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Presidential Advisers' Testimony Before Congressional Committees: An Overview

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Presidential Advisers' Testimony Before Congressional Committees: An Overview

Summary

Since the beginning of the federal government, Presidents have called upon executive branch officials to provide them with advice regarding matters of policy and administration. While Cabinet members were among the first to play such a role, the creation of the Executive Office of the President (EOP) in 1939 and the various agencies located within that structure resulted in a large increase in the number and variety of presidential advisers. All senior staff members of the White House Office and the leaders of the various EOP agencies and instrumentalities could be said to serve as advisers to the President.

Occasionally, these executive branch officials playing a presidential advisory role have been called upon to testify before congressional committees and subcommittees. Sometimes, such invited appearances have been prompted by allegations of personal misconduct on the part of the official, but they have also included instances when accountability for policymaking and administrative or managerial actions have instigated the request for testimony. Because such appearances before congressional committees or subcommittees seemingly could result in demands for advice proffered to the President, or the disclosure — inadvertent or otherwise — of such advice, there has been resistance, from time to time, by the Chief Executive to allowing such testimony.

Congress has a constitutionally rooted right of access to the information it needs to perform its Article I legislative and oversight functions. Generally, a congressional committee with jurisdiction over the subject matter, which is conducting an authorized investigation for legislative or oversight purposes, has a right to information held by the executive branch in the absence of either a valid claim of constitutional privilege by the executive or a statutory provision whereby Congress has limited its constitutional right to information.

A congressional committee may request (informally or by a letter from the committee chair, perhaps co-signed by the ranking Member) or demand (pursuant to subpoena) the testimony of a presidential adviser. However, Congress may encounter legal and political problems in attempting to enforce a subpoena to a presidential adviser. Conflicts concerning congressional requests or demands for executive branch testimony or documents often involve extensive negotiations and may be resolved by some form of compromise as to, *inter alia*, the scope of the testimony or information to be provided to Congress.

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Presidential Advisers' Testimony Before Congressional Committees: An Overview

Since the beginning of the federal government, Presidents have called upon executive branch officials to provide them with advice regarding matters of policy and administration. The Constitution recognized such relationships when it authorized the President, in Article II, Section 2, to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices." There were, as well, reasons to expect that such advice, whether offered orally or in writing, would be held in confidence. The advice was for the President's consideration and his decisionmaking. The matters involved were sensitive, perhaps bearing upon the foreign, military, economic, or law enforcement policy of the nation. Also, the provision, discussion, and use of such advice by the executive branch could affect its relationships with the other coequal constitutional branches. President George Washington and his Cabinet had these considerations in mind, as Secretary of State Thomas Jefferson's notes on their deliberations reflect, when they decided upon a response to a 1792 congressional request for information.

> We had all considered, and were of one mind, first, that the House was an inquest, and therefore might institute inquiries. Second that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public; consequently were to exercise a discretion. Fourth, that neither the committee nor House had a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President....[1]

The Cabinet, composed of the principal officers in each of the executive departments, failed, for several reasons, to develop as an important source of presidential advice. The department heads constituting the Cabinet were often chosen to satisfy interests that contributed significantly to the President's election. Considerations of partisanship, ideology, geography, public image and stature, and aptitude, among others, figured prominently in their selection. Sometimes the President was not personally well acquainted with these individuals and had only minimal confidence and trust in them. In a few cases, a political rival was included in the Cabinet.

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[1] Andrew A. Lipscomb and Albert Ellery Bergh, eds., *The Writings of Thomas Jefferson*, vol. 1 (Washington: Thomas Jefferson Memorial Association, 1903), pp. 303-304.

It is also very likely that some activist Presidents were ill suited to the group deliberation of the Cabinet. Similarly, many Cabinet members might have felt unqualified, or were unwilling, to offer counsel to the President on matters outside of their immediate portfolios; their advice was perhaps limited to, and protective of, departmental interests. Finally, personal hostilities between or among department heads could result in such tumult within the Cabinet that little useful advice could be gained.

Consequently, Presidents generally looked to other quarters for advisers. One development in this regard was the creation of circles of advisers composed of both public officials and private citizens. President Andrew Jackson, whose election and White House tenure occurred in an era marked by violent political controversy and party instability, utilized an informal group of advisers which came to be known as the Kitchen Cabinet. The members represented "rising social groups as yet denied the prestige to which they felt their power and energies entitled them" — newspapermen, the President's private secretary, campaign organizers and officials from prior administrations, and longtime personal friends.[2]

When John Tyler succeeded to the presidency upon the death of William Henry Harrison, he revived Jackson's practice. Deserted by Whigs and Democrats alike, Tyler resorted to a select circle of advisers composed of personal and political friends from his native Virginia — a college president, a state supreme court judge, four members of the state's delegation in the House of Representatives, and a Senator.[3] Following this practice, several succeeding Presidents had informal groups of advisers that were given colorful names by the press. For example, for Grover Cleveland, it was a Fishing Cabinet; for Theodore Roosevelt, a Tennis Cabinet; for Warren G. Harding, a Poker Cabinet; and for Herbert Hoover, a Medicine Ball Cabinet.

Jackson's inclusion of his personal secretary in his Kitchen Cabinet reflects another line of development regarding presidential advisers. Beginning with Washington, Presidents sought to meet the demands of their office with the assistance of a single personal secretary, usually a relative, compensated from their own private resources. In 1833, Congress authorized the President to appoint, with the advise and consent of the Senate, a secretary "whose duty it shall be, under the direction of the President, to sign in his name and for him, all patents for lands sold or granted under the authority of the United States."[4] Jackson named Andrew Jackson Donelson, his wife's nephew and current personal secretary, to this position, relieving himself of continued personal compensation of the young man. Ultimately, Congress appropriated funds to the Chief Executive in 1857 for an official household — a personal secretary, a steward to supervise the Executive Mansion, and a messenger.[5]

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[2] Arthur M. Schlesinger, Jr., *The Age of Jackson* (Boston, MA: Little, Brown, 1945), p. 67.

[3] Louis W. Koenig, *The Invisible Presidency* (New York: Rinehart, 1960), p. 40.

[4] 4 Stat. 633.

[5] 11 Stat. 228.

Many years later, in 1929, Congress was persuaded to authorize an increase in the President's top personnel, adding two more secretaries and an administrative assistant.[6] Appointed to these senior staff positions were presidential lieutenants, if not presidential intimates and advisers. When Franklin D. Roosevelt came to the presidency in 1933, he brought with him, from his New York gubernatorial experience, a new kind of advisory circle, composed of intellectuals, or at least a core group of Columbia University professors who were joined by other ideas people to form the "Brains Trust." Because there were an insufficient number of staff positions at the White House to accommodate them, these advisers were placed elsewhere in the executive branch, but, for the most part, directly served the President.[7]

This staffing situation, coordination problems, and the development of a new administrative management concept prompted Roosevelt to create, by announcement, a study panel — the President's Committee on Administrative Management, under the leadership of Louis Brownlow, a prominent public administration practitioner — in 1936 to examine and make recommendations regarding these matters.[8] Reporting some 10 months later, the Brownlow committee addressed presidential staffing in dramatic and detailed terms.

> The President needs help. His immediate staff assistance is entirely inadequate. He 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. These assistants, probably not exceeding six in number, would be in addition to the present secretaries, who deal with the public, with the Congress, and with the press and radio. These aides would have no power to make decisions or issue instructions in their own right. They would not be interposed between the President and the heads of his departments. They would not be assistant presidents in any sense. Their function would be, when any matter was presented to the President for action affecting any part of the administrative work of the Government, to assist him in obtaining quickly and without delay all pertinent information possessed by any of the executive departments so as to guide him in making his responsible decisions; and then when decisions have been made, to assist him in seeing to it that every administrative department and agency affected is promptly informed. Their effectiveness in assisting the President will, we think, be directly proportional to their ability to discharge their functions with restraint. They would remain in the background, issue no orders, make no decisions, emit no public statements. Men for these positions should be carefully chosen by the President from within and without the Government. They should be men in whom the President has personal confidence and whose character and attitude is [sic] such that they would not attempt to exercise power on their own account. They should be possessed of high competence, great physical vigor, and a passion for anonymity. They should be installed in the White House itself, directly accessible to the President. In the selection of these aides, the President should be free to call on

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[6] 45 Stat. 1230.

[7] See Rexford G. Tugwell, *The Brains Trust* (New York: Viking, 1968).

[8] Samuel I. Rosenman, ed., *The Public Papers and Addresses of Franklin D. Roosevelt, Volume 5: The People Approve, 1936* (New York: Random House, 1938), p. 144.

departments from time to time for the assignment of persons who, after a tour of duty as his aides, might be restored to their old positions.[9]

In addition to the proposed addition of six assistants to the President's staff, the committee's report also recommended vesting responsibility in the President for the continuous reorganization of the executive branch. Released to Congress on January 12, 1937, the report soon became lost in high politics. Three weeks after submitting the Brownlow committee's report to Congress, Roosevelt announced he wanted to enlarge the membership of the Supreme Court. His "court packing" plan not only fed congressional fears of a presidential power grab, but also so preoccupied Congress that the Brownlow committee's recommendations were ignored.

Executive Office of the President

Although efforts at gaining legislative approval of the Brownlow committee's recommendations lay in ruin in the spring of 1938, the President had not deserted the cause. By July, Roosevelt was meeting with Brownlow and the other committee members. The panel would not be officially reassembled, but he wanted each man's help with a reorganization authority proposal. The resulting measure empowered the President to propose reorganization plans, subject to a veto by a majority vote of disapproval in both houses of Congress, and to also appoint six administrative assistants.

After three days of discussion and debate, the House adopted the bill on March 8, 1939. Twelve days later, the Senate began considering the proposal. Following two days of sparring over amendments, the Senate adopted the bill. A quick conference cleared the measure for Roosevelt's signature on April 3.[10] Earlier, the President had asked the Brownlow committee members to assist with the preparation of his initial reorganization plans.[11]

Following consultations with Budget Bureau Director Harold D. Smith, the Brownlow group presented two reorganization proposals to Roosevelt on April 23. Plan 1, submitted to Congress on April 25, transferred certain agencies to the Executive Office of the President, but offered no explanation of that entity.[12] In Plan 2, a presidential emergency council was abolished and most of its functions were transferred to the Executive Office.[13] While both plans were acceptable to legislators, their effective dates were troublesome in terms of accommodating fiscal calendar necessities. By joint resolution, Congress provided that both plans would

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[9] U.S. President's Committee on Administrative Management, *Report of the President's Committee* (Washington: GPO, 1937), p. 5.

[10] 53 Stat. 561.

[11] Richard Polenberg, *Reorganizing Roosevelt's Government* (Cambridge, MA: Harvard University Press, 1966), pp. 184-187.

[12] 53 Stat. 1423.

[13] 53 Stat. 1431 at 1435.

be effective on July 1, 1939.[14] Following this action, the President, on September 8, issued E.O. 8248, formally organizing the Executive Office and, thereby, defining it in terms of its components.[15] Brownlow, who drafted the initial reorganization plan, viewed the Executive Office as the institutional realization of administrative management and "the effective coordination of the tremendously wide-spread federal machinery." He called the initial version "a little thing" compared to its later size. It grew under Roosevelt and "it continued to expand and was further regularized by statute, by appropriation acts, and by more reorganization plans" during the succeeding years.[16]

The Executive Office organized by E.O. 8248 consisted of the White House Office, the Bureau of the Budget, the National Resources Planning Board, the Office of Government Reports, and the Liaison Office for Personnel Management. It also provided that, "in the event of a national emergency," there could be established "such office for emergency management as the President shall determine." The Office for Emergency Management was created by an administrative order on May 25, 1940, and its functions were further specified in an administrative order of January 7, 1941.[17] It subsequently served as a parent unit for a number of subordinate emergency management bodies.

Presidential Adviser Growth

The creation of the Executive Office of the President contributed to an increase in the number of presidential advisers for several reasons. First, it provided an enclave for various agencies that immediately assisted the President. Primary among these was the White House Office, which was no longer merely the President's small office staff, but an agency with hierarchically organized staff positions whose personnel rapidly expanded during the next few decades.

Second, it counted agencies, such as the Liaison Office for Personnel Management and the Office for Emergency Management, that were headed by an administrative assistant — and adviser — to the President on the White House Office payroll. It also included agencies, such as the Bureau of the Budget (and its Office of Management and Budget successor), that were headed by leaders for whom advising the President was a primary responsibility.

Third, senior White House Office staff would come to supervise and direct the staff of other Executive Office entities: the Assistant to the President for National Security Affairs would direct the National Security Council staff and the Assistant to the President for Domestic Policy would direct the Domestic Council staff.

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[14] 53 Stat. 813.

[15] 3 C.F.R., 1938-1943 Comp., pp. 576-579.

[16] Louis Brownlow, *A Passion for Anonymity: The Autobiography of Louis Brownlow, Second Half* (Chicago, IL: University of Chicago Press, 1958), p. 416.

[17] 3 C.F.R., 1938-1943 Comp., pp. 1320-1321.

Fourth, in January 1973, President Richard M. Nixon vested his Secretary of the Treasury and his director of the Office of Management and Budget with dual White House Office positions, respectively, of Assistant to the President for Economic Affairs and Assistant to the President for Executive Management. He also vested his Secretary of Agriculture, Secretary of Health, Education, and Welfare, and Secretary of Housing and Urban Development with dual White House Office positions, respectively, of Counselor to the President for Natural Resources, Counselor to the President for Human Resources, and Counselor to the President for Community Development.[18] Having such dual White House Office titles was viewed as giving added emphasis, if not authority, to the role of these officials as presidential advisers.

In the aftermath of World War II, Congress statutorily chartered most of the agencies within the Executive Office of the President. Furthermore, Congress routinely appropriated funds for the operating expenses of these entities. In 1944, Congress had adopted an amendment to an appropriation bill that was designed to restrain the creation of Executive Office agencies by executive order — a frequent occurrence during 1941-1944. The amendment stated:

> After January 1, 1945, no part of any appropriation or fund made available by this or any other Act shall be allotted or made available to, or used to pay the expenses of, any agency or instrumentality including those established by Executive order after such agency or instrumentality has been in existence for more than one year, if the Congress has not appropriated any money specifically for such agency or instrumentality or specifically authorized the expenditure of funds by it.[19]

In 1982, when Title 31 of the United States Code was recodified, the amendment was repealed and replaced with new language at Section 1347.[20] The opening sentence of the new section, which remains as operative law, states: "An agency in existence for more than one year may not use amounts otherwise available for obligation to pay its expenses without a specific appropriation or specific authorization by law."

With their growing number and influence, senior staff members of the White House Office and certain other Executive Office agencies began to become of interest to congressional committees when accountability for policymaking and administrative or managerial actions prompted requests for their testimony. Some, like War Production Board chairman Donald M. Nelson,[21] who was popularly known as the "arms czar," appeared before and cooperated with the Senate Special

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[18] *Weekly Compilation of Presidential Documents*, vol. 9, Jan. 8, 1973, p. 7.

[19] 58 Stat. 387.

[20] 96 Stat. 877 at 925, 1076.

[21] Established by E.O. 9024 of Jan. 16, 1942, the War Production Board was technically located within the Office for Emergency Management, an agency within the Executive Office of the President, but it operated independently as an arm of the President. The chairman of the board was presidentially appointed without Senate confirmation; eight other specified government officials were members of the board. The board was terminated by E.O. 9638 of Oct. 4, 1945.

Committee to Investigate the National Defense Program ("Truman Committee") during World War II to report on and discuss war material production and related coordination matters.[22] Others, like Office of War Mobilization director James F. Byrnes, who was sometimes referred to as the "assistant president," apparently avoided appearing before congressional committees during the World War II era, but were in communication with various individual Members of Congress in leadership positions and served as liaisons between the President and Congress on a number of war matters.[23]

Presidential Adviser Testimony

Beginning with the closing years of World War II, examples are provided below of instances when a presidential adviser — a civilian executive branch official, other than a member of the traditional Cabinet, who, as part of that official's responsibilities and activities, consulted with the President — testified before a congressional committee or subcommittee. Because these consultations with the President by such an official may be considered by the President to be privileged and constitutionally protectable, examples are also provided of instances when invited congressional committee or subcommittee testimony by a presidential adviser was refused. None of the examples involves testimony or refusal to testify by a former presidential adviser. All examples are based upon the public record.

- Jonathan Daniels, Administrative Assistant to the President, White House Office, appeared before the Senate Committee on Agriculture and Forestry on February 28 and March 7 and 8, 1944, to discuss his involvement in the personnel policy of the Rural Electrification Administration.[24]

- Wallace H. Graham, Physician to the President, White House Office, appeared before the Senate Committee on Appropriations on January 13, 1948, to discuss information to which he might have been privy with regard to the commodity market.[25]

- Harry H. Vaughn, Military Aide to the President, White House Office, appeared before the Senate Committee on Expenditures in Executive Departments (now Governmental Affairs) on August 30

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[22] Donald M. Nelson, *Arsenal of Democracy: The Story of American War Production* (New York: Harcourt, Brace, 1946), pp. 128, 332; Donald H. Riddle, *The Truman Committee: A Study in Congressional Responsibility* (New Brunswick, NJ: Rutgers University Press, 1964), pp. 36, 70, 83-84.

[23] Herman Miles Somers, *Presidential Agency: The Office of War Mobilization and Reconversion* (Cambridge, MA: Harvard University Press, 1950), p. 74.

[24] U.S. Congress, Senate Committee on Agriculture and Forestry, *Administration of the Rural Electrification Act*, hearings, 78th Cong., 2nd sess. (Washington: GPO, 1944), pp. 611ff, 695ff, 721ff.

[25] U.S. Congress, Senate Committee on Appropriations, *Speculation in Commodity Markets*, hearings, 80th Cong., 2nd sess. (Washington: GPO, 1948), pp. 49ff.

and 31, 1949, to discuss his personal involvement in certain government procurement contracts.[26]

- Donald S. Dawson, Administrative Assistant to the President, White House Office, appeared before the Senate Committee on Banking and Currency on May 10 and 11, 1951, to discuss allegations he had attempted to "dominate" the Reconstruction Finance Corporation and influence appointments to that body.[27]

- Sherman Adams, Assistant to the President, White House Office, appeared before the House Committee on Interstate and Foreign Commerce Committee on June 17, 1958, to discuss his involvement with certain lobbyists.[28]

- Edward E. David, Jr., Science Adviser to the President, White House Office, and director, Office of Science and Technology, appeared before the Senate Committee on Interior and Insular Affairs on June 15, 1971, to discuss the Nixon Administration's position on energy policy matters; he appeared again before the House Committee on Science and Astronautics on June 14, 1972, to discuss science policy matters relating to Soviet-American cooperation agreements.[29]

- Virginia H. Knauer, Special Assistant to the President for Consumer Affairs, White House Office, and director, Office of Consumer Affairs, appeared before the House Select Committee on Small Business on June 25, 1971, to discuss consumer protection and advertising standards.[30]

- Jerome H. Jaffe, Special Consultant to the President, White House Office, and director, Special Action Office for Drug Abuse Prevention, appeared before the House Committee on Interstate and Foreign Commerce on June 28, August 2, October 27, and

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[26] U.S. Congress, Senate Committee on Expenditures in the Executive Departments, *Influence in Government Procurement*, hearings, 81st Cong., 1st sess. (Washington: GPO, 1949), pp. 495ff, 563ff.

[27] U.S. Congress, Senate Committee on Banking and Currency, *Study of Reconstruction Finance Corporation*, hearings, 82nd Cong., 1st sess. (Washington: GPO, 1951), pp. 1709ff, 1795ff.

[28] U.S. Congress, House Committee on Interstate and Foreign Commerce, *Investigation of Regulatory Commissions and Agencies*, hearings, 85th Cong., 2nd sess. (Washington: GPO, 1958), p. 3712 ff.

[29] U.S. Congress, Senate Committee on Interior and Insular Affairs, *The President's Energy Message*, hearings, 92nd Cong., 1st sess. (Washington: GPO, 1971), p. 12ff; U.S. Congress, House Committee on Science and Astronautics, *U.S.-U.S.S.R. Cooperative Agreements*, hearings, 92nd Cong., 2nd sess (Washington: GPO, 1972), p. 60ff.

[30] U.S. Congress, House Select Committee on Small Business, *Advertising and Small Business*, hearings, 92nd Cong., 1st sess. (Washington: GPO, 1971), p. 567ff.

November 8, 1971, to discuss various aspects of the operations of the Special Action Office.[31]

- Peter Flanigan, Assistant to the President, White House Office, appeared before the Senate Committee on the Judiciary on April 20, 1972, during the course of hearings on the confirmation of Richard Kleindienst as Attorney General to discuss his involvement in apparent lobbying activities by the International Telephone and Telegraph Company.[32]

- Bruce A. Kehrli, Special Assistant to the President, White House Office, appeared before the Senate Select Committee on Presidential Campaign Activities on May 17, 1973, to discuss matters related to the Watergate incident.[33]

- Patrick J. Buchanan, Special Consultant to the President, White House Office, appeared before the Senate Select Committee on Presidential Campaign Activities on September 26, 1973, to discuss matters related to the Watergate incident.[34]

- Richard M. Harden, Special Assistant to the President, White House Office, appeared before the Senate Appropriations Subcommittee on Treasury, Postal Service, and General Government on March 9, 1977, to discuss funds for the White House Office; he appeared again before the House Appropriations Subcommittee on Treasury, Postal Service, and General Government on March 15, 1977, to discuss these same matters.[35]

- Rose Mary Woods, Personal Secretary to the President, White House Office, appeared before the Senate Select Committee on Presidential

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[31] U.S. Congress, House Committee on Interstate and Foreign Commerce, *Special Action Office for Drug Abuse Prevention*, hearings, 92nd Cong., 1st sess. (Washington: GPO, 1971), pp. 171ff, 1037ff, 1443, 1578ff.

[32] U.S. Congress, Senate Committee on the Judiciary, *Nominations of Richard G. Kleindienst and L. Patrick Gray III*, hearings, 92nd Cong., 2nd sess (Washington: GPO, 1972), p. 1585ff.

[33] U.S. Congress, Senate Select Committee on Presidential Campaign Activities, *Presidential Campaign Activities of 1972*, hearings, 93rd Cong., 1st sess. (Washington: GPO, 1973), p. 75ff.

[34] Ibid., p. 3899ff.

[35] U.S. Congress, Senate Committee on Appropriations, *Treasury, Postal Service, and General Government Appropriations: Fiscal Year 1978*, hearings, 95th Cong., 1st sess. (Washington: GPO, 1977), p. 1021ff; U.S. Congress, House Committee on Appropriations, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1978*, hearings, 95th Cong., 1st sess. (Washington: GPO, 1977), p. 77ff.

Campaign Activities on March 22, 1974, to discuss matters related to the Watergate incident.[36]

- J. Frederick Buzhardt, Special Counsel to the President, White House Office, appeared before the Senate Select Committee on Presidential Campaign Activities on April 10 and May 7, 1974, to discuss matters related to the Watergate incident.[37]

- Alexander M. Haig, Jr., Staff Coordinator to the President, White House Office, appeared before the Senate Select Committee on Presidential Campaign Activities on May 2, and 15, 1974, to discuss matters related to the Watergate incident.[38]

- Leonard Garment, Assistant to the President, White House Office, appeared before the Senate Select Committee on Presidential Campaign Activities on May 17, 1974, to discuss matters related to the Watergate incident.[39]

- Lloyd Cutler, Counsel to the President, White House Office, appeared before the Senate Judiciary Subcommittee to Investigate the Activities of Individuals Representing the Interests of Foreign Governments on September 10, 1980, to discuss efforts by the President's brother, Billy Carter, to influence the federal government on behalf of the government of Libya.[40]

- Zbigniew Brzezinski, Assistant to the President for National Security Affairs, White House Office, appeared before the Senate Judiciary Subcommittee to Investigate the Activities of Individuals Representing the Interests of Foreign Governments on September 17, 1980, to discuss efforts by the President's brother, Billy Carter, to influence the federal government on behalf of the government of Libya.[41]

- Samuel Berger, Deputy Assistant to the President for National Security Affairs, White House Office, appeared before the Senate

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[36] U.S. Congress, Senate Select Committee on Presidential Campaign Activities, *Presidential Campaign Activities of 1972*, hearings, 93rd Cong., 2nd sess. (Washington: GPO, 1974), p. 10193ff.

[37] Ibid., pp. 10539ff, 10877ff.

[38] Ibid., pp. 10849ff, 10998ff.

[39] Ibid., p. 11053ff.

[40] U.S. Congress, Senate Committee on the Judiciary, *Inquiry into the Matter of Billy Carter and Libya*, hearings, 96th Cong., 2nd sess. (Washington: GPO, 1981), p. 1195ff.

[41] Ibid., p. 1339ff.

Committee on Foreign Relations on May 3, 1994, to provide a briefing on United States policy toward Haiti.[42]

- Samuel Berger, Assistant to the President for National Security Affairs, White House Office, appeared before the Senate Committee on Governmental Affairs on September 11, 1997, concerning campaign fund-raising practices in connection with the 1996 federal election campaign.[43]

- Lloyd N. Cutler, Special Counsel to the President, White House Office, appeared before the House Committee on Banking, Finance, and Urban Affairs on July 26, 1994, concerning whether White House aides had inappropriately learned details of a Resolution Trust Corporation (RTC) investigation of the failed Madison Guaranty Savings and Loan.[44]

- Lisa M. Caputo, Press Secretary to the First Lady, White House Office, appeared before the House Committee on Banking, Finance, and Urban Affairs on July 28, 1994, concerning whether White House aides had inappropriately learned details of an RTC investigation of the failed Madison Guaranty Savings and Loan.[45]

- W. Neil Eggleston, Associate Counsel to the President, White House Office, appeared before the House Committee on Banking, Finance, and Urban Affairs on July 28, 1994, concerning whether White House aides had inappropriately learned details of an RTC investigation of the failed Madison Guaranty Savings and Loan.[46]

- Mark D. Gearan, Assistant to the President for Communications, appeared before the House Committee on Banking, Finance, and Urban Affairs on July 28, 1994, concerning whether White House aides had inappropriately learned details of an RTC investigation of the failed Madison Guaranty Savings and Loan.[47]

- Harold Ickes, Assistant to the President and Deputy Chief of Staff, White House Office, appeared before the House Committee on

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[42] *Congressional Record*, Daily Digest, vol. 140, May 3, 1994, p. D245.

[43] U.S. Congress, Senate Committee on Governmental Affairs, *Investigation of Illegal or Improper Activities in Connection with the 1996 Federal Election Campaign*, hearings, 105th Cong., 1st sess. (Washington: GPO, 1998), p. 204ff.

[44] U.S. Congress, House Committee on Banking, Finance, and Urban Affairs, *White House Contacts with Treasury/RTC Officials About "Whitewater"-Related Matters*, part 1, hearing, 103rd Cong., 2nd sess. (Washington: GPO, 1994), p. 12ff.

[45] Ibid., part 2, p. 104ff.

[46] Ibid., p. 108ff.

[47] Ibid., p. 103ff.

Banking, Finance, and Urban Affairs on July 28, 1994, concerning whether White House aides had inappropriately learned details of an RTC investigation of the failed Madison Guaranty Savings and Loan.[48]

- Bruce Lindsey, Assistant to the President and Senior Adviser, White House Office, appeared before the House Committee on Banking, Finance, and Urban Affairs on July 28, 1994, concerning whether White House aides had inappropriately learned details of an RTC investigation of the failed Madison Guaranty Savings and Loan.[49]

- John D. Podesta, Assistant to the President and Staff Secretary, White House Office, appeared before the House Committee on Banking, Finance, and Urban Affairs on July 28, 1994, concerning whether White House aides had inappropriately learned details of an RTC investigation of the failed Madison Guaranty Savings and Loan.[50]

- Clifford Sloan, Associate Counsel to the President, White House Office, appeared before the House Committee on Banking, Finance, and Urban Affairs on July 28, 1994, concerning whether White House aides had inappropriately learned details of an RTC investigation of the failed Madison Guaranty Savings and Loan.[51]

- George R. Stephanopoulis, Senior Policy adviser to the President, appeared before the House Committee on Banking, Finance, and Urban Affairs on July 28, 1994, concerning whether White House aides had inappropriately learned details of an RTC investigation of the failed Madison Guaranty Savings and Loan.[52]

- Margaret A. Williams, Chief of Staff to the First Lady, White House Office, appeared before the House Committee on Banking, Finance, and Urban Affairs on July 28, 1994, concerning whether White House aides had inappropriately learned details of an RTC investigation of the failed Madison Guaranty Savings and Loan.[53]

- Lloyd N. Cutler, Special Counsel to the President, White House Office, appeared before the Senate Committee on Banking, Housing, and Urban Affairs on August 5, 1994, concerning whether White

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[48] Ibid., p. 105ff.

[49] Ibid., p. 100ff.

[50] Ibid., p. 112ff.

[51] Ibid., p. 100ff.

[52] Ibid., p. 111ff.

[53] Ibid., p. 109ff.

House aides had inappropriately learned details of an RTC investigation of the failed Madison Guaranty Savings and Loan.[54]

- W. Neil Eggleston, Deputy Counsel to the President, White House Office, appeared before the Senate Committee on Banking, Housing, and Urban Affairs on August 3, 1994, concerning whether White House aides had inappropriately learned details of an RTC investigation of the failed Madison Guaranty Savings and Loan.[55]

- Harold Ickes, Assistant to the President and Deputy Chief of Staff, White House Office, appeared before the Senate Committee on Banking, Housing, and Urban Affairs on August 4, 1994, concerning whether White House aides had inappropriately learned details of an RTC investigation of the failed Madison Guaranty Savings and Loan.[56]

- Joel I. Klein, Deputy Counsel to the President, appeared before the Senate Committee on Banking, Housing, and Urban Affairs on August 3, 1994, concerning whether White House aides had inappropriately learned details of an RTC investigation of the failed Madison Guaranty Savings and Loan.[57]

- Bruce R. Lindsey, Assistant to the President and Senior Adviser, White House Office, appeared before the Senate Committee on Banking, Housing, and Urban Affairs on August 4, 1994, concerning whether White House aides had inappropriately learned details of an RTC investigation of the failed Madison Guaranty Savings and Loan.[58]

- Thomas F. McLarty III, Counselor to the President, White House Office, appeared before the Senate Committee on Banking, Housing, and Urban Affairs on August 4, 1994, concerning whether White House aides had inappropriately learned details of an RTC investigation of the failed Madison Guaranty Savings and Loan.[59]

- Beth Nolan, Associate Counsel to the President, White House Office, appeared before the Senate Committee on Banking, Housing,

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[54] U.S. Congress, Senate Committee on Banking, Housing, and Urban Affairs, *Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation — Washington DC Phase*, vol. 4, hearings, 103rd Cong., 2nd sess. (Washington: GPO, 1995), p. 734ff.

[55] Ibid., p. 87ff.

[56] Ibid., p. 353ff.

[57] Ibid., p. 86ff.

[58] Ibid., p. 357ff.

[59] Ibid., p. 270ff.

and Urban Affairs on August 3, 1994, concerning whether White House aides had inappropriately learned details of an RTC investigation of the failed Madison Guaranty Savings and Loan.[60]

- John D. Podesta, Assistant to the President and Staff Secretary, White House Office, appeared before the Senate Committee on Banking, Housing, and Urban Affairs on August 4, 1994, concerning whether White House aides had inappropriately learned details of an RTC investigation of the failed Madison Guaranty Savings and Loan.[61]

- Clifford M. Sloan, Associate Counsel to the President, White House Office, appeared before the Senate Committee on Banking, Housing, and Urban Affairs on August 3, 1994, concerning whether White House aides had inappropriately learned details of an RTC investigation of the failed Madison Guaranty Savings and Loan.[62]

- George R. Stephanopoulis, Senior Adviser to the President for Policy and Strategy, White House Office, appeared before the Senate Committee on Banking, Housing, and Urban Affairs on August 4, 1994, concerning whether White House aides had inappropriately learned details of an RTC investigation of the failed Madison Guaranty Savings and Loan.[63]

- Margaret A. Williams, Assistant to the President and Chief of Staff to the First Lady, White House Office, appeared before the Senate Committee on Banking, Housing, and Urban Affairs on August 4, 1994, concerning whether White House aides had inappropriately learned details of an RTC investigation of the failed Madison Guaranty Savings and Loan.[64]

- Mark D. Gearan, Assistant to the President and Director of Communications and Strategic Planning, White House Office, appeared before the Senate Special Committee to Investigate the Whitewater Development Corporation and Related Matters on July 25, 1995, concerning whether White House staff had engaged in improper contacts regarding the Madison Guaranty Saving and Loan Association, the White Water Development Corporation, and other matters.[65]

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[60] Ibid., p. 89ff.

[61] Ibid., p. 360ff.

[62] Ibid., p. 88ff.

[63] Ibid., p. 360ff.

[64] Ibid., p. 272ff.

[65] *Congressional Record*, vol. 141, July 25, 1995, p. D493; although the transcripts of the (continued...)

- Deborah Gorham, Assistant to the Associate Counsel to the President, White House Office, appeared before the Senate Special Committee to Investigate the Whitewater Development Corporation and Related Matters on August 1, 1995, concerning whether White House staff had engaged in improper contacts regarding the Madison Guaranty Saving and Loan Association, the White Water Development Corporation, and other matters.[66]

- Carolyn C. Huber, Special Assistant to the President and Director of Personal Correspondence, White House Office, appeared before the Senate Special Committee to Investigate the Whitewater Development Corporation and Related Matters on August 3, 1995, and January 18, 1996, concerning whether White House staff had engaged in improper contacts regarding the Madison Guaranty Saving and Loan Association, the White Water Development Corporation, and other matters.[67]

- Harold Ickes, Deputy Chief of Staff, White House Office, appeared before the Senate Special Committee to Investigate the Whitewater Development Corporation and Related Matters on February 23, 1996, concerning whether White House staff had engaged in improper contacts regarding the Madison Guaranty Saving and Loan Association, the White Water Development Corporation, and other matters.[68]

- Evelyn Lieberman, Deputy Press Secretary for Operations, White House Office, appeared before the Senate Special Committee to Investigate the Whitewater Development Corporation and Related Matters on July 26, 1995, concerning whether White House staff had engaged in improper contacts regarding the Madison Guaranty Saving and Loan Association, the White Water Development Corporation, and other matters.[69]

- Bruce R. Lindsey, Assistant to the President and Deputy Counsel to the President, White House Office, appeared before the Senate Special Committee to Investigate the Whitewater Development Corporation and Related Matters on August 8 and November 28, 1995, and January 16, 1996, concerning whether White House staff had engaged in improper contacts regarding the Madison Guaranty

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[65] (...continued)
hearings held by the Senate Special Committee have not been published, a committee list of those who testified before the panel is in the possession of the author.

[66] Ibid., Aug. 1, 1995, p. D519.

[67] Ibid., Aug. 3, 1995, p. D532; Ibid., vol. 142, Jan. 18, 1996, p. D10.

[68] Ibid., vol. 142, Feb. 23, 1996, p. D39.

[69] Ibid., vol. 141, July 26, 1995, p. D499.

Saving and Loan Association, the White Water Development Corporation, and other matters.[70]

- Capricia P. Marshall, Special Assistant to the First Lady, White House Office, appeared before the Senate Special Committee to Investigate the Whitewater Development Corporation and Related Matters on February 9, 1996, concerning whether White House staff had engaged in improper contacts regarding the Madison Guaranty Saving and Loan Association, the White Water Development Corporation, and other matters.[71]

- Thomas F. McLarty III, Counsel to the President, White House Office, appeared before the Senate Special Committee to Investigate the Whitewater Development Corporation and Related Matters on August 7, 1995, concerning whether White House staff had engaged in improper contacts regarding the Madison Guaranty Saving and Loan Association, the White Water Development Corporation, and other matters.[72]

- Bobby J. Nash, Assistant to the President and Director of Presidential Personnel, White House Office, appeared before the Senate Special Committee to Investigate the Whitewater Development Corporation and Related Matters on January 31 and April 30, 1996, concerning whether White House staff had engaged in improper contacts regarding the Madison Guaranty Saving and Loan Association, the White Water Development Corporation, and other matters.[73]

- Stephen R. Neuwirth, Associate Counsel to the President, White House Office, appeared before the Senate Special Committee to Investigate the Whitewater Development Corporation and Related Matters on August 3, 1995, concerning whether White House staff had engaged in improper contacts regarding the Madison Guaranty Saving and Loan Association, the White Water Development Corporation, and other matters.[74]

- John M. Quinn, Assistant to the President and Chief of Staff to the Vice President, White House Office, appeared before the Senate Special Committee to Investigate the Whitewater Development Corporation and Related Matters on August 7, 1995, concerning whether White House staff had engaged in improper contacts

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[70] Ibid., Aug. 8, 1995, p. D547; Ibid., Nov. 28, 1995, p. D747; Ibid., vol. 142, Jan. 16, 1996, p. D10.

[71] Ibid., vol. 142, Feb. 9, 196, p. D35.

[72] Ibid., vol. 141, Aug. 7, 1995, p. D544.

[73] Ibid., vol. 142, Jan. 31, 1996, p. D22; Ibid., Apr. 30, 1996, p. D195.

[74] Ibid., vol. 141, Aug. 3, 1995, p. D532.

regarding the Madison Guaranty Saving and Loan Association, the White Water Development Corporation, and other matters.[75]

- Jane C. Sherburne, Special Counsel to the President, White House Office, appeared before the Senate Special Committee to Investigate the Whitewater Development Corporation and Related Matters on November 9, 1995, and February 9, 1996, concerning whether White House staff had engaged in improper contacts regarding the Madison Guaranty Saving and Loan Association, the White Water Development Corporation, and other matters.[76]

- Patti Solis, Special Assistant to the President and Director of Scheduling for the First Lady, appeared before the Senate Special Committee to Investigate the Whitewater Development Corporation and Related Matters on May 14, 1996, concerning whether White House staff had engaged in improper contacts regarding the Madison Guaranty Saving and Loan Association, the White Water Development Corporation, and other matters.[77]

- Patsy L. Thomasson, Deputy Assistant to the President and Assistant Director for Presidential Personnel, White House Office, appeared before the Senate Special Committee to Investigate the Whitewater Development Corporation and Related Matters on July 25, 1995, and May 9, 1996, concerning whether White House staff had engaged in improper contacts regarding the Madison Guaranty Saving and Loan Association, the White Water Development Corporation, and other matters.[78]

- Margaret A. Williams, Assistant to the President and Chief of Staff to the First Lady, White House Office, appeared before the Senate Special Committee to Investigate the Whitewater Development Corporation and Related Matters on July 26, November 2, and December 11, 1995, concerning whether White House staff had engaged in improper contacts regarding the Madison Guaranty Saving and Loan Association, the White Water Development Corporation, and other matters.[79]

- Charles Easley, Director of the Office of White House Security, White House Office, appeared before the Senate Committee on the Judiciary on June 28, 1996, concerning the dissemination of Federal

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[75] Ibid., Aug. 7, 1995, p. D544.

[76] Ibid., Nov. 9, 1995, p. D721; Ibid., vol. 142, Feb. 9, 1996, p. D35.

[77] Ibid., vol. 142, May 14, 1996, p. D236.

[78] Ibid., vol. 141, July 25, 1995, p. D493; Ibid., vol. 142, May 9, 1996, p. D227.

[79] Ibid., vol. 141, July 26, 1995, p. D499; Ibid., Nov. 2, 1995, p. D707; Ibid., Dec. 11, 1995, p. D774.

Bureau of Investigation background investigation reports and other information to the White House.[80]

- Lanny Breuer, Special Counsel to the President, White House Office, appeared before the House Committee on Government Reform and Oversight on November 7, 1997, concerning White House compliance with committee subpoenas issued in the course of an investigation into alleged fund-raising abuses and the funneling of foreign money into political campaigns.[81]

- Cheryl Mills, Deputy Assistant to the President and Deputy Counsel to the President, White House Office, appeared before the House Committee on Government Reform and Oversight on November 6 and 7, 1997, concerning White House compliance with committee subpoenas issued in the course of an investigation into alleged fund-raising abuses and the funneling of foreign money into political campaigns.[82]

- Dimitri Nionakis, Associate Counsel to the President, White House Office, appeared before the House Committee on Government Reform and Oversight on November 7, 1997, concerning White House compliance with committee subpoenas issued in the course of an investigation into alleged fund-raising abuses and the funneling of foreign money into political campaigns.[83]

- Charles F. C. Ruff, Counsel to the President, White House Office, appeared before the House Committee on Government Reform and Oversight on November 6 and 7, 1997, concerning White House compliance with committee subpoenas issued in the course of an investigation into alleged fund-raising abuses and the funneling of foreign money into political campaigns.[84]

- Nancy Heinreich, Deputy Assistant to the President for Appointments and Scheduling, White House Office, appeared before the House Committee on Government Reform and Oversight on November 13, 1997, concerning the White House access and political campaign donations of Johnny Chung.[85]

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[80] Ibid., vol. 142, June 28, 1996, p. D362.

[81] U.S. Congress, House Committee on Government Reform and Oversight, *White House Compliance with Committee Subpoenas*, hearings, 105th Cong., 1st sess. (Washington: GPO, 1998), p. 219ff.

[82] Ibid., pp. 51ff, 157ff.

[83] Ibid., p. 218ff.

[84] Ibid., pp. 44ff, 152f.

[85] U.S. Congress, House Committee on Government Reform and Oversight, *Johnny Chung:*
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- Mark Lindsay, Assistant to the President and Director of White House Management and Administration, White House Office, appeared before the House Committee on Government Reform on March 23, 2000, concerning White House mismanagement of its e-mail system and e-mails subpoenaed by the committee.[86]

- Dimitri Nionakis, Associate Counsel to the President, appeared before the House Committee on Government Reform on May 24, 2000, concerning White House mismanagement of its e-mail system and e-mails subpoenaed by the committee.[87]

- Beth Nolan, Counsel to the President, White House Office, appeared before the House Committee on Government Reform on March 30 and May 4, 2000, concerning White House mismanagement of its e-mail system and e-mails subpoenaed by the committee.[88]

- Thomas J. Ridge, Assistant to the President for Homeland Security, White House Office, appeared before the Senate Committee on Governmental Affairs on June 20, 2002, concerning the proposed Department of Homeland Security.[89]

- Thomas J. Ridge, Assistant to the President for Homeland Security, White House Office, appeared before the House Committee on Government Reform on June 20, 2002, concerning the proposed Department of Homeland Security.[90]

- Thomas J. Ridge, Assistant to the President for Homeland Security, White House Office, appeared before the House Committee on

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[85] (...continued)
His Unusual Access to the White House, His Political Donations, and Related Matters, hearings, 105th Cong., 1st sess. (Washington: GPO, 1998), p. 705ff.

[86] U.S. Congress, House Committee on Government Reform, *Missing White House E-mails: Mismanagement of Subpoenaed Records*, hearings, 106th Cong., 2nd sess. (Washington: GPO, 2001), p. 137ff.

[87] Ibid., p. 769ff.

[88] Ibid., pp. 262ff, 769ff.

[89] U.S. Congress, Senate Committee on Governmental Affairs, *President Bush's Proposal to Create a Department of Homeland Security*, hearing, 107th Cong., 2nd sess. (Washington: GPO, 2002), p. 25ff.

[90] U.S. Congress, House Committee on Government Reform, *The Department of Homeland Security: An Overview of the President's Proposal*, hearing, 107th Cong., 2nd sess. (Washington: GPO, 2002), p. 85ff.

Energy and Commerce on June 26, 2002, concerning the proposed Department of Homeland Security.[91]

- Thomas J. Ridge, Assistant to the President for Homeland Security, White House Office, appeared before the Senate Committee on the Judiciary on June 26, 2002, concerning the proposed Department of Homeland Security.[92]

- Thomas J. Ridge, Assistant to the President for Homeland Security, White House Office, appeared before the House Committee on the Judiciary on June 26, 2002, concerning the proposed Department of Homeland Security.[93]

- Thomas J. Ridge, Assistant to the President for Homeland Security, White House Office, appeared before the Senate Committee on Environment and Public Works on July 10, 2002, concerning the proposed Department of Homeland Security.[94]

- Thomas J. Ridge, Assistant to the President for Homeland Security, White House Office, appeared before the House Select Committee on Homeland Security on July 15, 2002, concerning the proposed Department of Homeland Security.[95]

- Thomas J. Ridge, Assistant to the President for Homeland Security, White House Office, appeared before the Senate Committee on Health, Education, Labor, and Pensions on July 16, 2002, concerning the proposed Department of Homeland Security.[96]

- Thomas J. Ridge, Assistant to the President for Homeland Security, White House Office, appeared before the Senate Committee on Agriculture, Nutrition, and Forestry on July 17, 2002, concerning the proposed Department of Homeland Security.[97]

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[91] U.S. Congress, House Committee on Energy and Commerce, *Creating the Department of Homeland Security: Consideration of the Administration's Proposal*, hearings, 107th Cong., 2nd sess. (Washington: GPO, 2002), p. 14ff.

[92] *Congressional Record*, v. 148, June 26, 2002, p. D687.

[93] U.S. Congress, House Committee on the Judiciary, *Homeland Security Act of 2002*, hearing, 107th Cong. 2nd sess. (Washington: GPO, 2002), p. 5ff.

[94] *Congressional Record*, v. 148, July 10, 2002, p. D730.

[95] U.S. Congress, House Select Committee on Homeland Security, *H.R. 5005, the Homeland Security Act of 2002, Days 1 and 2*, hearings, 107th Cong., 2nd sess. (Washington: GPO, 2002), p. 7ff.

[96] U.S. Congress, Senate Committee on Health, Education, Labor, and Pensions, *Homeland Security*, hearing, 107th Cong., 2nd sess. (Washington: GPO, 2002), p. 8ff.

[97] *Congressional Record*, v. 148, July 17, 2002, p. D768.

In a somewhat different case, Condoleezza Rice, Assistant to the President for National Security Affairs, after initially declining to testify, appeared before the National Commission on Terrorist Attacks Upon the United States on April 8, 2004, concerning the anti-terrorism efforts of the Bush Administration prior to the September 11, 2001, attacks upon the World Trade Center and the Pentagon.[98] Some viewed the commission as an independent entity because its membership was appointed by the President and the party leaders of Congress, while others noted that the panel's authorizing statute established it in the legislative branch.[99]

Presidential Adviser Testimony Refused

Beginning with the years immediately after the conclusion of World War II, examples are provided below of instances when invited congressional committee or subcommittee testimony by a presidential adviser was refused. All examples are based upon the public record.

- John R. Steelman, Assistant to the President, White House Office, declined in March 1948 to appear before a special subcommittee of the House Committee on Education and Labor.[100]

- Herbert G. Klein, Director of White House Communications, White House Office, declined on September 21, 1971, to appear before the Senate Judiciary Subcommittee on Constitutional Rights.[101]

- Frederick V. Malek, Special Assistant to the President, White House Office, and Charles W. Colson, Special Counsel to the President, White House Office, declined in December 1971 to appear before the Senate Judiciary Subcommittee on Constitutional Rights.[102]

- Henry A. Kissinger, Assistant to the President for National Security Affairs, White House Office, declined on February 28, 1972, to appear before the Senate Committee on Foreign Relations.[103]

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[98] James G. Lakely, "Al Qaeda a Target Early, Rice Says," *Washington Times*, Apr. 9, 2004, pp. A1, A13; Dan Eggen and Walter Pincus, "Rice Defends Pre-9/11 Anti-Terrorism Efforts: U.S. 'Was Not on War Footing,' She Says," *Washington Post*, Apr. 9, 2004, pp. A1, A10.

[99] See 116 Stat. 2408.

[100] U.S. Congress, House Committee on Education and Labor, *Investigation of the GSA Strike,* hearings, 80th Cong., 2nd sess. (Washington: GPO, 1948), pp. 347-353.

[101] U.S. Congress, Senate Committee on the Judiciary, Freedom of the Press, hearings, 92nd Cong., 1st and 2nd sess. (Washington: GPO, 1972), p. 1299.

[102] Ibid., p. 425.

[103] *Congressional Record*, vol. 118, Mar. 28, 1972, p. 10471; Kissinger "occasionally talked on the phone, or privately met, with top legislative leaders, briefed them at pro forma consultations before major military actions or on the occasion of big diplomatic agreements, and once in a while informally briefed larger congressional groups. Kissinger would go to the Hill, incognito as it were, a couple of times a year and he might entertain a congressional

(continued...)

- David Young, Special Assistant to the National Security Council, declined on April 29, 1972, to appear before the House Government Operations Subcommittee on Foreign Operations and Government Information.[104]

- Thomas J. Ridge, Assistant to the President for Homeland Security, White House Office, declined March 15 and April 4, 2002, requests to appear before the Senate Committee on Appropriations.[105]

- Thomas J. Ridge, Assistant to the President for Homeland Security, White House Office, after declining to appear before the House Appropriations Subcommittee on Treasury, Postal Service, and General Government in late March, agreed to an informal, closed, April 10, 2002, meeting of subcommittee members.[106]

- Douglas Badger, Special Assistant to the President for Economic Policy, Office of Policy Development, declined on March 31, 2004, to appear before the House Committee on Ways and Means.[107]

Why Presidential Advisers Do Not Regularly Testify Before Committees

"Although White House aides do not testify before congressional committees on a regular basis," it has been observed, "under certain conditions they do. First, intense and escalating political embarrassment may convince the White House that

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[103] (...continued)
group in the OEOB [Old Executive Office Building] maybe once a year. In some of the sessions that did occur the Congress was misinformed on key issues ... in the cases of the Vietnam peace agreement and the first SALT agreements with the Soviets." John Prados, *Keepers of the Keys: A History of the National Security Council from Truman to Bush* (New York: William Morrow, 1991), p. 309.

[104] U.S. Congress, House Committee on Government Operations, *U.S. Government Information Policies and Practices — Security Classification Problems Involving (b)(1) of the Freedom of Information Act*, hearings, 92nd Cong., 2nd sess. (Washington: GPO, 1972), p. 2453.

[105] Associated Press, "Ridge Won't Tell Senate His Views on the War," *Washington Times*, Mar. 5, 2002, p. A3; Alison Mitchell, "Congressional Hearings: Letter to Ridge Is Latest Jab in Fight Over Balance of Powers," *New York Times*, Mar. 5, 2002, p. A8; Mark Preston, "Byrd Holds Firm," *Roll Call*, Apr. 18, 2002, pp. 1, 26, 28.

[106] George Archibald, "Panel Ties Funding to Ridge Testimony," *Washington Times*, Mar. 22, 2002, pp. A1, A14; George Archibald, "White House Mollifies House Panel," *Washington Times*, Mar. 23, 2002, A1, A4; Elizabeth Becker, "Domestic Security: Ridge Briefs House Panel, but Discord Is Not Resolved," *New York Times*, Apr. 11, 2002, p. A17.

[107] Amy Goldstein, "Democrats Ask Bush Aides to Explain Role on Medicare Cost," *Washington Post*, Mar. 20, 2004, p. A5; "Ways and Means Republicans Allow Scully, White House to Avoid Answering Questions on Medicare Estimate Coverup," News Release from Rep. Charles B. Rangel, Committee on Ways and Means, Apr. 1, 2004.

it is in the interest of the President to have these aides testify and ventilate the issue fully. Second, initial White House resistance may give way in the face of concerted congressional and public pressure."[108]

Given the comity between the executive and legislative branches, Congress often elects not to request the appearance of presidential aides.[109] When Congress has requested the appearance of such aides, Presidents and their aides have at times resisted, asserting the separation of powers doctrine and/or executive privilege.[110] These two grounds for declining to comply with congressional requests for the appearance of presidential aides overlap, and it is sometimes difficult to determine which argument is being raised.[111]

President Richard M. Nixon contended: "Under the doctrine of separation of powers, the manner in which the President personally exercises his assigned executive powers is not subject to questioning by another branch of Government. If the President is not subject to such questioning, it is equally appropriate that members of his staff not be so questioned, for their roles are in effect an extension of the Presidency."[112]

The separation of powers doctrine was also cited in guidelines for White House staff issued during the Carter Administration as the basis for the "immunity" of the

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[108] Louis Fisher, "White House Aides Testifying before Congress," *Presidential Studies Quarterly*, vol. 27, Winter 1997, p. 139.

[109] Ibid., p. 151.

[110] Ibid., pp. 140-141.

[111] In two instances during the Carter Administration, when presidential advisers declined to appear before committees, objections were raised which are difficult to categorize. *See* Mark J. Rozell, "Executive Privilege and the Modern Presidents: In Nixon's Shadow," *Minnesota Law Review*, vol. 83, May 1999, pp. 1069, 1090-1091, 1092.

The Bush Administration resisted congressional attempts to secure the testimony of Tom Ridge, Assistant to the President for Homeland Security. The Administration invoked the separation of powers doctrine ("Ridge Will Not Give Congress His Testimony," *USA Today*, Mar. 25, 2002, p. 7A), and stated that Ridge would not appear because he was a presidential adviser, not a Cabinet officer, and because he was not confirmed by the Senate. The Bush Administration also contended that the President, rather than Congress, oversees a presidential adviser who is not confirmed by the Senate. "A Nation Challenged: Congressional Hearings," *New York Times*, Mar. 5, 2002, p. 8; "Congress, White House Fight Over Ridge Status," *Washington Post*, Mar. 21, 2002, p. A33. However, some Members argued that Ridge's position was new and unique, and that he had influence over multiple departments whose budgets were subject to Congress's power of the purse. "Backlash Grows Against White House Secrecy," *Christian Science Monitor*, Mar. 25, 2002, p. 3.

[112] Fisher, "White House Aides Testifying before Congress," p. 140 (quoting *Public Papers of the President, 1973* (Washington: GPO, 1975), at p. 160). The separation of powers doctrine was also cited by the Carter Administration as the rationale for White House advisers not appearing before Congress. Rozell, "Executive Privilege and the Modern Presidents: In Nixon's Shadow," pp. 1091-1092.

staff from appearing before committees.[113] The guidelines "articulated the traditional arguments against compulsory testimony to Congress by White House advisers (i.e., need for 'frank and candid discussions,' personal advisers are agents of the President)."[114]

Executive privilege was invoked during the Nixon Administration when congressional committees sought the testimony of a White House aide at a Senate confirmation hearing[115] and the testimony of the White House Counsel at Senate committee hearings on the Watergate incident and related matters.[116]

Congress's Right to Executive Branch Information

Congress has a constitutionally rooted right of access to the information it needs to perform its Article I legislative and oversight functions.[117] Generally, a congressional committee with jurisdiction over the subject matter, which is conducting an authorized investigation for legislative or oversight purposes, has a right to information held by the executive branch in the absence of either a valid

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[113] Rozell, "Executive Privilege and the Modern Presidents: In Nixon's Shadow," p. 1091 and note 116 (citing to memorandum of February 8, 1979, from Robert Lipshutz to White House staff).

[114] Ibid., p.1091 and note 15 (citing to Lipshutz memorandum).

[115] Fisher, "White House Aides Testifying before Congress," p. 140.

[116] Ibid., pp. 140-141.

[117] *See McGrain* v. *Daugherty*, 273 U.S. 135, 177, 181-182 (1927). In a frequently quoted passage, the Court explained, at p. 174:

> 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. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.

See also Watkins v. *United States*, 354 U.S. 178, 200 note 33 (1957). For a more detailed discussion of the constitutional and statutory authority for congressional access to information and for an examination of related issues, see CRS Report RL30240, *Congressional Oversight Manual.*

claim of constitutional privilege by the executive or a statutory provision whereby Congress has limited its constitutional right to information.[118]

Efforts by congressional committees to obtain information from the executive branch are sometimes met with assertions of executive privilege.[119] No decision of the Supreme Court resolves the question of whether there are any circumstances in which the executive branch can refuse to provide information sought by Congress on the basis of executive privilege, but the case law offers some guidance for committees when the privilege is asserted. In upholding a judicial subpoena in *United States* v. *Nixon*,[120] the Supreme Court found a constitutional basis for the doctrine of executive privilege,[121] rejected the President's contention that the privilege was absolute,[122] and balanced the President's need for confidentiality and the judiciary's need for the materials in a criminal proceeding.[123]

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[118] *See Wilkinson v. United States*, 365 U.S. 399, 408-409 (1961); *Congressional Oversight Manual*, *supra* note 117.

[119] For a more detailed analysis of the doctrine of executive privilege in the context of congressional investigations, see CRS Report RL30319, *Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments*, by Morton Rosenberg. *See also* Louis Fisher, *The Politics of Executive Privilege* (Durham, NC: Carolina Academic Press, 2004).

[120] 418 U.S. 683 (1974). The subpoena, issued to the President at the request of the Watergate Special Prosecutor, demanded tape recordings of confidential conversations between the President and his advisors. Ibid., p. 703.

[121] The Court found the basis in "the supremacy of each branch within its own assigned area of constitutional duties" and in the separation of powers. Ibid., pp. 705, 706. See also ibid., pp. 708, 711. The Court also found the privilege to be rooted in the President's need for confidentiality. Ibid., p. 708.

[122] Ibid., p. 708. The Court considered presidential communications to be "presumptively privileged" (ibid., p. 705). Because the privilege is not absolute, judicial review is available. Ibid., 708.

[123] Ibid., p. 707. The Court resolved the "competing interests" so as to preserve "the essential functions of each branch." Ibid. Under the circumstances of the case, the judicial need for the tapes outweighed the President's "generalized interest in confidentiality.... " Ibid., p. 713. The Court was careful to limit the scope of its decision (ibid., p. 712 n.19), noting that it was not addressing a case involving a congressional demand for information or a case involving the President's interest in preserving state secrets. The Court appeared to be willing to accord greater protection to "military, diplomatic, or sensitive national security secrets" (ibid., p. 706) than it was to a President's communications with his advisers.

United States v. *Nixon* did not involve a presidential claim of executive privilege in response to a congressional subpoena. In *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725 (D.C. Cir. 1974), the court reviewed the President's assertion of executive privilege as grounds for not complying with a committee subpoena for tape recordings of conversations between the President and his staff. The court found that "the presumption that the public interest favors confidentiality [in presidential communications] can be defeated only by a strong showing of need by another institution of government.... " Ibid., p. 730. Under the unusual circumstances of that case,

(continued...)

A distinction has been recognized by the courts between two aspects of executive privilege — the presidential communications privilege and the deliberative process privilege.[124] The former has a constitutional basis in the separation of powers doctrine and is rooted in concern for presidential decision making,[125] whereas the latter "is primarily a common law privilege" applicable "to decisionmaking of executive officials generally."[126] The former applies to entire documents (including factual material) and "covers final and postdecisional materials as well as predeliberative ones."[127] The latter covers predecisional and deliberative materials, not "purely factual [material], unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the

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[123] (...continued)
the court found that the legislative and oversight needs of the committee were insufficient to overcome the claim of privilege. Ibid., p. 732.

[124] *In re Sealed Case (Espy)*, 121 F.3d 729 (D.C. Cir. 1997). For an analysis of *Espy*, see Rozell, "Executive Privilege and the Modern Presidents: In Nixon's Shadow," pp. 1119-1120.

[125] *Espy*, 121 F.3d at 745, 752. Confidential advice is critical to presidential decision making. Ibid., p. 751. To limit the privilege to its purpose (protecting "the confidentiality of the President's decision making process"), *Espy* construed the privilege narrowly. Ibid., p. 752. *Espy* held that the presidential communications privilege "extends to communications authored by or solicited and received by presidential advisers" when "preparing advice for the President," "even when these communications are not made directly to the President." Ibid., pp. 751-752, 762. *Espy* restricted the privilege to White House advisers with "operational proximity" to the President (ibid., p. 752) and found that the privilege "should not extend to staff outside the White House in executive branch agencies." Ibid. The privilege does not apply to White House advisers when they "exercise substantial independent authority or perform other functions in addition to advising the President.... " Ibid.

At issue in *Espy* was a grand jury subpoena for documents pertaining to an investigation by the White House Counsel. The documents "were generated in the course of advising the President in the exercise of his appointment and removal power, a quintessential and nondelegable presidential power." Ibid.

The *Espy* court emphasized that its "opinion should not be read as in any way affecting the scope of the [presidential communications] privilege in the congressional-executive context.... The President's ability to withhold information from Congress implicates different constitutional considerations than the President's ability to withhold evidence in judicial proceedings." Ibid., p. 753. Furthermore, the court in *Espy* noted that its "determination of how far down into the executive branch the presidential communications privilege goes" was limited to the circumstances of the case. Ibid.

Arguably, the privilege must be asserted by the President personally. Ibid, p. 745 note 16 (collecting cases).

[126] Ibid., p. 745.

[127] Ibid.

government's deliberations."[128] Both privileges are qualified.[129] When either privilege is asserted, the court will balance the public interests involved and assess the need of the party seeking the privileged information.[130]

The range of executive branch officials who may appropriately assert executive privilege before congressional committees, and the circumstances under which they may do so, remains unresolved by the courts[131] and is a matter that may be determined by case-by-case accommodation between the political branches.[132] Some guidance in this regard was offered by Chief Justice William Rehnquist, when he was Assistant Attorney General in the Nixon Administration. Rehnquist distinguished between "those few executive branch witnesses whose sole responsibility is that of advising the President," who "should not be required to appear [before Congress] at all, since all of their official responsibilities would be subject to a claim of privilege," and "the executive branch witness ... whose responsibilities include the administration of departments or agencies established by Congress, and from whom Congress may quite properly require extensive testimony," subject to "appropriate" claims of privilege.[133]

Will a congressional request for the testimony of one who advises the President be honored? It is the view of the executive[134] that (1) the few individuals whose sole duty is to advise the President should never be required to testify because all of their duties are protected by executive privilege and (2) an official who has operational functions in a department or agency established by law may be required to testify, although at times such an official may invoke executive privilege. It is the view of

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[128] Ibid., p. 737.

[129] Ibid., p. 746. The presidential communications privilege is more difficult to overcome, requiring the party seeking the information to "provide a focused demonstration of need...." Ibid. "The [deliberative process] privilege disappears altogether when there is any reason to believe government misconduct occurred.... A party seeking to overcome the presidential privilege seemingly must always provide a focused demonstration of need, even when there are allegations of misconduct by high-level officials." Ibid.

[130] Ibid.

[131] *Cf. In re Lindsey*, 158 F.3d 1263, 1277-1278 (D.C. Cir.) (*dictum*), *cert denied sub nom. Office of the President* v. *Office of Independent Counsel*, 525 U.S. 996 (1998).

[132] *See* Dawn Johnsen, "Executive Privilege Since *United States* v. *Nixon*: Issues of Motivation and Accommodation," vol. 83, *Minnesota Law Review*, May 1999, p. 1127ff.

[133] U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Separation of Powers, *Executive Privilege: The Withholding of Information by the Executive*, hearings, 92nd Cong., 1st Sess. (Washington: GPO, 1971), p. 427 (hereafter, Rehnquist statement).

[134] *See* Rehnquist's statement (*supra* text accompanying note 133) and the discussion of the precedents and practice concerning congressional access to executive branch information, particularly the testimony of presidential advisers) (*supra* notes 110 to 116 and accompanying text).

the judiciary that the presidential communications privilege should be restricted to White House advisers when "preparing advice for the President.... "[135]

Procedure for Obtaining Executive Branch Testimony

A congressional committee may request (informally or by a letter from the committee chair, perhaps cosigned by the ranking Member) or demand (pursuant to subpoena[136]) the testimony of a presidential adviser. However, Congress may encounter legal and political problems in attempting to enforce a subpoena to a presidential adviser.

Conflicts concerning congressional requests or demands for executive branch testimony or documents often involve extensive negotiations, and may be resolved by some form of compromise as to, inter alia, the scope of the testimony or information to be provided to Congress.[137] If the executive branch fails to comply with a committee subpoena, and if negotiations do not resolve the matter, the committee may employ Congress's inherent contempt authority (involving a trial at

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[135] *See Espy*, 121 F.3d at 751-752.

[136] Standing committees of both the Senate (Rule XXVI(1)) and the House (Rule XI, cl. 2(m)) have subpoena power.

[137] A presidential adviser may provide information to a committee in a hearing (answering questions of members of a committee under applicable rules of the House or the committee), in an informal briefing (with only the chairman or with a few or all committee members), or in a deposition. *See*, e.g., Fisher, "White House Aides Testifying before Congress," p. 139. The appearance of a presidential adviser before a committee may be open to the public or it may be closed. His testimony at a hearing may be sworn or unsworn.

In response to congressional attempts to secure the testimony of Ridge (*see supra* note 111), Ridge offered to brief Members privately, but some Members objected. Subsequently, Ridge offered to brief Members of both the Senate and the House informally, but in public. Ridge argued that his proposal would satisfy congressional needs but "avoid the setting of a precedent that could undermine the constitutional separation of powers and the longstanding traditions and practices of both Congress and the executive branch." "A Nation Challenged: The Security Director," *New York Times*, Mar. 26, 2002, p. 13. Ridge said that he would meet with Members in "briefings" but not in "hearings." Louis Fisher, *The Politics of Executive Privilege* (Durham, NC: Carolina Academic Press, 2004), p. 226.

Although the focus of this report is on issues raised by the testimony of presidential advisers before congressional committees, their testimony before other legislative branch entities raises similar issues. Condoleezza Rice, Assistant to the President for National Security Affairs, appeared twice before the National Commission on Terrorist Attacks Upon the United States. The commission, which reported to the Congress and the President, may be viewed as a legislative body because it was established in the legislative branch and because nine of its 10 members were appointed by the congressional leadership. Act of Nov. 27, 2002, P.L. 107-306, 116 Stat. 2408 (amended 2004), 6 U.S.C. § 101 note. Rice was interviewed privately by the commission on February 7, 2004. "Refusal to Testify Has Precedent," *Washington Post*, Mar. 27, 2004, p. A10. Although the Bush Administration at first argued that her appearance in public might prevent the President from receiving the "best and most candid possible advice," she subsequently testified in public and under oath on April 8, 2004. "Talking About Secrets," *Legal Times*, Apr. 19, 2004, p. 66.

the bar of the Senate or House) or statutory criminal contempt authority in an effort to obtain the needed information.[138] Both of these procedures are somewhat cumbersome, and their use may not result in the production of the information that is sought.[139]

When faced with a refusal by the executive branch to comply with a demand for information, Congress has several alternatives to inherent and statutory contempt, although these alternatives are not without their own limitations.[140] One approach is to seek declaratory or other relief in the courts. Previous attempts to seek judicial resolution of interbranch conflicts over information access issues have encountered procedural obstacles and have demonstrated the reluctance of the courts to resolve sensitive separation of powers issues.[141] Other approaches may include, inter alia, appropriations riders, impeachment, and a delay in the confirmation of presidential appointees.[142]

In addition to the options generally available in the event of a refusal by the executive to provide information sought by Congress, when a presidential adviser who is not serving in a department or agency established by law declines to testify before a committee, Congress might wish to enact legislation establishing the entity and making the head of the entity subject to Senate confirmation.[143]

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[138] Both the inherent contempt power and the statutory procedure (2 U.S.C. 192, 194) are outlined in CRS Report RL30240, *Congressional Oversight Manual.* The statutory civil contempt procedure which may be used by Senate committees is not applicable in the case of an executive branch official. 28 U.S.C. 1365.

[139] See Randall K. Miller, "Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege," vol. 81, *Minnesota Law Review*, February 1997, pp. 631, 658.

[140] For a overview and evaluation of the alternatives, see J. Richard Broughton, "Paying Ambition's Debt: Can the Separation of Powers Tame the Impetuous Vortex of Congressional Investigations?," vol. 21, *Whittier Law Review*, 2000, pp. 797, 825-832. *See also* Roberto Iraola, "Congressional Oversight, Executive Privilege, and Requests for Information Relating to Federal Criminal Investigations and Prosecutions," vol. 87, Iowa Law Review, August 2002, p. 1559ff.

[141] *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) and 567 F.2d 121 (D.C. Cir. 1977) (second opinion); *United States* v. *House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983).

[142] See, e.g., Broughton, "Paying Ambition's Debt: Can the Separation of Powers Tame the Impetuous Vortex of Congressional Investigations?," pp. 831-835; Louis Fisher, *Constitutional Conflicts between Congress and the President*, 4th ed (Lawrence, KS: University Press of Kansas, 1997), pp. 183-184. In response to the resistance of the Bush Administration to congressional attempts to obtain the testimony of Ridge (*see supra* note 111), it was reported that the House Appropriations Committee considered a delay in acting on the appropriation for the Executive Office of the President. "Panel Ties Funding to Ridge Testimony," *Washington Times*, Mar. 22, 2002, pp. A1, A14.

[143] As discussed above (*see supra* p. 27), an executive branch official who administers a department or agency established by law is generally expected to testify before committees, in contrast to an individual whose sole responsibility is to advise the President. Some

(continued...)

Conclusion

(1) Legal and policy factors may explain why presidential advisers do not regularly testify before committees. (2) Generally, a congressional committee with jurisdiction over the subject matter, which is conducting an authorized investigation for legislative or oversight purposes, has a right to information held by the executive branch in the absence of either a valid claim of constitutional privilege by the executive or a statutory provision whereby Congress has limited its constitutional right to information. (3) A committee may request or demand the testimony of a presidential adviser. Legal mechanisms available for enforcing congressional subpoenas to the executive branch may fail to provide the committee with the desired information. (4) Negotiations may result in the production of at least some of the information sought.

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[143] (...continued)
presidential advisers are in units of the Executive Office of the President established by law, and are also subject to confirmation by the Senate. *See*, e.g., 15 U.S.C. 1023 (Council of Economic Advisors); 42 U.S.C. 4321, 4372 (Office of Environmental Quality); 42 U.S.C. 6611, 6612 (Office of Science and Technology Policy); 31 U.S.C. 501, 502 (Office of Management and Budget (OMB)).

To increase its oversight of OMB, Congress passed legislation subjecting the Director to Senate confirmation, notwithstanding the objections of the Nixon Administration. *See* Donald S. Onley, "Treading on Sacred Ground: Congress's Power to Subject White House Advisers to Senate Confirmation," vol. 37, *William & Mary Law Review*, Spring 1996, pp. 1183-1184. Congress' constitutional authority over offices and officeholders is limited by separation of powers considerations and by constitutional powers of the President. *See ibid.*, pp. 1187-1214. *See also* Aaron-Andrew Bruhl, "Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause," vol. 19, *Journal of Law & Politics*, Fall 2003, pp. 345, 375 note 238. By subjecting a presidential adviser to confirmation by the Senate, Congress may obtain practical, although not necessarily legal leverage, in attempting to secure his testimony. *See generally* Louis Fisher, "Executive Privilege and the Bush Administration: Congressional Access to Information--Using Legislative Will and Leverage," vol. 52, *Duke Law Journal*, November 2002, p. 323.

The Bush Administration resisted congressional attempts to have Tom Ridge, the Director of the Office of Homeland Security, testify. *See supra* note 111. The Office of Homeland Security was established within the Executive Office of the President pursuant to E.O. 13228, issued on October 8, 2001. *Federal Register*, vol. 66, Oct. 10, 2001, pp. 51812-51817. Even before Congress requested Ridge's testimony, legislation had been introduced to create an office with homeland security functions. *See*, e.g., S. 1449, 107th Cong. (to establish within the White House a National Office for Combating Terrorism, with a director subject to Senate confirmation); S. 1534, 107th Cong. (to establish a "Department of National Homeland Security," with the Secretary subject to Senate confirmation). Upon the introduction of S. 1534, Sen. Joseph Lieberman observed that the Secretary "will be accountable to the Congress and the American people." *Congressional Record*, daily edition, vol. 147. Oct. 10, 2001, p. S10646. Ultimately, Congress established the Department of Homeland Security. P.L. 107-296, § 101, 116 Stat. 2135 (2002). Ridge's nomination as the first Secretary of the new department was approved subject to his "commitment to respond to requests to appear and testify before any duly constituted committee of the Senate." *Congressional Record*, daily edition, vol. 149, Jan. 22, 2003, p. S1372.