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Presidential Advisers' Testimony Before Congressional Committees: An Overview

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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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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 decision making. 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.

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

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.

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

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 advice 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

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,

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

⁴ 4 Stat. 633.

⁵ 11 Stat. 228.

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.

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 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

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. (continued...)

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 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.

(...continued)

184-187.

¹² 53 Stat. 1423.

¹³ 53 Stat. 1431 at 1435.

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.

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.

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 Committee to Investigate the National Defense Program (“Truman Committee”) during

¹⁸ *Weekly Compilation of Presidential Documents*, vol. 9, January 8, 1973, p. 7.

¹⁹ 58 Stat. 387.

²⁰ 96 Stat. 877 at 925, 1076.

²¹ Established by E.O. 9024 of January 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 October 4, 1945.

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 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

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.

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.

- 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 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. Kehrl, 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

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.

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.

- 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 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

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.

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.

- 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 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 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

⁴¹ Ibid., p. 1339ff.

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.

⁴⁸ Ibid., p. 105ff.

- 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. Stephanopoulos, 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 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

⁴⁹ Ibid., p. 100ff.

⁵⁰ Ibid., p. 112ff.

⁵¹ Ibid., p. 100ff.

⁵² Ibid., p. 111ff.

⁵³ Ibid., p. 109ff.

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.

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, 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. Stephanopoulos, 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

⁵⁶ *Ibid.*, p. 353ff.

⁵⁷ *Ibid.*, p. 86ff.

⁵⁸ *Ibid.*, p. 357ff.

⁵⁹ *Ibid.*, p. 270ff.

⁶⁰ *Ibid.*, p. 89ff.

⁶¹ *Ibid.*, p. 360ff.

⁶² *Ibid.*, p. 88ff.

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
- 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

⁶³ *Ibid.*, p. 360ff.

⁶⁴ *Ibid.*, p. 272ff.

⁶⁵ *Congressional Record*, vol. 141, July 25, 1995, p. D493; although the transcripts of the 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.*, August 1, 1995, p. D519.

⁶⁷ *Ibid.*, August 3, 1995, p. D532; *Ibid.*, vol. 142, January 18, 1996, p. D10.

⁶⁸ *Ibid.*, vol. 142, February 23, 1996, p. D39.

- 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 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

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

⁷⁰ Ibid., August 8, 1995, p. D547; Ibid., November 28, 1995, p. D747; Ibid., vol. 142, January 16, 1996, p. D10.

⁷¹ Ibid., vol. 142, February 9, 1996, p. D35.

⁷² Ibid., vol. 141, August 7, 1995, p. D544.

⁷³ Ibid., vol. 142, January 31, 1996, p. D22; Ibid., April 30, 1996, p. D195.

⁷⁴ Ibid., vol. 141, August 3, 1995, p. D532.

- contacts 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 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

⁷⁵ Ibid., August 7, 1995, p. D544.

⁷⁶ Ibid., November 9, 1995, p. D721; Ibid., vol. 142, February 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., November 2, 1995, p. D707; Ibid., December 11, 1995, p. D774.

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* (continued...)

- 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 Heinrich, 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
- 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

(...continued)

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: 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.

- 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 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

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.

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.

- J. Scott Jennings, Special Assistant to the President and Deputy White House Political Director, appeared before the Senate Committee on the Judiciary on August 2, 2007, concerning the dismissal of United States Attorneys following issuance by the committee of a subpoena compelling such testimony.⁹⁸
- Alan R. Swendiman, Special Assistant to the President and Director, Office of Administration, Executive Office of the President, and Theresa Payton, Chief Information Officer, Office of Administration, Executive Office of the President, appeared before the House Committee on Oversight and Government Reform on February 26, 2008, concerning views on issues regarding missing White House electronic records and related matters.⁹⁹
- Paul A. Volcker, Chairman of the President's Economic Advisory Board, appeared before the Joint Economic Committee on February 26, 2009, concerning recommendations for financial regulatory system reform.¹⁰⁰
- Paul A. Volcker, Chairman of the President's Economic Recovery Advisory Board, appeared before the Senate Committee on Banking, Housing, and Urban Affairs on February 2, 2010, concerning Administration financial regulatory system reform proposals including the "Volcker Rule."¹⁰¹
- Brook M. Colangelo, Chief Information Officer, Office of Administration, Executive Office of the President, appeared before the House Committee on Oversight and Government Reform on May 3, 2011, regarding the technical systems in place to maintain electronic records at the Executive Office of the President.¹⁰²
- Paul A. Volcker, Chairman of the President's Economic Recovery Advisory Board, appeared before the Senate Committee on Banking, Housing, and Urban Affairs Subcommittee on Financial Institutions and Consumer Protection on May 9, 2012, concerning perspectives on concerns about large financial institutions which failures pose systemic threats to the financial system.¹⁰³

⁹⁸ Paul Kane, "Bush Aide Addresses Missing RNC E-Mails," *Washington Post*, August 3, 2007, p. A2; Neil A. Lewis, "White House Aide Won't Answer Questions of a Senate Panel," *New York Times*, August 3, 2007, p. A13. Sara M. Taylor, who had been Deputy Assistant to the President and Director of Political Affairs, appeared before the Senate Committee on the Judiciary on July 11, 2007, also concerning the dismissal of United States Attorneys, and also following issuance by the committee of a subpoena.

⁹⁹ U.S. Congress, House Committee on Oversight and Government Reform, *Electronic Records Preservation at the White House*, hearings, 110th Cong., 2nd sess., February 26, 2008, (Washington, DC: GPO, 2008).

¹⁰⁰ U.S. Congress, Joint Economic Committee, *Restoring the Economy: Strategies for Short-Term and Long-Term Change*, hearings, 111th Cong., 1st sess., February 26, 2009, S. Hrg. 111-110 (Washington, DC: GPO, 2009).

¹⁰¹ U.S. Congress, Senate Committee on Banking, Housing, and Urban Affairs, *Prohibiting Certain High-Risk Investment Activities by Banks and Bank Holding Companies*, hearings, 111th Cong., 2nd sess., February 2, 2010, S. Hrg. 111-771 (Washington, DC: GPO, 2010).

¹⁰² U.S. Congress, House Committee on Oversight and Government Reform, *Presidential Records in the New Millennium: Updating the Presidential Records Act and Other Federal Recordkeeping Statutes To Improve Electronic Records Preservation*, hearings, 112th Cong., 1st sess., May 3, 2011, (Washington, DC: GPO, 2011).

¹⁰³ U.S. Congress, Senate Committee on Banking, Housing, and Urban Affairs Subcommittee on Financial Institutions and Consumer Protection, *Is Simpler Better? Limiting Federal Support for Financial Institutions*, hearings, 112th Cong., 2nd sess., May 9, 2012, S. Hrg. 112-679 (Washington, DC: GPO, 2012).

- Todd Park, U.S. Chief Technology Officer, Office of Science and Technology, Executive Office of the President, and Steven VanRoekel, Federal Chief Information Officer and Administrator, E-Government and Information Technology, Office of Management and Budget appeared before the House Committee on Oversight and Government Reform on November 13, 2013, regarding the implementation of federal health care marketplace websites.¹⁰⁴
- Jennifer O'Connor, Attorney, Office of the White House Counsel, appeared before the House Committee on Oversight and Government Reform on June 24, 2014, concerning efforts to provide emails and other documents requested by Congress related to process and review of applications of organizations applying for tax-exempt status, including the emails of Lois Lerner, and related matters.¹⁰⁵

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.¹⁰⁶ 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.¹⁰⁷ On June 26, 2008, David S. Addington, Chief of Staff for Vice President Richard Cheney, testified before a subcommittee of the House Committee on the Judiciary concerning legal justification for harsh interrogation methods.¹⁰⁸

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.¹⁰⁹
- 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.¹¹⁰

¹⁰⁴ U.S. Congress, House Committee on Oversight and Government Reform, *Obamacare Implementation: The Rollout of HealthCare.gov*, hearings, 113th Cong., 1st sess., November 13, 2013, (Washington, DC: GPO, 2014).

¹⁰⁵ U.S. Congress, House Committee on Oversight and Government Reform, *IRS Obstruction: Lois Lerner's Missing Emails, Part II*, hearings, 113th Cong., 2nd sess., June 24, 2014, (Washington, DC: GPO, 2014).

¹⁰⁶ James G. Lakely, "Al Qaeda a Target Early, Rice Says," *Washington Times*, April 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*, April 9, 2004, pp. A1, A10.

¹⁰⁷ See 116 Stat. 2408.

¹⁰⁸ Dan Eggen, "Bush Policy Authors Defend Their Actions," *Washington Post*, June 27, 2008, p. A2; Scott Shane, "Two Testify on Memo Spelling Out Interrogation," *New York Times*, June 27, 2008, p. A15.

¹⁰⁹ 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.

- 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.¹¹¹
- 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.¹¹²
- 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.¹¹³
- 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.¹¹⁴
- 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.¹¹⁵
- 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.¹¹⁶
- Karl C. Rove, Assistant to the President and Deputy Chief of Staff, did not appear before the Senate Committee on the Judiciary on August 2, 2007, concerning the

(...continued)

¹¹⁰ U.S. Congress, Senate Committee on the Judiciary, Freedom of the Press, hearings, 92nd Cong., 1st and 2nd sess. (Washington: GPO, 1972), p. 1299.

¹¹¹ *Ibid.*, p. 425.

¹¹² *Congressional Record*, vol. 118, March 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 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.

¹¹³ 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.

¹¹⁴ Associated Press, “Ridge Won’t Tell Senate His Views on the War,” *Washington Times*, March 5, 2002, p. A3; (name redacted), “Congressional Hearings: Letter to Ridge Is Latest Jab in Fight Over Balance of Powers,” *New York Times*, March 5, 2002, p. A8; Mark Preston, “Byrd Holds Firm,” *Roll Call*, April 18, 2002, pp. 1, 26, 28.

¹¹⁵ George Archibald, “Panel Ties Funding to Ridge Testimony,” *Washington Times*, March 22, 2002, pp. A1, A14; George Archibald, “White House Mollifies House Panel,” *Washington Times*, March 23, 2002, A1, A4; Elizabeth Becker, “Domestic Security: Ridge Briefs House Panel, but Discord Is Not Resolved,” *New York Times*, April 11, 2002, p. A17.

¹¹⁶ Amy Goldstein, “Democrats Ask Bush Aides to Explain Role on Medicare Cost,” *Washington Post*, March 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, April 1, 2004.

- dismissal of United States Attorneys, following the issuance by the committee of a subpoena compelling his testimony on that date.¹¹⁷
- David Simas, Assistant to the President and Director of Political Strategy and Outreach, Office of Political Strategy and Outreach, declined to appear before the House Committee on Oversight and Government Reform on July 1, 2014, concerning the operation of the White House Office of Political Strategy, following the issuance of a subpoena by that committee.¹¹⁸

Weighing Congress's Right to Executive Branch Information with Executive Claims of Absolute Immunity

Congress has a constitutionally rooted right of access to the information it needs to perform its Article I legislative and oversight functions.¹¹⁹ Generally, a congressional committee with jurisdiction over the subject matter, which is conducting an authorized investigation for

¹¹⁷ U.S. Congress, Senate Committee on the Judiciary, *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?* 110th Cong., 1st sess., S.Hrg. 110-495 (Washington: GPO, 2008), p. 459. Rove resigned later that month. Harriet Miers, who had been Counsel to the President, did not appear before the House Committee on the Judiciary on July 12, 2007, concerning the dismissal of United States Attorneys, following the issuance of a subpoena compelling her testimony on that date. U.S. Congress, House Committee on the Judiciary, *Resolution Recommending that the House of Representatives Find Harriet Miers and Joshua Bolten, Chief of Staff, White House, in Contempt of Congress for Refusal to Comply with Subpoenas Duly Issued by the Committee on the Judiciary*, 110th Cong., 1st sess., November 5, 2007, H.Rept. 110-423, p. 3. The House later adopted a resolution finding Miers in contempt of Congress (H.Res. 979, 110th Congress.) Rove and Miers were interviewed by the committee during the 111th Congress. Miers met with the committee on June 15, 2009, and Rove met with the committee on July 7 and July 30, 2009. (See http://judiciary.house.gov/issues/issues_WHInterviews.html.)

¹¹⁸ For news accounts, see Shane Goldmacher, "Darrell Issa Subpoenas Top Obama Political Aide," *Government Executive*, July 11, 2014, available at <http://www.govexec.com/oversight/2014/07/darrell-issa-subpoenas-top-obama-political-aide/88516/>; Steven T. Dennis, "White House Cites Immunity, Rebuffs Issa Subpoena for Simas," *CQ.com*, July 15, 2014, available at <http://www.cq.com/doc/news-4515754?7&search=jBfK47Vc>; David Michaels, "Obama Administration's Immunity Claim Rejected by Oversight Panel," *CQ.com*, July 25, 2014, available at <http://www.cq.com/doc/committees-2014072500319014?9&search=jBfK47Vc>; Steven T. Dennis, "Simas Ignores Subpoena Again as White House Defies Issa," *CQ.com*, July 25, 2014, available at <http://www.cq.com/doc/news-4524005?16&search=jBfK47Vc>. For a Justice Department legal opinion regarding this request for testimony, see U.S. Department of Justice, Office of Legal Counsel, "Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach From Congressional Subpoena," July 15, 2014, available at http://www.justice.gov/sites/default/files/opinions/attachments/2014/07/25/simas-immunity-final_1.pdf.

¹¹⁹ 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*, by (name redacted) et al.

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.¹²⁰

Given the tradition of comity between the executive and legislative branches, Congress often elects not to request the appearance of presidential aides.¹²¹ 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.¹²² 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.¹²³

The executive branch has articulated a long-standing position that “the President’s immediate advisers are absolutely immune from congressional testimonial process.”¹²⁴ This principle of absolute immunity would prevent Congress from compelling a presidential adviser to appear before a committee for purposes of providing testimony.

The executive branch position, as articulated in various opinions of the Department of Justice Office of Legal Counsel, is grounded in the separation of powers and legal principles underlying executive privilege.¹²⁵ Specifically, the DOJ argues that because the President must be immune from compelled congressional testimony, his close presidential advisers, who “function as the President’s alter ego,” must also be immune from compelled testimony.¹²⁶ To hold otherwise, the DOJ argues, would interfere with the President’s “discharge of his constitutional functions” in two significant ways.¹²⁷ First, permitting Congress to compel testimony from close presidential advisers would “threaten the President’s independence and autonomy from Congress” in that committees could “harass ... advisers in an effort to influence their conduct” and “promote a

¹²⁰ See *Wilkinson v. United States*, 365 U.S. 399, 408-409 (1961); *Congressional Oversight Manual*, *supra* note 117.

¹²¹ (name redacted), “White House Aides Testifying Before Congress,” *Presidential Studies Quarterly*, vol. 27, winter 1997, p. 151.

¹²² *Ibid.*, pp. 140-141. 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.” *Ibid.* p. 140.

¹²³ 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*, March 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*, March 5, 2002, p. 8; “Congress, White House Fight Over Ridge Status,” *Washington Post*, March 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*, March 25, 2002, p. 3.

¹²⁴ See, *Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach from Congressional Subpoena*, Op. O.L.C. (July 15, 2014) at 1. The opinion cites supporting DOJ memoranda dating to 1972. *Ibid.* fn. 2.

¹²⁵ *Ibid.* p. 3.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

perception that the President is subordinate to Congress.”¹²⁸ Second, compelled testimony by presidential advisers would “threaten executive branch confidentiality, which is necessary (among other things) to ensure that the President can obtain the type of sound and candid advice that is essential to the effective discharge of his constitutional duties.”¹²⁹ Although conceding that advisers could appear before Congress and invoke executive privilege with respect to specific questions, the DOJ finds that procedure insufficient to protect executive branch autonomy. “In the heat of the moment, without the opportunity for careful reflection,” the executive branch argues, “the adviser might have difficulty confining his remarks to those that do not reveal [] sensitive information.”¹³⁰

With respect to the many instances in which close presidential advisers have testified before Congress, the DOJ asserts that those officials have done so voluntarily “as an accommodation to a congressional committee’s legitimate interest in investigating certain activities of the Executive Branch.”¹³¹ The DOJ argues that voluntary testimony, as opposed to compelled testimony, does not trigger the same concerns under the separation of powers, nor do examples of voluntary testimony “undermine the Executive Branch’s long-established position on absolute immunity.”¹³²

No decision of the Supreme Court resolves the question of whether there are any circumstances in which close presidential advisers can refuse a subpoena to appear before a congressional committee for purposes of providing testimony. However, in *Committee on the Judiciary v. Miers*, the U.S. District Court for the District of Columbia rejected the long-standing executive branch position and held that close presidential advisers are *not* immune from compulsory congressional testimony.¹³³

The *Miers* case arose out of an investigation by the House Committee on the Judiciary into the termination and replacement of a number of U.S. Attorneys during the George W. Bush Administration.¹³⁴ In the course of the investigation, the committee issued a subpoena to former White House Counsel Harriet Miers, seeking her testimony on the matter. Following a legal conclusion from the DOJ that “Ms. Miers is immune from compulsion to testify before the Committee on this matter,” Miers informed the Committee that she would not appear.¹³⁵ The Committee subsequently filed a civil lawsuit asking a federal court to order Miers to comply with the subpoena.

The *Miers* opinion represents a clear repudiation of the executive view of absolute immunity for close presidential advisers. The district court strongly disagreed with the executive’s arguments, noting that:

¹²⁸ Ibid.

¹²⁹ Ibid. pp.3-4.

¹³⁰ Ibid. p. 4.

¹³¹ Ibid. fn 2.

¹³² Ibid.

¹³³ 558 F. Supp 2d 53 (D.D.C. 2008).

¹³⁴ For a more detailed discussion of the investigation leading up to the *Miers* case see, CRS Report R42670, *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments*, by (name redacted) and (name redacted).

¹³⁵ Memorandum for the Counsel to the President Re: Immunity of Former Counsel to the President from Compelled Congressional Testimony from Principal Deputy Assistant Attorney General, Office Legal Counsel, DOJ, dated July 10, 2007.

The Executive cannot identify a single judicial opinion that recognizes absolute immunity for senior presidential advisers in this or any other context. That simple yet critical fact bears repeating: the asserted absolute immunity claim here is entirely unsupported by existing case law. In fact, there is Supreme Court authority that is all but conclusive on this question and that powerfully suggests that such advisers do not enjoy absolute immunity. The Court therefore rejects the Executive's claim of absolute immunity for senior presidential aides.¹³⁶

Instead, the court held that Miers "must appear before the Committee to provide testimony, and invoke executive privilege where appropriate."¹³⁷ In reaching its conclusion, the district court also rejected the argument that close advisers should be considered the "alter ego" of the President. The court noted that this line of argument had been foreclosed by the Supreme Court in the case of *Harlow v. Fitzgerald*¹³⁸—a civil suit for damages in which the Court expressly refused to accord presidential advisers with absolute immunity.¹³⁹ Indeed, the district court in *Miers* went further and, in fact, questioned whether the president himself was absolutely immune from compelled congressional testimony.¹⁴⁰ *Miers* did, however, leave open the question of whether presidential advisers engaged in "special functions" relating to "national security or foreign policy" may be accorded some form of immunity from compelled testimony.¹⁴¹

The district court likewise rejected that argument that the absence of absolute immunity would create a "chilling effect" on the candid and frank advice advisers would provide to the President. The court reasoned that the ability of an adviser to appear, and invoke executive privilege in response to specific questioning, "should serve as an effective check against public disclosure of truly privileged communications, thereby mitigating any adverse impact on the quality of advice that the President receives."¹⁴²

The reasoning adopted by the *Miers* court may have significant influence in that it so clearly repudiated the executive's claim of absolute immunity for presidential advisers, while reaffirming Congress's essential role in conducting oversight and enforcing its own subpoenas. However, as a district court decision, the *Miers* opinion has limited precedential value. For its part, the executive branch maintains that *Miers* was wrongly decided.¹⁴³ Consistent with that conclusion, DOJ continues to adhere to its position that close presidential advisers have absolute immunity from compelled testimony by Congress.¹⁴⁴

¹³⁶ *Miers*, 558 F. Supp. 2d at 99.

¹³⁷ *Ibid.* pp. 106-07.

¹³⁸ 457 U.S. 800 (1982).

¹³⁹ *Miers*, at 101. ("There is nothing left to the Executive's primary argument in light of *Harlow*.")

¹⁴⁰ *Ibid.* pp. 102-03 ("Significantly, although the Supreme Court has established that the President is absolutely immune from civil suits arising out of his official actions, even the President may not be absolutely immune from compulsory process more generally ... Congress's use of (and need for vindication of) its subpoena power in this case is no less legitimate or important than was the grand jury's in *United States v. Nixon*. Both involve core functions of a co-equal branch of the federal government, and for the reasons identified in *Nixon*, the President may only be entitled to a presumptive, rather than an absolute, privilege here. And it is certainly the case that if the President is entitled only to a presumptive privilege, his close advisers cannot hold the superior card of absolute immunity.") (citations omitted).

¹⁴¹ *Ibid.* pp. 101-02 ("[T]here is no suggestion whatsoever that the decisions in question here involve national security or other particularly sensitive function that *Harlow* indicates may warrant absolute immunity.")

¹⁴² *Ibid.* p. 102.

¹⁴³ *Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach from Congressional Subpoena*, Op. O.L.C. (July 15, 2014) at 9.

¹⁴⁴ *Ibid.*

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 subpoena¹⁴⁵) 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.¹⁴⁶ 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 the bar of the Senate or House) or statutory criminal contempt authority in an effort to obtain the needed information.¹⁴⁷ Both of these procedures are somewhat cumbersome, and their use may not result in the production of the information that is sought.¹⁴⁸

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.¹⁴⁹ One approach is to seek declaratory or other relief in the

¹⁴⁵ Standing committees of both the Senate (Rule XXVI(1)) and the House (Rule XI, cl. 2(m)) have subpoena power.

¹⁴⁶ 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 113), 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 long-standing traditions and practices of both Congress and the executive branch." "A Nation Challenged: The Security Director," *New York Times*, March 26, 2002, p. 13. Ridge said that he would meet with Members in "briefings" but not in "hearings." (name redacted), *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 November 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*, March 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*, April 19, 2004, p. 66.

¹⁴⁷ Both the inherent contempt power and the statutory procedure (2 U.S.C. 192, 194) are outlined in CRS Report RL30240, *Congressional Oversight Manual*, by (name redacted) et al. 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.

¹⁴⁸ See Randall K. Miller, "Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege," vol. 81, *Minnesota Law Review*, February 1997, pp. 631, 658.

¹⁴⁹ For an 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*, (continued...)

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.¹⁵⁰ Other approaches may include, inter alia, appropriations riders, impeachment, and a delay in the confirmation of presidential appointees.¹⁵¹

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.¹⁵²

(...continued)

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.

¹⁵⁰ *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).

¹⁵¹ See, e.g., Broughton, "Paying Ambition's Debt: Can the Separation of Powers Tame the Impetuous Vortex of Congressional Investigations?," pp. 831-835; (name redacted), *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*, March 22, 2002, pp. A1, A14.

¹⁵² 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 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 Advisers); 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 (name redacted), "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 113. 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, October 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, October 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, January 22, 2003, p. S1372.

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, however, 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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