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Legal Sidebar

Advising the President: Rules Governing Access and Accountability of Presidential Advisors

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Media reports have raised questions regarding the extent to which federal ethics laws and regulations apply to Presidential advisors. Article II of the U.S. Constitution vests the President with broad authority to appoint advisors to key posts in the executive branch. The Constitution simultaneously imposes a check on the influence of these unelected advisors by requiring, in certain cases, Senate confirmation of a President's nominee. However, the President appoints certain officers and employees without such approval, including those in White House roles or within the Executive Office of the President (EOP). Furthermore, Presidents also have relied upon individuals working outside the government to assist the Administration as "special advisors," whether through formal roles on advisory committees or as informal advisors to the President directly.

Generally, the extent to which presidential advisors are subject to ethics requirements depends on the classification of their relationship to the government. Two of the main bodies of federal ethics law that potentially govern the conduct of presidential advisors—statutory conflict of interest provisions and the regulatory Standards of Ethical Conduct for Employees of the Executive Branch—generally apply to "employees" of the government. Federal law generally defines *employee* using three factors: appointment in the civil service by a designated official (including the President); performance of a federal function; and supervision of that performance by a designated official. All three factors must be met for an individual to qualify as an employee. One federal court has explained further that "[t]he status of 'employee' requires an unequivocal intention to bring an individual within the civil service."

This Sidebar examines three categories of Presidential advisors and the related ethics requirements and limitations that apply to their respective roles: employees who serve full-time, regular appointments;

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outside advisors who are formally appointed to temporary roles; and informal, personal advisors with whom the President consults.

Appointment of White House Advisors as Federal Employees

Federal law gives the president some discretion in appointing his White House advisors. Specifically, Congress has authorized 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." Such appointments are limited to a maximum number of positions at particular levels of pay, but otherwise Congress drafted the President's hiring authority fairly broadly, particularly because it granted the authority "without regard to any other provision of law regulating the employment or compensation of persons in the Government service."

Once installed in their positions, however, these advisors—having been selected by the President and tasked with particular duties about which they report to the President or other White House official—become federal employees. And while the breadth of the President's hiring authority has prompted questions about who may be appointed as such an advisor, it appears to be commonly understood that, once employed at the White House in an official capacity, these advisors are subject to ethics requirements governing employee conduct and conflicts of interest.

For instance, in a 2017 opinion, the Office of Legal Counsel (OLC) in the Department of Justice considered whether the President could appoint relatives to be White House advisors, and its conclusion relied significantly on its understanding that various federal ethics rules apply to White House advisors. Departing from a series of historical precedents that had concluded that the anti-nepotism statute precludes the President from appointing relatives as White House staff, OLC reasoned that the President's broad statutory hiring authority permitted him to appoint relatives as White House advisors. Expressly noting that such appointments were subject to quantitative limits on certain positions and federal laws governing employee conduct, OLC highlighted the additional intent of Congress that employees appointed under the President's authority are not excused "from full compliance with all laws, executive orders, and regulations governing such employee's conduct while serving under the appointment." This understanding appears to be critical to its conclusion, as OLC contemplated that the President—regardless of the anti-nepotism statute—would be able to consult with family members in informal roles (the final category discussed in this Sidebar). According to OLC, "[a] President wanting a relative's advice on governmental matters therefore has a choice: to seek that advice on an unofficial, ad hoc basis without conferring the status and imposing the responsibilities that accompany formal White House positions; or to appoint his relative to the White House under [the general hiring authority] and subject him to substantial restrictions against conflicts of interest."

Use of Outside Advisors in Temporary or Informal Roles

As OLC recognized, the President's authority to name advisors extends beyond formal appointments to White House roles. In some cases, Presidents have appointed these individuals to formal, though temporary, roles, and in other cases, Presidents have relied upon personal associates to provide advice without formally assigning them to a particular position within the Administration.

Advisors Named to Temporary Federal Advisory Roles

Presidents have relied upon outside experts and consultants to advise on particular government initiatives or federal programs, naming such individuals as advisors in their professional capacities but not as full-time government employees. This unique type of government service allows such advisors to share expertise gleaned in their private professional positions, but consequently raises questions about how to address potential conflicts of interests posed by their government service. As the Office of Government

Ethics (OGE) has explained, while conflict of interest restrictions arguably should apply to advisors who serve the government, even if only on a temporary basis, "the Government cannot obtain the expertise it needs if it requires experts to forego their private professional lives as a condition of temporary service." Accordingly, Congress tailored how ethics requirements apply to these types of employees in an effort to balance these competing governmental interests.

To this end, Congress created a category of employees known as special government employees (SGEs), which it defined to cover situations in which outside experts and consultants provide advice on a temporary basis, with or without compensation. To qualify as an SGE, the individual generally must be "retained, designated, appointed, or employed" and cannot serve for more than 130 days during any 365-day period. Federal regulations expressly clarify that "[s]tatus as an employee is unaffected by pay or leave status or, in the case of a special Government employee, by the fact that the individual does not perform official duties on a given day." As a general rule, SGEs are subject to some, but not all of the ethics provisions that govern the conduct of regular employees. Typically, the text of the statutory language or regulation expressly states whether the provision would apply to employees, SGEs, or both.

Although Congress established the category of SGEs, uncertainty about an advisor's status still may arise given the array of potential roles that outside advisors may fill in a presidential administration. For example, many SGEs serve in a limited capacity on federal advisory committees, including those established by the President, but not all members of such committees qualify as SGEs. Rather, as described by OGE, advisory committees may be comprised of three types of members: regular government employees, SGEs, and representatives. OGE characterizes SGEs as a "hybrid" of the other categories of membership – "subject to less restrictive conflict of interest requirements than regular employees, but [...] subject to more restrictive requirements than non-employees." At the ends of this spectrum, regular employees (as discussed above) are subject to all applicable ethics rules as a matter of their full-time positions, and representatives are subject to none. Notably, OGE describes the third group, which it labels "representatives," as advisors who represent specific interest groups and "may make policy recommendations to the Government." Because these advisors "are not expected to render disinterested advice to the Government" and instead represent particular interests, they are not subject to the ethics restrictions designed to curtail such influence. Thus, another important question when determining which ethics rules may apply to particular advisors is whether those advisors are serving as SGEs or as representatives. A 2016 Government Accountability Office (GAO) report recommended measures to improve the oversight of the use of SGEs, noting that "weak internal coordination and misunderstanding about the SGE designation contributed" to misidentification of SGEs. In response, OGE issued updated regulations in 2017 to facilitate coordination between agency officials to ensure that the designation of such employees is accurate.

Reliance on Informal, Personal Advisors

Presidents also have relied upon a final category of presidential advisor—a personal, informal advisor. As alluded to earlier in this posting, without formal status as government employees (whether regular or special), these advisors are not subject to the governing ethics statutes and regulations. OLC has opined on the appropriate status of informal presidential advisors, concluding that the applicability of ethics rules to informal, personal advisors depends on the factual circumstances of the consultations.

As OLC noted in its opinion regarding the appointment of the President's relatives as White House advisors, the President may seek advice on an unofficial, ad hoc basis from individuals who are not employed by the White House or the government generally. That position echoed similar analysis that the office issued forty years prior, in an opinion examining the applicability of conflict of interest laws to presidential advisors. OLC, citing a noted ethics scholar, emphasized that the factual circumstances of the advisor's role and relationship to the President are dispositive and explained that the ethics restrictions resulting from government employment do not confer "'merely by voicing an opinion on government

matters to a federal official at a cocktail party.'" Even if similarly informal consultations occur on a frequent basis and on a range of policy issues, OLC concluded that such personal advisory relationships would not be subject to ethics and conflicts of interest regulation. OLC stressed the significance of the "fundamentally personal nature of the relationship."

Importantly, however, the opinion distinguished that type of general advice from work on a particular issue. Reflecting the elements defining federal employees, OLC also concluded that a personal advisor who is not initially named to a formal position, but who assumes a more formal role to assist the President on specific matters, should be evaluated as a regular employee or SGE. In the example reviewed in that opinion, the advisor "departed from his usual role of an informal advisor" by organizing and chairing meetings of government officials on a particular issue as well as assuming responsibilities for coordinating related government activities on that issue. The advisor "presumably [was] working under the direction or supervision of the President," leading OLC to conclude that the advisor should be given a formal designation and subject to any consequent ethics requirements.