Obama Administration is acting differently than past administrations when it comes to the use of czars and presidential advisers,” noted that “there is ample opportunity for congressional oversight over these advisors,” and concluded that “President Obama’s advisors aren’t doing anything more than the law and the Constitution allow.”²³⁶

Senator John Cornyn’s statement noted that, “These czars present serious accountability concerns” and included these points:

First, it seems that some of President Obama’s czars may wield a measure of authority usually reserved to principal officers of the United States. In particular, some appear to exercise significant authority and have broad terms of duty, jurisdiction, and tenure.... If these czars are principal officers, they must be subject to Senate confirmation as required by the Constitution.... Second, even if none of the czars are principal officers, their ability to exercise decision-making authority absent congressional oversight is troubling. Controlling access to the President and possessing great responsibilities, czars can act unchecked in ways that significantly influence or duplicate the duties of Senate-confirmed officials.... Third, any distribution of taxpayer funds by unaccountable czars is unacceptable. Because we do not know exactly what the czars do, it is difficult to determine how much influence they have over the granting of federal money.²³⁷

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

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

My definition of czar means, first, that this person reports only to the president.... Public [Law] 95-570 is silent about any requirement for Senate confirmation of these appointments. I interpret this silence as evidencing the intent of Congress to reconfirm in 1978 the historic practice of not requiring Senate approval of White House staff members, whether they’re called czars or not. Likewise, White House staffers do not give formal testimony to congressional committees, unless, as in the Watergate instance, criminality is alleged.... White House officers constantly visit the Hill for informal conferences with members and staffs.... White House staff members have no legal responsibility other than to assist and advise the president.... It would be unthinkable that law clerks at the Supreme Court should be in any way accountable to the president or to Congress. It would be unthinkable that the appointments of any of the personal legislative or committee staff here at the Capitol should be approved by the White House, and likewise, vice versa.... The president’s personal staff are independently responsible only to the president. And in the end, he [the President] is the only czar that is. And he is accountable to the American electorate.²³⁸

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

²³⁶ Statement of Senator Durbin, p. 1.

²³⁷ Statement of Senator Cornyn, pp. 1-2.

²³⁸ CQ October 6 Transcript, pp. 4-5.

Czar is ... a clever label. It's clearly meant to imply ... certain positions a breadth of authority and leveled status beyond the particulars of the formal title, seemingly beyond the confines of the normal process.... The rise of government by bureaucrats, largely due to the delegation of power from Congress to administrative agencies, combined with the removal of those agencies from the president's control, has given rise to efforts by presidents from both political parties to get the bureaucratic state under control through various mechanisms. The rise of czars in the current administration is merely another manifestation ... of this phenomenon.²³⁹

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

This line between non-officer and officer is not defined by the appointments clause, itself, but we do have some authority. Recently, under the Bush administration, the Justice Department's Office of Legal Counsel in April of 2007 issued an opinion that synthesized and harmonized the Supreme Court's opinions on who is an officer for appointments clause purposes ... two requirements that are necessary ... in order to be an officer, you must hold an office, which in turn is defined as a position to which is delegated by legal authority a portion of the sovereign powers of the federal government, what the Supreme Court in *Buckley v. Valeo* termed significant authority. The second requirement is that this position must be continuing.²⁴⁰

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

There are two governing legal principles.... the first one, the appointments clause. It is a necessary condition for the exercise of actual legal authority in the government for someone in the executive branch, for anyone other than the president to have been appointed to an office pursuant to the appointments clause, to be either a superior officer or an inferior officer. The other necessary condition for the exercise of power by anyone other than the president is some source of statutory authority, because only the president has constitutional power and the president's constitutional powers are essentially non-delegable. The consequence of those two principles is that it is extremely doubtful whether anyone on the White House staff, the sort of person sometimes called a czar, could actually exercise legal authority, at least as a formal matter.... although it is common for there to be a divergence between influence in the government and actual formal legal authority, especially with respect to the White House staff—it is extremely common for members of the White House staff to be extremely influential, even though they cannot take any genuinely legal binding decision—whether that division between legal authority and informal practical influence is a good thing is a difficult question of policy.²⁴¹

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

[T]here's no indication that these advisers—particularly those serving in unconfirmed positions within the executive office of the president—have been vested with any actual

²³⁹ *Ibid.*, pp. 5-6.

²⁴⁰ *Ibid.*, p. 8.

²⁴¹ *Ibid.*, p. 9.

executive authority, and that precludes a categorical conclusion that the requirements of the appointments clause apply to their service.... under current jurisprudential principles, it's difficult to discern a basis upon which a review in court would conclude as a legal matter that the existence of these advisers runs contrary to our constitutional system.... Also, it's not clear that legislative proposals, even if enacted, would have much, if any, effect on presidential utilization of advisers, as it does not appear possible for Congress to prohibit either implicitly or explicitly a president from relying upon personal advisers irrespective of whether they are confirmed or draw salary.²⁴²

Mr. Halstead also discussed the oversight authority of Congress:

Given the limitations that are inherent in any judicial or legislative response to this controversy, it seems that the most effective congressional response may be one that is based simply on persistent and aggressive assertion of the oversight prerogatives of the House and Senate. Longstanding Supreme Court precedent recognizes the power of Congress to engage in oversight of any matter related to its legislative function. And even while there is no explicit provision in the Constitution authorizing congressional oversight, the Supreme Court has declared that that power is so essential as to be implicit in the general vesting of legislative authority in the Congress.... Congress's power in the oversight context certainly extends to the receipt of testimony from presidential advisers. Research conducted by my colleagues at CRS has revealed numerous instances where such advisers have testified before committees, effectively disposing of the argument that separation of powers principles impose a structural bar to the appearance of these advisers before Congress.... [T]he oversight process ... requires sustained and focused effort from members of Congress and their staff ... a robust oversight regime focusing on specific, substantive executive action taken in areas over which such advisers have political influence could be an extremely effective approach and would enable Congress as an institution to more forcefully assert its constitutional prerogatives and to ensure compliance with its enactments.²⁴³

Following the opening statements, Senator Feingold established for the record that none of the witnesses had appointments clause concerns “for so-called czars that are housed in federal agencies and report to Senate-confirmed officials.” Several specific questions were then discussed. First, Senator Feingold asked “what would these [White House] advisers have to be doing ... that would trigger an appointments clause issue? And specifically, how should we analyze the widely reported duty that some of these officers have to ... ‘coordinate policy development’ ... between two or more departments?”²⁴⁴ In response, Mr. Harrison replied,

I think the sort of thing that would be problematic would be if someone like that were to do one of two things: one, to give an order to someone with actual legal authority that did not simply represent carrying forward the president's order, that was not just communicating the president's order; or were that person—and I think this is highly unlikely—to purport to take some actual binding measure himself or herself, for example, issuing a regulation or authorizing an expenditure, an exercise of formal legal authority.²⁴⁵

Mr. Spalding stated as an example that he found “to be somewhat troubling ... the climate czar being a chief negotiator, doing automobile emissions standards based on a Supreme Court interpretation of the Clean Air Act ... [Y]ou're now at several stages of separation, getting into

²⁴² *Ibid.*, p. 10.

²⁴³ *Ibid.*, pp. 10-11.

²⁴⁴ *Ibid.*, p. 11.

²⁴⁵ *Ibid.*, p. 12.

some operational regulatory questions, not the EPA administrator, whom you have approved.”²⁴⁶ Responding to a similar question raised by Senator Sheldon Whitehouse later in the hearing, he cited as any instance “if an agent of the president is actually doing things that go to the extent of seeming to step on an officer that has been approved by Congress.... given the legislative instructions from Congress to carry out the law, that strikes me as potentially raising a serious issue.”²⁴⁷

In another question, Senator Feingold queried whether the Senate should “be concerned about the possibility that an NSC [National Security Council] staffer may end up having more ability to influence foreign policy decisions than, say, a Senate-confirmed ... assistant secretary of state,” given that “the NSC plays an important role in coordinating the work of different departments and agencies.”²⁴⁸ In response, Mr. Patterson noted that President Obama had not accepted the recommendation of the Project on National Security Reform “that the assistant to the president for national security affairs be confirmed by the Senate and be given a great deal more authority,” and he didn’t think “any future president would, either.”²⁴⁹ He further stated that recommendations of NSC staff members would be made to the President through the national security advisor.

Senator Coburn quoted the Special Master for TARP Executive Compensation, Kenneth Feinberg’s statement that “I have the discretion conferred upon by Congress [sic] to attempt to recover compensation that has already been paid to executives”²⁵⁰ and then asked for a legal analysis of the special master’s position. In response, Mr. Harrison stated that two questions would have to be answered:

So the question, first, would be whether the secretary of the treasury had the statutory authority to create that office pursuant to his authority under TARP or some other legislation and then whether he has appropriately exercised it so as to constitute Mr. Feinberg an inferior officer.... The second question—because he is an inferior officer, clearly not a principal or superior officer, because the Senate didn’t confirm him—... would be whether he receives adequate supervision from a principal officer, someone who is Senate-confirmed, ... and to know that, you would need to know the extent to which he is overseen presumably by the secretary of the treasury, perhaps some other higher officer in the ... Department of the Treasury. There are a number of cases in the Supreme Court, in the lower courts about exactly how much supervision is required.... But the basic principle is that for an inferior officer to operate permissibly, the inferior officer has to be subject to substantial supervision from somebody higher up.... I don’t think there’s any difficulty with your calling an inferior officer to testify ... [Y]ou can call the secretary of the treasury, so you can find out about the legal nature of the relationship ... [Y]ou could find out about both sides, about whether the secretary thinks he’s supervising Mr. Feinberg and how much supervision Mr. Feinberg thinks he’s getting And I think the Treasury Department would have to take the position that Mr. Feinberg is at least—is an inferior officer, because I believe he is exercising some significant authority pursuant to the laws of the United States.²⁵¹

²⁴⁶ *Ibid.*, p. 13.

²⁴⁷ *Ibid.*, pp. 18-19.

²⁴⁸ *Ibid.*, p. 13.

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*, pp. 14-15.

²⁵¹ *Ibid.*, pp. 15-16.

Mr. Spalding testified that “Congress needs to be more careful in the types of legislative discretion it gives, which in many cases gave rise to the creation of these czars in the first place” and cited the TARP legislation as “a great example of that.” He further explained, “do you give too much discretion, which then allows for the type of policy this person is pursuing ... Is that actually violating your legislative direction to the officer, secretary of treasury, in carrying out your legislative intent?”²⁵² Building on Mr. Spalding’s statements, Mr. Samahon reiterated the importance of statutes stating clearly who has the power to appoint, thereby making clear the “judgment of who is actually an inferior officer,” and noted that, under the case of *Morrison v. Olson* “you could just be very, very powerful and therefore, deemed not an inferior officer.”²⁵³

Senator Feingold asked Mr. Halstead “if he [Mr. Feinberg] is an inferior officer in the Treasury Department, is there any reason he can’t be asked to” testify?²⁵⁴ Mr. Halstead replied,

No, not at all ... there are roughly 75 instances since ... the end of the World War II era where presidential advisers, high-level presidential advisers, have appeared before congressional committees. Now the fact that there’s no structural separation of powers prohibition against the appearance of these individuals is a much different thing than saying it’s going to be easy to get them to appear before Congress [when the invitation to testify is declined] at that point, it becomes a question for a committee and Congress as an institution as to whether or not to assert the institutional prerogatives and powers that it has to compel testimony from certain individuals [I]t’s not uncommon as a practical matter for the Senate to obtain the commitment of a nominee to an advice and consent position that they will affirmatively agree to appear before the committee when requested to get a commitment from the secretary of the treasury or to any individual so appointed or to any other position that they would not only adhere to that agreement in relation to their general duties, but also to inquiries from the committee as to the impact that these advisers or other personnel are having on their carrying out or conduct of the legal authorities that are vested specifically in them.²⁵⁵

Responding to a question asked by Senator Coburn on a so-called “czar” perhaps exercising authority that he or she doesn’t have by statute, Mr. Spalding expressed this viewpoint: “[T]he main question at issue is responsibility and accountability. One of the problems with the modern administrative state is it’s not oftentimes clear who’s actually responsible and thus who is accountable, especially from a ... congressional or executive point of view.... Congress could write clear laws that make these things known.”²⁵⁶

Finally, Senator Feingold noted, “as chairman of the African Affairs Subcommittee of the Foreign Relations Committee, I’ve supported the appointment of a special envoy to Sudan. There’s also a Senate-confirmed inferior officer who’s the assistant secretary for the bureau of African affairs. Should I be concerned that this special envoy and his staff may unconstitutionally infringe ... or ignore the assistant secretary’s authority?”²⁵⁷ Mr. Harrison responded:

²⁵² *Ibid.*, p. 16.

²⁵³ *Ibid.*, pp. 16-17.

²⁵⁴ *Ibid.*, p. 21.

²⁵⁵ *Ibid.*, pp. 21-22.

²⁵⁶ *Ibid.*, p. 24.

²⁵⁷ *Ibid.*, pp. 25-26.

I doubt an arrangement like that would create a constitutional question, provided that the special envoy was appointed appropriately as an inferior officer ... and the lines of authority were clearly drawn ... both in the statute and in whatever the president and the State Department set up.... the real concern is less constitutional ... and more practical. Any time you have overlapping responsibilities, it's extremely important that people know who ... makes what decisions and ultimately ... who is in charge of actually acting for the United States.²⁵⁸

Responding to Senator Feingold's follow-up question, "And I take it a legitimate concern for the congressional oversight, regardless of whether it raises legal issues," he stated, "Making sure ... that the government is set up properly ... and is functioning properly is a central role of the Congress."²⁵⁹ Mr. Samahon stated his view that, "I think there is potentially a problem ...

[G]oing back to the OLC [Office of Legal Counsel] April 2007 opinion that, if one is exercising diplomatic functions, one would plainly seem to be an officer. What the question would then be is whether being a special envoy is a continuing office such that the second requirement for officerhood is met. If that's the case, then we have someone who should be subject to presidential nomination with Senate advice and consent.²⁶⁰

Mr. Halstead noted that, "With regard to congressional oversight prerogatives in such a context, the Supreme Court has stated that the ... oversight prerogatives of Congress are at their peak when looking into allegations of maladministration, governmental inefficiency ... So it would clearly be something that would be very suited for congressional inquiry."²⁶¹

Senator Feingold concluded the hearing by stating that

Administrations going back decades have created positions with important portfolios that are not subject to Senate approval. This is certainly not an isolated issue with the Obama administration ... Congress may need to act to make sure that, going forward, the proper checks and balances are in place.²⁶²

Senate Committee on Homeland Security and Governmental Affairs

The Senate Committee on Homeland Security and Governmental Affairs conducted a hearing entitled "Presidential Advice and Consent: The Past, Present, and Future of Policy Czars" on October 22, 2009.²⁶³ In his opening statement, the chairman, Senator Joseph Lieberman, stated that these questions would be examined: "have presidents of both parties, including President Obama, consolidated power excessively in the White House through the appointment of these officials contrary to at least the spirit of the Constitution if not our laws, particularly as against the authority of members of the cabinet," "does the growing use of czars in the White House, in

²⁵⁸ *Ibid.*, p. 26.

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*, p. 27.

²⁶² *Ibid.*

²⁶³ The opening statements and the witness statements are available, at http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=5b22e173-5b74-46a0-b2ab-d300b6381de4.

the administration this and past ones, frustrate Congress in carrying out its constitutional responsibility to oversee the expenditure of the public's money, which we appropriate,"²⁶⁴ and what can or should be Congress's response. Senator Susan Collins, the ranking Member, expressed these concerns about "czars" in her opening statement:

The proliferation of czars diminishes the ability of Congress to conduct its oversight responsibilities and to hold officials accountable for their actions. These czars can create confusion about which officials are responsible for various policy decisions. They can duplicate or dilute the statutory authority and responsibilities that Congress has conferred on cabinet officials and other senior executive branch officials In addition the proliferation of czars can circumvent the constitutionally mandated process of advice and consent. Czars can exercise considerable power and influence over major policy, and yet they are not required to clear the rigorous Senate confirmation process. Czars bypass this important constitutional protection through a unilateral grant of authority from the president Positions subject to Senate confirmation or otherwise recognized by our laws such as the director of national intelligence, the national security advisor and the chairman of the Recovery Accountability and Transparency Board do not raise the same concerns with accountability, transparency and oversight because they are recognized in law and because many of these positions are subject to Senate confirmation.²⁶⁵

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

For example, I think Congress should be able to call the president's climate czar, Carol Browner, the energy and environmental czar, to ask her about the negotiations that she conducted with the automobile industry that led to very significant policy changes with regard to emission standards. I think that's particularly important because the Supreme Court in 2007 held that it was the Environmental Protection Agency that had that very responsibility under the Clean Air Act. And yet these negotiations were not undertaken by the EPA administrator, but rather by the White House czar [W]hat I offered on the Senate floor, but it fell to a point of order unrelated to the merits, is that ... the president make available to Congress to testify, upon a reasonable request, individuals who have responsibility for interagency development or coordination of any rule, regulation or policy and that it would apply to only those individuals who are without statutory authority ... the second half of the amendment also called on the president to provide us twice a year with a written summary of the activities of these officers within the White House.²⁶⁶

Senator Robert Bennett requested "as a point of personal privilege a few moments in an opening statement" to make remarks, that included the excerpts below, "Because the White House has specifically identified me as being hypocritical on this issue by virtue of my position with respect to a Y2K czar"²⁶⁷:

In November of 1997 I requested that President Clinton appoint a Y2K czar. I was the chairman of the Y2K committee ... in the Congress to deal with a problem that ... cut across

²⁶⁴ Transcript obtained by subscription from *CQ.com* on U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, hearing on the Future of Policy Czars, 111th Congress, 1st sess., October 22, 2009, p. 1 of the transcript downloaded for printing. (Further information available from author.)

²⁶⁵ *Ibid.*, pp. 2-3.

²⁶⁶ *Ibid.*, pp. 32-33.

²⁶⁷ *Ibid.*, p. 4.

the entire government [I]n February of 1998 President Clinton appointed a Y2K czar, John Koskinen ... [O]ne of the first things ... [he] did ... was to call me ... and set up a pattern of regular consultation. Every Wednesday afternoon ... [he] called me ... and set up a pattern of regular consultation That was a very different situation than the situation described by Senator Collins and the letter which I saw the kind of circumstance we created then was very different from the kind of circumstance that we see now.²⁶⁸

Later, he expressed this observation:

Congress passed a law creating the Council of Economic Advisers, and yet there is an economic czar, Paul Volcker ... And the question is, who has the president's ear on the economy? And then there's ... Larry Summers. And if you want to influence the president, if you're a member of the Congress, whom do you call? ... the Council of Economic Advisers? ... Larry Summers? Or ... Paul Volcker? ... we do happen to have a Cabinet officer of health and human services with whom I have never had a conversation about health care, not because I have any opposition to her but because it's my perception that Nancy-Ann DeParle is calling the shots rather than the Secretary Sebelius.²⁶⁹

Senator Claire McCaskill's opening remarks noted that

[T]alking about the Y2K czar ... that was not confirmed by the Senate how ubiquitous the czar was working with the legislature that he was constantly around. I kept thinking of Nancy-Ann DeParle ... we can't walk down the hall without seeing her. She is in the chairman's offices constantly of the committees, and the ranking members. And she's visited across the aisle time after time ... So I think there is [sic] situations where a special advisor is created and that doesn't mean they're not working closely with Congress in order to solve a problem.²⁷⁰

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

Whether an executive official is confirmed by the full Senate or appointed by the president alone to serve on the White House staff, that official holds the position by virtue of the authority that the Congress has granted to the president. Such White House staffers receive a salary by virtue of the spending authority that Congress has granted to the executive branch. Even presidential assistants and advisors have a constitutional obligation to answer questions before the Congress, if it is necessary for the Congress to fulfill its constitutional oversight and investigative functions.²⁷¹

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

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

²⁶⁸ Ibid., pp. 4-5.

²⁶⁹ Ibid., p. 20.

²⁷⁰ Ibid., p. 5.

²⁷¹ Ibid., p. 16.

[P]residents have the discretion and authority to appoint advisors who can assist them in carrying out their presidential obligations. My interest ... reside[s] in the issues of effective management, transparency, and lines of authority. Who's reporting to whom? How specific is the job description? Does the individual initiate, coordinate or execute policy? To whom does that individual report? Is it the same person to whom the individual is accountable? Some of today's White House czars have come to their positions with little public clarification of duty, and they already have a department of subject authority led by a Senate-approved secretary [D]o these individuals - these so-called 'czars' ... direct or develop policy? Are they accountable to the president, to the secretary, or to both? To whom do private constituencies look to provide input, guidance or opinion? Who resolves the conflict between the two? ... [W]ithout a clear delineation of responsibilities and reporting authority, this creates both a huge potential management problem and, clearly, the appearance of potential conflict ... [I]t can diminish the capacity of both advisor and secretary to operate effectively in accordance with the department's mission ... [F]rom time to time, it can cause confusion for those under the chain of command of the secretary, as well as outside the department purview.²⁷²

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

[S]taff personnel certainly may have considerable power or influence as opposed to authority. But this power is entirely derivative of the president. White House staffers may communicate orders from the president, but they cannot legally give orders themselves ... White House staffers often make important decisions, but the weight of their decisions depend entirely on the willingness of the president to back them up White House czars play essential roles that lift the burden of coordination from the president. They help to reduce the range of options. But if the number of czars proliferate, they can clog and confuse presidential authority Czars may create layers between the president and Cabinet secretaries Members of Congress, as well as national leaders, may be confused as to the locus of authoritative decisions. Foreign leaders may not know who speaks for the president ... [C]zars can pull problems into the White House that could be, and should be, settled at the Cabinet level ... [O]nly those issues that are central to the president's policy agenda should be in the White House czars are often frustrated because they're supposed to be in charge of a policy area, but they do not have the authority commensurate with their responsibilities. Czars cannot enforce decisions on departments or agencies ... [They] control neither personnel nor budgets, and for these they must depend on Cabinet secretaries White House staffers enjoy proximity to the president ... Cabinet secretaries are often at a disadvantage in securing presidential attention.²⁷³

He also noted the role of Congress:

The Framers of the Constitution ... placed Congress in Article I for a reason. In republican governments, the legislature should predominate in policymaking, as James Madison made clear in Federalist 51.²⁷⁴

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

²⁷²Ibid., pp. 6-7.

²⁷³ Ibid., p. 8.

²⁷⁴ Ibid., p. 9.

[White House] advisors ... have no power beyond the fact that they are close to the president. They cannot transform executive branch policy into the policy of the United States. They can't sign regulations. They can't submit legislation to Congress. Their authority is very limited ... [I]t has been the consistent position of the Justice Department under both Republican and Democratic administrations that people in those advisory roles need not be appointed in accordance with the Appointments Clause, that is by and with the advice and consent of the Senate ... [T]hey cannot take action that would create a legal obligation, either on behalf of the government or ... the citizenry at large. The president can implement policy and transform it into government policy, only through officers that have been appointed under the Appointments Clause, and who are responsible through the oversight process to Congress.²⁷⁵

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

Whenever you start getting close to advice that is prepared for and given to the president, you start, obviously, getting into some very difficult separation of powers issues. But to the extent that the czars who actually hold offices at the agencies, some of which have been confirmed by the Senate, undertake a policymaking role in addition to the role they serve in their office, that is fine ... so long as they do not attempt to exercise authority that was not otherwise properly delegated to them.²⁷⁶

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

For war mobilization, [Franklin D.] Roosevelt had at least three successive primary czars: William S. Knudsen at the Office of Production Management ... Donald Nelson, chairman of the War Production Board ... and James F. Byrnes, who led the Office of War Mobilization ... it also appears that these ‘czars’ were accountable to Congress. An examination of the April 1941 to April 1943 hearings of the ... Senate Special Committee Investigating the National Defense Program ... chaired by Senator Harry S. Truman ... indicate that Knudsen appeared once, his deputy appeared twice, and Nelson thrice.²⁷⁷

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

When a president prohibits congressional testimony by a czar or other presidential agent, efforts should be made to obtain the desired information in some other way, such as the provision of responsive, factual documents ... a Freedom of Information Act request ... or written answers to interrogatories, testimony by a department or agency official heading the unit in which the czar or presidential agent is located, or a briefing of congressional committee leaders or staff.

The authorization [for the White House Office, Executive Office of the President, and the Office of the Vice President] might be revisited with a view to the adequacy of its allotments, ... reporting requirements and ... scope, should it be extended to other Executive Office entities.²⁷⁸

²⁷⁵ Ibid., p. 10.

²⁷⁶ Ibid., p. 14.

²⁷⁷ Ibid., p. 12.

²⁷⁸ Ibid.

Following the opening statements, Senator Lieberman asked, with regard to White House advisors, what if they “actually begin to act like officers, that they are making decisions, they’re forcing decisions on Cabinet secretaries ... What should our response be?”²⁷⁹ In response, Mr. Casey stated that “to the extent they act like officers, their actions are not valid, their actions are not legally enforceable. A court will not enforce an order or a rule signed by a presidential advisor.”²⁸⁰ As follow-up questions, Senator Lieberman asked about the validity of claims that such advisors “should not be called to testify on their policy coordination” and whether Congress “should legislate to compel” White House advisors “to testify ... about the policy coordination role that they’re playing?”²⁸¹ Mr. Casey noted that, “the advice someone gives directly to the president ... is clearly privileged” and stated that “it is difficult to think of a system ... regulating the independence of presidential advice ... that would not raise serious separation of powers issues.”²⁸² To Mr. Ridge, “one of the challenges associated with the ability of Congress to even have a basis for inquiry, ... would be resolved, if, in making the appointment, there was public revelation of precisely the function that that advisor was going to play within the White House.”²⁸³ He added that he thought that Congress is not “in a position to do that, because ... the president hasn’t outlined specifically what those coordinating responsibilities are.”²⁸⁴

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

In 2007, this committee wrote legislation that became law that created within the Executive Office of the President a Senate-confirmed position to be coordinator for the prevention of weapons of mass destruction. And the coordinator’s role—which is defined in this law—says that this individual should serve as the principal adviser to the president on all matters relating to the prevention of weapons of mass destruction, proliferation and terrorism This was to be a Senate-confirmed coordinator located within the Executive Office of the President. Now, neither President Bush nor President Obama ever filled this statutorily created position, but both of them created and filled a White House policy czar for weapons of mass destruction. That individual, the WMD czar, has exactly the same functions that were set forth in the law [T]his is ... a prime example of ... both presidents appointing a White House policy czar, which completely circumvents a statutorily confirmed position created by Congress.²⁸⁵

Both Mr. Ridge and Mr. Pfiffner responded that this circumstance is “very troubling.” According to Mr. Ridge, “the conditions are ... so evident ... that your claim for this individual to testify before you should be legitimized – since you created the position, they filled it, but they didn’t send a name to the Hill.” To Mr. Pfiffner, “the fact that that confidential responsibility overlaps or duplicates a position that is supposed to be” a presidential appointment with consent of the Senate “is very troubling.”²⁸⁶ Mr. Casey stated that he did not “find it troubling” and suggested that perhaps, “why the office hasn’t been filled” is “because there is a feeling that it’s simply too close

²⁷⁹ *Ibid.*, p. 14.

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*, p. 15.

²⁸² *Ibid.*

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*, p. 16.

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid.*, p. 17.

to the president's own authority," thereby raising "very serious separation of powers concerns."²⁸⁷ Mr. Relyea noted: "in 1944, with [James] Byrnes at the head ... of the Office of War Mobilization [OWM], that was seen as too powerful in some regards. He was the president's agent ... appointed without Senate confirmation. OWM had been created by executive order. Congress said 'We're going to reconstitute the office,' and they did by statute Set it up as a Senate-confirmed, statutorily created entity. I think that might be an answer here; that you eliminate, either by funding or by its role, this White House unit and ... [replace it with] a congressional creation."²⁸⁸ Senator McCaskill, while noting that the Weapons of Mass Destruction Commission had recommended repeal of the WMD coordinator position because "they don't think it's an appropriate Senate-confirmed position," stated that she tended to agree with Senator Collins that "it would [be] incumbent to fill it, unless and until it is repealed."²⁸⁹

Senator Lieberman also queried whether "some of these positions that are now within the White House, that appear to be policy coordinating, not within the inner circle ... of the president" should be made statutory.²⁹⁰ In response, Mr. Relyea noted that, "even though Congress creates ... a staff authorization for the White House office, provides the funds for the White House office personnel, thus far ... Congress has not seen fit to invade that domain and has left it to the president."²⁹¹ Mr. Casey stated: "I think the real question is whether by creating one of these offices, you can then effectively prevent the president from looking to someone else to be his adviser on the issue. And I think that, ... is where the constitutional problem is it raises very serious separation of powers issues. I'm not exactly sure what the courts would do."²⁹² Mr. Pfiffner suggested, as a solution, "comity between the branches from both sides, so the president doesn't keep trying to keep things away from Congress ... And that Congress doesn't get too heavy handed, on the other hand."²⁹³ Mr. Ridge cautioned that, "if you decide to legislate ... don't undermine the credibility and the function of the secretary who, ultimately ... is accountable to you."²⁹⁴

Later, during the discussion of Senator Collins's amendment to the Department of the Interior, Environment, and Related Agencies Appropriations Act for FY2010, Mr. Relyea asked whether consideration had been given to "legislation that would overturn the implementation capacity in that executive order," referring to the type of document issued by the President for some of the White House advisor positions.²⁹⁵

Senator Lieberman concluded the hearing by stating that "I think we both [he and Senator Collins] share a desire to do something about this to help Congress uphold our constitutional responsibility for oversight. But ... we understand the balance here, as reflected in the Constitution."²⁹⁶

²⁸⁷ Ibid., p. 18.

²⁸⁸ Ibid., pp. 18-19.

²⁸⁹ Ibid., p. 28.

²⁹⁰ Ibid.

²⁹¹ Ibid., p. 30.

²⁹² Ibid.

²⁹³ Ibid., p. 31.

²⁹⁴ Ibid.,

²⁹⁵ Ibid., p. 35.

²⁹⁶ Ibid., p. 36.

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