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ARTICLES OF IMPEACHMENT AGAINST
PRESIDENT DONALD J. TRUMP
VOLUME X

HEARING
BEFORE THE
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HOUSE OF REPRESENTATIVES

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BUDGET OF THE U. S. GOVERNMENT
A New Foundation For
American Greatness

Fiscal Year 2018



Office of Management and Budget

BUDGET OF THE U. S. GOVERNMENT
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American Greatness
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Office of Management and Budget

THE BUDGET DOCUMENTS

Budget of the United States Government, Fiscal Year 2018 contains the Budget Message of the President, information on the President's priorities, and summary tables.

Analytical Perspectives, Budget of the United States Government, Fiscal Year 2018 contains analyses that are designed to highlight specified subject areas or provide other significant presentations of budget data that place the budget in perspective. This volume includes economic and accounting analyses; information on Federal receipts and collections; analyses of Federal spending; information on Federal borrowing and debt; baseline or current services estimates; and other technical presentations.

The *Analytical Perspectives* volume also has supplemental materials that are available on the internet at www.budget.gov/budget/Analytical_Perspectives and on the Budget CD-ROM. These supplemental materials include tables showing the budget by agency and account and by function, subfunction, and program.

Appendix, Budget of the United States Government, Fiscal Year 2018 contains detailed information on the various appropriations and funds that constitute the budget and is designed primarily for the use of the Appropriations Committees. The *Appendix* contains more detailed financial information on individual programs and appropriation accounts than any of the other budget documents. It includes for each agency: the proposed text of appropriations language; budget schedules for each account; legislative proposals; narrative explanations of each budget account; and proposed general provisions applicable to the appropriations of entire agen-

cies or group of agencies. Information is also provided on certain activities whose transactions are not part of the budget totals.

ELECTRONIC SOURCES OF BUDGET INFORMATION

The information contained in these documents is available in electronic format from the following sources:

Internet. All budget documents, including documents that are released at a future date, spreadsheets of many of the budget tables, and a public use budget database are available for downloading in several formats from the internet at www.budget.gov/budget. Links to documents and materials from budgets of prior years are also provided.

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The Internet and CD-ROM also include many of the budget tables in spreadsheet format, and supplemental materials that are part of the *Analytical Perspectives* volume. It also includes *Historical Tables* that provide data on budget receipts, outlays, surpluses or deficits, Federal debt, and Federal employment over an extended time period, generally from 1940 or earlier to 2018 or 2022.

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GENERAL NOTES

1. All years referenced for budget data are fiscal years unless otherwise noted. All years referenced for economic data are calendar years unless otherwise noted.
2. At the time of this writing, only one of the annual appropriations bills for 2017 had been enacted (the Military Construction and Veterans Affairs Appropriations Act), as well as the Further Continuing and Security Assistance Appropriations Act, which provided 2017 discretionary funding for certain Department of Defense accounts; therefore, the programs provided for in the remaining 2017 annual appropriations bills were operating under a continuing resolution (Public Law 114-223, division C, as amended). For these programs, references to 2017 spending in the text and tables reflect the levels provided by the continuing resolution.
3. Detail in this document may not add to the totals due to rounding.

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THE BUDGET MESSAGE OF THE PRESIDENT

TO THE CONGRESS OF THE UNITED STATES:

On February 28, I spoke to a joint session of the Congress about what we need to do to begin a new chapter of American Greatness. I asked the Nation to look forward nine years and imagine the wonders we could achieve by America's 250th anniversary of our Independence if we set free the dreams of our people by removing the barriers holding back our economic growth.

This Budget's defining ambition is to unleash the dreams of the American people. This requires laying a new foundation for American Greatness.

Through streamlined Government, we will drive an economic boom that raises incomes and expands job opportunities for all Americans. Faster economic growth, coupled with fiscal restraint, will enable us to fully fund our national priorities, balance our budget, and start to pay down our national debt.

Our moral commitment to replacing our current economic stagnation with faster economic growth rests on the following eight pillars of reform:

Health Reform. We need to enable Americans to buy the healthcare they need at a price they can afford. To this end, we must repeal Obamacare and its burdensome regulations and mandates, and replace it with a framework that restores choice and competition. This will lower the cost of care so that more Americans can get the medical attention they need. Additionally, Medicaid, which inadequately serves enrollees and taxpayers, must be reformed to allow States to manage their own programs, with continued financial support from the Federal Government.

Tax Reform and Simplification. We must reduce the tax burden on American workers and businesses, so that we can maximize incomes and economic growth. We must also simplify our tax system, so that individuals and businesses do not waste countless hours and resources simply paying their taxes.

Immigration Reform. We must reform immigration policy so that it serves our national interest. We will adopt commonsense proposals that protect American workers, reduce burdens on taxpayers and public resources, and focus Federal funds on underserved and disadvantaged citizens.

Reductions in Federal Spending. We must scrutinize every dollar the Federal Government spends. Just as families decide how to manage limited budgets, we must ensure the Federal Government spends precious taxpayer dollars only on our highest national priorities, and always in the most efficient, effective manner.

Regulatory Rollback. We must eliminate every outdated, unnecessary, or ineffective Federal regulation, and move aggressively to build regulatory frameworks that stimulate—rather than

stagnate—job creation. Even for those regulations we must leave in place, we must strike every provision that is counterproductive, ineffective, or outdated.

American Energy Development. We must increase development of America's energy resources, strengthening our national security, lowering the price of electricity and transportation fuels, and driving down the cost of consumer goods so that every American individual and business has more money to save and invest. A consistent, long-term supply of lower-cost American energy brings with it a much larger economy, more jobs, and greater security for the American people.

Welfare Reform. We must reform our welfare system so that it does not discourage able-bodied adults from working, which takes away scarce resources from those in real need. Work must be the center of our social policy.

Education Reform. We need to return decisions regarding education back to the State and local levels, while advancing opportunities for parents and students to choose, from all available options, the school that best fits their needs to learn and succeed.

To unleash the power of American work and creativity—and drive opportunity and faster economic growth—we must reprioritize Federal spending so that it advances the safety and security of the American people.

This Budget, therefore, includes \$639 billion for the Department of Defense—a \$52 billion increase from the 2017 annualized continuing resolution level. This increase will be offset by targeted reductions elsewhere. This defense funding is vital to rebuilding, modernizing, and preparing our Armed Forces for the future so that our military remains the world's preeminent fighting force and we can continue to ensure peace through strength. This Budget also increases funding to take care of our great veterans, who have served their country with such honor and distinction.

The Budget also meets the need to materially increase funding for border security, immigration enforcement, and law enforcement at the Departments of Homeland Security and Justice. These funding increases will provide additional resources for a southern border wall, expanded detention capacity, and initiatives to reduce violent crime, as well as more immigration judges, U.S. Immigration and Customs Enforcement officers, and Border Patrol agents. The Budget also invests significant resources in efforts to combat opioid abuse.

In these dangerous times, our increased attention to public safety and national security sends a clear message to the world—a message of American strength and resolve. It follows through on my promise to focus on keeping Americans safe, keeping terrorists out of our Nation, and putting violent offenders behind bars.

As this Budget returns us to economic prosperity, it will also allow us to fund additional priorities, including infrastructure, student loan reform, and initiatives to help working families such as paid parental leave. We will champion the hardworking taxpayers who have been ignored for too long. Once we end our economic stagnation and return to robust growth, so many of our aspirations will be within reach.

It is now up to the Congress to act. I pledge my full cooperation in ending the economic malaise that has, for too long, crippled the dreams of our people. The time for small thinking is over. As we look forward to our 250th year, I am calling upon all Members of Congress to join me in striving to do big and bold and daring things for our Nation. We have it in our power to set free the dreams of our people. Let us begin.

DONALD J. TRUMP

THE WHITE HOUSE,
MAY 23, 2017

A NEW FOUNDATION FOR AMERICAN GREATNESS

I. OVERVIEW

This 2018 Budget lays the groundwork for an overdue renewal of the American spirit, and provides a detailed and specific roadmap to get us there. *A New Foundation for American Greatness* is not just the title of this Budget. It is a bold and specific set of policy and budgetary initiatives that tackle many of the problems ignored or exacerbated by previous administrations.

Our Nation must make substantial changes to the policies and spending priorities of the previous administration if our citizens are to be safe and prosperous in the future. This Budget represents an attainable vision of a Government that preserves the safety and fiscal security of this Nation while enabling the creativity and drive that has always supported the American Dream. This New Foundation for American Greatness presents an opportunity for our Nation's values and constitutional principles to send a message of American strength, leadership, and fiscal responsibility to the rest of the world.

This message comes from a place of profound respect for the American people and the hard-working taxpayers who built this Nation. It reflects President Donald J. Trump's deep commitment to restore this Nation's greatness, a rejection of the failed status quo, and an effort that strives to be worthy of the American people and the trust they have placed in the President.

With a \$20 trillion debt threatening generations of American prosperity, our Federal budget must spend every dollar effectively, efficiently, and in ways that make a demonstrable

difference for our Nation. It also must do something equally important: lay the foundation for a rebuilt national defense, strengthened borders, and the long-term soundness of our economy and well-being of the American family.

The President and this Budget aim to achieve this by laying:

- A new foundation that solidifies our commitment to the border's security.
- A new foundation of policies to produce new American jobs.
- A new foundation for immigration policy that serves the national interest and the American taxpayer.
- A new foundation of federalism that trusts States to help manage America's health care.
- A new foundation that creates a pathway to welfare reform that is focused on promoting work and lifting people out of poverty.
- A new foundation that places America first by returning more American dollars home and ensuring foreign aid supports American interests and values.
- A new foundation that spurs innovation and enables the American worker and family to thrive.
- A new foundation of restraint that limits Government regulation and intrusion.
- A new foundation of discipline that puts our budget on a path to balance.

- And, a new foundation of focus on the forgotten American worker who now has an advocate in the Oval Office.

The time is now to address the fundamental challenges facing our Nation. It is more than just words on pages; it is a call to action to save this great Nation. We have borrowed from our children and their future for too long, the devastating consequences of which cannot be overstated. We are fast approaching having publicly held debt at or exceeding 100 percent of our Gross Domestic Product (GDP), a point at which hopes for a more prosperous future are irrevocably lost.

This Budget makes it clear that we will reverse the damaging trends from previous administrations and restore the American Dream. The New

Foundation for American Greatness will put our Nation's budget back into balance and begin to reduce the national debt.

A New Foundation for American Greatness requires a new approach to how we tax, regulate, and support our American worker and job creators. A new approach to how we provide for the common defense and promote the general welfare. A new approach to how we care for the sick and educate our young. A new approach to how we spend every tax dollar.

The President believes it will take courage and bold leadership to restore our Nation's greatness. This Budget is a large and bold reversal from the spiral of decline we were on toward a more bright and prosperous future.

II. WHAT WENT WRONG: INHERITING \$20 TRILLION IN DEBT AND A BROKEN, STAGNANT ECONOMY

The new Administration inherited an economic situation in which the United States is \$20 trillion in debt and yet at the same time dramatically underserving the needs of its citizens due to a broken, stagnant economy.

The previous administration's economic policies resulted in a near doubling of the national debt from \$10.6 trillion in 2009 to nearly \$20 trillion in 2016. The amount of this debt that is publicly held—that is, the portion that requires financing on the capital markets—is \$14 trillion. Relative to the economy, publicly held debt at the end of last fiscal year was 77 percent of GDP, nearly double the level of 39 percent of GDP eight years earlier. This run-up in debt over the last eight years brought it to a level that we have not seen since shortly after World War II.

While our national debt has soared, our economic growth has been historically abysmal.

Stagnant economic growth has severely weakened our Nation's capacity to pay off the debt in the future, especially as measured

against historic norms. Overall growth of the economy was subpar even before the last recession and recovery from that recession has been weak.

From World War II to 2007, the average fourth quarter-over-fourth quarter growth rate was 3.5 percent. Over the last nine years, average growth has been 1.3 percent.

Productivity growth is also down from historical averages. Productivity growth (defined as growth in real output per labor hour) has averaged 0.5 percent per year over 2011-2016. Over the years 1948 to 2007, average annual productivity growth was 2.3 percent. This stagnation has left hardworking taxpayers and American families feeling like the American Dream is out of their reach.

SOURCES OF ECONOMIC STAGNATION

Trade Deals That Have Exported American Jobs. All across America, there are cities and towns devastated by unfair trade policies. Horrible trade deals from prior administrations

have stripped wealth and jobs from our Nation. Persistent trade deficits go hand in hand with a stagnant recovery and our trade deficits have increased: net exports were about -1 percent of GDP in the early 1990s; they were -3.4 percent of GDP in 2016.

Burdensome Federal Regulation. Until the new Administration took office this year, the regulatory state had continued to grow and impede growth in the economy. For example, over the 10 years ending in 2016, non-independent agencies added between \$78-\$115 billion in estimated annual costs through the finalization of new regulations. This included several environmental regulations, such as the Light Duty Fuel Economy regulations and the Power Plant Mercury regulations that each had estimated compliance costs approaching or exceeding \$10 billion per year. The true impact of regulations during this time was undoubtedly higher, as regulations issued by the so-called “independent agencies” are not included in this total. These “independent agencies” issue the majority of burdensome financial regulations, including the vast majority of the cost of compliance with the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act).

Everyone believes in and supports safe food supplies and clean air and water. But the agencies of the Federal Government have gone way beyond what was originally intended by the Congress. The hallmark feature of these regulations has been a mind-numbing complexity that minimizes the understanding of what constitutes compliance, and maximizes the opportunity for arbitrary and ad hoc bureaucratic decision-making, often through vehicles that may not be a legitimate substitute for notice-and-comment rulemaking, such as guidance and interpretive documents.

Burdensome Permitting Process. As major infrastructure projects are proposed, Federal agencies are responsible for reviewing potential impacts on safety, security, communities, and the environment. Over time, the legal requirements and processes for the permitting and review of

major infrastructure projects have developed in a siloed and ad-hoc way, creating complex processes that in some cases take multiple years to complete. Projects that are particularly large and complex, or that have significant environmental impacts, are often in the permitting and review process for several years. Up to 18 Federal agencies and 35 bureaus are responsible for individual, independent permitting and review decisions. Delays and uncertainty in project review timelines can affect critical financing and siting decisions; postpone needed upgrades, replacements, or new development; and ultimately, delay job creation and negatively affect American competitiveness. While there have been a number of efforts to improve these processes over time, they have had little quantifiable impact. Under the auspices of the infrastructure initiative, through administrative, regulatory, and legislative changes, the Administration will work to streamline and rationalize the permitting process while maintaining opportunities for meaningful public input and protecting the environment.

Highest Business Taxes in the World. The corporate tax rate in the United States is the highest in the Organization for Economic Cooperation and Development (OECD) and one of the highest in the world. While the Federal corporate income tax in the United States is 35.0 percent, after including State taxes, the rate is 38.9 percent. This compares to an average top marginal tax rate of 22.5 percent worldwide and 24.7 percent in the OECD. As long as our corporate tax rate is well above other nations, businesses will have the incentive to locate overseas, and America will continue to lose out on both jobs and tax revenue.

Low Business Investment. Due to high taxes, high regulations, and poor economic policies, real private nonresidential fixed investment has grown by only 1.3 percent each year (on a fourth quarter-over-fourth quarter basis) since 2007, compared to 4.9 percent annually before the recession. The capital stock is an important determinant of labor productivity, and weak

growth in labor productivity in recent years reinforces the need for more investment.

THE HUMAN COST OF ECONOMIC STAGNATION: TOO MANY AMERICANS LEFT BEHIND

Due to the slow recovery and over-burdened job creators, American workers and their families have not seen significant gains in their wages in recent years. In 2016, real hourly wages for production workers grew by only 0.5 percent (on a December-over-December basis). From the end of 2007 to the end of 2016, real GDP grew by 12.1 percent, but real wages grew by only 7.7 percent. In 2015, 13.5 percent of Americans lived in poverty, higher than in 2007. The poverty rate among children was even higher, 19.7 percent in 2015, compared to 18 percent in 2007.

Further compounding the twin challenges of growing debt and economic stagnation are social and economic policies that have failed millions of able-bodied adults. Millions of Americans are too discouraged to remain in the labor force or are being forced to work part-time.

In December 2007, before the start of the Great Recession, the labor force participation (LFP) rate was 66.0 percent. At the end of 2016, over seven years after the end of the recession, the participation rate was 62.7 percent. This is not solely a reflection of an aging population. Even amongst “prime-age” workers (those aged 25 to 54 years), participation in the labor force has declined, from 83.1 percent at the end of 2007, to 81.5 percent at the end of 2016. For those aged 25 to 34 years, too, participation has fallen according

to the U.S. Bureau of Labor Statistics (from 83.1 percent in December 2007, to 81.9 percent in December 2016). The employment-to-population ratio has fallen one percentage point for this young demographic between the end of 2007 and the end of 2016.

THE DANGEROUS COMBINATION OF HISTORIC DEBT AND ECONOMIC STAGNATION

Recent Federal budgets tell the story of a persistent and unresolved national crisis. During the Great Recession, the Federal budget deficit rose to unprecedented heights as revenue fell and spending rose sharply. From 2009 to 2012, the budget ran trillion-dollar deficits ranging in size from 6.8 percent to 9.8 percent of GDP, a standard measure of the size of deficits relative to the economy. Relative to GDP, these deficits were the largest seen since the Nation was on an all-out war footing during World War II.

From 2013 to 2016, deficits diminished from the trillion-dollar peaks, but still remained between \$400 and \$700 billion. These deficits were still above historical levels prior to the recession, despite coming years after the recession ended. Unless we change our fiscal course, our budget deficits will begin rising again after next year and will soon reach trillion-dollar levels once again. That would mean the publicly held debt will continue to mushroom and soon place the Nation in uncharted fiscal territory, unable to weather unexpected events such as recession or war, and vulnerable to fiscal and economic crises.

III. HOW TO MAKE THINGS RIGHT: NEW POLICIES FOR JOBS AND GROWTH AND NEW SPENDING PRIORITIES

To promote safety and prosperity for all Americans, we need to reprioritize Federal spending as we change the policies that have stifled economic growth. We need to incentivize business investment and reform the tax and regulatory systems that have been headwinds for growth. We need trade practices that will

stimulate American exports and jobs. We need family friendly policies that acknowledge the reality of dual income households. In addition, we need to bring Federal deficits and debt under control so that the Federal Government no longer absorbs available capital that could go to more productive uses.

NEW POLICIES FOR JOBS AND GROWTH

The President's Budget proposes the following bold steps to spark faster economic growth, balance the budget within 10 years, and finance important new priorities.

Control Federal Spending. The first step is to bring Federal spending under control and return the Federal budget to balance within 10 years. Deficit spending has become an ingrained part of the culture in the Nation's capital. It must end to avoid passing unsustainable levels of debt on to our children and grandchildren and causing serious economic damage. When debt levels keep increasing, more and more of the Nation's resources are required to service that debt and are diverted away from Government services that citizens depend on. To help correct this and reach our budget goal in 10 years, the Budget includes \$3.6 trillion in spending reductions over 10 years, the most ever proposed by any President in a Budget. By including the anticipated economic gains that will result from the President's fiscal, economic, and regulatory policies, the deficit will be reduced by \$5.6 trillion compared to the current fiscal path.

As a result, by the end of the 10-year budget window, when the budget reaches balance, publicly held debt will be reduced to 60 percent of GDP, the lowest level since 2010, when the economic policies of the last administration took effect. Under this plan, the debt will continue to fall both in nominal dollars and as a share of GDP beyond that point, putting us on a path to repay the debt in full within a few decades. Bringing the budget into surplus and reducing the level of debt sets up a virtuous cycle in which fewer tax dollars are needed to service the debt. This increases budget flexibility, in which the Government can pursue other needed priorities. Reduced Federal borrowing on the capital markets also frees up capital to flow to productivity-enhancing investments, leading to higher economic growth.

The following are a few of the ways we will bring spending under control:

Repeal and Replace Obamacare. The Budget includes \$250 billion in deficit savings associated with health care reform as part of the President's commitment to rescue Americans from the failures of Obamacare, and to expand choice, increase access, and lower premiums. The President supports a repeal and replace approach that improves Medicaid's sustainability and targets resources to those most in need, eliminates Obamacare's onerous taxes and mandates, provides funding for States to stabilize markets and ensure a smooth transition away from Obamacare, and helps Americans purchase the coverage they want through the use of tax credits and expanded Health Savings Accounts. Repealing Obamacare and its regulations on businesses will also increase employment, thereby increasing GDP and creating much needed economic growth. The Administration applauds the House's passage of the American Health Care Act and is committed to working with the Congress to repeal and replace Obamacare.

The Administration is committed to providing needed flexibility to issuers to help attract healthy consumers to enroll in health insurance coverage, improve the risk pool and bring stability and certainty to the individual and small group markets, while increasing the options for patients and providers. The Administration also supports State flexibility and control to create a free and open health care market and will continue to empower States to make decisions that work best for their markets. In light of these goals, the Budget promotes efficient operations and only funds critical activities for the Health Insurance Exchanges. The Administration will continue to work with the Congress to provide for a stable transition from the burdensome requirements of Obamacare and transition to a health care system focused on these core values.

Reform Medicaid. To realign financial incentives and provide stability to both Federal and State budgets, the Budget

proposes to reform Medicaid by giving States the choice between a per capita cap and a block grant and empowering States to innovate and prioritize Medicaid dollars to the most vulnerable populations. States will have more flexibility to control costs and design individual, State-based solutions to provide better care to Medicaid beneficiaries. These reforms are projected to save \$610 billion over 10 years.

Support the Highest Priority Biomedical Research and Development. The Budget institutes policies to ensure that Federal resources maximally support the highest priority biomedical science by reducing reimbursement of indirect costs (and thus focusing a higher percentage of spending on direct research costs) and implementing changes to the National Institutes of Health's (NIH) structure to improve efficiencies in the research enterprise. In 2018, the Department of Health and Human Services (HHS) and NIH will develop policies to reduce the burden of regulation on recipients of NIH funding consistent with the Administration's initiatives on regulatory reform and the goals articulated for the new Research Policy Board established in the 21st Century Cures Act.

Provide a Path Toward Welfare Reform. The Budget provides a path toward welfare reform, particularly to encourage those individuals dependent on the Government to return to the workforce. In doing so, this Budget includes Supplemental Nutrition Assistance Program (SNAP) reforms that tighten eligibility and encourage work, and proposals that strengthen child support and limit the Earned Income Tax Credit (EITC) and the Child Tax Credit (CTC) to those who are authorized to work in the United States.

As a primary component of the social safety net, SNAP—formerly Food Stamps—has grown significantly in the past decade. As expected, SNAP participation grew to historic

levels during the recession. However, despite improvements in unemployment since the recession ended, SNAP participation remains persistently high.

The Budget proposes a series of reforms to SNAP that close eligibility loopholes, target benefits to the neediest households, and require able-bodied adults to work. Combined, these reforms will reduce SNAP expenditures while maintaining the basic assistance low-income families need to weather hard times. The Budget also proposes SNAP reforms that will re-balance the State-Federal partnership in providing benefits by establishing a State match for benefit costs. The Budget assumes a gradual phase-in of the match, beginning with a national average of 10 percent in 2020 and increasing to an average of 25 percent by 2023. To help States manage their costs, in addition to the currently available operational choices States make that can impact participation rates and benefit calculations, new flexibilities to allow States to establish locally appropriate benefit levels will be considered.

The Budget also includes a number of proposals that strengthen the Child Support Enforcement Program, providing State agencies additional tools to create stronger, more efficient child support programs that facilitate family self-sufficiency and promote responsible parenthood. Specifically, a suite of Establishment and Enforcement proposals serves to increase child support collections that in turn result in savings to Federal benefits programs, and a Child Support Technology Fund will allow States to replace aging information technology systems to increase security, efficiency, and program integrity.

The Budget also proposes to require a Social Security Number (SSN) that is valid for work in order to claim the CTC and EITC. Under current law, individuals who do not have SSNs valid for work can claim the CTC, including the refundable portion of

the credit. This proposal would ensure only people who are authorized to work in the United States are eligible for the CTC. In addition, this proposal fixes gaps in current administrative practice for EITC filers that allowed some people with SSNs that are not valid for work to still claim the EITC.

Reform Disability Programs. The Budget proposes to reform disability insurance programs to promote greater LFP. Currently, people with disabilities have low rates of LFP—20 percent—which is less than a third of the LFP rate of the overall working age population. Disability benefits are essential for workers with long-term and permanent disabilities who are unable to work. Program integrity efforts are crucial to ensure only participants who remain eligible continue receiving benefits. The greatest waste is when the Government is not doing enough to enable individuals to remain in the labor force—incentives and pathways to recover from a temporary disability and return to work. These disability insurance programs should be helping people to stay in the workforce and be self-sufficient.

At the same time, Government must ensure only those who are truly eligible receive benefits. Reform proposals in the Budget include efforts to improve program integrity, close loopholes that make the program more susceptible to fraud, and address inequities in the system. For instance, the Budget proposes to hold fraud facilitators liable for overpayments and, instead of the automatic current lifetime appointment for Federal staff reviewing applications, the Budget proposes a probationary period for all new Administrative Law Judges hired.

To test creative and effective ways to promote greater LFP of people with disabilities so individuals can be independent and self-sufficient, the Budget proposes to expand demonstration authority to allow the Administration to test new program rules and processes and require mandatory

participation by program applicants and beneficiaries. An expert panel will identify specific changes to program rules that would increase LFP and reduce program participation, informed by successful demonstration results and other evidence. Past efforts have provided enhanced incentives to pursue work for disability insurance beneficiaries who already spent years out of the labor force. The Budget, in contrast, focuses on early intervention return-to-work initiatives that would help the individual worker maintain attachment to the labor force while also reducing the individuals' need to apply to the disability insurance programs.

Currently, there is a common expectation that receipt of disability benefits results in a permanent exit from the labor force. The Budget challenges this assumption by evaluating alternative program designs that will result in helping individuals with temporary work-disabilities return to work. The Budget includes targets for reduced program costs in the second five years of the budget window, savings that would result from increased LFP by people with disabilities.

Reform Federal Employees Retirement Benefits. The employee retirement landscape continues to evolve as private companies are providing less compensation in the form of retirement benefits. The shift away from defined benefit programs and cost-of-living adjustments for annuitants is part of that evolution. By comparison, the Federal Government continues to offer a very generous package of retirement benefits. Consistent with the goal of reining in Federal Government spending in many areas, as well as to bring Federal retirement benefits more in line with the private sector, adjustments to reduce the long-term costs associated with these benefits are included in this Budget. These proposals include increasing employee payments to the defined benefit Federal Employee Retirement System pension such that the employee will generally be paying the same amount as the employing agency,

and reducing or eliminating cost-of-living adjustments for existing and future retirees. Viewed in the context of the broader labor environment, the Administration believes the implementation and phasing in of these changes will not impact the Federal Government's recruiting and retention efforts.

Reduce Improper Payments Government-Wide. For the past few years, improper payments have been rising, and the Budget helps fulfill the President's promise to crack down on these improper Government payments. Even though the majority of Government payments are made properly, any waste of taxpayer money is unacceptable. The Budget prioritizes shrinking the amount of improper cash out the door. Specifically, by 2027 the Budget proposes to curtail Government-wide improper payments by half through actions to improve payment accuracy and tighten administrative controls.

Reduce the Federal Government to Redefine its Proper Role and Promote Efficiency. The Budget Blueprint for 2018 provided a plan for reprioritizing Federal discretionary spending so that it advances the safety and security of the American people. It included a \$54 billion increase in defense spending in 2018, which was fully offset by \$54 billion in reductions to non-defense programs. The Budget provides more detail on these spending reductions and provides additional savings and reforms that are necessary to balance the budget by 2027.

Details on these spending reductions are included in a separate *Major Savings and Reforms* volume. This volume provides a specific, aggressive set of program elimination, reduction, and saving proposals that redefine the proper role of the Federal Government, and curtail programs that fall short on results or provide little return to the American people.

For instance, within HHS, in order to return the provision of social services back to State and local governments as well as the private sector, the Budget eliminates the Social Services Block Grant (SSBG), a broad-based block grant that lacks strong performance and accountability standards. Relatedly, the Budget reduces the portion of the Temporary Assistance for Needy Families (TANF) block grant (10 percent) that States may transfer from TANF to SSBG. Finally, the Budget eliminates the TANF Contingency Fund, as it fails to provide well-targeted counter-cyclical funding to States.

Redirect Foreign Aid Spending. The Budget supports the core activities of the Department of State, the U.S. Agency for International Development (USAID), and other international programs, and refocuses their work on the highest priorities and strategic objectives. These include: investing in critical embassy security and maintenance needs in order to safeguard Federal employees overseas; meeting our commitment to Israel; supporting U.S. national security in efforts to defeat the Islamic State of Iraq and Syria; preventing the spread or use of weapons of mass destruction by state or non-state actors; maintaining U.S. leadership in shaping global humanitarian assistance while also asking the rest of the world to increase their share; fostering opportunities for U.S. economic interests by combatting corruption and ensuring a level playing field for American businesses; advancing global health security and pandemic preparedness; and ensuring effectiveness and accountability to the U.S. taxpayer. The Budget will also continue to support ongoing commitments to global health programs, including completing our commitment to Gavi, the Vaccine Alliance, maintaining funding for malaria programs, and continuing treatment for all current HIV/AIDS patients under the U.S. President's Emergency Plan for Aids Relief.

The Budget proposes to reduce or end direct funding for international programs and organizations whose missions do not substantially advance U.S. foreign policy interests. The Budget also renews attention on the appropriate U.S. share of international spending at the United Nations, at the World Bank, and for many other global issues where the United States currently pays more than its fair share. In addition, this Budget request focuses on making the Department of State and USAID leaner, more efficient, and more effective, and streamlines international affairs agencies more broadly through the elimination of Federal funding to several smaller agencies. The Budget will allow the Department of State and USAID to support their core missions, while ensuring the best use of American taxpayer dollars in ways that advance national security as we work to build a more prosperous and peaceful world.

Reduce Non-Defense Discretionary Spending Each Year with a 2-Penny Plan. The Budget Blueprint outlined a plan to reduce non-defense discretionary spending by \$54 billion in 2018. As part of the plan to achieve a balanced budget by 2027, the Budget builds on this approach with a 2-penny plan that would reduce non-defense budget authority by two percent each year, to reach approximately \$385 billion in 2027, or just over 1.2 percent of GDP. For comparison, at the 2017 cap level, non-defense base budget authority is \$519 billion and 2.7 percent of GDP. This reduction may seem steep, but the strict and disciplined discretionary policies already proposed in the Budget Blueprint will serve as a down payment on the out-year reforms the Administration will unveil, as it seeks to downsize the mission of the non-defense discretionary budget in the coming years.

Simplify the Tax Code and Provide Tax Relief. A comprehensive overhaul to our tax code will boost economic growth and investment. A simpler, fairer, and more efficient tax system is critical to growing the economy and creating

jobs. Our outdated, overly complex, and burdensome tax system must be reformed to unleash America's economy, and create millions of new, better-paying jobs that enable American workers to meet their families' needs.

The Budget assumes deficit neutral tax reform, which the Administration will work closely with the Congress to enact.

The Administration has articulated several core principles that will guide its discussions with taxpayers, businesses, Members of Congress, and other stakeholders. Overall, the Administration believes that tax reform, both for individuals and businesses, should grow the economy and make America a more attractive business environment.

Tax relief for American families, especially middle-income families, should:

- Lower individual income tax rates.
- Expand the standard deduction and help families struggling with child and dependent care expenses.
- Protect homeownership, charitable giving and retirement saving.
- End the burdensome alternative minimum tax, which requires many taxpayers to calculate their taxes twice.
- Repeal the 3.8 percent Obamacare surcharge on capital gains and dividends, which further hinders capital formation.
- And, abolish the death tax, which penalizes farmers and small business owners who want to pass their family enterprises on to their children.

The Administration believes that business tax reform should:

- Reduce the tax rate on American businesses in order to fuel job creation and economic growth.
- Eliminate most special interest tax breaks to make the tax code more equitable, more

efficient, and to help pay for lower business tax rates.

- And, end the penalty on American businesses by transitioning to a territorial system of taxation, enabling these businesses to repatriate their newly earned overseas profits without incurring additional taxes. This transition would include a one-time repatriation tax on already accumulated overseas income.

Going forward, the President is committed to continue working with the Congress and other stakeholders to carefully and deliberatively build on these principles to create a tax system that is fair, simple, and efficient—one that puts Americans back to work and puts America first.

Provide a Comprehensive Plan to Reform the Federal Government and Reduce the Federal Civilian Workforce. During the first 100 days of this Administration, the Office of Management and Budget issued guidance that takes steps to implement the President's charge to reorganize agencies and reduce the Federal workforce to begin the work of creating a leaner, more accountable, less intrusive, and more effective Government. Each executive department and agency will be examined and the American public will have an opportunity to provide input. The result will be a comprehensive Government reform plan that eliminates unnecessary, overlapping, outdated and ineffective programs. Some agencies may find the greatest efficiencies come from insourcing or reducing management layers while others will want to review programs, shared service and outsourcing options, or restructuring. This may mean reorganizing, consolidating, and eliminating programs, functions, and organizations where necessary.

Rather than setting arbitrary targets, the Administration tasked each agency to determine workforce levels that align with effectively and efficiently delivering its mission, including planning for funding levels in the President's Budget. In addition to broad agency reform, the Administration is committed to removing the

red tape that often traps Federal employees in an overly bureaucratic environment. It is often heard that managers are unable to function at an optimal level, given unnecessary layers of disjointed guidance, policy, and regulation. To alleviate this barrier to managing an efficient and effective workforce, a standard requirement included in the Agency Reform plan response is a plan for how agencies will reward top performers, while holding those with conduct or performance issues accountable.

Roll Back Burdensome Regulations. The American people deserve a regulatory system that works for them, not against them—a system that is both effective and efficient. Each year, however, Federal agencies issue thousands of new regulations that, taken together, impose substantial burdens on American consumers and businesses big and small. These burdens function much like taxes that unnecessarily inhibit growth and employment. The President is committed to fixing these problems by eliminating unnecessary and wasteful regulations. To that end, the President has already taken four significant steps:

Launch a Regulatory Freeze. On January 20, 2017, the President's Chief of Staff issued a memorandum to all agencies, directing them to pull back any regulations that had been sent to, but not yet published by, the Office of the Federal Register; to not publish any new regulations unless approved by one of the President's political appointees; and to delay the effective date of any pending regulations for 60 days to provide the new Administration time to review and reconsider those regulations. Federal agencies responded by pulling back over 60 so-called "midnight" regulations from being issued and continue to take a very close look at those published, but not yet in effect.

Control Costs and Eliminate Unnecessary Regulations. On January 30, 2017, the President signed Executive Order (EO) 13771, "Reducing Regulation and Controlling Regulatory Costs." This EO emphasizes a

critical principle for the regulatory state. It requires Federal agencies to identify for elimination at least two existing regulations for each new regulation they issue. It generally also requires agencies to ensure that for 2017, the total incremental cost of all new regulations be no greater than \$0. For 2018 and beyond, the EO establishes and institutionalizes a disciplined process for imposing regulatory cost caps and allowances for each Federal agency.

Establish Executive Order (EO) 13777, "Enforcing the Regulatory Reform Agenda." This EO establishes within each agency a Regulatory Reform Officer and a Regulatory Reform Task Force to carry out the President's regulatory reform priorities. These new teams will work hard to identify regulations that eliminate jobs or inhibit job creation; are outdated, unnecessary, or ineffective; or impose costs that exceed benefits. These efforts build upon a widely recognized and bipartisan consensus that many existing regulations are likely to be ineffective and no longer necessary. The difference, however, is accountability, and these teams and this effort will be a critical means by which Federal agencies will identify and cut regulations in a smart and efficient manner.

Reform Financial Regulation and Prevent Taxpayer-Funded Bailouts. The Budget fosters economic growth and vibrant financial markets by rolling back the regulatory excesses mandated by the Dodd-Frank Act. On February 3, 2017, the Administration issued an EO on Core Principles for Regulating the United States Financial System (Core Principles EO), which includes preventing taxpayer-funded bailouts and restoring accountability within Federal financial regulatory agencies.

As directed in the Core Principles EO, the Secretary of the Treasury, with the heads of the member agencies of the Financial Stability Oversight Council, is conducting a thorough review of the extent to which existing laws,

regulations, and other Government policies promote (or inhibit) these Core Principles. The Budget includes \$35 billion in savings to be realized through reforms that prevent bailouts and reverse burdensome regulations that hinder financial innovation and reduce access to credit for hardworking American families.

Further, the Budget proposes legislation to restructure the Consumer Financial Protection Bureau (CFPB). CFPB's interpretation of the Dodd-Frank Act has resulted in an unaccountable bureaucracy controlled by an independent director with unchecked regulatory authority and punitive power. Restructuring is required to ensure appropriate congressional oversight and to refocus CFPB's efforts on enforcing the law rather than impeding free commerce. The Budget proposes to limit CFPB's funding in 2018 to allow for an efficient transition period and bring a newly streamlined agency into the regular appropriations process beginning in 2019.

The Budget also proposes to restore the Securities and Exchange Commission's accountability to the American taxpayer by eliminating the "Reserve Fund" created by the Dodd-Frank Act.

Reform Immigration Policy. America's immigration policy must serve our national interest. The Budget supports commonsense immigration standards that protect American workers, reduce burdens on taxpayers and public resources, and focus Federal funds on underserved and disadvantaged citizens. When fully implemented, these changes have the potential to save American taxpayers trillions of dollars over future decades.

Census data show that current U.S. immigration policy results in a large numbers of residents and citizens who struggle to become financially independent and instead rely on Government benefits financed by taxpayers. In 2012, the census reported that 51 percent of all households

headed by immigrants received payments from at least one welfare or low-income assistance program. In addition, participation in welfare programs among immigrant-headed households varies by education level. In 2012, 76 percent of households headed by an immigrant without a high school education used at least one major welfare program compared to 26 percent for households headed by an immigrant with at least a bachelor's degree. Focusing immigration policy on merit-based admissions has the potential to reduce Federal outlays for welfare payments to lower-skilled immigrant-headed households.

Estimates from a recent report by the National Academy of Sciences (NAS) on the Economic and Fiscal Consequences of Immigration indicate that each individual immigrant who lacks a high school education may create as much as \$247,000 more in costs at all levels of government than they pay in taxes over the next 75 years. Based on data from the Census Bureau's Current Population Survey, 8.2 million adults with a high school education or less settled in the United States from abroad between 2000 and 2015.

The NAS study also found that, in 2013, first-generation immigrants (across all skill levels) and their dependents living in the United States may have cost government at all levels as much as \$279 billion more than they paid in taxes for all levels of government, when the costs of national defense and other public goods are included on an average cost basis. The Federal costs alone were estimated to be as much as \$147 billion if all public goods and benefits are included.

Some of this cost is driven by our Nation's current refugee policy. Under the refugee program, the Federal Government brings tens of thousands of entrants into the United States, on top of existing legal immigration flows, who are instantly eligible for time-limited cash benefits and numerous non-cash Federal benefits, including food assistance through SNAP, medical care, and education, as well as a host of State and local benefits.

A large proportion of entrants arriving as refugees have minimal levels of education, presenting particular fiscal costs. The HHS Annual Survey of Refugees showed that, in 2015, those who had arrived in the previous five years had less than 10 years of education on average. The survey also showed that of refugees who arrived in the prior five years nearly 50 percent were on Medicaid in 2015, 45 percent received cash assistance, and 75 percent received benefits from SNAP. These federally supported benefit programs are not tracked separately in terms of welfare and other benefits; they are added to the bottom line of the Federal deficit and Federal programs. The way that refugee spending is typically budgeted for makes it difficult to attribute the full fiscal costs, including appropriated funds for the Department of State and HHS, along with fee-funded programs from the Department of Homeland Security. Additional State and local funding for services, including public education, is not captured in the Federal budget, nor are local and State taxes collected from refugees to the Federal Government. While HHS is appropriated funds specifically for refugee benefits, many others, including SNAP and Medicaid, are unallocated to refugees.

The paradoxical effect of refugee spending is that the larger the number the United States admits for domestic resettlement, the fewer people the United States is able to help overall; each refugee admitted into the United States comes at the expense of helping a potentially greater number out of country. Thus, reducing the number of refugees increases the number of dislocated persons the United States is financially able to assist, while increasing the number of refugees may have the effect of reducing the total size of the refugee population the United States is able to assist financially.

The Administration is exploring options for budget presentation that would make transparent the net budgetary effects of immigration programs and policy. The goal of such changes would be to capture better the impact of immigration policy decisions on the Federal Government's fiscal path. Once the net effect of immigration

on the Federal Budget is more clearly illustrated, the American public can be better informed about options for improving policy outcomes and saving taxpayer resources. In that regard, the Budget supports reforming the U.S. immigration system to encourage merit-based admissions for legal immigrants, ending the entry of illegal immigrants, and a substantial reduction in refugees slotted for domestic resettlement.

NEW PRIORITIES

The Budget reprioritizes spending in several important ways.

Invest in Defense. The President's Budget includes \$639 billion of discretionary budget authority for the Department of Defense (DOD), a \$52 billion increase above the 2017 annualized continuing resolution (CR) level, fully offset by targeted reductions elsewhere. These resources provide for the military forces needed to conduct ongoing operations, deter potential adversaries, and protect the security of the United States.

Reverse the Defense Sequestration.

The Budget fully reverses the defense sequestration by increasing funding for national defense by \$54 billion above the cap in current law, and fully offsetting this increase. This includes a \$52 billion increase for the DOD, as well as \$2 billion of increases for other national defense programs. Since defense sequestration was first triggered in 2013, the world has grown more dangerous due to rising terrorism, destabilizing technology, and increasingly aggressive potential adversaries. Over the same period, our military has become smaller, and deferred training, maintenance, and modernization have degraded its ability to prepare for future war while sustaining current operations. The President's Budget ends this depletion and begins to rebuild the U.S. Armed Forces, laying the groundwork for a larger, more capable, and more lethal joint force consistent with a new National Defense Strategy.

Fill Critical Gaps and Build Warfighting Readiness.

The Administration inherited the smallest Army since before World War II, a Navy and Marine Corps facing shortfalls in maintenance and equipment procurement, and the smallest Air Force with the oldest planes in history. The President began corrective action immediately, ordering a readiness review, requesting \$30 billion of additional 2017 appropriations (of which the Congress provided \$21 billion), and developing a budget that adds \$54 billion to national defense in 2018. These funds will begin years of increased investment to end the depletion of our military and build warfighting readiness. In 2018, the Budget provides for 56,400 more Soldiers, Sailors, Airmen, and Marines than the end strength planned by the Obama Administration. These troops are needed to fill gaps in our combat formations, man essential units previously scheduled for divestment, and provide critical enablers. The Budget prioritizes readiness, funding critical shipyard requirements, accelerating depot maintenance and weapon system sustainment, enhancing training, growing our cyber workforce and capabilities, and restoring degraded infrastructure. Funds also recapitalize, modernize, and enhance weapons systems. For example, the Air Force, Navy, and Marine Corps would buy 84 new fighter aircraft in 2018, including 70 Joint Strike Fighters and 14 Super Hornets. The Navy continues to increase its ship count, with the acquisition of eight new battle force ships funded in 2018.

Implement Defense Reform. The Budget lays the groundwork for an ambitious reform agenda that underscores the President's commitment to reduce the costs of military programs wherever feasible without reducing effectiveness or efficiency. The Budget also continues ongoing efforts to improve the Department's business processes, reduce major headquarters activities by 25 percent, and eliminate redundant spending on service contracts.

Increase Border Security and Investments in Public Safety. The President's Budget includes \$44.1 billion for the Department of Homeland Security (DHS) and \$27.7 billion for the Department of Justice (DOJ) for law enforcement, public safety and immigration enforcement programs and activities.

Increase Border Security Infrastructure and Technology. The President's Budget secures the borders of the United States by investing \$2.6 billion in high-priority tactical infrastructure and border security technology, including funding to plan, design, and construct a physical wall along the southern border as directed by the President's January 25, 2017 EO. This investment would strengthen border security, helping stem the flow of people, drugs, and other illicit material illegally crossing the border.

Increase DHS Personnel. The Budget also advances the President's plan to strengthen border security and immigration enforcement with more than \$300 million to recruit, hire, and train 500 new Border Patrol Agents and 1,000 new Immigration and Customs Enforcement law enforcement personnel in 2018, plus associated support staff. These new personnel would improve the integrity of the immigration system by adding capacity to interdict those aliens attempting to cross the border illegally, as well as to identify and remove those already in the United States who entered illegally.

Enforce the Nation's Laws. The Budget enhances enforcement of immigration laws by proposing an additional \$1.5 billion above the 2017 annualized CR level for expanded detention, transportation, and removal of illegal immigrants. These funds would ensure that DHS has sufficient detention capacity to hold prioritized aliens, including violent criminals and other dangerous individuals, as they are processed for removal.

Invest in Law Enforcement. The Budget provides critical resources for DOJ

to confront terrorism, reduce violent crime, tackle the Nation's opioid epidemic, and combat illegal immigration. Additional spending is provided for DOJ to enhance public safety and law enforcement including \$214 million above current levels for immigration enforcement—allowing DOJ to hire 75 additional immigration judge teams, bringing the total number of funded immigration judge teams to 449. In addition, \$84 million more is provided for increases in the Federal detainee population. Increases of \$188 million are included to address violent and gun-related crime in communities across the Nation and to target transnational criminal organizations and drug traffickers. As part of this increase, \$103 million is added to maintain and expand capacity to fight against opioids and other illicit drugs. Further, DOJ will take steps to mitigate the risk that sanctuary jurisdictions pose to public safety.

Invest in Cybersecurity. The internet has transformed and modernized our society and enabled astonishing business growth. It has fostered education, fueled innovation, and strengthened our military. That transformation—and the opportunities it has created—has been exploited by our enemies and adversaries. Bad actors must not be allowed to use the internet to perpetrate crimes and threaten our security. These crimes affect our largest companies, impact millions of people at a time, damage our small businesses, and affect our national security. The Budget supports the President's focus on cybersecurity to ensure strong programs and technology to defend the Federal networks that serve the American people, and continues efforts to share information, standards, and best practices with critical infrastructure and American businesses to keep them secure. The Budget also includes an increase in law enforcement and cybersecurity personnel across DHS, DOD, and the Federal Bureau of Investigation to execute these efforts and counter cybercrime. In addition, the Budget includes an increase in resources for the National Cybersecurity and

Communications Integration Center, which enables DHS to respond effectively to cyber attacks on critical infrastructure.

Provide an Infrastructure Plan to Support \$1 Trillion in Private/Public Infrastructure Investment. The President has consistently emphasized that the Nation's infrastructure needs to be rebuilt and modernized to create jobs, maintain America's economic competitiveness, and connect communities and people to more opportunities. Unfortunately, the United States no longer has the best infrastructure in the world. According to the World Economic Forum, the United States' overall infrastructure places 12th, with countries such as Japan, Germany, the Netherlands, and France ranking higher.

If the United States continues to underinvest in infrastructure, we will continue to fall further and further behind our peers and our economic performance will suffer. Given these challenges, the Administration's goal is to seek long-term reforms on how infrastructure projects are regulated, funded, delivered, and maintained. Simply providing more Federal funding for infrastructure is not the solution. Rather, we will work to fix underlying incentives, procedures, and policies to spur better, and more efficient, infrastructure decisions and outcomes, across a range of sectors, including surface transportation, airports, waterways, ports, drinking and waste water, broadband and key Federal facilities. Such improvements will include tracking the progress of major infrastructure projects on a public dashboard to ensure transparency and accountability of the permitting process.

The President's target of \$1 trillion will be met with a combination of new Federal funding, incentivized non-Federal funding, and expedited projects that would not have happened but for the Administration's involvement (for example, the Keystone XL Pipeline). While the Administration will propose additional funding for infrastructure, those funds will be focused on incentivizing additional non-Federal investments. While the Administration continues to work with the Congress, States, localities, and

other infrastructure stakeholders to finalize the suite of direct Federal programs that will support this effort, the Budget includes \$200 billion in outlays related to the infrastructure initiative.

The impact of this investment will be amplified with other administrative and regulatory actions the Administration plans to pursue. The Administration is comprehensively reviewing administrative policies that impact infrastructure, and will eliminate and revise policies that no longer fulfill a useful purpose. Further, as part of the regulatory reform agenda, the Administration will eliminate or significantly revise regulations that create unnecessary barriers to infrastructure investment by all levels of government and the private sector.

The United States has maintained an excellent aviation safety record while operating the world's most congested airspace. Despite this record, the Federal Aviation Administration (FAA) is challenged increasingly to address the quickly evolving needs of the Nation's airspace users.

To accommodate growing air traffic volume and meet the demands of aviation users, the Administration proposes to shift the air traffic control functions to a non-profit, non-governmental entity. Similar efforts have been undertaken successfully in many other countries. This transformative undertaking will create an innovative corporation that can more nimbly respond to the demand for air traffic services, all while reducing taxes and Government spending. The parts of FAA that will remain with the Government will retain important aviation safety regulatory activities as well as maintain the Airport Improvement Program grant program.

The Budget reflects the proposal to shift the air traffic control function to an independent, non-governmental organization beginning in 2021, with a cap reduction in discretionary spending of \$72.8 billion, and reduction in aviation excise taxes of \$115.6 billion. These estimated changes represent a high-level reflection of the Administration's proposal.

Support Families and Children. The Administration is committed to helping American families and children.

Provide Paid Parental Leave. During his campaign, the President pledged to provide paid family leave to help new parents. The Budget delivers on this promise with a fully paid-for proposal to provide six weeks of paid family leave to new mothers and fathers, including adoptive parents, so all families can afford to take time to recover from childbirth and bond with a new child without worrying about paying their bills.

Using the Unemployment Insurance (UI) system as a base, the proposal will allow States to establish paid parental leave programs in a way that is most appropriate for their workforce and economy. States would be required to provide six weeks of parental leave and the proposal gives States broad latitude to design and finance the program. The proposal is fully offset by a package of sensible reforms to the UI system—including reforms to reduce improper payments, help unemployed workers find jobs more quickly, and encourage States to maintain reserves in their Unemployment Trust Fund accounts. The Administration looks forward to working with the Congress on legislation to make paid parental leave a reality for families across the Nation.

Extend the Children's Health Insurance Program (CHIP). While the future of CHIP is addressed alongside other health reforms, the Budget proposes to extend CHIP funding for two years, through 2019, providing stability to States and families. The Budget also proposes a series of improvements that rebalance the State-Federal partnership, including returning to the historic Federal matching rate, and increasing State flexibility.

Reform Student Loan Programs. In recent years, income-driven repayment (IDR) plans, which offer student borrowers the option of making affordable monthly payments based

on factors such as income and family size, have grown in popularity. However, the numerous IDR plans currently offered to borrowers overly complicate choosing and enrolling in the right plan. The Budget proposes to streamline student loan repayment by consolidating multiple IDR plans into a single plan. The single IDR plan would cap a borrower's monthly payment at 12.5 percent of discretionary income. For undergraduate borrowers, any balance remaining after 15 years of repayment would be forgiven. For borrowers with any graduate debt, any balance remaining after 30 years of repayment would be forgiven.

To support this streamlined pathway to debt relief for undergraduate borrowers, and to generate savings that help put the Nation on a more sustainable fiscal path, the Budget eliminates the Public Service Loan Forgiveness program, establishes reforms to guarantee that all borrowers in IDR pay an equitable share of their income, and eliminates subsidized loans. These reforms will reduce inefficiencies in the student loan program and focus assistance on needy undergraduate student borrowers instead of high-income, high-balance graduate borrowers. All student loan proposals apply to loans originated on or after July 1, 2018, except those provided to borrowers to finish their current course of study.

The Budget also supports expanded access to Pell Grants for eligible recipients through Year-Round Pell. This policy incentivizes students to complete their degrees faster, helping them reduce their loan debt and enter the workforce sooner. Year-Round Pell gives students the opportunity to earn a third semester of Pell Grant support during an academic year, boosting total Pell Grant aid by \$1.5 billion in 2018 for approximately 900,000 students.

Extend the Current VA Choice Program. Veterans' access to timely, high quality health care is one of this Administration's highest priorities. The Budget provides mandatory funding to extend the Veterans Choice Program, enabling eligible veterans to receive timely care, close to home. As of April 2017, veterans have completed

over 8.7 million appointments through the Choice Program. The Administration will work with the Congress to improve this program and implement bold change so that the Department of Veterans Affairs (VA) continues to provide the services and choices veterans have earned. The Budget proposes to fully offset the cost of continuing this

program through targeted programmatic changes to mandatory benefits programs to better align them with programmatic intents. Through these tradeoffs, VA will focus its budgetary resources on providing veterans with the most efficient and effective care and benefits.

Summary Tables

Table S-1. Budget Totals

(In billions of dollars and as a percent of GDP)

	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	Totals	
													2018-2022	2018-2027
Budget Totals in Billions of Dollars:														
Receipts	3,268	3,460	3,654	3,814	3,982	4,161	4,390	4,615	4,864	5,130	5,417	5,724	20,001	45,751
Outlays	3,853	4,062	4,094	4,340	4,470	4,617	4,832	4,933	5,073	5,306	5,527	5,708	22,353	48,901
Deficit/surplus (-)	585	603	440	526	488	456	442	319	209	176	110	-16	2,351	3,150
Debt held by the public	14,168	14,824	15,353	15,957	16,509	17,024	17,517	17,887	18,150	18,379	18,541	18,575		
Gross domestic product (GDP)	18,407	19,162	20,014	20,947	21,981	23,093	24,261	25,489	26,779	28,134	29,557	31,053		
Budget Totals as a Percent of GDP:														
Receipts	17.8%	18.1%	18.3%	18.2%	18.1%	18.0%	18.1%	18.1%	18.2%	18.2%	18.3%	18.4%	18.1%	18.2%
Outlays	20.9%	21.2%	20.5%	20.7%	20.3%	20.0%	19.9%	19.4%	18.9%	18.9%	18.7%	18.4%	20.3%	19.6%
Deficit/surplus (-)	3.2%	3.1%	2.2%	2.5%	2.2%	2.0%	1.8%	1.3%	0.8%	0.6%	0.4%	-0.1%	2.1%	1.4%
Debt held by the public	77.0%	77.4%	76.7%	76.2%	75.1%	73.7%	72.2%	70.2%	67.8%	65.3%	62.7%	59.8%		

Table S-2. Effect of Budget Proposals on Projected Deficits

(Deficit increases (+) or decreases (-) in billions of dollars)

	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	Totals	
													2018-2022	2018-2027
Projected deficits in the pre-policy baseline	585	605	413	553	647	743	861	925	956	1,082	1,234	1,338	3,238	8,775
Percent of GDP	3.2%	3.2%	2.1%	2.7%	3.0%	3.3%	3.8%	3.8%	3.8%	4.1%	4.5%	4.7%		
Proposals in the 2018 Budget:														
Major initiatives:														
Repeal and replace Obamacare			25	30	-5	-30	-35	-40	-40	-50	-50	-55	-15	-250
Support \$1 trillion in private/public infrastructure investment ..			5	25	40	50	40	20	10	5	5		160	200
Reform financial regulation and prevent taxpayer-funded bail-outs				-2	-3	-3	-4	-4	-4	-4	-4	-5	-13	-35
Establish a paid parental leave program			1	1	2	2	2	2	2	2	2	2	7	19
Reform Medicaid and the Children's Health Insurance Program (CHIP)			-2	-3	-10	-20	-40	-60	-80	-105	-130	-165	-76	-616
Reform the welfare system			-9	-16	-23	-25	-30	-33	-33	-34	-35	-34	-102	-272
Reform Federal student loans			-4	-7	-11	-13	-15	-17	-18	-19	-19	-20	-50	-143
Reduce improper payments Government-wide			-0	-1	-2	-3	-5	-5	-10	-21	-38	-58	-10	-142
Reform disability programs			-1	-1	-2	-2	-3	-5	-8	-12	-17	-22	-9	-72
Reform retirement benefits for Federal employees			-4	-1	-3	-4	-6	-7	-8	-9	-10	-11	-17	-63
Limit Farm Bill subsidies and make other agricultural reforms ..			- ^a	-3	-4	-4	-4	-4	-4	-5	-5	-5	-15	-38
Extend the current Veterans Choice program			1	2	2	3	3	4	4	4	4	4	11	29
Other spending reductions and program reforms			-7	-12	-16	-17	-26	-35	-38	-27	-71	-89	-79	-339
Total, major initiatives			4	10	-32	-67	-122	-185	-228	-276	-369	-458	-208	-1,723
Reprioritize discretionary spending:														
Eliminate the defense sequester and raise the cap on defense discretionary spending		2	42	52	52	50	49	48	47	45	43	41	245	469
Reorganize Government and apply two-penny plan to non-defense discretionary spending		-5	-15	-49	-81	-112	-133	-156	-179	-202	-226	-251	-390	-1,404
Phase down the use of Overseas Contingency Operations funding ¹		1	-2	-16	-33	-51	-69	-77	-82	-85	-87	-90	-171	-593
Total, reprioritize discretionary spending		-3	25	-13	-63	-113	-152	-185	-214	-243	-271	-299	-316	-1,528
Debt service and indirect interest effects		- ^a	*	*	-1	-5	-12	-24	-38	-55	-76	-101	-18	-311
Total proposals in the 2018 Budget		-3	29	-3	-96	-185	-287	-394	-480	-573	-715	-858	-542	-3,563
Effect of economic feedback		*	-2	-24	-63	-102	-153	-213	-267	-333	-408	-496	-345	-2,062
Total deficit reduction in the 2018 Budget		-3	27	-28	-159	-288	-440	-607	-747	-906	-1,124	-1,354	-887	-5,625
Resulting deficit/surplus (-) in the 2018 Budget	585	603	440	526	488	456	442	319	209	176	110	-16	2,351	3,150
Percent of GDP	3.2%	3.1%	2.2%	2.5%	2.2%	2.0%	1.8%	1.3%	0.8%	0.6%	0.4%	-0.1%		

^a \$500 million or less¹ Reductions associated with OCO are relative to the BBEDCA baseline and are based on notional placeholder amounts that are consistent with a potential transition of certain OCO costs into the base budget while continuing to fund contingency operations. The placeholder amounts do not reflect specific decisions or assumptions about OCO funding in any particular year.

Table S-3. Baseline by Category¹

(In billions of dollars)

	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	Totals	
													2018-2022	2018-2027
Outlays:														
Discretionary programs:														
Defense	585	592	600	623	640	653	665	676	695	713	732	750	3,181	6,747
Non-defense	600	624	618	629	637	650	659	672	688	705	722	739	3,193	6,718
Subtotal, discretionary programs	1,185	1,215	1,219	1,251	1,277	1,303	1,323	1,348	1,384	1,418	1,453	1,488	6,373	13,464
Mandatory programs:														
Social Security	910	946	1,005	1,070	1,138	1,207	1,281	1,362	1,448	1,537	1,630	1,728	5,702	13,406
Medicare	588	593	582	646	701	757	854	885	913	1,012	1,106	1,195	3,541	8,650
Medicaid	368	378	408	432	454	480	507	537	570	604	648	688	2,280	5,328
Other mandatory programs	560	656	589	626	643	670	717	719	726	759	821	846	3,244	7,115
Subtotal, mandatory programs	2,427	2,573	2,583	2,774	2,936	3,114	3,359	3,503	3,656	3,912	4,205	4,457	14,767	34,500
Net interest	240	276	316	372	431	487	542	592	634	670	706	741	2,147	5,489
Total outlays	3,853	4,065	4,118	4,398	4,643	4,905	5,224	5,443	5,673	6,000	6,364	6,687	23,287	53,453
Receipts:														
Individual income taxes	1,546	1,660	1,836	1,934	2,042	2,165	2,291	2,425	2,568	2,719	2,880	3,058	10,268	23,918
Corporation income taxes	300	324	355	375	401	400	414	425	439	455	475	497	1,945	4,235
Social insurance and retirement receipts:														
Social Security payroll taxes	810	857	892	931	972	1,027	1,081	1,133	1,191	1,251	1,316	1,379	4,903	11,173
Medicare payroll taxes	247	258	270	283	297	315	332	348	367	386	407	427	1,497	3,432
Unemployment insurance	49	49	50	49	49	50	51	52	53	54	56	57	248	519
Other retirement	9	10	10	11	11	12	12	13	13	14	15	16	56	127
Excise taxes	95	87	106	107	110	114	116	119	123	127	131	136	553	1,189
Estate and gift taxes	21	23	24	26	28	29	31	33	36	38	40	43	139	328
Customs duties	35	34	40	42	43	44	46	50	53	56	60	65	214	499
Deposits of earnings, Federal Reserve System	116	97	70	56	49	51	60	70	78	86	91	98	286	709
Other miscellaneous receipts	40	60	54	56	57	58	60	61	64	65	67	69	284	610
Total receipts	3,268	3,460	3,707	3,869	4,059	4,264	4,495	4,730	4,984	5,251	5,538	5,844	20,394	46,741
Deficit	585	605	411	529	584	641	728	713	689	749	826	842	2,894	6,712
Net interest	240	276	316	372	431	487	542	592	634	670	706	741	2,147	5,489
Primary deficit	345	329	95	157	153	154	187	121	55	79	120	101	746	1,224
On-budget deficit	620	647	436	533	564	612	682	640	593	627	681	668	2,826	6,035
Off-budget deficit/surplus (-)	-36	-42	-25	-4	20	29	47	72	97	122	145	174	68	678

Table S-3. Baseline by Category¹—Continued

(In billions of dollars)

	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	Totals	
													2018-2022	2018-2027
Memorandum, budget authority for discretionary programs:														
Defense	607	616	616	630	645	661	677	694	711	729	747	765	3,229	6,875
Non-defense	560	551	548	562	575	589	604	619	634	650	667	683	2,879	6,133
Total, discretionary budget authority	1,167	1,167	1,164	1,192	1,221	1,250	1,281	1,313	1,346	1,379	1,414	1,449	6,108	13,008
Memorandum, totals with pre-policy economic assumptions:														
Receipts	3,268	3,467	3,707	3,838	3,991	4,151	4,330	4,505	4,703	4,902	5,116	5,339	20,017	44,581
Outlays	3,853	4,072	4,120	4,392	4,638	4,894	5,211	5,431	5,659	5,984	6,350	6,678	23,255	53,356
Deficit	585	605	413	553	647	743	881	925	956	1,082	1,234	1,338	3,238	8,775

¹ Baseline estimates are on the basis of the economic assumptions shown in Table S-9, which incorporate the effects of the Administration's fiscal policies. Baseline totals reflecting current-law economic assumptions are shown in a memorandum bank.

Table S-4. Proposed Budget by Category

(In billions of dollars)

	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	Totals		
													2018-2022	2018-2027	
Outlays:															
Discretionary programs:															
Defense	585	594	643	665	670	667	662	665	679	693	708	722	3,307	6,774	
Non-defense	600	619	601	567	537	506	485	464	455	446	437	429	2,696	4,927	
Subtotal, discretionary programs	1,185	1,213	1,244	1,232	1,207	1,173	1,148	1,129	1,134	1,139	1,145	1,151	6,003	11,701	
Mandatory programs:															
Social Security	910	946	1,005	1,070	1,137	1,205	1,279	1,360	1,446	1,535	1,628	1,725	5,696	13,392	
Medicare	588	593	582	646	700	756	851	882	910	1,017	1,085	1,166	3,535	8,594	
Medicaid	368	378	404	423	439	460	467	477	490	499	518	524	2,193	4,701	
Other mandatory programs	560	656	570	603	609	622	658	653	649	667	687	678	3,062	6,396	
Allowance for Obamacare repeal and replacement			-30	-30	-90	-130	-140	-155	-160	-170	-170	-170	-175	-420	-1,250
Allowance for infrastructure initiative			5	25	40	50	40	20	10	5	5		160	200	
Subtotal, mandatory programs	2,427	2,573	2,535	2,736	2,835	2,963	3,156	3,237	3,345	3,553	3,754	3,919	14,226	32,033	
Net interest	240	276	315	371	428	481	528	567	595	613	629	639	2,123	5,166	
Total outlays	3,853	4,062	4,094	4,340	4,470	4,617	4,832	4,933	5,073	5,306	5,527	5,708	22,353	48,901	
Receipts:															
Individual income taxes	1,546	1,660	1,836	1,935	2,044	2,167	2,293	2,428	2,572	2,723	2,884	3,062	10,275	23,945	
Corporation income taxes	300	324	355	375	401	400	414	425	439	455	475	497	1,946	4,236	
Social insurance and retirement receipts:															
Social Security payroll taxes	810	857	892	931	972	1,027	1,081	1,133	1,191	1,251	1,316	1,379	4,903	11,173	
Medicare payroll taxes	247	258	270	283	297	315	332	348	367	386	407	427	1,497	3,432	
Unemployment insurance	49	49	50	49	50	53	55	54	56	56	59	62	257	543	
Other retirement	9	10	12	14	16	18	20	22	23	24	25	26	80	199	
Excise taxes	95	87	106	107	110	99	101	104	106	109	113	117	524	1,072	
Estate and gift taxes	21	23	24	26	28	29	31	33	36	38	40	43	139	328	
Customs duties	35	34	40	42	43	44	46	50	53	56	60	65	214	499	
Deposits of earnings, Federal Reserve System ...	116	97	70	56	50	52	61	71	78	87	92	99	290	717	
Other miscellaneous receipts	40	60	54	55	57	57	59	61	63	64	66	69	282	606	
Allowance for Obamacare repeal and replacement			-55	-60	-85	-100	-105	-115	-120	-120	-120	-120	-405	-1,000	
Total receipts	3,268	3,460	3,654	3,814	3,982	4,161	4,390	4,615	4,864	5,130	5,417	5,724	20,001	45,751	
Deficit/surplus (-)	585	603	440	526	488	456	442	319	209	176	110	-16	2,351	3,150	
Net interest	240	276	315	371	428	481	528	567	595	613	629	639	2,123	5,166	
Primary deficit/surplus (-)	345	326	125	155	60	-25	-87	-249	-386	-438	-518	-654	228	-2,017	
On-budget deficit/surplus (-)	620	644	466	534	472	431	399	251	117	59	-30	-185	2,301	2,514	
Off-budget deficit/surplus (-)	-36	-42	-25	-8	16	25	42	68	92	117	140	169	50	636	

Table S-4. Proposed Budget by Category—Continued

(In billions of dollars)

	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	Totals	
													2018-2022	2018-2027
Memorandum, budget authority for discretionary programs:														
Defense	607	646	668	668	668	666	665	679	693	707	722	737	3,335	6,873
Non-defense	560	536	479	464	450	428	419	410	402	394	386	378	2,239	4,209
Total, discretionary funding	1,167	1,182	1,147	1,132	1,118	1,094	1,084	1,089	1,095	1,101	1,108	1,115	5,574	11,081

Table S-5. Proposed Budget by Category as a Percent of GDP

(As a percent of GDP)

	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	Totals	
													2018-	2018-
													2022	2027
Outlays:														
Discretionary programs:														
Defense	3.2	3.1	3.2	3.2	3.0	2.9	2.7	2.6	2.5	2.5	2.4	2.3	3.0	2.7
Non-defense	3.3	3.2	3.0	2.7	2.4	2.2	2.0	1.8	1.7	1.6	1.5	1.4	2.5	2.0
Subtotal, discretionary programs	6.4	6.3	6.2	5.9	5.5	5.1	4.7	4.4	4.2	4.0	3.9	3.7	5.5	4.8
Mandatory programs:														
Social Security	4.9	4.9	5.0	5.1	5.2	5.2	5.3	5.3	5.4	5.5	5.5	5.6	5.2	5.3
Medicare	3.2	3.1	2.9	3.1	3.2	3.3	3.5	3.5	3.4	3.6	3.7	3.8	3.2	3.4
Medicaid	2.0	2.0	2.0	2.0	2.0	2.0	1.9	1.9	1.8	1.8	1.8	1.7	2.0	1.9
Other mandatory programs	3.0	3.4	2.8	2.9	2.8	2.7	2.7	2.6	2.4	2.4	2.3	2.2	2.8	2.6
Allowance for Obamacare repeal and replacement			-0.1	-0.1	-0.4	-0.6	-0.6	-0.6	-0.6	-0.6	-0.6	-0.6	-0.4	-0.5
Allowance for infrastructure initiative			*	0.1	0.2	0.2	0.2	0.1	*	*	*		0.1	0.1
Subtotal, mandatory programs	13.2	13.4	12.7	13.1	12.9	12.8	13.0	12.7	12.5	12.6	12.7	12.6	12.9	12.8
Net interest	1.3	1.4	1.6	1.8	1.9	2.1	2.2	2.2	2.2	2.2	2.1	2.1	1.9	2.0
Total outlays	20.9	21.2	20.5	20.7	20.3	20.0	19.9	19.4	18.9	18.9	18.7	18.4	20.3	19.6
Receipts:														
Individual income taxes	8.4	8.7	9.2	9.2	9.3	9.4	9.5	9.5	9.6	9.7	9.8	9.9	9.3	9.5
Corporation income taxes	1.6	1.7	1.8	1.8	1.8	1.7	1.7	1.7	1.6	1.6	1.6	1.6	1.8	1.7
Social insurance and retirement receipts:														
Social Security payroll taxes	4.4	4.5	4.5	4.4	4.4	4.4	4.5	4.4	4.4	4.4	4.5	4.4	4.4	4.4
Medicare payroll taxes	1.3	1.3	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4
Unemployment insurance	0.3	0.3	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2
Other retirement	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1
Excise taxes	0.5	0.5	0.5	0.5	0.5	0.4	0.4	0.4	0.4	0.4	0.4	0.4	0.5	0.4
Estate and gift taxes	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1
Customs duties	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2
Deposits of earnings, Federal Reserve System	0.6	0.5	0.4	0.3	0.2	0.2	0.3	0.3	0.3	0.3	0.3	0.3	0.3	0.3
Other miscellaneous receipts	0.2	0.3	0.3	0.3	0.3	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.3	0.2
Allowance for Obamacare repeal and replacement			-0.3	-0.3	-0.4	-0.4	-0.4	-0.5	-0.4	-0.4	-0.4	-0.4	-0.4	-0.4
Total receipts	17.8	18.1	18.3	18.2	18.1	18.0	18.1	18.1	18.2	18.2	18.3	18.4	18.1	18.2
Deficit/surplus (-)	3.2	3.1	2.2	2.5	2.2	2.0	1.8	1.3	0.8	0.6	0.4	-0.1	2.1	1.4
Net interest	1.3	1.4	1.6	1.8	1.9	2.1	2.2	2.2	2.2	2.2	2.1	2.1	1.9	2.0
Primary deficit/surplus (-)	1.9	1.7	0.6	0.7	0.3	-0.1	-0.4	-1.0	-1.4	-1.6	-1.8	-2.1	0.2	-0.7
On-budget deficit/surplus (-)	3.4	3.4	2.3	2.5	2.1	1.9	1.6	1.0	0.4	0.2	-0.1	-0.6	2.1	1.1
Off-budget deficit/surplus (-)	-0.2	-0.2	-0.1	-*	0.1	0.1	0.2	0.3	0.3	0.4	0.5	0.5	*	0.2

Table S-5. Proposed Budget by Category as a Percent of GDP—Continued

(As a percent of GDP)

	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	Totals	
													2018-2022	2018-2027
Memorandum, budget authority for discretionary programs:														
Defense	3.3	3.4	3.3	3.2	3.0	2.9	2.7	2.7	2.6	2.5	2.4	2.4	3.0	2.8
Non-defense	3.0	2.8	2.4	2.2	2.0	1.9	1.7	1.6	1.5	1.4	1.3	1.2	2.0	1.7
Total, discretionary funding	6.3	6.2	5.7	5.4	5.1	4.7	4.5	4.3	4.1	3.9	3.7	3.6	5.1	4.5

*0.05 percent of GDP or less.

Table S-6. Mandatory and Receipt Proposals

(Deficit increases (+) or decreases (-) in millions of dollars)

	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	Totals	
												2018-2022	2018-2027
Agriculture:													
Farm Bill savings:													
Limit crop insurance premium subsidy to \$40,000			-1,552	-1,620	-1,815	-1,826	-1,845	-1,856	-1,885	-1,897	-1,920	-6,813	-16,218
Limit eligibility for agricultural commodity payments to \$500,000 Adjusted Gross Income (AGI)		-72	-60	-77	-73	-71	-67	-64	-60	-56	-53	-353	-653
Limit Crop Insurance eligibility to \$500,000 AGI			-34	-35	-40	-42	-45	-49	-53	-58	-64	-151	-420
Eliminate Harvest Price Option for Crop Insurance			-1,212	-1,251	-1,314	-1,325	-1,335	-1,353	-1,365	-1,378	-1,390	-5,103	-11,924
Streamline conservation programs		-84	-210	-272	-319	-402	-560	-716	-886	-1,072	-1,234	-1,287	-5,755
Eliminate small programs		-111	-304	-313	-339	-335	-335	-335	-335	-335	-335	-1,402	-3,077
Total Farm Bill savings		-267	-3,372	-3,568	-3,900	-4,001	-4,188	-4,373	-4,584	-4,797	-4,996	-15,108	-38,046
Establish Food Safety and Inspection Service (FSIS) user fee			-660	-660	-660	-660	-660	-660	-660	-660	-660	-2,640	-5,940
Establish Animal Plant and Health Inspection Service (APHIS) user fee		-20	-20	-20	-20	-20	-20	-20	-20	-20	-20	-100	-200
Establish Grain Inspection, Packers, and Stockyards Administration (GIPSA) user fee		-30	-30	-30	-30	-30	-30	-30	-30	-30	-30	-150	-300
Establish Agricultural Marketing Service (AMS) user fee		-20	-20	-20	-20	-20	-20	-20	-20	-20	-20	-100	-200
Eliminate interest payments to electric & telecommunications utilities		-131	-136	-136	-140	-142	-137	-138	-139	-139	-139	-685	-1,377
Eliminate the Rural Economic Development Program		-6	-154	-158	-159							-477	-477
Total, Agriculture		-474	-4,392	-4,592	-4,929	-4,873	-5,055	-5,241	-5,453	-5,666	-5,865	-19,260	-46,540
Education:													
Create single income-driven student loan repayment plan ¹		-1,685	-3,333	-5,317	-6,830	-8,141	-9,060	-9,972	-10,394	-10,726	-10,946	-25,306	-76,404
Eliminate subsidized student loans		-1,052	-2,157	-3,098	-3,791	-4,199	-4,499	-4,744	-4,960	-5,145	-5,228	-14,297	-38,873
Eliminate Public Service Loan Forgiveness		-859	-1,466	-2,179	-2,679	-3,030	-3,263	-3,493	-3,575	-3,491	-3,436	-10,213	-27,471
Eliminate account maintenance fee payments to guaranty agencies		-443										-443	-443
Support Year-Round Pell grants		81	314	322	327	332	338	344	350	356	361	1,376	3,125
Reallocate mandatory Pell funding to support Year-Round Pell Grants		-81	-314	-322	-327	-332	-338	-344	-350	-356	-361	-1,376	-3,125
Total, Education		-4,038	-6,956	-10,594	-13,300	-15,370	-16,823	-18,209	-18,930	-19,362	-19,609	-50,259	-143,192
Energy:													
Reduce Strategic Petroleum Reserve by half		-500	-500	-552	-1,390	-1,426	-1,489	-1,519	-1,549	-3,793	-3,868	-4,368	-16,586
Restart Nuclear Waste Fund Fee in 2020				-381	-381	-382	-382	-382	-382	-382	-382	-1,144	-3,054
Repeal borrowing authority for Western Area Power Administration (WAPA)		-610	-900	-1,095	-660	-725	-235	-50	-50	-50	-50	-3,990	-4,425

Table S-6. Mandatory and Receipt Proposals—Continued

(Deficit increases (+) or decreases (-) in millions of dollars)

	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	Totals		
												2018-2022	2018-2027	
Divest Southwestern Power Administration transmission assets			-13										-13	-13
Divest WAPA transmission assets			-580										-580	-580
Divest Bonneville Power Administration transmission assets			-1,821	-396	-386	-386	-386	-386	-386	-386	-386	-386	-2,989	-4,919
Total, Energy		-1,110	-3,814	-2,424	-2,817	-2,919	-2,492	-2,337	-2,367	-4,611	-4,686	-13,084	-29,576	
Health and Human Services:														
Reform Medicaid				-10,000	-20,000	-40,000	-60,000	-80,000	-105,000	-130,000	-165,000	-70,000	-610,000	
Extend Children's Health Insurance Program (CHIP) funding through 2019 *		-2,359	-3,365	159	-250								-5,815	-5,815
Repeal the Independent Payment Advisory Board (IPAB)							1,040	1,471	1,583	1,700	1,828			7,621
Improve the Medicare appeals system			127	127	127	127	127	127	127	127	127	127	635	1,270
Improve 340B program integrity														
Prohibit governmental discrimination against health care providers that refuse to cover abortion														
Interactions		-20		17	13	2	-3	-3	-5	-3	-4	12	-6	
Strengthen Child Support Enforcement and Establishment		-22	-35	-54	-68	-85	-86	-87	-90	-90	-91	-264	-708	
Establish a Child Support Technology Fund		-110	-122	-120	-121	-136	-43	-48	-55	-36	-42	-609	-833	
Shift Social Services Block Grant (SSBG) expenditures to Foster Care and Permanency		18	22	23	23	23	23	23	23	23	23	109	224	
Extend certain Medicare Access and CHIP Reauthorization Act of 2015 (MACRA) programs through 2019:														
Extend Health Centers		1,439	3,346	2,161	254								7,200	7,200
Extend the National Health Service Corps		62	248	232	56	16	6						614	620
Extend Teaching Health Centers Graduate Medical Education		60	60										120	120
Extend Family to Family Health Information Centers		1	4	4	1								10	10
Extend the Maternal, Infant, and Early Childhood Home Visiting Program		16	112	316	268	68	20						780	800
Extend the Special Diabetes Program for the National Institutes of Health and the Indian Health Service		180	266	111	30	8	4	2					595	601
Extend Medicare Enrollment Assistance Programs		18	32	18	6	2							76	76
Extend Abstinence Education and Personal Responsibility Education Program		3	88	116	54	10	1	5					271	277
Extend Health Profession Opportunity Grants		3	45	75	39	7							169	169
Total Health and Human Services		-584	828	-6,815	-19,568	-39,958	-58,911	-78,510	-103,417	-128,279	-163,159	-66,097	-598,374	

Table S-6. Mandatory and Receipt Proposals—Continued

(Deficit increases (+) or decreases (-) in millions of dollars)

	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	Totals			
												2018-2022	2018-2027		
Homeland Security:															
Extend expiring Customs and Border Protection (CBP) fees													-3,931	-4,143	-8,074
Increase Customs user fees		-7	-9	-12	-19	-26	-38	-46	-52	-66	-78	-73	-73	-73	-353
Increase immigration user fees															
Establish Electronic Visa Update System user fee ²															
Reform the National Flood Insurance Program		-95	-301	-509	-730	-971	-1,076	-1,141	-1,260	-1,375	-1,432	-2,606	-2,606	-2,606	-8,890
Authorize mandatory outlays for U.S. Coast Guard Continuation Pay		3	9	28	31	33	34	35	36	37	38	104	104	104	284
Eliminate BrandUSA; make revenue available to CBP ²		62	70	78									210	210	210
Transfer Electronic System for Travel Authorization receipts to International Trade Administration ²															
Total, Homeland Security		-36	-231	-415	-718	-964	-1,080	-1,152	-1,276	-5,335	-5,615	-2,365	-2,365	-2,365	-16,823
Interior:															
Lease oil and gas in the Arctic National Wildlife Refuge (ANWR)						-400	-500			-400	-500	-400	-400	-400	-1,800
Repeal Gulf of Mexico Energy Security Act (GOMESA) State payments		-272	-327	-344	-366	-376	-375	-375	-375	-375	-375	-1,685	-1,685	-1,685	-3,560
Cancel Southern Nevada Public Land Management Act (SNPLMA) balances		-83	-69	-78											-230
Repeal enhanced geothermal payments to counties		-3	-3	-3	-4	-4	-4	-4	-4	-4	-4	-17	-17	-17	-37
Reauthorize the Federal Land Transaction Facilitation Act		-5	-6	-9	-12	-3									-35
Total, Interior		-363	-405	-434	-382	-783	-879	-379	-379	-779	-879	-2,367	-2,367	-2,367	-5,662
Labor:															
Establish a paid parental leave program:															
Provide paid parental leave benefits ²		709	709	2,420	1,644	1,868	2,109	2,172	2,296	2,415	2,160	7,350	7,350	7,350	18,502
Establish an Unemployment Insurance (UI) solvency standard ²				-758	-1,894	-2,568	-1,045	-1,833	-1,072	-1,488	-2,254	-5,220	-5,220	-5,220	-12,912
Improve UI program integrity ²		-94	-215	-251	-249	-243	-211	-253	-249	-241	-228	-1,052	-1,052	-1,052	-2,234
Provide for Reemployment Services and Eligibility Assessments ²				-88	-541	-562	-522	-411	-413	-493	-499	-519	-1,713	-1,713	-4,048
Total, establish a paid parental leave program		615	406	870	-1,061	-1,465	442	-327	482	187	-841	-635	-635	-635	-692
Improve Pension Benefit Guaranty Corporation (PBGC) solvency		-1,196	-1,202	-1,210	-1,294	-1,507	-1,625	-1,705	-1,546	-2,238	-2,335	-6,409	-6,409	-6,409	-15,858
Accelerate PBGC premium payment									3,088	-3,088	-5,005				-5,005
Total, Labor		-581	-796	-340	-2,355	-2,972	-1,183	-2,032	2,024	-5,139	-8,181	-7,044	-7,044	-7,044	-21,555

Table S-6. Mandatory and Receipt Proposals—Continued

(Deficit increases (+) or decreases (-) in millions of dollars)

	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	Totals	
												2018-2022	2018-2027
Transportation:													
Air Traffic Control:													
Reform Air Traffic Control ²					14,391	14,976	15,627	16,382	17,302	18,073	18,881	29,367	115,632
Outlay savings from discretionary cap adjustment					-8,786	-9,669	-10,058	-10,293	-10,407	-10,407	-10,407	-18,455	-70,027
Reform Essential Air Service ²					52							52	52
Assume Highway Trust Fund outlays conform to baseline levels of Highway Trust Fund revenues		367	637	173	-919	-5,546	-15,164	-16,833	-18,156	-19,436	-20,399	-5,288	-95,276
Total, Transportation		367	637	173	4,738	-239	-9,595	-10,744	-11,261	-11,770	-11,925	5,676	-49,619
Treasury:													
Provide authority for Bureau of Engraving and Printing to construct new facility ²		-15	-74	-3	5	-314	5	14	3	165	-494	-401	-708
Veterans Affairs:													
Continue the Veterans Choice Program		718	1,593	2,469	3,056	3,437	3,500	3,500	3,500	3,500	3,500	11,273	28,773
Cap Post-9/11 GI Bill Flight Training		-42	-43	-46	-48	-50	-52	-54	-56	-59	-61	-229	-511
Extend round-down of cost-of-living adjustments (COLAs)		-20	-66	-127	-182	-235	-295	-347	-403	-466	-536	-630	-2,677
Modernize Individual Unemployability		-3,205	-3,394	-3,582	-3,773	-3,968	-4,166	-4,369	-4,576	-4,787	-5,002	-17,922	-40,822
Total, Veterans Affairs		-2,549	-1,910	-1,286	-947	-816	-1,013	-1,270	-1,535	-1,812	-2,099	-7,508	-15,237
Corps of Engineers:													
Divest Washington Aqueduct				-119								-119	-119
Reform inland waterways financing ²		-108	-107	-106	-105	-104	-103	-103	-101	-100	-100	-530	-1,037
Total, Corps of Engineers		-108	-107	-225	-105	-104	-103	-103	-101	-100	-100	-649	-1,156
Environmental Protection Agency:													
Expand use of pesticide licensing fees		5	4	4	4	4	3	2	1	1	1	21	29
Office of Personnel Management (OPM):													
Reduce Federal retirement benefits:													
Eliminate Federal Employee Retirement System COLA; reduce Civil Service Retirement System COLA by 0.5%		-524	-1,187	-1,892	-2,657	-3,481	-4,369	-5,322	-6,344	-7,432	-8,591	-9,740	-41,799
Other Federal retirement changes		-1,875	-2,134	-3,055	-2,617	-3,298	-3,620	-3,943	-4,383	-4,841	-5,280	-12,979	-35,046
Increase Employee Contributions:													
Increase employee contributions to 50% of cost with 6-year phase-in (1% per year) ²		-1,719	-3,227	-4,810	-6,372	-7,959	-9,537	-9,568	-9,599	-9,624	-9,640	-24,087	-72,055
Intragovernmental effects of OPM proposals (non-scoreable):													
Loss of mandatory offsetting receipts from OPM proposals			12,295	13,957	15,779	17,425	19,050	19,166	19,280	19,384	19,472	59,456	155,808

Table S-6. Mandatory and Receipt Proposals—Continued

(Deficit increases (+) or decreases (-) in millions of dollars)

	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	Totals	
												2018-2022	2018-2027
Discretionary effect of OPM proposals			-6,657	-7,230	-7,826	-8,265	-8,624	-8,290	-7,966	-7,650	-7,341	-29,978	-69,849
Total, Office of Personnel Management		-4,117	-910	-3,031	-3,692	-5,578	-7,100	-7,957	-9,012	-10,163	-11,380	-17,329	-62,941
Other Independent Agencies:													
Federal Communications Commission:													
Enact Spectrum License User Fee		-50	-150	-300	-450	-500	-500	-500	-500	-500	-500	-1,450	-3,950
Reform the Postal Service		-2,807	-4,685	-4,871	-4,791	-4,923	-4,904	-4,913	-4,795	-4,676	-4,655	-22,077	-46,020
Restructure the Consumer Financial Protection Bureau		-145	-650	-683	-706	-726	-745	-764	-784	-804	-826	-2,910	-6,833
Eliminate the Securities and Exchange Commission Reserve Fund			-50	-50	-50	-50	-50	-50	-50	-50	-50	-200	-450
Mandatory effects of agency eliminations		1				-1							
Total, Other Independent Agencies		-3,001	-5,535	-5,904	-5,997	-6,200	-6,199	-6,227	-6,129	-6,030	-6,031	-26,639	-57,255
Cross-cutting reforms:													
Repeal and replace Obamacare ²		25,000	30,000	-5,000	-30,000	-35,000	-40,000	-40,000	-50,000	-50,000	-55,000	-15,000	-250,000
Implement an infrastructure initiative		5,000	25,000	40,000	50,000	40,000	20,000	10,000	5,000	5,000		160,000	200,000
Reform welfare programs:													
Reform Supplemental Nutrition Assistance Program (SNAP)		-4,637	-7,627	-13,990	-16,928	-21,130	-24,871	-24,634	-25,714	-26,135	-25,266	-64,312	-190,932
Establish a SNAP authorized retailer application fee		-252	-246	-241	-236	-230	-230	-230	-230	-230	-230	-1,205	-2,355
Eliminate SSBG		-1,411	-1,683	-1,700	-1,700	-1,700	-1,700	-1,700	-1,700	-1,700	-1,700	-8,194	-16,694
Reduce Temporary Assistance for Needy Families (TANF) block grant		-1,218	-1,491	-1,550	-1,582	-1,615	-1,632	-1,632	-1,632	-1,632	-1,632	-7,456	-15,616
Provide funding for welfare research and Census Bureau Survey of Income and Program Participation, transferred from TANF													
Eliminate TANF Contingency Fund		-567	-608	-608	-608	-608	-608	-608	-608	-608	-608	-2,999	-6,039
Require Social Security Number (SSN) for Child Tax Credit & Earned Income Tax Credit ³		-449	-4,512	-4,447	-4,358	-4,309	-4,296	-4,373	-4,460	-4,555	-4,652	-18,075	-40,411
Total, reform welfare programs		-8,534	-16,167	-22,536	-25,412	-29,592	-33,337	-33,177	-34,344	-34,860	-34,088	-102,241	-272,047
Reform disability programs and test new approaches:													
Test new approaches to increase labor force participation		100	100	100	100	100	-2,494	-5,069	-9,332	-13,809	-18,627	500	-48,831
Reinstate the reconsideration review stage in 10 States			71	-10	-59	-526	-246	-263	-305	-354	-376	-524	-2,068
Reduce 12 month retroactive Disability Insurance benefits to six months		-113	-643	-797	-951	-1,043	-1,112	-1,191	-1,272	-1,349	-1,430	-3,547	-9,901
Create sliding scale for multi-recipient Supplemental Security Income families		-743	-827	-861	-882	-956	-906	-862	-955	-979	-1,002	-4,269	-8,973

Table S-6. Mandatory and Receipt Proposals—Continued

(Deficit increases (+) or decreases (-) in millions of dollars)

	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	Totals		
												2018-2022	2018-2027	
Create a probationary period for Administrative Law Judges (ALJs)														
Eliminate Workers Compensation Reverse Offsets			-3	-8	-12	-16	-19	-22	-25	-28	-31	-39	-164	
Offset overlapping unemployment and disability payments ²			-58	-249	-329	-324	-319	-323	-323	-296	-317	-960	-2,538	
Total, reform disability programs and test new approaches		-756	-1,360	-1,825	-2,133	-2,765	-5,096	-7,730	-12,212	-16,815	-21,783	-8,839	-72,475	
Reduce improper payments:														
Reduce improper payments Government-wide			-719	-1,482	-2,383	-4,288	-4,549	-9,652	-20,480	-38,024	-57,633	-8,872	-139,210	
Allow Government-wide use of CBP entry/exit data to prevent improper payments				-1	-5	-11	-20	-26	-31	-40	-43	-17	-177	
Use Death Master File to prevent improper payments														
Authorize Social Security Administration (SSA) to use all collection tools to recover funds			-2	-2	-3	-4	-4	-5	-5	-5	-11	-11	-41	
Hold fraud facilitators liable for overpayments				-1	-1	-1	-1	-1	-1	-1	-1	-1	-3	-8
Increase overpayment collection threshold for Old Age, Survivors, and Disability Insurance		-8	-26	-43	-59	-77	-93	-107	-135	-144	-156	-213	-848	
Exclude SSA debts from discharge in bankruptcy		-9	-18	-23	-29	-34	-36	-38	-40	-43	-45	-113	-315	
Allow SSA to use commercial database to verify real property		-12	-28	-44	-53	-60	-69	-70	-68	-76	-79	-197	-559	
Increase oversight of paid tax return preparers ²		-14	-31	-35	-38	-42	-47	-50	-55	-61	-66	-160	-439	
Provide more flexible authority for the Internal Revenue Service to address correctable errors ²		-30	-61	-64	-65	-67	-70	-71	-74	-76	-77	-287	-655	
Total, reduce improper payments		-73	-885	-1,695	-2,636	-4,584	-4,889	-10,020	-20,889	-38,470	-58,111	-9,873	-142,252	
Reform the medical liability system ²		-179	-1,097	-1,928	-3,308	-4,827	-6,541	-8,082	-9,114	-9,642	-10,295	-11,339	-55,013	
Reform financial regulation and prevent taxpayer-funded bailouts			-2,400	-3,000	-3,400	-4,300	-4,400	-4,300	-4,300	-4,400	-4,500	-13,100	-35,000	
Conduct spectrum auctions below 6 gigahertz				-300	-300							-6,000	-6,000	
Eliminate allocations to the Housing Trust Fund and Capital Magnet Fund ²		-194	-104	-177	-247	-321	-335	-348	-367	-375	-378	-1,044	-2,846	
Authorize additional Afghan Special Immigrant Visas		15	20	20	18	18	18	16	15	16	16	91	172	
Modify TRICARE Pharmacy fees (includes non-scoreable accrual effect)		293	209	161	117	102	51	29	-49	-93	-187	881	632	
Extend Joint Committee mandatory sequestration										8,361	-20,341	-27,435	-39,415	

Table S-6. Mandatory and Receipt Proposals—Continued

(Deficit increases (+) or decreases (-) in millions of dollars)

	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	Totals		
												2018-2022	2018-2027	
Total, cross-cutting reforms		20,571	33,216	3,720	-17,301	-41,270	-74,529	-93,612	-117,899	-169,980	-217,761	-1,063	-674,845	
Total, mandatory and receipt proposals		3,967	9,555	-32,168	-67,365	-122,356	-184,954	-227,758	-275,731	-368,961	-457,782	-206,367	-1,723,454	
¹ The single income-driven repayment plan proposal has sizeable interactive effects with the proposals to eliminate subsidized loans and Public Service Loan Forgiveness. These effects, \$7.4 billion over 10 years, are included in the single income-driven repayment plan subtotal.														
² The estimates for this proposal include effects on receipts. The receipt effects included in the totals above are as follows:														
Extend Children's Health Insurance Program (CHIP) funding through 2019		49	-219	-367	-67								-604	-604
Establish Electronic Visa Update System user fee		-27	-27	-31	-28	-29	-28	-31	-28	-29	-28		-142	-286
Eliminate BrandUSA; make revenue available to CBP		162	170	178									510	510
Transfer Electronic System for Travel Authorization receipts to International Trade Administration		-162	-171	-178	-185	-193	-200	-208	-215	-223	-230		-889	-1,965
Provide paid parental leave benefits					-916	-962	-971	-1,158	-1,264	-1,365	-1,459		-1,878	-8,095
Establish an Unemployment Insurance (UI) solvency standard				-758	-1,894	-2,568	-1,045	-1,833	-1,072	-1,488	-2,254		-5,220	-12,912
Improve UI program integrity			4	8	23	42	86	57	81	102	132		77	535
Provide for Reemployment Services and Eligibility Assessments			-1		18	89	238	269	229	264	284		106	1,390
Reform Air Traffic Control					14,391	14,976	15,627	16,382	17,302	18,073	18,881		29,367	115,632
Reform Essential Air Service					129	130	132	133	134	136	137		259	931
Authority for Bureau of Engraving and Printing to construct new facility		-15	-74	-3	5	-314	5	14	3	165	-494		-401	-708
Reform inland waterways financing		-108	-107	-106	-105	-104	-103	-103	-101	-100	-100		-530	-1,037
Increase employee contributions to 50% of cost with 6-year phase-in (1% per year)		-1,719	-3,227	-4,810	-6,372	-7,959	-9,537	-9,568	-9,599	-9,624	-9,640		-24,087	-72,055
Repeal and replace Obamacare		55,000	60,000	85,000	100,000	105,000	115,000	120,000	120,000	120,000	120,000		405,000	1,000,000
Require Social Security Number (SSN) for Child Tax Credit & Earned Income Tax Credit		-298	-1,176	-1,194	-1,228	-1,261	-1,313	-1,381	-1,455	-1,526	-1,618		-5,157	-12,450
Offset overlapping unemployment and disability payments				1	3	7	13	18	23	46	36		11	147
Increase oversight of paid tax return preparers		-12	-18	-20	-22	-24	-27	-29	-32	-36	-39		-96	-259
Provide more flexible authority for the IRS to address correctable errors		-5	-10	-11	-11	-12	-13	-13	-14	-15	-15		-49	-119
Reform the medical liability system		-24	-222	-545	-982	-1,468	-2,054	-2,666	-3,053	-3,261	-3,444		-3,241	-17,719
Eliminate allocations to the Housing Trust Fund and Capital Magnet Fund		-75	-79	-96	-110	-117	-122	-126	-129	-131	-134		-477	-1,120
Total receipt effects of mandatory proposals		52,766	54,843	77,068	102,649	105,233	115,688	119,757	120,810	120,987	120,015		392,559	989,815

Table S-7. Proposed Discretionary Caps for 2018 Budget

(Net budget authority in billions of dollars)

	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	Totals		
												2018-	2027	
Current Law Base Caps:¹														
Defense	551	549	562	576	590	605	620	636	652	668	685	6144		
Non-Defense	519	516	530	543	556	570	584	599	614	629	645	5,784		
Total, Base Current Law Caps	1,070	1,065	1,092	1,119	1,146	1,174	1,204	1,234	1,266	1,298	1,331	11,928		
Proposed Base Cap Changes:²														
Defense	+25	+54	+54	+53	+52	+50	+49	+47	+45	+44	+42	+489		
Non-Defense	-15	-54	-77	-99	-121	-144	-167	-190	-213	-236	-260	-1,559		
Total, Base Cap Changes	+10	+*	-23	-46	-69	-93	-118	-142	-168	-193	-219	-1,070		
Proposed Base Caps:														
Defense ³	576	603	616	629	642	655	669	683	697	712	727	6,633		
Non-Defense	504	462	453	444	435	426	417	409	401	393	385	4,225		
Total, Base Caps	1,080	1,065	1,069	1,073	1,077	1,081	1,086	1,092	1,098	1,105	1,112	10,858		
Additional Non-Defense (NDD) Cap Reductions for Budget Proposals:⁴														
Air Traffic Control Reform					-10	-10	-10	-10	-10	-10	-10	-73		
Federal Employee Retirement														
Cost Share Reduction			-7	-7	-8	-8	-9	-8	-8	-8	-7	-70		
Total, Proposed NDD Cap Reductions			-7	-7	-18	-19	-19	-19	-18	-18	-18	-143		
Proposed Base Caps with Additional NDD Adjustments:														
Defense ³	576	603	616	629	642	655	669	683	697	712	727	6,633		
Non-Defense	504	462	446	437	417	407	398	390	383	375	367	4,082		
Total, Proposed Base Caps	1,080	1,065	1,062	1,066	1,059	1,062	1,067	1,073	1,080	1,087	1,094	10,715		
Cap Adjustments:⁴														
Overseas Contingency Operations ⁶	89	77	60	43	26	12	12	12	12	12	12	278		
Defense	70	65	52	39	24	10	10	10	10	10	10	240		
Non-Defense	19	12	8	4	2	2	2	2	2	2	2	38		
Emergency Requirements	3													
Program Integrity	2	2	2	2	2	2	2	2	2	2	2	20		
Disaster Relief ⁷	8	7	7	7	7	7	7	7	7	7	7	68		
Total, Cap Adjustments	101	85	69	52	35	21	21	21	21	21	21	365		
Total, Discretionary Budget Authority	1,181	1,150	1,131	1,117	1,093	1,083	1,088	1,094	1,101	1,108	1,115	11,080		

Table S-7. Proposed Discretionary Caps for 2018 Budget—Continued

(Net budget authority in billions of dollars)

	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	Totals
												2018-2027
<i>Memorandum—Appropriations Counted Outside of Discretionary Caps:</i>												
<i>21st Century Cures Appropriations⁸</i>	1	1	1	1	*	1	1	*	*	*	.....	5
<i>Non-BBEDCA Emergency Funding⁹</i>	—*	—5										—5

* \$500 million or less.

¹ The caps presented here are equal to the levels estimated for 2017 through 2021 in the Balanced Budget and Emergency Deficit Control Act of 1985 (BBEDCA) with separate categories of funding for “defense” (or Function 050) and “non-defense” programs. The 2017 caps were revised in the Bipartisan Budget Act of 2015 and the 2018 through 2021 caps include OMB estimates of Joint Committee enforcement (also known as “sequestration”). For 2022 through 2027, programs are assumed to grow at current services growth rates consistent with current law.

² The Administration proposed in its March 16 *Blueprint* an increase in the existing defense caps for 2017 and 2018 that is offset with decreases to the non-defense caps. One-half of the 2017 increase (\$5 billion of which is classified as Overseas Contingency Operations) is paid for out of non-defense in 2017 while the entire increase in 2018 is paid for out of non-defense. After 2018, the Budget proposes caps through 2027 that reflect an annual 2.1 percent increase for defense programs and an annual two percent (or “2-penny”) decrease for non-defense programs.

³ The defense base cap estimates for 2019-2027 reflect inflated 2018 levels, not a policy judgment. The Administration will determine 2019-2027 defense funding levels in the 2019 Budget, in accordance with the National Security Strategy, National Defense Strategy, and Nuclear Posture Review that are currently under development.

⁴ These cap reductions are for reforms in the Budget that would shift the Federal Aviation Administration’s air traffic control function to an independent, non-governmental organization beginning in 2021 and reduce Federal agency costs through changes to current civilian employee retirement plans.

⁵ The funding amounts below are cap adjustments that are designated pursuant to Section 251(b)(2) of BBEDCA.

⁶ The outyear amounts for OCO in the 2018 Budget reflect notional placeholders consistent with a potential transition of certain OCO costs into the base budget while continuing to fund contingency operations. The placeholder amounts do not reflect specific decisions or assumptions about OCO funding in any particular year.

⁷ “Disaster Relief” appropriations are amounts designated as such by the Congress provided they are for activities carried out pursuant to a determination under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. These amounts are held to a funding ceiling that is determined one year at a time and OMB currently estimates the 2018 ceiling to be at \$7.4 billion. The Administration is requesting \$6.8 billion in 2018, but does not explicitly request disaster-designated appropriations in any year after the budget year. A placeholder set at the budget year request level is included in each of the outyears.

⁸ The 21st Century Cures Act permitted funds to be appropriated each year and not counted towards the discretionary caps so long as the appropriations were specifically provided for the authorized purposes. These amounts are displayed outside of the discretionary totals for this reason and the levels included through the budget window reflect authorized levels.

⁹ The 2018 Budget includes a permanent cancellation of balances of emergency funding in the Department of Energy that were not designated pursuant to BBEDCA. These cancellations are not being re-designated as emergency; therefore no savings are being achieved under the caps nor will the caps be adjusted for these cancellations.

Table S-8. 2018 Discretionary Overview by Major Agency

(Net budget authority in billions of dollars)

	2017 Estimate ^{1,2}	2018 Request ²	2018 Request less 2017 Estimate	
			Dollar	Percent
Base Discretionary Funding:				
Cabinet Departments:				
Agriculture ³	22.7	18.0	-4.6	-20.5%
Commerce	9.2	7.8	-1.5	-15.8%
Defense: ¹				
<i>CR/Enacted for 2017</i>	521.8	574.5	+52.8	+10.1%
<i>Adjustment for March Defense Request for 2017</i>	27.4		-27.4	N/A
<i>Total, Defense Policy</i>	549.1	574.5	+25.4	+4.6%
Education	68.2	59.0	-9.2	-13.5%
Energy	29.7	28.0	-1.7	-5.6%
<i>National Nuclear Security Administration</i>	12.5	13.9	+1.4	+11.4%
<i>Other Energy</i>	17.2	14.1	-3.1	-18.0%
Health and Human Services ⁴	78.0	65.3	-12.7	-16.2%
Homeland Security (DHS):				
<i>DHS excluding 2017 Border Request</i>	41.3	44.1	+2.8	+6.8%
<i>March Border Security Request for 2017¹</i>	3.0		-3.0	N/A
Housing and Urban Development (HUD):				
<i>HUD gross total (excluding receipts)</i>	46.9	40.7	-6.2	-13.2%
<i>HUD receipts</i>	-13.2	-9.5	+3.7	N/A
Interior	13.2	11.7	-1.4	-10.9%
Justice (DOJ):				
<i>DOJ program level (excluding offsets)</i>	28.8	27.7	-1.1	-3.8%
<i>DOJ mandatory spending changes (CHIMPs)</i>	-11.8	-11.3	+0.5	N/A
Labor	12.1	9.7	-2.4	-19.8%
State and Other International Programs ³	39.7	28.2	-11.5	-29.1%
Transportation	18.6	16.2	-2.4	-12.7%
Treasury:				
<i>Treasury program level (excluding offsets)</i>	12.6	12.1	-0.5	-4.1%
<i>Treasury mandatory spending changes (CHIMPs)</i>	-0.9	-0.9		N/A
Veterans Affairs	74.5	78.8	+4.3	+5.8%
Major Agencies:				
Corps of Engineers	6.0	5.0	-1.0	-16.3%
Environmental Protection Agency	8.2	5.7	-2.6	-31.4%
General Services Administration	0.2	0.5	+0.3	N/A
National Aeronautics and Space Administration	19.2	19.1	-0.2	-0.8%

Table S-8. 2018 Discretionary Overview by Major Agency—Continued

(Net budget authority in billions of dollars)

	2017 Estimate ^{1,2}	2018 Request ²	2018 Request less 2017 Estimate	
			Dollar	Percent
National Science Foundation	7.4	6.7	-0.8	-10.7%
Small Business Administration	0.9	0.8	-.*	-4.9%
Social Security Administration ⁴	9.0	9.1	+.*	+0.3%
Other Agencies	20.4	17.9	-2.6	-12.5%
2017 Allowance ¹	-13.6	.....	+13.6	N/A
Subtotal, Discretionary Base Budget Authority	1,079.6	1,065.0	-14.6	-1.4%
Cap Adjustment Funding:				
Overseas Contingency Operations:				
Defense: ¹				
<i>CR/Enacted for 2017</i>	65.0	64.6	-0.4	-0.6%
<i>Adjustment for March Defense Request for 2017</i>	4.7	.....	-4.7	N/A
<i>Total, Defense Policy</i>	69.7	64.6	-5.1	-7.3%
Homeland Security	0.2	.....	-0.2	-100.0%
State and Other International Programs	19.2	12.0	-7.2	-37.4%
Subtotal, Overseas Contingency Operations	89.0	76.6	-12.4	-14.0%
Emergency Requirements:				
Agriculture	0.2	.....	-0.2	N/A
Housing and Urban Development	0.4	.....	-0.4	N/A
Transportation	1.0	.....	-1.0	N/A
Corps of Engineers	1.0	.....	-1.0	N/A
National Aeronautics and Space Administration	0.1	.....	-0.1	N/A
Subtotal, Emergency Requirements	2.7	.....	-2.7	N/A
Program Integrity:				
Health and Human Services	0.4	0.4	+0.1	+17.3%
Social Security Administration	1.2	1.5	+0.3	+26.8%
Subtotal, Program Integrity	1.5	1.9	+0.4	+24.5%
Disaster Relief: ⁵				
Homeland Security	6.7	6.8	+0.1	+1.2%
Housing and Urban Development	1.4	.....	-1.4	N/A
Subtotal, Disaster Relief	8.1	6.8	-1.3	-16.4%
Subtotal, Cap Adjustment Funding	101.4	85.3	-16.1	-15.9%
Total, Discretionary Budget Authority	1,181.0	1,150.3	-30.7	-2.6%

Table S-8. 2018 Discretionary Overview by Major Agency—Continued

(Net budget authority in billions of dollars)

	2017 Estimate ^{1,2}	2018 Request ³	2018 Request less 2017 Estimate	
			Dollar	Percent
<i>Memorandum - Appropriations Counted Outside of Discretionary Caps:</i>				
<i>21st Century Cures Appropriations:⁶</i>				
<i>Health and Human Services</i>	0.9	1.1	+0.2	+21.1%
<i>Non-BBEDCA Emergency Appropriations:</i>				
<i>Agriculture</i>	-*		+	N/A
<i>Energy⁷</i>		-4.7	-4.7	N/A

* \$50 million or less.

¹ At the time the 2018 Budget was prepared, 2017 appropriations remained incomplete and the 2017 column reflects at the account level enacted full-year and continuing appropriations provided under the Continuing Appropriations Act, 2017 (Division C of Public Law 114-223, as amended by Division A of Public Law 114-254 and amended further by Public Law 115-30) that expired on May 5. In addition, the levels are adjusted to illustratively reflect the current law caps for 2017 and the Administration's March 16 request for additional appropriations for defense and border security, which are included with the levels shown for the Departments of Defense and Homeland Security. The 2017 levels include a further allowance adjustment to reflect the reductions to non-defense programs proposed by the Administration.

² Enacted, continuing, and proposed changes in mandatory programs (CHIMPs) are included in both 2017 and 2018.

³ Funding for Food for Peace Title II Grants is included in the State and Other International Programs total. Although the funds are appropriated to the Department of Agriculture, the funds are administered by the U.S. Agency for International Development.

⁴ Funding from the Hospital Insurance and Supplementary Medical Insurance trust funds for administrative expenses incurred by the Social Security Administration that support the Medicare program are included in the Health and Human Services total and not in the Social Security Administration total.

⁵ "Disaster Relief" appropriations are amounts designated by the Congress provided they are for activities carried out pursuant to a determination under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. These amounts are held to a funding ceiling that is determined one year at a time and OMB currently estimates the 2018 ceiling to be at \$7.4 billion. The Administration is requesting \$6.8 billion in 2018.

⁶ The 21st Century Cures Act permitted funds to be appropriated each year for certain activities and not counted toward the discretionary caps so long as the appropriations were specifically provided for the authorized purposes. These amounts are displayed outside of the discretionary totals for this reason.

⁷ The 2018 Budget proposes to eliminate the Title 17 Innovative Technology Loan Guarantees Program and the Advanced Technology Vehicles Manufacturing Loan Program in the Department of Energy. This proposal includes a permanent cancellation of most of the remaining balances of emergency funding that were not designated pursuant to BBEDCA. These cancellations are not being re-designated as emergency; therefore no savings are being achieved under the caps nor will the caps be adjusted for these cancellations.

Table S-9. Economic Assumptions¹

(Calendar years)

	Actual		Projections										
	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027
Gross Domestic Product (GDP):													
Nominal level, billions of dollars	18,037	18,566	19,367	20,237	21,197	22,253	23,379	24,563	25,806	27,111	28,483	29,924	31,439
Percent change, nominal GDP, year/year	3.7	2.9	4.3	4.5	4.7	5.0	5.1	5.1	5.1	5.1	5.1	5.1	5.1
Real GDP, percent change, year/year	2.6	1.6	2.3	2.4	2.7	2.9	3.0	3.0	3.0	3.0	3.0	3.0	3.0
Real GDP, percent change, Q4/Q4	1.9	1.9	2.3	2.5	2.8	3.0	3.0	3.0	3.0	3.0	3.0	3.0	3.0
GDP chained price index, percent change, year/year	1.1	1.3	1.9	2.0	2.0	2.0	2.0	2.0	2.0	2.0	2.0	2.0	2.0
Consumer Price Index,² percent change, year/year													
	0.1	1.3	2.6	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3
Interest rates, percent:³													
91-day Treasury bills ⁴	*	0.3	0.8	1.5	2.1	2.6	2.9	3.0	3.0	3.1	3.1	3.1	3.1
10-year Treasury notes	2.1	1.8	2.7	3.3	3.4	3.8	3.8	3.8	3.8	3.8	3.8	3.8	3.8
Unemployment rate, civilian, percent³													
	5.3	4.9	4.6	4.4	4.6	4.7	4.8	4.8	4.8	4.8	4.8	4.8	4.8

* 0.05 percent or less.

Note: A more detailed table of economic assumptions appears in Chapter 2, "Economic Assumptions and Interactions with the Budget," in the *Analytical Perspectives* volume of the Budget.¹ Based on information available as of early March, 2017.² Seasonally adjusted CPI for all urban consumers.³ Annual average.⁴ Average rate, secondary market (bank discount basis).

Table S-10. Federal Government Financing and Debt

(Dollar amounts in billions)

	Actual 2016	Estimate										
		2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027
Financing:												
Unified budget deficit/surplus (-):												
Primary deficit/surplus (-)	345	326	125	155	60	-25	-87	-249	-386	-438	-518	-654
Net interest	240	276	315	371	428	481	528	567	595	613	629	639
Unified budget deficit/surplus (-)	585	603	440	526	488	456	442	319	209	176	110	-16
As a percent of GDP	3.2%	3.1%	2.2%	2.5%	2.2%	2.0%	1.8%	1.3%	0.8%	0.6%	0.4%	-0.1%
Other transactions affecting borrowing from the public:												
Changes in financial assets and liabilities: ¹												
Change in Treasury operating cash balance	155	-3										
Net disbursements of credit financing accounts:												
Direct loan and Troubled Asset Relief Program (TARP) equity purchase accounts	83	67	88	81	68	65	61	61	60	60	58	55
Guaranteed loan accounts	16	-9	2	-1	-2	-5	-7	-9	-5	-5	-5	-4
Net purchases of non-Federal securities by the National Railroad Retirement Investment Trust (NRRIT)	*	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-*
Net change in other financial assets and liabilities ²	213											
Subtotal, changes in financial assets and liabilities ...	467	54	90	79	64	59	53	51	54	54	52	50
Seigniorage on coins	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1
Total, other transactions affecting borrowing from the public	466	54	89	78	64	59	52	51	54	54	52	50
Total, requirement to borrow from the public (equals change in debt held by the public)	1,051	656	529	604	552	515	494	369	263	229	162	34
Changes in Debt Subject to Statutory Limitation:												
Change in debt held by the public	1,051	656	529	604	552	515	494	369	263	229	162	34
Change in debt held by Government accounts	368	159	210	142	112	96	39	54	76	*	-20	-140
Change in other factors	6	1	2	3	3	2	2	2	2	1	1	2
Total, change in debt subject to statutory limitation	1,425	816	740	749	666	613	535	426	341	230	143	-104
Debt Subject to Statutory Limitation, End of Year:												
Debt issued by Treasury	19,513	20,328	21,067	21,815	22,479	23,091	23,625	24,049	24,389	24,620	24,763	24,658
Adjustment for discount, premium, and coverage ³	25	27	28	30	31	32	34	35	36	36	36	37
Total, debt subject to statutory limitation ⁴	19,538	20,355	21,095	21,844	22,510	23,123	23,658	24,084	24,425	24,656	24,799	24,695
Debt Outstanding, End of Year:												
Gross Federal debt: ⁵												
Debt issued by Treasury	19,513	20,328	21,067	21,815	22,479	23,091	23,625	24,049	24,389	24,620	24,763	24,658
Debt issued by other agencies	26	27	26	25	24	23	23	21	20	19	19	18
Total, gross Federal debt	19,539	20,354	21,093	21,840	22,503	23,114	23,647	24,071	24,410	24,639	24,781	24,676
As a percent of GDP	106.1%	106.2%	105.4%	104.3%	102.4%	100.1%	97.5%	94.4%	91.2%	87.6%	83.8%	79.5%

Table S-10. Federal Government Financing and Debt—Continued

(Dollar amounts in billions)

	Actual		Estimate									
	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027
Held by:												
Debt held by Government accounts	5,372	5,531	5,740	5,883	5,994	6,090	6,130	6,184	6,260	6,260	6,240	6,101
Debt held by the public ⁶	14,168	14,824	15,353	15,957	16,509	17,024	17,517	17,887	18,150	18,379	18,541	18,575
As a percent of GDP	77.0%	77.4%	76.7%	76.2%	75.1%	73.7%	72.2%	70.2%	67.8%	65.3%	62.7%	59.8%
Debt Held by the Public Net of Financial Assets:												
Debt held by the public	14,168	14,824	15,353	15,957	16,509	17,024	17,517	17,887	18,150	18,379	18,541	18,575
Less financial assets net of liabilities:												
Treasury operating cash balance	353	350	350	350	350	350	350	350	350	350	350	350
Credit financing account balances:												
Direct loan and TARP equity purchase accounts	1,227	1,294	1,383	1,464	1,532	1,597	1,658	1,719	1,779	1,839	1,897	1,952
Guaranteed loan accounts	28	18	20	19	17	12	5	-4	-9	-14	-19	-23
Government-sponsored enterprise preferred stock	109	109	109	109	109	109	109	109	109	109	109	109
Non-Federal securities held by NRRIT	24	24	22	21	20	19	18	17	17	16	16	15
Other assets net of liabilities	-42	-42	-42	-42	-42	-42	-42	-42	-42	-42	-42	-42
Total, financial assets net of liabilities	1,699	1,753	1,842	1,921	1,985	2,045	2,097	2,149	2,203	2,257	2,310	2,360
Debt held by the public net of financial assets	12,469	13,071	13,511	14,036	14,524	14,979	15,420	15,738	15,947	16,122	16,232	16,215
As a percent of GDP	67.7%	68.2%	67.5%	67.0%	66.1%	64.9%	63.6%	61.7%	59.5%	57.3%	54.9%	52.2%

* \$500 million or less.

¹ A decrease in the Treasury operating cash balance (which is an asset) is a means of financing a deficit and therefore has a negative sign. An increase in checks outstanding (which is a liability) is also a means of financing a deficit and therefore also has a negative sign.² Includes checks outstanding, accrued interest payable on Treasury debt, uninvested deposit fund balances, allocations of special drawing rights, and other liability accounts; and, as an offset, cash and monetary assets (other than the Treasury operating cash balance), other asset accounts, and profit on sale of gold.³ Consists mainly of debt issued by the Federal Financing Bank (which is not subject to limit), the unamortized discount (less premium) on public issues of Treasury notes and bonds (other than zero-coupon bonds), and the unrealized discount on Government account series securities.⁴ The statutory debt limit is approximately \$19,809 billion, as increased after March 15, 2017.⁵ Treasury securities held by the public and zero-coupon bonds held by Government accounts are almost all measured at sales price plus amortized discount or less amortized premium. Agency debt securities are almost all measured at face value. Treasury securities in the Government account series are otherwise measured at face value less unrealized discount (if any).⁶ At the end of 2016, the Federal Reserve Banks held \$2,463.5 billion of Federal securities and the rest of the public held \$11,704.3 billion. Debt held by the Federal Reserve Banks is not estimated for future years.

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Executive Office of the President



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

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

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

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

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

Appointment of White House Advisors as Federal Employees

Federal law gives the president some discretion in appointing his White House advisors. Specifically, Congress has authorized the President “to appoint and fix the pay of employees in the White House Office [. . . who] shall perform such official duties as the President may prescribe.” Such appointments are limited to a maximum number of positions at particular levels of pay, but otherwise Congress drafted the President’s hiring authority fairly broadly, particularly because it granted the authority “without regard to any other provision of law regulating the employment or compensation of persons in the Government service.”

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

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

Use of Outside Advisors in Temporary or Informal Roles

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

Advisors Named to Temporary Federal Advisory Roles

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

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

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

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

Reliance on Informal, Personal Advisors

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

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

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

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

Application of the Anti-Nepotism Statute to a Presidential Appointment in the White House Office

Section 105(a) of title 3, U.S. Code, which authorizes the President to appoint employees in the White House Office “without regard to any other provision of law regulating the employment or compensation of persons in the Government service,” exempts positions in the White House Office from the prohibition on nepotism in 5 U.S.C. § 3110.

January 20, 2017

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked whether section 3110 of title 5, U.S. Code, which forbids a public official from appointing a relative “to a civilian position in the agency . . . over which [the official] exercises jurisdiction or control,” bars the President from appointing his son-in-law to a position in the White House Office, where the President’s immediate personal staff of advisors serve. We conclude that section 3110 does not bar this appointment because the President’s special hiring authority in 3 U.S.C. § 105(a) exempts positions in the White House Office from section 3110.

A decision of the D.C. Circuit, *Haddon v. Walters*, 43 F.3d 1488 (D.C. Cir. 1995) (per curiam), lays out a different, but overlapping, route to the same result. According to the reasoning of *Haddon*, section 3110 does not reach an appointment in the White House Office because section 3110 covers only appointments in an “agency,” which the statute defines to include “Executive agenc[ies],” and the White House Office is not an “Executive agency” within the definition generally applicable to title 5. Although our analysis does not track every element of the D.C. Circuit’s reasoning about the meaning of “Executive agency,” we believe that *Haddon* arrived at the correct outcome and that our conclusion here—that, because of the President’s special hiring authority for the White House Office, section 3110 does not forbid the proposed appointment—squares with both the holding and a central part of the analysis in that case.

I.

Section 105(a) of title 3 authorizes the President “to appoint and fix the pay of employees in the White House Office without regard to any other provision of law regulating the employment or compensation of persons in the Government service,” as long as the employees’ pay is within listed salary caps. 3 U.S.C. § 105(a)(1). These employees are to “perform such official duties as the President may prescribe.” *Id.* § 105(b)(1). We understand that most White House Office employees are appointed under section 105 or a similar hiring authority, such as 3 U.S.C. § 107 (the authorization for domestic policy staff). See *Authority to Employ White House Office Personnel Exempt from the Annual and Sick Leave*

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Act Under 5 U.S.C. § 6301(2)(x) and (xi) During an Appropriations Lapse, 36 Op. O.L.C. ___, at *5 (Apr. 8, 2011), <https://www.justice.gov/olc/opinions>; *Authority to Employ the Services of White House Office Employees During an Appropriations Lapse*, 19 Op. O.L.C. 235, 236 (1995). Such employees are the President's "immediate personal staff" and work in close proximity to him. *Meyer v. Bush*, 981 F.2d 1288, 1293 & n.3 (D.C. Cir. 1993). The appointment at issue here, we understand, would be under 3 U.S.C. § 105(a).

Section 3110 of title 5, also known as the anti-nepotism statute, states that "[a] public official may not appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position in the agency in which he is serving or over which he exercises jurisdiction or control any individual who is a relative of the public official." 5 U.S.C. § 3110(b). The statute expressly identifies the President as one of the "public official[s]" subject to the prohibition, and a son-in-law is a covered "relative." *Id.* § 3110(a)(2), (a)(3). Moreover, under Article II of the Constitution, the President exercises "jurisdiction or control" over the White House Office as well as over the rest of the Executive Branch. *See Myers v. United States*, 272 U.S. 52, 163–64 (1926); *Inspector General Legislation*, 1 Op. O.L.C. 16, 17 (1977). Less certain is whether the White House Office is an "agency"—a term that section 3110 defines to include an "Executive agency," thereby calling up the definition of "Executive agency" generally applicable to title 5, *see* 5 U.S.C. § 3110(a)(1)(A); *id.* § 105. But whether or not the White House Office meets this definition (a subject to which we will return in Part II, *infra*), we believe that the President's special hiring authority in 3 U.S.C. § 105(a) permits him to make appointments to the White House Office that the anti-nepotism statute might otherwise forbid.

Section 3110 prohibits the appointment of certain persons to positions of employment in the federal government. It is therefore a "provision of law regulating the employment . . . of persons in the Government service."¹ Under section 105(a), the President can exercise his authority to appoint and fix the pay of employees in the White House Office "without regard to" such a law. 3 U.S.C. § 105(a)(1). This authority is "[s]ubject" only to the provisions of subsection (a)(2), which limit the number of White House employees the President may appoint at certain pay levels. *See id.* § 105(a)(2). Thus, according to the most natural and straightforward reading of section 105(a), the President may appoint relatives as employees in the White House Office "without regard to" the anti-nepotism statute.

This reading of the two statutes gives section 105(a) a meaning no more sweeping than its words dictate. The ordinary effect of "without regard" language is to

¹ Subsection (c) of section 3110, which states that an individual appointed, employed, promoted, or advanced in violation of the statute's prohibition is "not entitled to pay," 5 U.S.C. § 3110(c), may also make section 3110 a "provision of law regulating the . . . compensation of persons in the Government service" rendered inapplicable by section 105(a).

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negate the application of a specified class of provisions. In *American Hospital Association v. Bowen*, 834 F.2d 1037 (D.C. Cir. 1987), for example, the D.C. Circuit declared that the “plain meaning” of a “without regard” exemption, which there enabled the Secretary of Health and Human Services (“HHS”) to carry out his contracting authority “without regard to any provision of law relating to the making, performance, amendment or modification of contracts of the United States,” was “to exempt HHS from . . . the vast corpus of laws establishing rules regarding the procurement of contracts from the government,” although not from the requirements of the Administrative Procedure Act. *Id.* at 1054; *see also Friends of Animals v. Jewell*, 824 F.3d 1033, 1045 (D.C. Cir. 2016) (holding that a statutory direction to issue a rule “without regard to any other provision of statute or regulation that applies to issuance of such rule” effectively changed the Endangered Species Act); *Alliance for the Wild Rockies v. Salazar*, 672 F.3d 1170, 1174–75 (9th Cir. 2012) (reaching the same conclusion about a direction to issue a rule “without regard to any other provision of statute or regulation”); *cf. Crowley Caribbean Transport, Inc. v. United States*, 865 F.2d 1281, 1282–83 (D.C. Cir. 1989) (noting, in interpreting an authorization to the President to take certain action “notwithstanding any other provision of this chapter or any other Act,” that a “clearer statement is difficult to imagine,” and declining to “edit” the language to add an implied exemption).

Applying the “without regard” language, our Office has interpreted section 105(a) as a grant of “broad discretion” to the President “in hiring the employees of [the White House Office]”; the provision, we have said, “reflect[s] Congress’s judgment that the President should have complete discretion in hiring staff with whom he interacts on a continuing basis.” *Applicability of the Presidential Records Act to the White House Usher’s Office*, 31 Op. O.L.C. 194, 197 (2007); *see also* Memorandum for Bernard Nussbaum, Counsel to the President, from Daniel L. Koffsky, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Presidential Authority under 3 U.S.C. § 105(a) to Grant Retroactive Pay Increases to Staff Members of the White House Office* at 2–3 (July 30, 1993) (section 105(a)’s “sweeping language” gives the President “complete discretion” in adjusting pay of White House Office employees “in any manner he chooses”). That congressional intent is manifest in the House and Senate committee reports accompanying the 1978 legislation by which Congress enacted section 105(a). *See* Pub. L. No. 95-570, 92 Stat. 2445 (1978). Both reports state that the language “expresses the committee’s intent to permit the President *total discretion in the employment, removal, and compensation* (within the limits established by this bill) *of all employees in the White House Office.*” H.R. Rep. No. 95-979, at 6 (1978) (emphasis added); S. Rep. No. 95-868, at 7 (1978) (same). Aside from the reference to the compensation limits in subsection (a)(2), that statement is qualified only by the committees’ explanation that section 105(a) “would not excuse any employee so appointed from full compliance with all laws, executive

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orders, and regulations governing such employee's conduct while serving under the appointment." H.R. Rep. No. 95-979, at 6; S. Rep. No. 95-868, at 7 (same).

One piece of section 105(a)'s legislative history does point the other way. During the House subcommittee hearing, the General Counsel to the President's Reorganization Project at the Office of Management and Budget ("OMB") testified that the language exempting the White House Office (along with other entities in the Executive Office of the President) from the usual rules on hiring and compensation "would not exempt [these entities] from the restrictions under the nepotism statute because of the specific provisions of that act which apply to the President." *Authorization for the White House Staff: Hearings Before the Subcomm. on Employee Ethics and Utilization of the H. Comm. on Post Office and Civil Service, 95th Cong. 20 (1978)* ("*Authorization for the White House Staff*") (testimony of F.T. Davis, Jr.). Even if we were prepared to reach a different understanding of section 105(a)'s text based on a single witness statement, *but see S&E Contractors, Inc. v. United States*, 406 U.S. 1, 13 n.9 (1972) ("In construing laws we have been extremely wary of testimony before committee hearings . . ."), this particular statement does not offer a persuasive basis on which to do so. Although no member of the subcommittee disputed the OMB official's interpretation, it is far from clear whether the members (and later, the authors of the House and Senate reports) ultimately endorsed his view about the language. The OMB official offered his interpretation after the subcommittee chair asked about the language's effect on a number of federal laws and authorities, including "the Hatch Act, nepotism law, criminal conflict of interest laws, [and] Executive Order 11222 regulating employee conduct"; the chair explained that she was asking in order to draft the committee report. *Authorization for the White House Staff* at 20 (question of Rep. Schroeder). But while another of the witness's assertions ultimately made it into the committee reports—his statement that the language would not affect any laws "dealing with conduct by public officials once they are appointed," *id.* (testimony of Mr. Davis), *see also* H.R. Rep. No. 95-979, at 6; S. Rep. No. 95-868, at 7—his comment about the anti-nepotism statute did not. *Cf. Gustafson v. Alloyd Co.*, 513 U.S. 561, 580 (1995) ("If legislative history is to be considered, it is preferable to consult the documents prepared by Congress when deliberating."). Moreover, the rationale the OMB official offered for his interpretation—that "specific provisions" of section 3110 "apply to the President"—is not particularly convincing. Because the President exercises "jurisdiction or control" over the entire Executive Branch, section 3110, by its express terms, would seemingly apply to the President's filling of numerous positions in federal agencies, even if the "without regard to any other provision of law" language carved out a handful of entities in the Executive Office of the President, such as the White House Office. *Cf. Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 905 (D.C. Cir. 1993) ("*AAPS*") (suggesting a reading of section 3110 under

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which “a President would be barred from appointing his brother as Attorney General, but perhaps not as a White House special assistant”).

In our view, therefore, section 105(a) exempts presidential appointments to the White House Office from the scope of the anti-nepotism statute.

II.

Haddon v. Walters, 43 F.3d 1488 (D.C. Cir. 1995) (per curiam), also bears on the question here and might appear to resolve it, albeit through a different route. Relying on arguments that would apply equally to the White House Office, *Haddon* held that the Executive Residence at the White House is not an “Executive agency” within the title 5 definition. *Id.* at 1490. Because the prohibition in section 3110 applies, as relevant here, only to appointments in “Executive agenc[ies],” *Haddon* seems to compel the conclusion that the bar against nepotism would not extend to appointments in the White House Office. Reinforcing this conclusion, though resting on other grounds, an earlier opinion of the D.C. Circuit had expressed “doubt that Congress intended to include the White House” as an “agency” under section 3110. *AAPS*, 997 F.2d at 905; *but see id.* at 920–21 (Buckley, J., concurring in the judgment) (disputing that interpretation of “agency”).

The matter, however, is somewhat more complicated. Not every part of the reasoning in *Haddon* is entirely persuasive, and the court’s rationale extends more broadly than necessary, in our view, to address the question now at hand. Nonetheless, we believe that *Haddon* lends support to our conclusion that the President may appoint relatives to positions in the White House Office.

Haddon held that the Executive Residence, which like the White House Office has a staff appointed under title 3, *see* 3 U.S.C. § 105(b), is not an “Executive agency” within the title 5 definition. *Haddon* was considering 42 U.S.C. § 2000e-16, which extends the antidiscrimination provisions of Title VII of the Civil Rights Act of 1964 to employees or applicants for employment “in executive agencies as defined in [5 U.S.C. § 105].” 42 U.S.C. § 2000e-16(a). Under that definition (the same one that governs section 3110), an “Executive agency” means “an Executive department, a Government corporation, and an independent establishment.” 5 U.S.C. § 105. Because the Executive Residence, like the White House Office, is plainly not an “Executive department” or a “Government corporation,” *see id.* §§ 101, 103, the issue in *Haddon* came down to whether the Executive Residence is an “independent establishment,” *see id.* § 104.

The D.C. Circuit had two reasons for concluding that the Executive Residence is not an independent establishment and therefore not an Executive agency under 5 U.S.C. § 105. First, the court observed that another statute, 3 U.S.C. § 112, authorizes “[t]he head of any department, agency, or independent establishment of the executive branch of the Government [to] detail, from time to time, employees

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of such department, agency, or establishment to the White House Office, the Executive Residence at the White House, the Office of the Vice President, the Domestic Policy Staff, and the Office of Administration.” In the court’s view, this phrasing suggested that the listed entities in the Executive Office of the President are not themselves “department[s], agenc[ies], or independent establishment[s].” *Haddon*, 43 F.3d at 1490 (“That Congress distinguished the Executive Residence from the independent establishments, whatever they may be, suggests that Congress does not regard the Executive Residence to be an independent establishment, as it uses that term.”). Second, the court said that title 5 of the U.S. Code “relates to government organization and employees and prescribes pay and working conditions for agency employees,” while title 3 of the Code “addresses similar concerns with respect to the President’s advisors and the staff of the Executive Residence.” *Id.* The incorporation of the title 5 definition in section 2000e-16, the court explained, suggests that Congress intended the statute to cover only “title 5” positions—not positions provided for in 3 U.S.C. § 105 and other title 3 authorities. *Id.*²

The D.C. Circuit’s first reason may be the less convincing of the two. The wording of the detail statute, 3 U.S.C. § 112, “distinguish[es]” between the sending and receiving entities only insofar as the sending entities are identified generically, while the small group of entities that may receive details, including the Executive Residence and the White House Office, are specifically named. This wording might well be an apt way to authorize a detail without implying anything about the status of the receiving entities. Indeed, Congress elsewhere used similar constructions to provide for transfers between executive departments. Section 2256 of title 7, U.S. Code, declares that the “head of any department” may “transfer to the Department [of Agriculture]” funds to perform certain inspections, analyses, or tests. Similarly, under 22 U.S.C. § 2675, the Secretary of State may “transfer to any department” certain “funds appropriated to the Department of State.” The generic references to “departments” on one side of these transactions could not be read to imply that the entities on the other side, the Departments of Agriculture and State, are not “departments.”

The court’s second argument seems stronger, although the court stated it more broadly than the facts of *Haddon* required. The court apparently viewed the provisions in title 3 as creating a complete substitute for title 5: “while Title 5 relates to government organization and employees and prescribes pay and working conditions for agency employees, Title 3 addresses similar concerns

² Shortly after *Haddon*, Congress passed the Presidential and Executive Office Accountability Act, Pub. L. No. 104-331, 110 Stat. 4053 (1996), which expressly applies Title VII and other federal civil rights and workplace laws to entities in the Executive Office of the President, including the White House Office and the Executive Residence. *See id.* § 2(a) (relevant provisions codified at 3 U.S.C. §§ 401, 402, 411).

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with respect to the President’s advisors and the staff of the Executive Residence.” *Haddon*, 43 F.3d at 1490 (citation omitted). The court then quoted, in a parenthetical, the “without regard” provision for hiring in the Executive Residence that exactly parallels the one for the White House Office. *Id.* (quoting 3 U.S.C. § 105(b)(1)). Inasmuch as the plaintiff in *Haddon* claimed that he had been unlawfully passed over for promotion—that he had not been appointed to a higher position with higher pay—his claim had to do with exactly the subjects identified in 3 U.S.C. § 105(b)(1), “employment or compensation of persons in the Government service.” Section 105(b)(1) could therefore be understood to displace the restrictions in Title VII, even if title 3 did not completely displace all of title 5. Thus, the court’s broader statements about the relationship of title 3 and title 5, though not dicta, went further than necessary to decide the case and further than we need to go here.

In any event, our conclusion above—that the President’s special hiring authority in 3 U.S.C. § 105(a) allows him to appoint relatives to the White House Office without regard to section 3110’s bar against nepotism—is consistent with the holding in *Haddon* and with the court’s reliance on the parallel language in 3 U.S.C. § 105(b)(1). In accordance with *Haddon*, we believe that the White House Office is not an “Executive agency” insofar as the laws on employment and compensation are concerned. Both the “without regard” language of section 105(a) and the general treatment of the White House Office under title 3 instead of title 5 undergird this conclusion.³ Having conformed our analysis, to this extent, with the only authoritative judicial guidance bearing on this question, we have no need to delve into the issue whether the White House Office should be considered outside of title 5 for all purposes whenever the application of that title is confined to “Executive agenc[ies].”⁴

³ We do not address the application of section 3110 to any other component of the government.

⁴ We have observed before that the D.C. Circuit’s reasoning in *Haddon* would seemingly extend to other entities listed in section 112 with special hiring authorities under title 3, including the White House Office. See Memorandum for Gregory B. Craig, Counsel to the President, from David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Application of 5 U.S.C. § 3110 to Two Proposed Appointments by the President to Advisory Committees* at 18 (Sept. 17, 2009); *Application of 18 U.S.C. § 603 to Contributions to the President’s Re-Election Committee*, 27 Op. O.L.C. 118, 118 (2003) (“Section 603 Opinion”). In one circumstance, however, because of features “unique” to the statutory scheme at issue—the Hatch Act Reform Amendments of 1993 (“HARA”)—we have found that the White House Office should be treated as an “Executive agency” under title 5 notwithstanding *Haddon*. See Section 603 Opinion, 27 Op. O.L.C. at 119 (White House Office employees may make contributions to a President’s authorized re-election campaign by virtue of an exception available to employees in an “Executive agency”).

Section 603 of title 18 prohibits “an officer or employee of the United States or any department or agency thereof” from “mak[ing] any contribution . . . to any other such officer, employee or person . . . if the person receiving such contribution is the employer or employing authority of the person making the contribution.” 18 U.S.C. § 603(a). But section 603(c) exempts from liability “employee[s] (as defined in section 7322(1) of title 5)” —meaning, employees subject to HARA. Section 7322(1), in

III.

Our Office, on several occasions, has addressed the application of section 3110 to presidential appointments, including appointments to the White House Office and other entities within the Executive Office of the President. Although our conclusion today departs from some of that prior work, we think that this departure is fully justified. Our initial opinions on the subject drew unwarranted inferences about Congress's intent from a single witness statement in a congressional hearing. Moreover, the surrounding legal context has been transformed by the subsequent enactment of section 105(a), which expressly and specifically addresses employment within the White House Office, and also by the D.C. Circuit's decision in *Haddon*.

A.

Section 3110 was enacted in 1967. In a 1972 memorandum, our Office concluded that the statute would bar the President from appointing a relative "to permanent or temporary employment as a member of the White House staff." Memorandum for John W. Dean, III, Counsel to the President, from Roger C. Cramton, Assistant Attorney General, Office of Legal Counsel, *Re: Applicability to President of Restriction on Employment of Relatives* at 1 (Nov. 14, 1972) ("Cramton Memo"). The Cramton Memo is brief but unequivocal: section 3110, we said, "seems clearly applicable to . . . positions on the White House staff." *Id.* at 2.

In 1977, we advised that section 3110 would preclude the President from appointing the First Lady to serve as chair of the President's Commission on

tum, defines "employee" as "any individual, other than the President and the Vice President, employed or holding office in . . . an Executive agency." 5 U.S.C. § 7322(1)(A). Several considerations led us in our Section 603 Opinion to confirm a prior opinion treating the White House Office as an "Executive agency" for purposes of section 7322(1), *see Whether 18 U.S.C. § 603 Bars Civilian Executive Branch Employees and Officers from Making Contributions to a President's Authorized Re-Election Campaign Committee*, 19 Op. O.L.C. 103 (1995). First, there would be "no purpose" for section 7322(1)'s express exclusion of the President and the Vice President if they were not understood to be "holding office in . . . an Executive agency." Section 603 Opinion, 27 Op. O.L.C. at 119. Second, the exception to HARA's substantive prohibition on partisan political activity in 5 U.S.C. § 7324(b)(2)(B)(i) applies to "employee[s] paid from an appropriation for the Executive Office of the President," further reflecting HARA's assumption that such employees are otherwise covered. Section 603 Opinion, 27 Op. O.L.C. at 119. Third, reading section 7322(1) to exclude employees of the White House Office "might be thought to produce highly anomalous results," as it would follow that White House employees "would be entirely free from the restrictions of [HARA]" and "would be able to engage in all sorts of partisan political activity," including by "us[ing] [their] official authority or influence for the purpose of interfering with or affecting the result of an election," *see* 5 U.S.C. § 7323(a)(1). Section 603 Opinion, 27 Op. O.L.C. at 119. Thus, we determined that there are "powerful reasons to conclude that the term 'Executive agency' in section 7322(1) does not have the same meaning that section 105 of title 5 generally assigns it (and that cases like *Haddon* recognize) for the purpose of title 5." *Id.*

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Mental Health ("Mental Health Commission"), whether with or without compensation. See Memorandum for Douglas B. Huron, Associate Counsel to the President, from John M. Harmon, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Possible Appointment of Mrs. Carter as Chairman of the Commission on Mental Health* (Feb. 18, 1977) ("Mental Health Commission Memo I") (referencing attached Memorandum for John M. Harmon, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Legality of the President's Appointing Mrs. Carter as Chairman of the Commission on Mental Health* (Feb. 17, 1977) ("Mental Health Commission Memo II")). We determined that the Mental Health Commission, which would be established by executive order and assigned specific authorities, would "clearly" qualify as an independent establishment within the "comprehensive" meaning of that term. Mental Health Commission Memo I. Our analysis noted, however, that the funding for the Commission would come from an annual appropriation for the Executive Office of the President covering "Unanticipated Needs," and we accordingly considered the effect of language in that appropriation that, presaging section 105(a), authorized the President to hire personnel "without regard to any provision of law regulating employment and pay of persons in the Government service." Mental Health Commission Memo II, at 5-6. We ultimately concluded that the appropriation language did not override section 3110. Although we did not say that the Mental Health Commission would be located in the White House Office specifically, our analysis suggested that our conclusion about the appointment would have been the same, whether or not the position was located there. See *id.*

Shortly afterward, the White House asked us to answer that very question: whether section 3110 applied to the contemplated appointment of the President's son to serve as an unpaid assistant to a member of the White House staff. See Memorandum for the Attorney General from John M. Harmon, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Employment of Relatives Who Will Serve Without Compensation* (Mar. 23, 1977) ("White House Aide Memo I") (referencing attached Memorandum for John M. Harmon, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Appointment of President's Son to Position in the White House Office* (Mar. 15, 1977) ("White House Aide Memo II")). The Civil Service Commission, the predecessor of the Office of Personnel Management, had advanced several arguments why section 3110 did not forbid the President's appointment of relatives to his personal staff. See White House Aide Memo I, at 1. Reaffirming the points made in the Mental Health Commission Memos, however, our Office concluded that the statute also covered the proposed appointment. Once again, we rejected an argument that the language in the annual appropriation for the White House Office (i.e., the "without regard" language) exempted those appointments from section 3110. White House Aide Memo II, at 1-3.

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In 1983, we were asked whether the President could appoint a relative to a Presidential Advisory Committee on Private Sector Initiatives (“CPSI”). See Memorandum for David B. Waller, Senior Associate Counsel to the President, from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Appointment of Member of President’s Family to Presidential Advisory Committee on Private Sector Initiatives* (Feb. 28, 1983). We answered that the President’s proposed appointment of a relative to the CPSI raised “virtually the same problems raised by Mrs. Carter’s proposed service on the President’s Commission on Mental Health.” *Id.* at 2. Because we lacked “sufficient time to reexamine the legal analysis contained in our earlier memoranda,” we stated that we had no choice but to “adhere to the conclusion” that “the President cannot, consistently with section 3110, appoint a relative as an active member of such a Commission.” *Id.*

Most recently, we advised whether the President could appoint his brother-in-law and his half-sister to two advisory committees. Once again, we found that section 3110 precluded the appointments. See Memorandum for Gregory B. Craig, Counsel to the President, from David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Application of 5 U.S.C. § 3110 to Two Proposed Appointments by the President to Advisory Committees* (Sept. 17, 2009) (“Barron Opinion”). In the course of that analysis, we considered whether one of the committees, the President’s Commission on White House Fellowships (“Fellowships Commission”), was located within the Executive Office of the President or was instead a free-standing establishment within the Executive Branch. *Id.* at 14–15.⁵ Concluding that, either way, the Fellowships Commission was, or was within, an “independent establishment” falling within the title 5 definition of Executive agency, we did not decide the question. *Id.* But we explicitly rejected the possibility that the Fellowships Commission constituted a part of the White House Office. *Id.* at 14. As a result, the Barron Opinion had no occasion to reapply or reconsider our precedents finding that section 3110 barred the President from appointing relatives to White House Office positions. See *id.* at 18–19 (distinguishing *Haddon*).

B.

Although none of our previous opinions analyzed the interaction between 3 U.S.C. § 105(a) and the anti-nepotism statute, our 1977 memoranda did consider the effect of language in annual appropriations for the Executive Office of the

⁵ We concluded that the other advisory committee at issue, the President’s Council on Physical Fitness and Sports, constituted part of the Department of Health and Human Services. Barron Opinion at 9. Nothing in our present opinion should be understood to question our prior conclusions about filling positions not covered by the special hiring authorities in title 3.

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President that was nearly identical to section 105(a). Prompted by the inconsistency between our earlier memoranda and the implications of *Haddon*, we now revisit the reasoning in those memoranda in order to assess the issue presented under section 105(a).

While acknowledging that the appropriation language was “broad” and the issue “not wholly free of doubt,” our memorandum regarding the White House appointment reasoned that section 3110 should be understood as a “specific prohibition” constituting an “exception to the general rule that limitations on employment do not apply to the White House Office.” White House Aide Memo II, at 3. We therefore invoked the “basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.” *Id.* (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)). But the canon about general and specific statutes seems of limited help here, because neither of the two relevant statutes can readily be characterized as more or less specific than the other. To be sure, section 3110 could be said to concern the “specific” subject of nepotism. But section 105(a) could reasonably be described as a statute “dealing with [the] narrow, precise, and specific” subject of hiring for the White House Office that ought to overcome the generally applicable anti-nepotism rule of section 3110.

The 1977 memoranda also put significant weight on the legislative history of section 3110, discerning a clear congressional intent that the Executive Office of the President, including the White House Office, be among the entities subject to the anti-nepotism prohibition. See Mental Health Commission Memo I; Mental Health Commission Memo II, at 5; White House Aide Memo I, at 2; White House Aide Memo II, at 2–3. We think that this history is not so compelling, however, as to direct the outcome on the question here.

Section 3110 was enacted as part of the Postal Revenue and Federal Salary Act of 1967. See Pub. L. No. 90-206, § 221, 81 Stat. 613, 640. When Congress considered and passed the legislation, the annual appropriations for the Executive Office of the President then in effect included the permissive language about the President’s authority to hire personnel in the White House Office. See Pub. L. No. 90-47, tit. III, 81 Stat. 113, 117 (1967). As our 1977 memoranda observed, there was no mention of those appropriations or that language during Congress’s consideration of the anti-nepotism provision. But one witness, the Chairman of the Civil Service Commission, testified before the Senate committee that, in his view, the language then under consideration would have prevented President Franklin Delano Roosevelt from appointing his son “at the White House as a civilian aide” (as President Roosevelt had done). *Federal Pay Legislation: Hearings Before the S. Comm. on Post Office and Civil Service*, 90th Cong. 366 (1967) (“*Federal Pay Legislation Hearings*”) (testimony of Chairman Macy). Following the hearing, the Senate amended the provision in the bill and explicitly named the President as a “public official” to whom the bar applied. “Because the Senate Hearings contain

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the only extended discussion of the provision and the only discussion at all of its application to the President,” we explained in our memorandum concerning the White House appointment, “it seems appropriate to attach particular significance to the Civil Service Commission’s interpretation of the statute in the course of the hearings. It is reasonable to assume that the Senate Committee and eventually the Congress acted on the basis of Chairman Macy’s interpretation of the prohibition as drafted.” White House Aide Memo II, at 2.

Having reexamined the legislative materials, we no longer would make that assumption. The Senate committee and Chairman Macy were reviewing a version of the bill that prohibited nepotistic appointments to “department[s],” defined more broadly to include “each department, agency, establishment, or other organization unit in or under the . . . executive . . . branch of the Government . . . including a Government-owned or controlled corporation.” H.R. 7977, 90th Cong. § 222 (as referred to S. Comm. on Post Office and Civil Service, Oct. 16, 1967) (emphasis added). It is unclear why the Senate amended the provision to apply instead to “Executive agenc[ies]” and thus to call up the title 5 definition of that term. See H.R. 7977, 90th Cong., § 221 (as reported out of S. Comm. on Post Office and Civil Service, Nov. 21, 1967). The Senate report does not explain the change. See S. Rep. No. 90-801, at 28 (1967). Nevertheless, that the Civil Service Commission Chairman was considering different statutory language when offering his view about the scope of the prohibition dilutes the strength of his testimony—which, as a witness statement, should typically be afforded less weight to begin with. See *S&E Contractors*, 406 U.S. at 13 n.9; *Gustafson*, 513 U.S. at 580.

Because the appropriation language was apparently never mentioned during the House’s or Senate’s consideration of the bill, the debates and other materials include no clear statement that the anti-nepotism provision was intended to prevail over the broad hiring authority previously granted in that year’s appropriation for the Executive Office of the President.⁶ Moreover, aside from that single question

⁶ Individual senators did stress the amended provision’s breadth in floor statements. See 113 Cong. Rec. 36103 (1967) (statement of Sen. Randolph) (indicating that the Senate amended the provision “to plug any loopholes which might exist,” because “[i]t was critical that the nepotism provisions be applied across the board”); *id.* (stating that “[w]e could not stop at a certain point in formulating a policy on nepotism” and “had to apply the policy across the board”); *id.* at 36103–04 (suggesting that “the White House believes, as does now the Congress, that a nonnepotism policy should apply equally to any branch of Government”); *id.* at 37316 (statement of Sen. Udall) (explaining that the provision applies “across-the-board, from the highest office to the lowest paid job, with equal force and effect” and that “[n]o official in any of the three branches of the Government . . . may appoint or promote a relative to any position under his or her control or jurisdiction,” and calling it “the strongest possible guarantee against any abuse of Federal appointive authority and any preference in Federal positions that is adverse to the public interest”). These statements, whatever their worth in demonstrating congressional intent more generally, suggest that at least those senators meant for section 3110 to have broad effect across the three branches of government. But because those statements do not speak to section 3110’s relationship to the President’s hiring authority under the annual appropriations for the

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about the service of President Roosevelt's son as a White House aide—which was part of a series of questions posed by the senators to Chairman Macy about the language's application to the President generally, *see Federal Pay Legislation Hearings* at 360–69—neither the Senate nor the House appears to have focused on the White House Office. We therefore are hesitant to infer that the 90th Congress envisioned that section 3110 would overcome the President's hiring authorities under the annual appropriation. We are even more reluctant to draw that inference with respect to the permanent special hiring authority for the White House Office that Congress enacted ten years later.

IV.

Finally, we believe that this result—that the President may appoint relatives to his immediate staff of advisors in the White House Office—makes sense when considered in light of other applicable legal principles. Congress has not blocked, and most likely could not block, the President from seeking advice from family members in their personal capacities. *Cf. In re Cheney*, 406 F.3d 723, 728 (D.C. Cir. 2005) (en banc) (referring to the President's need, “[i]n making decisions on personnel and policy, and in formulating legislative proposals, . . . to seek confidential information from many sources, both inside the government and outside”); *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 466 (1989) (construing the Federal Advisory Committee Act (“FACA”) not to apply to the judicial recommendation panels of the American Bar Association in order to avoid “formidable constitutional difficulties”). Consequently, even if the anti-nepotism statute prevented the President from employing relatives in the White House as advisors, he would remain free to consult those relatives as private citizens. *See Barron Opinion* at 8–9 (finding the application of section 3110 to presidential advisory committees constitutional in part because “[t]he President remains free to consult his relatives in their private, individual capacities at the time and place of, and on the subjects of, his choosing”). And our Office has found that such an informal, “essentially personal” advisory relationship, even if the private person offers advice to the President on a “wide variety of issues,” does not make that person an employee of the federal government subject to the conflict of interest laws in title 18. *Status of an Informal Presidential Advisor as a “Special Government Employee”*, 1 Op. O.L.C. 20, 20–21 (1977) (“*Informal Presidential Advisor*”); *see also id.* at 22 (“Mrs. Carter would not be regarded as a special Government employee solely on the ground that she may discuss governmental matters with the President on a daily basis.”).⁷

Executive Office of the President—and, of course, could not speak to the relationship between section 3110 and the later-enacted section 105(a)—they do not illuminate the matter at hand.

⁷ Our opinion explained, however, that while the informal presidential advisor's general practice (as we understood it) of discussing policy issues directly with the President did not itself render him a

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But the conflict of interest laws do apply to employees of the White House Office. See 18 U.S.C. §§ 203, 205, 207, 208, 209 (all applicable to, *inter alia*, officers and employees in the “executive branch”); *id.* § 202(e)(1) (defining “executive branch” for purposes of those statutes to include “each executive agency as defined in title 5, and any other entity or administrative unit in the executive branch”); *id.* § 207(c)(2)(A)(iii), (d)(1)(C) (applying more stringent post-employment restrictions to employees appointed to the White House Office pursuant to 3 U.S.C. § 105(a)(2)); see also, e.g., *Applicability of Post-Employment Restrictions in 18 U.S.C. § 207 to a Former Government Official Representing a Former President or Vice President in Connection with the Presidential Records Act*, 25 Op. O.L.C. 120 (2001) (considering section 207’s application to former employees of the White House Office).

A President wanting a relative’s advice on governmental matters therefore has a choice: to seek that advice on an unofficial, ad hoc basis without conferring the status and imposing the responsibilities that accompany formal White House positions; or to appoint his relative to the White House under title 3 and subject him to substantial restrictions against conflicts of interest. *Cf. AAPS*, 997 F.2d at 911 n.10 (declining, after holding that the First Lady qualifies as a “full-time officer or employee” of the government under FACA, to decide her status under the conflict of interest statutes). In choosing his personal staff, the President enjoys an unusual degree of freedom, which Congress found suitable to the demands of his office. Any appointment to that staff, however, carries with it a set of legal restrictions, by which Congress has regulated and fenced in the conduct of federal officials.

* * * * *

In our view, section 105(a) of title 3 exempts appointments to the White House Office from the bar in section 3110 of title 5. Section 3110 therefore would not prohibit the contemplated appointment.

DANIEL L. KOFFSKY
Deputy Assistant Attorney General
Office of Legal Counsel

government employee, his more extensive “work” on a particular “current social issue”—in connection with which the advisor “called and chaired a number of meetings that were attended by employees of various agencies” and “assumed considerable responsibility for coordinating the Administration’s activities in that particular area”—did cross a line and made him a government employee for purposes of that work. *Informal Presidential Advisor*, 1 Op. O.L.C. at 23.

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE

Thursday, November 17, 2016

JPMorgan's Investment Bank in Hong Kong Agrees to Pay \$72 Million Penalty for Corrupt Hiring Scheme in China

JPMorgan Securities (Asia Pacific) Limited (JPMorgan APAC), a Hong Kong-based subsidiary of multinational bank JPMorgan Chase & Co. (JPMC), agreed to pay a \$72 million penalty for its role in a scheme to corruptly gain advantages in winning banking deals by awarding prestigious jobs to relatives and friends of Chinese government officials.

Assistant Attorney General Leslie R. Caldwell of the Criminal Division, U.S. Attorney Robert L. Capers of the Eastern District of New York and Assistant Director in Charge William F. Sweeney Jr. of the FBI's New York Field Office made the announcement.

"The so-called Sons and Daughters Program was nothing more than bribery by another name," said Assistant Attorney General Caldwell. "Awarding prestigious employment opportunities to unqualified individuals in order to influence government officials is corruption, plain and simple. This case demonstrates the Criminal Division's commitment to uncovering corruption no matter the form of the scheme."

"U.S. businesses cannot lawfully seek to gain a business advantage by corruptly influencing foreign government officials," said U.S. Attorney Capers. "The common refrain that this is simply how business is done overseas is no defense. In this case, JPMorgan employees designed a program to hire otherwise unqualified candidates for prestigious investment banking jobs solely because these candidates were referred to the bank by officials in positions to award business to the bank. In certain instances, referred candidates were hired with the understanding that the hiring was linked to the award of specific business. This is no longer business as usual; it is corruption."

"Creating a barter system in which jobs are awarded to applicants in exchange for lucrative business deals is a corrupt scheme in and of itself," said Assistant Director in Charge Sweeney. "But when foreign officials are among those involved in the bribe, the international free market system and our national security are among the major threats we face. Those engaging in these illegal acts abroad may think they're out of sight and out of mind, but they're wrong. The FBI has recently established three dedicated international corruption squads to combat this type of *quid pro quo*, and we'll use all resources at our disposal to uncover and put an end to these crimes."

According to JPMorgan APAC's admissions, beginning in 2006, senior Hong Kong-based investment bankers set up and used a "client referral program," also referred to as the "Sons and Daughters Program," to hire candidates referred by clients and government officials. The Sons and Daughters Program was used as a means to influence those same officials to award investment deals to JPMorgan APAC. By late 2009, JPMorgan APAC executives and senior bankers revamped the client referral program to improve its efficacy by prioritizing those hires linked to upcoming client transactions. In order to be hired, a referred candidate had to have a "directly attributable linkage to business opportunity."

According to admissions made in connection with the resolution, these *quid pro quo* arrangements were discussed internally among JPMorgan APAC bankers. For example, in late 2009, a Chinese government official communicated to a senior JPMorgan APAC banker that hiring a referred candidate would significantly influence the role JPMorgan APAC would receive in an upcoming initial public offering (IPO) for a Chinese state-owned company. The banker communicated this message to several senior colleagues, who then spent several months trying to place the referred

candidate in an investment banking position in New York. Despite learning from personnel in New York that this referred candidate was not qualified for an investment banking position, senior JPMorgan APAC bankers created a new position for the candidate in New York, and JPMorgan APAC thereafter obtained a leading role in the IPO. Further, JPMorgan APAC employees misused compliance questionnaires to justify and paper over corrupt business arrangements. Employees also used a template with pre-filled answers, including that there was "no expected benefit" from the hire, and compliance personnel drafted and modified questionnaires that failed to state the true purpose of the hire.

JPMorgan APAC further admitted that candidates hired during the scheme were typically given the same titles and paid the same amount as entry-level investment bankers, despite the fact that many of these hires performed ancillary work such as proofreading and provided little real value to any deliverable product.

The corrupt scheme netted JPMorgan APAC at least \$35 million in profits from business mandates with Chinese state-owned companies.

JPMorgan APAC entered into a non-prosecution agreement and agreed to pay a criminal penalty of \$72 million to resolve the matter. As part of the agreement, JPMorgan APAC has agreed to continue to cooperate with the department in any ongoing investigations and prosecutions relating to the conduct, including of individuals, to enhance its compliance program, and to report to the department on the implementation of its enhanced compliance program.

The department reached this resolution based on a number of factors, including that JPMorgan APAC did not voluntarily and timely disclose the conduct at issue. However, JPMorgan APAC did receive full credit for its and JPMC's cooperation with the criminal investigation, including conducting a thorough internal investigation, making foreign-based employees available for interviews in the United States and producing documents to the government from foreign countries in ways that did not implicate foreign data privacy laws. JPMorgan APAC also took significant employment action against six employees who participated in the misconduct resulting in their departure from the bank, and it disciplined an additional 23 employees who, although not involved in the misconduct, failed to effectively detect the misconduct or supervise those engaged in it. JPMorgan APAC imposed more than \$18.3 million in financial sanctions on former or current employees in connection with the remediation efforts. Based on these actions and other considerations, the company received a non-prosecution agreement and an aggregate discount of 25 percent off of the bottom of the U.S. Sentencing Guidelines fine range.

In related proceedings, the U.S. Securities and Exchange Commission (SEC) filed a cease and desist order against JPMC, whereby JPMC agreed to pay \$130.5 million in disgorgement to the SEC, including prejudgment interest. The Federal Reserve System's Board of Governors also issued a consent cease-and-desist order and assessed a \$61.9 million civil penalty. Thus, the combined U.S. criminal and regulatory penalties paid by JPMC and its Hong Kong subsidiary are approximately \$264.4 million.

The FBI's New York Field Office investigated the case. The department appreciates the significant cooperation and assistance provided by the SEC and the Federal Reserve Bank of New York in this matter. Assistant Deputy Chief Leo Tsao and Trial Attorneys James P. McDonald and Derek J. Ettinger of the Criminal Division's Fraud Section and Assistant U.S. Attorney James P. Loonam of the Eastern District of New York's Business and Securities Fraud Section prosecuted the case.

The Criminal Division's Fraud Section is responsible for investigating and prosecuting all FCPA matters. Additional information about the Justice Department's FCPA enforcement efforts can be found at www.justice.gov/criminal/fraud/fcpa.

Attachment(s):

[Download JPMorgan Securities Asia Pacific NPA](#)

Topic(s):

Financial Fraud
Foreign Corruption

Component(s):

12/15/2019 JPMorgan's Investment Bank in Hong Kong Agrees to Pay \$72 Million Penalty for Corrupt Hiring Scheme in China | OPA | Department ...

Criminal Division

Criminal - Criminal Fraud Section

USAO - New York, Eastern

Press Release Number:

16-1343

Updated October 3, 2017

Repeated failures by Ukraine General Prosecutor's Office show politics at work, serious reform needed

 antac.org.ua/en/news/burisma-group-of-companies-are-still-under-criminal-investigation-in-ukraine-despite-

Allegations that Ukraine's General Prosecutor's Office abuses its power and has helped an alleged criminal keep stolen assets show much more must be done to clean up this important institution if the country is to effectively combat systemic corruption and put an end to an ugly legacy of theft by public officials and other elites.

The National Anti-Corruption Bureau of Ukraine (NABU) is investigating whether officials in the prosecutor's office failed to take actions relating to criminal proceedings against Burisma Group President Mykola Zlochevskyi. The failure to act resulted in a missed opportunity to recover US\$23.5 million stolen from Ukraine.

Furthermore, despite overwhelming evidence suggesting criminal actions, the Prosecutors Office recently dropped its cases against Zlochevskyi and his company Burisma. The NABU continues to investigate [\[1\]](#) several cases.

"Confiscation of \$US23.5 million from Zlochevskyi's companies in London would have been the first success story in Ukraine's efforts to recover funds laundered abroad by Yanukovich and his associates. But instead of handing evidence to the UK's Serious Fraud Office in a timely fashion, the Prosecutor General's Office did everything possible to prevent this potential asset recovery success story from happening, said **Daria Kaleniuk from the Anti-Corruption Action Centre**.

No one in the Prosecutor General's Office has been punished for the dumping of Zlochevskyi's case. No prosecutor or investigator has been found liable. The leadership of the office, which tried to cover up the dumping of the criminal case concerning Zlochevsky, resigned only under enormous public and [diplomatic pressure](#).

"Nowadays, the General Prosecution Office is a political entity, not a law enforcement agency," said **Yaroslav Yurchyshyn, the Executive Director of Transparency International - Ukraine**.

To fix this situation TI-Ukraine and AntAC made the following recommendations:

1. **PGO to explain publicly detailed reasons and conditions of closing criminal investigations against Zlochevskyi and Burisma Group companies; consider reopening these cases.**

2. **Ukraine and United Kingdom to establish joint investigation team, which should investigate not only activities of Zlochevskiy and Burisma, but also alleged corruption and abuse of power of prosecutors and investigators who dumped the initial criminal investigation. The team should be led by foreign law enforcement officers.**
3. **Parliament to consider passing legislation, which sets up competitive public selection procedure of the Prosecutor General of Ukraine, who should be independent professional beyond politics.**
4. International partners to condition Ukraine on delivering measurable results in recovery proceeds of grand corruption prior to granting financial technical assistance to the country.

###

For more information and commentaries please contact Tata Peklun, antac.ua@gmail.com and Andrii Sliusar, sliusar@ti-ukraine.org.

List of attached documents:

1. Letter of General Prosecutors Office 072-33039-14 from Dec 29, 2016 addressed to Viktor Chumak, translation
2. Letter of General Prosecutors Office 1715-32844-14 from March, 12 2015 addressed to MP Sergiy Leschenko, translation
3. Letter of the former deputy Prosecutor General Vitalii Kasko addressed to the former Prosecutor General O.Zalisko from Nov 20, 2014, translation
4. Report of the former deputy Prosecutor General Vitalii Kasko addressed to the former Prosecutor General Vitalii Yarema, translation
5. London Criminal Court Judgment in the Case NoRSTO72014
6. Official letter №041-204/20487 from the National Anti-corruption Bureau from June, 23.06.2016
7. Press release in PDF

Notes for editors:

There are reasonable grounds to believe that close associates of current Ukrainian President Petr Poroshenko, have significantly assisted Mykola Zlochevskiy in dismissing criminal cases against him by PGO.

Specifically, on Dec 24, 2016 Mykola Zlochevskiy was filmed at the meeting in Vienna restaurant with Igor Kononenko, incumbent Member of Parliament, who is first deputy head of the largest political faction in parliament called Poroshenko's Bloc. Kononenko is publicly known as close friend and business partner of President Poroshenko. Kononenko joined official leadership of the Poroshenko Bloc after Mr. Yuri Loutsenko left the position of its

head to become Prosecutor General of Ukraine in May 2016. President appointed Yuriy Lutsenko after initiating special amendments allowing Lutsenko to become Prosecutor General despite the absence of legal education.

It is said that Kononenko personally supervises the work of a separate department of investigation of specially important cases. Exactly this department has been investigating the cases concerning Zlochevskiy and the companies of Burisma group.

This how the cases month by month were dumped by the General Prosecutor's Office of Ukraine:

1. **In 2014-2015 the General Prosecutor's Office of Ukraine**, which was managed by Vitaliy Yarema at that moment, **assisted Mykola Zlochevskiy with unblocking 23.5 mln USD seized in the UK.**

In April 2014, British Serious Fraud Office started a preliminary investigation of money laundering in the amount of 35 million dollars allegedly committed by Mykola Zlochevskiy. In this criminal case, the British law enforcers blocked 23.5 mln USD on the accounts of the companies beneficially owned by Zlochevsky. The Ukrainian party became aware of this in late July 2014, when the GPO **received request** for mutual legal assistance from the British counterparts. In particular request asked to provide information regarding Zlochevskiy and companies related to him.^[iii] On Aug 5, 2014, on the basis of the request and report ^[iiii] of the Deputy Prosecutor General (at that time), Vitaliy Kasko, the Main Investigative Department of the GPO initiated criminal proceedings No 4201400000000805^[iv] regarding illicit enrichment and money laundering in especially large sizes committed by Zlochevskiy.

Two months from the start of the preliminary investigation, on Sept, 23, 2014, the investigation **issued^[v] the first letter stating "uncertain legal status and absence of notification of suspicion of Mykola Zlochevskiy"** at the request of his defence attorney who tried to cancel the seizure of funds in the UK.

The British law enforcers received partial response^[vi] to their preliminary request to Ukrainian party on Sept 25, 2014, **after** Zlochevskiy's defense had already received the certificate confirming absence of criminal investigation regarding him.

On Nov 20, 2014, Vitaliy Kasko, responsible at that moment for international cooperation, notified the management of the GPO on the need to timely provide British law enforcers with requested information "due to the court hearings scheduled for the beginning of Dec, particularly regarding the legitimacy of seizure of Zlochevskiy's assets in the UK"^[vii].

On Dec 2, 2014, **one day before the court hearings** in the Central Criminal Court of London, the GPO issued the **second letter^[viii] stating "uncertain legal status and absence of notification of suspicion of Mykola Zlochevskiy"** at the request of his

defense. The letter was used immediately by Zlochevskyi attorneys during court hearings in London on Dec 3-5, 2014^[ix]. The results of those hearings as well as arguments of the parties were used later by the court as a **ground of decision to unblock the seized assets**.

On Dec 4, 2014, five months after the investigation had started in Ukraine, in violation of the law and **without any reasonable grounds** the Deputy General Prosecutor, Herasymiuk M.V. **transferred this investigation to the Ministry of Internal Affairs**.^[x] Therefore, the collection of evidence necessary for preparation of notification of suspicion was stopped for two weeks.

On Dec 10, 2014, the representatives of the British Embassy in Ukraine informed ^[xi] the GPO regarding Zlochevsky's challenge of the seizure of funds and "possible cancellation of the seizure by the British court due to **lack of active actions from Ukrainian side in investigation of the indicated criminal proceedings**, particularly due to the absence of notification of suspicion and request to seized the abovementioned funds".

On Dec 25, 2014, the GPO received letter^[xii] from the respective US authorities regarding the risk of the January court decision to unblock the funds due to slow-pace investigation of Zlochevsky's case, that would also question the EU, Lichtenstein and Switzerland sanctions against Yanukovych and his associates.

On Dec 29, 2014, the GPO took the criminal investigation back from the Ministry of Internal Affairs. **At the same day the GPO issued the notification of suspicion** to Zlochevskyi in illicit enrichment and money laundering. The very next day, on Dec, 30, 2014, the Pechersk Court of the Kyiv City seized the assets blocked in London.^[xiii] However, **on Jan 21, 2015**, the Central Criminal Court of London cancelled^[xiv] the seizure of the accounts.

The Court did not take into account the information regarding the suspicion of Zlochevskyi and the decision of Pechersk Court to seize the assets due to the lack of the evidence which Ukrainian prosecutors and court used to justify their decisions, The decision of the London Court drew conclusion no new sufficient evidence were collected during 8 months of investigation to prove the necessity of seizure. The absence of such evidence was the result of the GPO's inaction, which did not investigate the origin of 23.5 mln USD on the accounts of Zlochevskyi's companies. The British judge also stressed attention at the **inconsistency of the position of Ukrainian prosecutors, who during the period of 27 days both issued the letter confirming the innocence of Zlochevsky and notified him about suspicion**.

2. In criminal proceedings regarding **illicit enrichment and money laundering** (No4201400000000805) the prosecutors investigated **payment of taxes in Ukraine by Zlochevsky, but not the origin of money, seized in Britain**; they also "blurred" the criminal proceedings by adding other unrelated episodes.

On Dec 29, 2014, in this criminal proceeding Zlochevskyi was notified of suspicions in illicit enrichment in large-scale and money laundering.[xv] but the GPO **did not transfer this episode to court**. Investigation continued, and in two years it **transformed into tax avoidance investigation**. As part of the preliminary investigation, Ukrainian investigators had to establish the origin and legitimacy of significant funds on bank accounts of companies belonging to Zlochevskyi as former top official.

Instead, investigators checked the payment of the personal income tax by Zlochevskyi during his time in the office[xvi]. District tax inspection hold an audit and did not find any outstanding taxes[xvii].

On this basis, the GPO closed[xviii] the criminal proceedings in the regard of suspicion of Zlochevskyi in **illicit enrichment and money laundering** on Nov 1, 2016. The reason for the closure was "absence of corpus delicti" (the event of the crime).

PGO manipulatively stated[xix] that decision of the court in London also confirmed lack of violation of tax law by Zlochevskyi. While court in London was discovering not just likelihood of tax avoidance by Zlochevskyi, but possibility of illegal origin of seized 23.5 mln USD at the accounts of companies of Burisma holding in Britain.

The PGO didn't check the source[xx] of origin of 23.5 mln USD, which according to the statements made in the British court by Zlochevskyi's attorneys Burisma obtained[xxi] from offshore companies of Mr.Kurchenko, a frontman of corrupt financial and gas empire within Yanukovych regime. Mr.Kurchenko, who had been under the EU sanctions since March 2014. He is now suspect by the PGO for organized crime, fraud, fictitious entrepreneurship, embezzlement and abuse of power, which all together caused losses to the Ukrainian state in gas and banking sector totaling to at least 5 bln UAH.

At the same time, the Prosecutor General of Ukraine, Yuriy Lutsenko, appointed in 2016 by the President Poroshenko, could not just close the criminal proceedings, which lasted three years and had a considerable public attention in Ukraine and abroad.

On October 10, 2016, the Office of Large Taxpayers of the State Fiscal Service of Ukraine held unscheduled tax audit of Esko-Pivnich LLC, which was part of Burisma holding. The tax audit **concerned the period of 8 months of 2016** and establishes a violation of tax law.

Based on the results of the tax audit the Chief Accountant of Esko-Pivnich LLC, Volodarska R.Z., was notified of suspicion of tax evasion in especially large amounts. It was done within the same criminal proceedings whereas Ukrainian investigators studied tax payments by Zlochevskyi in his time in the office. The investigation revealed that Volodarska underestimated the income tax of Esko-Pivnich LLC in the amount of 33,099,840 UAH. In addition to accrued taxes, Esko-Pivnich LLC paid penalties in the amount of 16,549,920 UAH. The company reimbursed the unpaid taxes and damages completely during the period of

preliminary investigation[xxii]. This has been done because according to the Criminal Code of Ukraine, a person who has committed a tax crime is exempted from criminal liability if he or she pays in full the taxes and damages to the state before the indictment is announced.

On Nov 1, 2016, **the same day** when the GPO **closed the criminal proceedings regarding illicit enrichment** and money laundering allegedly committed by Zlochevskyi, during the interrogation the Chief Accountant, Volodarska, informed the investigators on full reimbursement of the damages and **appealed for exemption from criminal liability**. On November 17, 2016, Podil District Court of the Kyiv city confirmed the full reimbursement of the damages and exempted the Chief Accountant of Esco-Pivnich LLC from criminal liability.[xxiii]

Within available court decisions it is hard to trace any **evident logic** in the actions of Ukrainian investigators who combined the episode of company's tax evasion in 2016 with the criminal proceedings on illicit enrichment and money laundering allegedly committed by Zlochevskyi in 2010-2014.

At the same time, with the closure of the criminal proceedings against Mykola Zlochevskyi Ukrainian prosecutors lost the opportunity to further confiscate Zlochevskyi's assets seized[xxiv] in Ukraine, namely 2 land plots, 3 houses and Rolss-Royce Phantom car.

3. Since May 7, 2014 GPO has been investigating case No4201400000000375 of alleged criminal activity of subsidiaries of Burisma in Ukraine, namely companies Esco-Pivnich LLC, Pari LLC and First Ukrainian Oil & Gas Company LLC which extract and sell gas in Ukraine based on agreements on joint activity with state-owned company Ukgasvydobuvannya.

Allegedly Burisma subsidiaries were extracting and selling gas in Ukraine for significantly discounted prices to related companies to reduce official profits, which according to the agreements on joint activity had to be shared with the state-owned company. Officials of Ukgazvydobuvannya state-owned company were allegedly embezzling funds of the company through such schemes. According to the information shared by the General Prosecutor Yuriy Lutsenko, on 7 July 2016, Burisma subsidiaries were also allegedly involved in the large scale tax avoidance schemes. Lutsenko estimated amount of unpaid taxes at 1 billion UAH during 2014-2015.

Since August 2016 this criminal investigation focuses only on the episode of tax avoidance by Burisma subsidiaries and does not focus on proper execution of agreements on joint activity by Burisma subsidiary. **Starting from October 2016 the description of the case in the court decisions in the framework of this criminal investigation does not include any mentions of subsidiaries of Burisma.**[xxv]

Investigation of tax avoidance crime instead of embezzlement gives green light for prosecutors to close the case should Burisma holding pay to the budget of Ukraine estimated by prosecutors losses.

References:

[i] Criminal case No4201500000001142 regarding **issuing illegally natural resources licenses** to companies Pari LLC, Esko Pivnich LLC, First Ukrainian Oil Gas Company LLC, Aldea Ukraine LLC, Ukrnaftoburinnya CJSC, Krymtopenergoservice LLC, Gasoilinvest LLC, Company Azov-oil LLC, Nadragas LLC, Tekhnoresource PJSC by officials of the Ministry of Environment and Natural Resources of Ukraine during the period of 2010-2015 years aimed for self-enrichment and criminal case No4201400000000181 regarding **embezzlement of state funds totaling to 49,380 mln UAH at public procurement** of consulting services for implementing technologies of remote land exploration during Zlochevskyi's tenure of the Minister of Environmental Protection of Ukraine. The case was investigated by the General Prosecutor's Office (GPO) in Ukraine until the end of 2015. At the beginning of 2016, the NABU has taken over this case and investigation currently continues (from the official Official letter №041-204/20487 from the National Anti-corruption Bureau from June, 23.06.2016).

[ii] From the letter of the former deputy Prosecutor General Vitalii Kasko addressed to the former Prosecutor General O.Zalisko from Nov 20, 2014 // first published in MP Sergiy Leschenko blog // <http://blogs.pravda.com.ua/authors/leschenko/561ff0acc4633/>

[iii] From the Report of the former deputy Prosecutor General Vitalii Kasko addressed to the former Prosecutor General Vitalii Yarema // first published in MP Sergiy Leschenko blog // <http://blogs.pravda.com.ua/authors/leschenko/561ff0acc4633/>

[iv] From the letter of General Prosecutors Office №17/1/5-32844-14 from March, 12 2015 addressed to MP Sergiy Leschenko, signed former deputy to Prosecutor General O.Baganets // first published in MP Sergiy Leschenko blog // <http://blogs.pravda.com.ua/authors/leschenko/5549e581cb3df/>

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[vi] From the Report of the former deputy Prosecutor General Vitalii Kasko addressed to the former Prosecutor General Vitalii Yarema // first published in MP Sergiy Leschenko blog // <http://blogs.pravda.com.ua/authors/leschenko/561ff0acc4633/>

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Leschenko blog // <http://blogs.pravda.com.ua/authors/leschenko/561ff0acc4633/>

[viii] Official letter issued by the General Prosecutor Office as of Dec, 2, 2014 p. to the attorney P.Boyko // first published in MP Sergiy Leschenko blog
<http://blogs.pravda.com.ua/authors/leschenko/561ff0acc4633/>

[ix] London Criminal Court Judgment in the Case NoRSTO72014

[x] From the letter of General Prosecutors Office №17/1/5-32844-14 from March, 12 2015 addressed to MP Sergiy Leschenko, signed former deputy to Prosecutor General O.Baganets // first published in MP Sergiy Leschenko blog
// <http://blogs.pravda.com.ua/authors/leschenko/5549e581cb3df/>

[xi] From the Report of the former deputy Prosecutor General Vitalii Kasko addressed to the former Prosecutor General Vitalii Yarema // first published in MP Sergiy Leschenko blog // <http://blogs.pravda.com.ua/authors/leschenko/561ff0acc4633/>

[xii] From the Report of the former deputy Prosecutor General Vitalii Kasko addressed to the former Prosecutor General Vitalii Yarema // first published in MP Sergiy Leschenko blog // <http://blogs.pravda.com.ua/authors/leschenko/561ff0acc4633/>

[xiii] From the letter of General Prosecutors Office №17/1/5-32844-14 from March, 12 2015 addressed to MP Sergiy Leschenko, signed former deputy to Prosecutor General O.Baganets // first published in MP Sergiy Leschenko blog
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[xiv] London Criminal Court Judgment in the Case NoRSTO72014

[xv] From the letter of General Prosecutors Office №17/1/5-32844-14 from March, 12 2015 addressed to MP Sergiy Leschenko, signed former deputy to Prosecutor General O.Baganets // first published in MP Sergiy Leschenko blog
// <http://blogs.pravda.com.ua/authors/leschenko/5549e581cb3df/>

[xvi] From the letter of General Prosecutors Office №07/2-33039-14 from Dec 29, 2016 addressed to Viktor Chumak, Ukrainian MP, signed by the deputy to the Prosecutor General Y.Stolyarchuk // https://drive.google.com/file/d/0B7_tuaxGF0VvX1ZVUVFEVUZyYamc/view

[xvii] From the letter of General Prosecutors Office №07/2-33039-14 from Dec 29, 2016 addressed to Viktor Chumak, Ukrainian MP, signed by the deputy to the Prosecutor General Y.Stolyarchuk // https://drive.google.com/file/d/0B7_tuaxGF0VvX1ZVUVFEVUZyYamc/view

[xviii] Judgment from the criminal case №4201400000000805 from Nov, 11, 2016 // <http://www.reyestr.court.gov.ua/Review/62761052>

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[xx] Para 50-51 from the London Criminal Court Judgment in the Case NoRSTO72014

[xxi] Para 6 from the the London Criminal Court Judgment in the Case NoRSTO72014

[xxii] From the letter of General Prosecutors Office №07/2-33039-14 from Dec 29, 2016 addressed to Viktor Chumak, Ukrainian MP, signed by the deputy to the Prosecutor General Y.Stolyarchuk // https://drive.google.com/file/d/0B7_tuaxGF0VvX1ZVUVFEVUZyamc/view

[xxiii] From the letter of General Prosecutors Office №07/2-33039-14 from Dec 29, 2016 addressed to Viktor Chumak, Ukrainian MP, signed by the deputy to the Prosecutor General Y.Stolyarchuk // https://drive.google.com/file/d/0B7_tuaxGF0VvX1ZVUVFEVUZyamc/view

[xxiv] Judgment from the criminal case №4201400000000805 // <http://reyestr.court.gov.ua/Review/55416526>

[xxv] Information available via the search results judgments in criminal investigation No4201400000000375

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Schiff: There is now 'more than circumstantial evidence' of Trump-Russia collusion

By MADELINE CONWAY | 03/22/2017 06:15 PM EDT

Rep. Adam Schiff, the top Democrat on the House Intelligence Committee, said Wednesday that there is "more than circumstantial evidence now" to suggest that President Donald Trump's campaign may have colluded with Russia's attempts to disrupt the election, but he would not offer details.

"I can tell you that the case is more than that," Schiff told Chuck Todd on MSNBC. "And I can't go into the particulars, but there is more than circumstantial evidence now."

When Todd followed up, asking if he had "seen direct evidence of collusion," Schiff would not say so directly, but insisted that he has seen some "evidence that is not circumstantial" and is worth investigating.

"I don't want to go into specifics, but I will say that there is evidence that is not circumstantial and is very much worthy of investigation, so that is what we ought to do," Schiff said.



Nunes claims some Trump transition messages were intercepted

By AUSTIN WRIGHT

The FBI is currently investigating any links between the Trump campaign and Russia and whether the two parties coordinated with Russia's suspected cyberattacks on Democratic Party officials before the election.

Trump and his aides have repeatedly denied any such wrongdoing. While Democrats have been raising questions about the president's relationship with Russia for months, no public evidence has emerged to tie him or his associates directly to the cyberattacks.

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Hunter Biden joins the team of Burisma Holdings



Press release

London, 12 May, 2014

Burisma Holdings, Ukraine's largest private gas producer, has expanded its Board of Directors by bringing on Mr. R Hunter Biden as a new director.

Mr. R Hunter Biden will be in charge of the Holdings' legal unit and will provide support for the Company among international organizations. On his new appointment, he commented: "Burisma's track record of innovations and industry leadership in the field of natural gas means that it can be a strong driver of a strong economy in Ukraine. As a new member of the Board, I believe that my assistance in consulting the Company on matters of transparency, corporate governance and responsibility, international expansion and other priorities will contribute to the economy and benefit the people of Ukraine."

The Chairman of the Board of Directors of Burisma Holdings, Mr. Alan Apter, noted: "The company's strategy is aimed at the strongest concentration of professional staff and the introduction of best corporate practices, and we're delighted that Mr. Biden is joining us to help us achieve these goals."

Mr. Hunter Biden is a counsel to Boies, Schiller & Flexner LLP, a national law firm based in New York, USA, which served in cases including "Bush vs. Gore", and "U.S. vs. Microsoft". He is one of the co-founders and a managing partner of the investment advisory company Rosemont Seneca Partners, as well as chairman of the board of Rosemont Seneca Advisors. He is an Adjunct Professor at Georgetown University's Masters Program in the School of Foreign Service.

4/7/2019

Hunter Biden joins the team of Burisma Holdings - Burisma

Mr. Biden has experience in public service and foreign policy. He is a director for the U.S. Global Leadership Coalition, The Center for National Policy, and the Chairman's Advisory Board for the National Democratic Institute. Having served as a Senior Vice President at MBNA bank, former U.S. President Bill Clinton appointed him an Executive Director of E-Commerce Policy Coordination under Secretary of Commerce William Daley. Mr. Biden served as Honorary Co-Chair of the 2008 Obama-Biden Inaugural Committee.

Mr. Biden is a member of the bar in the State of Connecticut, the District of Columbia, the U.S. Supreme Court and the Court of Federal Claims. He received a Bachelor's degree from Georgetown University, and a J.D. from Yale Law School.

R. Hunter Biden is also a well-known public figure. He is chairman of the Board of the World Food Programme USA which works together with the world's largest humanitarian organization, the United Nations World Food Programme. In this capacity he offers assistance to the poor in developing countries, fighting hunger and poverty, and helping to provide food and education to 300 million malnourished children around the world.

Company Background:

Burisma Holdings is a privately owned oil and gas company with assets in Ukraine and operating in the energy market since 2002. To date, the company holds a portfolio with permits to develop fields in the Dnieper-Donets, the Carpathian and the Azov-Kuban basins. In 2013, the daily gas production grew steadily and at year-end amounted to 11.6 thousand BOE (barrels of oil equivalent - incl. gas, condensate and crude oil), or 1.8 million m³ of natural gas. The company sells these volumes in the domestic market through traders, as well as directly to final consumers.

For more information contact the press office at media@burisma.com

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WORLD

Biden's Son, Polish Ex-President Quietly Sign On To Ukrainian Gas Company

Revelations that Hunter Biden and Aleksander Kwasniewski serve on the board of a company controlled by a Yanukovich ally raise serious conflict of interest questions for Western countries' Ukraine policy.

By Max Seddon

Posted on May 13, 2014, at 6:22 p.m. ET



Pool | Reuters

DONETSK, Ukraine — U.S. Vice President Joe Biden's youngest son has joined the board of a gas company owned by an ally of Ukraine's

fugitive ex-president Viktor Yanukovich and a key European

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the move raises questions about a potential conflict of interest for Joe Biden, who was the White House's main interlocutor with Yanukovich while the latter was president and has since spearheaded Western efforts to wean Ukraine off Russian gas.

Company documents in Cyprus show that Joe Biden's son, R. Hunter Biden, became a member of the board of directors of Burisma Holdings, which describes itself as Ukraine's largest private natural gas producer, on April 18. Burisma announced Hunter Biden's appointment in a [press release](#) Monday on its website which was quickly picked up by Russian state media.

"Burisma's track record of innovations and industry leadership in the field of natural gas means that it can be a strong driver of a strong economy in Ukraine," Hunter Biden said in the statement on Burisma's website. "As a new member of the Board, I believe that my assistance in consulting the Company on matters of transparency, corporate governance and responsibility, international expansion and other priorities will contribute to the economy and benefit the people of Ukraine."

Hunter Biden could not be immediately reached for comment. An assistant at Rosemont Seneca Partners, the investment firm where he is partner, said he was out of the office. A woman who answered the phone at the London number listed for Burisma on its website appeared to have no idea who either Biden was. By late Tuesday, however, Burisma had reacted quickly enough to remove a link to a *New York Times* [story](#) from April, when Biden visited Kiev and urged it to reduce its dependence on Russian gas, from a prominent position on the homepage.

Kendra Barkoff, a spokesperson for Joe Biden, denied to comment on the vice president's son's appointment. "Hunter Biden is a private

citizen and a lawyer, she said. The vice president does not endorse
BuzzFeed News Biden's Son, Polish Ex-President Quietly Sign On To Ukra

it proved difficult to discern at first whether the Burisma website carrying the press release was even real. Its photos of Hunter Biden and Rosemont co-founder Devon Archer, who is listed as a member of the Burisma board, are lifted from Rosemont's website. The company site carries a bizarre interview with Archer — apparently first published in the Ukrainian newspaper *Kapital*, then translated badly into English with Slavic syntax left intact — in which he tacitly acknowledges his connections to the Biden family and says Burisma "reminds [him] of Exxon in its early days." The Burisma site was registered anonymously through the domain service GoDaddy in 2010, according to the who.is service.

Company registration documents for Burisma show, however, that both Hunter Biden and Archer joined its board of directors in April. Burisma is completely owned by another Cypriot offshore company, Brociti Investments Limited, which, records show, belongs to Mykola Zlochevsky, who was energy minister and deputy national security council chair under Yanukovych, deposed in February. While in government, Zlochevsky claimed that he had sold his energy assets, though an investigation in Ukrainian *Forbes* later showed this was untrue.

As well as the other directors listed on Burisma's website, Cypriot records list a man named Aleksander Kwasniewski — the name of Poland's president from 1995 to 2005 — as having become a director Jan 2. Kwasniewski was a key figure in the European Union's attempts to draw Ukraine closer to Brussels during Yanukovych's presidency: he and former European Parliament president Pat Cox visited Kiev 27 times in failed attempts to secure the release of Yanukovych's rival, former prime minister and current presidential candidate Yulia Tymoshenko, from prison.

While it was not immediately possible to confirm that the Burisma director was the same Kwasniewski, the address provided in the

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 Journalist's home, Wilanowska 372 in Warsaw, writes Quintess

provided for Kwasniewski's wife Jolanta's real estate company, Royal Wilanow Agency, according to Polish media reports. Other Polish media reports list the address as the Kwaniewski family's private apartment. Jolanta Kwasniewska left the firm while her husband was in office, but returned to manage it after his term ended.

Kremlin spokesperson Dmitry Peskov told BuzzFeed that Russia saw no conflict of interest in Joe Biden working to wean Ukraine off Russian gas - which makes up about 60 percent of the country's energy supply - while his son worked in the Ukrainian gas industry.

"Anyway, as everyone knows, there's no gas in Ukraine," he added. "The gas in Ukraine is Russian."

Rosie Gray contributed reporting from Washington, DC.



Max Seddon is a correspondent for BuzzFeed World based in Berlin. He has reported from Russia, Ukraine, Azerbaijan and across the ex-Soviet Union and Europe. His secure PGP fingerprint is 6642 80FB 4059 E3F7 BEBE 94A5 242A E424 92E0 7B71

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Biden's Son, Polish Ex-President Quietly Sign On To Ukrainian Gas Company

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Pool / Reuters

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joined the board of a gas company owned by an ally of Ukraine's fugitive ex-president Viktor Yanukovich and a key European interlocutor with Kiev who was previously president of Poland.

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the vice president's son's appointment. "Hunter Biden is a private citizen and a lawyer," she said. "The Vice President does not endorse any particular company and has no involvement with this company."

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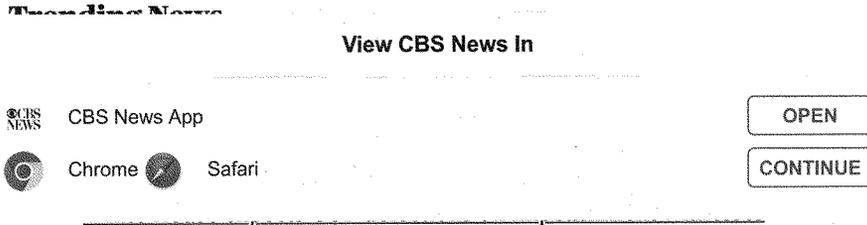
A guide to Trump's past comments about NATO

BY SHAYNA FREISLEBEN
APRIL 12, 2017 / 4:06 PM / CBS NEWS

President Donald Trump met on Wednesday with North Atlantic Treaty Organization (NATO) Secretary General Jens Stoltenberg at the White House. Past meetings between American presidents and NATO leaders have seldom seen such a contentious lead-in.

Despite words of praise for NATO at their joint news conference, Mr. Trump has repeatedly questioned NATO's purpose and efficacy, calling it "obsolete," while charging that the United States is saddled with paying an unfair share as a member. It was one of Mr. Trump's most consistent messages in the months preceding his election. But if his views are strongly held, they're relatively newly formed. The only mention of NATO on his Twitter feed before he hit the campaign trail was [a single 2012 tweet](#) lamenting that Israel, not a NATO member, was excluded from a NATO gathering in Chicago.

Here's a comprehensive look at Mr. Trump's past comments about the military alliance.



March 21, 2016 -- then-candidate Trump meets with the Washington Post's editorial board. He describes NATO as an anachronism from a more affluent American time:

“NATO was set up at a different time. NATO was set up when we were a richer country. We’re not a rich country anymore. We’re borrowing, we’re borrowing all of this money...NATO is costing us a fortune and yes, we’re protecting Europe with NATO but we’re spending a lot of money. Number one, I think the distribution of costs has to be changed. I think NATO as a concept is good, but it is not as good as it was when it first evolved.”

March 21, 2016 -- Trump participates in a CNN town hall later the same day. He’s asked directly about NATO by host Wolf Blitzer, and again cites the costs to the U.S.

CNN’s Blitzer: Do you think the United States needs to rethink U.S. involvement in NATO?

Trump: Yes, because it’s costing us too much money. And frankly they have to put up more money. They’re going to have to put some up also. We’re playing disproportionately. It’s too much. And frankly it’s a

different world than it was when we originally conceived of the idea.

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“Mr. Trump struck similar themes when he discussed the future of NATO, which he called “unfair, economically, to us,” and said he was open to an alternative organization focused on counterterrorism.”

March 27, 2016 -- Trump sends one of his earliest campaign-season tweets about NATO:

My statement on NATO being obsolete and disproportionately too expensive (and unfair) for the U.S. are now, finally, receiving plaudits!

– Donald J. Trump (@realDonaldTrump) March 27, 2016

April 2, 2016 -- Trump doubles down on NATO criticism at a Racine, WI campaign rally, but admits he's only a recent study on the NATO topic:

“I said here's the problem with NATO: it's obsolete. Big statement to make when you don't know that much about it, but I learn quickly.”

April 8, 2016 -- “Looks like I was right about NATO,” Trump tweets, linking to a Foreign Policy article about other Republican senators arguing over NATO allies' laggardly defense spending:

Looks like I was right about NATO. I had no

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criticism prompted the move:

See, when I said NATO was obsolete because of no terrorism protection, they made the change without giving me credit. <https://t.co/sRCF1H3rjg>

– Donald J. Trump (@realDonaldTrump) June 6, 2016

July 17, 2016 -- Trump and running mate Mike Pence are interviewed by CBS News' Lesley Stahl on 60 Minutes; she asked Trump to explain how he would tackle the fight against ISIS as president. NATO was invoked:

“We’re going to have surrounding states and, very importantly, get NATO involved because we support NATO far more than we should, frankly, because you have a lot of countries that aren’t doing what they’re supposed to be doing.”

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“If we cannot be properly reimbursed for the tremendous cost of our military protecting other countries, and in many cases the countries I’m talking about are extremely rich...we have many NATO members that aren’t paying their bills.”

July 20, 2016 -- Trump softens his rhetoric, somewhat, on NATO; in a tweet, he does not refer to the military alliance “obsolete,” instead calling for fellow members to “pay their bills”:

Wow, NATO's top commander just announced that he agrees with me that alliance members must PAY THEIR BILLS. This is a general I will like!

– Donald J. Trump (@realDonaldTrump) [July 30, 2016](#)

January 15, 2017 -- in a joint interview, post-election, pre-inauguration, with the Times of London and Germany’s Bild, Trump reflects on his “obsolete” comment, but insists he was both correct and vindicated:

“I took such heat, when I said NATO was obsolete. It’s obsolete because it wasn’t taking care of terror. I took a lot of heat for two days. And then they started saying Trump is right.”

CNN Poll: The nation remains divided on impeachment as House vote approaches

 [cnn.com/2019/12/16/politics/impeachment-poll-cnn/index.html](https://www.cnn.com/2019/12/16/politics/impeachment-poll-cnn/index.html)

December 17,
2019



(CNN)The American public is about evenly split over whether President Donald Trump should be impeached and removed from office, according to a new CNN Poll conducted by SSRS, with the House of Representatives poised to vote on articles of impeachment this week.

RELATED: Full poll results

Support for impeaching Trump and removing him from office stands at 45% in the new poll, down from 50% in a poll conducted in mid-November just after the conclusion of the House Intelligence Committee's public hearings. Opposition to impeachment and removal stands at 47% in the new poll, up from 43% in November. Support for impeachment and removal among Democrats has dipped from 90% in November to 77% now.

That finding comes even as public views on the facts driving the impeachment process have held steady. Americans are about evenly divided over whether there is enough evidence against Trump for the House to vote to impeach him and send the case to the Senate for trial (47% say yes, 48% no, about the same as in November). And a narrow majority (51% now, 53% in November) continue to say Trump used the presidency improperly in his interactions with the President of Ukraine by attempting to gain political advantage against

a possible 2020 rival.

The poll finds that Trump's approval rating has also held steady in the last month: 43% currently approve of the way he is handling his job, 53% disapprove.

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House panel approves articles of impeachment against Trump

Looking ahead to a possible Senate trial should the House vote in favor of impeachment, half of adults (50%) say it is not at all likely that anything that might come up during that trial would change their minds on removing Trump from office. That is lower than the 59% who said they were not at all likely to change their minds about removing Bill Clinton from office in 1999 ahead of his Senate trial.

Among the 24% who say a Senate trial on the charges facing Trump would be at least somewhat likely to sway their views, 19% are currently undecided about impeachment and removal, 38% support it and 43% oppose it.

About a third of Americans (32%) believe the impeachment inquiry will ultimately help Trump's reelection bid, while 25% say it will hurt his chances and 37% say it will make no difference. Republicans are fairly bullish on the impact it will have for the President, with a majority of Republicans (54%) saying they believe it will help Trump in 2020. Among Democrats, 40% believe it will hurt the President's shot at a second term, while 38% believe that it will make no difference.

Across 15 battleground states which could decide the election in 2020, views about impeaching and removing Trump are just as divided as they are nationally. In these states -- all of which were decided by 8 points or less in 2016 -- 46% say Trump should be impeached and removed, while 45% say that he should not. But residents of these states also lean toward believing Trump did improperly use his office to gain political advantage in next year's election: 50% say yes, 45% no.

Nationwide, those who support impeaching Trump and removing him from office are more apt to say they do so because of the particular offenses raised in the impeachment inquiry than for his overall behavior. Nearly nine in 10 who support removing Trump from office say a major reason they do so is because they believe he "sought foreign assistance to benefit his 2020 presidential campaign," or because "Trump used his office improperly to gain political advantage in the 2020 presidential election." More than eight in 10 in this group say a major reason they back removal is because "Trump has obstructed Congressional attempts to investigate his administration." Fewer, 68%, say a major reason they support impeachment and removal is because of other impeachable offenses Trump has committed which are not covered in the charges the House is considering, while 50% say a major reason to back it is because Trump is doing a bad job running the country.

READ: Full House Judiciary Committee impeachment report

Those who oppose impeaching and removing Trump, however, are more likely to cite Trump's overall job performance (64%) than his innocence (56%) as a major reason to oppose impeachment and removal. About two-thirds say a major reason to oppose impeaching and removing Trump is because he has been "the victim of an unfair

investigation" (66%), and 64% say a major reason they oppose impeachment is because they do not think "the offenses Democrats say Trump has committed rise to the level of an impeachable offense."

Attention to the impeachment proceedings has held steady compared with last month, with about three-quarters (76%) saying they are following at least somewhat closely and about a quarter (23%) largely tuned out.

Both major parties and the President generally receive negative reviews for their handling of the inquiry, and the leaders of both houses of Congress have seen drops in their favorability ratings.

Overall, 42% approve of the way Democrats in Congress are handling the current impeachment inquiry, while 49% disapprove, about the same as in October. Republicans fare slightly worse (37% approve of their handling of impeachment), but that's better than in October, when 30% approved. Forty percent say they approve of Trump's handling of the inquiry, 52% disapprove.

House Speaker Nancy Pelosi has seen her favorability rating dip from 44% in October, just after she announced the opening of an impeachment inquiry, to 39% now, with the dip concentrated among independents. Senate Majority Leader Mitch McConnell remains less well known than Pelosi (26% say they don't know enough to have a view on McConnell). His favorability rating stands at 25% in the poll, down from 30% in late January. His favorability rating has dipped more among Republicans than others.

The CNN Poll was conducted by SSRS December 12 through 15 among a random national sample of 1,005 adults reached on landlines or cellphones by a live interviewer. Results for the full sample have a margin of sampling error of plus or minus 3.7 percentage points.



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September 20, 2018 03:05 PM

Top Dem: Trump impeachment would have to be bipartisan

Rep. Jerrold Nadler vows not to "tear the country apart"

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Buck Ennis

The Democrat positioned to spearhead any potential impeachment of President Donald Trump won't pull the trigger on proceedings without GOP backing.

That was the message that Rep. Jerrold Nadler, the ranking member of the House Judiciary Committee, delivered at a *Crain's* breakfast forum Thursday morning. Nadler, a 13-term Democrat representing parts of Manhattan and Brooklyn, has feuded with Trump for decades, and he will almost certainly become the committee's chairman if Democrats capture the House this fall.

But even though that committee would be charged with holding any initial inquiries into the conduct of the president and filing articles of impeachment, Nadler insisted he would only pursue that course under specific circumstances—including securing at least some Republican support.

"Impeachment should not be partisan," Nadler said. "You have to be in a situation to undertake impeachment where you believe that once all the evidence is public, not a majority but a good fraction of the opposition voters who supported the president would say, 'Well, they had to do it. It was the right thing to do.'"

Moderator Greg David, a *Crain's* columnist, recalled that the Manhattan-Brooklyn congressman opposed the impeachment of former President Bill Clinton in the late 1990s, even though the Democratic commander in chief had committed perjury.

"An impeachable offense is not a crime," Nadler said, but rather an action or policy that poses a direct threat to the institutions and Constitution of the United States.

"Perjury about a private sexual affair has nothing to do with anything," Nadler said. "If the president perjured himself about colluding with Russians, that would be worthy of impeachment. Perjury about some real estate deal that happened 10 years ago that the Trump Organization took, that would not be an impeachable offense. It would be a crime."

Rep. Hakeem Jeffries, a fellow Judiciary Committee member who also spoke at the *Crain's* forum, echoed Nadler. He said Republicans—not Democrats—were fomenting rumors of impending impeachment proceedings as part of an effort to rile the GOP base ahead of the midterm elections.

"The drum for impeachment is not being beat by House Democrats or Senate Democrats. It is being beat by the president and his co-conspirators on the other side," Jeffries said.

"This notion that as soon as we get the gavel, the first thing we're going to do is march toward impeachment couldn't be further from the truth."

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glsfbg • a year ago

How does Congressman Nadler feel about Maxine Waters` Keith Ellison, Al Green, etc. who are very vocal about impeachment? Green has already entered articles of impeachment more than once.

^ | ▾ • Reply • Share ▾

StanChaz → glsfbg • a year ago • edited

I do believe that despite Trump we still have something called freedom of speech. Unlike the Republicans who have sold their souls and values to Trump in exchange for tax-cuts to the wealthiest as they march with him like lemmings, Democrats, on the other hand, still value diversity of opinion, and practice it. Congressman Nadler and his rational views will be the deciding factor with regard to possible impeachment should the House turn Republican in November.

At the very least things should be brought out into the open, into the sunshine of legitimate investigations, rather than being hidden and subverted in the sham circus that we today have in Congress under Republican rule.

^ | ▾ • Reply • Share ▾

glsfbg → StanChaz • a year ago

You didn't answer the question. I didn't expect you to.

^ | ▾ • Reply • Share ▾

Susan Jones • a year ago

The democrats screaming with there fists up in the air because they are so lazy not to work for the people who put them there in the first place. The dems are the lazy party and it shows, They all need to be voted out of office and we need term limits to get these old farts out. We need campaign reform so Nancy P. won't be giving out her millions from super pac fun money. Come on democrats get DACA and immigration reform passed and a budget. Democrats and liberal media drag this country down.

^ | ▾ • Reply • Share ▾

StanChaz → Susan Jones • a year ago • edited

Seems like you're the one screaming about others screaming...

Perhaps we'll get you a mirror my dear Susan, a real one

-- instead of the funhouse mirror you're using that projects all your Party's faults onto the Dems.

Come on Republicans, save your own skins and join the coming blue wave.

Lifeguard Trump doesn't give a damn about you.

For it's all about Trump Inc. & him - a man who erroneously thinks he's above the law.

I find it amusing that Republicans embrace being labeled as red, because as in the old slogan of "better red than dead" they indeed are the traitors of today in enabling Trump, not only in his embracing of Putin, but also in his undermining the most valuable institutions of our American society, our separation of powers, and our international relationships - not to mention the fourth estate. When he's not golfing that is.

What's truly dragging this country down is that snake-oil-salesman & wanna-be-dictator called Donald Trump - our tantrum-twittering, racist-ranting, war-hero-dissing, health-care-destroying, lobbyist-loving, tax-evading, tariff-crazed, wife-cheating, mistress-bribing, kids-in cages & bone-spur-Putin-loving-traitorous Liar-In-Chief, --our sorry sorry excuse for a President. When he's not busy dividing or distracting us and shamelessly creating fake scapegoats, this con-man is selling us off to the highest bidder, or selling us out to our lowest low-life enemies, as he furthers Trump Inc. and the agendas of his ultra-rich buddies & comrades.

1 ^ | v • Reply • Share >

Dan G → StanChaz • a year ago

I agree with Stan. Trump hates Canadiens too, you left that out Stan.

^ | v • Reply • Share >

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SPEECH: DONALD TRUMP DELIVERS A SPEECH IN GRAND RAPIDS, MI - DECEMBER 21, 2015

Ford China Trump Mexico president great guy

Positive

Donald Trump



1

And you know, I brought him here. So the poll comes along, every single poll, there are 11 of them right here. See the name, Trump on top? By keeping them small. Small. But every single poll that they took for the debate, who won the debate? Who won? And it's sort of interesting because the Fox poll, which came out and it's a big one and a good one, which came out three or four nights after the debate had me up 11 points, 11. And I was already leading.

single poll Fox poll poll

Positive

Donald Trump



2

And then I said, I guess, I won the debate, right folks? You know, so we -- they had 11 polls and they had Drudge, who's a great guy, 46%. That's at 46% of the vote out of 15 people. That's a lot. I would honestly take right now 46% of three people, but this is 15 people. By the way, sadly, I guess you heard, Lindsey Graham left the race tonight.

46% Lindsey Graham way race tonight

Positive

Donald Trump



3

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Sad, very sad. I'm extremely said. He was nasty to me, wasn't he? Nasty. You see how many – everybody that goes against me is like X, X. So we started off with 17. I won't say how many left but a lot of people are starting to leave. They're going to start to leave. But everybody that's going – wouldn't it be nice – that should happen with our country.

lot of people country that's

Negative

Donald Trump



4

Everybody goes against us, down the tubes. Sort of interesting, right? Sort of interesting. So I'll go through fast. So this is on the debate. This – The night of the debate, hundreds and hundreds of thousands of people voted. Who was number one in the debate? I was. I love you too. So who is number one?

night of the debate debate number

Positive

Donald Trump



5

Trump. Drudge, 46%. Time magazine. They didn't even give me the man of the year or the person of the year. They should have. That's why it's heading down the tubes, folks. They gave it to a woman, who has not done the right thing in German. It's not doing too well over there. Nice woman. I like her. I like her.

Time magazine 46% right thing Nice woman

Negative

Donald Trump



6



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Press (https://blog.factba.se/): Let me like her. Emay have to deal with it. Look, he's Putin likes me, I want her to like me too, right? Right? You know, it's sort of funny. So Putin out of nowhere – I never met Putin. But we were on 60 Minutes together. Not together, but together, meaning I had a segment, he had a segment. We got tremendous ratings on that show.

Putin 60 Minutes tremendous ratings segment

Positive

Donald Trump



7

I took full credit. I said, if it wasn't for me, they wouldn't. But We didn't meet. So we were stable mates sort of sense, right? It was he and I on 60 Minutes like five, six weeks ago, and it was great. And he came out of nowhere two days ago and he said, 'Trump is brilliant. He's great. He's the leader.'

leader 60 Minutes six weeks two days stable mates sort of sense didnt meet full credit

Positive

Donald Trump



8

He's the leader of the parties. And he said nice things. I didn't know. I never met him. So I didn't know. And he said nice things. All of a sudden, I'm hearing things like, oh, isn't it terrible that Putin is saying that. That's not terrible. That's good. That's like a good thing, not a bad thing. He can't stand Obama.

leader Im hearing things good thing cant stand Obama

Negative

Donald Trump



9



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Obama can't stand him. They're always fighting. Wouldn't it be nice if we could get along like with people (did 1213702329)
You know? It's unbelievable. No, no. Think of it, you know, it's Russia after all. Somebody said, are you at all
offended that he said nice things about you? I said, no, no. And they said, oh, Trump should have been much
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Obama Obama cant nice things Trump

Negative

Donald Trump



10

That's terrible. And then they said, you know, he's killed reporters and I don't like that. I'm totally against that. By the way, I hate some of these people, but I'd never kill him. I hate him. No, I think - no, these people, honestly, I'll be honest, I'll be honest. I would never kill them. I would never do that.

way people reporters

Negative

Donald Trump



11

Let's say, no I wouldn't. I would never kill them, but I do hate him and some of them are such lying, disgusting people. It's true. It's true. But I would never kill them and anybody that does I think would be despicable. But you know, nobody said - they say, he killed reporters. I said, really? He says, he didn't. Other people say he didn't. Who did he kill?

nobody such lying disgusting people

Negative

Donald Trump



12



I don't know but we hear that. I said, tell me who did he kill? And I go through this whole thing. It's great if we could get Russia on our side and other countries on our side and knock the hell out of them, right? Right? So stupid. Just knock the living hell out of them.

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Donald Trump



13

Remember I said, take the oil, right? For years I've been saying that. For years I've been and – Look, we have people running this country, who are stupid, who are stupid. I went to an Ivy League school. I'm very highly educated. I went to the best business school in the world, the Wharton School of Finance.

Wharton School of Finance Ivy League school years Ive best business school

Positive

Donald Trump



14

Somebody said, he's plainspoken. I don't have to be plainspoken. I have like this incredible vocabulary. But honestly, how can I describe our leaders better than the words stupid? Really, right? There's no word. There's no word. You know, I used to say grossly incompetent. But stupid stronger, isn't it? I don't know.

Somebody incredible vocabulary leaders words

Negative

Donald Trump



15

You look – Bye bye. Bye bye. Hard to believe. USA. USA. USA. USA. So unbelievable. But I'm really trying to be really neutral. To one guy I said, get him out of here now. And they said the next day, it was horrible, horrible the way Trump talked. I mean the guy was a bad guy. It was terrible what he was doing.



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Donald Trump



16

But I was very rough, I said get him out of here. OK, so the next day, they come out and they say, that was horrible the way the Trump – the next day, I had another big one, 21,000 people. I had one guy. One guy was like he went a little crazy. And I was very nice I said, please remove him but be very nice.

[guy](#) [next day](#) [way](#) [Trump](#)

Positive

Donald Trump



17

And if he wants to come back, let him. You know what they did the next? So the first day, he was terrible. He was rough. The second day – I was going to tell you the second day but you know, do you ever noticed how few it is and they will make it tomorrow sound like this was the biggest – we had 9,000 or 10,000 people in here.

[biggest](#) [second day](#) [first day](#) [people](#)

Negative

Donald Trump



18

They'll talk about one guy or two guys – headline, Trump had tickets. They had like three people. There was nobody outside. No, no. They set a site, a picket area. Said, nobody showed up. They will talk about the guy that just got taken out in about two seconds. So what happened, I was rough with the first guy.

[two seconds](#) [They'll talk](#) [guy](#) [first guy](#)

Negative



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Donald Trump



19

Then the second, I was really not because I got a lot of bad press that I was too rough. I wasn't nice. So the second guy was – the second event, I said, be really nice to him. Please, don't hurt him, please. And he was a bad guy. He was a rough guy, who's swinging at them. He was – you know, they were in fistfights.

guy fistfights second guy second event lot of bad press

👎 Negative

Donald Trump



20

I mean I'm telling these guys to be nice. In the meantime, I'm standing up here. They have to take him on, right? But I'm saying, please, be gentle. If he'd like to come back later – I was so nice. So the next day, Trump was off his game. He was very, very weak. So you can't win with these people. So you're too tough, you're too this, you're too that.

guys next day your meantime

👍 Positive

Donald Trump



21

They're bad people. I'll tell you the only thing I love – in fact, sometimes I'm going to do it myself. They never turn the camera, right? I've told you. You've heard this. They never turn the camera around. The thing I like about a guy like that or a guy like wherever the hell, the cameras move. They won't turn the cameras.

people only thing bad people thing

👎 Negative



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Donald Trump

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22

So when I go home. I'm proud of – nobody gets audiences like I getting. Number one with the heart, right? Nobody. Nobody gets audience. We go, I get 35,000 in Mobile Alabama. I get 20,000. I mean, we get tremendous audiences. And Dallas was incredible, 21,000 people. Every place we go, it's packed. It's sold out.

Dallas Alabama Mobile Alabama place tremendous audiences

Positive

Donald Trump



23

It's all guided by the size of the venue. Look at this venue, the biggest – I don't know when it was built. When was this venue built? Where's the owner? He was very nice. We gave – he gave me a nice discount. Where's the owner? Where is the owner? We beat the hell out of him, but he's a good guy. He gave us a pretty cheap price.

size of the venue cheap price hell

Positive

Donald Trump



24

I must tell you. Where is he? Anyway. Well – however old it is. I mean we broke the record and I don't have a guitar. No guitar, you know? Elton John said, you get the biggest crowds in the world for a guy without a guitar, meaning you know without music, which is pretty good. So we're having an amazing time.

Elton John biggest crowds world

Positive



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Donald Trump

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25

The subject is a tough subject because our country is doing poorly. We don't win. We're being laughed out all over the world. We're soft. We're weak. We have guys like Bergdahl, who get caught – I mean he left. He was a deserter. He was a deserter. He was a dirty rotten deserter. And we lost five and maybe six young great brilliant wonderful people trying to bring him back.

🔍 tough subject 🔍 great brilliant wonderful people 🔍 guys

🗨️ Negative

Donald Trump



26

They were killed, right? So he deserts. Now 60 years ago, they would have been shot within a very short period of time, right? Twenty five years ago, probably shot. Ten years ago, long-term in prison. Now I hear he's going to get off scratch free, why? No no. Think of it. And then we traded this guy who as far as I'm concerned, we could take him, drop him right back in the middle.

🗨️ guy 🔍 long term 🔍 short period of time

🗨️ Negative

Donald Trump



27

We traded – Hello. Hey cameras, turn around there's another guy up there. The only time the camera will move is to see somebody like bye bye. That was the same guy fell as he came back in for seconds. What? No but it's sort of amazing. I have to finish the thing. So they never show the crowds. They always show my face and I have a big ego.

🔍 only time 🔍 cameras 🔍 face

🗨️ Negative



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28

I like, I like when they – but my wife said, how many people were at the event? Oh, it was packed. Oh, I said, what do you think? Well, I heard big noise but they only showed your face. They never move the camera. So I love your face too. He's a handsome guy. So I love him. We're all in love. Every place I go, it's a love fest.

big noise handsome guy place

Positive

Donald Trump



29

I'm telling you folks, there's a movement going on. We're tired of what's happening. We're gonna take our country back. We're gonna take it back. We're gonna take it back. But I want the cameras to span the room. Go ahead fellas, watch. They don't turn them. They don't turn them. They don't turn them. Go ahead turn them.

movement should fallas im folks

Positive

Donald Trump



30

Look, turn the camera. Go ahead, turn the camera ma'am. Turn the camera. You with the blond hair, turn the camera. Show the room. Go ahead. They don't turn them. What about hey, you in the center, why don't you turn your camera? Show them how many people come to these rallies. Turn them. Go ahead. Turn them.

blond hair center camera ma'am

Positive



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31

Go ahead. They did? Thank you. That's the first time they've ever done that. Thank you. That's the first time. Amazing, amazing. Because what's going on is amazing and I'm telling you, it's a love fest. A friend of mine, very successful guy. He said, how many people tonight? I said, I don't know. It holds like 7,500. I think they have like 10,000. He said, what do you do? I said, they stand in the halls.

🔍 first time 🔍 successful guy 🔍 friend

👍 Positive

Donald Trump



32

They stand all over the place. There are people outside that can't get in. Shall we wait a little while and let them get in? I don't think so, right? But no, they have people outside. They can't get in. And he said, how do you do that? Because I don't have a teleprompter, right? No teleprompter, right? I don't want a teleprompter.

🔍 people 🔍 place 🔍 cont

👎 Negative

Donald Trump



33

You speak from the heart and the brain. You got a – the brain, very important. But he said, how do you do that? And here's a guy, very, very rich, very successful guy. I said, you speak and it's easy because there's so much love in the room. It really is true. There is love in every room, whether I'm in Oklahoma, whether I'm in Dallas, whether I'm in Iowa, whether I go into I mean North Carolina, South Carolina.

📍 North Carolina 📍 South Carolina 📍 Oklahoma 🔍 much love

👍 Positive



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34

New Hampshire is through the roof. There's love. I'm telling you folks, there's love in the room. We are going to turn this around. We're gonna get this country going again. There's love in the room. And you see Hillary – I mean, did you watch that? What happened to her? She's terrible. She's terrible. Donald Trump is on video and ISIS is using him on the video to recruit.

New Hampshire ISIS Donald Trump video

Positive

Donald Trump



35

And it turned out to be a lie. She's a liar. No, it turned out to be a lie. Turned out to be a lie. And the last person that she wants to run against is me. Believe me. Believe me. You know, I was just with somebody from ABC. I won't mention him. And he said, oh the Hillary camp said they'd love to run against Trump.

ABC Hillary camp last person

Negative

Donald Trump



36

Of course, they're gonna say – that's what they want to say. I mean, it's gonna be very – ask Jeb Bush if he enjoys running against me. Seriously, ask him. In all fairness, ask Lindsey Graham. Did he enjoy running against Trump? Ask Perry, Governor Perry. Nice guys. All nice guys. Ask Bobby Jindal. He's back in Louisiana, which is a great state, by the way.

theyre gonna Jeb Bush great state

Positive



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37

And they don't like him very much anymore over there. Ask all of these guys that have gone out, do they enjoy running against Trump? They don't enjoy it. They don't enjoy it. I enjoy it. They don't enjoy it. I mean people have said that Jeb Bush -- you know, he's low energy. People have said that if I, if I didn't run, this thing would have been over already.

gays Jeb Bush people low energy

👍 Negative

Donald Trump



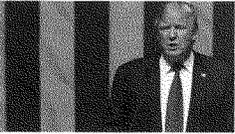
38

He would had it. Why? For what reason? I mean, I don't know why. But they say, he would have had it. He's gonzo. He's down to 2%. And you saw they gave him during the debates a couple of soundbites. He goes like this, you could see it right here. He memorized it. Mr. Trump, I mean Donald, uh, uh. And I said, Jeb, I've got 42. You've got 2. We started off, you were here, I was here always in the center.

2% Mr. Trump couple of soundbites Jeb

👍 Negative

Donald Trump



39

Now you're way down there and the next time you won't even be on the stage. Look, I love running against Hillary. I love running against her. Are you with me or against me? Oh, he's with me. Oh, oh, oh. You know, I'm looking at this guy and he's going crazy and I thought he was a protester. They'll say, he was a protester.

protester youre way next time guy

👍 Positive



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40

But he's got he's got a beautiful red, make America great hat on. Make America great, make America great again. OK, we like you. We're not gonna throw you out, OK? No, I see this guy, looks like a nice guy. He's going crazy but he's on our side, right? You're on our side. I like that. So look at this, the press just came out of the cage.

America has nice guy guy

Positive

Donald Trump



41

They just came out of the cage. So, so Hillary is gonna get beaten, but I haven't started with Hillary yet. What happened to her? I'm watching the debate and she disappeared. Where did she go? Where did she go? I thought she quit. I thought she gave up. Where did she go? Where did Hillary go? They had to start the debate without her.

Hillary debate cage

Negative

Donald Trump



42

Phase two. Why, I know where she went. It's disgusting. I don't want to talk about. It's too disgusting. Don't say it. It's disgusting. Let's not - we want to be very, very straight up, OK? But I thought that - wasn't that a weird deal? We're ready to start. They were looking. They gave her every benefit of the doubt because you know, it's ABC and she practically owns ABC.

ABC benefit of the doubt weird deal

Negative



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43

She really does. I mean George Stephanopoulos interviewed me the other day. It was terrible. It was like it was one of the great interviews. Did anybody see that interview? But you know, he's a big, he's a big Hillary fan. Tonight, I was interviewed by another Hillary fan from ABC. He's all right. He's OK. Relax, relax, relax.

anybody George Stephanopoulos big Hillary fan great interviews

Positive

Donald Trump



44

Take it easy. He's very committed. Relax. He's actually a Trump guy. He's just -- he's got a lot of energy. OK. OK. OK. Sit down. Come on, relax, relax. He's on our side. Who would know it? But he's on our side, I think. So I look forward to running against Hillary. We're gonna beat Hillary. You know what happened?

guy Trump Hes side Hillary

Positive

Donald Trump



45

I backed John McCain. He lost. And that was a tough one in all fairness because I would say things weren't exactly going great. But he lost. And then I backed Mitt Romney. He should have won. He should have won. That was a race. We had a failed president and that was the race that should have been won and it should have been won easily.

John McCain Mitt Romney fairness

Negative



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46

And something happened. He went away, right? Oh don't hurt him. Don't hurt him. Be very nice. Be very nice. Yeah, be nice to him. Don't hurt him. See how nice I'm being. I'm only doing it for them you know that. Don't hurt him. Tell me -- I love you too man. Look at you, how handsome you are. Look, is there more fun than a Trump rally?

something nice Im Trump rally fun

Positive

Donald Trump



47

Is there more fun? [Audio gap] No tax, no nothing. And everyone says, oh free trade. I'm a free trader. I love free trade. But it's gotta be smart trade. They can't take our jobs, take our base. They can't take, they can't take our money and then you get accused, oh, he's not a free trader. No, no. It's got to be fair.

cant free trade Audio gap

Positive

Donald Trump



48

They can't come in and take your factories and have cars made in Mexico and have cars made in Japan and have cars made all over the place except here. And you have your closed plants all over the place, and you guys are looking for jobs. It's a disgrace. And by the way, I'll tell you the one big thing that really helps me now.

Mexico Japan big thing cars way

Negative



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49

You are really making great cars now. That's really helps me because for a while it was getting a little bit sticky there, right? It was getting a little bit little – a little bit sticky. But you're making great cars. And I'll tell you just a couple of things I always talk about. Has anyone heard what I said about the Ford company, Ford?

Ford little bit Ford company couple of things

Positive

Donald Trump



50

Has anyone – I tell that story, you heard it. Has anyone heard that story? Yes. Do you want to hear it again? OK, I'll tell you. So politicians are controlled by their donors and special interests and lobbyists. That's they control. Companies pay these lobbyists hundreds of thousands of dollars a month, even millions of dollars a month and they go in and they give Bush and they give – look, I don't want to get involved.

special interests Companies dollars

Positive

Donald Trump



51

Rubio, this one, this one, this one, this one and everybody. Except me. I'm the only one that's self funding. I'm the only one. Oh, it's the only one. I'm the only one. They gave Hillary a fortune. They're all giving these people. The insurance companies, the car companies, other countries, by the way. How do you honestly think?

insurance companies only one thats self funding car companies

Positive



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52

Look, these aren't stupid people. How do you honestly think that China does so well? Is it because we're so stupid? And we are. But do you think they're so stupid? They're not that stupid. China does well. They have so many lobbyists. They have so many people representing their interests. Well, it's just, it's just I can't believe that it can happen.

China arent stupid people interests

Negative

Donald Trump



53

What's gonna happen is this and I tell the story of Ford. Ford is now building a \$2.5 billion plant in Mexico, right? We know that, right? No, no, think of it. Now you guys know the automobile business better than anybody, better than I do or ever will. All I know is I know how to keep, you know, people working because nobody – you know, I have created tens of thousands of jobs over my lifetime.

Ford story of Ford automobile business people

Negative

Donald Trump



54

I'm really good at it. I'm really good at it. So that's what I know. But you know the car industry. So Ford, good company. I like Ford. In fact, the president wrote me a beautiful letter talking about well, you know, it wasn't that bad. But he hardly mentioned what he was doing. He said, you know, how well the company – he didn't want to mention this.

president Ford president beautiful letter good company fact

Positive



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55

So Ford spending \$2.5 billion. That's the biggest point. Can you imagine a one story plant \$2.5 billion. That's a lot. That's a big plant, right? And it's gonna be in Mexico and they're gonna build trucks, cars and parts. And they're gonna make these things and they're gonna ship them all over maybe the world.

Ford Mexico \$2.5 billion they're gonna build trucks they're gonna

Positive

Donald Trump



56

I don't know. I don't care about the world. But they're gonna ship them into this country, no tax, nothing. Now, I'm all for it if we get something. We don't get anything. What do we get for it? The Wharton School of Finance, got to get some. We get nothing. We lose plants. They close your plants.

Wharton School of Finance they're gonna country

Negative

Donald Trump



57

And you're one of the -- I tell about the Ford plant. But usually, I'm not in Michigan. Usually, I'm someplace else where they care less about cars. They care about other things, right? Here, we care seriously about cars, right? We like cars, right? So, so Ford, \$2.5 billion, they gonna build a plant. They're gonna make these cars.

Ford Im someplace They're gonna Ford plant

Positive



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They're gonna be fine. They're gonna ship them in. No tax, nothing. Where do we benefit other than – what happens is, you're closing plants, all over, mostly Michigan, but you're closing plants. Now Tennessee had a problem because Tennessee was all set to get one of the big plants. One of the foreign companies was coming in. They're all set.

Tennessee Michigan foreign companies They're gonna

🗨️ Negative

Donald Trump



59

The deal was ready to be inked. And all of a sudden, boom, it was announced they're going to Mexico. Mexico is going to become the car capital of the world. You better be careful. Watch. Not with me as president. It's not, by the way. Not with me. Not with me. So here's what happened. So Jeb Bush and Hillary and others – I don't even know why I mentioned Jeb.

Mexico president Jeb Bush Jeb Hillary

🗨️ Negative

Donald Trump



60

You know what happens is this. Look, it's sad. It's very sad. His family is so ashamed. Look, sad. No you know why I don't like it? Spending millions of dollars of advertising on me, negative ads on me. He's got to get through about seven other guys before it gets to me. Why isn't he spending on other people?

dollars of advertising negative ads family

🗨️ Negative



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So here's the story. So they are given – I think he has \$128 million. Now, a lot of it has been spent. Think of this, think of this. The person that spent the least by far is Donald Trump. And I'm in first place by a lot. Is that great? The person that spent the least is Trump. The person that spent the most is Jeb Bush.

[\\$128 million](#) [Jeb Bush](#) [first place](#) [Donald Trump](#)

Positive

Donald Trump



62

Spent \$55 million, \$55 million and he's down at the bottom of the barrel, practically. Now wouldn't it be nice if we could do that for our country? Spend the least and get the best production. Now, I'm going to be spending a lot. I thought – again, I'm spending my own money. I'm the only one. I'm self-funded.

[im self](#) [best production](#) [im](#)

Positive

Donald Trump



63

But listen to this. I thought I'd be at about \$35 million to this point. You know, I'm prepared for it. I don't care. Whatever it costs. I mean, whatever – hey, look, if I see I'm doing poorly. I'm doing poorly. But you know, we all know that I'm doing well. But I'm expected – I expected by this time, by like January to be up to about \$35 million in expenditures for ads, mostly for advertising, right?

[point](#) [im](#) [expenditures](#) [ads](#)

Negative



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And I spend nothing. No because these – No, I spend nothing. I spend nothing. To be honest, I spend I think \$212,000 and that was only because I like the people. The people in Iowa are great. Some of those radio stations have been so – you know, they've been nice. I put some ads on the radio stations in Iowa, but I spent \$212,000. They've spent \$30 million, \$40 million, \$50 million, \$25 million, \$28 million.

Iowa \$212,000 \$25 million radio stations ads

Positive

Donald Trump



65

The money they spent – and they have no control over it. And you know, these PACs, the money is all being stolen from inside because the consultants are like bloodsuckers. They're 10 times worse than a real estate salesman or broker, 10 times, which is saying pretty bad stuff. So just think of it. So we have a case, where I'm gonna have \$35 million spent.

salesman \$35 million real estate salesman bad stuff im gonna

Negative

Donald Trump



66

I'm \$35 million under budget, is that good? Wouldn't that be nice? And very importantly, I'm doing the best. By far, doing the best because the Fox poll that just came out. We have a couple of them, we have CNN, so good, 36; second place is 16, then you have 9; and 8 and 5 and 2 or 1. I'll tell you they're nice guys.

CNN \$35 million second place couple

Positive



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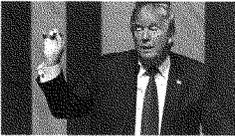
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They're very noncombative. They're so noncombative, I never saw people. They say, please leave and they walk out. I mean, they're very noncombative people. That's nice. You know, the funny thing and I mean this, I could take those three people, the three people. They'll say, it was a massive, massive demonstration.

🔍 funny thing 🔍 massive demonstration 🔍 people

👍 Positive

Donald Trump



68

Three people. And what they do is they put them in little section so you go, But I like that because then the cameras have to follow to see how many people are here. I do. But I really believe if I took those three people and I think they're good unless, they're drugged out, which is a possibility. I mean honestly because then I can't reason with them.

🔍 little section 🔍 cameras 🔍 people

👎 Negative

Donald Trump



69

I always say to kids. People say, why are you kids here? I say no drugs, no alcohol, no cigarettes, whatever, from the time they're like two years old. I hope it worked. I think it worked. I mean, I hope. But I say no drugs, no alcohol, no cigarettes. I used to drive them crazy. Ivanka would look, Daddy, you're driving me crazy with that statement.

🔍 two years 🔍 time they're 🔍 People 🔍 Ivanka

👍 Positive



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70

But I say that. But unless you're drugged out, which is a possibility. But if they're not, I'm telling you. I could sit with those kids and we would talk and all I'm doing is, I want to make our country better. I want to put people back to work. You know, forgetting all about even the applause hold for a second.

possibility applause hold kids people

Positive

Donald Trump



71

I want to put people back to work. We want to make our country strong. We want to create good health care, not Obamacare, which is a disaster, where the premiums are going up 35%, 45%, 55% and it's crashing. It's crashing. And I've explained this to them. I want to take care of our veterans. Our veterans are being treated horribly.

good health care care of our veterans Obamacare

Negative

Donald Trump



72

They're being treated horribly. I want to make, I want to make our military so strong, so big, so powerful that we don't have to use it. I don't want to use it. I don't want to use it. I don't want to use it. But what I want is I want people to look at us not like now where General Adriano when he left, recently I saw him on television, he said, we're the least prepared we've been.

Adriano General Adriano people television

Negative



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73

And I think he said from inception, from the beginning. But let's say since World War two, World War one, I mean he actually said I think more than that. But he said, we're the least prepared. We are practically ever we're the least prepared ever. At a time when we have to be the most prepared. And if I took these young kids that stood up and they, you know, they take a chance.

[young kids](#) [World War](#) [inception](#)

Positive

Donald Trump



74

They ruin their lives. They get arrested. What's the purpose of it? If I put them in a room and talk to them. Really, I had lunch with them or dinner, and I'd do it. I honestly believe, assuming no substance abuse, which is a possibility because who else would do this. I mean you stand up in a group of 9,000 maniacs that want to kill him, right?

[substance abuse](#) [lunch](#) [group](#)

Negative

Donald Trump



75

But if -- I really believe I could talk to them say, look, we want to make our country good. We want to bring back spirit. We want to bring back our jobs from places that have been ripping us off. We want to take care of our country. And you go through point by point, whether you're a Democrat, a liberal, a conservative, a Republican, it's all the same.

[point](#) [care of our country](#) [Democrat](#)

Positive



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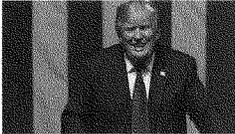
76

I mean don't you think that would be a positive thing? I really believe if somebody would give him the message, it would be a positive thing. I really believe that. OK, now you're gonna play. Right? So, so Ford. So they open up a plant. Thank you. That's another friend. You know, it's hard to tell the friendly ones from there.

Ford you're gonna play positive thing message

Positive

Donald Trump



77

There's so much enthusiasm in here. That's another one. Thank you. So Ford is gonna build a plant. And I'm saying to myself, how does it help us? Now here's what happens. Let's assume that Hillary becomes president. Oh my God. Oh, she'll be the worst. Is that a president? You saw her the other day, in all fairness.

president Ford much enthusiasm shall

Positive

Donald Trump



78

You saw her the other day. You saw the debates where they hide them in between football games. They put them on crazy. How about the next debate they have? They're putting it against two NFL playoff games so that nobody watches. Let me just tell you, I may win. I may not win. Hillary, that's not a president.

NFL president football football games next debate NFL playoff games

Negative



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Donald Trump



79

That's not. She's not taking us to – everything that's been involved in Hillary has been losses. You take a look. Even a race to Obama, she was gonna beat Obama. I don't know who would be worse. I don't know. How does it get worse? But she was gonna beat – she was favorite to win and she got slung. She lost.

🔍 everything 🔍 gonna beat 🔍 race 🔍 Obama

🗣️ Negative

Donald Trump



80

I mean she lost but I watched her the other night. It was hard. It was really hard because there were a lot of other things went better including reading books and reading financial papers, which I actually enjoy reading. But I watched her the other night and I said, this is not a president. Now you can say what you want.

🔍 president 🔍 lot of other things 🔍 reading books 🔍 night

🗣️ Negative

Donald Trump



81

And we can be nice so we don't have to be nice. But the truth is, we have a very important thing happening. If we don't get it right this time. We're not gonna have a country left, folks. We're not gonna have a country. We're not gonna have a country left. So if Hillary were president or Jeb or one of these guys or Rubio, any of them.

🔍 president 🔍 important thing happening 🔍 truth 🔍 Hillary

🗣️ Negative



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82

First of all, most of them don't know what I'm talking about. They think, oh the Ford, is that wonderful that Ford is moving to Mexico. That's a great thing. By the way, Nabisco, just to make you feel not so lonely in the car business. Nabisco from Chicago just announced that they're moving their big plant from Chicago into Mexico, OK. Mexico, Mexico is becoming the China nearby.

Mexico Nabisco big plant great thing way

Positive

Donald Trump



83

They are taking our business like – and by the way, I have great relationships with Mexico. I have great relationships with the Mexican people. I have thousands of them that have worked for me over the years. I have unbelievable relationships with Hispanics. I just won a poll in Nevada, where I was number one with the Hispanics, OK? Because I create jobs I create jobs, OK? But so here's the story.

Mexico Nevada great relationships Mexican people jobs

Positive

Donald Trump



84

So let's say any one of these politicians, other than me. I mean, honestly, any one of them get elected and they're there. And Ford is you know building this massive plant now. They all know it's a bad thing. They know it's not good. How is it good? We're closing three plants in Michigan to build one in Mexico.

Ford Mexico Michigan massive plant bad thing

Negative



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85

It's not too good. I mean, they're gonna have to do a lot of hard work to convince me. So I would say, I'd devote about 30 seconds to listening to them and then I cut it off because I don't have time. Obama, it was reported today, played 250 rounds of golf and he's gonna be in Hawaii. I think that they say for three weeks.

Hawaii golf three weeks they're gonna rounds of golf Obama

Negative

Donald Trump



86

How can a president – for three weeks. I don't have time for that. I love golf. I think it's one of the greats but I don't have time. 250 rounds, that's more than a guy who plays on the PGA Tour plays. He played more golf last year than Tiger Woods. No, think of it. We don't have time for this. We don't have time for this.

president three weeks PGA Tour plays Tiger Woods rounds

Negative

Donald Trump



87

We have to work. We have to work, OK? He talks about the carbon footprint and then he files a really old 747 that spews out all sorts of to Hawaii, right? The carbon foot – what happened to the carbon footprint? So here's the story. So with all of the money they give and it's massive. Yes, thank you. Yes, darling.

carbon footprint carbon foot money

Positive



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88

Yes. Well she doesn't sound very tough. That's a very weak voice. Go a little louder we can't hear you darling. Wow, that's not a protestor prime, right? So with all of this money that they give. Here's what happens, they go to a Jeb. And they say Mr. President, Ford has moved in, bah, bah, bah. Let's say, he knows it's bad because it's bad.

👤 Ford 👤 President 🔍 Mr. President 🔍 protestor prime 🔍 weak voice

👤 Negative

Donald Trump



89

He'll say, well, that's no good. We don't want them to make that deal. Then he'll get a call from his donors, his special interests, his lobbyists. And they'll say, they helped you. They gave you \$5 million, Jeb. You have to let them do it. And you know he's a very weak person so he's going to in two seconds.

👤 two seconds 🔍 \$5 million 🔍 weak person 🔍 special interests 🔍 Hell

👤 Negative

Donald Trump



90

You have to let them go in and he'll let them go in. They'll call Hillary. They'll say, Madam President, they gave you millions, they gave you millions of dollars. You can't do anything about that. And she'll say, you're right, I can't. They've been very loyal to me. Not to you, but to her, OK? Because she's 100% – look, is she crooked or what?

👤 President 🔍 100% 🔍 Madam President 🔍 you're right 🔍 she'll

👤 Negative



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91

OK? Give me a break. Is she crooked? I mean how crooked is she? How crooked is she? And you have to understand in my prior life, one of the magazines said world class businessmen, which is true. I'm all over the world and I did great, really good. And I get along with everybody. I get along with her. I get along with everybody.

🔍 prior life 🔍 world class businessmen 🔍 magazines

👍 Positive

Donald Trump



92

I get along with Democrats. That's my obligation. That's my job. I have to do that. So they say to her, they say, it's bad. We got to stop it. And then she'll be confronted with the special interests, the lobbyists, the donors. And immediately she'll say, all right, let him build. Now here's Trump. Now Trump is president.

🔍 hates Trump 🔍 special interests 🔍 lobbyists

👍 Positive

Donald Trump



93

Trump, Trump, Trump is now President. Trump, Trump. So President Trump, I owe them all like – you know, who I owe? I hear – this is the group I owe. I owe these people. Wow. I owe this group. So I didn't take any of their money. And by the way, you know, it's sort of adverse to what I do. These people are coming up, especially I've been in first place practically since I announced, right?

🔍 Trump 🔍 President Trump 🔍 President

👍 Positive



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94

For like six months, I've been in first place. Do you know how many people have come up? Don, I'd love to contribute to your campaign. I said, I'm not taking money. They said, but we'd love to make a major contribution. Because if I do, you know what's gonna happen. It's just psychologically. Even if it's not a deal or any.

place id love we'd love major contribution

Positive

Donald Trump



95

It's just a guy gives you \$5 million and he's representing a company or he's representing China or he's a -- you know, you've sort of feel obligated. I still really don't think it. But I'm a very loyal person. So I just do the easy way, don't take it. And it's very hard for me to say no because all my life I take, I take money.

guy China \$5 million has a you've sort of feel

Negative

Donald Trump



96

I love money. I take money. Now I'm telling these people, I don't want your money. I don't want your money because I know what happens. So now they come to me and I'll get a call from the head of Ford. Nice guy, by the way, I think, who the hell knows, right? But I think he is. Wrote me a beautiful letter.

Ford Nice guy beautiful letter head of Ford

Positive



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97

And he'll say to me, Mr. President, we're doing a wonderful thing. I said, why is it wonderful that you're building a plant in Mexico? Why can't you build that plant in the United States. Ideally, in Michigan, you know, ideally, I want it in Michigan. But why can't you even if it's anywhere in the United States, right?

President United States Michigan Mr. President wonderful thing

Positive

Donald Trump



98

But why can't you build that plant in Michigan? Well, bah, bah, bah, bah, bah. After about three seconds, I know it's all nonsense because there's nothing you can give us. And I'll say no, no, no. Here's the story. Here's the story. I'm a free trader, but this is no good for our country. If you build that plant in Mexico, I'm gonna charge you 35% on every car, truck and part that you send into our country.

Michigan Mexico three seconds I'm gonna charge free trader plant

Negative

Donald Trump



99

Every every single one. Every single car, truck and part, we're gonna put a tax of 35%. And I'm a free trader but we can't be stupid traders because what's happening with China is 10 times worse. I mean, we have a trade deficit with China, \$500 billion a year. And then I listen to Obama, our trading partner, they're no partner.

China partner \$500 billion single car free trader trade deficit

Negative



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100

They are ripping us and I love China. They pay me a fortune. They buy my apartments. I have them as tenants in my building. I have the largest bank in the world in China. They pay me a lot of rent. How can I dislike China? But they're too smart for our politicians. So here's what happens. So I say, I want 35% tax on every car and every truck and every part that comes into this country.

China 35% largest bank lot of rent tax

Positive

Donald Trump



101

And he's gonna say, well, we won't do it. Now here's what's probably gonna happen and I have the smartest businessmen in the world. Many of whom are endorsing me. Carl Icahn is endorsing me. A lot of the great ones because they know I'm like smart. This is what I do. So what happens – but this is too easy.

heres whats lot Carl Icahn

Positive

Donald Trump



102

I don't need any – but this is too easy. This takes minutes. So what happens is he'll say probably, we can't do that. I'll say don't worry about it. Call me whenever you're ready. Within 24 hours I'll get a call and he'll make one more plea. Mr. President, that's not right. I'll say, 35%. And if you wait another day, it's going to 40%, OK? It's true.

24 hours 35% 40% Mr. President hours dont worry

Negative



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103

Going to 40%. And as good and as tough and as smart as they are, here's what he's gonna say. He has to. This isn't like 99%. This is 100%. He's gonna say, Mr. President, we're going to build our new plant in the United States. Right here. Well, there's no place. I'd like to see it. But we're going to build our new - and that's 100%. Now, he may wait a day, he may wait two days.

President United States 100% two days hes gonna Mr. President

Positive

Donald Trump



104

But that's what's going to happen. All right get him out. Get him out. Get him out. Thank you. No, he's so brave. He's so brave. He's holding up his hands like he's Mike Tyson. He'd never throw a punch. He's so brave. So anybody else is going to do whatever these companies want, I'm not. Because I'm not controlled, I am not controlled by anybody.

hes Mike Tyson thats whats hes

Positive

Donald Trump



105

I'm doing this to make our country great again. Very simple. Very simple. And your industry in Michigan is going to start up big league again. These car manufacturers, they're gonna build right here now. It's enough. It's enough what's going on. This stupidity. A friend of mine is an excavator and I tell this story and it happened six, seven months ago and he's very depressed.

Michigan seven months car manufacturers enough whats friend

Positive



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106

I said, what's wrong with you? Very good, great excavator, digs foundations and footings for a lot of big buildings and roads and everything else. And he's always ordered Caterpillar tractor stuff. He's always ordered Caterpillar excavators and tractors. So I said to him, why are you upset? He said, the first time in my life Donald, I've ordered Komatsu tractors.

excavator Caterpillar great excavator first time life Donald

Negative

Donald Trump



107

It's a big order. I said, how do you find them? Good. They're not quite as good, but they're good. They're quality equipment. But I never did it before. I've always – my whole life I've ordered Caterpillar tractors, Caterpillar equipment. He said, but what Japan has done to the yen with their recent devaluations makes it impossible for Caterpillar to compete.

Caterpillar whole life live Their quality equipment Japan

Positive

Donald Trump



108

Now he told me this probably almost a year ago now and I've been telling this story. And I've been saying be careful. Look, Caterpillar, look at what's happened to their stock. I mean this guy told me better than any analysts can tell me because that's your customer. And I said, so why did you do it? He said, I owe it to myself, to my family, to my employees, to my company to buy the best stuff I can get for the best price.

best stuff Caterpillar best price

Negative



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109

And he was very, very upset. First time, in his entire life that that happened. He was very, very upset. Now, they devalue. We have Carolyn Kennedy as our negotiator with Japan. We have political hacks as our negotiators with China. They put these brutal killers in charge. I know these guys. They are brutal, brutal brilliant killers.

🇺🇸 Japan 🇨🇳 China 🔍 brutal killers 🔍 First time 🔍 entire life

👎 Negative

Donald Trump



110

And we put political hacks in there. We put Carolyn. She's a nice person. She's my daughter's – I think she's very nice. She has to be nice. Ivanka likes her so she's nice. Who cares? I don't want her negotiating. I saw it on 60 Minutes. They did a profile on Carolyn Kennedy. Hello. Look at this people.

👤 Carolyn Kennedy 🔍 She's 🔍 daughters 🔍 political hacks

👍 Positive

Donald Trump



111

Well, what a bunch of losers, I tell you. You are a loser. You really are a loser now. Get him out. You know, it's so staged. They put him in different corners. So staged. Really are a loser. Sad. It's sad because we're all here to make America great again. We're not here – we don't have to listen to this stuff.

🇺🇸 America 🔍 bunch of losers 🔍 different corners

👎 Negative



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112

But I have to tell you, I see what these guys do and they stage it because they only have a few of them. These guys will make it sound like it's a big deal. There's like three people so far, four people. I'll tell you we should have been doing that for the last seven, eight years. Why didn't we do it? OK? Say what you want about them, but we should have been doing that.

🔍 guys 🔍 big deal 🔍 people

👍 Positive

Donald Trump



113

We don't do that. For some reason, we, meaning we collectively, we don't do that. We should have been doing that because what they've done to our country has destroyed our country. They are – And I'll tell you what. It doesn't have long to go. We're in a big fat bubble. We're going to be up to \$21 trillion in debt.

🔍 reason 🔍 big fat bubble 🔍 country

👎 Negative

Donald Trump



114

You saw that piece of garbage omnibus that they just passed, which is a disgrace, which is a disgrace. Approved by the Republicans, by the way, I'm more angry with the Republicans than I am with the Democrat. At least you know where they're coming from. But what they just passed is a disgrace. It's a disgrace.

🔍 piece of garbage omnibus 🔍 Republicans 🔍 disgrace

👎 Negative



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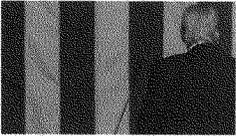
115

If we're gonna bring our country back and it shouldn't be allowed. And these politicians that get elected by you and everybody else and they go to Washington and then they do a total fold all the time. They're always folding because they're politicians. They're all talk. They're no action. They don't get the job done.

🗳️ politicians 📍 Washington 🔍 total fold 🔍 theyre politicians

👎 Negative

Donald Trump



116

They don't get it done. So anyway, so that's what happened. That's the story on the Ford. It's hard to believe. They're so weak though. Do you noticed? They just walk out. Come with us. Oh, OK. Bah, bah, bah. They're young people. You know what, idealistic – although he wasn't so young actually. I must say.

🗳️ Ford 🔍 young people 🔍 story

👎 Negative

Donald Trump



117

So with Ford, they come back. I guarantee you they come back. With Nabisco, the same thing. I don't want people building outside of this country. I want to keep our great people to work. I want to bring jobs back from China. China is ripping us like nobody has ever ripped us. China created the single greatest theft in the history of the world.

🗳️ China 🗳️ Nabisco 🗳️ Ford 🔍 great people 🔍 single greatest theft

👍 Positive



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Donald Trump

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They've taken our money. They've taken our jobs. They've rebuilt China. I love China. I love the people. I love what they do for me personally. They're wonderful. But they're too smart, they're too sharp, they're too cunning for our politicians, who are not smart people to handle. And on top of not being smart people, they're totally under the control of people that represent interests that are not good for us. It's very simple.

China smart people They're people

Positive

Donald Trump



119

Don't forget. Don't forget, six months ago, prior to June 16th, I was like the fair haired boy. I gave \$350,000 to the Republican governors and so. I was on the other side writing checks. I was like Mr. establishment, can you believe it? Once I do this, I'm not establishment anymore, which I love, I love, I love.

six months \$350,000 June 16th Mr. establishment side writing checks

Positive

Donald Trump



120

But nobody understands the game. Somebody said, well, have you dealt with politicians? Like, how about all my life I deal with – that's all I do is I deal with politicians. I got the old post office on Pennsylvania Avenue, probably the most sought after property in the history of the GSA, General Services.

GSA General Services Pennsylvania Avenue history of the GSA

Positive



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121

I got it under the Obama administration. Can you believe it? Everybody wanted it. I got it. That means you're really good. I mean, you're really – and now it's under construction. We're building one of the great hotels of the world. It's under budget, ahead of schedule. It's about a year early. We're gonna be opening in September of next year, of '16. It's a year ahead of schedule.

Obama administration September of next year great hotels of the world

Positive

Donald Trump



122

That's what we have to do. And you know, what? We have to build a wall on our southern border. We have to do it. We have to do it. And it's gonna be a great wall. It's gonna be a real war. Nobody is coming over that wall, folks. Nobody. It's gonna be way, way up there. It's going to be a Trump wall. I always say, I've got to make it great and I've got to even make it beautiful cause someday they will honor me by calling it the Trump wall.

Trump wall great wall beautiful cause southern border

Negative

Donald Trump



123

So now we're gonna build a wall. And it's not a big deal. Building a wall is not – you know, that's not a big deal. When I build 95-story buildings – let me tell you, walls are easy. Walls are really easy. It's called precast blank. Now in the past, you know, they've wanted walls but they weren't able.

95-story buildings wall big deal

Positive



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124

Oh, here we go. I can't believe how easily they leave. I'll tell you, these security people, they're amazing. They just leave. OK. So we're gonna build a wall and we're gonna let people come in, but they're coming in legally. They're coming in legally. Now, if you remember, when I first came up with illegal immigration, oh, did I take trouble.

🔍 illegal immigration 🔍 wall 🔍 security people

👍 Positive

Donald Trump



125

Rush Limbaugh said, I've never seen any human being take more incoming than Trump. And then I turned out to be right. It turned out to be right. Right? It turned out to be right. And now everybody wants to come to my — but it's too late for them. Most of them, it's over. It's over. Many of them are over it. Do I hear some noise?

🔍 human being 🔍 Trump 🔍 Rush Limbaugh 🔍 noise

👎 Negative

Donald Trump



126

It's so much fun. OK, you can get them out. Yeah. Don't hurt them. Be nice. Now the press is gonna say Trump is soft. That's the problem. He's soft. He's gotten very soft. Yeah, don't hurt him. OK. OK. So let me tell you one other thing because it just has to go with the dealmaking and we need it. We need love.

🔍 fun 🔍 much fun 🔍 press 🔍 thing

👍 Positive



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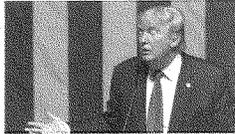
127

We need compassion. We need heart. We need great health care. We need a lot of things. But look at the Iran deal, and this just came to me and I've never heard it from anywhere else. Iran made one of the greatest deals ever made in the history of deal making beyond countries. We gave them a \$150 billion.

Iran \$150 billion Iran deal great health care greatest deals

Positive

Donald Trump



128

They kept our prisoners, which now they just announced they will begin negotiation for the prisoners. Do you believe this? We could have had them first. They kept our prisoners and they want to now start negotiation and they won a lot and they let us. But we won a lot. It makes me so angry, OK? So angry.

prisoners negotiation lot

Negative

Donald Trump



129

We should have gone in there, three years ago, when this – You ever see anything take so long as this crazy Iran deal? We should have gone in there three years ago. Say, look, number one, give us back our prisoners. You don't want them. We do. It will set a great tone. Very important. Give us back our prisoners and they would have said no. We get up. We walk.

prisoners Iran three years crazy Iran deal number

Positive



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130

A day later – and what we do when we walk, what do we do? We double up the sanctions. We triple up. A day later, within 48 hours, let's say. They call back. OK, we'll give you. That's it. We have a prisoners back. That would have been three years ago. But we have people like John Kerry and people like Barack Obama that are so incompetent.

three years 48 hours John Kerry Barack Obama people

Positive

Donald Trump



131

That deal is a disgrace. So I've been saying this, 24 days for inspection but the 24 days doesn't start till a whole legal process ends and who knows how long that. So they have like this huge long period of time. So they're doing nuclear. And by the time, we get there everything is beautiful. Looks like that floor right there.

disgrace huge long period of time days doesnt start whole legal process ends

Negative

Donald Trump



132

Everything's beautiful, painted battleship gray, everything's beautiful. So that's that. Now they have a right to self inspect. How about their bad areas? They don't want us in those areas. Those areas will self inspect. I mean, I can't even talk about this deal. So I've been saying, it's one of the greatest deals ever.

battleship gray battleship bad areas Everything's

Positive



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133

And then about a week and a half ago I started saying, it's not. They made an even greater deal than that. We gave them Iraq. Think of it, the second largest oil reserves in the world. We gave them Iraq. So they got the deal. They're loaded up with cash. They have \$150 billion, billion, billion, billion with a B dollars.

[Iraq](#) [\\$150 billion](#) [second largest oil reserves](#) [B dollars](#) [greater deal](#)

Positive

Donald Trump



134

But what did we do? We gave them Iraq because when we decapitated Iraq, those two armies, those two militaries were the same. They'd fight for decades. Boom, boom. They go 15 feet back, forth. There was equilibrium in the Middle East. You had a dictator. Who the hell cares? What the hell. I want to build this country.

[Iraq](#) [Middle East](#) [15 feet](#) [They'd fight](#) [Boom](#)

Negative

Donald Trump



135

I want to rebuild America. We spent, look, look, we've spent \$4 trillion, maybe \$5 trillion. They don't even know what we spent. They used to say and I've been using this number for two years so you know it's a hell of a lot higher. \$2 trillion in Iraq. Thousands of our young great people dead. Wounded warriors, who I love all over the place.

[Iraq](#) [America](#) [\\$2 trillion](#) [Wounded warriors](#) [young great people](#) [I've](#)

Negative



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136

You see all over these incredible people. Our most incredible people, the wounded warriors. They're all over. So think of this, Think of this. So we gave them all of this money. Cost 2 - It's impossible. \$2 trillion. This isn't now billions. This is now - we're into the trillions. Words you never even heard of 10, 12 years ago.

incredible people wounded warriors Cost

Negative

Donald Trump



137

\$2 trillion, but the \$2 trillion is now probably \$3 trillion. And in the Middle East, I guess, we've spent \$5 trillion. We could have rebuilt our bridges, our tunnels, our roads, our hospitals, our airports. We could have rebuilt our country. We could have rebuilt our military. We could have taken care of Social Security.

Middle East \$2 trillion \$3 trillion care of Social Security bridges

Positive

Donald Trump



138

We could have taken care of every. We could have taken care of our veterans, who are treated worse than illegal immigrants, in many cases. So just think about it. So we spent at the time \$2 trillion, which is now at least \$3 trillion for Iraq. And what's happening? Iran is coming in, second largest oil reserves in the world.

Iraq Iran \$2 trillion illegal immigrants care of our veterans largest oil reserves

Negative



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139

Iran is coming in. They've been fighting for decades and decades. Iran is coming in, walking in and just like you're standing here and sitting here, now everybody standing. That's good. But just like you standing here, they're taking over Iraq. What have we got? We got nothing. And I've been saying for three years, take the oil.

Iran live decades

Positive

Donald Trump



140

I didn't say bomb the oil. You can do that too. I don't care because we're rebuilding. Exxon Mobile, these guys are so good. Boom, boorn, boom, they put it back so fast. But you take the oil and you take the oil. You know, to the victor belong the spoils, right? You take the oil. You don't just leave it. We're the only country in the world - You know, when I was young, when I was very young, we never lost a war.

Exxon Mobile only country Boom

Positive

Donald Trump



141

They always used to say, my history teacher, United States has never lost a war. Now, we never win a war. We can't beat anybody. We can't beat anybody. We can't beat ISIS. I watch on television, they have a general. Well, what do you think about ISIS? Do you think we can - I don't know. It's going to be a very tough battle.

history teacher United States tough battle

Negative



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142

I'm saying, where is General Patton? I want General Patton. Where is General MacArthur? Where is he. No, I watched this general on television saying that ISIS is a tough battle. Then I hear one of the reasons they're not doing the oil is Obama doesn't want to infect the environment because the oil is gonna pollute the environment.

General Patton reasons theyre Obama doesnt

👍 Negative

Donald Trump



143

This man there is something wrong with him. There is something wrong with him. So I said, take the oil. Take the oil. And you know what we do with the oil? We take the oil and we give some to the soldiers that have been so badly hurt. We give some to those wounded warriors. We give some to the parents, who have lost soldiers, sons and daughters, in that war.

wounded warriors oil parents

👍 Negative

Donald Trump



144

And you're talking about peanuts compared to the values. You're talking about peanuts and you go in and you take the oil and you'd circle it and you make a lot of money. And you use it for good causes and you give some to Iraq, if the government remains. I mean, it's horrible government. Look, it's so corrupt.

government Iraq good causes your circle peanuts

👍 Negative



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145

It's such a corrupt government. You know that. I mean ISIS formed – the reason ISIS formed, they wouldn't let them in on the deal. So they formed ISIS and ISIS turned out to be a hell of a lot tougher than the Iraqi government. So who has the oil now? So – and who takes the oil? You know who the number one buyer of the oil is? China.

ISIS reason ISIS Iraq government

Negative

Donald Trump



146

China. They haven't fired a bullet. They haven't spent \$0.10. They're buying the oil. You know who's taking the oil in Libya? China. China smart. I'm not angry with them. I'm angry with our people. If I get elected president, those days are over. We're gonna become so successful again. We're gonna become so successful again.

China Libya haven't president

Negative

Donald Trump



147

You know, there's an expression about the American Dream, remember? And I always talk, the American Dream, wonderful American Dream. The truth is the American Dream is dead, but I'm gonna make it bigger and better and stronger than ever before, ever before. Bigger and better and stronger. We're gonna do something.

American Dream I'm gonna wonderful American Dream

Positive



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148

So I want to tell you, we've had a number of rallies. Yes. Thank you, darling. Thank you. We've had a number of rallies in Michigan. They've been incredible. But the people, whether it's Michigan or anywhere else, everybody we're all in the same thing. You know, they used to have an expression, the silent majority is back, right?

Michigan silent majority number of rallies people

Positive

Donald Trump



149

The silent majority. This isn't really a silent majority anymore, folks. This is a very very aggressive, very very noisy loud majority. Very very noisy, very very loud. So I want to tell you, I'm leading in every single poll. I'm leading. And I don't know, look, we have to get out and vote and all of that stuff.

silent majority noisy loud majority single poll

Negative

Donald Trump



150

We have to do it. You know, the last election people were not inspired. They didn't get out and vote. And if they would have voted, you would have had much better. But they didn't get out and vote. I think this time they're really inspired. Nobody has ever had crowds like this. You know, they say the crowds -- the biggest crowds anyone's ever seen.

people last election people biggest crowds anyone's time there

Positive



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151

They say these are crowds like the night before the election. You have a crowd like this maybe and I doubt that. And they're getting bigger and stronger and more and more vocal. We are going to make our country so strong and so powerful and we are going to make our [Audio cuts out]1jM8W_ytRE

crowds country 1jM8W ytRE

Positive



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12/15/2019

Ukraine's leaders campaign against 'pro-Putin' Trump | Financial Times

US presidential election**Ukraine's leaders campaign against 'pro-Putin' Trump**

Ukraine's leaders campaign against 'pro-Putin' Trump



Serhiy Leshchenko holds papers allegedly showing payments made to Donald Trump aide Paul Manafort © AFP

Roman Olearchyk in Kiev AUGUST 28 2016

For years, Serhiy Leshchenko, a top Ukrainian anti-corruption campaigner, worked to expose kleptocracy under former president Viktor Yanukovich. Now, he is focusing on a new perceived pro-Russian threat to Ukraine: US presidential candidate Donald Trump.

The prospect of Mr Trump, who has praised Ukraine's arch-enemy Vladimir Putin, becoming leader of the country's biggest ally has spurred not just Mr Leshchenko but Kiev's wider political leadership to do something they would never have attempted before: intervene, however indirectly, in a US election.

Mr Leshchenko and Ukraine's anti-corruption bureau published a secret ledger this month that authorities claim show millions of dollars of off-the-book cash payments to Paul Manafort, Mr Trump's campaign director, while he was advising Mr Yanukovich's Regions party from 2005.

Mr Manafort, who vigorously denies wrongdoing, subsequently resigned from his campaign role. But Mr Leshchenko and other political actors in Kiev say they will continue their efforts to prevent a candidate — who recently suggested Russia might keep Crimea, which it annexed two years ago — from reaching the summit of American political power.

“A Trump presidency would change the pro-Ukrainian agenda in American foreign policy,” Mr Leshchenko, an investigative journalist turned MP, told the Financial Times. “For me it was

important to show not only the corruption aspect, but that he is [a] pro-Russian candidate who can break the geopolitical balance in the world.”

Mr Trump's rise has led to a new cleavage in Ukraine's political establishment. Hillary Clinton, the Democratic nominee, is backed by the pro-western government that took power after Mr Yanukovich was ousted by street protests in 2014. The former Yanukovich camp, its public support sharply diminished, leans towards Mr Trump.

If the Republican candidate loses in November, some observers suggest Kiev's actions may have played at least a small role.

It was important to show not only the corruption aspect, but that [Trump] is [a] pro-Russian candidate who can break the geopolitical balance in the world

Serhiy Leshchenko

“Ukraine's anti-corruption activists have probably saved the Western world,” Anton Shekhovtsov, a western-based academic specialising in Russia and Ukraine, tweeted after Mr Manafort resigned.

Concerns about Mr Trump rocketed in Kiev when he hinted some weeks ago he might recognise Russia's claim to Crimea, suggesting “the people of Crimea, from what I've heard, would rather be with Russia than where they were”.

Natalie Jaresko, a US-born Ukrainian and former State Department official who served for a year as Ukraine's finance minister, fired off a volley of tweets to US officials. In one, she challenged former Republican presidential candidate John McCain: “Please assure us you disagree with statement on Crimea/Ukraine. Trump's lies not position of free world, inc Rep party.”

On Facebook, Arseny Yatseniuk, the former prime minister, warned that Mr Trump had “challenged the very values of the free world”. Arsen Avakov, interior minister, called the candidate's statement the “diagnosis of a dangerous marginal”.

Ukrainian politicians were also angered by the Trump team's alleged role in removing a reference to providing arms to Kiev from the Republican party platform at its July convention.

Adrian Karatnycky, a senior fellow at Washington's Atlantic Council think-tank, said it was “no wonder that some key Ukrainian political figures are getting involved to an unprecedented degree in trying to weaken the Trump bandwagon”.

Kiev moved beyond verbal criticism when Ukraine's national anti-corruption bureau and Mr Leshchenko — who has a reputation for being close to the bureau

US election poll tracker

12/15/2019

Ukraine's leaders campaign against 'pro-Putin' Trump | Financial Times

Which White House candidate is leading in the polls?

— published the ledger showing alleged payments to Mr Manafort last week.

The revelations provoked fury among former Regions party backers. Asked by telephone about Mr Manafort's activities in Ukraine, a former Yanukovich loyalist now playing a lead role in the Regions party's successor, called Opposition Bloc, let loose a string of expletives. He accused western media of "working in the interests of Hillary Clinton by trying to bring down Trump".

Though most Ukrainians are disillusioned with the country's current leadership for stalled reforms and lacklustre anti-corruption efforts, Mr Leshchenko said events of the past two years had locked Ukraine on to a pro-western course. The majority of Ukraine's politicians, he added, are "on Hillary Clinton's side".

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03/07/2011

FIGHTING CORRUPTION IN UKRAINE: UKRAINIAN STYLE – ROUND TABLE

PARLIAMENT MEMBERS ATTEMPT SOFTENING PROVISIONS OF ANTI-CORRUPTION LAW AS MUCH AS POSSIBLE TO SATISFY PERSONAL NEEDS – EXPERTS

The Gorshenin Institute held a round table discussion Fighting Corruption: Ukrainian Style, where experts discussed the problem of corruption in the country and the ways to combat it.

The participants in the round-table discussion said that the corruption-fighting shall be managed by authorities independent from the Ministry of Internal Affairs and working on different principles than the Ministry.

Opening the discussion, the first deputy head of the Ukrainian Parliament's committee on combating the organized crime and corruption, **Hennadiy Moskal**, said that the parliamentary majority was attempting to soften as much as possible the provisions of the draft law On Principles of Preventing and Fighting Corruption in Ukraine to satisfy their personal needs. The draft law was submitted by Ukrainian President **Viktor Yanukovich**. In particular, Moskal recalled that one and a half years ago the Ukrainian parliament already approved a package of laws aimed at fighting corruption, however the enactment of the laws was postponed three times and later the laws were cancelled. Moskal also said that members of parliament are trying to do everything possible to keep their personal interest intact. That is why the draft law submitted by the president, if approved, will not be accepted in Europe.

The MP, member of Parliament's Committee on Justice, **Serhiy Vlasenko**, said for his part that the mentioned anti-corruption law 90 per cent reproduces the earlier approved and cancelled law and "the remaining 10 per cent makes the earlier law softer". According to Vlasenko, if the law does not include a provision obliging officials' relatives to declare their expenses, the law won't work effectively. "There will be mothers-in-law in our country worth of tens of millions dollars," Vlasenko said. He also said that today corruption means bribery to people while bribery is just an element of corruption. Vlasenko is convinced that it is necessary to change the ideology of fighting corruption in the country. "The main problem of fighting corruption in Ukraine is that there is no strategy and ideology for doing that," Vlasenko said. In particular, Vlasenko said it is necessary to introduce a mechanism to make it impossible for a bribe-taker to spend the illegally received money. Vlasenko also said that without attention from public, media and European institutions it will not be possible to change the state of corruption in Ukraine.

The chairman of the International Association of Officers Combating Organized Crime, **Oleksandr Davydenko** said that openness and transparency of authorities in charge of enforcing the state policy in this field will help fighting corruption and organized crime. "If the responsible persons are unknown it means that there is no responsibility," Davydenko said. He also said that now the names of those who develop the methods of fighting corruption and organized crime and control their implementation are not known.

Ukrainian Federation of Employers Board Member **Yuriy Bohuslavskyy** said that corruption decreases Ukraine's competitiveness. "Corruption creates monopoly. This affects the country's competitiveness. As a result, Ukraine may soon end up with the level of competitiveness of African countries," - Bohuslavskyy said.

The chairman of public organization Ukrainian Anti-Corruption Committee, major-general **Andriy Koval**, said that there is a need for a more active cooperation between NGOs and the Ministry of Internal Affairs and State Security Service of Ukraine.

LB.UA Internet Portal Chief Editor **Sonya Koshkina** said that one month ago LB.UA decided to support Ukrainian President Yanukovich's initiative on fighting corruption. "Over the past year, Yanukovich repeatedly said that corruption interferes with our life. Yanukovich said this when talking to the nation on TV on the first anniversary of his inauguration, this phrase was also heard a number of times over the last year. When Yanukovich meets people they complain him of being demanded bribes in policlinics or in the Odessa sea port to load lorries with grain. But when the president asks people to give him specific facts: names, positions, addresses and office numbers, people become confused. We decided to help the president learn these facts and addresses: we set up a special section called Corruption-STOP at our web-site. This is a sort of a coordination office where people may send their complaints, both unanimously and publicly. We already have several hundreds of complaints, and what is more, most of them tell about major abuses. These are violations by tax authorities, large bribes. We process the complaints and forward them to respective authorities - the National Security and Defense Council, Prosecutor-General's Office. In other words, we inform the government on the events at a local level, - Koshkina said.

Koshkina also told about another activity within the Corruption-STOP project: journalistic investigations. "We had a series of publications prepared based on letters and investigations in the Odessa sea port. We received information about corruption in the area of land management in Kharkiv Region, we are about to finish the journalistic investigation on this issue. We decided to involve ourselves in this subject as people began complaining to us. Because if we do not make these facts public nothing will ever change," Koshkina said.

Reference:

In 2010, Gorshenin Institute conducted a telephone survey on the topic "Corruption in Ukraine." Its results show the following trends:

1. Ukrainians recognize that corruption is rampant in Ukraine

The majority of the respondents (86.0%) believe that bribery is common in Ukraine. As many as 54.8% of them think that it is «very common,» while nearly a third of the respondents believe that is «common.» According to 8.8% of the survey participants, bribery is not common in Ukraine. Among them, 7.4% expressed their confidence that it is «not very common» and 1.4% said it was «not common.» Approximately 5.2% of the respondents did not give an answer to this question.

2. Although Ukrainians have a negative attitude towards the phenomenon of corruption, they resort to it to solve their problems.

As many as 68.8% of the Ukrainian citizens had to give money or gifts to the people, who could solve their problems. Almost one fifth of the respondent did not have such an experience (18.9%), while 12.3% did not answer the question.

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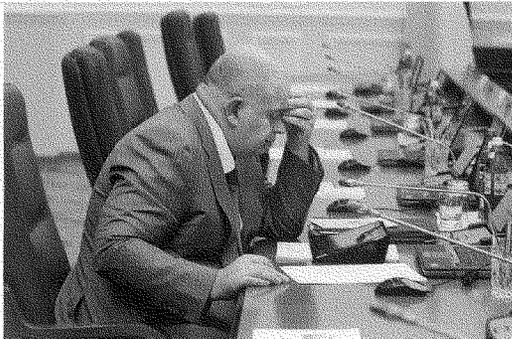
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Court seizes property of ex-minister Zlochevsky in Ukraine - PGO

By Interfax-Ukraine. Published Feb. 4, 2016 at 6:40 pm



 Ex- Ecology Minister Mykola Zlochevsky at the Cabinet of Ministers on March 14, 2012.

Photo by Ukrafoto

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The movable and immovable property of former Minister of Ecology and Natural Resources of Ukraine Mykola Zlochevsky in Ukraine has been seized, according to the press service of the Prosecutor General's Office of Ukraine (PGO).

"The PGO filed a petition to court to arrest the property of the ex-Minister of Ecology and Natural Resources of Ukraine, the Deputy Secretary of the National Security and Defence Council of Ukraine, Mykola Zlochevsky, from which arrest was withdrawn, and other property he actually uses, namely housing estate with a total area of 922 square meters, a land plot of 0.24 hectares, a garden house with a total area of 299.8 square meters, a garden house in the territory of Vyshgorod district, a garden house of 2,312 square meters, a land plot of 0.0394 hectares, a Rolls-Royce Phantom car, a Knott 924-5014 trainer," reads the report.

The PGO clarifies that the court satisfied the petition on Feb. 2.

"Thus, none of the objects of movable and immovable property, which was seized under the previous court ruling, has not been excluded from Zlochevsky's property," the press service said.

Zlochevsky is suspected of committing a criminal offense under Part 3 of Article 368-2 of the Criminal Code of Ukraine (illicit enrichment).

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People First: The latest in the watch on Ukrainian democracy

By Viktor Tkachuk. Published Sept. 30, 2012 at 6:43 pm



 An elderly woman sells her shoes as she asks for alms in Kiev on Sept. 10, 2012. AFP PHOTO/ SERGEI SUPINSKY

Photo by AFP

The final days of the middle class in Ukraine

Ukrainian sociologists claim that less than 5 percent of the population enjoys a quality of life comparable with the average level of the European middle class. According to their research, this social strata is made up of entrepreneurs and top management of large companies exclusively. At the same time, only 1 percent of the population can be considered rich.

Today the remaining portion of the population spends most of their income on food (53 percent); it should be noted that inflation is increasing the price for food without improving the quality. Besides food, families spend a lot of money on education and medical care, despite the fact that these services are supposedly free in Ukraine. Most Ukrainians are left with almost no funds for recreation or cultural development.

Ukrainian scientists illustrate that while in European societies the share of middle class is on average 60-65 percent, in Ukraine the great stratification of the population is deepening. It is believed that stable democratic development requires at least 50 percent of a population to belong to the middle class. In Ukraine, as in most post-Soviet countries, the majority of highly-qualified specialists do not belong to middle class in terms of their income. At the same time almost 17 percent of the population survives on less money than the minimum subsistence level (about \$130 per month). It is hard to hope for positive democratic developments in Ukraine when the middle class – the basis of democracy – is being watering down further and further.

People First Comment: There are a number of reasons why the Ukrainian middle class is diminishing. The first is that anybody with

any brains has already moved their wealth and their families out to countries that are less hostile to the concept of middle class wealth. The second reason is the almost wonton destruction of the small and medium sized business sector through crippling taxation and the rapacious demands of the tax police. Those in power really do seem to be under the illusion that all wealth generated in this country belongs to the state... that is apart from their wealth.

In most successful economies small business is the backbone of the nation contributing the lion's share of the tax revenue and also the majority of the national growth however in Ukraine the regime see it more as a singular source of taxation to prop up their failing economic policies. Thus the middle class are simply voting with their feet; after all, why should anybody who has worked hard and made enough money to be comfortable risk losing it to the bandits who manipulate the tax revenue service. The standard system here appears to be if you make any money at all here they will tax you mercilessly to a point where there is no point working hard.

It is a sad reality that it is simply better to leave Ukraine and move to somewhere, anywhere, where the rule of law and justice have real meaning. Sadly, Ukrainians today have more civil rights living, even illegally, in Europe or in North America than they do living in Ukraine such is the current state of Ukrainian society.

Yanukovich U-turns on Ukraine's European future

In his address to the Ukrainian people on the 21st anniversary of Ukraine's independence (Aug. 24) President Viktor Yanukovich said that European integration must not come at the cost of intrusion into

the country's internal affairs. In his words, integration into the EU at the cost of losing independence, making economic and territorial concessions, and having internal affairs intruded into is absolutely unacceptable. At the same time Yanukovich stated that processes of integration into Commonwealth of Independent States will not be left outside of Ukraine's attention; it is after all one of the largest market for Ukrainian exporters.

Right after reassuring the Ukrainian people of his intention to protect state interests Yanukovich left for his second meeting in six weeks with Russian President Vladimir Putin in Sochi.

This meeting turned out quite unexpectedly for journalists and experts, since no breakthrough agreements between the two countries were reached. At the same time the President of Ukraine stated that Ukraine aims to become an observer in the Shanghai Cooperation Organisation (SCO), to further develop Eastern vectors of economic cooperation. These statements about reversing integration into the EU at any cost and the simultaneous request to gain observer's status in the SCO suggest Yanukovich is re-orientating from European integration to Eurasian, despite many months political rhetoric to the opposite.

People First Comment: The problem with European integration for the regime is that if they join the EU they will have to obey the rules, something in Ukraine they seem singularly unable to do up until now. Since coming to power they have bent the Constitution, change the whole basis of democracy within the Verkhovna Rada, written laws specifically to suit their purpose, rewritten the entire electoral system and corrupted the judiciary to a point where many would rightly claim that Ukraine no longer has a functioning legal system or a working democracy. And the critics would be right. In two

years the joys in blue have undone a fledgling democracy and in its place built a neo-Soviet criminocracy. So their penny has finally dropped... joining the European family is not a good idea... Not a good idea for whom?

In joining the EU Ukraine would have to build a functioning democratic system controlled by the will of the people and backed by a function legislature. Corruption would be much more difficult as the EU has standardised systems of control and functioning accounting systems that would make blatant theft so obvious that even the blind would see. Monopolies would be illegal and take-overs would have to be legal as opposed to men in masks backed up by the tax police... in fact Ukraine would have to build a truly functioning democratic society in which the hospitals would work properly, children would get a sound education, the small business would flourish, salaries would rise and as would the standards of living. This is not Utopia; this is the reality of the European system, but this is not what the regime considers to be in the national interest...

So now they turn toward China as if the Chinese are going to allow them to play their games without any sort of penalty. As many African nations have found to their cost, nothing that comes from China comes for free. Everything has its price and perhaps the regime ought to take note that in China the price of high level corruption, is your life.

Financial, currency risks growing

With the October elections drawing near the experts and population hold a growing fear of a significant devaluation for the national currency. Another destabilising factor is that Ukrainian banks and importers are resorting more and more to speculation: making

money or currency reselling(5). Experts underline the danger of the current tendencies in Ukraine's economy and state finances. Particularly, ex-Minister of Finance Viktor Pynzenyk has said that the Ukrainian economy has no stimulus towards growth. The reasons for this are the decreasing demand for Ukrainian products on external markets and the absence of any serious positive changes on the internal market that might stimulate investment and domestic demand.

Another factor that is worsening instability are measures implemented to stop currency bleed from Ukraine, introduced by the National Bank of Ukraine. Meanwhile, import of foreign currency is going through a process of deregulation, with the requirement to prove where imported cash has been withdrawn from being removed as of Aug. 31. Experts highlight that the policy is likely to attract large quantities of questionably-sourced (black) cash which will be invested in Ukraine's high interest deposit accounts; interest rates currently reach up to 20 percent in hryvnia. Not only will this increase the shadow sector of the Ukrainian economy, but the risks of currency and financial speculations will grow as well.

The population has already increased the rates of currency buying (July saw growth of 26% compared to June) and some banks have started limiting credit in UAH. At the same time Prime Minister M. Azarov repeatedly states that the government together with the National Bank will prevent the national currency from being devalued and will not permit use of the "printing press". Only 33% of Ukrainians believe him, whilst 39% are certain that the national currency rates will fall significantly, even before the end of the year(8).

People First Comment: When bank interest rates rise above 20 percent you can bet your bottom dollar that the nation and its entire

banking system is in real trouble. Currently some banks are offering interest on deposits of 25 and 26%, fine for the investor willing to take a punt but very risky indeed for the average citizen looking for a safe haven for their life savings. This is not the first time we have seen the Ukrainian currency go more than a bit wobbly.

How many of you can remember the karbovanets... Funny money designed by the National Bank as an interim between the ruble and the hryvnia. In fact, it was a very slick method of making a few people very rich indeed. You see they borrowed money from the banks... which at that time happened to be the state in dollars but repaid it in hryvnia at fixed interest rates. By manipulating the exchange rates and causing rampant inflation, their dollar loans were repaid at a fraction of the real cost allowing them to pocket the difference. They got very rich but any poor Ukrainian with savings in Karbovanets saw them evaporate.

Successive regimes, rather than grow the economy, have been using the national currency reserves for years to support the value of the hryvnia and peg it to the US dollar. A wise move you might think until you realise that this is totally false accounting because the national currency reserves are not infinite. Now the piggy bank is almost empty and try as they might the value of the hryvnia is slowly falling. It will most likely slip gently before the October election but afterwards it could easily go into freefall once again wiping out the savings of ordinary people.

How do you fight it? Hold your money in foreign currency at home in a very strong safe until Ukraine gets a government that cares about your welfare and decent legislation to control the banking system.

Informal giving is a positive surprise for Ukraine

Ukrainians, inspired by the Italian tradition of caffè sospeso or coffee “in suspense,” whereby people buying coffee anonymously pay for the next customers coffee. The tradition is proving so effective that it is bleeding over into other spheres of life. Specifically, well-to-do Kyiv residents are buying drugs in pharmacies and leaving them for those in need. These drugs become drugs “in suspense” and they are listed on a special board. Obviously only non-prescription drugs are distributed in this way. Currently this movement is spreading in Kyiv, 6 pharmacies to date, whilst other Ukrainian cities are likely to follow. The drugs are mostly consumed by impoverished senior citizens(9).

Ukrainians seem to enjoy playing charity: the new movement quickly spread from cafés to pharmacies and even to dry cleaners and yoga studios. This mechanism circumvents bureaucratic barriers and the general distrust of big charity funds. These new charity initiatives are being promoted heavily on social networks. Giving a present to an unknown person by buying him or her medicine, coffee or services is simple and pleasant act. So, Ukraine demonstrates new ways of building communication bridges between people. It might come as a surprise, but Ukrainians are clearly much better at generating social capital than they think of themselves(10).

People First Comment: Ukrainians are wonderfully caring and charitable people only it's a secret. Herein lies a very powerful social conundrum that if Ukrainians declare their wealth and use it for social good, they get hammered by the tax police. Rather than donate to the lost cause of government taxation they go about their charity quietly, without fuss or publicity. To the outside world it may appear that Ukrainians are heartless and uncaring but exactly the opposite is true. Children's homes get flooded with clothes, books, used

computers, toys and worst of all fluffy animals, this new phase of buying over the counter drugs for those least able to afford them is just an extension of their inherent generosity.

The sad part about it is that if the parliament were to pass sensible charities legislation to enable real charities to operate freely then the cost of State social support would drop appreciably. What many democratic societies have found is that if you allow the free market to operate properly those that have acquired even a little wealth want to share it with those who have nothing; it is simply a part of their humanity. When people can choose which worthy cause to support, all sorts of social good prevails in areas that governments really have nothing to do with. Organisations such as the World Wide Fund for Nature, Save the Children and Medicine Sans Frontier are entirely supported by private and corporate charity. In the UK the lifeboat maritime rescue service is financed entirely by private donations whilst in Ukraine what search and rescue services that do exist are part of the military and run at government cost... assuming of course that they have the fuel to fly helicopters and run rescue boats.

Charity is an integral part of any humane society. The suppression of Ukrainian charity by this government and frankly those that have preceded it, through their short-sightedness and callous attitudes is just another example of how far behind the times and out of touch Ukrainian leaders really are.

Victor Tkachuk is chief executive officer of the Kyiv-based People First Foundation (www.peoplefirst.org.ua), a former deputy secretary of the National Security and Defense Council of Ukraine, adviser to three Ukrainian presidents and a former parliament member, Tkachuk can be reached via viktor.tkachuk@peoplefirst.org.ua.

[Article History](#)

Prosecutors put Zlochevsky, multimillionaire ex-ecology minister, on wanted list

By Ilya Timtchenko. Published Jan. 18, 2015 at 7:30 pm



☐ Prosecutors have put Mykola Zlochevsky, country's 48-year-old ecology minister in 2010-2012, on the wanted list for alleged financial corruption.

Photo by Courtesy

Prosecutors have put Mykola Zlochevsky, country's 48-year-old ecology minister in 2010-2012, on the wanted list for alleged financial corruption, Prosecutor General Vitaliy Yarema said on Jan. 16.

The British government froze \$23 million that the ex-minister, whose whereabouts remain

unknown, kept in United Kingdom banks, Yarema added. Forbes Ukraine estimated Zlochevsky's overall fortune at \$156 million.

Prosecutors refused to reveal the details of the investigation over the phone and haven't replied to an e-mailed request for comment.

Zlochevsky, who also served several terms in the parliament, is believed to control Burisma Holding Limited, a producer of oil and gas in Ukraine. A Cyprus-registered entity owns 20 licenses for hydrocarbon extraction and claims to control a quarter of the nation's private oil and gas market. The company's board of directors includes Hunter Biden, son of the incumbent U.S. Vice President Joe Biden, as well as Alexander Kwasniewski, ex-president of Poland.

The Ecology Ministry hasn't replied to the Kyiv Post's email request to tell whether Burisma still possess the production licenses.

Anna Babinets, an investigative journalist who covered Zlochevsky's affairs, wrote he was monetizing his ministerial position through controlling the licensing of oil and gas extraction.

On Aug. 19, 2014, head of the Anti-Corruption Action Center Vitaliy Shabunin wrote an official letter to Yarema stating that private energy companies Pari and Esko-Pivnich also belong to Burisma Holding.

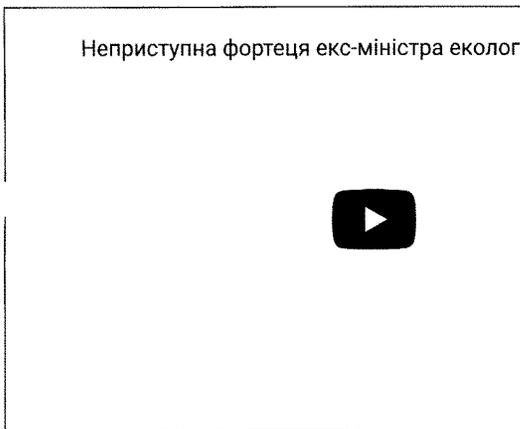
He added that it is likely that Ukrnaftoburinnya, another oil developer, belongs to Zlochevsky as well. In July 2014, Dnipropetrovsk billionaire Governor Ihor Kolomoisky was said to take over 45 percent of the company's shares. Shabunin wrote that permits for these companies were

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given without a tender and during Zlochevsky's ministerial cadence.

Jurisma Holding did not provide their list of licenses and did not say if Zlochevsky abused his power.

An owner of a Rolls-Royce and two Bentley Continentals at a time of his ministerial service, Zlochevsky is also known for having an extremely luxurious 4.5 hectare-large residence near Kyiv that he owned through Velyki Klyuchi, a private company.



TV journalist Natalie Sedletska exposes the lavish residence of ex-Ecology Minister Mykola Zlochevsky.

Zlochevsky kept visiting the residence even after the EuroMaidan Revolution overthrew his political patron – President Viktor Yanukovich, locals told Radio Liberty in October 2014.

Tetyana Tymochko, an environmental activist, accused the former ecology minister of severe

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violations of the ecology laws while constructing the residence.

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Under Yanukovich, Ukraine slides deeper in ranks of corrupt nations

By Mark Rachkevych. Published Dec. 1, 2011. Updated Dec. 1 2011 at 11:39 pm



<https://www.kyivpost.com/article/content/ukraine-politics/under-yanukovich-ukraine-slides-deeper-in-ranks-of-118032.html>

 partyofregions.org.ua

Photo by partyofregions.org.ua

Corruption watchdog Transparency International puts nation in 'highly corrupt' category. The results for President Viktor Yanukovich's much-trumpeted campaign against corruption are in – a drop of 18 places in a leading global ranking.

Ukraine now sits alongside the Central African Republic, Congo, Uganda and Tajikistan in 152nd place of 183 countries in Transparency International's Corruption Perceptions Index on Dec. 1.

Ukraine scored 2.3 in Transparency International's 10-point scale, falling in the "highly corrupt" group of countries.

That's sobering news for Yanukovich, who made fighting corruption a top campaign pledge and recently said corrupt officials are "increasingly feeling" the effects of new legislation.

Yanukovich has formed a much-lauded anti-corruption committee and pushed through legislative changes designed to combat graft.

But many in and outside of Ukraine say that the nation has only become more corrupt under his rule, and has slid deeper toward kleptocracy and authoritarianism.

"Transparency International urges Viktor Yanukovich to fully make use of his powers as president of Ukraine and head [a] real fight

<https://www.kyivpost.com/article/content/ukraine-politics/under-yanukovich-ukraine-slides-deeper-in-ranks-of-118032.html>

against corruption offenders," said TORO, a corruption watchdog in Kirovohrad and Transparency International's national contact in Ukraine

"Ukraine in the year 2011 is on the way to corruption abyss," the organization said.

The president's press service refused to comment, referring the Kyiv Post instead to the president's official website. The website had not addressed Transparency's report by the time the Kyiv Post went to press. A spokeswoman for Yanukovich could not be reached.

The Group of States Against Corruption (GRECO), a Council of Europe body to which Ukraine has belonged since 2006, on Nov. 30 urged Ukraine to increase its efforts to combat bribery and create greater transparency of political funding.

"Provisions on public sector bribery needed expanding to cover non-material gain, private sector bribery and trading in influence were not fully addressed, and improvements were needed on sanctions," GRECO said in their third corruption monitoring report on Ukraine.

At a June 8 meeting of the National Anti-Corruption Committee, Yanukovich said that corruption robs the state budget of some \$2.5 billion in revenues annually. On top of that, Yanukovich said, improper government spending robs the state of additional billions of dollars.

Through corrupt dealings in the sphere of public procurement, from 10 to 15 percent of the state budget ends up in the pockets of officials. That is, \$7.4 billion," Yanukovich said in June. "That's why in

the last 15 months we have worked hard on the eradication of corruption.”

Yanukovich has faced increased criticism inside and outside Ukraine for trying to present attempts of political persecution against his opponents as genuine attempts at cracking down on corruption.

Referring to the Transparency International corruption ranking, Hryhoriy Nemyria, an adviser to jailed opposition leader Yulia Tymosheko, asked: “Is this the result of Mr. Yanukovich’s anti-corruption campaign?”

For their part, citizens need to continue demanding better performance from their leaders, the Transparency report said.

Transparency’s rating is comprised of 17 data sources. The surveys and assessments used to compile the index include questions relating to the bribery of public officials, kickback in public procurement, embezzlement of public funds, and questions that probe the strength and effectiveness of public-sector anti-corruption efforts.

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UPDATE: Publication of Manafort payments violated law, interfered in US election, Kyiv court rules

Published Dec. 12, 2018. Updated Dec. 12 2018 at 2:45 pm



Editor's Note: This story has been updated to include a statement by MP Serhiy Leshchenko.

Two Ukrainian officials violated the law by revealing information about

millions of dollars of alleged illegal cash payments to lobbyist and former chair of U.S. President Donald Trump's election campaign Paul Manafort, a Kyiv district court said on Dec. 12.

In reviewing an administrative case filed by lawmaker Boryslav Rozenblat, the court concluded that Artem Sytnyk, director of the National Anti-Corruption Bureau of Ukraine, and parliamentarian Serhiy Leshchenko acted illegally when they revealed that Manafort's surname and signature were found in the so-called "black ledger" of ousted President Viktor Yanukovich's Party of Regions.

The "black ledger" is alleged to be a secret accounting book showing suspicious payments by the party to a range of individuals and officials. It became a key document implicating Manafort in corruption in Ukraine, and helped to end his tenure as Trump's campaign chair.

In a statement on its website, the court also appeared to describe the two men's actions as constituting interference in the 2016 United States presidential election.

The release of information about the "black ledger," which was part of a pre-trial investigation, "led to interference in the electoral processes of the United States in 2016 and harmed the interests of Ukraine as a state," the court's press service wrote.

The court also declared that Leshchenko acted illegally and termed his actions "interference in the external politics of Ukraine by spreading the above-mentioned information about Paul Manafort."

In October 2017, the court launched judicial proceedings in Rozenblat's suit against Sytnyk and Leshchenko. In the suit, the lawmaker called on the court to recognize the two men's actions as illegal.

In its Dec. 11 ruling, the court partially satisfied the demands of the plaintiff because Sytnyk and Leshchenko, as “subjects of state authority,” could not prove that they spread the information about Manafort without violating the law, the court’s press-service wrote.

In response to the ruling, Leshchenko published a post on Facebook suggesting that the decision was aimed at helping President Petro Poroshenko remove Sytnyk from office. By finding the National Anti-Corruption Bureau chief in violation of the law, the government will attempt to deflect criticism from among Western diplomats in Kyiv if he is removed, Leshchenko claimed.

“In response to criticisms about how (firing Sytnyk) is unacceptable, the scammers in the president’s circle will say: we’re firing him for illegally influencing the elections in the U.S.,” Leshchenko wrote.

In 2005, Manafort went to work for the Party of Regions in Ukraine after mass protests prevented its leader, then Prime Minister Yanukovich, from assuming the presidency after the falsified 2004 election. That event, known as the Orange Revolution, became the impetus for a large and extremely expensive campaign to burnish Yanukovich’s reputation in Western capitals.

Manafort’s consulting would eventually help Yanukovich win the presidency in 2011. After a tenure marred by excessive corruption, Yanukovich would subsequently be forced from power by the EuroMaidan Revolution in 2014 and flee to Russia.

In May 2016, Leshchenko published information from the Party of Region’s “black ledger” showing that the party spent large sums of money on paid advertising and the services of top state officials.

In August 2016, the National Anti-Corruption Bureau of Ukraine published a report indicating that Manafort's name was found in the ledger alongside a list of payments. It concluded that Manafort could have received more than \$12 million from the Party of Regions since 2007.

That revelation helped force Manafort to abandon his role as Trump campaign chair. However, it also proved controversial in Ukraine.

After Trump's November 2016 election, Nazar Kholodnytsky, head of the Special Anti-Corruption Prosecutor's office, said his agency could not prove the authenticity of Manafort's supposed signature in the ledger. It also saw no grounds to press charges against Manafort.

In January 2017, the news site Politico published an article suggesting that Ukrainian government officials attempted to use the "black ledger" to interfere in the U.S. presidential election in favor of Trump's rival for the presidency, Secretary of State Hillary Clinton.

In June 2017, Yaroslav Hordiyevych, spokesperson for the Special Anti-Corruption Prosecutor's office, told the Kyiv Post that his agency did not support Leshchenko and the National Anti-Corruption Bureau's decision to release the information.

Claims that Ukraine attempted to interfere in the U.S. presidential election have even reached Trump himself. In July 2017, the U.S. president wrote in a tweet: "Ukrainian efforts to sabotage Trump campaign – 'quietly working to boost Clinton.'"

In his Facebook post, Leshchenko suggested this was another reason for the court ruling.

"With this decision, Poroshenko will try to earn additional loyalty from the

Trump Administration, so it will close its eyes to any violations during the (March 2019 Ukrainian presidential) elections and the use of administrative resources, so that the ruling corrupt officials remain in power," he wrote.

TOP PROFS: NOT ENOUGH TO IMPEACH; NLJ

The National Law Journal

October 5, 1998 Monday

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**THE NATIONAL
LAW JOURNAL****Section:** Pg. 4 (col. 1); Vol. 21**Length:** 2083 words**Byline:** Harvey Berkman National Law Journal , Staff Reporter**Body**

NLJ JURY OF 12 CON-LAW EXPERTS WEIGHS EVIDENCE.

on a jury of 12 constitutional law professors, all but two told The National Law Journal that, from a constitutional standpoint, President Clinton should not be impeached for the things Independent Counsel Kenneth W. Starr claims he did.

Some of the scholars call the question a close one, but most suggest that it is not; they warn that impeaching William Jefferson Clinton for the sin he admits or the crimes he denies would flout the Founding Fathers' intentions.

On the charges as we now have them, assuming there is no additional report [from Mr. Starr], impeaching the president would probably be unconstitutional, asserts Cass R. Sunstein, co-author of a treatise on constitutional law, who teaches at the University of Chicago Law School.

The first reason for this conclusion is that the one charge indisputably encompassed by the concept of impeachment-abuse of power-stands on the weakest argument and evidence.

The allegations that invoking privileges and otherwise using the judicial system to shield information is an abuse of power that should lead to impeachment and removal from office is not only frivolous, but also dangerous, says Laurence H. Tribe, of Harvard Law School.

The second reason is that the Starr allegation for which the evidence is disturbingly strong-perjury-stems directly from acts the Founders would have considered personal, not governmental, and so is not the sort of issue they intended to allow Congress to cite to remove a president from office.

No Large-Scale Infidelity

Says Professor Sunstein, Even collectively, the allegations don't constitute the kind of violation of loyalty to the United States or large-scale infidelity to the Constitution that would justify impeachment, given the Framers' decision that impeachment should follow only from treason, bribery or other like offenses. What we have in the worst case here is a pattern of lying to cover up a sexual relationship, which is very far from what the Framers thought were grounds for getting rid of a president.

TOP PROFS: NOT ENOUGH TO IMPEACH; NLJ

Douglas W. Kmiec, who spent four years in the Justice Department's Office of Legal Counsel and now teaches at Notre Dame Law School, agrees: The fundamental point is the one that Hamilton makes in Federalist 65: Impeachment is really a remedy for the republic; it is not intended as personal punishment for a crime.

There's no question that William Jefferson Clinton has engaged in enormous personal misconduct and to some degree has exhibited disregard for the public interest in doing so, he says. But does that mean that it is gross neglect-gross in the sense of being measured not by whether we have to remove the children from the room when the president's video is playing, but by whether [alleged terrorist Osama] bin Laden is now not being properly monitored or budget agreements aren't being made?

Adds Prof. John E. Nowak, of the University of Illinois College of Law, the impeachment clause was intended to protect political stability in this country, rather than move us toward a parliamentary system whereby the dominant legislative party can decide that the person running the country is a bad person and get rid of him. Mr. Nowak co-authored a constitutional law hornbook and a multivolume treatise with fellow Illinois professor Ronald Rotunda, with whom he does not discuss these matters because Professor Rotunda is an adviser to Mr. Starr.

It seems hard to believe that anything in the report could constitute grounds for an impeachment on other than purely political grounds, Professor Nowak says. If false statements by the president to other members of the executive branch are the equivalent of a true misuse of office would think that the prevailing legislative party at any time in our history when the president was of a different party could have cooked up ways that he had misused the office.

And that, says Prof. A.E. Dick Howard, who has been teaching constitutional law and history for 30 years, would be a step in a direction the Founders never intended to go.

The Framers started from a separation-of-powers basis and created a presidential system, not a parliamentary system, and they meant for it to be difficult for Congress to remove a president-not impossible, but difficult, says Professor Howard, of the University of Virginia School of Law. We risk diluting that historical meaning if we permit a liberal reading of the impeachment power-which is to say: If in doubt, you don't impeach.

Many of the scholars point to the White House's acquisition of FBI files on Republicans as an example of something that could warrant the Clintons' early return to Little Rock-but only if it were proved that these files were acquired intentionally and malevolently misused. The reason that would be grounds for impeachment, while his activities surrounding Monica Lewinsky would not, the professors say, is that misuse of FBI files would implicate Mr. Clinton's powers as president. But if Mr. Starr has found any such evidence, he has not sent it to Congress, which he is statutorily bound to do.

One professor who believes there is no doubt that President Clinton's behavior in the Lewinsky matter merits his impeachment is John O. McGinnis, who teaches at Yeshiva University, Benjamin N. Cardozo School of Law. I don't think we want a parliamentary system, although I would point out that it's not as though we're really going to have a change in power. If Clinton is removed there will be Gore, sort of a policy clone of Clinton. A parliamentary system suggests a change in party power. That fear is somewhat overblown.

Professor McGinnis considers the reasons for impeachment obvious. I don't think the Constitution cares one whit what sort of incident [the alleged felonies] come from, he says. The question is, Can you have a perjurer and someone who obstructs justice as president? And it seems to me self-evident that you cannot. The whole structure of our country depends on giving honest testimony under law. That's the glue of the rule of law. You can go back to Plato, who talks about the crucial-ness of oaths in a republic. It's why perjury and obstruction of justice are such dangerous crimes.

This argument has some force, says Professor Kmiec, but the public is hesitant to impeach in this case because of a feeling that the entire process started illegitimately, that the independent counsel statute is flawed and that the referral in this case was even more flawed, in that it was done somewhat hastily by the attorney general.

TOP PROFS: NOT ENOUGH TO IMPEACH; NLJ

Jesse H. Choper, a professor at the University of California at Berkeley School of Law (Boalt Hall) and co-author of a con-law casebook now in its seventh edition, agrees that perjury, committed for any reason, can count as an impeachable offense. The language says high crimes and misdemeanors, and [perjury] is a felony, so my view is that it comes within the [constitutional] language. But whether we ought to throw a president out of office because he lied under oath in order to cover up an adulterous affair my judgment as a citizen would be that it's not enough.

A Judge Would Be Impeached

Many of the professors say Mr. Clinton would almost certainly be impeached for precisely what he has done, were he a judge rather than the president. That double standard, they say, is contemplated by the Constitution in a roundabout way. Says Professor Kmeic, The places where personal misbehavior is raised have entirely been in the context of judicial officers. There is a healthy amount of scholarship that suggests that one of the things true about judicial impeachments (which is not true of executive impeachments) is the additional phraseology saying that judges serve in times of good behavior. The counterargument is that there is only one impeachment clause, applying to executive and judicial alike. But our history is that allegations of profanity and drunkenness, gross personal misbehavior, have come up only in the judicial context.

In addition to history, there is another reason for making it harder to impeach presidents, says Akhil Reed Amar, who teaches constitutional law at Yale Law School and who recently published a book on the Bill of Rights: When you impeach a judge, you're not undoing a national election. The question to ask is whether [President Clinton's] misconduct is so serious and malignant as to justify undoing a national election, canceling the votes of millions and putting the nation through a severe trauma.

They're Uncomfortable

None of these arguments, however, is to suggest that the professors are comfortable with what they believe the president may well be doing: persistently repeating a single, essential lie—that his encounters did not meet the definition of sexual relations at his Paula Jones deposition. Mr. Clinton admits that this definition means he could never have touched any part of her body with the intent to inflame or satiate her desire. It is an assertion that clashes not only with Ms. Lewinsky's recounting of her White House trysts to friends, erstwhile friends and the grand jury, but also with human nature.

That's one of the two things that trouble me most about his testimony—that he continues to insist on the quite implausible proposition [of] Look, Ma, no hands, which is quite inconsistent with Monica Lewinsky's testimony, and that he's doing that in what appears to be quite a calculated way, Professor Tribe laments. But I take some solace in the fact that [a criminal prosecution for perjury] awaits him when he leaves office.

Professor Amar agrees that whatever crimes he may have committed, he'll have to answer for it when he leaves office, and that is the punishment that will fit his crime.

Also disturbing to Professor Tribe is the president's apparent comfort with a peculiar concept of what it means to tell the truth, a concept the professor describes as it may be deceptive, but if you can show it's true under a magnifying glass tilted at a certain angle, you're OK.

But even that distortion, he believes, does not reach the high bar the Founders set for imposing on presidents the political equivalent of capital punishment.

It would be a disastrous precedent to say that when one's concept of truth makes it harder for people to trust you, that that fuzzy fact is enough to say there has been impeachable conduct, Professor Tribe says. That would move us very dramatically toward a parliamentary system. Whether someone is trustworthy is very much in the eye of the beholder. The concept of truth revealed in his testimony makes it much harder to have confidence in him, but the impeachment process cannot be equated with a vote of no confidence without moving us much closer to a parliamentary system.

TOP PROFS: NOT ENOUGH TO IMPEACH; NLJ

Professor Kmiec does suggest that something stronger than simple no confidence might form the possible basis for impeachment. Call it no confidence at all. It is possible that one could come to the conclusion that the president's credibility is so destroyed that he'd have difficulty functioning as an effective president, Professor Kmiec says. But the public doesn't seem to think so, and I don't know that foreign leaders think so, given the standing ovation Mr. Clinton received at the United Nations.

In the end, Professor Howard says that he opposes impeachment under these conditions not only because the past suggests it is inappropriate, but also because of the dangerous precedent it would set. Starting with the Supreme Court's devastatingly unfortunate and totally misconceived opinion [in **Clinton v. Jones**], which allowed Ms. Jones's suit to proceed against the president while he was still in office, this whole controversy has played out in a way that makes it possible for every future president to be harassed at every turn by his political enemies, Professor Howard warns. To draw fine lines and say that any instance of stepping across that line becomes impeachable invites a president's enemies to lay snares at every turn in the path. I'm not sure we want a system that works that way.

The other jurors on this panel of constitutional law professors were:

--The one essentially abstaining juror: Michael J. Gerhardt, of the College of William and Mary, Marshall-Wythe School of Law.

--Douglas Laycock, of The University of Texas School of Law.

--Thomas O. Sargentich, co-director of the program on law and government at American University, Washington College of Law.

--Suzanna A. Sherry, professor at the University of Minnesota Law School.

Load-Date: April 16, 2011

GLOBAL POWER

Trump admin cancels \$300M aid to Pakistan over terror record

The proposed cuts mark a new low in what were already deteriorating relations with the United States' longtime ally.



Newly graduate Pakistani police officers march during their graduation ceremony after completing their training in Islamabad, Pakistan, on Dec. 17, 2015. Muhammad Reza / Anadolu Agency/Getty Images

Sept. 2, 2018, 11:08 AM EDT

By Saphora Smith and Reuters

The U.S. military said it has made a final decision to cancel \$300 million in aid to Pakistan, accusing Islamabad of not doing enough to root out militants from its border region with Afghanistan.

The proposed cuts mark a new low in what were already deteriorating relations with the United States' longtime ally.

Pentagon spokesman Lieutenant Colonel Kone Faulkner said in a statement to Reuters on Saturday that if the cuts are approved by Congress, the Pentagon aimed to spend the money on "other urgent priorities."

The Coalition Support Funds – which the Pentagon is now proposing to cut – were part of a broader suspension of aid to Pakistan announced by President Donald Trump at the start of the year.

The Trump administration has claimed Islamabad is granting safe haven to militants who are waging a 17-year-old war in neighboring Afghanistan – a charge Pakistan denies. Announcing the initial suspension of funds in January, the president accused Islamabad of rewarding past U.S. aid with "nothing but lies & deceit."

U.S. officials had previously held out the possibility that Pakistan could win back the funding if it showed that it was taking decisive actions to root out insurgents.

"But a final decision was made "due to a lack of Pakistani decisive actions in support of the South Asia Strategy," Faulkner told Reuters.

"The remaining \$300 [million] was reprogrammed," he added.

He said the other \$500 million in Coalition Support Funds was stripped by Congress from Pakistan earlier this year, to bring the total withheld to \$800 million.

The chairman of Pakistan's senate foreign relations committee, Mushahid Hussain, said the proposed cuts were "a sop to India." He also claimed that the money in question was owed to Pakistan and did not constitute aid.



U.S. to withhold \$255 million in aid from Pakistan

JAN. 2, 2018/00:49

Analysts say that the Trump administration's increasing closeness with Indian Prime Minister Narendra Modi is leaving space for other countries such as China, Russia, Iran and Turkey to gain influence in Pakistan.

Russia in particular has launched a charm offensive in Pakistan including the signing of a military cooperation pact, helicopter deliveries and officer training exercises.

While Russia-Pakistan strategic dialogue, training and military sales began in earnest around a decade ago, the Trump administration's apparent antipathy along with the victory of cricket icon-turned-anti-corruption crusader Imran Khan in July's election appear to have provided an opportunity for Moscow to significantly ramp up its influence in the country.

Such changes could have a big effect on the war in Afghanistan. Trump has grown increasingly frustrated with the conflict, prompting U.S. peace talks with the Taliban.

Khan, who once suggested he might order the shooting down of U.S. drones if they entered Pakistani airspace, has opposed the United States' open-ended presence in Afghanistan. In his victory speech, he said he wanted "mutually beneficial" relations with Washington.



Cricket star-turned-politician Imran Khan, chairman of Pakistan Tehreek-e-Insaf (PTI), gives a speech as he declares victory in the general election in Islamabad, Pakistan on July 26, 2018. Reuters TV / Reuters TV

Meanwhile Trump has repeatedly railed against Pakistan's reluctance or inability to crack down on extremists in its border regions, including militants in the Taliban-linked Haqqani network.

"The United States has foolishly given Pakistan more than 33 billion dollars in aid over the last 15 years, and they have given us nothing but lies & deceit, thinking of our leaders as fools," Trump tweeted at the start of the year. "They give safe haven to the terrorists we hunt in Afghanistan, with little help. No more!"

J.S. Ambassador Nikki Haley has also accused Pakistan of playing a "double game" on fighting terrorism. Haley said Pakistan would work with the U.S. at times, while at the same time harboring terrorists that attack American troops in Afghanistan.

The proposed cuts are not the first move to withdraw U.S. military support to Pakistan. Ali J. Siddiqui, Pakistan's ambassador to the U.S., confirmed to NBC News last month that the U.S. has also axed a long-standing military training program between the two countries.

Many of Pakistan's top military commanders participated in the program, which also proved to be a useful back channel for American diplomats – a total of 66 Pakistani officers were due to be involved this year.

Separately on Friday, the Trump administration announced it would eliminate U.S. funding to the United Nations relief agency for Palestinian refugees (UNRWA) calling it an "irredeemably flawed operation."

Wajahat S. Khan contributed.



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The New York Times

Donald Trump Used Over \$250,000 From Charity for Business Disputes, Report Says

By Steve Eder

Sept. 20, 2016

Donald J. Trump, already under scrutiny for how he uses his foundation, directed more than a quarter of a million dollars from the charity to settle legal disputes stemming from his personal businesses, according to a report on Tuesday in The Washington Post.

The payments from Mr. Trump's charity, the Donald J. Trump Foundation, helped settle unpaid fines by the town of Palm Beach, Fla., and a lawsuit over a hole in one at a tournament at a Trump golf course, The Post said.

The New York attorney general, Eric T. Schneiderman, who regulates charities in the state, said last week that he was looking into the foundation to see whether it was in compliance with state laws. His office declined to comment on Tuesday about whether it would look into the donations tied to Mr. Trump's business disputes.

A group of congressional Democrats has also asked the Department of Justice to look into a \$25,000 political donation made through the foundation in support of Florida's attorney general, Pam Bondi, around the time her office was reviewing allegations against Mr. Trump's for-profit education programs. Ms. Bondi ultimately decided not to take action against Mr. Trump.

Aides to Mr. Trump, the Republican presidential nominee, have said that donation was made in error from the foundation.

Jason Miller, a spokesman for the Trump campaign, discounted the latest revelations, saying in a statement that foundation transactions had been publicly disclosed. "There was not, and could not be, any intent or motive for the Trump Foundation to make improper payments," he said.

Legal experts said the foundation's donations in connection with litigation involving Mr. Trump's personal businesses may have violated tax regulations that prohibit using nonprofit charities for private interests.

"That's way across the line," said Lloyd Mayer, a professor at Notre Dame Law School who specializes in nonprofit and tax law. "It's not even close. It's clearly self-dealing for a private foundation like the Trump Foundation."

Mr. Mayer said he was surprised about the amount of money involved in the Trump expenditures. "I haven't seen numbers this large before," he said.

In one instance reported by The Post, the foundation made a \$158,000 donation to settle a lawsuit by a golfer who was denied a promised \$1 million payout for getting a hole in one at a charity golf tournament at a Trump course in Westchester County, N.Y.

The organization that put on the event, Alonzo Mourning Charities, had bought an insurance policy to cover any holes in one, but the insurer refused to pay the prize after determining that the golfer's tee shot was a few yards shorter than the 150 yards required by the policy.

As part of the settlement, both Mr. Trump's club and Alonzo Mourning Charities had to donate money to a charity of the golfer's choosing. The club's donation, according to tax records, came from the Trump Foundation.

In another case, the foundation paid \$100,000 in 2007 to Fisher House Foundation, a veterans' cause, as part of a settlement for fines racked up by Mr. Trump's Mar-a-Lago Club in Palm Beach when it hoisted an oversize pole for an American flag.

Other unusual donations from the foundation have included \$20,000 paid to an artist to paint a portrait of Mr. Trump, and \$12,000 for an autographed helmet from the football player Tim Tebow.

A compounding factor for Mr. Trump is that he has given relatively little of his own money to the foundation; in recent years, it has relied almost exclusively on donations from others.

Mr. Trump and his campaign have deflected questions about his foundation, saying that he has donated “tens of millions of dollars” to charities, through his charity and directly from personal accounts, and that his friends have also contributed to help “worthy causes.” But Mr. Trump has refused to release his personal tax returns, which would indicate how much money he reported giving away.

On Tuesday, the campaign of Hillary Clinton, the Democratic nominee, seized on the revelations about the mixing of foundation money with business issues.

“Once again, Trump has proven himself a fraud who believes the rules don’t apply to him,” said Christina Reynolds, a spokeswoman for Mrs. Clinton. “It’s past time for him to release his tax returns to show whether his tax issues extend to his own personal finances.”

Mr. Trump paid a \$2,500 penalty to the Internal Revenue Service for his foundation’s donation in support of Ms. Bondi. Some of the other expenditures may have occurred too long ago to be taxed and fined under the statute of limitations, said Marc Owens, a Washington lawyer who was formerly the director of the I.R.S.’s tax-exempt organizations division. But he said there could be other ways the I.R.S., or the New York attorney general, could pursue the foundation.

“I don’t recall ever seeing a pattern of self-dealing that encompasses so many different kinds of self-dealing,” he said.

The New York Times

Harry Reid Cites Evidence of Russian Tampering in U.S. Vote, and Seeks F.B.I. Inquiry

By David E. Sanger

Aug. 29, 2016

The Senate minority leader, Harry Reid of Nevada, asked the F.B.I. on Monday to investigate evidence suggesting that Russia may try to manipulate voting results in November.

In a letter to the F.B.I. director, James B. Comey Jr., Mr. Reid wrote that the threat of Russian interference “is more extensive than is widely known and may include the intent to falsify official election results.” Recent classified briefings from senior intelligence officials, Mr. Reid said in an interview, have left him fearful that President Vladimir V. Putin’s “goal is tampering with this election.”

News reports on Monday said the F.B.I. warned state election officials several weeks ago that foreign hackers had exported voter registration data from computer systems in at least one state, and had pierced the systems of a second one.

The bureau did not name the states, but Yahoo News, which first reported the confidential F.B.I. warning, said they were Arizona and Illinois. Matt Roberts, a spokesman for Arizona’s secretary of state, said the F.B.I. had told state officials that Russians were behind the Arizona attack.

After the F.B.I. warning, Arizona took its voter registration database offline from June 28 to July 8 to allow for a forensic exam of its systems, Mr. Roberts said.

The F.B.I., in its notice to states, said the voter information had been “exfiltrated,” which means that it was shipped out of the state systems to another computer. But it does not mean that the data itself was tampered with.

It is unclear whether the hackers intended to affect the election or pursued the data for other purposes, like gaining personal identifying information about voters. The F.B.I. warning referred to “targeting activity” against state boards of elections, but did not discuss the intent of the hackers.

“That incident was only a small part of what disturbed me,” Mr. Reid said on Monday.

In his letter to the F.B.I., he offered no specifics about how Russian hackers could manipulate election data, an effort made harder by the varying vote-tallying procedures in each state.

But the prospect of election tampering has been discussed since the revelation that two Russian intelligence agencies, the F.S.B. and the G.R.U., were believed to be responsible for the hacking of the networks of the Democratic National Committee.

Emails published by a hacker who called himself Guccifer 2.0 — believed to be an alias for Russian hackers linked to the intelligence agencies — revealed that the committee had denigrated the campaign of Senator Bernie Sanders of Vermont.

The disclosures led to the resignation of Representative Debbie Wasserman Schultz of Florida as the committee’s chairwoman.

Mr. Reid’s accusation that Russia is seeking not only to influence the election with propaganda but also to tamper with the vote counting goes significantly beyond anything the Obama administration has said in public.

While intelligence agencies have told the White House that they have “high confidence” that Russian intelligence services were behind the hacking of the Democratic committee, the administration has not leveled any accusations against Mr. Putin’s government. Asked about that in the interview, Mr. Reid said he was free to say things the president was not.

But Mr. Reid argued that the connections between some of Donald J. Trump’s former and current advisers and the Russian leadership should, by itself, prompt an investigation. He referred indirectly in his letter to a speech given in Russia by one Trump adviser, Carter Page, a consultant and investor in the energy giant Gazprom, who criticized American sanctions policy toward Russia.

“Trump and his people keep saying the election is rigged,” Mr. Reid said. “Why is he saying that? Because people are telling him the election can be messed with.” Mr. Trump’s advisers say they are concerned that unnamed elites could rig the election for his opponent, Hillary Clinton.

Mr. Reid argued that if Russia concentrated on “less than six” swing states, it could alter results and undermine confidence in the electoral system. That would pose challenges, given that most states have paper backups, but he noted that hackers could keep people from voting by tampering with the rolls of eligible voters.

The New York Times <https://nyti.ms/2CyF3Jh>

I Am Part of the Resistance Inside the Trump Administration

I work for the president but like-minded colleagues and I have vowed to thwart parts of his agenda and his worst inclinations.

Sept. 5, 2018

The Times is taking the rare step of publishing an anonymous Op-Ed essay. We have done so at the request of the author, a senior official in the Trump administration whose identity is known to us and whose job would be jeopardized by its disclosure. We believe publishing this essay anonymously is the only way to deliver an important perspective to our readers. We invite you to submit a question about the essay or our vetting process here. [Update: Our answers to some of those questions are published here.]

President Trump is facing a test to his presidency unlike any faced by a modern American leader.

It's not just that the special counsel looms large. Or that the country is bitterly divided over Mr. Trump's leadership. Or even that his party might well lose the House to an opposition hellbent on his downfall.

[The author of this Op-Ed will publish a book in November 2019 titled "A Warning."]

The dilemma — which he does not fully grasp — is that many of the senior officials in his own administration are working diligently from within to frustrate parts of his agenda and his worst inclinations.

I would know. I am one of them.

To be clear, ours is not the popular "resistance" of the left. We want the administration to succeed and think that many of its policies have already made America safer and more prosperous.

But we believe our first duty is to this country, and the president continues to act in a manner that is detrimental to the health of our republic.

That is why many Trump appointees have vowed to do what we can to preserve our democratic institutions while thwarting Mr. Trump's more misguided impulses until he is out of office.

The root of the problem is the president's amorality. Anyone who works with him knows he is not moored to any discernible first principles that guide his decision making.

Although he was elected as a Republican, the president shows little affinity for ideals long espoused by conservatives: free minds, free markets and free people. At best, he has invoked these ideals in scripted settings. At worst, he has attacked them outright.

In addition to his mass-marketing of the notion that the press is the "enemy of the people," President Trump's impulses are generally anti-trade and anti-democratic.

Don't get me wrong. There are bright spots that the near-ceaseless negative coverage of the administration fails to capture: effective deregulation, historic tax reform, a more robust military and more.

But these successes have come despite — not because of — the president's leadership style, which is impetuous, adversarial, petty and ineffective.

From the White House to executive branch departments and agencies, senior officials will privately admit their daily disbelief at the commander in chief's comments and actions. Most are working to insulate their operations from his whims.

Meetings with him veer off topic and off the rails, he engages in repetitive rants, and his impulsiveness results in half-baked, ill-informed and occasionally reckless decisions that have to be walked back.

"There is literally no telling whether he might change his mind from one minute to the next," a top official complained to me recently, exasperated by an Oval Office meeting at which the president flip-flopped on a major policy decision he'd made only a week earlier.

The erratic behavior would be more concerning if it weren't for unsung heroes in and around the White House. Some of his aides have been cast as villains by the media. But in private, they have gone to great lengths to keep bad decisions contained to the West Wing, though they are clearly not always successful.

It may be cold comfort in this chaotic era, but Americans should know that there are adults in the room. We fully recognize what is happening. And we are trying to do what's right even when Donald Trump won't.

The result is a two-track presidency.

Take foreign policy: In public and in private, President Trump shows a preference for autocrats and dictators, such as President Vladimir Putin of Russia and North Korea's leader, Kim Jong-un, and displays little genuine appreciation for the ties that bind us to allied, like-minded nations.

Astute observers have noted, though, that the rest of the administration is operating on another track, one where countries like Russia are called out for meddling and punished accordingly, and where allies around the world are engaged as peers rather than ridiculed as rivals.

On Russia, for instance, the president was reluctant to expel so many of Mr. Putin's spies as punishment for the poisoning of a former Russian spy in Britain. He complained for weeks about senior staff members letting him get boxed into further confrontation with Russia, and he expressed frustration that the United States continued to impose sanctions on the country for its malign behavior. But his national security team knew better — such actions had to be taken, to hold Moscow accountable.

This isn't the work of the so-called deep state. It's the work of the steady state.

Given the instability many witnessed, there were early whispers within the cabinet of invoking the 25th Amendment, which would start a complex process for removing the president. But no one wanted to precipitate a constitutional crisis. So we will do what we can to steer the administration in the right direction until — one way or another — it's over.

The bigger concern is not what Mr. Trump has done to the presidency but rather what we as a nation have allowed him to do to us. We have sunk low with him and allowed our discourse to be stripped of civility.

Senator John McCain put it best in his farewell letter. All Americans should heed his words and break free of the tribalism trap, with the high aim of uniting through our shared values and love of this great nation.

We may no longer have Senator McCain. But we will always have his example — a lodestar for restoring honor to public life and our national dialogue. Mr. Trump may fear such honorable men, but we should revere them.

There is a quiet resistance within the administration of people choosing to put country first. But the real difference will be made by everyday citizens rising above politics, reaching across the aisle and resolving to shed the labels in favor of a single one: Americans.

The writer is a senior official in the Trump administration.

Follow The New York Times Opinion section on Facebook and Twitter (@NYTopinion).

A version of this article appears in print on Sept. 6, 2018, Section A, Page 23 of the New York edition with the headline: The Quiet Resistance Inside the Trump Administration

.DITORIAL

Joe Biden Lectures Ukraine

By The Editorial Board

Dec. 11, 2015

The only applause Vice President Joseph Biden Jr. got while he addressed the Ukrainian Parliament on Tuesday was when he berated Russia. That's not hard: Russia's venality — the seizure of Crimea and the support for separatists in eastern Ukraine — is a strong unifying force in Ukrainian politics. By contrast, Mr. Biden's ardent talk of the need to put an end to Ukraine's ubiquitous corruption and the power of its oligarchs was met with stony silence.

Mr. Biden was right to upbraid Russia and to pledge an extra \$190 million in aid to Ukraine. And as a Western leader who has made Ukraine his special project, he was also right to warn Ukrainian legislators to waste no more time in rooting out corruption. Though the European Union is likely to renew sanctions against Russia again in January, its patience with Ukraine is being tested by the lack of critical reforms. In his address, Mr. Biden specifically called for an overhaul of the office of the prosecutor general, changes in the energy sector, transparency about official sources of income and other reforms.

Russia's actions are no excuse for the failure of democratically elected Ukrainian leaders to crack down on corruption. About 50 magnates currently own about 85 percent of Ukraine's gross domestic product, according to the Jamestown Foundation's Eurasia Daily Monitor. Many politicians and judges are holdovers from previous governments, mouthing a new line but living by old rules and blocking serious reform measures.

Taking on so well-entrenched a system is a huge challenge. A measure of President Petro Poroshenko's weakness against these forces was his having to import foreigners for key jobs, including Mikheil Saakashvili, the former president of Georgia, to be governor of Odessa and David Sakvarelidze, a former Georgian prosecutor, to be Ukraine's deputy prosecutor general.

Sadly, the credibility of Mr. Biden's message may be undermined by the association of his son with a Ukrainian natural-gas company, Burisma Holdings, which is owned by a former government official suspected of corrupt practices. A spokesman for the son, Hunter Biden,

argues that he joined the board of Burisma to strengthen its corporate governance. That may be so. But Burisma's owner, Mykola Zlochevsky, has been under investigation in Britain and in Ukraine. It should be plain to Hunter Biden that any connection with a Ukrainian oligarch damages his father's efforts to help Ukraine. This is not a board he should be sitting on.

Joe Biden, His Son and the Case Against a Ukrainian Oligarch

By James Risen

Dec. 8, 2015

WASHINGTON — When Vice President Joseph R. Biden Jr. traveled to Kiev, Ukraine, on Sunday for a series of meetings with the country's leaders, one of the issues on his agenda was to encourage a more aggressive fight against Ukraine's rampant corruption and stronger efforts to rein in the power of its oligarchs.

But the credibility of the vice president's anticorruption message may have been undermined by the association of his son, Hunter Biden, with one of Ukraine's largest natural gas companies, Burisma Holdings, and with its owner, Mykola Zlochevsky, who was Ukraine's ecology minister under former President Viktor F. Yanukovich before he was forced into exile.

Hunter Biden, 45, a former Washington lobbyist, joined the Burisma board in April 2014. That month, as part of an investigation into money laundering, British officials froze London bank accounts containing \$23 million that allegedly belonged to Mr. Zlochevsky.

Britain's Serious Fraud Office, an independent government agency, specifically forbade Mr. Zlochevsky, as well as Burisma Holdings, the company's chief legal officer and another company owned by Mr. Zlochevsky, to have any access to the accounts.

But after Ukrainian prosecutors refused to provide documents needed in the investigation, a British court in January ordered the Serious Fraud Office to unfreeze the assets. The refusal by the Ukrainian prosecutor general's office to cooperate was the target of a stinging attack by the American ambassador to Ukraine, Geoffrey R. Pyatt, who called out Burisma's owner by name in a speech in September.

"In the case of former Ecology Minister Mykola Zlochevsky, the U.K. authorities had seized \$23 million in illicit assets that belonged to the Ukrainian people," Mr. Pyatt said. Officials at the prosecutor general's office, he added, were asked by the United Kingdom "to send documents supporting the seizure. Instead they sent letters to Zlochevsky's attorneys attesting that there was no case against him. As a result, the money was freed by the U.K. court, and shortly thereafter the money was moved to Cyprus."

Mr. Pyatt went on to call for an investigation into "the misconduct" of the prosecutors who wrote the letters. In his speech, the ambassador did not mention Hunter Biden's connection to Burisma.

But Edward C. Chow, who follows Ukrainian policy at the Center for Strategic and International Studies, said the involvement of the vice president's son with Mr. Zlochevsky's firm undermined the Obama administration's anticorruption message in Ukraine.

"Now you look at the Hunter Biden situation, and on the one hand you can credit the father for sending the anticorruption message," Mr. Chow said. "But I think unfortunately it sends the message that a lot of foreign countries want to believe about America, that we are hypocritical about these issues."

Late Bedingfield, a spokeswoman for the vice president, said Hunter Biden's business dealings had no impact on his father's policy positions in connection with Ukraine.

"Hunter Biden is a private citizen and a lawyer," she said. "The vice president does not endorse any particular company and has no involvement with this company. The vice president has pushed aggressively for years, both publicly with groups like the U.S.-Ukraine Business Forum and privately in meetings with Ukrainian leaders, for Ukraine to make every effort to investigate and prosecute corruption in accordance with the rule of law. It will once again be a key focus during his trip this week."

Ryan F. Toohey, a Burisma spokesman, said that Hunter Biden would not comment for this article.

It is not known how Mr. Biden came to the attention of the company. Announcing his appointment to the board, Alan Apter, a former Morgan Stanley investment banker who is chairman of Burisma, said, "The company's strategy is aimed at the strongest concentration of professional staff and the introduction of best corporate practices, and we're delighted that Mr. Biden is joining us to help us achieve these goals."

Joining the board at the same time was one of Mr. Biden's American business partners, Devon Archer. Both are involved with Rosemont Seneca Partners, an American investment firm with offices in Washington.

Mr. Biden is the younger of the vice president's two sons. His brother, Beau, died of brain cancer in May. In the past, Hunter Biden attracted an unusual level of scrutiny and even controversy. In 2014, he was discharged from the Navy Reserve after testing positive for cocaine use. He received a commission as an ensign in 2013, and he served as a public affairs officer.

Before his father was vice president, Mr. Biden also briefly served as president of a hedge fund group, Paradigm Companies, in which he was involved with one of his uncles, James Biden, the vice president's brother. That deal went sour amid lawsuits in 2007 and 2008 involving the Bidens and an erstwhile business partner. Mr. Biden, a graduate of Georgetown University and Yale Law School, also worked as a lobbyist before his father became vice president.

Burisma does not disclose the compensation of its board members because it is a privately held company, Mr. Toohey said Monday, but he added that the amount was "not out of the ordinary" for similar corporate board positions.

Asked about the British investigation, which is continuing, Mr. Toohey said, "Not only was the case dismissed and the company vindicated by the outcome, but it speaks volumes that all his legal costs were recouped."

In response to Mr. Pyatt's criticism of the Ukrainian handling of Mr. Zlochevsky's case, Mr. Toohey said that "strong corporate governance and transparency are priorities shared both by the United States and the leadership of Burisma. Burisma is working to bring the energy sector into the modern era, which is critical for a free and strong Ukraine."

Vice President Biden has played a leading role in American policy toward Ukraine as Washington seeks to counter Russian intervention in Eastern Ukraine. This week's visit was his fifth trip to Ukraine as vice president.

Ms. Bedingfield said Hunter Biden had never traveled to Ukraine with his father. She also said that Ukrainian officials had never mentioned Hunter Biden's role with Burisma to the vice president during any of his visits.

"I've got to believe that somebody in the vice president's office has done some due diligence on this," said Steven Pifer, who was the American ambassador to Ukraine from 1998 to 2000. "I should say that I hope that has happened. I would hope that they have done some kind of check, because I think the vice president has done a very good job of sending the anticorruption message in Ukraine, and you would hate to see something like this undercut that message."

Ukraine Ousts Viktor Shokin, Top Prosecutor, and Political Stability Hangs in the Balance

nytimes.com/2016/03/30/world/europe/political-stability-in-the-balance-as-ukraine-ousts-top-prosecutor.html

Andrew E. Kramer

March 29,
2016



MOSCOW — Bowing to pressure from international donors, the Ukrainian Parliament voted on Tuesday to remove a prosecutor general who had clung to power for months despite visible signs of corruption.

But in a be-careful-what-you-wish-for moment, veteran observers of Ukrainian politics said that the prosecutor, Viktor Shokin, had played an important role in balancing competing political interests, helping maintain stability during a treacherous era in the divided country's history.

The United States and other Western nations had for months called for the ousting of Mr. Shokin, who was widely criticized for turning a blind eye to corrupt practices and for defending the interests of a venal and entrenched elite. He was one of several political figures in Kiev whom reformers and Western diplomats saw as a worrying indicator of a return to past corrupt practices, two years after a revolution that was supposed to put a stop to self-dealing by those in power.

As the problems festered, Kiev drew increasingly sharp criticism from Western diplomats and leaders. In a visit in December, Vice President Joseph R. Biden Jr. said corruption was eating Ukraine "like a cancer." Christine Lagarde, the managing director of the International Monetary Fund, which props up Ukraine financially, said last month that progress was so slow in fighting corruption that "it's hard to see how the I.M.F.-supported program can continue."

With this pressure mounting, Parliament on Tuesday voted by a comfortable margin to remove Mr. Shokin.

In the final hours before Parliament voted him out, Mr. Shokin had fired his reform-minded deputy prosecutor, David Sakvarelidze, with whom he had been feuding. It was not immediately clear whether that firing would remain in force.

With the prosecutor's office in turmoil throughout Ukraine on Tuesday, one of Mr. Sakvarelidze's appointees in the Odessa regional office was arrested by military prosecutors, assumed to be loyal to Mr. Shokin.

Foreign donors had complained about rot in the prosecutor's office, not least because much of the money suspected of being stolen was theirs.

In one high-profile example, known in Ukraine as the "diamond prosecutors," troves of diamonds, cash and other valuables were found in the homes of two of Mr. Shokin's subordinates, suggesting that they had been taking bribes.

But the case became bogged down, with no reasons given. When a department in Mr. Shokin's office tried to bring it to trial, the prosecutors were fired or resigned. The perpetrators seemed destined to get off with claims that the stones were not worth very much.

For many Ukrainians, the case encapsulated a failure to follow through on the sweeping promises made during the heady days of the revolution to root out corruption and establish a modern, transparent state. Instead, there has seemed to be a return to business-as-usual horse-trading and compromise among the tightly knit Ukrainian oligarchic and business elite.

Since his appointment a year ago, Mr. Shokin had been criticized for not prosecuting officials, businessmen and members of Parliament for their roles in corrupt schemes during the government of former President Viktor F. Yanukovich. He also did not press cases for sniping by the police and opposition activists during the street protests in 2014 that killed more than 100 people and wounded about 1,000.

To a certain extent, analysts say, accommodations of this sort are necessary if the government is to get anything done in Parliament, because supporters of the Yanukovich government remain a political force in Ukraine, coalesced around the Opposition Bloc party. It represents Russian-speaking southeastern areas of Ukraine and the former elite, whose support in Parliament President Petro O. Poroshenko needs to push through reforms and to try to implement a peace accord with Russia.

“There are prices the new political establishment has to pay,” Tymofiy Mylovanov, the president of the Kiev School of Economics, said in an interview. “How do they pay? They guarantee some security for their opponents’ business interests.”

J.S. Slaps Egypt on Human Rights Record and Ties to North Korea

By Gardiner Harris and Declan Walsh

Aug. 22, 2017

WASHINGTON — The Trump administration on Tuesday denied Egypt \$96 million in aid and delayed \$195 million in military funding because of concerns over Egypt's human rights record and its cozy relationship with North Korea.

Analysts said they were surprised by the moves, which followed an Oval Office meeting in April between President Trump and President Abdel Fattah el-Sisi of Egypt, during which Mr. Trump lavished praise on the military strongman.

"I just want to let everybody know, in case there was any doubt, that we are very much behind President el-Sisi," Mr. Trump said. "He's done a fantastic job in a very difficult situation. We are very much behind Egypt and the people of Egypt. The United States has, believe me, backing, and we have strong backing."

Egypt is among the largest recipients of United States aid. But on Tuesday, the State Department confirmed that it was curtailing its funding to the country because of its lack of progress in human rights and a new law restricting the activities of nongovernmental organizations.

Asked if Egypt's robust relationship with North Korea played a role in Tuesday's action, a State Department official would say only that issues of concern have been raised with Cairo, but refused to provide details about the talks.

While Mr. Sisi approved the new law almost two months after his meeting with Mr. Trump, concerns over Egypt's human rights record and its relationship with North Korea have been percolating for years.

Robert Satloff, the executive director of the Washington Institute for Near East Policy, said the conflicting messages from the Trump administration were surprising.

"It is unusual that the Trump administration would take a punitive measure against Egypt, given the president's outreach to President Sisi and his general embrace of this Egyptian government," Mr. Satloff said. "I would not say reports of difficulties with Egypt's human rights situation or its connection with North Korea are new."

Secretary of State Rex W. Tillerson's top priority has been to increase North Korea's economic and diplomatic isolation, and he has asked foreign leaders in almost every meeting that they cut ties with Pyongyang.

Egypt has been close with North Korea since at least the 1970s. North Korean pilots trained Egyptian fighter pilots before the 1973 war with Israel, and Egypt was later accused of supplying Scud missiles to North Korea, said Daniel Leone of the Project on Middle East Democracy.

This year, United Nations investigators said they acquired evidence of North Korean trade in "hitherto unreported items such as encrypted military communications, man-portable air defense systems, air defense systems and satellite-guided missiles" in the Middle East and Africa, among other locations.

In 2015, a United Nations panel said that Egypt's Port Said was being used by North Korean front companies and shipping agents engaged in weapons smuggling.

Successive American administrations have privately raised the issue of North Korea in talks with Cairo, but with little success. The United States may be pressuring Egypt over its civilian and military links to North Korea. One of Egypt's richest men, Naguib Sawiris, owns Orascom Telecom Media and Technology, the telecommunications company that helped set up North Korea's main cellular telephone network in 2008.

Another factor in the decision to limit funding to Egypt is the draconian law regulating aid agencies — particularly those funded by Western governments and organizations — which was signed into law by Mr. Sisi in late May. Several Egyptian groups, including those working with victims of police torture, said the law will make it impossible for them to continue their work and may force them to shut down.

The Trump administration has proposed significant cutbacks in foreign aid and has promised to demand greater accountability from aid recipients.

But Tuesday's actions were not as tough as they might have been. By pausing the provision of \$195 million in military funding, the Trump administration saved the money from expiring entirely on Sept. 30. This way, Egypt could eventually get the money if its record on human rights improves.

2/15/2019

U.S. Suspends \$800 Million In Aid To Pakistan : NPR



WAMU 98.5

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WORLD

U.S. Suspends \$800 Million In Aid To Pakistan

July 10, 2011 · 2:20 PM ET

NPR STAFF AND WIRES

The Obama administration's decision to suspend \$800 million in aid to the Pakistan's military signals a tougher U.S. line with a critical but sometimes unreliable partner in the fight against terrorism.

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NPR's Jackie Northam Reports On The U.S.-Pakistan Relationship

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President Barack Obama's chief of staff, William Daley, said in a broadcast interview Sunday that the estranged relationship between the United States and Pakistan must be made "to work over time," but until it does, "we'll hold back some of the money that the American taxpayers are committed to give" to the country's powerful military forces.

The suspension of U.S. aid, first reported by *The New York Times*, followed a statement last week by Adm. Mike Mullen, chairman of the U.S. Joint Chiefs of Staff, that Pakistan's security services may have sanctioned the killing of Pakistani journalist

Saleem Shahzad, who wrote about infiltration of the military by extremists. His battered body was found in June.

The allegation was rejected by Pakistan's powerful military establishment, including the Inter-Services Intelligence Agency, which has historic ties to the Taliban and other militant groups and which many Western analysts regard as a state-within-a-state.

George Perkovich, an expert on Pakistan with the Carnegie Endowment for International Peace in Washington, said Mullen's comments and the suspension of aid represent "the end of happy talk," where the U.S. tries to paper over differences between the two nations.

Daley, interviewed on ABC's *This Week*, suggested the decision to suspend military aid resulted from the increasing estrangement between the U.S. and Pakistan. "Obviously there's still a lot of pain that the political system in Pakistan is feeling by virtue of the raid that we did to get Osama bin Laden," Daley said.

Panetta told reporters traveling with him to Afghanistan on Saturday that the U.S. would continue to press Pakistan in the fight against extremists, including al-Qaida's new leader, Ayman al-Zawahri.

"We have to continue to emphasize with the Pakistanis that in the end it's in their interest to be able to go after these targets as well," Panetta said. "And in the discussions I've had with them, I have to say that, you know, they're giving us cooperation in going after some of these targets. We've got to continue to push them to do that. That's key."

The U.S. has long been unhappy with Pakistan's evident lack of enthusiasm for carrying the fight against terrorists to its tribal areas, as well as its covert support for the Taliban and anti-Indian extremist groups.

But tensions ratcheted up in January, when CIA security contractor Raymond Davis shot and killed two Pakistanis who he said were trying to rob him. They spiked in May, when U.S. forces killed bin Laden during a covert raid on a home in Abbottabad, the location of Pakistan's military academy.

The Bin Laden Raid

The early May raid on bin Laden's compound was carried out by U.S. Navy Seals, without giving Pakistan advanced knowledge. Shortly after, Defense Secretary Leon Panetta, in his former role as CIA chief, suggested Pakistan's military was either complicit or incompetent for not knowing bin Laden was living in Pakistan.

Shuja Nawaz, director of the South Asia Center at the Atlantic Council, says the raid and the criticism have had a big impact in Pakistan.

"All of this has really kind of spooked the Pakistanis, and particularly the military, that came under a lot of criticism at home. So they're reacting largely to shore up their domestic base again."

Not long after the bin Laden raid, Pakistan took its own unilateral actions, says Brian Katulis with the Center for American Progress.

"Pakistan ordered U.S. special forces, trainers to leave a few week ago. A couple of weeks ago, the defense minister said that the drone strikes the U.S. was conducting from Shamsi airbase in Pakistani territory had stopped, and that they were requesting the U.S. to pull out its infrastructure there."

In a written statement, a Pentagon spokesperson indicated that Pakistan's decision to eject the American military trainers is what prompted the U.S. decision to withhold military aid. And if the American trainers can't get in, they also can't send in military equipment needed by the Pakistanis.

Nawaz, of the Atlantic Council, says this is a dangerous circle, and that neither side is going to come out ahead because the U.S. and Pakistan need each other. Nawaz says most of the supplies to American troops in Afghanistan run through Pakistan.

"The U.S. certainly needs Pakistan for its air and land line of communication, particularly in this final two or three years of the Afghan campaign. And Pakistan certainly needs the U.S.' financial assistance to continue its own fighting against terrorism on the western border."

A Pause In Military Aid

The \$800 million in suspended aid represents 40 percent of the \$2 billion in U.S. military aid to Pakistan, and according to the *Times* includes money for counterterrorism operations.

12/15/2019

U.S. Suspends \$800 Million In Aid To Pakistan : NPR

The report said some of the money represented equipment that can't be set up for training because Pakistan won't give visas to the trainers. About \$300 million was intended to reimburse Pakistan for the cost of deploying 100,000 troops along the Afghan border, the newspaper said.

A senior U.S. official confirmed that the suspension came in response to the Pakistani army's decision to significantly reduce the number of visas for U.S. military trainers. "We remain committed to helping Pakistan build its capabilities, but we have communicated to Pakistani officials on numerous occasions that we require certain support in order to provide certain assistance," a senior U.S. official told The Associated Press. The official was not authorized to discuss the issue publicly and spoke only on condition of anonymity.

Secretary of State Hillary Clinton recently told senators that "when it comes to our military aid, we are not prepared to continue providing that at the pace we were providing it unless we see certain steps taken."

California Rep. Howard Berman, the top Democrat on the House Foreign Affairs Committee, said Sunday that he agreed with the administration's decision. "I have repeatedly expressed concern over sending assistance to Pakistan's military as elements of it actively undermine the country's democratically elected government and institutions, and I'm relieved the Pentagon shares my concerns," Berman said.

Pakistan army spokesman Maj. Gen. Athar Abbas declined comment on the suspension. He pointed to comments by Army Chief Ashfaq Parvez Kayani, who last month said U.S. military aid should be diverted to civilian projects.

Hasan-Askari Rizvi, a Pakistani political and defense analyst, said the U.S. decision to suspend aid is an attempt to increase pressure on Pakistan, but he believes it could hurt both sides.

"The Pakistani military has been the major supporter of the U.S. in the region because it needed weapons and money," said Rizvi. "Now, when the U.S. builds pressure on the military, it will lose that support."

Rivzi said the move could make it harder for the U.S. to push the Taliban into peace talks, in preparation for its withdrawal from Afghanistan. At the same time, he said, the Pakistani military relies on U.S. aid in its fight against militant groups.

"This kind of public denunciation needs to stop, and they need to talk," Rivzi said. "They shouldn't go to the brink because both will suffer."

But Abbas, the Pakistani military spokesman, said the loss of aid would have no effect on military operations. "In the past, we have not been dependent on any external support for these operations, and they will continue," Abbas said.

Perkovich, the Carnegie Endowment expert, called the suspension of U.S. aid "overdue."

"We've been trying for years to get, persuade, push the Pakistani army to conduct military operations on their border with Afghanistan, especially in North Waziristan, and they've said it's not in their interest, that they're overstretched already," Perkovich said in a telephone interview from Paris. "I think it's smart to say, 'We hear you.' ... If the army doesn't want the support, we hear them and we'll withdraw the support."

Perkovich said if billions in U.S. financial aid didn't change the behavior of the Pakistan military, then withdrawing it probably wouldn't either. The shift in the administration's policy was prompted by recent tensions, he said. But it also grew out of the U.S. decision to begin withdrawing troops from Afghanistan.

"That decision to withdraw from Afghanistan finally enables us to focus on Pakistan, and basically confront the reality that Pakistan's the bigger problem," he said.

Perkovich said he doesn't think Pakistan will shift its policies in order to restore U.S. military aid. But he said the suspension could have some positive effect in the long run, by forcing Pakistan to take a hard look at the dominant role the security services play in Pakistan.

"Internally in Pakistan, there's going to be a much more intense debate now on whether the Army has put the country on a good course," he said.

Op-ed by Ambassador of Ukraine to the USA Valeriy Chaly for The Hill: "Trump's comments send wrong message to world"



04 August 2016, 17:13

The U.S. presidential race has captured attention of the world, sometimes posing serious challenges for foreign diplomats when they find their country in the campaign's spotlight. Ukraine, which came to the world's attention two years with its Revolution of Dignity and then worked to remain on the world's radar after Russian aggression, has found itself in the spotlight once again.

Recent comments by Republican nominee Donald Trump about the Ukrainian peninsula of Crimea — occupied by Russia since March 2014 — have raised serious concerns in Kyiv and beyond Ukraine. Many in Ukraine are unsure what to think, since Trump's comments stand in sharp contrast to the Republican party platform. Since the Russian aggression, there has been bipartisan support for U.S. sanctions against Russia, and for such sanctions to remain in place until the territorial integrity of Ukraine is restored. Efforts to enhance Ukraine's defense capacity are supported across the aisle, as well, to ensure that Ukraine becomes strong enough to deter Russia's aggression.

Even if Trump's comments are only speculative, and do not really reflect a future foreign policy, they call for appeasement of an aggressor and support the violation of a sovereign country's territorial integrity and another's breach of international law. In the eyes of the world, such comments seem alien to a country seen by partners as a strong defender of democracy and international order. The United States was among the 100 nations which supported the U.N. resolution "Territorial Integrity of Ukraine" not recognizing Russia's attempt to annex Crimea.

A candidate for the presidency in any country ought to realize the challenges he or she will face to ensure consistency in foreign policy and uphold his or her country's international commitments. Ukraine — a strategic partner of the United States — entered the 1994 Budapest multilateral commitment, giving away the world's third largest nuclear arsenal in return for security assurances to its territorial integrity from three nuclear powers: the United States, the United Kingdom and Russia.

This commitment has been broken by one signatory country, which attempted to annex Crimea and invaded Ukraine's Donbas region. While Ukraine was recovering from the bloodshed in Maidan orchestrated by then-President Viktor Yanukovich, Russia seized control over Crimea's Supreme Council and its security infrastructure. The sham referendum carried out at a gunpoint had nothing to do with a free and fair expression of the people's will and ignored the choice of the indigenous people of Crimea, the Crimean Tatars.

Russia has unleashed its repressive machine against those who protest against the occupation. Censorship, arrests, assassinations, abductions, the banning of the Crimean Tatars' representative body — the Mejlis — all threaten another tragedy and ethnic cleansing.

7/15/2019 Op-ed by Ambassador of Ukraine to the USA Valeriy Chaly for The Hill: "Trump's comments send wrong message to world" - Publicatio...

The attempted annexation of Crimea has also posed new threats to nuclear safety. International institutions like the U.N. and the International Atomic Energy Agency (IAEA) do not recognize the annexation and, from a jurisdictional standpoint, cannot control nuclear facilities and radiation security in those areas. Moreover, Russia has already threatened to deploy nuclear weapons in Crimea in direct vicinity of NATO and EU states. Russia is restoring Soviet-era nuclear storage facilities and has already deployed the means for carrying the weapons, including warships and combat aircrafts.

Russia did enter Ukraine in 2014 and would undoubtedly keep on invading should the position of the most important global actors be favorable or neutral, or one of appeasement, and should Ukraine not continue enhancing its defense potential. Right now, Russia is flexing its muscles, building military capacity and testing state-of-the-art weapons in the Ukrainian Donbas. In numbers, Russia's presence in Ukraine means on average 400 shells a week.

Last week, Ukraine's Ministry of Defense identified and reported 22 flights of unmanned aerial vehicles (UAV) operated by Russia-backed militants. Russia continues to pour its weapons and military equipment to Donbas: For instance, from July 22 to July 28, nearly 6,000 tons of fuel, 80 tons of ammunition and 120 tons of military cargo (including repair parts for military vehicles) were delivered through an uncontrolled part of the Ukrainian-Russian border. The Organization for Security and Cooperation in Europe's monitoring mission has reported that Russian-backed militants have used a wide array of heavy weapons, including mortars, high-caliber artillery and tanks.

This bloody war, which has already taken more than 10,000 Ukrainian lives and internally displaced almost 2 million, is a fight of a young democracy for independence and its choice to be part of the West and embrace Western values. Neglecting or trading the cause of a nation inspired by those values — cemented by Americans in their fight for independence and civil rights — would send a wrong message to the people of Ukraine and many others in the world who look to the U.S. as to a beacon of freedom and democracy.

"The Hill": <http://bit.ly/2aY970b>

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Rep. Rashida Tlaib, the first Palestinian-American woman and one of the first Muslim women elected to Congress, was sworn in to office Thursday. | Rashida Tlaib

CONGRESS

Freshman Rep. Tlaib: Dem majority will 'impeach the motherf---er'

By **CAITLIN OPRYSKO** | 01/04/2019 09:13 AM EST | Updated 01/04/2019 09:24 PM EST

Freshman Rep. Rashida Tlaib declared Thursday night that the newly installed Democratic majority in the House will "go in there and impeach the motherf---er," breaking with party leaders and stirring controversy just hours after officially taking office.

House Speaker Nancy Pelosi (D-Calif.) and other top Democrats have been largely hesitant to promise President Donald Trump's impeachment, preferring instead to wait for the results of the ongoing Russia investigation led by special counsel Robert Mueller. But Tlaib (D-Mich.) and others in the newly installed House have expressed an eagerness to begin impeachment proceedings even before Mueller issues a final report.

“When your son looks at you and says, ‘Momma look, you won, bullies don’t win,’ and I said ‘Baby they don’t,’ because we’re going to go in there and we’re gonna impeach the motherf---er,” Tlaib said at a party Thursday night. Video of the congresswoman's remarks was captured and posted to Twitter by user @_NestorRuiz and were reported by journalists from The Washington Post and The Huffington Post.

Earlier Thursday Tlaib's hometown newspaper, the Detroit Free Press, published an editorial she co-authored in which she called for impeachment proceedings against Trump to begin, albeit in a much more measured tone.

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Pelosi on Friday said she wouldn't have necessarily used the same language as Tlaib, and that her comments did not represent the position of all House Democrats. But Pelosi also pointed out that the president himself is known for using similarly coarse rhetoric.

“I don't think it's anything worse than the president has said,” she said at a town hall hosted by MSNBC, adding later that “some of the words that he uses have a direct impact on people's lives. My colleague's comments do not have an impact on people's lives.”

“Generationally, that would not be language I would use, but nonetheless, I don't think we should make a big deal of it,” Pelosi argued.

Tlaib, the first Palestinian-American woman and one of the first Muslim women elected to Congress, had been sworn in earlier Thursday on Capitol Hill. Her office did not immediately respond to a request for comment, but Tlaib doubled down on her comments Friday morning on Twitter, claiming that Trump's presidency is a “constitutional crisis.”

“I will always speak truth to power,” she wrote, including the hashtag “#unapologeticallyMe.”

“This is not just about Donald Trump. This is about all of us. In the face of this constitutional crisis, we must rise,” she added.

Asked to address the growing criticism of her remarks and language, Tlaib refused to apologize Friday evening and instead said that her choice of words is not any different from how her constituents talk.

“I am very passionate, and I grew up in an incredibly beautiful, urban community — the city of Detroit — born and raised,” she said during an interview with a local TV station. “We say colorful things in interesting ways, but I tell you, the president of the United States is my focus. The residents back home are my focus.”

Trump responded to Tlaib’s comments directly on Friday afternoon, saying she “dishonored herself.”

“This is a person that I don’t know. I assume she’s new. I think she dishonored herself, and I think she dishonored her family,” he told reporters at a news conference. “Using language like that in front of her son, and whoever else was there, I thought that was a great dishonor to her and to her family. I thought it was highly disrespectful to the United States of America.”

Asked about the video on Friday morning, Democratic Congressional Campaign Committee Chairwoman Cheri Bustos (D-Ill.) neither condemned nor endorsed the comments.

“Well, passions are running high,” she said in an interview on CNN’s “New Day.” “Let’s just leave it at that, okay?”

Bustos, who represents a rural Illinois Congressional district where Trump won in 2016, also echoed Pelosi’s calls to hold off on impeachment talk until Mueller finishes his investigation.

Rep. Jerry Nadler, the New York Democrat who now chairs the House panel that would initiate impeachment proceedings, was more firm in his objection to Tlaib’s language. In an interview with CNN, he also threw cold water on the idea of guaranteeing impeachment.

“I don’t really like that kind of language. But more to the point, I disagree with what she said. It is too early to talk about that intelligently. We have to follow the facts,” he said,

instead promoting legislation Democrats plan to take up that would shield Mueller from outside influence.

“We have to get the facts. We will see where the facts lead,” he said. “Maybe that will lead to impeachment. Maybe it won't. It is much too early.”

CONGRESS

Dems livid after Tlaib vows to ‘impeach the motherf—er’

By RACHAEL BADE, HEATHER CAYGLE and JOHN BRESNAHAN

Tlaib's expletive-laden comment was widely shown on morning cable news shows and drew swift condemnation from Republicans, including from the president, who seemingly jumped on the remarks as evidence the new Democratic House would focus more on opposing the president than on governing.

“How do you impeach a president who has won perhaps the greatest election of all time, done nothing wrong (no Collusion with Russia, it was the Dems that Colluded), had the most successful first two years of any president, and is the most popular Republican in party history 93%?” Trump wrote on Twitter on Friday morning.

In another tweet, Trump portrayed the push as a sign of desperation due to the success of his administration in a Friday morning tweet, writing that Democrats “only want to impeach me because they know they can't win in 2020, too much success!”

The White House further weighed in on the controversy later Friday morning, with press secretary Sarah Huckabee Sanders echoing Trump's tweet, while deputy press secretary Hogan Gidley labeled Tlaib's comments disruptive.

“It shows you kind of what's on the mind of Democrats right now, they're into name calling,” Gidley said in an interview on Fox News, pointing to a Georgia congressman under fire for appearing to compare the president to Hitler.

“Now she's using obscene language to describe this president. If they want to come to Washington to engage in this type of nasty, ridiculous outrageous rhetoric instead of focusing on the issue at hand... they are going to have a very difficult time in this town and with their constituencies,” he said.

RNC Chairwoman Ronna McDaniel contended that “expletive-filled rants about our president tell you all you need to know about the priorities of the Democrats in Congress.”

“President Trump fights every day for a better life for Americans,” she said in a tweet. “Democrats are only committed to fighting President Trump.”

Republican leadership in the House weighed in as well.

“Meet the new House Democrat majority,” House Minority Whip Steve Scalise (R-La.) wrote on Twitter, linking to a story about the video, while House Minority Leader Kevin McCarthy (R-Calif.) told Fox News that Democrats' "whole focus here is to try to attack this president while we are trying to move America forward."

McCarthy was more forceful speaking to reporters in the Capitol on Friday before heading to the White House to discuss border security, denouncing Pelosi's comments and calling on Pelosi to speak with Tlaib about the remark.

Republican Caucus Chairwoman Liz Cheney (R-Wyo.) denounced Tlaib's' “very foul language used in accusations of the necessity to impeach,” adding that “we are in a situation where the Democrats are clearly bringing into this offense that they take charge a level of rhetoric, level of attack, level of vitriol that is not good for the country and ignores the very real national security challenge we face.”

She rejected comparisons between Tlaib's remarks and some of the oft-criticized rhetoric used by the president, telling reporters that “I am not going to repeat the allegations because frankly, I don't want my kids to hear them.”

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"I think we have to have an investigation by the FBI into his financial, personal and political connections to Russia," Nancy Pelosi said of Donald Trump. | AP Photo

Pelosi calls for probe of possible Russian blackmail of Trump

By ISAAC ARNSDORF | 02/05/2017 11:34 AM EST

House Democratic leader Nancy Pelosi urged the FBI to probe President Trump's finances and personal ties to find out if the Russian government is blackmailing him.

"I want to know what the Russians have on Donald Trump," the California Democrat told Chuck Todd on NBC's "Meet the Press." "I think we have to have an investigation by the FBI into his financial, personal and political connections to Russia, and we want to see his

tax returns, so we can have truth in the relationship between Putin, whom he admires, and Donald Trump."

Intelligence officials briefed Trump and outgoing President Barack Obama on claims that Russia has attempted to compromise him, and the FBI is investigating those allegations, CNN reported in January. The investigation of included intercepted communications, according to the New York Times.

House and Senate panels are also investigating Russian interference in the 2016 election, including possible contacts between the Kremlin and Trump's campaign.

Trump on Saturday diminished Russian President Vladimir Putin's human rights violations in an interview with Bill O'Reilly on Fox News, saying, "You think our country's so innocent?"

CONGRESS

Democrats aim to make Steve Bannon a scarier Karl Rove

By KYLE CHENEY

Earlier Sunday on "Meet the Press," Todd asked Vice President Mike Pence, "Why can't [Trump] say a negative thing about Vladimir Putin?"

"The president has said many times if we got along with Russia better, that would be a good thing for the world," Pence answered. "Maybe it's not going to work out. But I think he's absolutely determined. He had a productive conversation with President Putin."

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Sen. Barbara Boxer called for an investigation into one of Donald Trump's companies after a Mother Jones report. | Getty

Sen. Boxer calls for probe into Trump Model Management

By LOUIS NELSON | 09/07/2016 11:24 AM EDT

California Sen. Barbara Boxer called on U.S. Citizenship and Immigration Services to open an investigation into Donald Trump's model management company over allegations that it broke immigration laws.

Boxer's request, which came in the form of a letter made public on Wednesday, follows a report from Mother Jones magazine alleging that Trump Model Management employed foreign women who had traveled to the U.S. on tourist visas that did not allow them to work.

"I am extremely concerned by the claims levied against Trump Model Management and ask that you open an investigation into the company's employment practices," Boxer wrote in her letter to Citizenship and Immigration Services Director León Rodríguez. "I hope you will make clear that immigration and labor violations like these will not be tolerated."

Trump's campaign did not immediately respond to a request for comment.

Trump has built much of his campaign upon the issue of immigration, winning the Republican primary in large part because of his hard-line stances on the issue. He has promised to crack down on foreign visitors who overstay their visas and build a wall on America's southern border, which Mexico would be forced to pay for.

But citing interviews with multiple women who worked for the agency, the Mother Jones story alleges that Trump Model Management never obtained work visas for at least some of its models and specifically instructed them to lie on customs forms about why they were in the U.S. Some models told Mother Jones that they made little money because of high fees that Trump Model Management charged them for housing and other expenses.

Of working for the agency, one Canadian-born model said, "it is like modern-day slavery."

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Trump in trouble over 'Second Amendment' remark

The campaign says he was referencing gun-rights voter mobilization, but the remark was widely interpreted as a joke about using guns against his Democratic rival.

By **LOUIS NELSON** | 08/09/2016 03:44 PM EDT | Updated 08/09/2016 06:02 PM EDT

Donald Trump on Tuesday said "the Second Amendment people" may be the only way to stop Hillary Clinton from getting to appoint federal judges if she wins the presidential election in November.

"Hillary wants to abolish, essentially abolish, the Second Amendment," he said as an aside while smiling. "By the way, and if she gets to pick her judges, nothing you can do, folks. Although the Second Amendment people, maybe there is, I don't know. But I'll tell you what, that will be a horrible day."

The reference to the Second Amendment, the right to keep and bear arms, could be interpreted as a joke about using violence to stop Clinton or her judicial picks.

Trump was speaking at a rally in Wilmington, North Carolina, where he repeated his regular claim that Clinton intends to "abolish" the Second Amendment, presumably by appointing liberal justices to the Supreme Court. But Trump punctuated that line with an aside, suggesting that Second Amendment supporters might be in a position to stop her even if she's elected.

The Trump campaign rejected the notion that Trump was inciting violence against Clinton or anyone else with his aside at the Wilmington rally. Instead, the campaign said the Manhattan billionaire was simply appealing to the collective political muscle Second Amendment supporters possess.

"It's called the power of unification – 2nd Amendment people have amazing spirit and are tremendously unified, which gives them great political power," Trump's senior communications adviser Jason Miller said in a statement emailed to POLITICO. "And this year, they will be voting in record numbers, and it won't be for Hillary Clinton, it will be for Donald Trump."

Indiana Gov. Mike Pence, Trump's running mate, said Trump was "of course not" advocating violence with his remarks. Pence was on stage at a town hall-style event in Lancaster PA when Trump made the remarks.

"Hillary Clinton has made it very clear that she wants to see changes in the right of law abiding citizens to keep and bear arms, and Donald Trump is clearly saying that people cherish that right. People who believe that firearms in the hands of law abiding citizens make our communities more safe not less safe should be involved in the political process and let their voice be heard," Pence said in an interview with Philadelphia's NBC10.

Clinton did not take any questions after her event in Miami on Tuesday, but reached for comment, Clinton campaign manager Robby Mook condemned the comments. "This is simple—what Trump is saying is dangerous. A person seeking to be the President of the United States should not suggest violence in any way," he said in a statement.

Following Trump's remark, the main super PAC supporting her, Priorities USA Action, immediately circulated the clip with the subject line, "Donald Trump Just Suggested That Someone Shoot Hillary Clinton."

Congressional Democrats piled on. Sen. Elizabeth Warren tweeted that Trump "makes death threats because he's a pathetic coward who can't handle the fact that he's losing to a girl."

"I don't know if this statement is intended to incite violence, but Donald Trump is a reckless individual who will say or do anything," said Rep. G.K. Butterfield, a North Carolina Democrat and chairman of the Congressional Black Caucus. "That's inciteful to use language about the Second Amendment ... it should be denounced,"

Rep. Eric Swalwell, a California Democrat, called on Twitter for the Secret Service to investigate. "Donald Trump suggested someone kill Sec. Clinton. We must take people at their word. @SecretService must investigate #TrumpThreat," he wrote.

(Martin Mulholland, a spokesman for the Secret Service, did not directly address the question of whether the agency – which provides protection to both Trump and Clinton -- plans to investigate the remark, but he wrote in an email to POLITICO, "The Secret Service is aware of the comment.")

Sen. Chris Murphy, a Democrat from Connecticut, launched a series of tweets criticizing the comments: "Don't treat this as a political misstep. It's an assassination threat, seriously upping the possibility of a national tragedy & crisis," he wrote. "This isn't play. Unstable people with powerful guns and an unhinged hatred for Hillary are listening to you, @realDonaldTrump."

The National Rifle Association defended the first part of Trump's comment, in which Trump said that Clinton would appoint anti-Second Amendment judges to the Supreme Court. ".@realDonaldTrump is right. If @HillaryClinton gets to pick her anti-#2A #SCOTUS judges, there's nothing we can do. #NeverHillary," the organization tweeted from its official Twitter account.

The group subsequently encouraged members to vote for pro-gun rights candidates. "But there IS something we will do on #ElectionDay: Show up and vote for the #2A! #DefendtheSecond #NeverHillary," the group wrote on its Twitter account.

Bob Owens, the editor of the NRA-linked BearingArms.com, initially tweeted disapproval of Trump's comments. "That was a threat of violence. As a REAL supporter of the #2A it's appalling to me," Owens tweeted. Bearing Arms had sponsored the May meeting of the NRA's lobbying arm where the group formally endorsed Trump.

Within two hours of posting that tweet, however, Owens deleted it and put up a link to a new blog post on Bearing Arms, contending that Trump's comments had been taken out of context.

"While he left himself open to be exploited by a serially dishonest media that has clearly chosen to support Hillary in this election, I don't see anything to suggest that he was threatening violence against Mrs. Clinton," he wrote.

Matthew Nussbaum, Sarah Wheaton, Nolan McCaskill, Gabriel Debenedetti and Burgess Everett contributed to this report.

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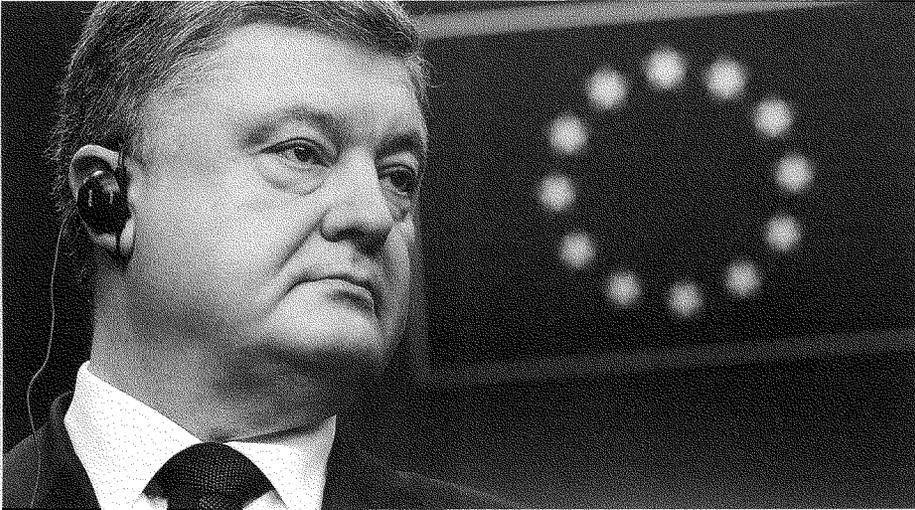


PRESIDENTIAL TRANSITION

Ukrainian efforts to sabotage Trump backfire

Kiev officials are scrambling to make amends with the president-elect after quietly working to boost Clinton.

By KENNETH P. VOGEL and DAVID STERN | 01/11/2017 05:05 AM EST



President Petro Poroshenko's administration, along with the Ukrainian Embassy in Washington, insists that Ukraine stayed neutral in the American presidential race. | Getty

Donald Trump wasn't the only presidential candidate whose campaign was boosted by officials of a former Soviet bloc country.

Ukrainian government officials tried to help Hillary Clinton and undermine Trump by publicly questioning his fitness for office. They also disseminated documents implicating a top Trump aide in corruption and suggested they were investigating the matter, only to back away after the election. And they helped Clinton's allies research damaging information on Trump and his advisers, a Politico investigation found.

A Ukrainian-American operative who was consulting for the Democratic National Committee met with top officials in the Ukrainian Embassy in Washington in an effort to expose ties between Trump, top campaign aide Paul Manafort and Russia, according to people with direct knowledge of the situation.

The Ukrainian efforts had an impact in the race, helping to force Manafort's resignation and advancing the narrative that Trump's campaign was deeply connected to Ukraine's foe to the east, Russia. But they were far less concerted or centrally directed than Russia's alleged hacking and dissemination of Democratic emails.

Russia's effort was personally directed by Russian President Vladimir Putin, involved the country's military and foreign intelligence services, according to U.S. intelligence officials. They reportedly briefed Trump last week on the possibility that Russian operatives might have compromising information on the president-elect. And at a Senate hearing last week on the hacking, Director of National Intelligence James Clapper said "I don't think we've ever encountered a more aggressive or direct campaign to interfere in our election process than we've seen in this case."

There's little evidence of such a top-down effort by Ukraine. Longtime observers suggest that the rampant corruption, factionalism and economic struggles plaguing the country — not to mention its ongoing strife with Russia — would render it unable to pull off an ambitious covert interference campaign in another country's election. And President Petro Poroshenko's administration, along with the Ukrainian Embassy in Washington, insists that Ukraine stayed neutral in the race.



CONGRESS

Lawmakers broach possible Trump campaign coordination with Russia

By AUSTIN WRIGHT and MARTIN MATISHAK

Yet Politico's investigation found evidence of Ukrainian government involvement in the race that appears to strain diplomatic protocol dictating that governments refrain from engaging in one another's elections.

Russia's meddling has sparked outrage from the American body politic. The U.S. intelligence community undertook the rare move of publicizing its findings on the matter, and President Barack Obama took several steps to officially retaliate, while members of Congress continue pushing for more investigations into the hacking and a harder line against Russia, which was already viewed in Washington as America's leading foreign adversary.

Ukraine, on the other hand, has traditionally enjoyed strong relations with U.S. administrations. Its officials worry that could change under Trump, whose team has privately expressed sentiments ranging from ambivalence to deep skepticism about Poroshenko's regime, while sounding unusually friendly notes about Putin's regime.

Poroshenko is scrambling to alter that dynamic, recently signing a \$50,000-a-month contract with a well-connected GOP-linked Washington lobbying firm to set up meetings with U.S. government officials "to strengthen U.S.-Ukrainian relations."

Revelations about Ukraine's anti-Trump efforts could further set back those efforts.

"Things seem to be going from bad to worse for Ukraine," said David A. Merkel, a senior fellow at the Atlantic Council who helped oversee U.S. relations with Russia and Ukraine while working in George W. Bush's State Department and National Security Council.

Merkel, who has served as an election observer in Ukrainian presidential elections dating back to 1993, noted there's some irony in Ukraine and Russia taking opposite sides in the 2016 presidential race, given that past Ukrainian elections were widely viewed in Washington's foreign policy community as proxy wars between the U.S. and Russia.

"Now, it seems that a U.S. election may have been seen as a surrogate battle by those in Kiev and Moscow," Merkel said.

...

The Ukrainian antipathy for Trump's team — and alignment with Clinton's — can be traced back to late 2013. That's when the country's president, Viktor Yanukovich, whom Manafort had been advising, abruptly backed out of a European Union pact linked to anti-corruption reforms. Instead, Yanukovich entered into a multibillion-dollar bailout agreement with

Russia, sparking protests across Ukraine and prompting Yanukovich to flee the country to Russia under Putin's protection.

In the ensuing crisis, Russian troops moved into the Ukrainian territory of Crimea, and Manafort dropped off the radar.

Manafort's work for Yanukovich caught the attention of a veteran Democratic operative named Alexandra Chalupa, who had worked in the White House Office of Public Liaison during the Clinton administration. Chalupa went on to work as a staffer, then as a consultant, for Democratic National Committee. The DNC paid her \$412,000 from 2004 to June 2016, according to Federal Election Commission records, though she also was paid by other clients during that time, including Democratic campaigns and the DNC's arm for engaging expatriate Democrats around the world.

A daughter of Ukrainian immigrants who maintains strong ties to the Ukrainian-American diaspora and the U.S. Embassy in Ukraine, Chalupa, a lawyer by training, in 2014 was doing pro bono work for another client interested in the Ukrainian crisis and began researching Manafort's role in Yanukovich's rise, as well as his ties to the pro-Russian oligarchs who funded Yanukovich's political party.

In an interview this month, Chalupa told Politico she had developed a network of sources in Kiev and Washington, including investigative journalists, government officials and private intelligence operatives. While her consulting work at the DNC this past election cycle centered on mobilizing ethnic communities — including Ukrainian-Americans — she said that, when Trump's unlikely presidential campaign began surging in late 2015, she began focusing more on the research, and expanded it to include Trump's ties to Russia, as well.

She occasionally shared her findings with officials from the DNC and Clinton's campaign, Chalupa said. In January 2016 — months before Manafort had taken any role in Trump's campaign — Chalupa told a senior DNC official that, when it came to Trump's campaign, "I felt there was a Russia connection," Chalupa recalled. "And that, if there was, that we can expect Paul Manafort to be involved in this election," said Chalupa, who at the time also was warning leaders in the Ukrainian-American community that Manafort was "Putin's political brain for manipulating U.S. foreign policy and elections."

PRESIDENTIAL TRANSITION

Trump confronts firestorm over Russia allegations

By ELI STOKOLS, SHANE GOLDMACHER, JOSH DAWSEY and MICHAEL CROWLEY

She said she shared her concern with Ukraine's ambassador to the U.S., Valeriy Chaly, and one of his top aides, Oksana Shulyar, during a March 2016 meeting at the Ukrainian Embassy. According to someone briefed on the meeting, Chaly said that Manafort was very much on his radar, but that he wasn't particularly concerned about the operative's ties to Trump since he didn't believe Trump stood much of a chance of winning the GOP nomination, let alone the presidency.

That was not an uncommon view at the time, and, perhaps as a result, Trump's ties to Russia — let alone Manafort's — were not the subject of much attention.

That all started to change just four days after Chalupa's meeting at the embassy, when it was reported that Trump had in fact hired Manafort, suggesting that Chalupa may have been on to something. She quickly found herself in high demand. The day after Manafort's hiring was revealed, she briefed the DNC's communications staff on Manafort, Trump and their ties to Russia, according to an operative familiar with the situation.

A former DNC staffer described the exchange as an "informal conversation," saying "'briefing' makes it sound way too formal," and adding, "We were not directing or driving her work on this." Yet, the former DNC staffer and the operative familiar with the situation agreed that with the DNC's encouragement, Chalupa asked embassy staff to try to arrange an interview in which Poroshenko might discuss Manafort's ties to Yanukovich.

While the embassy declined that request, officials there became "helpful" in Chalupa's efforts, she said, explaining that she traded information and leads with them. "If I asked a question, they would provide guidance, or if there was someone I needed to follow up with." But she stressed, "There were no documents given, nothing like that."

Chalupa said the embassy also worked directly with reporters researching Trump, Manafort and Russia to point them in the right directions. She added, though, “they were being very protective and not speaking to the press as much as they should have. I think they were being careful because their situation was that they had to be very, very careful because they could not pick sides. It’s a political issue, and they didn’t want to get involved politically because they couldn’t.”

Shulyar vehemently denied working with reporters or with Chalupa on anything related to Trump or Manafort, explaining “we were stormed by many reporters to comment on this subject, but our clear and adamant position was not to give any comment [and] not to interfere into the campaign affairs.”

Both Shulyar and Chalupa said the purpose of their initial meeting was to organize a June reception at the embassy to promote Ukraine. According to the embassy’s website, the event highlighted female Ukrainian leaders, featuring speeches by Ukrainian parliamentarian Hanna Hopko, who discussed “Ukraine’s fight against the Russian aggression in Donbas,” and longtime Hillary Clinton confidante Melanne Vermeer, who worked for Clinton in the State Department and was a vocal surrogate during the presidential campaign.

Shulyar said her work with Chalupa “didn’t involve the campaign,” and she specifically stressed that “We have never worked to research and disseminate damaging information about Donald Trump and Paul Manafort.”

But Andrii Telizhenko, who worked as a political officer in the Ukrainian Embassy under Shulyar, said she instructed him to help Chalupa research connections between Trump, Manafort and Russia. “Oksana said that if I had any information, or knew other people who did, then I should contact Chalupa,” recalled Telizhenko, who is now a political consultant in Kiev. “They were coordinating an investigation with the Hillary team on Paul Manafort with Alexandra Chalupa,” he said, adding “Oksana was keeping it all quiet,” but “the embassy worked very closely with” Chalupa.

In fact, sources familiar with the effort say that Shulyar specifically called Telizhenko into a meeting with Chalupa to provide an update on an American media outlet’s ongoing investigation into Manafort.

Telizhenko recalled that Chalupa told him and Shulyar that, “If we can get enough information on Paul [Manafort] or Trump’s involvement with Russia, she can get a hearing in Congress by September.”

Chalupa confirmed that, a week after Manafort’s hiring was announced, she discussed the possibility of a congressional investigation with a foreign policy legislative assistant in the office of Rep. Marcy Kaptur (D-Ohio), who co-chairs the Congressional Ukrainian Caucus. But, Chalupa said, “It didn’t go anywhere.”

Asked about the effort, the Kaptur legislative assistant called it a “touchy subject” in an internal email to colleagues that was accidentally forwarded to Politico.

Kaptur’s office later emailed an official statement explaining that the lawmaker is backing a bill to create an independent commission to investigate “possible outside interference in our elections.” The office added “at this time, the evidence related to this matter points to Russia, but Congresswoman Kaptur is concerned with any evidence of foreign entities interfering in our elections.”

...

Almost as quickly as Chalupa’s efforts attracted the attention of the Ukrainian Embassy and Democrats, she also found herself the subject of some unwanted attention from overseas.

Within a few weeks of her initial meeting at the embassy with Shulyar and Chalupa, Chalupa on April 20 received the first of what became a series of messages from the administrators of her private Yahoo email account, warning her that “state-sponsored actors” were trying to hack into her emails.

She kept up her crusade, appearing on a panel a week after the initial hacking message to discuss her research on Manafort with a group of Ukrainian investigative journalists gathered at the Library of Congress for a program sponsored by a U.S. congressional agency called the Open World Leadership Center.

Center spokeswoman Maura Shelden stressed that her group is nonpartisan and ensures “that our delegations hear from both sides of the aisle, receiving bipartisan information.” She said the Ukrainian journalists in subsequent days met with Republican officials in North Carolina and elsewhere. And she said that, before the Library of Congress event, “Open World’s program manager for Ukraine did contact Chalupa to advise her that Open World is a nonpartisan agency of the Congress.”

Chalupa, though, indicated in an email that was later hacked and released by WikiLeaks that the Open World Leadership Center “put me on the program to speak specifically about Paul Manafort.”

Republicans pile on Russia for hacking, get details on GOP targets

By MARTIN MATISHAK and AUSTIN WRIGHT

In the email, which was sent in early May to then-DNC communications director Luis Miranda, Chalupa noted that she had extended an invitation to the Library of Congress forum to veteran Washington investigative reporter Michael Isikoff. Two days before the event, he had published a story for Yahoo News revealing the unraveling of a \$26 million deal between Manafort and a Russian oligarch related to a telecommunications venture in Ukraine. And Chalupa wrote in the email she’d been “working with for the past few weeks” with Isikoff “and connected him to the Ukrainians” at the event.

Isikoff, who accompanied Chalupa to a reception at the Ukrainian Embassy immediately after the Library of Congress event, declined to comment.

Chalupa further indicated in her hacked May email to the DNC that she had additional sensitive information about Manafort that she intended to share “offline” with Miranda and DNC research director Lauren Dillon, including “a big Trump component you and Lauren need to be aware of that will hit in next few weeks and something I’m working on you should be aware of.” Explaining that she didn’t feel comfortable sharing the intel over email, Chalupa attached a screenshot of a warning from Yahoo administrators about “state-sponsored” hacking on her account, explaining, “Since I started digging into Manafort these messages have been a daily occurrence on my yahoo account despite changing my password often.”

Dillon and Miranda declined to comment.

A DNC official stressed that Chalupa was a consultant paid to do outreach for the party’s political department, not a researcher. She undertook her investigations into Trump, Manafort and Russia on her own, and the party did not incorporate her findings in its dossiers on the subjects, the official said, stressing that the DNC had been building robust research books on Trump and his ties to Russia long before Chalupa began sounding alarms.

Nonetheless, Chalupa’s hacked email reportedly escalated concerns among top party officials, hardening their conclusion that Russia likely was behind the cyber intrusions with which the party was only then beginning to grapple.

Chalupa left the DNC after the Democratic convention in late July to focus fulltime on her research into Manafort, Trump and Russia. She said she provided off-the-record information and guidance to “a lot of journalists” working on stories related to Manafort and Trump’s Russia connections, despite what she described as escalating harassment.

About a month-and-a-half after Chalupa first started receiving hacking alerts, someone broke into her car outside the Northwest Washington home where she lives with her husband and three young daughters, she said. They “rampaged it, basically, but didn’t take anything valuable — left money, sunglasses, \$1,200 worth of golf clubs,” she said, explaining she didn’t file a police report after that incident because she didn’t connect it to her research and the hacking.

But by the time a similar vehicle break-in occurred involving two family cars, she was convinced that it was a Russia-linked intimidation campaign. The police report on the latter break-in noted that “both vehicles were unlocked by an unknown person and the interior was ransacked, with papers and the garage openers scattered throughout the cars. Nothing was taken from the vehicles.”

Then, early in the morning on another day, a woman “wearing white flowers in her hair” tried to break into her family’s home at 1:30 a.m., Chalupa said. Shulyar told Chalupa that the mysterious incident bore some of the hallmarks of intimidation campaigns used against foreigners in Russia, according to Chalupa.

“This is something that they do to U.S. diplomats, they do it to Ukrainians. Like, this is how they operate. They break into people’s homes. They harass people. They’re theatrical about it,” Chalupa said. “They must have seen when I was writing to the DNC staff, outlining who Manafort was, pulling articles, saying why it was significant, and painting the bigger picture.”

In a Yahoo News story naming Chalupa as one of 16 “ordinary people” who “shaped the 2016 election,” Isikoff wrote that after Chalupa left the DNC, FBI agents investigating the hacking questioned her and examined her laptop and smartphone.

Chalupa this month told Politico that, as her research and role in the election started becoming more public, she began receiving death threats, along with continued alerts of state-sponsored hacking. But she said, “None of this has scared me off.”

...

While it’s not uncommon for outside operatives to serve as intermediaries between governments and reporters, one of the more damaging Russia-related stories for the Trump campaign — and certainly for Manafort — can be traced more directly to the Ukrainian government.

Documents released by an independent Ukrainian government agency — and publicized by a parliamentarian — appeared to show \$12.7 million in cash payments that were earmarked for Manafort by the Russia-aligned party of the deposed former president, Yanukovich.

The New York Times, in the August story revealing the ledgers’ existence, reported that the payments earmarked for Manafort were “a focus” of an investigation by Ukrainian anti-corruption officials, while CNN reported days later that the FBI was pursuing an overlapping inquiry.

One of the most damaging Russia-related stories during Donald Trump's campaign can be traced to the Ukrainian government. | AP Photo

Clinton's campaign seized on the story to advance Democrats' argument that Trump's campaign was closely linked to Russia. The ledger represented "more troubling connections between Donald Trump's team and pro-Kremlin elements in Ukraine," Robby Mook, Clinton's campaign manager, said in a statement. He demanded that Trump "disclose campaign chair Paul Manafort's and all other campaign employees' and advisers' ties to Russian or pro-Kremlin entities, including whether any of Trump's employees or advisers are currently representing and or being paid by them."

A former Ukrainian investigative journalist and current parliamentarian named Serhiy Leshchenko, who was elected in 2014 as part of Poroshenko's party, held a news conference to highlight the ledgers, and to urge Ukrainian and American law enforcement to aggressively investigate Manafort.

"I believe and understand the basis of these payments are totally against the law — we have the proof from these books," Leshchenko said during the news conference, which attracted international media coverage. "If Mr. Manafort denies any

allegations, I think he has to be interrogated into this case and prove his position that he was not involved in any misconduct on the territory of Ukraine,” Leshchenko added.

Manafort denied receiving any off-books cash from Yanukovich’s Party of Regions, and said that he had never been contacted about the ledger by Ukrainian or American investigators, later telling POLITICO “I was just caught in the crossfire.”

According to a series of memos reportedly compiled for Trump’s opponents by a former British intelligence agent, Yanukovich, in a secret meeting with Putin on the day after the *Times* published its report, admitted that he had authorized “substantial kickback payments to Manafort.” But according to the report, which was published Tuesday by BuzzFeed but remains unverified. Yanukovich assured Putin “that there was no documentary trail left behind which could provide clear evidence of this” — an alleged statement that seemed to implicitly question the authenticity of the ledger.

2016

Inside the fall of Paul Manafort

By KENNETH P. VOGEL and MARC CAPUTO

The scrutiny around the ledgers — combined with that from other stories about his Ukraine work — proved too much, and he stepped down from the Trump campaign less than a week after the *Times* story.

At the time, Leshchenko suggested that his motivation was partly to undermine Trump. “For me, it was important to show not only the corruption aspect, but that he is [a] pro-Russian candidate who can break the geopolitical balance in the world,” Leshchenko told the *Financial Times* about two weeks after his news conference. The newspaper noted that Trump’s candidacy had spurred “Kiev’s wider political leadership to do something they would never have attempted before: intervene, however indirectly, in a U.S. election,” and the story quoted Leshchenko asserting that the majority of Ukraine’s politicians are “on Hillary Clinton’s side.”

But by this month, Leshchenko was seeking to recast his motivation, telling Politico, “I didn’t care who won the U.S. elections. This was a decision for the American voters to decide.” His goal in highlighting the ledgers, he said was “to raise these issues on a political level and emphasize the importance of the investigation.”

In a series of answers provided to Politico, a spokesman for Poroshenko distanced his administration from both Leshchenko’s efforts and those of the agency that reLeshchenko Leshchenko leased the ledgers, The National Anti-Corruption Bureau of Ukraine. It was created in 2014 as a condition for Ukraine to receive aid from the U.S. and the European Union, and it signed an evidence-sharing agreement with the FBI in late June — less than a month and a half before it released the ledgers.

The bureau is “fully independent,” the Poroshenko spokesman said, adding that when it came to the presidential administration there was “no targeted action against Manafort.” He added “as to Serhiy Leshchenko, he positions himself as a representative of internal opposition in the Bloc of Petro Poroshenko’s faction, despite [the fact that] he belongs to the faction,” the spokesman said, adding, “it was about him personally who pushed [the anti-corruption bureau] to proceed with investigation on Manafort.”

But an operative who has worked extensively in Ukraine, including as an adviser to Poroshenko, said it was highly unlikely that either Leshchenko or the anti-corruption bureau would have pushed the issue without at least tacit approval from Poroshenko or his closest allies.

“It was something that Poroshenko was probably aware of and could have stopped if he wanted to,” said the operative.

And, almost immediately after Trump’s stunning victory over Clinton, questions began mounting about the investigations into the ledgers — and the ledgers themselves.

An official with the anti-corruption bureau told a Ukrainian newspaper, “Mr. Manafort does not have a role in this case.”

And, while the anti-corruption bureau told Politico late last month that a “general investigation [is] still ongoing” of the ledger, it said Manafort is not a target of the investigation. “As he is not the Ukrainian citizen, [the anti-corruption bureau] by the law couldn’t investigate him personally,” the bureau said in a statement.

Some Poroshenko critics have gone further, suggesting that the bureau is backing away from investigating because the ledgers might have been doctored or even forged.

Valentyn Nalyvaichenko, a Ukrainian former diplomat who served as the country’s head of security under Poroshenko but is now affiliated with a leading opponent of Poroshenko, said it was fishy that “only one part of the black ledger appeared.” He asked, “Where is the handwriting analysis?” and said it was “crazy” to announce an investigation based on the ledgers. He met last month in Washington with Trump allies, and said, “of course they all recognize that our [anti-corruption bureau] intervened in the presidential campaign.”

And in an interview this week, Manafort, who re-emerged as an informal advisor to Trump after Election Day, suggested that the ledgers were inauthentic and called their publication “a politically motivated false attack on me. My role as a paid consultant was public. There was nothing off the books, but the way that this was presented tried to make it look shady.”

He added that he felt particularly wronged by efforts to cast his work in Ukraine as pro-Russian, arguing “all my efforts were focused on helping Ukraine move into Europe and the West.” He specifically cited his work on denuclearizing the country and on the European Union trade and political pact that Yanukovich spurned before fleeing to Russia. “In no case was I ever involved in anything that would be contrary to U.S. interests,” Manafort said.

Yet Russia seemed to come to the defense of Manafort and Trump last month, when a spokeswoman for Russia’s Foreign Ministry charged that the Ukrainian government used the ledgers as a political weapon.

“Ukraine seriously complicated the work of Trump’s election campaign headquarters by planting information according to which Paul Manafort, Trump’s campaign chairman, allegedly accepted money from Ukrainian oligarchs,” Maria Zakharova said at a news briefing, according to a transcript of her remarks posted on the Foreign Ministry’s website. “All of you have heard this remarkable story,” she told assembled reporters.

...

Beyond any efforts to sabotage Trump, Ukrainian officials didn’t exactly extend a band of friendship to the GOP nominee during the campaign.

The ambassador, Chalyp, penned an op-ed for The Hill, in which he chastised Trump for a confusing series of statements in which the GOP candidate at one point expressed a willingness to consider recognizing Russia’s annexation of the Ukrainian territory of Crimea as legitimate. The op-ed made some in the embassy uneasy, sources said.

“That was like too close for comfort, even for them,” said Chalupa. “That was something that was as risky as they were going to be.”

Former Ukrainian Prime Minister Arseniy Yatsenyuk warned on Facebook that Trump had “challenged the very values of the free world.”

Ukraine’s minister of internal affairs, Arsen Avakov, piled on, trashing Trump on Twitter in July as a “clown” and asserting that Trump is “an even bigger danger to the US than terrorism.”

Avakov, in a Facebook post, lashed out at Trump for his confusing Crimea comments, calling the assessment the “diagnosis of a dangerous misfit,” according to a translated screenshot featured in one media report, though he later deleted the post. He called Trump “dangerous for Ukraine and the US” and noted that Manafort worked with Yanukovich when the former Ukrainian leader “fled to Russia through Crimea. Where would Manafort lead Trump?”

Manafort's man in Kiev

By KENNETH P. VOGEL

The Trump-Ukraine relationship grew even more fraught in September with reports that the GOP nominee had snubbed Poroshenko on the sidelines of the United Nations General Assembly in New York, where the Ukrainian president tried to meet both major party candidates, but scored only a meeting with Clinton.

Telizhenko, the former embassy staffer, said that, during the primaries, Chaly, the country's ambassador in Washington, had actually instructed the embassy not to reach out to Trump's campaign, even as it was engaging with those of Clinton and Trump's leading GOP rival, Ted Cruz.

"We had an order not to talk to the Trump team, because he was critical of Ukraine and the government and his critical position on Crimea and the conflict," said Telizhenko. "I was yelled at when I proposed to talk to Trump," he said, adding, "The ambassador said not to get involved — Hillary is going to win."

This account was confirmed by Nalyvaichenko, the former diplomat and security chief now affiliated with a Poroshenko opponent, who said, "The Ukrainian authorities closed all doors and windows — this is from the Ukrainian side." He called the strategy "bad and short-sighted."

Andriy Artemenko, a Ukrainian parliamentarian associated with a conservative opposition party, did meet with Trump's team during the campaign and said he personally offered to set up similar meetings for Chaly but was rebuffed.

"It was clear that they were supporting Hillary Clinton's candidacy," Artemenko said. "They did everything from organizing meetings with the Clinton team, to publicly supporting her, to criticizing Trump. ... I think that they simply didn't meet because they thought that Hillary would win."

Shulyar rejected the characterizations that the embassy had a ban on interacting with Trump, instead explaining that it "had different diplomats assigned for dealing with different teams tailoring the content and messaging. So it was not an instruction to abstain from the engagement but rather an internal discipline for diplomats not to get involved into a field she or he was not assigned to, but where another colleague was involved."

And she pointed out that Chaly traveled to the GOP convention in Cleveland in late July and met with members of Trump's foreign policy team "to highlight the importance of Ukraine and the support of it by the U.S."

Despite the outreach, Trump's campaign in Cleveland gutted a proposed amendment to the Republican Party platform that called for the U.S. to provide "lethal defensive weapons" for Ukraine to defend itself against Russian incursion, backers of the measure charged.

The outreach ramped up after Trump's victory. Shulyar pointed out that Poroshenko was among the first foreign leaders to call to congratulate Trump. And she said that, since Election Day, Chaly has met with close Trump allies, including Sens. Jeff Sessions, Trump's nominee for attorney general, and Bob Corker, the chairman of the Senate Foreign Relations Committee, while the ambassador accompanied Ivanna Klympush-Tsintsadze, Ukraine's vice prime minister for European and Euro-Atlantic integration, to a round of Washington meetings with Rep. Tom Marino (R-Pa.), an early Trump backer, and Jim DeMint, president of The Heritage Foundation, which played a prominent role in Trump's transition.

...

Many Ukrainian officials and operatives and their American allies see Trump's inauguration this month as an existential threat to the country, made worse, they admit, by the dissemination of the secret ledger, the antagonistic social media posts and the perception that the embassy meddled against — or at least shut out — Trump.

“It’s really bad. The [Poroshenko] administration right now is trying to re-coordinate communications,” said Telizhenko, adding, “The Trump organization doesn’t want to talk to our administration at all.”

During Nalyvaichenko’s trip to Washington last month, he detected lingering ill will toward Ukraine from some, and lack of interest from others, he recalled. “Ukraine is not on the top of the list, not even the middle,” he said.

Poroshenko’s allies are scrambling to figure out how to build a relationship with Trump, who is known for harboring and prosecuting grudges for years.

A delegation of Ukrainian parliamentarians allied with Poroshenko last month traveled to Washington partly to try to make inroads with the Trump transition team, but they were unable to secure a meeting, according to a Washington foreign policy operative familiar with the trip. And operatives in Washington and Kiev say that after the election, Poroshenko met in Kiev with top executives from the Washington lobbying firm BGR — including Ed Rogers and Lester Munson — about how to navigate the Trump regime.

Ukrainians fall out of love with Europe

By DAVID STERN

Weeks later, BGR reported to the Department of Justice that the government of Ukraine would pay the firm \$50,000 a month to “provide strategic public relations and government affairs counsel,” including “outreach to U.S. government officials, non-government organizations, members of the media and other individuals.”

Firm spokesman Jeffrey Birnbaum suggested that “pro-Putin oligarchs” were already trying to sow doubts about BGR’s work with Poroshenko. While the firm maintains close relationships with GOP congressional leaders, several of its principals were dismissive or sharply critical of Trump during the GOP primary, which could limit their effectiveness lobbying the new administration.

The Poroshenko regime’s standing with Trump is considered so dire that the president’s allies after the election actually reached out to make amends with — and even seek assistance from — Manafort, according to two operatives familiar with Ukraine’s efforts to make inroads with Trump.

Meanwhile, Poroshenko’s rivals are seeking to capitalize on his dicey relationship with Trump’s team. Some are pressuring him to replace Chaly, a close ally of Poroshenko’s who is being blamed by critics in Kiev and Washington for implementing — if not engineering — the country’s anti-Trump efforts, according to Ukrainian and U.S. politicians and operatives interviewed for this story. They say that several potential Poroshenko opponents have been through Washington since the election seeking audiences of their own with Trump allies, though most have failed to do so.

“None of the Ukrainians have any access to Trump — they are all desperate to get it, and are willing to pay big for it,” said one American consultant whose company recently met in Washington with Yuriy Boyko, a former vice prime minister under Yanukovich. Boyko, who like Yanukovich has a pro-Russian worldview, is considering a presidential campaign of his own, and his representatives offered “to pay a shit-ton of money” to get access to Trump and his inaugural events, according to the consultant.

The consultant turned down the work, explaining, “It sounded shady, and we don’t want to get in the middle of that kind of stuff.”

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Sen. Mark Warner: "There's no one that could factually say there's not plenty of evidence of collaboration or communications between Trump Organization and Russians." | AP Photo/Alex Brandon

CONGRESS

Warner: 'Enormous amounts of evidence' of possible Russia collusionBy **KELSEY TAMBORRINO** | 03/03/2019 12:24 PM EST

The top Democrat on the Senate Intelligence Committee said Sunday lawmakers have found "enormous amounts of evidence" into potential collusion between the presidential campaign of Donald Trump and the Russians during the 2016 election.

Mark Warner of Virginia made his remarks in response to an assertion that there is "no factual evidence of collusion" from the Sen. Richard Burr (R-N.C.), who is chairman of the Intelligence Committee.

As evidence, Warner cited on NBC's "Meet the Press" ongoing negotiations about Trump Tower and the dump of WikiLeaks material.

"Where that evidence leads, in terms of a conclusion ... I'm going to reserve judgment, until I'm finished," Warner said.

But he added: "There's no one that could factually say there's not plenty of evidence of collaboration or communications between Trump Organization and Russians."

CPAC

Trump delivers scorched-earth speech as he tries to regain footingBy **ANDREW RESTUCCIA**

Warner's House Intelligence Committee counterpart, Adam Schiff, said Sunday on CBS' "Face the Nation" that there's both "direct evidence" and "abundant circumstantial evidence" of collusion with Russia.

The California Democrat said "there is direct evidence" in emails from the Russians offering dirt on Hillary Clinton in what is described as the "Russian government effort to help elect Donald Trump."

"They offer that dirt. There is an acceptance of that offer in writing from the president's son, Don Jr., and there is overt acts in furtherance of that," Schiff said. "That is the meeting at Trump Tower and all the lies to cover up that meeting at the Trump Tower, and apparently lies that the president participated in."

Asked Sunday by NBC host Chuck Todd whether a Russia conspiracy without any actual evidence of a crime being committed could lead to impeachment of the president, Warner

again said he would wait to reach his conclusion but qualified his statement by looking at history.

"I have never, in my lifetime, seen a presidential campaign, from a person of either party, have this much outreach to a foreign country and a foreign country that the intelligence community, and our committee has validated, intervened, massively, in our election and intervened with an attempt to help one candidate, Donald Trump, and to hurt another candidate, Hillary Clinton," he said.

Warner also said that some of the "key people" the Senate committee wants to talk to are "caught up" in the Mueller criminal investigations.

"Those criminal investigations need to conclude, before we get a chance to talk to them," he said.

For his part, Trump has continued to call any and all suggestions of collusion to be part of a witch hunt against him. On Sunday, he tweeted: "I am an innocent man being persecuted by some very bad, conflicted & corrupt people in a Witch Hunt that is illegal & should never have been allowed to start.

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UKRAINE

Poroshenko Addresses U.S. Congress, Asks For Military Aid, Special Security Status

September 18, 2014 15:16 GMT

UPDATED September 18, 2014 20:34 GMT

By RFE/RL

Ukrainian President Petro Poroshenko has asked a joint session of the U.S. Congress for military aid and to confer a special security status upon Ukraine.

In an emotional speech before U.S. legislators, Poroshenko said that his army needed more military equipment, both "lethal and nonlethal."

He said that "blankets [and] night-vision goggles are also important. But one cannot win a war with blankets...and cannot keep the peace with blankets."

Poroshenko mentioned that just since the start of a cease-fire on September 5, Ukraine has lost 17 soldiers.

The Ukrainian president warned of a threat to "global security everywhere" posed by the Russian aggression against his country.

He described Ukraine's conflict with Russia as the world's worst since the U.S.-Soviet Cuban missile crisis in 1962 and urged the United States not to let "Ukraine stand alone in the face of this aggression."

Poroshenko also pleaded with Washington to give Ukraine "special," non-NATO security status to help beef up its defenses against aggression from Russia.

Poroshenko also said that Russia's annexation of Crimea was one of "the most cynical acts of treachery in modern history."

He added that there is "no way, at no price, and under no condition" that Kyiv will put up with the occupation.

The Ukrainian leader also called for the creation of a special fund "to support U.S. companies' investment in Ukraine and help reform our economy and justice system."

Poroshenko said all assistance received by Ukraine from the West will be used "by noncorrupt establishments and the new generation of officials will guarantee that the funding will be used effectively."

In a gesture of support for Poroshenko, the United States pledged \$53 million in fresh aid to Ukraine on September 18, including antimortar radar equipment.

Senior U.S. administration officials said the new assistance would include \$46 million to bolster Ukraine's security in its conflict with Russian-backed separatists in eastern Ukraine and \$7 million in humanitarian aid.

Later, U.S. President Barack Obama met with Poroshenko at the White House.

Speaking in the Oval Office after their talks, Obama condemned what he called "Russian aggression, first in Crimea and most recently in portions of eastern Ukraine."

Obama praised Poroshenko for his leadership, saying it has "been critical at a very important time in Ukraine's history."

Obama said the United States would continue to help Ukraine find a diplomatic solution to the crisis the country faces.

Poroshenko thanked Obama for what he said was the "enormous" support the United States has shown Ukraine.

Poroshenko said he and Obama discussed the question of energy and that a U.S. "team" would be in Ukraine next week to review Ukraine's energy situation and needs with winter coming soon.

Meanwhile, a bill authorizing military aid -- including lethal aid -- to Ukraine and putting more sanctions on Russia unanimously passed the U.S. Senate Foreign Relations Committee on September 18.

The Ukraine Freedom Support Act of 2014, authored by Senators Robert Menendez (Democrat-New Jersey) and Bob Corker (Republican-Tennessee), passed by an 18-0 vote.

When and if the bill will come up for a vote in the U.S. Senate is uncertain, as it passed on the last day before the chamber adjourns until November.

The bill goes further than the Obama administration's newly announced aid package on September 18, which authorizes \$46 million in nonlethal military aid.

The Menendez-Corker bill authorizes \$350 million in military aid, including some forms of lethal aid.

With additional reporting by Reuters, AP, AFP, Interfax, and RFE/RL's Luke Johnson in Washington

Pentagon pick Ashton Carter discusses Iraq and Ukraine at Senate hearing - as it happened

Updated 14 Jul 2017: **faces nomination hearing at Senate**

Carter supports giving lethal arms to Ukraine

Senators grill nominee on strategies in Syria and Iraq

Defense nominee pressed on Afghanistan withdrawal plan



Alan Yuhas in New York

Wed 4 Feb 2015 16:14 EST

Key events

Show ...

- 4 Feb 2015** Carter: 'Isis' defeat won't be the end of extremism'
- 4 Feb 2015** Carter: 'sanctions key to dealing with Putin'
- 4 Feb 2015** Carter grilled about Syria and Assad
- 4 Feb 2015** Carter asked about Afghanistan

4 Feb 2015 Carter: Pentagon strategy 'not safe to keep bending'
 4 Feb 2015 Carter: 'US needs cyberwar deterrence'
 Feb 2015 Carter backs lethal weapons for Ukraine

Live feed

Show

4 Feb 2015 16:14

Senator McCain has adjourned the hearing, so we'll wrap our coverage of secretary of defense nominee Ashton Carter with the summary below.

Carter said he supports giving lethal arms to the Ukrainian government for its war against Russia-backed rebels in the nation's east. He said he is "strongly inclined" to provide equipment, but not personnel, and that Europe must continue to inflict punitive sanctions to deal with "the big Putin lie".

Senators John McCain and Lindsey Graham grilled Carter about US strategy in Syria, Iraq and Afghanistan. The senators demanded "conditions-based withdrawal" from Afghanistan and a plan to deal with Syrian leader Bashar al-Assad.

"The United States' involvement is necessary, but not sufficient" to defeat Isis, Carter said, but he added that extremism will continue beyond a successful campaign. "We need to be thinking about terrorism more generally as a more enduring part of our national security mission," he said. **Cyber capabilities are "not anywhere near where we should be as a country,"** and upgrades would be part of Carter's defense agenda, he said. "Deterrence requires that a potential enemy knows that you have the ability to respond."

"I don't think it's safe to keep bending" military strategy to accommodate the budget, Carter said, promising major reforms, a path out of "the wilderness of sequester" and to be "a stickler for chain of command."

Carter said he would not give in to pressure from the White House to accelerate the pace of releases from Guantánamo Bay. He also said he supported the exchange of five Taliban prisoners for US POW Bowe Bergdahl.

Carter committed to reviews of the US nuclear weapons program, but staunchly defended the rationale for a ready US arsenal of nuclear arms. He also promised to review ways to improve the military's efforts to combat sexual assault.

4 Feb 2015 16:02

Senator Tillis asks **about the size of the US navy fleet and its capabilities.** "What would you share with us that should make us feel OK for some reduction in the fleet?"

"You have to look at quality and not just quantity," Carter says.

“We are the paramount navy in the world. ... It allows us to be present when things break somewhere, whether it be a conflict or a natural disaster. You see the Americans show up first. How do they do that? One of the ways they do that through the navy. So I have a strong interest in doing that not just through the quality but the quantity as well.”

It’s all about the budget, he concludes.

Updated at 4.02pm EST

4 Feb 2015 15:58

Carter: 'Isis' defeat won't be the end of extremism'

Alaskan senator Dan Sullivan asks **about the endgame in the war against Isis**, and Carter responds by saying that even though he sees an end to the terrorist group he thinks the US should take a broader perspective.

“This won’t be the end of Islamist extremist terrorism,” he says. **“Our experience has been that this is a movement that changes and shifts and floats around the world.”**

He says that even though he hopes “Islamic extremism burns itself out” at some point, there are still dangerous and socially isolated groups and with outsize power provided by technology.

“We need to be thinking about terrorism more generally as a more enduring part of our national security mission ... We need to be protecting people whatever [terrorists] are t]Updated at 4.05pm EST

. Feb 2015 15:58

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4 Feb 2015 15:53

Ernst asks about surveillance versus privacy, albeit in euphemistic terms.

She asks whether Carter has an opinion “in regards to protecting our national security interests” versus protecting the privacy of normal citizens.

Carter dodges slightly, saying, **the government can “do a lot more” to protect Americans without invading their privacy.** “The federal government does have a role in protecting the country from cyber attack in the same way it has a role in protecting the country from other attacks.”

The government can share information it has collected about threats with private companies, Carter says, as well as can conduct and sponsor research for network defense.

“We’re not anywhere near where we should be as a country;” he says, and people “would be clamoring to do more” if they understood the threats out there.

4 Feb 2015 15:48

Joni Ernst of Iowa says that technological superiority is “one of our primary tools for dominance on the battlefield,” but **worries about the advancing cyber capabilities of Russia, North Korea and other countries.**

Carter embraces her pitch. “Not only is our civilian infrastructure susceptible to cyber attack, but we have to be concerned about our military infrastructure. As you say, there’s no point in having planes and ships and armored vehicles in today’s world if the network itself is vulnerable.”

He says the **network security in the Defense Department “is not where it should be”** to defend against cyber attacks.

4 Feb 2015 15:45

Ayotte asks **whether Carter thinks it wise to transfer Guantánamo detainees to Yemen,** considering the current state of affairs in the peninsular nation.

“That doesn’t sound very sensible,” Carter says, predictably.

Ayotte’s last follow-up request is that Carter come to New Hampshire, showering Carter with yet another invitation to spend hang out with a senator in their home state. Updated at 3.59pm EST

4 Feb 2015 15:42

Senator Kelly Ayotte now asks about **Russian violations about the INF treaty on nuclear weapons,** including a new cruise missile recently revealed to be in development by the Federation.

I’m told it’s quite clear that Russia has violated the INF treaty. What are we going to do about it?”

We have options, Carter says: **“I think we need to remind Russia that it’s a two-way street ... if you’re absolved from your restrictions under this treaty then we are too. ...** I think there are

defensive steps that we can take, there are deterrent steps that we can take, and there are counterforce steps that we can take.”

The judgement behind the INF treaty was we’re both better off [with the treaty], but these are two way streets.”

4 Feb 2015 15:38

Martin Heinrich asks a follow-up question about inmates at Guantánamo Bay, and Carter agrees with him that there are people there who must remain imprisoned.

“What can you do with the people in Guantanamo that need to be incarcerated,” Carter asks, “If not at Gitmo they need to be incarcerated.”

“That’s a very difficult question, it’s partly a legal one, it’s partly a practical one.” He says he’ll work with the committee and the administration to find a solution, but that “it’s plain as day that [some prisoners] need to be incarcerated in a super-max type place.”

4 Feb 2015 15:35

Cotton moves to Russia. “Right now there’s fighting in Ukraine, much of it is over ... the so-called Minsk line where forces were separated in September.”

He talks about the “little green men” - Russian soldiers wearing unmarked uniforms acting in support of the rebels. Cotton asks would those soldiers be in a violation of the Geneva conventions.

“I don’t know the international legal standard, Carter says, but **“I think the little green men are part of the big lie, the big Putin lie,** where he is clearly pretending he is not violating the integrity of a sovereign nation. ... I don’t know the legal sense but from the common sense of it” Putin has violated Ukraine’s sovereignty.

Cotton says **he wants Nato “on the lookout for the little green men.”**

4 Feb 2015 15:32

Arkansas’ Tom Cotton begins his second round of questions, and asks Carter whether **he thinks a prisoner swap of five Taliban members for POW Bob Bergdahl was the right decision.**

“I have read the letters from all the joint chiefs of staff ... all of which express support for the decision. I don’t want to speak for them but just speaking for myself, it does just boil down to one thing, which you from your own distinguished service understand, that we have for decades and decades and decades ... have a sacred duty to bring back our fallen.”

“That was the motivation that the chiefs cited that motivated their support ... It obviously was a difficult decision to make because of the five people you cite, but **knowing what I know about the**

circumstances I would have supported it.”

Cotton is not happy: “Well I opposed it then and I oppose it now, and Bowe Bergdahl was not illen, there were thousands of soldiers looking for him.”

Cotton says Congress was not notified as the law requires about the prisoner swap, and asks for Carter’s assurance that he will abide by the law. Carter assents. Updated at 3.39pm EST

4 Feb 2015 15:27

Cruz: “How would you characterize our objective with respect to Isis?”

Carter: “To inflict a lasting defeat upon Isis. I only include the word ‘lasting’ because they need to stay defeated.”

Cruz: “What would be required militarily, to destroy, or as you put it to inflict a lasting defeat on Isis?”

Carter: “Militarily it would be a dismantlement of their forces and their networks, and to get to the point about lastingly, there’s a political ingredient to this that I need to add, which is to have them replaced in Iraq, and in Syria, with a government that the people want to be part of, so that they don’t have to be governed by maniacs and terrorists.”

Feb 2015 15:25

Cruz harps on Israel and Iran, saying that it’s a matter of public knowledge that the nation possesses nuclear weapons. He says nobody wants nuclear weapons just because Israel does, but that the other nations in the area would desire them should Iran gain such arms.

“The prospect of Iran having nuclear weapons is a pretty fearful matter, and you don’t have to be an Israeli or an American [to think so],” Carter answers. Cruz keeps hunting for a condemnation of US negotiations with Iran over the latter’s nuclear program. He stops when Carter concedes “the negotiations have precisely the opposite objective” from keeping Iran completely free of nuclear technology. Updated at 3.27pm EST

4 Feb 2015 15:20

Senator Ted Cruz now takes center stage: “I have been for some time critical of the Obama administration’s foreign policy,” Cruz begins, in understatement.

He says he wants to talk about threats to America, starting with Iran: **what danger would a nuclear-armed Iran pose to the United States?**

Carter: “In a phrase: exceptionally grave. That for two reasons, one: they might use them, and two: they might stimulate others to get them.”

Cruz: "What is it about the regime in Iran that poses a significant threat?"

Carter: "Well if you take at face value what they say, they have the ambition to wipe off the face of the map other nations, namely Israel. They have a long history of behaving in a disruptive way, of supporting terrorism, of trying to undermine other governments in the region."

4 Feb 2015 15:17

King asks **a follow-up about European defense spending.**

Carter: "I think they need to spend more on their own defense, because their own defense is our defense. That's what being an ally is about. I'd like to see them carry their full weight of being an ally. As I said earlier i don't think any American can be satisfied with the defense spending of our allies. I think it should be higher."

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The money machine: how a high-profile corruption investigation fell apart

After a revolution overthrew Ukraine's disgraced president, Theresa May promised to help the country's new leaders recover stolen assets. But the UK's first case collapsed within a year
by Oliver Bullough

Main image: MoneyMachine WebBanner Photograph: Guardian Design Team

Wed 12 Apr 2017 01.00 EDT

On 11 March 2014, a London branch of the French bank BNP Paribas received a request from a Ukrainian lawyer. He asked the bank to close accounts belonging to his client and transfer their balances to Cyprus.

The accounts contained a mere \$23m, and the transaction should have been routine. But although the amount was unremarkable by the standards of the City, the times were not. Ukraine had just overthrown its president, Viktor Yanukovich, and the world was on the lookout for money that Yanukovich and his associates had stashed abroad.

Yanukovich was a man whose corruption had to be seen to be believed. The colossal greed of the president and his cronies beggared the Ukrainian state and infuriated ordinary citizens. Tens of thousands of people protested in central Kiev throughout the winter of 2013-14, until Yanukovich fled Ukraine that February. After the revolution, protesters who broke into his private residence found vintage cars, ostriches, a drinking den shaped like a galleon. There were stacks of treasures in the garage; he had had no space left for them in his \$30m, six-storey, log-built palace.

The country's new government accused its predecessors of stealing \$100bn, and the west - perhaps embarrassed that so much of this money had ended up in its banks - promised to do what it could to help return it to Ukraine.

At the end of April 2014, London hosted a summit that would - in the words of then-home secretary Theresa May - "provide practical leadership and assistance to the Ukrainian government as they identify and recover assets looted under the Yanukovich regime ... It is the tangible manifestation of our shared determination to end the culture of impunity, and prevent our open societies and open economies from being abused by corrupt individuals to launder and hide stolen funds."

Dozens of countries sent representatives to the summit, from the United States and the United Kingdom down to the tiniest tax havens: Bermuda, Monaco, the Isle of Man. On the summit's final afternoon, Britain's then-attorney general, Dominic Grieve QC, made a dramatic

announcement: the UK had already joined the fight. A transfer had been flagged as suspicious, and British authorities had frozen the account and initiated a money-laundering investigation.

“This week the UK’s Serious Fraud Office (SFO) announced that it is investigating allegations of corruption linked to the Yanukovich regime and has obtained a court order to restrain assets valued at approximately \$23m,” Grieve told the assembled delegates. “There will be no effective deterrent for corruption whilst levels of detection of illicit financial flows and recovery of misappropriated assets remain small.”

If the frozen \$23m was indeed linked to corruption in Ukraine, it would still be only a fraction of what Yanukovich and his associates had been accused of embezzling. But the case was intended to send a message - about the west’s determination to make sure Ukraine could regain what had been stolen, and that its looters be punished. This pleasingly specific number, \$23m, dominated headlines from the summit, where it was held up as concrete proof that the rulers of the west were finally helping the rest of the world fight corruption.

“The message is clear,” May said. “We are making it harder than ever for corrupt regimes or individuals around the world to move, hide and profit from the proceeds of their crime.”

For decades, hundreds of billions of dollars have vanished from the world’s poorest countries, finding their way - via the tax and secrecy havens of Europe, south-east Asia and the Caribbean - into the banking system, real estate and luxury goods markets of the west. According to the World Bank, between \$20bn and \$40bn is stolen each year by public officials from developing countries. Rich countries returned only \$147.2m worth of these assets between 2010 and 2012 - far less than one cent out of every misappropriated dollar. And that may even understate the scale of the problem. Some lawyers involved in asset-recovery cases estimate the volume of money embezzled globally at around \$1tn a year, which makes the tiny amount of money recovered look even feebler.

As both a financial centre that launders an estimated £100bn a year and a prime real estate market for the investors of crooked cash, London has a special responsibility in the fight against corruption - one that it has rarely accepted. The 2014 summit - much like David Cameron’s highly publicised global Anti-Corruption Summit in 2016 - was intended to show Britain’s determination to live up to its responsibilities.

Instead, the case of the \$23m collapsed within a year - when a British judge ruled that the SFO had built its case on “conjecture and suspicion”, and ordered the money returned to its owner. This is the story of how a very high-profile corruption investigation fell apart - and what it means for Ukraine and the UK.

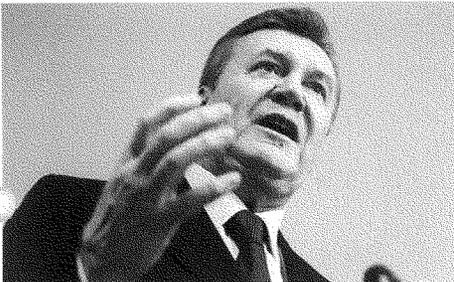
Yanukovich was not the first Ukrainian politician to engage in corruption, but he was certainly the best at it. In fact, the word corruption is a misleading one for Ukraine, since it implies a dishonest cancer afflicting an otherwise healthy organism, whereas in this case it was the other way round. Corruption was the system, and it metastasised into any parts of the state apparatus that remained healthy.

Within the three years after Yanukovich took office in 2010, Ukraine slipped from an already disastrous 134th on Transparency International’s corruption perceptions index down to 144th - putting it level with countries such as the Central African Republic and Nigeria, which are synonymous with shadiness and mismanagement. But the financial damage that Yanukovich and his predecessors

did to Ukraine is hard to measure in simple numbers. At the time of its independence in 1991, Ukraine's economy was almost as large as Poland's; now, it is a third of the size.

Yanukovich and his allies controlled the country's legal system, within which prosecutors have broad discretionary powers to initiate or block investigations – providing unlimited opportunities for extortion. They could deny export licenses, delay tax rebates, inflate medicine prices – and demand bribes in return. To outside observers, it seemed that the only opposition came from investigative journalists and activists who revealed the backroom deals that had carved up Ukraine's economy.

To frustrate any potential investigations, Ukraine's rulers became masters of the offshore world's network of tax havens. Once money was stolen, it was invested in European and American assets hidden at the end of intricate chains of shell companies, registered through tax havens in the Indian Ocean, Europe and the Caribbean. It is Cyprus, rather than Russia, Germany or America, that dominates the Ukrainian economy: an astonishing 92% of Ukraine's outward investment flowed into the Mediterranean tax haven in 2014.



Former president Viktor Yanukovich and his allies are accused of stealing vast wealth from the Ukrainian people. Photograph: Stanislav Krasilnikov/TASS

The secrecy of these offshore centres allowed the oligarchs around Yanukovich to keep the precise details of their deals hidden from the public – but ordinary Ukrainians knew enough to be angry. If Ukraine's 2014 revolution was about any one thing, it was about this corruption. Yanukovich and his allies had stolen as much as they could; more than they could ever need. And even the most apolitical citizens could see that infrastructure was rotting, medicines were scarce, schools were falling apart. The armed forces were so demoralised by the degeneration of the homeland they were supposed to defend that when Vladimir Putin invaded Crimea, a Ukrainian admiral defected as soon as Russia asked him to.

The UK government trumpeted the freezing of the \$23m for two reasons. First, it was meant to be the initial installment of many billions that would eventually help to rebuild Ukraine. If that sum could be confiscated and returned, perhaps so too could the hundreds of millions stashed in London, Latvia, Luxembourg, Liechtenstein and elsewhere. Second, the successful prosecution of a regime insider would send a message to the world's kleptocrats: your money isn't safe in London any more.

The \$23m was held in bank accounts at BNP Paribas belonging to two companies, which were in turn controlled by a Ukrainian politician named Mykola Zlochevsky. A large man with a shaved

Thead, Zlochevsky wears boxy suits, dislikes fastening the top button of his shirt, and has been a fixture of Ukraine's public life for two decades. In 2013, according to the Ukrainian news weekly, Focus, which almost certainly understated his fortune, he was Ukraine's 86th richest man and worth \$146m.

In 2010, after Yanukovich won the election, Zlochevsky became natural resources minister. That position gave him oversight of all energy companies operating in Ukraine, including the country's largest independent gas company, Burisma. The potential for a conflict of interest should have been clear, because Zlochevsky himself controlled Burisma. But there was no public outcry about this, because almost no one in Ukraine knew about it. Zlochevsky owned his businesses via Cyprus, a favoured haven for assets unobtrusively controlled by high-ranking officials in the Yanukovich administration.

In response to my questions about the freezing of Zlochevsky's \$23m, his London law firm, Peters & Peters, insisted that their client never benefited personally from the decisions that he took while in office. "Mr Zlochevsky has followed the letter and spirit of the law in his role as civil servant and has, at all times, held himself to the highest moral and ethical standards in his business dealings and public functions," Peters & Peters said in a statement. "Our clients have fallen victim to an entrenched and a cynical programme of smear campaigns and misinformation."

"Mr Zlochevsky's wealth is not a result of corruption or criminal conduct," the law firm told me. "He made his wealth before entering office."

It is true that Zlochevsky was a wealthy man before 2010. Burisma's website makes clear that the periods when it has performed best have consistently coincided with the high points in its owner's political career. During a previous Yanukovich government, in 2003-5, Zlochevsky chaired the State Committee for Natural Resources, and companies under his control won licenses to explore for oil. Then Yanukovich fell from grace, and the new government tried to strip Zlochevsky's companies of their oil exploration rights - and he had to sue the government in order to keep them. Yanukovich won the presidency in 2010 and Zlochevsky became a minister. The good times returned: Burisma gained nine production licenses and its annual production rose sevenfold. After the revolution, Zlochevsky left the administration.

According to a court judgment from January 2015, the \$23m in the account that had been frozen in London was the proceeds of the sale of an oil storage facility, which Zlochevsky had owned via a shell company in the British Virgin Islands, a tax haven that does not reveal who controls the many thousands of companies based there. The \$23m arrived in London from Latvia, a minimally regulated Eastern European country, where banks are famously welcoming towards money from the former Soviet Union.

On 14 April 2014, the money was frozen at a special court hearing in London requested by the Serious Fraud Office. As described in the later court judgment, the SFO argued that "there were reasonable grounds to believe that the defendant [Zlochevsky] had engaged in criminal conduct in Ukraine and the funds in the BNP account were believed to be the proceeds of such criminal conduct".

The SFO investigator Richard Gould claimed in the April 2014 court hearing that Zlochevsky's dual position in Ukraine as both a politician and a businessman gave "rise to a clear inference of a

wilful and dishonest exploitation of a direct conflict of interest by a man holding an important public office such as to amount to an abuse of the public's trust in him”.

The SFO further argued that “the complicated pattern of offshore holding companies established when he was still a serving minister was effectively to conceal his beneficial ownership of Burisma”, which it deemed inherently suspicious.

By 20 May 2014, Gould had obtained 6,170 electronic documents from BNP Paribas related to Zlochevsky's money, and assembled a special team to examine them. He also wanted evidence from Ukraine, so he wrote to the head of the international department of the general prosecutors' office, Vitaly Kasko, in Kiev.

A lean man with a sharp chin and luxuriant head of black hair, Kasko had been invited into the prosecutor's office after the revolution, and made responsible for negotiations with all the western countries that had promised to help at the London summit. He had previously served as a prosecutor, but quit when Yanukovich came to power in 2010 - this ensured that Kasko was personally untainted by corruption. He was also popular with activists, since he provided legal support for protesters dragged before Yanukovich's courts during the revolution.

Ukraine was at the time in a state of turmoil. Russia had annexed the peninsula of Crimea, and was aiding pro-Russian rebels in Ukraine's eastern provinces. Kiev had lost control of Donetsk and Luhansk, two of the country's most important cities, and protesters' barricades still dominated the centre of the capital. The country needed a new president and, that May, elected a magnate named Petro Poroshenko. Although he had served as a minister under Yanukovich and was himself a billionaire, Poroshenko pledged to sell his confectionery business, to govern only in the interests of the people, to prosecute the corrupt former insiders and to bring an end to the old way of doing things, including in the prosecutors' office. For too long, prosecutors had been acting essentially as gangsters in uniform, rather than investigating crimes.

Considering how central prosecutors had been to Yanukovich's corrupt regime, there were significant doubts over both the honesty, and competence of Ukraine's lawmen, but Kasko was hopeful that his colleagues would see the importance of regaining the \$23m and thus do all they could to help the SFO. He told me that he translated the British request, sent it to his boss, and awaited results.

“The investigation began but, no matter how much we pushed the investigators, it was not effective,” Kasko told me. Even when Zlochevsky's lawyers announced they would contest the freezing of the \$23m in a London court, the Ukrainian prosecutors still failed to send the SFO the evidence it needed to maintain the freezing order. “First the British wrote to me, then the Americans, with questions about what was happening with the investigation,” Kasko remembered.

It was hardly the mutual trust and cooperation supposedly created by the London summit. US and British diplomats were begging Ukraine to investigate a case, which, if it were successful, would benefit Ukraine, and yet nothing appeared to be happening. Eventually, six months after Gould first wrote to him, Kasko stepped decisively outside his area of responsibility, and wrote to his boss in the prosecutor's office to demand action.

“I said I wanted this to be investigated properly, that the Brits be told about it, and they get what they wanted,” recalled Kasko. “He said, ‘If you want, get on with it.’” It was hardly the most

enthusiastic of endorsements, but it was enough for Kasko. He forced investigators to work evenings, and weekends. They put together a dossier of evidence that Kasko felt supported the SFO's argument "that the defendant's assets were the product of criminal wrongdoing when he 'held public office", sent it to the SFO, and announced officially that Zlochevsky was suspected of a criminal offence in Ukraine.

It was only thanks to Kasko that the SFO had received any useful documents from Ukraine at all. "I asked the Brits, 'What else do we need to do?'" Kasko remembered. "And they said: 'That's fine, that's more than enough to defend the freezing order in court'."

Their confidence was misplaced. In January 2015, Mr Justice Nicholas Blake, sitting in the Old Bailey, rejected the SFO's argument. "The case remains a matter of conjecture and suspicion," he wrote in his judgment. To confiscate assets, prosecutors have to prove that the frozen money related to a specific crime and, he ruled, the SFO had totally failed to do so.

It was a humiliating reverse for British law enforcement, and for Gould, the lead investigator, who then moved to another agency. (Gould told me in July 2015 that he was "personally disappointed", but declined to comment further.) The judge unfroze the \$23m and handed it back to Zlochevsky.

The British government had made a big announcement of the original decision to seize the funds, but did not publicise this reversal. It is not hard to understand why. It was, after all, an embarrassing setback for the UK, which had held up this particular case as a sign of its commitment to confiscate money belonging to Yanukovich's allies and return it to the people of Ukraine.

When I contacted the SFO in May 2015, a spokeswoman told me: "We are disappointed we were not provided with the evidence by authorities in the Ukraine necessary to keep this restraint order in place", but declined to comment further because she said the investigation was ongoing. In January of this year, I contacted Dominic Grieve, who had made the dramatic announcement of the asset freezing. He is still an MP, but no longer in the government. He told me he had no recollection of the case.

Zlochevsky's lawyers at Peters & Peters told me that the judge had "ruled unequivocally that there was not reasonable grounds to allege that our client had benefited from any criminal conduct". Burisma's lawyers have since repeatedly referred to the ruling as evidence of their client's vindication, which calls into question the decision of the UK government to use this particular case as an example of its determination to recover assets and return them to Ukraine, when it had been unable to prove that there were sufficient grounds to keep the \$23m frozen.

When Kasko read the judge's ruling, he had questions, but of a rather different nature. At the hearing, the tycoon's lawyers had not just attacked the case against their client, but also produced evidence of his innocence, evidence that came from the unlikeliest of sources. Justice Blake's 21-page judgment made reference half a dozen times to a letter, dated 2 December 2014, signed by someone in the Ukrainian prosecutor's office, which stated baldly that Zlochevsky was not suspected of any crime.



Anti-government protests in Kiev, on 25 January 2014. Photograph: Arturas Morozovas/AP

Kasko felt this was bizarre. Everyone in a senior position at the prosecutor's office must have known he was leading a frenzied investigation into Zlochevsky at that precise time, so how could anyone have signed off on a letter saying that no investigation was going on? The letter appeared to be crucial to the judge's ruling, which stated that Zlochevsky "was never named as a suspect for embezzlement or indeed any other offence, let alone one related to the exercise of improper influence in the grant of exploration and production licenses".

As Kasko saw it, his colleagues had failed to help him when he begged them to investigate Zlochevsky. But when it came to writing a letter to help the tycoon, he believed they had happily done so.

According to Kasko, there were really only three possible reasons for why a senior Ukrainian prosecutor would have written a letter to Zlochevsky rather than assisting Kasko. He was either incompetent, corrupt or both. Peters & Peters did not respond to specific questions about the letter ("the allegations implied by your questions ... are untrue and entirely without foundation").

Whatever the explanation for this mysterious letter, the case highlighted a crucial flaw in countries' efforts to cooperate across borders. Even in the rare cases when the UK does freeze a foreign official's property, it is dependent for evidence from colleagues abroad who usually have fewer resources, less training and a decades-long tradition of institutionalised corruption. That means that any misconduct or incompetence by the Ukrainian prosecutors can undermine a case in the UK as surely as if the same actions were committed by the SFO.

Zlochevsky is not the only former Ukrainian official to have assets frozen abroad. As part of western assistance to the new Ukrainian government, European countries have blocked the assets of Yanukovich and a couple of dozen others. The asset freeze was intended to give Ukrainian prosecutors time to investigate and prosecute, and thus prevent the individuals involved burying assets in their favourite tax havens. The totals involved - around £220m in cash and property - would buy a lot of medicine and build a lot of roads.

The man in Ukraine responsible for gathering the evidence against many of the individuals whose assets have been frozen abroad is Sergei Gorbatyuk, head of the prosecutors' special investigations department. When we met in April last year, he looked tired and crumpled in a baggy grey suit; it was late in the evening, the only time he had free after a long day. Unusually for

a high-ranking official in the prosecutors' office, he has a reputation for honesty, which is why several anti-corruption activists recommended that I talk to him.

"Our main problem is that these high-ranking officials' assets are all registered abroad, in Monaco, or Cyprus, or Belize, or the British Virgin Islands, and so on, and we write requests to them, we wait for three or four years, or there's no response at all. And that's that, and it all falls apart," he said. "The asset has been re-registered five times just while we're waiting for an answer."

Even when foreign officials did reply to his letters, Gorbatyuk explained, he then had to find a way to understand what they had written. The authorities in Monaco for example had forwarded him 4,000 pages of documentation relating to one oligarch in French, Arabic and English, which he had received eight months previously but was yet to read. The official translators had waited for four months to tell him they were too busy to do the job, then an outside contractor proved incapable of managing it, and, he says, his bosses kept blocking the other suggestions he brought them. "This is the insanity of our whole system, this is everywhere. I get the impression no one wants anything to happen," he said.

And if previous cases are any guide, progress will continue to be slow. In one of the few examples of a Ukrainian corruption-related charge that has gone to court, ex-Prime Minister Pavlo Lazarenko was found guilty in California in 2004 of money laundering, and sentenced to 97 months in prison. Lazarenko had fled Ukraine back in 1999, when he fell out of favour with the then-president. He tried to claim asylum in the United States but instead became the first foreign leader convicted of laundering money through the American financial system.

Although the conviction was successful, the asset recovery process remains blocked. A total of \$271m of Lazarenko's money is frozen in Guernsey, Antigua, Switzerland, Liechtenstein and Lithuania, but Washington has been unable to recover it for a decade. And this is not an unusual case. The World Bank has an asset recovery database, which shows that cases have dragged on in western courts for more than 10 years in connection to money from Liberia, El Salvador, Kenya, Democratic Republic of the Congo, the Philippines, Zambia and elsewhere.

In evidence submitted to a parliamentary committee last year, the Serious Fraud Office said the obstacles put in its path by offshore jurisdictions were a key cause of these delays. "Top tier defendants are highly sophisticated and operate internationally. They are likely to be acutely aware of those jurisdictions with an environment that is favourable to them, and from which it is very difficult (and in some cases impossible) to either trace benefit or recover assets," the SFO said. "Such defendants are also likely to be astute in their use of financial products and other devices which they use to disguise their economic benefit from any crime."

On 8 March 2015, David Sakvarelidze, then Ukraine's first deputy general prosecutor, appeared on a Ukrainian news programme and made a dramatic accusation - that Ukrainian prosecutors had taken a bribe to help Zlochevsky.

The source for Sakvarelidze's claim was an unnamed foreign consultant working within Ukrainian law enforcement. "A high-ranking official in the prosecutors' office told him [the consultant] he suspected that one official had taken a bribe of \$7m," Sakvarelidze alleged in his television appearance. "It's shameful of course. People like that should not represent this country." (Sakvarelidze did not respond to interview requests. The allegation has not been proven, but it is the subject of an investigation by the newly established National Anti-Corruption Bureau of Ukraine.)

Sakvarelidze, an ethnic Georgian, had been hired just weeks earlier to help clean up the law enforcement system and he set to work. Progress was slow, however. In fact, it was so slow that the US ambassador to Ukraine, Geoffrey Pyatt, decided to make an astonishingly forthright interjection. In September 2015, speaking in the southern Ukrainian city of Odessa, Pyatt stated that prosecutors “were asked by the UK to send documents supporting the seizure” of the \$23m, but “instead sent letters to Zlochevsky’s attorneys attesting there was no case against him”. “Those responsible for subverting the case by authorising those letters should - at a minimum - be summarily terminated,” he said.

The allegation was part of a long and damning speech, in which he laid out just how little Ukraine had reformed its law enforcement bodies, something that makes recovering the millions stashed overseas unlikely if not impossible.

Ukraine’s national finances are currently dependent on the International Monetary Fund, where the dominant voice belongs to the United States. Pyatt was not just any ambassador therefore, but the local representative of the government’s paymaster. He was putting Ukraine on notice - sort out the prosecutor’s office, because America is getting annoyed. But it didn’t work. Rival prosecutors opened criminal cases against two of Kasko’s investigators, and their allies in other institutions. “Sadly, the protection racket we uncovered ... turned out to be just the tip of the iceberg,” Sakvarelidze wrote on Facebook in October 2015.

Change could only be won when international lenders forced President Poroshenko to act. It was tough talk from the west that obliged Ukraine’s parliament - long referred to sarcastically as the biggest business club in Europe - to create the anti-corruption bureau and a dedicated anti-corruption prosecution service. And it was only the bluntest of language from US officials that forced the Ukrainian government to fire crooked prosecutors. According to a valedictory interview by the former vice president Joe Biden in the Atlantic, Poroshenko only sacked the lawman blocking Kasko’s reforms because Biden made a direct threat. “Petro, you’re not getting your billion dollars,” Biden said he had told Ukraine’s president. “You can keep the [prosecutor] general. Just understand, we’re not paying if you do.”

Biden was Washington’s point man on Ukraine throughout the Obama administration, and consistently encouraged reformers and chided their opponents. In a speech in Ukraine’s parliament in December 2015, he said the country could not hope to reform itself on European lines or regain its money, if it did not do something about its entrenched corruption. “You cannot name me a single democracy in the world where the cancer of corruption is prevalent,” he told parliament. “It’s not enough to set up a new anti-corruption bureau and establish a special prosecutor fighting corruption. The Office of the General Prosecutor desperately needs reform.”

By then, however, almost two years had passed since the revolution and many Ukrainians had become disillusioned. The credibility of the United States was not helped by the news that since May 2014, Biden’s son Hunter had been on the board of directors of Burisma, Zlochevsky’s company.

The White House insisted the position was a private matter for Hunter Biden, and unrelated to his father’s job, but that is not how anyone I spoke to in Ukraine interpreted it. Hunter Biden is an undistinguished corporate lawyer, with no previous Ukraine experience. Why would a Ukrainian tycoon hire him?

Hunter Biden failed to reply to questions I sent him, but he told the Wall Street Journal in December 2015 that he had joined Burisma “to strengthen corporate governance and transparency at a company working to advance energy security”. That was not an explanation that many people found reassuring. The Washington Post was particularly damning: “The appointment of the vice president’s son to a Ukrainian oil board looks nepotistic at best, nefarious at worst,” it wrote, shortly after Hunter Biden’s appointment. “You have to wonder how big the salary has to be to put US soft power at risk like this. Pretty big, we’d imagine.”

In September last year, a court in Kiev cancelled the arrest warrant against Zlochevsky, ruling that prosecutors had failed to make any progress in their investigation. That same month, the Latvian media reported that Ukraine had not helped a police investigation into money laundering, so 50m frozen euros had passed into the Latvian state budget instead of being returned to Ukraine.

“I get the impression our foreign partners are disappointed by our failure to make progress tackling corruption, and that’s why they are paying us less attention,” said Kasko, who is now back in private practice, as he was during the Yanukovich years. Meanwhile, President Poroshenko’s approval rating is stuck in the low teens. He has failed to fulfil his promise to sell off his business empire, and was revealed in the Panama Papers leaks to be still engaged in structuring his assets offshore. His London law firm has recently been sending out threatening letters to journalists tempted to repeat accusations of corruption levelled at him by a former insider who has fled to the UK.



Theresa May and US attorney general Eric Holder (left) at the Ukraine Forum on Asset Recovery in 2014. Photograph: Getty Images

Kasko resigned on 15 February last year, accusing the prosecutor’s office of being a “hotbed of corruption”. Sakvarelidze was sacked a month later and charged with a “gross violation of the rules of prosecutorial ethics”. The whole reforming team came and went, without jailing anyone or recovering a single oligarch’s foreign fortune. Kasko told me he had resigned because he saw no point in waiting around impotently while his superiors undermined his cases. “I didn’t want to stay there like the Queen of England and watch,” he said. “The biggest problem in the prosecutor’s office is corruption. Sakvarelidze and I went in to fight against it, and they threw us out.”

Last year, Kasko’s successor formally apologised to the SFO on behalf of the Ukrainian prosecutor’s office for its role in the failure of the case of the \$23m.

All in all, the UK chose an unfortunate way to demonstrate “a strong commitment to the people of Ukraine”, as Theresa May stated in April 2014. But this unseemly episode highlights many of the reasons why so little of the cash stolen from poor countries is ever returned to them. Money can flow unhindered between countries, but police officers cannot, so it is always more difficult to prosecute a crime than to commit one.

At the start of each year, Ukraine budgets for the money it plans to reclaim from its deposed rulers, and at the end of the year activists from the Anti-Corruption Action Centre (an NGO that oversees recruitment of Ukraine’s new anti-corruption detectives) calculate how much of that money prosecutors actually found.

In the first nine months of 2016, the government intended to confiscate £250m. They actually retrieved just £4,500 – 0.0018% of the planned total.

They are not alone in struggling to get a grip on fraud. In its report to parliament last year, the SFO said it was failing to retain key investigators in the face of competition from banks, private investigators and other well-resourced City companies, something that complicates already tricky cases. If even the SFO considers itself under-resourced and out-gunned in the battle against the kleptocrats and their offshore empires, then the problem is still more severe in Ukraine. Things are likely to get worse as the window of opportunity provided by enthusiastic foreign assistance is closing fast. Joe Biden is gone now from the White House (although Hunter remains on the Burisma board), and Pyatt has left Kiev for a new ambassadorial posting.

With Donald Trump in power, the tiresome American pressure for reform in Ukraine may well be a thing of the past. Among European allies, France and Germany have elections this year and thus other things to worry about, as of course does post-Brexit Britain. When I sought comments on what the government was now doing to help Ukraine regain its assets, I was batted back and forth between the Home Office and the Foreign Office for a few days, before they eventually provided a joint statement sourced to a “government spokesperson”, confirming that Britain was committed to everything it has always been committed to.

“The UK is a strong supporter of the Ukrainian government’s reform process, and in particular the fight against corruption, which needs to proceed quickly,” they said, by email. That is undoubtedly true, but sadly the global situation is looking ever less favourable.

Ukrainian politicians have consistently failed to keep their resolutions without foreign governments stiffening their resolve and, with that pressure fading away, there will now be little to stop them returning to their old ways. The old oligarchs appear to be feeling as secure as they have done for a while, and Ukrainians who have long been on the defensive are reaching out for new friends.

On 19 January, the day before Trump’s inauguration, Zlochevsky’s gas company announced it was becoming a funder of the Atlantic Council, a prominent Washington thinktank. The Atlantic Council declined to say exactly how much money the tycoon had offered, only that his donation had been between \$100,000 and \$249,000. A month later, Burisma hired a new director. Joseph Cooper Black does not appear to have any more experience of Ukraine than his colleague Hunter Biden but – as an ex-ambassador and a former director of the CIA’s counterterrorism centre under George W Bush – he is likely to have lots of useful contacts in Washington.

Zlochevsky's last public appearance was in June 2016 at a Burisma-organised alternative energy forum, co-hosted in Monaco by Prince Albert II, who made the keynote speech. Photographs of the event showed Hunter Biden posing with various comfortably retired ex-politicians, wearing a blue suit twinned with highly-polished brown shoes. Zlochevsky was tanned and healthy in an open-necked shirt, while a more formally dressed Prince Albert placed a solicitous hand on his back.

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America faces an epic choice...

... in the coming year, and the results will define the country for a generation. These are perilous times. Over the last three years, much of what the Guardian holds dear has been threatened - democracy, civility, truth. This US administration is establishing new norms of behaviour. Anger and cruelty disfigure public discourse and lying is commonplace. Truth is being chased away. But with your help we can continue to put it center stage. It will be defining year and we're asking for your help as we prepare for 2020.

Rampant disinformation, partisan news sources and social media's tsunami of fake news is no basis on which to inform the American public in 2020. The need for a robust, independent press has never been greater, and with your help we can continue to provide fact-based reporting that offers public scrutiny and oversight. We are also committed to keeping our journalism open and accessible to everyone and with your help we can keep it that way.

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The Guardian



Welcome to Ukraine, the most corrupt nation in Europe

While the conflict with Russia heats up in the east, life for most Ukrainians is marred by corruption so endemic that even hospitals appear to be infected. Can anyone clean the country up?

Oliver Bullough

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Ukraine's National Cancer Institute occupies three smoke-grey, six-storey blocks in a residential district on the edge of Kiev. The external walls are tiled, with occasional scars where the bricks peep through. When Soviet workmen completed the facade, they built the date - "1968" - into it. Since then, maintenance appears to have been erratic. Nonetheless, business at the institute has always been brisk, and is getting brisker.

Half of Ukraine's men, and a fifth of its women, smoke; the national diet is heavy with animal fat; the national drink is vodka. Radiation from the Chernobyl disaster spread thyroid cancers throughout the 1980s generation, increasing the incidence among children tenfold. There are few family doctors, which means that breast, prostate and bowel tumours often go undetected for months. Survival rates for these cancers are among the worst in Europe.

In 2008, Professor Igor Shchepotin, an experienced Ukrainian-born surgeon, predicted in a magazine interview that the number of new diagnoses of cancer would continue to rise from 165,000 annually to 200,000 by 2020. That year, President Viktor Yushchenko picked Shchepotin out as Ukraine's champion in a new war on cancer. Shchepotin took charge of the Cancer Institute, which is both the country's leading cancer hospital and its premier research institution, and was granted extensive powers to mend Ukraine's health, including a budget independent of the health ministry, so that he could buy his own medicines and equipment. In Britain, he would be known as the "cancer tsar"; in Ukraine, he is called the "chief oncologist". And he has been an effective one, according to the institute's own assessment.

"Under the leadership of Professor Shchepotin, new approaches, conceptions and technology have been introduced, new principles for treating cancer patients, a significant proportion of whom have been returned to a fully active life," the institute said in a summary of its work published in April.

The Cancer Institute, though no more modern inside than out, feels reassuring. Surgeons in white coats discuss cases as they walk to the operating theatres. Nurses bustle around, bearing armfuls of folders. In the corridors, patients sit on folding cinema-style seats talking on their phones, while their relatives try to catch the doctors' attention. Old women dressed in green scrubs mop floors with disinfectant, giving the building a chemical tang that clings to your clothes long after you leave.

It feels like a place where patients can come knowing that the goal is to get them well again. But three surgeons working here, a former health minister, patients and anti-corruption activists all claim that this is not the whole story. They claim that the hospital, like government bodies all over Ukraine, appears to have been infected by corruption. And despite widespread public anger at the nation's corruption problem, which has provoked two revolutions in a decade, no one appears able or willing to do anything about it.

* * *

"Presumably there is money," said Konstantin Sidorenko, a consultant anaesthetist at the institute, when we first met in July. "But for some reason that money doesn't reach the most important places, like intensive care. So it means we have to earn everything ourselves."

The phrase "earn everything ourselves", he explained, is a euphemism for taking bribes, though Sidorenko was quick to point out that this wasn't something he wanted to do. He led the team of doctors running intensive care, so he was responsible for the institute's most vulnerable patients. Clinically, he felt he had no choice but to take the money.

We were on the sixth floor, sitting in his office, which was about the size of a typical bathroom. Sidorenko, who had greying, wavy hair and a friendly, open face, reached into the pocket of his white coat and took out a small cubic box. It contained an oxygen sensor for a respirator, the machines that provide air for patients unable to breathe for themselves. Each sensor costs around 4,000 hryvnias (UAH), currently £164, and each of his 10 respirators needs a replacement sensor at least once a year: UAH 40,000 (£1,649) in total. And that is just a tiny part of the money he needs to keep his machines working, which exceeds UAH 700,000 (£28,850) annually. For the last two years, he claimed, the institute had not provided him with sufficient money for maintenance, despite his repeated requests at clinical meetings.

"I have equipment worth millions, and I need to service it or it will break and my patients will die. I need to service it, but where do I get the money?" In other words, he had a dilemma: be honest and a bad doctor, or take bribes and be a good doctor. It is humiliating, but there is only one answer. "My doctors understand, and the patients pay," Sidorenko said.

Behind my chair was a tall settle, the kind found in former Soviet flats from Kiev to Kamchatka. The top half was a display cabinet full of medical books and files. Below that was a cupboard. Sidorenko squeezed past me to open the door and brought out a stack of envelopes so tall it required both hands to steady it. Some of them were half an inch thick, and all of them were full of banknotes.

He explained that almost all of his doctors collect the money from patients, then pass it on to him. He uses it to maintain the machines that keep his patients alive. These are the realities of being a doctor in Ukraine, he said. He was better qualified than most to assess the situation, since he sat on the commission that chooses which equipment the institute should buy. He said he had seen how the hospital systematically overpays for the equipment it buys and alleged that the institute had once bought a respirator for €130,000 more than it was worth. That €130,000 would have supplied his respirators with sensors for 40 years. Sidorenko had only one explanation for why the hospital would overpay for equipment: some managers were engaged in secret deals with the suppliers to defraud the state budget, and then dividing up the extra money among themselves. Essentially, Sidorenko's patients, via their kickbacks, were making up the shortfall. Shchepotin, the head of the institute, refused to comment on the specific allegations made by Sidorenko that such practices were taking place at the institute.

Sidorenko had another reason to be frustrated. He had 23 years of experience, but earned only €300 a month, barely enough to feed his four young children, let alone to pay the numerous small bribes - to teachers, traffic police, plumbers, tax officers - that are part of everyday life in Ukraine.

* * *

Kiev has a grand opera house, cathedrals, chain stores, sweeping central avenues, a metro, everything required to make a place look European. But it resembles a modern European capital city only in the way the Cancer Institute resembles a hospital. Transparency International's Corruption Perceptions Index - the most widely used indicator of corruption worldwide - rates Ukraine 142nd in the world, alongside Uganda. In the latest ranking, it fell behind Nigeria.

Since 1991, officials, members of parliament and businessmen have created complex and highly lucrative schemes to plunder the state budget. The theft has crippled Ukraine. The economy was as large as Poland's at independence, now it is a third of the size. Ordinary Ukrainians have seen their living standards stagnate, while a handful of oligarchs have become billionaires.

Public fury has fuelled two revolutions. In 2004, street protests helped Viktor Yushchenko defeat an attempt by the then prime minister Viktor Yanukovich to rig the presidential election. During his five years in power, however, Yushchenko failed to dislodge the networks of patronage. Amid widespread disillusionment, he lost the 2010 election to Yanukovich, who was in turn driven out in February 2014, after corruption mutated into still more virulent forms.

Officials from the general prosecutor's office, who were interviewed by Reuters, claimed that between 2010 and 2014, officials were stealing a fifth of the country's national output every year. This behaviour has infected all sectors of Ukrainian society. President Yanukovich lived in a vast

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palace on the edge of Kiev. After he fled, protesters found millions of dollars worth of paintings, icons, books and ceramics stacked in his garage. He'd had nowhere to display them.



Andrei Semivolos stands outside the institute, in front of a Soviet mural depicting doctors fighting cancer. Photograph: Joel van Houdt for the Guardian

The protesters camping out on the Maidan in central Kiev last winter wanted to prevent a repeat of 2004, when the old networks of corruption simply absorbed the new officials. Among those protesters was Andrei Semivolos, a pale, slim, dark-haired surgeon from the Cancer Institute with a mauve birthmark on his right temple. He had volunteered as a medic during the protests on the Maidan, patching up protesters beaten by police. He had returned to the institute determined to 'help change his workplace as he had helped change the government.

One of President Yanukovich's last attempts to salvage his image had been a televised visit to the institute, when he had handed out gifts to sick children, their heads bald from chemotherapy. Shchepotin, the chief oncologist, stood by his side, beaming. The publicity stunt failed to rehabilitate Yanukovich's reputation, and a fortnight later, on 22 February 2014, he fled. Soon after, Shchepotin, who had previously been a loyal supporter of Yanukovich, announced that the institute would be raising money to support the new government's army - a move that surprised Semivolos. To him, it sounded like Shchepotin was trying to ingratiate himself with the new order.

Semivolos wrote a long Facebook post on 20 March, in which he criticised the way Ukraine is run, Shchepotin, and what he called "past-it Soviet relics". Facebook had played an important role in catalysing the protests that swelled into revolution over the winter. Ukrainians knew how such posts could go viral and quickly energise mass protests. Shchepotin moved fast to respond to Semivolos's criticism by convening the Cancer Institute's "collective". Gathering the "collective" is a Soviet-era practice that nominally allows workers to hold managers to account. Managers control attendance, however, meaning they can keep a tight grip on proceedings.

"You get the impression that among us there is only one hero who won the revolution, and who's now fighting for the truth," Shchepotin told the assembled crowd. "But you are seriously mistaken, Dr Semivolos. Here are your colleagues and they are looking you in the eyes and saying what they think of you." Shchepotin pointed out that Semivolos's team of doctors had the worst performance record in the hospital, and speculated that Semivolos had posted the criticism to distract attention from his own incompetence. Those present voted unanimously to condemn Semivolos and to declare his opinion of Shchepotin false. For good measure, TV cameras came in

to film tearful co-workers upbraiding Semivolos for injuring the institute's reputation. Among a crowd of colleagues, he looked pale and alone.

In April, Semivolos responded by setting up a trade union with a dozen or so like-minded colleagues. He organised two protests outside the health ministry to demand an investigation into the hospital, to ask - among other questions - why no action had been taken after a 2009 probe suggested evidence of corruption there.

"We must remove corruption in Ukrainian healthcare like we would a malignant tumour," he wrote on Facebook on April 14. But his chances of success looked slim. Semivolos and his friends were fighting a hardened bureaucracy that was reasserting itself. There might have been a revolution on the Maidan, but here in the institute, it seemed that everything would proceed as normal.

Semivolos, however, was not alone. He had gained an ally in a very high place.

* * *

After Yanukovich fled last February, the new administration - headed by the speaker of parliament, who became acting president - gave control of most ministries to insiders and veteran politicians. This led to much muttering about how the old elite had clung on to power. Three new ministers, however, came from the Maidan protesters, and one of them was Oleg Musy. Slim and tanned, with a slight, grey beard, he looks like a 1970s musician - perhaps a member of the Police - on a comeback tour. Musy had headed the Maidan's medical volunteers, organising treatment for hypothermia and gunshot wounds.

In February, he became the new health minister, and embarked on an ambitious reform programme. He wanted to transform Ukrainian healthcare along European lines, and to clean up the process whereby the state buys drugs and equipment. Traditionally, Ukrainian officials have had wide discretion over which companies to approve and which to exclude, which, it is claimed, gives them the chance to make insider deals, inflate prices and steal with impunity. Musy wanted to end this practice and to dismiss anyone found to be involved in these deals.

This was a dangerous undertaking. In 2009, Yushchenko had commissioned a security operative, who specialised in organised crime, to lead an internal report into healthcare corruption. The report exposed how businessmen use offshore shell companies to conspire with corrupt officials, rig state tenders and jack up prices. Within weeks of the report being completed, an assailant threw a grenade at the operative who had written it, as he got out of his car on Tatarska Street in central Kiev. Shrapnel shredded his car, and scarred the nearby buildings. The man survived but only after extensive surgery at a specialist unit in Israel. His report was never officially published - although it was leaked online - and the assailant was never found.

Musy was not deterred, however, and began work on his reforms as soon as he took up his position. When I met him in August, he was startlingly open about the problems he faced. For a health system to function, he said, it needs 6-7% of all the money a country earns. The Ukrainian government was allocating only 3.5%, yet mysteriously the system continued to limp along.

"The question is why hasn't it died altogether?" he said. "And the answer is that additional finances are found from somewhere. Today the state pays around UAH 52bn (£2.1bn) into the healthcare system. Naturally, around the same amount is coming from somewhere else."

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If Musy's sums are correct, every man, woman and child in Ukraine pays an average of UAH 1,000 (£41) in bribes each year to keep the healthcare system operational. Considering that so much of the health budget is said to be stolen rather than used productively – Musy put theft from the medicines budget alone at 30-40% – the total is likely to be far higher. Among many examples, he said that in 2013 the ministry had bought 1,412 new ambulances, with the price of every vehicle inflated by UAH 200,000 (£8,223) – almost 50% of their true cost. “This isn't business, it is earning money dishonestly,” he said.



Andrei Semivolos with a patient at the National Cancer Institute in Kiev, Ukraine. Photograph: Joel van Houdt for the Guardian

Musy said a key front in his campaign for reform was the Cancer Institute. On June 26, he announced the results of an investigation into the hospital, detailing 43 alleged violations of the law. Among them were claims that patients had been forced to buy expensive medicines, even though those medicines had already been paid for by the state, and that equipment costing around UAH 42 million, bought in 2011, was gathering dust in a store cupboard, never used, with the warranty expired.

“This is the personal responsibility of the director,” Musy claimed in interviews with reporters. He said the details had been passed to police, who would interview Shchepotin in his capacity as head of the institute. He believed that the suspicion alone was grounds to sack Shchepotin, although that could not happen just yet, because Shchepotin had gone on sick leave. Under Ukrainian law, that meant he could not be dismissed for four months, not until October.

In brief comments to the Guardian, Shchepotin stated that claims of criminality at the institute were “lies”. He refused to comment on further questions about widespread corruption at the institute. In a television documentary broadcast on 20 December, Sergei Kaplin, a populist member of Ukraine's parliament, who presents a weekly investigative series called People's Prosecutor, challenged Shchepotin over corruption allegations. In one scene, Kaplin burst into Shchepotin's office with a camera crew. Shchepotin repeatedly refused to talk to him, unless he produced a search warrant.

* * *

Most patients come to the Cancer Institute via regional hospitals, so relatives caring for them need to find accommodation in Kiev. A charity called Zaporuka, which helps children with cancer, provides rooms for six families, in a large, detached house on a winding suburban street not far from the institute. Zaporuka's budget is about €500,000 a year – most of this comes from

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European donors - and it pays the salaries of two psychologists and two physiotherapists who work at the Cancer Institute. Natalia Onipko, who heads Zaporuka, is slight, with her blonde hair in a bob that falls onto her shoulders.

I often think about how much easier it would be for the doctors to work if they could just do what they are supposed to be doing," she told me. In a decade of working with parents, almost all of whom had paid bribes so their children could be treated, Onipko had never known anyone make an official complaint. "They're scared, of course they're scared," she explained. "Any scandal would end with them being sent back to their regional hospital. Do you understand what that would mean?"

Facilities are basic at the institute, but children coming there receive care from the country's top specialists, something they could not hope for in the provinces. Doctors have total discretion over which patients to admit or discharge, so it is not surprising that parents are anxious to keep them happy: giving them gifts, paying the amounts suggested, never speaking out. There are more cancer patients than there are beds - being sent back home would be a death sentence.



Natalia Onipko, president of Zaporuka, outside her office in Kiev.
Photograph: Joel van Houdt for the Guardian

We walked through to the kitchen, where six women sat around the table, chatting over tea as if they were old friends rather than strangers brought together by the awful coincidence of their children having cancer. At first, when I spoke to them, it seemed the mothers were reluctant to admit to breaking the law. It soon turned out they were simply struggling to understand what I was asking. Bribes were so ordinary that it seemed bizarre someone would have come all the way from Britain to ask questions about them. Eventually, however, one woman, who was from eastern Ukraine, explained how her doctor had extorted money: "He wrote 100 on a piece of paper, then pointed his fingers upwards. That meant dollars."

That prompted another woman to recall an encounter with a different doctor: "I remember the first time I saw him, he was winking and nodding his head, and I thought he had a tic or something; that he was mentally unwell. But actually he was catching my attention. Then he held out two fingers." Here she placed two fingers on her arm, as if she were playing charades. "That meant 200."

"Hundred?" a third woman asked, "you mean thousand." They all laughed.

As we walked out, Onipko explained that one of her most important jobs was to keep these parents' spirits up. They were not only struggling to support their children through a terrible illness, but also trying to navigate a health system apparently determined to exploit their desperation for financial gain. "I try not to criticise the doctors in front of the parents, because they have to trust their doctors," she said.

I heard the same stories throughout the institute: there was little money for maintenance, medicine or salaries, little interest in the patients, or in the medics doing the work of keeping people alive. One morning, I visited one of the institute's laboratories. Apart from some microscopes - given by donors eight years ago - the equipment in the department had not changed for two decades, according to one person who worked there.

From the facilities you would never have guessed this was one of the institute's most important departments. Patients' biopsies were stored on their original slides, between cardboard dividers, and kept in an index, like in an old library. These slides are crucial for diagnosing cancer. Doctors look at them through microscopes to determine the type and virulence of a patient's condition. Examples have to be stored in case the patient suffers a relapse. To prepare the biopsies, the lab workers drip purple dye onto slides suspended over an enamelled basin, which was once white but, after decades of use, is now dark purple.

* * *

Months passed before I next saw Oleg Musy, in a canteen in central Kiev, in one of the battered and dirty buildings that had been used as a headquarters for the revolutionaries. It was November and he wore a black leather jacket against the cold. He looked paler, and tired. The previous month, on 1 October, Prime Minister Arseniy Yatsenyuk had suspended Musy from his duties. Musy had, he said, failed to buy the medicines the country needed. It was a tough time, with the Ukrainian army at war with Russian-backed separatists in the east, the economy contracting, the currency plunging. The government needed competent officials, not revolutionaries engaged in quixotic ideological crusades.

Over the previous few months, many of Musy's supporters had turned against him. Patients of Ukraine, a charity that campaigns vigorously against corruption, accused Musy of conducting his battles at the price of sacrificing sick Ukrainians. It was urgent that the ministry buy drugs, they said, even at the cost of making deals with the businessmen who got rich from corrupt deals with the old government. That was not a point of view Musy shared.



While he was health minister Oleg Musy embarked on an ambitious reform programme.

“I will tell the truth,” he said. “The prime minister sent people from his own team to watch what was happening in the health ministry. I did not agree with their schemes, specifically with them maintaining the old ... schemes during the health ministry tenders.”

After Musy was suspended from his position, the old networks had re-established themselves, he said, as if nothing had happened. Musy claimed that some of the officials who ran procurement under Yanukovych were back, because the new government had failed to find anyone else with the expertise to navigate the ocean of paperwork required to buy medicine. Musy said this left the system open to the same kind of abuse the revolutionaries had promised to end. “It’s right that the west doesn’t want to give us money, that they say we’re not fighting against corruption. There isn’t a fight against corruption,” he said.

And what about the Cancer Institute? On 2 October, the day after Musy’s suspension, Shchepotin returned to work. Had Musy kept his powers for three more days, he claims he could have sacked Shchepotin, whose four months of sick leave was almost spent. “He was ill for four months, and had only three more days in which to be ill. But I was suspended, and he came back to work.”

* * *

The next evening, I visited Semivolos in his 13th-floor apartment on the edge of town to find out how his battle with Shchepotin was going. Semivolos made us tea and we sat in the kitchen. His wife kept us company and his son came in occasionally to give them both hugs. It was a cosy scene, the fridge covered in colourful magnets from foreign cities, cakes on the table, but he was gloomy.

He began our conversation with a 20-minute overview of the last millennium of Ukraine’s history. The basic message was one of survival against catastrophic odds. “How many revolutions did the republic have? Four? And only then did they get their republic,” he said. “We have total corruption - it couldn’t be more total. Cleaners don’t clean if you don’t give them money; ministers won’t govern if you don’t give them money.”

The personal clash between Semivolos and Shchepotin is now playing out in court. Shchepotin has sued Semivolos for defamation for his Facebook posts, claiming that “the negative information causes me great moral suffering and concern over my honour, my dignity, and my good name. People have lost their trust in me as a doctor, and now are unwilling to come to me or help.” The hearings are ongoing.

Semivolos laughed it off, but the issue is serious - Ukraine’s courts can be unpredictable.

During my time in the institute, I only saw Shchepotin once. He was at the end of a corridor, walking away from me, and was gone before I could get close. He agreed to talk by telephone, but refused to answer any questions about the specific allegations made against the institute and him. He insisted that he really had been ill and rejected any suggestion that the health ministry investigation had uncovered anything serious.

“There are a few facts, but they are not cause for an investigation, a probe, or anything,” he said. When I asked him about the defamation case he had brought against Semivolos, he said I was an “unserious person”, and “interested in gossip, rumours and the rest. These are the kind of things you find in the tabloids, and I don’t give interviews to the tabloids.” Then he put the phone down.

I sent a list of further questions via his secretary, but she returned it with the words “no comment” scrawled on it above his initials and the date - 27 November. I sent further requests for comment, detailing the allegations in this article, but they went unanswered.

* * *

That same day, 27 November, Ukraine’s new members of parliament took their seats, including Oleg Musy, who had been elected to represent a constituency in western Ukraine’s Lviv region. I watched the proceedings on a television in a small Kiev cafe called Mon Ami. It is near the administrative quarter, and I was due to meet a source who has worked as a senior official in various ministries since the days of Yushchenko.

He was late, bustling in and excusing himself with a wave in the direction of the television, where a succession of deputies were giving interviews and explaining how important it was to combat corruption. My source looked exhausted, and started explaining the situation before he had even removed his coat.

“It’s really difficult to beat these people. They control everything. It is like a hydra. They have secret service officers, prosecutors,” he said. “We are fighting real guys, you know. I would make a parallel with Colombia and the drugs cartels. They look fine, they look respectable, but behind the curtain there is blood.”

He ordered a filled croissant, and I had mushroom soup. We sat watching the deputies on television milling about: many of them in uniform, others in the embroidered shirts that are a nationalist symbol. Yatsenyuk and President Petro Poroshenko appeared together in a show of unity. There was a brief glimpse of Musy on screen, his handsome face turned towards one of his fellow members of parliament, listening patiently.

“It’s a real problem,” my lunch partner said, nodding towards the dethroned health minister. “Who do you want? A patriot but a disastrous manager, or an effective manager with questions hanging over him?”

I ate my soup and we discussed how businessmen who had got rich under Yanukovich, had quietly returned to Kiev in recent months. “We took away Yanukovich and his guys but it’s another matter replacing all their schemes,” he said. “Everyone is ready to carry out reforms, to make everything open, except for things that affect themselves.”

On 2 December, parliament approved a new health minister - Ukraine’s third in the year. He was Alexander Kvitashvili, a Georgian given Ukrainian citizenship especially for the job. Officials hoped that the fact he was foreign, and unconnected to any existing power structures meant he would be able to shake up the country’s hospitals in the way no Ukrainian could manage. Georgia is one of the few countries in the old Soviet Union that has managed to restrict corruption, if only at lower levels of officialdom.

The day after his appointment, the Kiev Post reported that Kvitashvili was confident he would be able to carry out genuine reform to Ukraine’s healthcare system. On 21 January, he confirmed that although the current health care funding system will remain the same in 2015, he would also begin introducing new funding mechanisms for hospital treatment. On 3 February, the latest stage in Kvitashvili’s reforms was announced: the health ministry stated that it will not renew Shchepotin’s contract when it runs out on 11 February.

Commenting on allegations of corruption within the healthcare system in a statement to Patients of Ukraine, Kvitashvili said: “Sadly, owing to imperfections in Ukrainian legislation, dishonest managers can’t be dismissed even for abuse of power.”

He continued by stating that the health ministry would conduct an “open and honest competition” to find a new director for the institute. “I really hope the police will finish their work and,” he added, “if any employees of the institute are found guilty, they will be held responsible for profiting from human misery.”

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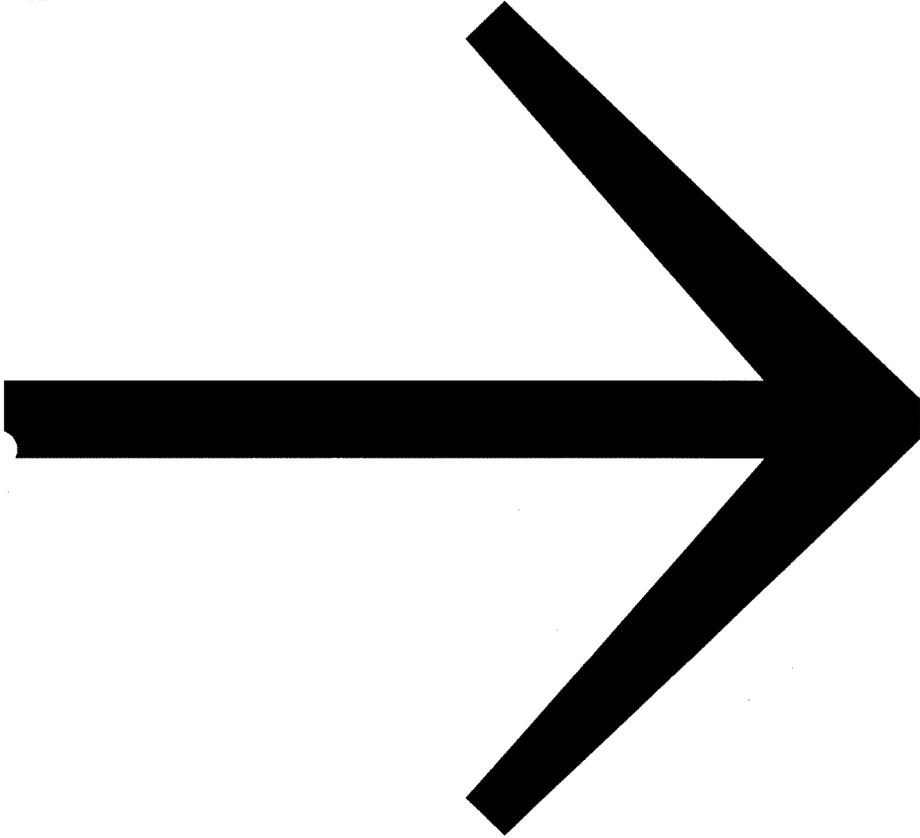
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Why shouldn't Hunter Biden join the board of a gas company in Ukraine?

The son of the US vice-president has been chosen to take charge of energy firm Burisma's legal unit - a decision based purely on merit, of course

Wed 14 May 2014 12.03 EDT

Name: Hunter Biden.

Age: 44.

Appearance: Chip off the old block.

His names rings a bell. Is he related to someone famous? He's the son of Joe Biden, the US vice president.

That is he, sort of a wayward, ne'er-do-well playboy type? Not really. He's a graduate of Yale Law School and a former senior vice-president at MBNA America Bank.

Good for him. During the Clinton administration he worked in the US Department of Commerce. He's presently a partner in an investment firm. And counsel for a national law firm. And an

adjunct professor at Georgetown University.

I get it: he likes to keep busy. He has even found the time to join the board of a gas company called Burisma Holdings Ltd.

Never heard of it. Perhaps that's because it's a Ukrainian gas company; Ukraine's largest private gas producer, in fact. He's taking charge of the company's legal unit.

Isn't that a bit fishy? Why do you say that?

Because he's the vice-president's son! That's a coincidence. "This is totally based on merit," said Burisma's chairman, Alan Apter.

He doesn't sound very Ukrainian. He's American, as is the other new board member, Devon Archer.

Who? Devon Archer, who works with Hunter Biden at Rosemont Seneca partners, which is half owned by Rosemont Capital, a private equity firm founded by Archer and Christopher Heinz.

Who? Christopher Heinz ... John Kerry's stepson.

I think Putin's propaganda people can take a long weekend; their work is being done for them. What do you mean?

Hasn't Joe Biden pledged to help Ukraine become more energy independent in the wake of its troubles with Russia? Well, yes.

And isn't Burisma, as a domestic producer, well positioned to profit from rising gas prices caused by the conflict? Possibly, but Hunter Biden is a salaried board member, not an investor. According to anonymous sources in the Wall Street Journal, neither Rosemont Seneca nor Rosemont Capital has made any financial investment in Burisma.

So it's not fishy at all? No one's saying that.

Do say: "Somebody needs to get involved in Ukraine's corporate governance, and it might as well be a clutch of rich, well-connected American dudes with weird first names."

Don't say: "Thanks, Dad."

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Schiff claims there's already 'd evidence' of collusion by Trump campaign

BY BRETT SAMUELS - 03/03/19 11:26 AM EST

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House Intelligence Committee Chairman Adam Schiff (D-Calif.) said Sunday that he believes a Russian lawyer's 2016 offer of damaging information on Hillary Clinton to members of the Trump campaign and their subsequent meeting amounts to "direct evidence" of collusion.

"I think there is direct evidence in the emails from the Russians through their intermediary offering dirt on Hillary Clinton as part of what is described in writing as the Russian government effort to help elect Donald Trump," Schiff said on CBS's "Face the Nation," in response to a question about collusion.

"They offer that dirt. There is an acceptance of that offer in writing from the president's son, Don Jr., and there is overt acts and furtherance of that," he added, citing a summer 2016 meeting at Trump Tower between the Russian lawyer and members of the president's team.

"That to me is direct evidence," Schiff continued. "But there's also abundant circumstantial evidence."

He pointed to charges against former Trump campaign chairman Paul Manafort and former Trump attorney Michael Cohen's testimony as examples.

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The Trump Tower meeting has remained a flashpoint in investigations into Russian interference in the 2016 election. Donald Trump Jr. initially said the meeting was focused on Russian adoption policy and that it was a waste of time, but the president last August confirmed that the meeting was meant to gather damaging information on his then-opponent.

Schiff stopped short of indicating that the evidence amounts to a case for impeachment, saying it's not yet clear there's evidence beyond a reasonable doubt that the president engaged in a criminal conspiracy. He said he intends to wait for the special counsel and congressional investigators to present their findings.

Schiff's committee concluded its investigation into Russian interference last year, but Schiff disputed the conclusion that there was no collusion reached by Republicans who were at that point leading the investigation.

The Senate Intelligence Committee chairman has said his panel, which is still investigating Russia's election interference and possible collusion, after two years of looking has yet to find direct proof of collusion, and Cohen also testified to Congress last week that he does not believe President Trump colluded with Russia.

Trump on Saturday derided Schiff over his pursuit of investigations into the president, taking aim at the congressman during a two-hour speech at the Conservative Political Action Conference.

— Updated 2:24 p.m.

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Ukraine's ambassador: Trump's comments send wrong message to world

BY AMB. VALERIY CHALY, CONTRIBUTOR - 08/04/16 01:30 PM EDT

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The U.S. presidential race has captured attention of the world, sometimes posing serious challenges for foreign diplomats when they find their country in the campaign's spotlight. Ukraine, which came to the world's attention two years with its Revolution of Dignity and then worked to remain on the world's radar after Russian aggression, has found itself in the spotlight once again.

Recent comments by Republican nominee Donald Trump about the Ukrainian peninsula of Crimea — occupied by Russia since March 2014 — have raised serious concerns in Kyiv and beyond Ukraine. Many in Ukraine are unsure what to think, since Trump's comments stand in sharp contrast to the Republican party platform. Since the Russian aggression, there has been bipartisan support for U.S. sanctions against Russia, and for such sanctions to remain in place until the territorial integrity of Ukraine is restored. Efforts to enhance Ukraine's defense capacity are supported across the aisle, as well, to ensure that Ukraine becomes strong enough to deter Russia's aggression.

Even if Trump's comments are only speculative, and do not really reflect a future foreign policy, they call for appeasement of an aggressor and support the violation of a sovereign country's territorial integrity and another's breach of international law. In the eyes of the world, such comments seem alien to a country seen by partners as a strong defender of democracy and international order. The United States was among the

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 100 nations which supported the U.N. resolution "Territorial Integrity of Ukraine" not recognizing Russia's attempt to annex Crimea.

A candidate for the presidency in any country ought to realize the challenges he or she will face to ensure consistency in foreign policy and uphold his or her country's international commitments. Ukraine — a strategic partner of the United States — entered the 1994 Budapest multilateral commitment, giving away the world's third largest nuclear arsenal in return for security assurances to its territorial integrity from three nuclear powers: the United States, the United Kingdom and Russia.

This commitment has been broken by one signatory country, which attempted to annex Crimea and invaded Ukraine's Donbas region. While Ukraine was recovering from the bloodshed in Maidan orchestrated by then-President Viktor Yanukovich, Russia seized control over Crimea's Supreme Council and its security infrastructure. The sham referendum carried out at a gunpoint had nothing to do with a free and fair expression of the people's will and ignored the choice of the indigenous people of Crimea, the Crimean Tatars.

Russia has unleashed its repressive machine against those who protest against the occupation. Censorship, arrests, assassinations, abductions, the banning of the Crimean Tatars' representative body — the Mejlis — all threaten another tragedy and ethnic cleansing.

The attempted annexation of Crimea has also posed new threats to nuclear safety. International institutions like the U.N. and the International Atomic Energy Agency (IAEA) do not recognize the annexation and, from a jurisdictional standpoint, cannot control nuclear facilities and radiation security in those areas. Moreover, Russia has already threatened to deploy nuclear weapons in Crimea in direct vicinity of NATO and EU states. Russia is restoring Soviet-era nuclear storage facilities and has already deployed the means for carrying the weapons, including warships and combat aircrafts.

Russia did enter Ukraine in 2014 and would undoubtedly keep on invading should the position of the most important global actors be favorable or neutral, or one of appeasement, and should Ukraine not continue enhancing its defense potential. Right now, Russia is flexing its muscles, building military capacity and testing state-of-the-art weapons in the Ukrainian Donbas. In numbers, Russia's presence in Ukraine means on average 400 shells a week.

Last week, Ukraine's Ministry of Defense identified and reported 22 flights of unmanned aerial vehicles (UAV) operated by Russia-backed militants. Russia continues to pour its weapons and military equipment to Donbas: For instance, from July 22 to July 28, nearly 6,000 tons of fuel, 80 tons of ammunition and 120 tons of military cargo (including repair parts for military vehicles) were delivered through an uncontrolled part of the Ukrainian-Russian border. The Organization for Security and Cooperation in Europe's monitoring mission has reported that Russian-backed militants have used a wide array of heavy weapons, including mortars, high-caliber artillery and tanks.

This bloody war, which has already taken more than 10,000 Ukrainian lives and internally displaced almost 2 million, is a fight of a young democracy for independence and its choice to be part of the West and embrace Western values. Neglecting or trading the cause of a nation inspired by those values — cemented by Americans in their fight for independence and civil rights — would send a wrong message to the people of Ukraine

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and many others in the world who look to the U.S. as to a beacon of
freedom and democracy.

Chaly is Ukraine's ambassador to the United States.

The views expressed by contributors are their own and not the views of The Hill.

TAGS DONALD TRUMP



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BUSINESS

25 companies that pay their board of directors a shocking amount

Paul Ausick 24/7 Wall Street

Published 6:00 a.m. ET Dec. 14, 2018

At one time, being a member of the board of directors of an S&P 500 company might have meant attending a few meetings a year, having some meals at the company's expense, and scoring a nice stipend.

Those days are probably over for most publicly traded U.S. companies as demands for board oversight have been increasing lately.

In its most recent annual survey of corporate board members, PricewaterhouseCoopers pointed to several issues board members are dealing with today: culture problems, cybersecurity issues, and calls for increased diversity on boards themselves, among others.

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Being a member of a corporate board may have its downsides, but it also has, in many cases, some excellent benefits. For example, board members are usually compensated in a combination of cash and stock awards, including a retainer, fees for meeting attendance, and additional retainers for committee chairs and members.

Research firm MyLogIQ LLC has compiled a ranking of director compensation at all S&P 500 companies. Here is MyLogIQ's list of the 25 S&P 500 companies with the highest total board compensation. The data was calculated from the company's proxy filings for 2017.

25. CSX Corp. (NYSE: CSX)

- Total board compensation: \$4.86 million
- Average compensation per board member: \$324,195

24. Chubb Ltd. (NYSE: CB)

- Total board compensation: \$4.86 million
- Average compensation per board member: \$324,218

23. Amgen Inc. (NASDAQ: AMGN)

- Total board compensation: \$4.93 million
- Average compensation per board member: \$328,916

22. Oracle Corp. (NYSE: ORCL)

- Total board compensation: \$4.98 million
- Average compensation per board member: \$552,899

21. Comcast Corp. (NASDAQ: CMCSA)

- Total board compensation: \$5.00 million
- Average compensation per board member: \$416,281

20. International Business Machines Corp. (NYSE: IBM)

- Total board compensation: \$5.01 million
- Average compensation per board member: \$334,068

19. Salesforce.com Inc. (NYSE: CRM)

- Total board compensation: \$5.31 million
- Average compensation per board member: \$530,719

18. Citigroup Inc. (NYSE: C)

- Total board compensation: \$5.35 million
- Average compensation per board member: \$297,407

17. Ford Motor Co. (NYSE: F)

- Total board compensation: \$5.36 million
- Average compensation per board member: \$357,385

16. Illumina Inc. (NASDAQ: ILMN)

- Total board compensation: \$5.42 million
- Average compensation per board member: \$492,524

15. Allergan plc (NYSE: AGN)

- Total board compensation: \$5.57 million
- Average compensation per board member: \$464,450

14. Mylan NV (NASDAQ: MYL)

- Total board compensation: \$5.59 million
- Average compensation per board member: \$465,432

13. Equity Residential (NYSE: EQR)

- Total board compensation: \$5.62 million
- Average compensation per board member: \$468,571

12. Wells Fargo & Co. (NYSE: WFC)

- Total board compensation: \$5.74 million
- Average compensation per board member: \$337,668

11. Vertex Pharmaceuticals Inc. (NASDAQ: VRTX)

- Total board compensation: \$5.93 million
- Average compensation per board member: \$459,661

10. Everest Re Group Ltd. (NYSE: RE)

- Total board compensation: \$5.98 million
- Average compensation per board member: \$747,278

9. Philip Morris International Inc. (NYSE: PM)

- Total board compensation: \$6.08 million
- Average compensation per board member: \$506,626

8. General Electric Co. (NYSE: GE)

- Total board compensation: \$6.26 million
- Average compensation per board member: \$347,825

7. Coty Inc. (NYSE: COTY)

- Total board compensation: \$6.29 million
- Average compensation per board member: \$786,444

6. The Goldman Sachs Group Inc. (NYSE: GS)

- Total board compensation: \$7.34 million
- Average compensation per board member: \$560,131

5. Roper Technologies Inc. (NYSE: ROP)

- Total board compensation: \$7.79 million
- Average compensation per board member: \$973,923

4. Fidelity National Information Services Inc. (NYSE: FIS)

- Total board compensation: \$7.90 million
- Average compensation per board member: \$790,388

3. Incyte Corp. (NASDAQ: INCY)

- **Total board compensation:** \$7.92 million
- **Average compensation per board member:** \$1.13 million

2. Regeneron Pharmaceuticals Inc. (NASDAQ: REGN)

- **Total board compensation:** \$23.88 million
- **Average compensation per board member:** \$2.17 million

1. Twenty-First Century Fox Inc. (NASDAQ: FOXA)

- **Total board compensation:** \$25.57 million
- **Average compensation per board member:** \$2.58 million

Detailed findings

Using the 250th ranked company, Applied Materials, as our example, the median cost of a board is around \$2.83 million a year. Applied Materials has a 10-member board of which nine are independent directors. The board met five times in 2017, and every director attended at least 75% of board and committee meetings. The company elects all board members annually.

Applied Materials paid each board member an annual retainer of \$70,000 and a fee of \$2,000 for each meeting attended. As of the second quarter of last year, audit committee members began receiving an additional annual retainer of \$25,000, human resources and compensation committee members receive an extra \$12,500, and governance and nominating committee members receive an additional \$10,000. The board chairperson receives an additional \$150,000 annually, and committee chairs receive between \$12,500 to \$25,000 in additional retainer fees. Other fees and travel reimbursements are also paid.

In addition to these cash payments, all nine non-employee directors received a stock award valued at \$222,643 in 2017.

If Applied Materials is typical, how much are board members paid in the extreme cases? The S&P 500 company that paid its directors the least was Berkshire Hathaway. The company pays a fee of \$900 for each meeting attended in person and \$300 for participating in any meeting conducted by telephone. A director who serves as a member of the audit committee receives a fee of \$1,000 quarterly. Directors are reimbursed for their out-of-pocket expenses

incurred in attending meetings of directors or shareholders. Microsoft co-founder Bill Gates was paid \$2,700 in 2017 for his service as a Berkshire Hathaway director. The company did not report any stock awards to directors in 2017.

At the top end of the rankings of board costs are media giant 21st Century Fox and pharmaceutical maker Regeneron. Both companies reported 2017 board costs of more than \$20 million and were the only two companies to report board costs of more than \$7.9 million. Federal regulations require public companies to report payments made to directors for professional services to the company.

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1/15/2020

Adam Schiff: There is 'ample evidence' of collusion between Trump campaign, Russians



WASHINGTON

Adam Schiff: There is 'ample evidence' of collusion between Trump campaign, Russians

Erin Kelly USA TODAY

Published 12:25 p.m. ET Feb. 14, 2018 | Updated 3:50 p.m. ET Feb. 14, 2018

WASHINGTON — There is "ample evidence" that the Trump campaign colluded with Russians, but only special counsel Robert Mueller can decide if it's enough to prove a crime beyond a reasonable doubt, the senior Democrat on the House Intelligence Committee said Wednesday.

"There is already, in my view, ample evidence in the public domain on the issue of collusion if you're willing to see it," Rep. Adam Schiff, D-Calif, told reporters at a newsmaker breakfast hosted by the *Christian Science Monitor*. "If you want to blind yourself, then you can look the other way."

President Trump has repeatedly denied any collusion and has denounced the Russia investigation as "a witch hunt" fueled by Democrats who are angry that Hillary Clinton lost the 2016 presidential election.

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Schiff said there is evidence — heard by the committee behind closed doors — that he can't talk about publicly because it remains classified. But he said there is plenty of evidence of collusion that has been reported publicly, including:

- Former Trump campaign adviser George Papadopoulos pleaded guilty to lying to the FBI about talking in April 2016 to a professor with close ties to the Kremlin who told

Papadopoulos that Moscow had "dirt" on Hillary Clinton. The professor told him about thousands of emails the Russians had from the Clinton campaign.

— Donald Trump Jr., Trump son-in-law Jared Kushner, and former campaign chairman Paul Manafort met with a Russian attorney at Trump Tower in June 2016 after being promised "dirt" on Clinton. The campaign later communicated to meeting organizers that they were disappointed they didn't get what they were promised.

— In July 2017, the president and White House advisers put together a misleading statement about the nature of the Trump Tower meeting, saying that it was for the purpose of discussing Russian adoptions.

— The Trump campaign knew through Papadopoulos that the Russians had obtained thousands of emails from the Clinton campaign. Then-candidate Trump publicly asked the Russians in July 2016 to hack Clinton and find her "30,000 emails that are missing" from the personal email server she used while secretary of State. WikiLeaks began posting emails from the Clinton campaign in October, just weeks before the November election.

- Former White House national security adviser Michael Flynn held secret conversations with Russian officials in December 2016 during the presidential transition period, promising to undermine sanctions imposed against Russia by the Obama administration for meddling in the U.S. election. Flynn pleaded guilty late last year to lying to the FBI about those conversations.

"All of this is evidence of collusion," said Schiff, a former federal prosecutor. "Now, I've never said that there was proof beyond a reasonable doubt. That's for Bob Mueller to decide. But to say there's no evidence of collusion, you'd have to ignore all this."

Mueller is investigating Russian interference in the 2016 election, possible collusion between the Trump campaign and the Russians, and possible obstruction of justice by the president.

"If this were a trial on the issue of did the Trump campaign conspire with the Russians to interfere or violate U.S. election laws by providing help to the Trump campaign, if this were a trial on that conspiracy charge...all of that evidence would come in as evidence of collusion," Schiff said.

The House and Senate intelligence committees and the Senate Judiciary Committee are each conducting their own Russia probes.

While it is up to Mueller to conduct the criminal investigation and file any charges he feels are warranted, it is up to the House panel "to tell the country as much as we can about what we have been able to learn," Schiff said.

Even if Mueller determines that he can't file criminal charges of conspiracy, the committee should inform people of any "unpatriotic" or "immoral" actions, even if they weren't illegal, Schiff said.

"It's not fine to work with a foreign power even if there is no violation of law involved," he said.



WASHINGTON

Exclusive: Nancy Pelosi vows 'different world' for Trump, no more 'rubber stamp' in new Congress

Nicole Gaudiano and Eliza Collins USA TODAY

Published 4:00 a.m. ET Jan. 3, 2019 | Updated 5:49 p.m. ET Jan. 3, 2019

WASHINGTON – Nancy Pelosi, who took the gavel as House speaker Thursday, told USA TODAY in an exclusive interview that President Donald Trump can expect a “different world” from the first two years of his presidency when the GOP controlled both chambers of Congress.

The California Democrat plans to confront Trump on many fronts, from investigating the deaths of immigrant children in U.S. custody to demanding Trump’s tax returns and protecting special counsel Robert Mueller’s Russia investigation.

Those clashes loom as Pelosi and her Democratic colleagues remain locked in a budget and border security battle with Trump that has left parts of the federal government shut for nearly two weeks.

The election of speaker was one of the first orders of business for the new Congress sworn in Thursday, when Democrats took control of the House for the first time in eight years.

Trump warned that investigations of him and his administration would lead to a “war-like posture” in Washington. The new speaker made clear she won’t shrink from a fight.

“He was used to serving with a Republican Congress, House and Senate that was a rubber stamp to him. That won’t be the case,” Pelosi said in the USA TODAY interview just before the holidays. “Oversight of government by the Congress is our responsibility.

“That’s the role that we play.”

Despite calls from some on the left wing of her party to try to remove Trump from office, Pelosi said the efforts to serve as a check on Trump's power don't extend to impeachment – at least not yet. She remains intent on protecting Mueller's investigation into whether the Trump campaign coordinated with Russia in the 2016 election.

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“If there's to be grounds for impeachment of President Trump – and I'm not seeking those grounds – that would have to be so clearly bipartisan in terms of acceptance of it before I think we should go down any impeachment path,” Pelosi said.

“I keep coming back to the same word: the facts,” she said. “The facts will indicate a path, and I don't think we should impeach a president for any political reason, but I don't think we can ignore any behavior that requires attention and that was all based on the facts.”

One of the first moves Democrats will take to try to check the power of the White House and Republicans will be the unveiling of an anti-corruption bill designed to ease obstacles to voting, curb the role of big money in politics and hold politicians and government officials to higher ethical standards. The plan's supporters want to require presidents to release their taxes – something Trump has refused to do.

Newly armed with subpoena power, Democrats are likely to investigate potential conflicts of interest between Trump's businesses and his role in setting policy for his administration, as well as possible ties between the Trump campaign and Russia and whether Trump and his family have financial ties to Russia. Democrats are also likely to subpoena Trump's tax returns.

Jim Manley, a former aide to Senate Democratic leader Harry Reid, said oversight of the Trump administration will be a “target-rich environment,” but as speaker, Pelosi will have an important role in guiding the broad parameters of the investigations.

“She'll give the chairmen wide latitude, don't get me wrong, but it's all going to be coordinated by the leadership,” Manley said. “That's just how she rolls.”

'War room-style effort'

For the past two years, members of Pelosi's team have held weekly strategy meetings with top policy and communication staffers from several committees with oversight powers. They have focused on exposing scandals among administration officials who have since left their positions, allegations of Trump's conflicts of interests, the handling of security clearances and aspects of the Russia investigation.

"Given the magnitude of the corruption, cronyism and incompetency in this administration, it's definitely a war room-style effort," said Ashley Etienne, a Pelosi spokesperson who leads communication work on oversight for Democrats.

As House speaker from 2007 to 2011 and as minority leader before and after that, Pelosi, 78, named close allies to the House Intelligence Committee, the only committee whose membership is controlled by party leaders and the committee that's the central player in the Russia investigation.

She is a former ranking member of the committee, and she may be more "deeply involved" in its work than any other, said Rep. Adam Schiff, D-Calif., the incoming chairman.

Her involvement isn't at the level of specific investigative threads or witnesses, he said. It's more at the level of the "Gang of Eight," the intelligence committee and party leaders who are briefed on covert actions.

When it comes to protecting the Mueller investigation, her position is part of a "consensus," said Rep. Jerrold Nadler, D-N.Y., the incoming House Judiciary Committee chairman.

"Nancy certainly agrees with that, and she pushed that," Nadler said.

Caution on impeachment

Pelosi's own caution about impeachment hasn't stopped some Democrats from twice voting for impeachment. A House resolution was defeated 355 to 66 on Jan. 19, 2018.

The group Need to Impeach, which is headquartered in her district and funded by billionaire activist Tom Steyer, gathered 6.5 million signatures in support of impeachment – and expects Pelosi to come around.

"The Democrats nationally want action around Trump," said Kevin Mack, lead strategist for Need to Impeach. "We as a party have to prove that we can represent Democratic values. So I

don't think Nancy Pelosi can be a speed bump on impeachment forever.”

Others said part of her caution about impeachment comes from watching Republicans go after President Bill Clinton during the Monica Lewinsky scandal – and lose House seats in 1998. The House, then dominated by Republicans, voted to impeach Clinton after the election, but he was acquitted by the Senate.

GOP pollster Frank Luntz said Americans could welcome the oversight of the Trump administration if they feel it is being done for the “right reasons.”

On the flip side, Luntz said, "If they think it's oversight for political gain, they will reject it."

Trump has sought to rally his political base by portraying Democrats as intent on taking him down. Alex Conant, a former aide to Sen. Marco Rubio, R-Fla., said Clinton benefited from "overzealous" Republicans during the Lewinsky scandal.

Because of that, Conant said, Pelosi will need to walk a fine line.

“Pelosi’s role will be to negotiate big policy matters with the White House ... and then to try to limit and guide the investigations behind the scenes,” said Conant, a White House spokesman during President George W. Bush’s second term. “Clearly, the Trump administration would love nothing more than for Democrats to overreach and go on fishing expeditions.”

Pelosi is not only the first woman to become House speaker but she is one of just a handful of people who won multiple terms in the post.

She is admired by some in the party for her legislative prowess. Getting Obamacare over the finish line is one example of that.

Former President Barack Obama said in November on "The Axe Files" podcast that Pelosi isn't always the best on a cable show “or with a quick soundbite,” but he called her an “extraordinary partner” and praised her as “one of the most effective legislative leaders that this country’s ever seen.”

Coastal elite caricature

She’s seen by Republicans and some Democrats as the personification of a coastal elite. Her Hawaii trip during the government shutdown fed into that criticism.

During the 2018 midterm campaign, the GOP ran constant ads hammering her, pointing out that her favorability rating was underwater. An NBC News/Wall Street Journal poll from mid-December had her at 41 percent unfavorable, 28 percent favorable. That same poll had Trump at 52 percent unfavorable, 37 percent favorable.

The campaign featured scathing attacks on Pelosi from Trump and Republicans. Even some Democrats sought to distance themselves from Pelosi. She worked on strategy behind the scenes and hauled in \$135.6 million for Democrats this cycle, including \$129 million directly for the Democratic Congressional Campaign Committee, according to her office. She prevailed, and Democrats won a net gain of 40 seats.

Pelosi has historically “appeared to be proper and relied on this grandmother image,” but she’s actually a “very strong, determined woman,” said Rep. Jackie Speier, D-Calif. Her relationship with Trump will be “a stunning dynamic to watch,” Speier said, because Trump hasn’t had to deal with anyone like her before – a mother of five children who knows how to deal with “bratty behavior.”

“The president has been successful in bullying people into doing things – that’s how he makes his deals,” she said. “He’s got to change his strategy, or he will fail.”

After Democrats won the House, Pelosi faced opposition in her bid for speaker, but she stamped out a centrist rebellion by agreeing to limit her term to just four more years. Rep. Marcia Fudge, D-Ohio, considered challenging Pelosi for the top spot – until Pelosi announced that Fudge would chair a subcommittee focused on elections and voting issues, one of her signature issues.

Republicans grudgingly admire her toughness and ability to hold her caucus together. Pelosi “plays the blood sport of politics” better than the past three GOP speakers, said Tim Cameron, a Republican strategist who worked for the House GOP conference under Speaker John Boehner.

“Her ability to dispel potential rivals is literally unrivaled,” Cameron said.

“I think every Republican speaker since 2010 has been jealous of what she was able to get done from 2006 to 2010. She never really had the issues that we had with the conservative wing of the party,” Cameron said.

Lecturing Trump

Though much of Pelosi's legislative dealmaking is done behind the scenes, the country witnessed her latest toe-to-toe battle with Trump on government funding during a televised meeting Dec. 11 in the Oval Office.

Republicans pounced on Pelosi for saying the GOP didn't have the votes in the House for a border wall. The House passed \$5.7 billion in funding for the wall Dec. 20, but the bill didn't get a vote in the Senate, and Senate Minority Leader Charles Schumer, D-N.Y., called on Trump to "abandon the wall."

Pelosi told USA TODAY that the House vote was another example of Trump's "rubber stamp Congress."

"I know that many of them did not really believe in that, but they gave him the vote anyway, for whatever reason," she said.

Pelosi's allies pointed to that Oval Office meeting – when the president said he'd be "proud" to shut down the government – as the latest example of Pelosi holding her own. She lectured Trump on negotiating with Congress, then donned sunglasses as she left the White House, in a moment that lit up the internet.

Speier recalled attending a holiday party with Pelosi the weekend after the meeting with the president. Women approached the pair to thank them for their work and compliment Pelosi for standing up to Trump.

"I said, 'We're sassy,' " Speier recalled to USA TODAY. "And then Nancy says, 'No, we're badassess.' "

12/15/2019

Poll: Americans split 42%-42% on impeaching Trump



NEWS

Poll: Americans split 42%-42% on impeaching Trump

Susan Page and Emma Kinery USA TODAY

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CORRECTIONS AND CLARIFICATIONS: An earlier version of this story misstated the percentage of respondents who said President Trump wasn't likely to complete his first term. The correct number is 36%.

WASHINGTON — Just six months after his inauguration, Americans already are split down the middle, 42%-42%, over whether President Trump should be removed from office, a new USA TODAY/iMediaEthics Poll finds.

While no serious effort is now underway in Congress to impeach Trump, the results underscore how quickly political passions have become inflamed both for and against the outsider candidate who won last year's campaign in a surprise. A third of those surveyed say they would be upset if Trump is impeached; an equal third say they would be upset if he's not.

Those findings, designed to measure the intensity of opinion, also show a perfect divide, 34%-34%.

"I don't really trust him — all the things he's done while he's in office, all of the lies, the investigation that goes on with him, the things he says to his staff," Vera Peete, 47, of Antioch, Calif., said in a follow-up phone interview. The caregiver from suburban San Francisco, an independent who voted for Democrat Hillary Clinton for president, was among those surveyed.

The online poll of 1,330 adults, taken July 17-19 by SurveyUSA, has a margin of error of 2.8 percentage points.

Americans are braced for turmoil ahead.

More than a third, 36%, say Trump isn't likely to complete his first term, for whatever reason. Only about one in four, 27%, express confidence he'll serve all four years of his term. Even one in 10 Republicans doubt he'll finish his tenure.

"These results suggest that Trump is probably the most beleaguered first-term president in the country's history, and certainly in modern history — highly unpopular among the public, with a significant portion clamoring for his impeachment barely six months after his inauguration," says David Moore, a senior fellow at the University of New Hampshire and polling director for iMediaEthics.org, a nonprofit, non-partisan news site.

Read more:

David Moore's analysis of the poll on iMediaEthics

Methodology for the USA TODAY/iMediaEthics Poll

In the poll, 44% approve of the job Trump is doing, 51% disapprove. His opposition is more intense than his support: 38% strongly disapprove of him; 22% strongly approve.

Nearly seven in 10 Democrats say Trump should be impeached. So do 36% of independents and, perhaps surprisingly, 15% of Republicans.

Sherman argued that the ousting of Comey, who was leading the investigation into Russia, amounted to the "high crimes and misdemeanors" required in the Constitution for removal from office.

In a speech on the House floor in May, Rep. Al Green, D-Texas, also called for Trump's impeachment.

But more senior Democrats haven't joined in. House Democratic leader Nancy Pelosi has called instead for creating an outside, independent commission to investigate the Russia allegations. House Republicans, who hold a 46-seat majority, are unlikely to entertain the possibility of removing the president.

That said, if Democrats won control of the House in next year's midterm elections, the party's base might press for a debate on the issue, especially depending on what the Russia investigations conclude.

Special counsel Robert Mueller and congressional oversight committees are investigating meddling in the 2016 election by Moscow that U.S. intelligence agencies have concluded

were designed to help Trump and hurt Clinton. The inquiries are examining whether Trump associates may have colluded with the Russians, an allegation the president strongly denies.

Support for impeachment is stronger among younger people than older ones; 51% of those under 35 but just 33% among those 50 and older say Trump should be removed from office. Women are more likely than men to back impeachment, 46% compared with 38%. There is also a racial and ethnic divide. Two-thirds of African-Americans and a majority of Hispanics back impeachment, compared with a third of whites.

"I believe in 2018 they will vote enough Democrats and independents in to impeach him," says Jeffrey Hobbs, 49, of Ochlocknee, a town of 605 in southern Georgia. He voted for Republican Mitt Romney in 2012 but didn't cast a ballot in 2016, and now he vows to never vote Republican again because of the GOP's failure to stand up to Trump.

Trump denounces the Russia allegations as a "political witch hunt," and his aides and allies argue he is the victim of biased news coverage.

"At the end of the day, I think, when those investigations are over, it will be another chapter in Washington scandals incorporated, that we had to have a scandal going on and gin up all this sort of nonsense, so that we could distract the president from his agenda and his people, and run around chasing something that's all about nothing," the new White House communications director, Anthony Scaramucci, said dismissively on CBS' *Face the Nation*, one of a series of appearances he made on Sunday talk shows.

Opponents of other modern presidents have backed impeachment, even when that didn't seem to be a realistic prospect. In 2014, a third of those surveyed by CNN/ORC said Barack Obama should be impeached; 65% said he shouldn't. In 2006, 30% said George W. Bush should be impeached; 69% disagreed.

As the Watergate scandal unfolded in 1973 and 1974, the Gallup Poll showed support for impeaching Richard Nixon steadily grew. It rose from 19% in June 1973 to 57% in August 1974, when he resigned in the face of his almost certain removal from office.

Bill Clinton is the only modern president to be impeached by the House, though the Senate refused to convict him on charges of perjury and obstruction of justice in connection with the Monica Lewinsky affair. Even as the House was moving to impeach him, though, Gallup found the public opposed to the step by 2-1.

No president since Nixon has faced as broad and fervent calls for his ouster as Trump does now, a situation that creates complicated cross-currents for him in politics and governing.

12/15/2019

Poll: Americans split 42%-42% on impeaching Trump

House Speaker Paul Ryan last month dismissed a reporter's suggestion that Republicans would be suggesting impeachment if a Democratic president had been accused of the same actions as Trump. "No, I don't think we would, actually," he said. "I don't think that's at all the case."

In the new poll, more than one in four, 27%, say Congress already has enough evidence to impeach Trump. Another 30% say there isn't sufficient evidence yet but predict there eventually will be from ongoing investigations.

Only about a third of those surveyed, 31%, say there will never be enough evidence to justify removing Trump from office.

LOCAL MATTERS

WILL TRUMP BE IMPEACHED?

The answer may lie in whether it is *really* in either party's interest.



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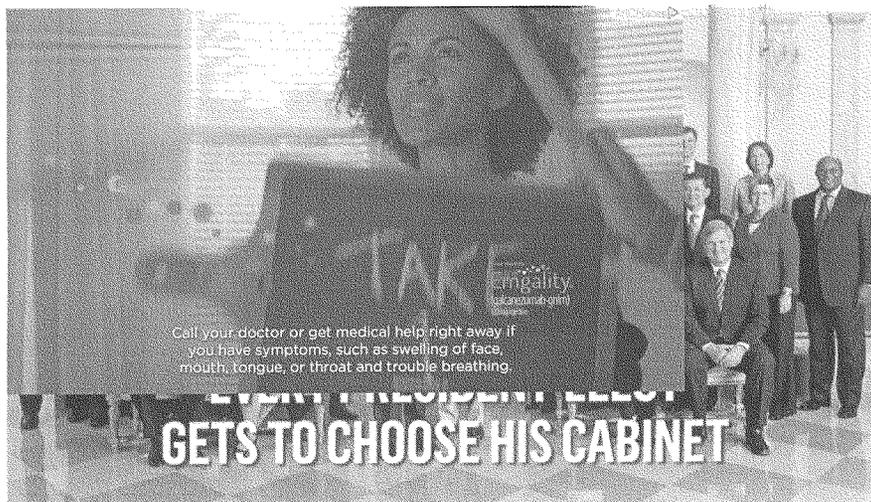
Peterson of the University of Utah has written a paper arguing that **Donald Trump** can technically be impeached immediately, provided that Trump University is judged to be as fraudulent as it looks. **Allan Lichtman**, the American University professor who predicted Trump's win, also predicted Trump would be impeached. Clearly, no one's wasting time on this. So what are we to make of it?

To start with, you'll get no predictions here, at least for a week or two. After Trump's disastrous first debate, I concluded Trump was toast and stuck to that assessment. I could ignore that mistake and link only to past articles that make me look prescient, but I haven't become that Trumpian yet. So I'm taking a break from guessing. A few weeks of respite should allow me to return to the business of forecasting—still incorrectly, of course, but with more energy.

Also, as everyone surely knows, the impeachment talk for this presidency is rather early. We're not even done tallying the votes, and the inauguration is more than two months away. At least allow the man a few days in the Oval Office and put off plans for a dethroning until week two.

Until then, though, sure, we can consider the following two questions: 1) What could make impeachment happen? 2) What would it accomplish?

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In 1868, took place several years into his term, and Clinton's didn't happen until his second term. Since Trump might be exhausted after one round in the White House, especially as the oldest president ever to take office, impeachment, itself, might take longer than his term.

But let's assume expedited processing is an option. Legally, impeachment, which is like an indictment, requires serious wrongdoing in order to be invoked—"Treason, Bribery, or other High Crimes and Misdemeanors," according to the Constitution. Peterson, the University of Utah law professor, argues that fraud and racketeering fit the bill, and both are at play with Trump University. But the decision is mostly political. That means relatively trivial offenses (perjury regarding extramarital relations, as with Clinton) can get blown up, while serious ones (use of torture in detention, as with **George W. Bush**) can get ignored. The political will to unseat a president must be overwhelming for things to go anywhere, and the fiasco of Clinton's impeachment trial, which saw Republicans lose seats in Congress, lessened everyone's appetite for more of the same.

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In fighting impeachment, then, Trump has some advantages and disadvantages. He has Republicans in charge of both the House and Senate, and partisanship tends to shield executives from accountability. George W. Bush got something close to a blank check for his first six years in office, and **Barack Obama**, albeit guilty of far smaller sins, also enjoyed a Democratic shield against those who probed too closely. Many Republicans would rather play ball with a very flawed president on their side than stir up a war with impeachment.

On the other hand, many elected Republicans, perhaps most, consider Trump to be a threat to their brand and priorities. They worry that Trump is unhinged. (Who, apart from Trump himself, doesn't?) To see Trump disappear and leave things to **Mike Pence**, a lockstep party man with all of Trump's traditional rightist views and none of Trump's eccentricities or heresies, would be a dream-come-true for **Paul Ryan** and **Mitch McConnell**. Pence would be happy to sign all the bills that hit his desk and reverse course on foreign policy, trade, and, to some extent, immigration. This is why many Trump supporters, like **Ann Coulter**, were apoplectic over the choice of Pence: he makes Trump more impeachable.

Still, for now, on balance, the cons of impeaching Trump far outweigh the pros, from the perspective of Republicans. The party would fracture, and much of the base would rebel. Even if Trump University leads to convictions, no president has been impeached for misdeeds committed prior to taking office. For impeachment to occur during a first term, Trump would have to be shown doing something very bad indeed: taking money from **Vladimir Putin**, say, or launching missiles at Hawaii. What's more plausible are small but steady violations of liberties and norms, leading to arbitrary detention, encroachments on press freedoms, blatantly politicized federal departments, and straight-up corruption. As we've seen over the past 20 years, the party of the president will



Would impeachment do anything worthwhile for Trump's opponents on the left? To the extent that it would distract Republicans from governance and block their agenda, yes. But soon all you would have would be President Pence and a return to the Bush years. Gone would be any suggestions of preserving parts of Obamacare or sparing entitlements, and an interventionist foreign policy (assuming Trump had avoided it) would return with a roar. So the choices on impeachment come down to brands of crazy, Trump-style or Pence-style. Is the craziest president the one with minimal impulse control or the one who still believes Americans are keen on regime change abroad and privatized Social Security? We'd have to be very unlucky to learn the answer.

Overall, the United States has a tricky system, one that's far less agile in times of loss of confidence in leaders. We can't call elections suddenly, so we've got to ride out any bad presidency for all four miserable years. The facile prescription for Trump haters in the years ahead would be to work to elect an opposition-party majority in the House and Senate in 2018. That would provide at least some checks on the White House. But the math is against such efforts. The more realistic effort is to look at how best to come back in 2020. In the meantime, Democrats can take note of how executive power gets abused and make sure, next time they're back in charge, to put in place ways to curb it permanently rather than use it for their own side. Because Trumps can always happen.

The Art of the Donald: Alison Jackson Pictures Trump's "Me Time"



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PHOTOGRAPH BY ALISON JACKSON.

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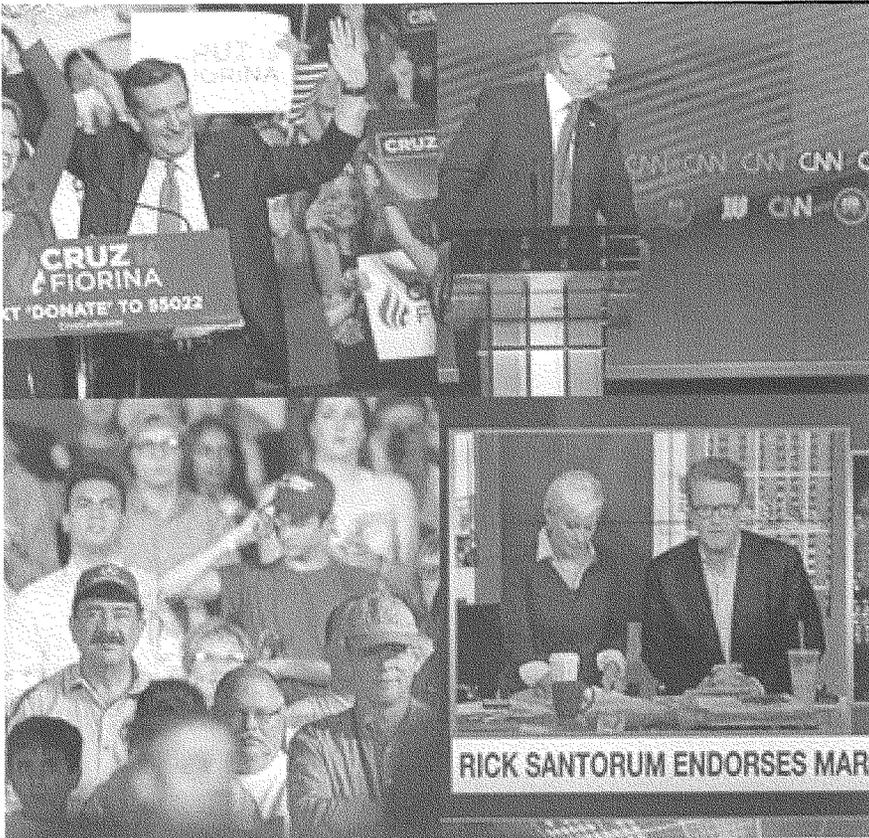


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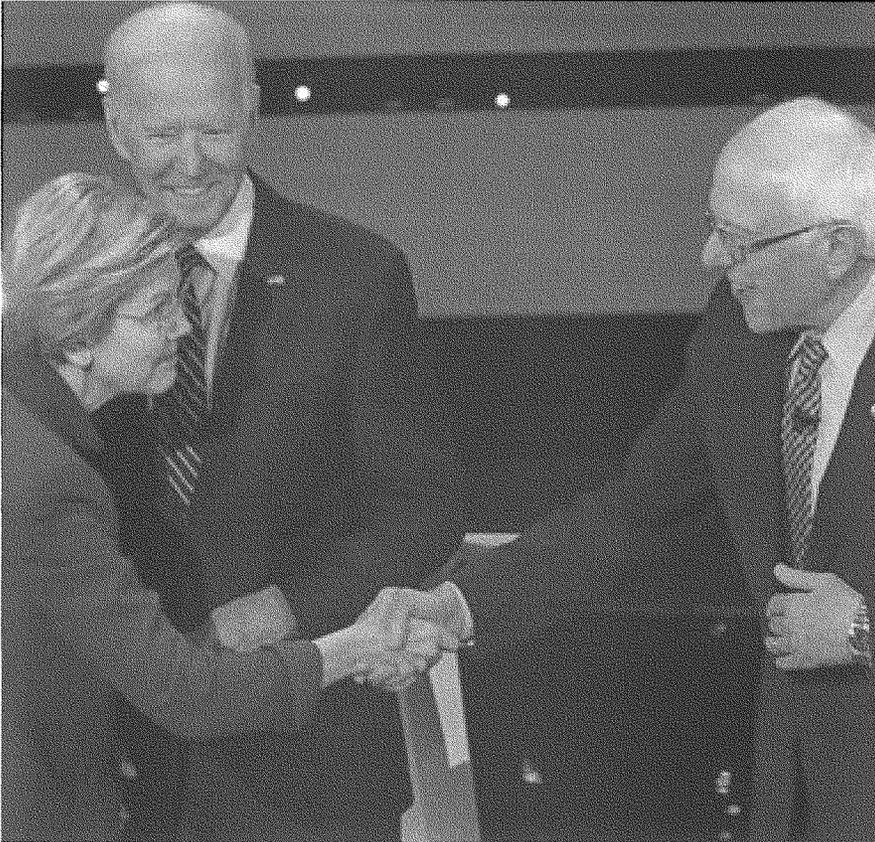


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HIVE

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BY ALISON DURKEE

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<https://www.wsj.com/articles/bidens-son-kerry-family-friend-join-ukrainian-gas-producers-board-1400031749>

Biden's Son, Kerry Family Friend Join Ukrainian Gas Producer's Board

Ukraine's Burisma Holdings Is Controlled by Former Energy Official Under Yanukovych



Hunter Biden, son of Vice President Joe Biden, talks with President Obama, and the vice president during a college basketball game in Washington. ASSOCIATED PRESS

By Paul Sonne And James V. Grimaldi

Updated May 13, 2014 11:25 pm ET

Vice President Joe Biden's son and a close friend of Secretary of State John Kerry's stepson have joined the board of a Ukrainian gas producer controlled by a former top security and energy official for deposed President Viktor Yanukovych.

The move has attracted attention given Messrs. Biden's and Kerry's public roles in diplomacy toward Ukraine, where the U.S. expressed support for pro-Western demonstrators who toppled Mr. Yanukovych's Kremlin-backed government in February. The uprising provoked a pro-Russia backlash that has plunged the post-Soviet republic into conflict and brought it to the brink of civil war.

Hunter Biden, a lawyer by training and the younger of the vice president's two sons, joined the board of directors of Ukrainian gas firm Burisma Holdings Ltd. this month and took on responsibility for the company's legal unit, according to a statement issued by the closely held gas producer.

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His appointment came a few weeks after Devon Archer —college roommate of the secretary of state's stepson, H.J. Heinz Co. ketchup heir Christopher Heinz—joined the board to help the gas firm attract U.S. investors, improve its corporate governance and expand its operations. A State Department spokesman declined to comment.

"The fact that I joined the board of directors is largely based on the company's will to grow," Mr. Archer said in an interview with Ukrainian media published on Burisma's website. "Last year alone witnessed a lot of transformations." He vowed to make the company more transparent.

Mr. Biden, 44 years old, and Mr. Archer, 39, work for Rosemont Seneca Partners, a U.S. investment company. It is affiliated with Rosemont Capital, a private-equity firm Mr. Archer co-founded with Mr. Heinz.

Two people familiar with Mr. Heinz's involvement in the firms said he isn't involved with the day-to-day operation of Rosemont Seneca, which is 50%-owned by Rosemont Capital. The people also said there was no financial investment by the firms in Burisma, just board memberships for Messrs. Biden and Archer.

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Messages were left for Hunter Biden at his offices in Washington and New York and at offices of a law firm where he is of counsel. A

person answering the phone at his office in Washington said Messrs. Biden and Archer were unavailable and promised to pass along a message.

The White House press secretary and the vice president's office described Hunter Biden's activities as those of a private citizen, bearing no endorsement of the U.S. government.

"Hunter Biden is a private citizen and a lawyer," said Kendra Barkoff, a spokeswoman for Joe Biden's office. "The vice president does not endorse any particular company and has no involvement with this company."

The board appointments come amid a broader push at Burisma to step up standards and investment. Alan Apter, an American investment banker who has worked in the former Soviet Union, joined Burisma as chairman of the board last year and received a mandate to improve the company's corporate governance and attract foreign capital. He said he met Mr. Archer, a longtime financier and entrepreneur, through mutual friends and invited him and later Mr. Biden to join the board.

"This is totally based on merit," Mr. Apter said. He said none of the independent directors holds a stake in the company. He said they would receive a salary for independent directorship commensurate with world-class experience but declined to name the sum.

Burisma is one of a handful of privately owned gas companies that together account for a little more than 10% of Ukraine's domestic production. The rest of the production comes from gas companies fully or partially owned by the Ukrainian state. Burisma's biggest subsidiary, Esko Pivnich, pumps gas from the Poltava region east of Kiev.

The gas producer is controlled by Nikolai Zlochevsky, a former member of Parliament for Mr. Yanukovich's Party of Regions, according to a person familiar with the matter. He served as Mr. Yanukovich's minister of environmental protection from July 2010 and then become minister of ecology and natural resources in December 2010, key positions with influence over the oil and gas industry.

Mr. Zlochevsky was removed from the post in April 2012 and appointed deputy secretary of Ukraine's National Security and Defense Council, a role he held until Mr. Yanukovich's government collapsed in late February. During his tenure as a government minister, Burisma and entities associated with the firm received a large number of permits for oil and gas exploration in Ukraine and stepped up their output considerably, according to Ukrainian press reports.

Mr. Zlochevsky couldn't be reached for comment.

Mr. Yanukovich, who was sanctioned by the U.S. in March, has taken refuge in Russia.

Burisma produced about 450 million cubic meters of gas in 2013 and became the largest independent gas producer in Ukraine by volume in the first quarter of this year, according to a company spokesman. The production figures couldn't be independently verified.

The Ukrainian company sells its gas domestically. It is poised to benefit from the rising gas prices the country is likely to see in the future, now that Russia has removed a discount on gas deliveries for Ukraine in response to what it sees as the rise of anti-Kremlin authorities in Kiev.

Ukrainian regulatory authorities cap gas prices for domestic industrial customers. The cap averaged about \$425 per thousand cubic meters of gas last year. Though Burisma doesn't reveal financial figures, calculations suggest the company's production last year would have commanded more than \$191 million in revenue on the domestic market at those rates.

Mr. Apter said Burisma's expansion could help reduce Ukraine's energy dependence and thereby help ease its political problems.

"The country is quite gas dependent and one would expect, like most countries, there is a desire to be independent of foreign sources, be they in Russia or elsewhere," Mr. Apter said. "It helps the country."

Burisma has now added deep U.S. political connections to its arsenal.

In addition to being Mr. Heinz's college roommate at Yale, Mr. Archer was an adviser to Mr. Kerry's presidential campaign in 2004 and co-chaired his National Finance Committee. According to his biography, he serves as a trustee of the Heinz Family Office, which manages the family business.

Hunter Biden's business activities have attracted attention before.

His work as a lobbyist when his father was in the U.S. Senate came under scrutiny. Shortly after his father became Barack Obama's running mate in 2008, he gave up his lobbying career and resigned his partnership at a Washington lobbying firm.

When he had been senator, Mr. Obama sought more than \$3.4 million in earmarks for clients of Hunter Biden, and succeeded in getting \$192,000 for St. Xavier University near Chicago, according to public disclosure records.

At the time, a spokesman for Mr. Obama said Hunter Biden hadn't met with the senator himself but rather with office staff. The spokesman also said it wasn't surprising to see Mr. Obama was fighting for interests and institutions in his home state of Illinois.

In early 2009, The Wall Street Journal reported that Hunter Biden and his uncle had run a fund of funds that was being marketed exclusively by Texas financier R. Allen Stanford's companies. Mr. Stanford later was sentenced to 110 years in prison for masterminding a \$7 billion Ponzi scheme.

At the time of the Journal article, a lawyer for the Bidens said the fund terminated the relationship and offered to return \$2.7 million in investment that companies controlled by Mr. Stanford had given the fund. He said the Bidens had never met Mr. Stanford.

—*Colleen McCain Nelson contributed to this article.*

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POLITICS

Trump, in August Call With GOP Senator, Denied Official's Claim on Ukraine Aid

Sen. Ron Johnson asked the president after hearing of potential pressure campaign

By Siobhan Hughes and Rebecca Ballhaus

Updated Oct. 4, 2019 5:47 pm ET

A Republican senator said he was told by an American diplomat in August that the release of U.S. aid to Ukraine was contingent on an investigation desired by President Trump and his allies, but Mr. Trump denied pursuing any such proposal when the lawmaker pressed him on it.

Sen. Ron Johnson said that Gordon Sondland, the U.S. ambassador to the European Union, had described to him a quid pro quo involving a commitment by Kyiv to probe matters related to U.S. elections and the status of nearly \$400 million in U.S. aid to Ukraine that the president had ordered to be held up in July.

Alarmed by that information, Mr. Johnson, who supports aid to Ukraine and is the chairman of a Senate subcommittee with jurisdiction over the region, said he raised the issue with Mr. Trump the next day, Aug. 31, in a phone call, days before the senator was to meet with Ukraine's president, Volodymyr Zelensky. In the call, Mr. Trump flatly rejected the notion that he directed aides to make military aid to Ukraine contingent on a new probe by Kyiv, Mr. Johnson said.

"He said, 'Expletive deleted—No way. I would never do that. Who told you that?'" the Wisconsin senator recalled in an interview Friday. Mr. Johnson said he told the president he had learned of the arrangement from Mr. Sondland.

Mr. Johnson's account, coupled with text messages among State Department officials released Thursday, show some Trump administration officials—including Mr. Sondland and a top U.S. diplomat in Kyiv—believed there was a link between Mr. Trump's July decision to hold up the aid to Ukraine and his interest in Kyiv's launching new probes.

Week after Mr. Trump ordered that hold on aid, he asked Mr. Zelensky in a phone call for help with two matters: an investigation of Joe Biden and one related to a conspiracy theory

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President Trump and Sen. Ron Johnson in Green Bay, Wis., this past April. PHOTO: ANDREW HARNIK/ASSOCIATED PRESS

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ump, has led to the impeachment inquiry by House Democrats, who argue that the president is unduly using the power of his office for his political aims.

SHARE YOUR THOUGHTS

How much of an impact will these texts have on the impeachment inquiry? Join the conversation below.

The White House didn't respond to a request for comment. Speaking to reporters Friday, Mr. Trump again denied a connection between his efforts to press Ukraine and his hold on aid to the country. The president also rejected the idea that he was pushing for a probe of Mr. Biden for political reasons.

Mr. Sondland, a former hotel executive and major Trump donor who was confirmed to the ambassador job last year, didn't respond to a request for comment through a spokesperson.

Mr. Johnson's account of Mr. Sondland's description of the conditions placed on aid to Ukraine runs counter to what Mr. Sondland told another diplomat a little over a week later.

On Sept. 9, Bill Taylor, a top U.S. diplomat in Kyiv, in a text message to Mr. Sondland also linked the hold on aid to the investigations the president was seeking. "I think it's crazy to withhold security assistance for help with a political campaign," Mr. Taylor wrote.

Mr. Sondland responded by disputing Mr. Taylor's assertion. "I believe you are incorrect about

Days later, the hold on the aid was lifted amid growing pressure from Congress.

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In his interview Friday, Mr. Johnson said his concern over the status of the aid was sparked by a news article about it.

Mr. Johnson said he learned of the potential arrangement involving military aid through a phone call with Mr. Sondland the day before Mr. Johnson spoke to Mr. Trump. Under the arrangement, Mr. Johnson said Mr. Sondland told him, Ukraine, under its newly elected president, would appoint a strong prosecutor general and move to “get to the bottom of what happened in 2016—if President Trump has that confidence, then he’ll release the military pending,” recounted Mr. Johnson.

“At that suggestion, I winced,” Mr. Johnson said. “My reaction was: Oh, God. I don’t want to see those two things combined.”

Mr. Johnson said he doesn’t believe Mr. Biden’s name came up during his conversations with Mr. Sondland or Mr. Trump.

In the call, Mr. Johnson said he also asked Mr. Trump if he could be authorized to tell the Ukrainians that support was coming. “He did not give me that authority,” Mr. Johnson said in a separate interview Wednesday. He said Mr. Trump assured him: “I hear what you’re saying; you’ll probably be happy with my decision.”

Mr. Trump and his allies have pushed the notion that, contrary to the conclusion by the U.S. intelligence community and by former special counsel Robert Mueller that Russia interfered in the 2016 election on Mr. Trump’s behalf, forces in Ukraine worked with Democrat Hillary Clinton’s campaign, unsuccessfully, in 2016. No evidence has emerged to support that theory.

Over the summer, the text messages show, State Department officials were seeking to work

Mr. Zelensky convincing Mr. Trump that “he will investigate/‘get to the bottom of what happened’ in 2016,” according to a text message by Kurt Volker, then the U.S. special representative for Ukraine negotiations.

The text messages released by House committees late Thursday indicate that U.S. officials coordinated with aides to the Ukrainian president and Rudy Giuliani, Mr. Trump’s private lawyer, on a draft statement in which Kyiv would announce an investigation into both Mr. Biden and the 2016 race—at the same time as announcing a visit by the Ukrainian president to the White House.

Mr. Taylor couldn’t be reached for comment.

Mr. Volker told House lawmakers in testimony on Thursday that he wasn’t aware the president had mentioned Mr. Biden’s name in the phone call with Mr. Zelensky until the White House released a rough transcript last week, according to a copy of his opening statement released Friday.

Separately, the House Intelligence Committee heard closed-door testimony Friday from Michael Atkinson, the Trump-appointed intelligence community inspector general who fielded a whistleblower’s complaint about the Ukraine call.

uring the all-day meeting—Mr. Atkinson’s second appearance before the panel about the complaint—the inspector general filled in details about how he investigated the whistleblower’s complaint and reiterated that he found the substance of it both urgent and credible, Rep. Mike Quigley (D., Ill.) said.

—Alex Leary contributed to this article.

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EUROPE

U.S. to Ship Modified Radar Systems to Ukraine

Modifications would prevent Ukraine from snooping on Russia



Rebels pull heavy weaponry back Wednesday in Donetsk, Ukraine. PHOTO: TASS/ZUMA PRESS

By *Julian E. Barnes and Gordon Lubold*

Updated Oct. 21, 2015 4:32 pm ET

Advanced radar systems being shipped to Ukraine to counter artillery strikes by pro-Russia separatists have been modified to prevent them from peering into Russia, according to U.S. officials.

The modifications drew fire from a leading Republican critic of the Obama administration, who called it a misguided attempt to mollify Russian President Vladimir Putin.

President Barack Obama signed an order on Sept. 29 to give Ukraine two radar systems worth \$10 million each. U.S. officials said this week that the systems would arrive at Ukraine's Yavoriv training ground by mid-November.

U.S. Army officials said they hope the radar would provide Ukraine with a new capability for stopping artillery and rocket attacks launched by separatists. Other officials said the transfer

also would send a message to Kiev that Washington's support for its security forces remains strong.

But with a cease-fire holding in eastern Ukraine and artillery attacks significantly reduced, the U.S. doesn't want the equipment to antagonize Russia. The modifications are supposed to ensure that Ukrainian forces don't escalate the current conflict by using the new systems to counter fire originating from Russian territory, officials said.

Sen. John McCain (R., Ariz.), chairman of the Senate Armed Services Committee, said the modifications to weaken the radar were symptomatic of a "delusional view" by the Obama administration that Mr. Putin will modify his behavior in Ukraine.

"This is part of their continuing effort to appease Vladimir Putin," he said. "It sends a signal to Russia and Ukraine that we are not willing to seriously confront Vladimir Putin's aggression."

Republicans, and some Democrats, have been urging the Obama administration to provide more systems to Ukraine, including Javelin antitank missiles. The Obama administration has been unwilling to provide any equipment that could be construed as offensive weaponry.

Restrictions on the intelligence the U.S. has provided Ukraine have led to criticism in Congress and in Kiev. Satellite imagery provided by the U.S. typically only includes Ukrainian territory, obscuring activity and troop buildups on Russia's side of the border.

Russian officials didn't immediately reply to a request for comment. Moscow typically has been critical of American and allied support for Kiev.

The deliveries come as the U.S. steps up training for Ukrainian forces. The U.S. has been training Ukrainian National Guard units for some time, but those troops generally don't serve on the front lines. Beginning next month, the Pentagon will begin training regular Army units, defense officials said. The training will include six battalions, including five conventional and one special operations force battalion.

The systems, known as AN/TPQ-36 counter-artillery radar, will be given to front-line Ukrainian army troops to use.

U.S. forces plan to begin training on how to use them as soon as they arrive. U.S. Army officials said the systems will protect against both rocket and artillery attacks.

Army officials identified surplus radar that could be sent to Ukraine last summer. But the transfer had to be approved by the White House. Officials said giving Ukraine the systems was consistent with the current policy of providing nonlethal defensive material.



Russia-backed rebels unload mortars from trucks during a pullback of weapons near Luhansk in eastern Ukraine on Oct. 15. U.S. officials said advanced radar systems being shipped to Ukraine to counter artillery strikes by pro-Russia separatists have been modified to prevent them from peering into Russia. **PHOTO:** MAX BLACK/ASSOCIATED PRESS

The U.S. has spent months vetting Ukrainian units that would use the new systems. Officials said the vetting took longer than expected but would be complete by the time the radar systems arrive next month.

The radar systems have a range of at least 15 miles, and represent a significant advance from U.S.-provided Lightweight Counter Mortar Radar systems that Ukrainian forces have been using to pinpoint artillery fire. U.S. officials said Ukrainians have developed innovative tactics for the use of the lightweight systems, and hope they will do the same with the larger, longer range systems.

But U.S. officials said the new radar are likely to provide a tempting target for any Russian troops active in eastern Ukraine.

U.S. officials said they are worried that Russian forces will target the radar, either seeking to jam or destroy the equipment, and will train vetted Ukrainian forces on how to minimize chances it can be detected by Russian forces.

U.S. Army officials have identified six surplus Q-36 systems currently stored in a Pennsylvania depot.

If Congress approves additional money and the Ukrainians show that they can use the systems effectively, officials said, the transfer of the other four would be considered.

Write to Julian E. Barnes at julian.barnes@wsj.com and Gordon Lubold at Gordon.Lubold@wsj.com

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Ukraine to Get More U.S. Aid, but Not Weapons; Obama Refuses to Budge on Lethal Aid Despite Poroshenko's Passionate Plea in Congress

Shishkin, Philip; Sparshott, Jeffrey . Wall Street Journal (Online) ; New York, N.Y. [New York, N.Y.]18 Sep 2014: n/a.

[ProQuest document link](#)

ABSTRACT

The White House announced a new \$53 million aid package for Ukraine, which includes counter-mortar radar, radios, vehicles, patrol boats, body armor, helmets and night-vision goggles.

FULL TEXT

WASHINGTON—President Barack Obama stuck to his refusal to provide weapons or other lethal military gear to Ukraine, despite a passionate appeal Thursday for help in fighting pro-Russia rebels by Ukraine's president.

Speaking before a joint session of Congress, President Petro Poroshenko described the monthslong conflict in eastern Ukraine as being at the forefront of a global fight for freedom and democracy.

"The outcome of today's war will determine whether we will be forced to accept the reality of a dark, torn and bitter Europe as part of a new world order," he said in a speech that was interrupted by several standing ovations.

The White House announced a new \$53 million aid package for Ukraine, which includes counter-mortar radar, radios, vehicles, patrol boats, body armor, helmets and night-vision goggles. But it stopped short of providing weapons or other lethal aid the Ukrainians have been seeking.

The decision reflects the Obama administration's long-standing concern that arming Ukraine would provoke Moscow into a further escalation that could drag Washington into a proxy war.

Mr. Obama said the U.S. would lead an effort to secure a diplomatic solution to the crisis in Ukraine that allows it to pursue the closer trade and political ties with Europe that have drawn Moscow's ire.

"We are going to continue to seek to mobilize the international community to say to Russia that Ukraine desires to have a good relationship with all its neighbors, both East and West," Mr. Obama said at the end of an Oval Office meeting with Mr. Poroshenko. "Russia cannot dictate to them their ability to work effectively with other partners in order to better the situation for the Ukrainian people."

In his speech to Congress, Mr. Poroshenko specifically asked Washington for lethal aid. "Blankets and night-vision goggles are important," he said. "But one cannot win a war with blankets."

But after meeting with Mr. Obama, he said that he was satisfied with U.S. support.

"I am getting everything possible," he told reporters. Later, he added: "I asked the president to increase the cooperation in security and defense and I received a positive answer."

As a tenuous cease-fire appeared to establish a frozen conflict in the insurgent-held areas of east Ukraine, Mr. Poroshenko used his Washington speech to cast the fight in broad, civilizational terms, and to nudge the reluctant West to confront the Kremlin more forcefully.

Washington and the European capitals have imposed several rounds of economic sanctions, which, although damaging to the Russian economy, have so far forced no apparent change in the Kremlin's role in Ukraine.

Ukraine's armed forces are regrouping now after suffering heavy losses last month at the hands of the insurgents and what Western officials have said were Russian troops and heavy artillery. Russia denies sending troops or materiel into Ukraine.

Early this month, Mr. Poroshenko accepted a cease-fire deal put forward by Moscow that left the separatists in control of large chunks of east Ukraine.

A major rationale for his requests for lethal aid now is that a stronger military could deter Moscow and the rebels from violating the truce or pressing their offensive further, or demanding more at the negotiating table.

In an emotional speech, Mr. Poroshenko called Russia's annexation of Crimea earlier this year as "one of the most cynical acts of treachery in modern history" and cast the subsequent pro-Russia insurgency in east Ukraine as a "threat to global security everywhere" and as a conflict "between civilization and barbarism."

He argued that the conflict isn't Ukraine's alone. "It is Europe's, and it is America's war, too," he said. "It is a war of the free world—and for a free world."

He dipped into American history for language designed to resonate with an American audience. " 'Live free or die' was one of the mottos of the American revolutionary war," Mr. Poroshenko said. " 'Live free or die' are the words of Ukrainian soldiers."

"These young boys, underequipped, and often unappreciated by the world, are the only thing that now stands between the reality of peaceful coexistence and the nightmare of a full relapse into the previous century and a new Cold War," he said.

Mr. Obama on Thursday praised Mr. Poroshenko's leadership, including the implementation of the cease-fire, ratification of a landmark deal with Europe and a new law granting limited autonomy to separatist-held territories. "Those were not easy laws that President Poroshenko passed," Mr. Obama said.

He said the U.S. would stand with Ukraine and is prepared to help the country in negotiations with Russia. "The sovereignty and territory of Ukraine is nonnegotiable," Mr. Obama said.

Write to Philip Shishkin at and Jeffrey Sparshott at

Credit: By Philip Shishkin and Jeffrey Sparshott

DETAILS

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About The Fact Checker

By **Glenn Kessler**

Jan. 1, 2017 at 5:11 p.m. EST

"Comment is free, but facts are sacred."

-- C.P. Scott, editor of the Manchester Guardian, 1921

About The Fact Checker

In an award-winning journalism career spanning more than three decades, Glenn Kessler has covered foreign policy, economic policy, the White House, Congress, politics, airline safety and Wall Street. He was The Washington Post's chief State Department reporter for nine years, traveling around the world with three different Secretaries of State. Before that, he covered tax and budget policy for The Washington Post and also served as the newspaper's national business editor.

Kessler has long specialized in digging beyond the conventional wisdom, such as when he earned a "laurel" from the Columbia Journalism Review* for obtaining Federal Aviation Administration records that showed that then President Bill Clinton had not delayed any scheduled flights when he had a controversial haircut on an airport tarmac. Kessler helped pioneer the fact-checking of candidates' statements during the 1992 and 1996 presidential campaigns, when he was chief political correspondent for Newsday, and continued to do it during the last five presidential campaigns for The Post.

AD

The National Association for Media Literacy Education (NAMLE) in 2015 awarded Kessler its Media Literate Media award, presented every two years, for his work on The Fact Checker. He is a member of the advisory board of the International Fact-Checking Network and has trained reporters in Morocco and Panama on fact-checking techniques and practices.

In 2007, St. Martins Press published Kessler's widely acclaimed book on Condoleezza Rice, *The Confidante*. Kessler appears frequently on television and has lectured widely on U.S. foreign policy.

Our Goal

This column first started on Sept. 19, 2007, as a feature during the 2008 presidential campaign. The Washington Post revived it as a permanent feature on Jan. 11, 2011, helmed by Kessler.

AD

Other members of The Fact Checker team are Salvador Rizzo and Meg Kelly.

- Rizzo is a reporter for The Fact Checker. He previously covered New Jersey politics, courts, state finances and Gov. Chris Christie, with stints at the Star-Ledger, the Bergen Record and Observer.

- Kelly produces video and reports for The Fact Checker. Before joining the Post, she covered the 2016 election for NPR as a visual producer.

The Fact Checker team was awarded an honorable mention in the competition for the 2019 Toner Prize for Excellence in Political Reporting, awarded by the S.I. Newhouse School of Public Communications at Syracuse University. The judges cited The Fact Checker's database of President Trump's false and misleading claims and praised fact checks that are "clear, deliberate and never hyperbolic."

The purpose of this website, and an accompanying column in the Sunday print edition of The Washington Post, is to "truth squad" the statements of political figures regarding issues of great importance, be they national, international or local. It's a big world out there, and so we rely on readers to ask questions and point out statements that need to be checked.

AD

But we are not limited to political charges or countercharges. We also seek to explain difficult issues, provide missing context and provide analysis and explanation of various "code words" used by politicians, diplomats and others to obscure or shade the truth. The Fact Checker is at heart about policy -- domestic and foreign -- as we have found that politicians are apt to be more misleading about complex and difficult-to-understand topics.

The success of this project depends, to a great extent, on the involvement of you--the reader. About 50 percent of our fact checks start with an inquiry from a reader. Readers send us suggestions on topics to fact check and tips on erroneous claims by political candidates, interest groups, and the media. Once we have posted an item on a subject, we invite your comments and contributions. You can follow us on Twitter at GlennKesslerWP or friend us on Facebook. We welcome comments and suggestions via tweets (Include #FactCheckThis in your tweet) or on our Facebook page.

You can also email us at factchecker@washpost.com.

AD

If you have facts or documents that shed more light on the subject under discussion, or if you think we have made a mistake, please let us know. We also want to make sure that the authors of questionable claims have ample opportunity to argue their case. We issue our own ruling on factual disputes (see our rules on the “Pinocchio Test” below) but it can be revised and updated if fresh evidence emerges. Our view is that a fact check is never really finished, so the rating can be revised after we obtain new information that changes the factual basis for our original ruling.

C-SPAN Interviews

On January 15, 2012, C-SPAN aired a one-hour interview with Glenn Kessler about the Fact Checker column and his life and career, which has been viewed on-line more than 400,000 times. (A transcript of the interview is also available.) In 2014, C-SPAN aired a second one-hour interview with Kessler.

A Few Basic Principles

- This is a fact-checking operation, not an opinion-checking operation. We are interested only in verifiable facts, though on occasion we may examine the roots of political rhetoric.
- We will focus our attention and resources on the issues that are most important to voters. We cannot nitpick every detail of every speech. We especially try to examine statements that are newsworthy or concern issues of importance. We understand that everyone makes mistakes, especially when speaking extemporaneously, so we do not play "gotcha."
- We will strive to be dispassionate and non-partisan, drawing attention to inaccurate statements on both left and right. But we also fact check what matters -- and what matters are people in power. When one political party controls the White House and both houses of Congress, it is only natural that the fact checks might appear too heavily focused on one side of the political spectrum. (Divided government is much better for The Fact Checker.) We urge readers to bring to our attention possible false claims we might have missed.

- We will stick to the facts of the issue under examination and are unmoved by ad hominem attacks. The identity or political ties of the person or organization making a charge is irrelevant: all that matters is whether their facts are accurate or inaccurate.
- We will adopt a “reasonable person” standard for reaching conclusions. We do not demand 100 percent proof. The burden for proving the accuracy of a claim rests with the speaker, however.
- Consistent with Washington Post policy, no one working on The Fact Checker may engage in partisan political activity or make contributions to candidates or advocacy organizations. Since 2013, The Washington Post has been owned by Jeff Bezos, the chief executive of Amazon, as a personal investment via Nash Holdings LLC. The Fact Checker is part of the national-news section of The Post, which is managed separately from the editorial and opinion section of The Post. In 2019, The Fact Checker received a \$250,000 grant from Google News Initiative/YouTube to expand production of video fact checks.

AD

- We are committed to being transparent about our sources. Whenever possible, we provide links to sources so readers have access to the information we used to reach the conclusions in our fact checks and can verify the information themselves.

- Everyone makes mistakes and we strive to correct any errors in accordance with The Washington Post's corrections policy. We welcome feedback from readers who may dispute our conclusions and who want to offer additional information that might result in a change in ruling.

The Pinocchio Test

Where possible, we will adopt the following standard in fact-checking the claims of a politician, political candidate, diplomat or interest group.

We do make some allowance for statements made in live interviews, as opposed to a prepared text. We will judge more harshly statements from a prepared text, on the grounds that the politician and staff had time to discuss the statistic. We also make allowances if the politician or interest group acknowledges an error was made. Finally, we also have a feature called "Recidivism Watch," which highlights claims repeated by politicians even though the claim has been previously debunked.

One Pinocchio

Some shading of the facts. Selective telling of the truth. Some omissions and exaggerations, but no outright falsehoods. (You could view this as "mostly true.")

Two Pinocchios

Significant omissions and/or exaggerations. Some factual error may be involved but not necessarily. A politician can create a false, misleading impression by playing with words and using legalistic language that means little to ordinary people. (Similar to "half true.")

Three Pinocchios

Significant factual error and/or obvious contradictions. This gets into the realm of "mostly false." But it could include statements which are technically correct (such as based on official government data) but are so taken out of context as to be very misleading. The line between Two and Three can be bit fuzzy and we do not award half-Pinocchios. So we strive to explain the factors that tipped us toward a Three.

Four Pinocchios

Whoppers.

The Geppetto Checkmark

Statements and claims that contain “the truth, the whole truth, and nothing but the truth” will be recognized with our prized Geppetto checkmark. We tend to reserve this for claims that are unexpectedly true, so it is not awarded very often.

An Upside-Down Pinocchio

A statement that represents a clear but unacknowledged “flip-flop” from a previously-held position.

Verdict Pending

There are occasions when it is impossible to render a snap judgment because the issue is very complex or there are good arguments on both sides. In this case, we will withhold our judgment until we can gather more facts. We will use this website to shed as much light as possible on factual controversies that are not easily resolved.

Bottomless Pinocchio

In December, 2018, The Fact Checker introduced the Bottomless Pinocchio. The bar for the Bottomless Pinocchio is high: Claims must have received Three or Four Pinocchios from The Fact Checker, and they must have been repeated at least 20 times. Twenty is a sufficiently robust number that there can be no question the politician is aware that his or her facts are wrong. The list of Bottomless Pinocchios will be maintained on its own landing page.

(The iconic Pinocchio image used by The Fact Checker was created in 2007 by illustrator Steve McCracken.)

Archives

Click on the Archives link on the top right of the Fact Checker page. The list will go back five years. For dates after Sept. 2013, adjust the year and month at the end of the url.

See 2007-2011 archives here.

All judgments are subject to debate and criticism from our readers and interested parties, and can be revised if fresh evidence emerges. We invite you to join the discussion on these pages and contact the Fact Checker directly with tips, suggestions, and complaints. If you feel that we are being too harsh on one candidate and too soft on another, there is a simple remedy: let us know about misstatements and factual errors we may have overlooked.

International Fact-Checking Network fact-checkers' code of principles

The International Fact-Checking Network (IFCN) at the Poynter Institute is committed to promoting excellence in fact-checking. Nonpartisan and transparent fact-checking can be a powerful instrument of accountability journalism. Conversely, unsourced or biased fact-checking can increase distrust in the media and experts while polluting public understanding. The following statement is the result of consultations among fact-checkers from around the world; it offers conscientious practitioners principles to aspire to in their everyday work. *The Washington Post Fact Checker was an inaugural signatory to this code of principles, which was announced on Sept. 15, 2016.*

(1) A COMMITMENT TO NONPARTISANSHIP AND FAIRNESS We fact-check claims using the same standard for every fact check. We do not concentrate our fact-checking on any one side. We follow the same process for every fact check and let the evidence dictate our conclusions. We do not advocate or take policy positions on the issues we fact-check.

(2) A COMMITMENT TO TRANSPARENCY OF SOURCES We want our readers to be able to verify our findings themselves. We provide all sources in enough detail that readers can replicate our work, except in cases where a source's personal security could be compromised. In such cases, we provide as much detail as possible.

(3) A COMMITMENT TO TRANSPARENCY OF FUNDING & ORGANIZATION We are transparent about our funding sources. If we accept funding from other organizations, we ensure that funders have no influence over the conclusions we reach in our reports. We detail the professional background of all key figures in our organization and explain our organizational structure and legal status. We clearly indicate a way for readers to communicate with us.

(4) A COMMITMENT TO TRANSPARENCY OF METHODOLOGY We explain the methodology we use to select, research, write, edit, publish and correct our fact checks. We encourage readers to send us claims to fact-check and are transparent on why and how we fact-check.

(5) A COMMITMENT TO OPEN AND HONEST CORRECTIONS We publish our corrections policy and follow it scrupulously. We correct clearly and transparently in line with our corrections policy, seeking so far as possible to ensure that readers see the corrected version.

By signing up to this code of principles, the fact-checking initiatives agree to produce a public report indicating how they have lived up to each of the five principles within a year from their signature, and once a year thereafter. The report will allow readers and others to judge to what extent the fact-checker is respecting the code of principles and will be linked to from this page.

Being a signatory to this code of principles and publishing a report in no way implies an endorsement from Poynter's IFCN or any of its members.

A formal process for adding signatories began in 2017. The Washington Post Fact Checker was evaluated by an independent assessor and officially accepted by the IFCN board on March 8, 2017, permitting the display of the badge below. The Fact Checker was reevaluated and accepted again in 2018 and 2019.



Columbia Journalism Review, May 1993:

* “LAUREL to New York Newsday, and to staff writer Glenn Kessler, for a record-breaking solo flight. With most of the nation’s news media zooming in on the president’s \$ 200 haircut on the Los Angeles Airport runway and roaring about the disruptions his hirsutic hubris caused, Kessler took off in a different direction -- and landed on some hard, concrete facts. His analysis of Federal Aviation Administration records, obtained under the Freedom of Information Act, revealed that, contrary to stories of circling planes, jammed-up runways, and inconvenienced passengers (and contrary, too, to the apology the White House felt pressured to make), only one (unscheduled) air taxi reported an actual (two-minute) delay. Unfortunately, most of the nation’s news media, in usual near-perfect formation, found neither time nor space to correct a story that had been wildly off course.”

WORLD

Ukrainians See Conflict in Biden's Anticorruption Message

Vice president's son serves on board of closely held Ukrainian oil firm



U.S. Vice President Joe Biden met with Ukraine's President Petro Poroshenko in Kiev on Monday. PHOTO: UKRAINIAN PRESIDENTIAL PRESS SERVICE/REUTERS

By Paul Sonne And Laura Mills

Dec. 7, 2015 4:24 pm ET

KIEV, Ukraine— Joe Biden is on his fifth trip to Ukraine as vice president, pressing the pro-Western government to root out widespread corruption, but activists here say that message is being undermined as his son receives money from a former Ukrainian official who is being investigated for graft.

Since May of last year, Hunter Biden, the vice president's son, has served as an independent director of Ukrainian gas firm Burisma Holdings Ltd., a closely held company run by a former government official whom Ukrainian and British authorities are investigating for alleged criminal wrongdoing.

Ilyk Zlochevsky, who served as ecology and natural resources minister under the Ukrainian government that was ousted in last year's pro-Western uprising, hasn't been charged and

What's New Podcast

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Ukrainians See Conflict in Biden's Anticorruption Message - WSJ

Mr. Biden's visit to Ukraine this week, which will include a formal address to Parliament on Tuesday, comes against the backdrop of increasing exasperation over corruption that has persisted in the two years since the country's pro-Western uprising and the general prosecutor's office tasked with prosecuting such wrongdoing has come under fire for inaction.

The vice president's office defended Hunter Biden's right to serve on the board of Burisma.

"Hunter Biden is a private citizen and a lawyer. The vice president does not endorse any particular company and has no involvement with this company," said Kate Bedingfield, a spokeswoman for Mr. Biden.

Hunter Biden said his work with Burisma aligns with his father's anticorruption message. A spokesman for the younger Mr. Biden said he joined the board "to strengthen corporate governance and transparency at a company working to advance energy security for Ukraine... These are also goals of the United States."

But some anticorruption campaigners here worry the link with Mr. Biden may protect Mr. Zlochevsky from being prosecuted in Ukraine. The general prosecutor didn't respond to multiple requests for comment on the investigation into Mr. Zlochevsky.

"If an investigator sees the son of the vice president of the United States is part of the management of a company...that investigator will be uncomfortable pushing the case forward," said Daria Kaleniuk, head of Ukraine's Anti-Corruption Action Center.

Hunter Biden has been working on geothermal energy initiatives that Burisma is pursuing and carrying out customary board member duties including company oversight.

"The situation raises a question mark about integrity," said Viktoriya Voytsitska, a member of Parliament and former employee of a rival gas company to Mr. Zlochevsky's. "There should be integrity at all levels, irrespective of whether these are of a public or private level."

Mr. Zlochevsky is under investigation in the U.K. on suspicion of money laundering, according to British authorities. He is also under investigation in a Ukrainian unlawful-enrichment probe and a separate Ukrainian into alleged abuse of power, forgery and embezzlement, according to letters from the general prosecutor reviewed by The Wall Street Journal.

"Mr. Zlochevsky has followed the letter and spirit of the law in his role as civil servant," Burisma said. "He has, at all times, held himself to the highest moral and ethical standards of fairness and decision making."

The firm said investigators hadn't produced any evidence of misconduct. Anticorruption campaigners and Ukrainian lawmakers have criticized the general prosecutor's office for lack of

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officials, some two years after the uprising on Maidan that promised an end to Ukraine's widespread corruption.

In March 2014, BNP Paribas reported Mr. Zlochevsky to U.K. authorities on suspicion of money laundering after his companies tried to move \$23 million to Cyprus from their British account at the bank, according to court documents.

A judge in the U.K. unfroze the \$23 million in January and chastised the U.K. Serious Fraud Office for holding the funds for months in their money-laundering probe without presenting sufficient evidence of a suspected crime. Burisma hailed the ruling as confirmation that Mr. Zlochevsky's assets were legally acquired.

The U.K. authorities are still pursuing the investigation.

U.S. Ambassador to Ukraine Geoffrey Pyatt singled out the mismanagement of Mr. Zlochevsky's case by Ukrainian prosecutors as an example of the country's failure to hold to account officials from the ousted government suspected of corruption. Mr. Pyatt suggested the court unfroze the money not because of Mr. Zlochevsky's innocence, but rather because of the incompetence of Ukrainian authorities.

Behind the relationship between Mr. Zlochevsky and Hunter Biden is an effort to anchor the future of a controversial Ukrainian company amid shifting political and economic tides, according to people familiar with the company's thinking.

In his political career, Mr. Zlochevsky allied with Moscow-leaning factions in Ukrainian politics, only to re-emerge after last year's uprising with high-profile Westerners on his company's board. Burisma now promotes its business as an antidote to Ukraine's reliance on the Kremlin for energy.

Twice, Mr. Zlochevsky served in top Ukrainian government positions that oversaw the allocation of gas licenses—first under President Leonid Kuchma from 2003 to 2005, as chairman of the since-disbanded State Committee for Natural Resources, and later under President Viktor Yanukovich from 2010 to 2012, as Ecology and Natural Resources Minister.

All the while, companies now part of Burisma rose to become the largest private gas producer in Ukraine. A review of Mr. Zlochevsky's activities by The Wall Street Journal found his oil and gas production businesses flourished by winning crucial permits while he was in office.

Ukrainian records indicate that Burisma's main subsidiaries—Esko-Pivnich and Pari—received all their exploration permits for fresh fields during his two stints in the top posts, excluding



What's News Podcast

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according to a review of the records and an official at the State Geological and Mineral Resources Service of Ukraine.

In many cases, the companies made use of a provision in Ukrainian rules, known as an “integral property complex,” which allowed the firms to receive a license to gas fields without auction if they already owned or rented some type of asset on the field, as simple as a pipe network or dwelling. Burisma says all its permits were issued in accordance with Ukrainian law.

Apart from Burisma, other companies connected to Mr. Zlochevsky also received licenses during his time in office. In 2004, Mr. Zlochevsky’s committee revoked a Ukrainian state firm’s license to one of Ukraine’s biggest gas fields, crippling a Polish-Ukrainian joint venture that had been harvesting deposits. It then awarded the license to a little known firm called Ukrnaftoburinna, which counted companies tied to Mr. Zlochevsky among its beneficiaries, according to Ukrainian public records and its former CEO. Those firms later sold out. Burisma said there was no conflict of interest.

The Ukrainian constitution prohibits ministers from combining public service duties with any work except for teaching, research or creative activities. Four people, however, said they met Mr. Zlochevsky to discuss Burisma investments while he was minister. Two said he sometimes conducted the business-related meetings in his office at the ministry itself.

Since Ukraine’s uprising, anticorruption crusaders and officials have regularly pointed to Mr. Zlochevsky as an example of Yanukovich-era excess.

—Alexis Flynn contributed to this article.

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Attorney General Jeff Sessions names prosecutor to probe FBI, DOJ wrongdoing

by Kelly Cohen | March 29, 2018 05:01 PM

UPDATED AT 5:22 P.M.

Attorney General Jeff Sessions revealed on Thursday that Utah's top federal prosecutor is investigating allegations of misconduct atop the Justice Department and FBI.

John Huber, is the lead U.S. attorney and top federal law enforcement officer in Utah, having served for two years under former President Barack Obama and reappointed by Sessions last spring.

According to Sessions, Huber has already been looking into allegations that the DOJ and FBI acted improperly in how a warrant to monitor former Trump campaign aide Carter Page was obtained leading up to the 2016 presidential election, as well as the role former Secretary of State Hillary Clinton had in the 2010 Uranium One deal.

In a letter to top Republican lawmakers who have been vocal in their accusations of abuse of powers, Sessions said he saw no cause to appoint a special counsel for the moment.

After Huber completes his review, Sessions said he will then determine the need for a special counsel — who would have broader prosecutorial powers.



"We understand that the Department is not above criticism and it can never be that the Department conceals errors when they occur," Sessions wrote. "I am confident that Mr. Huber's review will include a full, complete and objective evaluation of these matters in a manner that is consistent with the law and facts."

regular updates from Huber.

Sessions said he also receives

The lawmakers addressed in the letter — Senate Judiciary Chairman Chuck Grassley, R-Iowa, House Judiciary Chairman Bob Goodlatte, R-Va., and House Oversight Chairman Trey Gowdy, R-S.C. — have pressed the Justice Department to appoint a special counsel to look into surveillance of Page, as well as the relationship the DOJ and FBI had with Christopher Steele, the author of the Trump dossier, which GOP findings suggest was used in obtaining the wiretap.

Democrats have said Republicans are trying to thwart special counsel Robert Mueller, who is looking into Russian meddling in the 2016 election and possible collusion with the Trump campaign.

Early Wednesday, Inspector General Michael Horowitz confirmed a probe would be launched to examine how the Page warrant was obtained. Sessions had already hinted the inspector general would take the reins of the investigation earlier this year.

Horowitz is already investigating allegations of political bias in several investigations leading up to the 2016 presidential election.

But that wasn't enough for Grassley and Graham, who renewed their call for a special counsel later Wednesday.

Jay Carney: Joe Biden's son accepted position with Ukrainian gas company as 'private citizen'

by Susan Crabtree | May 13, 2014 04:26 PM

Vice President Joe Biden's son, Hunter Biden, has accepted a position with Ukraine's largest private gas producer, but that in no way means the White House signed off on or endorses his hiring, presidential spokesman Jay Carney said Tuesday.

Burisma Holdings announced Tuesday that Hunter Biden, Biden's youngest son, would serve on the company's board of directors.

The company in a news release on its website said Hunter Biden will be in charge of the Burisma's legal unit and will "provide support" among international organizations. The Moscow Times first reported the news Tuesday.

Asked about the hiring by a reporter Tuesday, Carney referred questions about it to the vice president's office and noted that it did not indicate that Obama was involved or approved of it.

"Hunter Biden and other members of the family are obviously private citizens and where they work is not an endorsement by the president or vice president," he said.

Kendra Barkoff, a spokeswoman for the vice president, did not respond to questions about whether Hunter Biden discussed the job with his father or sought his approval before accepting it.

Instead, she echoed Carney's earlier statement and referred questions to Hunter Biden's New York law office.

"Hunter Biden is a private citizen and a lawyer," she said. "The vice president does not endorse any particular company and has no involvement with this company. For any additional questions, I refer you to Hunter's office."

A spokeswoman for Boies, Schiller & Flexner LLP, a national law firm based in New York where Hunter Biden works, did not immediately respond to a request for comment.

Amid the escalating tensions between Ukraine and Russia in recent weeks, the European Commission, the executive body of the European Union, has tried to step in to try to prevent Russia from halting natural gas shipments to Ukraine unless it pays \$3.5 billion in debts.

1/15/2020

Jay Carney: Joe Biden's son accepted position with Ukrainian gas company as 'private citizen'

Ukraine has so far refused to pay in protest of Moscow's decision to nearly double the price it charges Kiev for gas imports.

In the company's release, Alan Apter, the chairman of the company's board of directors, said: "The company's strategy is aimed at the strongest concentration of professional staff and the introduction of best corporate practices, and we're delighted that Mr. Biden is joining us to help us achieve these goals."

In addition to his work at the New York law firm, Hunter also is a co-founder and a managing partner of investment advisory company Rosemont Seneca Partners and serves as director of the U.S. Global Leadership Coalition, a network of 400 businesses, nonprofits and foreign policy experts, and the chairman of the advisory board for the National Democratic Institute, a non-profit that works to support democratic institutions and elections around the world.

Joe Biden emerges as Obama's trusty sidekick

by Susan Crabtree | April 25, 2014 12:00 AM

Vice President Joe Biden has become the public face of the administration's handling of Ukraine, working to reassure Kiev and trying to talk tough with Russia.

During a whirlwind two-day visit to Ukraine, Biden met with the country's leaders and announced an additional \$50 million in aid. At a press conference, he delivered a lecture to Russian President Vladimir Putin, telling him to "stop talking and start acting" to defuse the crisis.

With no diplomatic end in sight, it's a high-stakes role for a vice president whose foreign policy chops were publicly mocked by former Defense Secretary Robert Gates, who wrote in a memoir published in January that Biden was "wrong on nearly every major foreign policy and national security issue over the past four decades."

Any missteps or another Russian land grab could prove fatal to Biden's political ambitions as he weighs a 2016 presidential bid. Critics say it will be hard for the vice president, a former chairman of the Senate Foreign Relations Committee, to separate himself from the administration's policy on Ukraine.

After his trip, late-night comics took aim at the vice president's tendency to run at the mouth and make gaffes, joking that Putin — and everyone else — had long stopped listening to Biden.

Republican lawmakers were also unimpressed by his calls for the Kremlin to stop backing Russian separatists.

"Or else what?" asked Sen. John McCain, painting the vice president as the front man for an administration unwilling to take tough action against Russia.

Indeed, after Biden left Ukraine, it seemed that nothing had changed. Tensions with Moscow remain high, and Russian militants show no signs of backing down in eastern Ukraine.

12/15/2019

Joe Biden emerges as Obama's trusty sidekick

But Biden's raising of the American flag in Kiev wasn't without benefit for President Obama, who was able to carry on with a week-long trip to Asia. And Biden's public diplomacy revealed Obama's new trust in his No. 2.

"So Biden talks a lot -- so what?" said James Goldgeier, dean of American University's School of International Service and a veteran of the Clinton White House's national security team. "The vice president has been extremely valuable to Obama -- he's done everything the president could have asked for and more."

The relationship between Obama and Biden is on the upswing following their 2012 low when the undisciplined -- but authentic -- vice president publicly supported gay marriage before the White House was ready to make the leap. Biden so angered the president's team that they reportedly froze him out of key meetings.

Since then, Obama has often turned to Biden to help in foreign policy binds — even if the assist only involves dispatching him to hot spots to repeat the administration's line.

Despite giving his vice president a chance to raise his foreign policy credentials, Obama has stayed neutral about Biden's political future.

"He has been, as I said earlier, a great partner in everything that I do," Obama said, as he sat next to Biden in an interview.

"I suspect that there may be other potential candidates for 2016 who have been great friends and allies," he added -- an awkward reference to former Secretary of State Hillary Clinton, who vastly outpolls other Democrats and whose presumed candidacy has frozen Biden in place.

At the same time, Clinton has political vulnerabilities. Her own foreign policy record is under scrutiny, especially now that her much-touted "reset" with Russia is in tatters. Clinton's "what difference does it make" remark during the Benghazi hearings cemented Republican views that the administration mishandled the terror attack that killed four Americans.

Still, Obama's relationship with Biden appears to be on the mend, possibly out of sheer necessity or long-term loyalty. The president has shown a new warmth in their relationship, posing for a selfie with Biden and joking that the two were on a "guys' trip" when they visited Pennsylvania.

Biden for his part has expressed comfort with acting publicly on Obama's behalf even as the president's poll numbers droop and his policies face tough criticism.

There is nothing I would do differently," Biden said about carrying out his job as he weighs future plans.

12/15/2019

Joe Biden emerges as Obama's trusty sidekick

Many insiders believe Biden is keeping his name in the presidential mix because it's better to keep people guessing than declare the end of his long career while still in office. But Biden has made it clear he'll enjoy the ride while it lasts.

John Lewis says Donald Trump isn't a legitimate president, and Trump hits back hard

By **Aaron Blake**

Jan. 14, 2017 at 8:23 a.m. EST

For the first time, a leading Democrat has called into question Donald Trump's legitimacy as president.

Rep. John Lewis, a Democratic congressman from Georgia and civil-rights icon, told NBC's Chuck Todd in an interview for Sunday's "Meet the Press" that he believes Russia's alleged hacking aimed at helping Trump in the 2016 race makes Trump an illegitimate president.

Asked whether he would forge a relationship with President-elect Trump, Lewis said, "It's going to be very difficult. I don't see this president-elect as a legitimate president."

He added: "I think the Russians participated in helping this man get elected, and they helped destroy the candidacy of Hillary Clinton." Lewis called it a "conspiracy" and added: "That's not right. That's not fair. That's not the open democratic process."

Lewis added that he won't attend Trump's inauguration, which he said is unprecedented in his 30-year congressional career.

Update: Trump hit back at Lewis on Saturday morning, saying Lewis should instead focus on his Atlanta district.



Donald J. Trump
@realDonaldTrump

Congressman John Lewis should spend more time on fixing and helping his district, which is in horrible shape and falling apart (not to.....

77.7K 7:50 AM - Jan 14, 2017

47.7K people are talking about this



Donald J. Trump
@realDonaldTrump

mention crime infested) rather than falsely complaining about the election results. All talk, talk, talk - no action or results. Sad!

67.7K 8:07 AM - Jan 14, 2017

37.9K people are talking about this

Lewis's comments come from a particularly powerful source: A black member of Congress and major civil-rights figure. While Lewis didn't cite allegations of bigotry and racism made against Trump, the whole thing can't help but hearken back to Trump's own questioning of the legitimacy of his predecessor, Barack Obama. For years, Trump raised questions about whether Obama was born in the United States and thus could serve legitimately as president. Obama eventually produced a birth certificate in 2012, but Trump only acknowledged Obama was born in the United States a few months ago.

AD

Members of the Congressional Black Caucus were particularly incensed by Trump's long-running questioning of the legitimacy of the first black president, saying it amounted to bigotry and a racial dog-whistle. After Trump finally admitted Obama was born in the United States in September 2016, members of the CBC held a press conference to denounce Trump.

At the time, Lewis urged Trump to seek forgiveness.

Lewis's words are sure to reverberate in Washington. The intelligence community has said Russia did indeed attempt to assist Trump in the 2016 election. But there's no real way of knowing whether it was decisive when it comes to putting Trump over the top.

AD

Most prominent Democrats have been reluctant to push the idea that Russia won the race for Trump and directly call into question his legitimacy, though Clinton and President Obama have suggested it made a difference -- if not *the* difference.

Clinton last month named Russia's hacking alongside FBI Director James Comey's late announcements about her email server investigation as the "unprecedented factors that I don't think we can ignore" when it came to her loss.

Obama has said he thought Russia had some impact, though he couldn't be sure whether it tipped the scales. "Elections can always turn out differently," he told NPR. "You never know which factors are going to make a difference. But I have no doubt that it had some impact, just based on the coverage."

About the only other major political figure prior to Lewis who has outright questioned Trump's legitimacy is former Mexican president Vicente Fox, who tangled with Trump over latter's stated plan to have Mexico pay for his U.S.-Mexico border wall.

AD

The Washington Post

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About The Fact Checker

By **Glenn Kessler**

Jan. 1, 2017 at 5:11 p.m. EST

"Comment is free, but facts are sacred."

-- **C.P. Scott, editor of the Manchester Guardian, 1921**

About The Fact Checker

In an award-winning journalism career spanning more than three decades, Glenn Kessler has covered foreign policy, economic policy, the White House, Congress, politics, airline safety and Wall Street. He was The Washington Post's chief State Department reporter for nine years, traveling around the world with three different Secretaries of State. Before that, he covered tax and budget policy for The Washington Post and also served as the newspaper's national business editor.

Kessler has long specialized in digging beyond the conventional wisdom, such as when he earned a "laurel" from the Columbia Journalism Review* for obtaining Federal Aviation Administration records that showed that then President Bill Clinton had not delayed any scheduled flights when he had a controversial haircut on an airport tarmac. Kessler helped pioneer the fact-checking of candidates' statements during the 1992 and 1996 presidential campaigns, when he was chief political correspondent for Newsday, and continued to do it during the last five presidential campaigns for The Post.

AD

The National Association for Media Literacy Education (NAMLE) in 2015 awarded Kessler its Media Literate Media award, presented every two years, for his work on The Fact Checker. He is a member of the advisory board of the International Fact-Checking Network and has trained reporters in Morocco and Panama on fact-checking techniques and practices.

In 2007, St. Martins Press published Kessler's widely acclaimed book on Condoleezza Rice, The Confidante. Kessler appears frequently on television and has lectured widely on U.S. foreign policy.

Our Goal

This column first started on Sept. 19, 2007, as a feature during the 2008 presidential campaign. The Washington Post revived it as a permanent feature on Jan. 11, 2011, helmed by Kessler.

AD

Other members of The Fact Checker team are Salvador Rizzo and Meg Kelly.

- Rizzo is a reporter for The Fact Checker. He previously covered New Jersey politics, courts, state finances and Gov. Chris Christie, with stints at the Star-Ledger, the Bergen Record and Observer.

- Kelly produces video and reports for The Fact Checker. Before joining the Post, she covered the 2016 election for NPR as a visual producer.

The Fact Checker team was awarded an honorable mention in the competition for the 2019 Toner Prize for Excellence in Political Reporting, awarded by the S.I. Newhouse School of Public Communications at Syracuse University. The judges cited The Fact Checker's database of President Trump's false and misleading claims and praised fact checks that are "clear, deliberate and never hyperbolic."

The purpose of this website, and an accompanying column in the Sunday print edition of The Washington Post, is to "truth squad" the statements of political figures regarding issues of great importance, be they national, international or local. It's a big world out there, and so we rely on readers to ask questions and point out statements that need to be checked.

AD

But we are not limited to political charges or countercharges. We also seek to explain difficult issues, provide missing context and provide analysis and explanation of various "code words" used by politicians, diplomats and others to obscure or shade the truth. The Fact Checker is at heart about policy -- domestic and foreign -- as we have found that politicians are apt to be more misleading about complex and difficult-to-understand topics.

The success of this project depends, to a great extent, on the involvement of you--the reader. About 50 percent of our fact checks start with an inquiry from a reader. Readers send us suggestions on topics to fact check and tips on erroneous claims by political candidates, interest groups, and the media. Once we have posted an item on a subject, we invite your comments and contributions. You can follow us on Twitter at GlennKesslerWP or friend us on Facebook. We welcome comments and suggestions via tweets (Include #FactCheckThis in your tweet) or on our Facebook page.

You can also email us at factchecker@washpost.com.

AD

If you have facts or documents that shed more light on the subject under discussion, or if you think we have made a mistake, please let us know. We also want to make sure that the authors of questionable claims have ample opportunity to argue their case. We issue our own ruling on factual disputes (see our rules on the “Pinocchio Test” below) but it can be revised and updated if fresh evidence emerges. Our view is that a fact check is never really finished, so the rating can be revised after we obtain new information that changes the factual basis for our original ruling.

C-SPAN Interviews

On January 15, 2012, C-SPAN aired a one-hour interview with Glenn Kessler about the Fact Checker column and his life and career, which has been viewed on-line more than 400,000 times. (A transcript of the interview is also available.) In 2014, C-SPAN aired a second one-hour interview with Kessler.

A Few Basic Principles

- This is a fact-checking operation, not an opinion-checking operation. We are interested only in verifiable facts, though on occasion we may examine the roots of political rhetoric.
- We will focus our attention and resources on the issues that are most important to voters. We cannot nitpick every detail of every speech. We especially try to examine statements that are newsworthy or concern issues of importance. We understand that everyone makes mistakes, especially when speaking extemporaneously, so we do not play "gotcha."
- We will strive to be dispassionate and non-partisan, drawing attention to inaccurate statements on both left and right. But we also fact check what matters -- and what matters are people in power. When one political party controls the White House and both houses of Congress, it is only natural that the fact checks might appear too heavily focused on one side of the political spectrum. (Divided government is much better for The Fact Checker.) We urge readers to bring to our attention possible false claims we might have missed.

- We will stick to the facts of the issue under examination and are unmoved by ad hominem attacks. The identity or political ties of the person or organization making a charge is irrelevant: all that matters is whether their facts are accurate or inaccurate.
- We will adopt a “reasonable person” standard for reaching conclusions. We do not demand 100 percent proof. The burden for proving the accuracy of a claim rests with the speaker, however.
- Consistent with Washington Post policy, no one working on The Fact Checker may engage in partisan political activity or make contributions to candidates or advocacy organizations. Since 2013, The Washington Post has been owned by Jeff Bezos, the chief executive of Amazon, as a personal investment via Nash Holdings LLC. The Fact Checker is part of the national-news section of The Post, which is managed separately from the editorial and opinion section of The Post. In 2019, The Fact Checker received a \$250,000 grant from Google News Initiative/YouTube to expand production of video fact checks.

AD

- We are committed to being transparent about our sources. Whenever possible, we provide links to sources so readers have access to the information we used to reach the conclusions in our fact checks and can verify the information themselves.

- Everyone makes mistakes and we strive to correct any errors in accordance with The Washington Post's corrections policy. We welcome feedback from readers who may dispute our conclusions and who want to offer additional information that might result in a change in ruling.

The Pinocchio Test

Where possible, we will adopt the following standard in fact-checking the claims of a politician, political candidate, diplomat or interest group.

We do make some allowance for statements made in live interviews, as opposed to a prepared text. We will judge more harshly statements from a prepared text, on the grounds that the politician and staff had time to discuss the statistic. We also make allowances if the politician or interest group acknowledges an error was made. Finally, we also have a feature called "Recidivism Watch," which highlights claims repeated by politicians even though the claim has been previously debunked.

One Pinocchio

Some shading of the facts. Selective telling of the truth. Some omissions and exaggerations, but no outright falsehoods. (You could view this as "mostly true.")

Two Pinocchios

Significant omissions and/or exaggerations. Some factual error may be involved but not necessarily. A politician can create a false, misleading impression by playing with words and using legalistic language that means little to ordinary people. (Similar to "half true.")

Three Pinocchios

Significant factual error and/or obvious contradictions. This gets into the realm of "mostly false." But it could include statements which are technically correct (such as based on official government data) but are so taken out of context as to be very misleading. The line between Two and Three can be bit fuzzy and we do not award half-Pinocchios. So we strive to explain the factors that tipped us toward a Three.

Four Pinocchios

Whoppers.

The Geppetto Checkmark

Statements and claims that contain “the truth, the whole truth, and nothing but the truth” will be recognized with our prized Geppetto checkmark. We tend to reserve this for claims that are unexpectedly true, so it is not awarded very often.

An Upside-Down Pinocchio

A statement that represents a clear but unacknowledged “flip-flop” from a previously-held position.

Verdict Pending

There are occasions when it is impossible to render a snap judgment because the issue is very complex or there are good arguments on both sides. In this case, we will withhold our judgment until we can gather more facts. We will use this website to shed as much light as possible on factual controversies that are not easily resolved.

Bottomless Pinocchio

In December, 2018, The Fact Checker introduced the Bottomless Pinocchio. The bar for the Bottomless Pinocchio is high: Claims must have received Three or Four Pinocchios from The Fact Checker, and they must have been repeated at least 20 times. Twenty is a sufficiently robust number that there can be no question the politician is aware that his or her facts are wrong. The list of Bottomless Pinocchios will be maintained on its own landing page.

(The iconic Pinocchio image used by The Fact Checker was created in 2007 by illustrator Steve McCracken.)

Archives

Click on the Archives link on the top right of the Fact Checker page. The list will go back five years. For dates after Sept. 2013, adjust the year and month at the end of the url.

See 2007-2011 archives here.

All judgments are subject to debate and criticism from our readers and interested parties, and can be revised if fresh evidence emerges. We invite you to join the discussion on these pages and contact the Fact Checker directly with tips, suggestions, and complaints. If you feel that we are being too harsh on one candidate and too soft on another, there is a simple remedy: let us know about misstatements and factual errors we may have overlooked.

International Fact-Checking Network fact-checkers' code of principles

The International Fact-Checking Network (IFCN) at the Poynter Institute is committed to promoting excellence in fact-checking. Nonpartisan and transparent fact-checking can be a powerful instrument of accountability journalism. Conversely, unsourced or biased fact-checking can increase distrust in the media and experts while polluting public understanding. The following statement is the result of consultations among fact-checkers from around the world; it offers conscientious practitioners principles to aspire to in their everyday work. *The Washington Post Fact Checker was an inaugural signatory to this code of principles, which was announced on Sept. 15, 2016.*

(1) A COMMITMENT TO NONPARTISANSHIP AND FAIRNESS We fact-check claims using the same standard for every fact check. We do not concentrate our fact-checking on any one side. We follow the same process for every fact check and let the evidence dictate our conclusions. We do not advocate or take policy positions on the issues we fact-check.

(2) A COMMITMENT TO TRANSPARENCY OF SOURCES We want our readers to be able to verify our findings themselves. We provide all sources in enough detail that readers can replicate our work, except in cases where a source's personal security could be compromised. In such cases, we provide as much detail as possible.

(3) A COMMITMENT TO TRANSPARENCY OF FUNDING & ORGANIZATION We are transparent about our funding sources. If we accept funding from other organizations, we ensure that funders have no influence over the conclusions we reach in our reports. We detail the professional background of all key figures in our organization and explain our organizational structure and legal status. We clearly indicate a way for readers to communicate with us.

(4) A COMMITMENT TO TRANSPARENCY OF METHODOLOGY We explain the methodology we use to select, research, write, edit, publish and correct our fact checks. We encourage readers to send us claims to fact-check and are transparent on why and how we fact-check.

(5) A COMMITMENT TO OPEN AND HONEST CORRECTIONS We publish our corrections policy and follow it scrupulously. We correct clearly and transparently in line with our corrections policy, seeking so far as possible to ensure that readers see the corrected version.

By signing up to this code of principles, the fact-checking initiatives agree to produce a public report indicating how they have lived up to each of the five principles within a year from their signature, and once a year thereafter. The report will allow readers and others to judge to what extent the fact-checker is respecting the code of principles and will be linked to from this page.

Being a signatory to this code of principles and publishing a report in no way implies an endorsement from Poynter's IFCN or any of its members.

A formal process for adding signatories began in 2017. The Washington Post Fact Checker was evaluated by an independent assessor and officially accepted by the IFCN board on March 8, 2017, permitting the display of the badge below. The Fact Checker was reevaluated and accepted again in 2018 and 2019.



Columbia Journalism Review, May 1993:

* “LAUREL to New York Newsday, and to staff writer Glenn Kessler, for a record-breaking solo flight. With most of the nation’s news media zooming in on the president’s \$ 200 haircut on the Los Angeles Airport runway and roaring about the disruptions his hirsutic hubris caused, Kessler took off in a different direction -- and landed on some hard, concrete facts. His analysis of Federal Aviation Administration records, obtained under the Freedom of Information Act, revealed that, contrary to stories of circling planes, jammed-up runways, and inconvenienced passengers (and contrary, too, to the apology the White House felt pressured to make), only one (unscheduled) air taxi reported an actual (two-minute) delay. Unfortunately, most of the nation’s news media, in usual near-perfect formation, found neither time nor space to correct a story that had been wildly off course.”

The Washington Post

Democracy Dies in Darkness

+

Democrats ask the FBI to investigate Trump advisers' Russia ties

By **Josh Rogin**

August 30, 2016 at 4:44 p.m. EDT

Several leading Democratic lawmakers are asking the Federal Bureau of Investigation to investigate senior Trump campaign advisers for collusion in the suspected Russian hacking of American political organizations and election systems. It's the most serious set of allegations to date about deep connections between the Trump team and the Kremlin, though the case is largely circumstantial.

On Monday, The New York Times broke the story of Senate Minority Leader Harry Reid's August 27 letter to FBI Director James Comey asking the bureau to investigate alleged Russian interference in the U.S. presidential election, which followed new reports that foreign hackers penetrated two state election databases. In the same letter, without naming them directly, Reid pointed Comey to two specific Trump advisers, each of whom is allegedly connected to Russia, according to Reid and the Clinton campaign.

Reid's letter implicitly asks Comey to look into the dealings of Roger Stone, the longtime Trump friend who has claimed to be in touch with Wikileaks founder Julian Assange, and Carter Page, a Trump foreign policy advisor who traveled to Moscow in July.

AD

Stone, Assange and Russian state media have all been pushing a conspiracy theory that the hack of the Democratic National Committee was related to the shooting death of 27-year old DNC staffer Seth Rich. There's no evidence the events are linked. Reid wants the FBI to investigate whether the similar statements are a coincidence or if they are all working together on the leaks.

"The prospect of individuals tied to Trump, Wikileaks and the Russian government coordinating to influence our election raises concerns of the utmost gravity and merits full examination," Reid wrote, referring to Stone.

Reid also said the FBI should investigate if there were any "complicit intermediaries" between the Russian government and Assange, including "any United States citizen."

AD

On Tuesday afternoon, four leading House Democrats sent their own letter to Comey calling on him to investigate the Russian ties of Stone, Page, retired Lt. Gen. Michael Flynn, and former Trump campaign chairman Paul Manafort. "Serious questions have been raised about overt and covert actions by Trump campaign officials on behalf of Russian interests," they wrote. "It is critical for the American public to know whether those actions may have directly caused or indirectly motivated attacks against Democratic institutions and our fundamental election process."

In a statement, Clinton campaign spokesman Glen Caplin said the Trump campaign has multiple advisers with deep ties to Russia and the campaign doubled down on Reid's call for an investigation into Roger Stone's ties to Wikileaks and the DNC hacks.

"By admitting he's in contact with Julian Assange through mutual friends, and claiming the Russian front Guccifer 2.0 is the source of hacked documents obtained by WikiLeaks, Roger Stone has raised serious and deeply troubling questions about potential collusion between Trump campaign associates and the Kremlin," he said. "This alarming red flag is a question that demands answers."

AD

In an interview today, Stone lashed out at Reid's call for the FBI to investigate. He said he has no connections with the Russian government and has communicated with Assange through a mutual friend only.

"He's essentially accusing me of treason. It's the new McCarthyism," Stone said. "I have no connections with Russians at all. They call us the conspiracy theorists but they are the ones accusing us of treason."

Stone said there's no proof that the Russians did anything related to the DNC hacks because a hacker calling himself "Guccifer 2.0" claimed credit for the hack in June. But there is a growing consensus in the U.S. intelligence community that the DNC hack was orchestrated and perpetrated by the Russian government and forensic evidence suggests that "Guccifer 2.0" is a persona created by the Russian government hackers to try to cover their tracks.

AD

Stone refused to characterize the frequency or nature of his indirect communications with Assange, but said he had no influence over Assange's actions related to the leaks and was not directly coordinating with Wikileaks. But he called Assange a "freedom fighter" and a "hero" who was "fighting the deep state," which means taking on the two-party duopoly in Washington.

In the interview, Stone also defended the Seth Rich conspiracy theory, accused Clinton or her allies of murdering at least three other people and said his email, bank, and social media accounts were all hacked last week by unknown assailants. Stone claimed that Assange has the “kryptonite” that will bring down the Clinton campaign, in the form of more leaked information about ties between the Clinton Foundation and the State Department during Clinton’s tenure as Secretary of State.

“I think he has the goods and he will release them at times of his choosing,” he said. “This makes me a conspiracy theorist? No, I’m a conspiracy realist.”

AD

Reid also wrote to Comey that “questions have been raised” about whether a senior Trump adviser with investments in the Russian state energy firm Gazprom met with “high-ranking sanctioned individuals” during a July trip to Moscow. The passage clearly refers to Page, who gave a speech in Moscow in July at the graduation ceremony of the New Economic School that many observers viewed as a rebuttal of U.S. foreign policy.

“Washington and other Western capitals have impeded potential progress through their often hypocritical focus on ideas such as democratization, inequality, corruption and regime change,” Page said in the lecture.

Page declined to comment for this article but sources close to the issue told me Reid was briefed last week by a very senior U.S. intelligence official on the suspected Russian political interference and that Reid is particularly interested in Page's activities while in Russia.

AD

Reid and the Clinton campaign are steadily increasing their focus on the ties between Vladimir Putin and Donald Trump. In her speech last week on the "alt-right" movement, Clinton focused on the fact that the two men praise each other and she called Putin the "godfather" of a "global brand of extreme nationalism" to which Trump allegedly subscribes.

There's definitely an overlapping of interests between the Trump camp and the Putin regime, not the least of which is a visceral hatred of Hillary Clinton. However, there's very little actual hard evidence of real collusion.

Democrats and the Clinton camp are raising the stakes by calling on the FBI to investigate her political opponents for working with an enemy intelligence service. It's another example of how both sides in this election cycle are pushing conspiracy theories that they cannot prove.

The Washington Post

Democracy Dies in Darkness

+

Hunter Biden's new job at a Ukrainian gas company is a problem for U.S. soft power

By **Adam Taylor**

May 14, 2014 at 5:46 p.m. EDT

Around the world, there is a major perception that U.S. foreign policy is dictated by a thirst for oil and gas. For example, a 2002 Pew Research poll found that 75 percent of French respondents felt that the United States-led invasion of Iraq was a simple ruse to gain control of Iraqi oil. And that isn't just what the "cheese-eating surrender monkeys" think either: Establishment figures in the United States such as Sen. John McCain and former Federal Reserve chairman Alan Greenspan have both made statements that suggest they buy into it, too.

Such a perception is probably an oversimplification, but there is clearly some truth to the idea. And whether it is true or not, perceptions clearly matter when it comes to international relations.

Think about that when you read the announcement that Vice President Biden's son, Hunter Biden, has accepted a position on the board at Ukraine's largest private gas firm. According to a news release posted Tuesday, the vice president's son would join the board of Burisma Holdings. The Yale-educated lawyer would be in charge of the company's legal unit, the release said.

.AD

Here's a small selection of the responses to the news, which ranged from the incredulous to the resigned:



Robert Coalson
@CoalsonR

Biden's son takes job a Ukraine gas firm. Boy, that looks really bad. What are they thinking"? bit.ly/RCzEE0

27 12:56 PM - May 13, 2014

56 people are talking about this



Olga Kuzmina
@OlgaKuzminaDC

Joe Biden's son is now head of legal affairs at Ukraine's largest gas company. Speechless!
themoscowtimes.com/business/artic...

31 11:37 AM - May 13, 2014

157 people are talking about this



Tim Huelskamp
@CongHuelskamp

Obama White House for sale or rent. Biden's son to head Ukrainian gas company. #Nefarious goo.gl/ZZ7W1U

75 12:20 PM - May 14, 2014

99 people are talking about this

While the general public appeared nonplussed, the official response has been muted. "Hunter Biden is a private citizen and a lawyer," White House spokesperson Kendra Barkoff told The Post. "The vice president does not endorse any particular company and has no involvement with this company."

Meanwhile, an ethics watchdog argued that it probably wasn't that big of a deal. "It can't be that because your dad is the vice president, you can't do anything," Melanie Sloan, executive director of Citizens for Responsibility and Ethics in Washington, told Reuters.

AD

It's true that there are no rules against Hunter Biden taking this position. And it's (fairly) safe to assume that his appointment was not part of a broader, U.S.-led plot to oust Moscow-backed Ukrainian president Viktor Yanukovich and steal all of Ukraine's gas. However, whatever the practical reality of this posting, its symbolic nature makes it look very bad.

For one thing, while Burisma is clearly trying to portray itself (perhaps genuinely) as an open, Western company, its ownership is more than a little murky. A 2012 investigation from Forbes Ukraine noted that registration documents from Ukraine and Cyprus indicated that Nikolay Zlochevsky, a former government minister and representative of Yanukovich's Party of Regions, was in control of the company. There was speculation from Ukrainian energy analysts that Biden's appointment may have been an attempt to avoid sanctions by other, bigger Yanukovich allies.

It's also unclear why, exactly, Biden was hired: At Yahoo News, Olivier Knox and Meredith Shiner have speculated that the fact that so much of Burisma's permits are in Ukraine's troubled Dnieper-Donets Basin may play a role.

AD

Then there's the broader problem: The appointment of the vice president's son to a Ukrainian oil board looks nepotistic at best, nefarious at worst. No matter how qualified Biden is, it ties into the idea that U.S. foreign policy is self-interested, and that's a narrative Vladimir Putin has pushed during Ukraine's crisis with references to Iraq and Libya. It clashes with the U.S. narrative that this is all about international law and human rights.

To be fair, Hunter Biden isn't the only person linked to politics on the board of Burisma: The Wall Street Journal reports that Devon Archer, the college roommate of John Kerry's stepson, has also joined, and on Wednesday, Ukrainian media reported that former Polish president Aleksander Kwasniewski would also join the board. It's an impressive crowd.

And Biden is certainly not the first politically-linked person to get a dubiously high-paying job on a board. As Mikhail Korchemkin of East European Gas Analysis pointed out to me, more than a few children of Russian politicians have ended up in executive positions in companies at the top of the Forbes 500 list, and China's "princelings" have a similar habit. Bringing big names in has obvious political advantages for companies and other rewards for the names – just ask Gerhard Schröder, the former chancellor of Germany, who sits on the board of the Nord Stream and catches flack for hugging Vladimir Putin, or Dominique Strauss Kahn, now on the board at a subsidiary of Rosneft, the Russian state oil giant where former secretary of state Donald L. Evans once turned down a role.

Still, you have to wonder how big the salary has to be to put U.S. soft power at risk like this. Pretty big, we'd imagine.

AD



'I'm not for impeachment' without bipartisan support, Pelosi says, roiling fellow Democrats

By **Mike DeBonis** and **Rachael Bade**

March 11, 2019 at 9:27 p.m. EDT

House Speaker Nancy Pelosi said in an interview that she opposes moving to impeach President Trump, even though she believes he is unfit for office — her most definitive statement on ousting the president and one that stands to alienate some members of the Democratic Party.

"I'm not for impeachment," she said in a March 6 interview conducted for a future issue of The Washington Post Magazine.

"This is news," added Pelosi (D-Calif.). "I haven't said this to any press person before. But since you asked, and I've been thinking about this, impeachment is so divisive to the country that unless there's something so compelling and overwhelming and bipartisan, I don't think we should go down that path because it divides the country. And he's just not worth it."

AD

Pelosi's remarks drew swift rebukes from some liberals who have been clamoring to begin impeachment proceedings over controversies ensnaring the Trump administration, with several House committees launching investigations.

Other Democrats on investigative committees were surprised that the speaker would all but rule out impeachment just as they were starting their investigations.

"I don't think it's something we decide whether or not its 'worth it,' " said House Progressive Caucus co-chair Pramila Jayapal (D-Wash.). "If [our investigations show] a consistent pattern of abuse of power, of obstruction of justice . . . then that to me seems like it will be impeachable."

AD

Moderate Democrats, however, welcomed what they considered a politically pragmatic response, especially with no bipartisan support for impeachment and Republicans controlling the Senate, which would have to convict Trump to remove him from office.

Democrats also recognize that moving toward impeachment would energize core GOP voters ahead of the 2020 presidential and congressional elections. Pelosi's comments come as Republicans are seeking to portray Democrats as radicals beholden to the far left, unwilling to respect democratic norms.

In the interview, Pelosi said she does not believe that Trump is up to the job of running the country. Asked whether he was fit to be president, she countered: “Are we talking ethically? Intellectually? Politically? What are we talking here?” When a reporter said all, she said he was not.

AD

“All of the above. No. No. I don’t think he is,” she said. “I mean, ethically unfit. Intellectually unfit. Curiosity-wise unfit. No, I don’t think he’s fit to be president of the United States.”

But Pelosi suggested that her opinion on whether he is worthy of his office may not matter if the public — and at least some Republicans — don’t support impeachment.

Most House Democrats agree that they should give the chairmen of investigative committees the space to conduct their probes before engaging in serious impeachment discussions. But Pelosi’s suggestion that she doesn’t support movement toward impeachment because Trump is “just not worth it” won’t sit well with some in her caucus, while infuriating some on the left.

AD

In an interview with The Washington Post on Monday, pro-impeachment billionaire Tom Steyer said Pelosi “correctly analyzed the problem” in concluding that Trump is unfit to be president. “But,” he continued, “she’s not willing to do what’s necessary to solve it for political reasons, and that seems to me to be the essence of what’s wrong in Washington, D.C.”

Steyer, who did not take a direct shot at Pelosi personally, added, “It is the Congress’s job to hold the president accountable and to uphold the Constitution of the United States.”

Pelosi’s comments are likely to provide cover to House Democrats from more moderate districts, especially those who beat Republicans in 2018 by campaigning on reforming health care, preserving Social Security and Medicare, and cleaning up Washington. While liberal firebrands have won an outsize share of media coverage, the House Democratic majority was captured largely because of freshmen who ran to the center, said Rep. Cheri Bustos (D-Ill.), chair of the Democratic Congressional Campaign Committee — and many of them are uncomfortable with impeachment talk.

AD

“We’ve got 31 Democrats who serve in districts that Donald Trump won, and I’m one of them,” Bustos said. “When I go home, I don’t have people asking me about impeaching him. That is just not something that I hear. They consistently ask about health care and rebuilding our country and figuring out how to work together.”

Pelosi “wants to get the work done,” she added. “She says we have to focus on results, and I have a great appreciation for her saying that, because that works in any congressional district in America.”

But even some more traditional Democrats disagree. Rep. Gerald E. Connolly (D-Va.), a member of the House Oversight and Reform Committee, said Pelosi’s comments were probably “designed to remind people that loose talk about impeachment is not helpful, that it distracts from our agenda and even from the intrinsic value of the oversight hearings.” But while he agreed, he said, she may have gone too far.

AD

“I felt that her statement didn’t leave much wiggle room, and on that part, I respectfully demur,” Connolly said. “I took an oath to the Constitution, not to the Democratic Party. . . . If I feel that I have a constitutional obligation to follow that procedure, then I have a legal and moral obligation to do so, even if no Republican wants to do anything.”

On the GOP side, House Republican leader Kevin McCarthy (Calif.) said Pelosi’s remarks were “a smart thing for her to say. I mean, there’s nothing to impeach.”

But many Republicans viewed her comments through a political lens, saying Pelosi was merely trying to protect her caucus’s moderate members.

“I think they have to put up a front saying they’re not going there, but everything behind the scenes says differently,” said the House Judiciary Committee’s ranking Republican, Doug Collins (Ga.). “I think they have a part of their conference they can’t say no to.”

Pelosi’s comments came days after the House Judiciary Committee, the panel with jurisdiction over impeachment proceedings, issued document requests to more than 80 people and entities affiliated with Trump’s administration, campaign and businesses. Rep. Jerrold Nadler (D-N.Y.), the chairman of the committee, called the requests the first step in a larger probe into possible obstruction of justice and abuses of power by the president.

Meanwhile, other House committees are beginning to investigate payments that Trump’s then-lawyer Michael Cohen made during the 2016 campaign to silence women who alleged affairs with Trump, as well as Trump’s plans to build a tower in Moscow and how he managed his private company.

For months, Pelosi has treated the possibility of Trump's impeachment delicately, publicly noting the need for bipartisan support and significant evidence of wrongdoing before pursuing the president's removal.

"If and when the time comes for impeachment, it will have to be something that has such a crescendo in a bipartisan way," she said, for instance, in a CBS News interview in early January.

She echoed that bipartisan requirement in the Post interview.

However, given congressional Republicans' unwillingness to push back on their leader in the Oval Office over the past two years, some Democrats disagree with Pelosi's assessment that any impeachment proceedings must have support from the GOP. House Democrats, they argue, have a job to do in holding the president accountable — regardless of the GOP's stance.

Steyer, for instance, noted that Republicans don't believe in climate change. Should the party turn a blind eye to that serious matter, too? he asked.

"If we're not allowed to tell the truth until the Republicans give us a signature that says it's okay, then we're not going to tell the truth about a lot of things," he said.

Pelosi has, at times, referenced the failed 1998 impeachment of President Bill Clinton by congressional Republicans as a formative experience in her thinking — an argument she renewed in the interview.

"There's no question that that was horrible for the country. It was unnecessary and the rest," she said. "But in terms of where we are, as Thomas Paine said, the times have found us. And the times have found us now. We have a very serious challenge to the Constitution of the United States in the president's unconstitutional assault on the Constitution, on the first branch of government, the legislative branch. . . . This is very serious for our country."

Meanwhile, members of Pelosi's caucus have been outspoken about their desire to impeach Trump. This month, Rep. Rashida Tlaib (D-Mich.) marched on Capitol Hill with impeachment supporters, and Rep. Maxine Waters (D-Calif.) has discussed impeaching the president in numerous interviews.

Two House Democrats, Reps. Al Green (Tex.) and Brad Sherman (Calif.), have already drafted articles of impeachment. Green moved in December 2017 to force the House to consider impeachment articles; the effort was killed on a 364-to-58 vote.

And outside the Capitol, Steyer has pledged to spend tens of millions of dollars on an effort to impeach Trump, forming a group called Need to Impeach that has taken out television ads and constructed a grass-roots network to push the issue. Steyer has also vowed to target the chairmen of House panels investigating the president to ensure that they do their jobs, as his organization has said.

“He’s brought us to the brink of nuclear war,” Steyer said in one nationally televised ad. “Obstructed justice at the FBI. And in direct violation of the Constitution, he’s taken money from foreign governments and threatened to shut down news organizations that report the truth. If that isn’t a case for impeaching and removing a dangerous president, then what has our government become?”

Sherman said Monday that he understood Pelosi’s position, and he declined to criticize her remarks but said that there were “very intense, very impatient people” in the Democratic caucus who might.

“It is clear to me the things Trump did that are felonious in the first months of his presidency are not politically sufficient to remove him from office,” he said, adding, “I will not be attacking the speaker for a decision not to officially begin the impeachment process at a time when there is no bipartisan support for it.”

But Sherman defended his decision to introduce articles of impeachment, as well as others who have raised the issue: “Imagine what Trump would have done over the last two years if he thought he was immune. . . . Think of the hundreds of things that have crossed his mind that he hasn’t done.”

The Washington Post

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Pelosi tamps down talk of impeachment

By **Brian Fung**

Jan. 6, 2019 at 12:11 p.m. EST

House Speaker Nancy Pelosi (D-Calif.) sought to quell a rising furor Sunday over whether Democratic lawmakers will seek to impeach President Trump, saying in an interview on CBS News's "Sunday Morning" that the public has yet to hear the conclusions of special counsel Robert S. Mueller III's investigation.

Democrats are unlikely to pursue a path of impeachment without Republican backing, Pelosi hinted. That could hinge significantly on whether Mueller's probe uncovers concrete evidence of wrongdoing.

"If and when the time comes for impeachment," she said, "it will have to be something that has such a crescendo in a bipartisan way."

Pelosi's remarks were echoed Sunday by House Majority Leader Steny H. Hoyer (D-Md.), who said calls for Trump's impeachment were a "distraction" from Democrats' "substantive agenda."

AD

“I don’t think an impeachment process is inevitable, and that’s not what we’re focused on,” Hoyer told NBC’s “Meet the Press.”

Pelosi’s remarks come amid days of Democratic infighting after newly elected Rep. Rashida Tlaib (D-Mich.) vowed at a progressive gathering on Thursday to “impeach the motherf-----,” referring to Trump.

Many of Tlaib’s colleagues have cautioned against moving too quickly toward impeachment. Rep. Adam Smith (D-Wash.) on Sunday told ABC News that impeaching Trump would be “an unbelievably serious undertaking.”

“We need to be very deliberate, very careful and very serious about how we do this,” he said. “We need to see Mueller’s report, and we need to make a very, very strong case if there is one to be made.”

AD

1/15/2020

Pelosi tamps down talk of impeachment - The Washington Post

Others said that while House lawmakers could “line up the votes,” a bid for impeachment would be fruitless without Republican support in the Senate.

“If the Republican senators, at least some of them, are not on board, then all you have is a failed impeachment, and I don’t think that benefits the country,” Rep. Adam B. Schiff (D-Calif.), chairman of the House Intelligence Committee, said Sunday on CNN.

In Washington, a wave of shock accompanied Tlaib’s use of profanity. Sen. Doug Jones (D-Ala.) told CNN on Sunday that even his most progressive constituents “know better” than to use “the coarse language the president uses in public.” For her part, Pelosi said Friday that although she did not agree with Tlaib’s choice of words, it was not “anything worse” than what Trump has said.

AD

But Mick Mulvaney, Trump’s acting chief of staff, rejected the idea that Trump has helped coarsen the public discourse.

“I don’t think anybody blames the president for the coarsening of the language,” Mulvaney told CNN on Sunday.

1/15/2020

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Still, some of Tlaib's colleagues have come to her defense. Rep. Alexandria Ocasio-Cortez (D-N.Y.), a fellow freshman, tweeted Saturday, "I got your back," and accused Republicans of working themselves into "faux-outrage."

"Republican hypocrisy at its finest: saying that Trump admitting to sexual assault on tape is just 'locker room talk,' but scandalizing themselves into faux-outrage when my sis says a curse word in a bar," Ocasio-Cortez tweeted.

And on Sunday, Schiff tweeted that "no one has done more to debase our political discourse, or fill the public square with vulgar insults and bile, than Donald J. Trump."

Karoun Demirjian contributed to this report.

AD

Rep. Rashida Tlaib profanely promised to impeach Trump. She's not sorry.

 [washingtonpost.com/politics/2019/01/04/hours-after-making-history-rep-rashida-tlaib-profanely-promises-](https://www.washingtonpost.com/politics/2019/01/04/hours-after-making-history-rep-rashida-tlaib-profanely-promises-)

By Amy B Wang

Rep. Rashida Tlaib (D-Mich.) made history Thursday afternoon for being the first Palestinian American woman sworn into Congress.

Hours later, she made headlines for swearing at a bar — in comments that continued to reverberate in Washington the following day.

At a reception Thursday night for the progressive group MoveOn.org, Tlaib vowed that the new Democrat-controlled House would be focusing on ousting President Trump from office.

“Don’t you ever, ever, let anybody take away your roots, your culture, who you are. Ever,” Tlaib told the crowd in the packed space. “Because when you [hang onto those things], people love you and you win. And when your son looks at you and says, ‘Mama, look. You won. Bullies don’t win.’

AD

“And I said, ‘Baby, they don’t,’ because we’re gonna go in there and we’re gonna impeach the motherf-----.”

Trump on Friday called Tlaib’s remarks “disgraceful” and claimed he didn’t know the lawmaker.

“I assume she’s new. I think she dishonored herself, and I think she dishonored her family,” Trump said at an afternoon news conference. “I thought it was highly disrespectful to the United States of America.”

As White House press secretary Sarah Sanders suggested hours earlier, Trump said he could not be impeached because he was too successful a president.

The crowd inside the State Room bar, near the Capitol, had responded to Tlaib’s remarks with applause, cheers and shouts of approval, according to a widely shared video taken by immigration activist Nestor Ruiz.

AD

But online and across Washington, Tlaib’s comments were met with divided responses: Many of her supporters said Tlaib had successfully channeled their own political frustration, though some — including a few Democratic colleagues — criticized her choice of words.

On the right, there was outrage.

“Look at the brand-new elected congresswoman and her language of what she says to her son in a rally that she thought was private last night,” House Minority Leader Kevin McCarthy (R-Calif.) said on Fox News. “Their whole focus here is to try and attack this president when we’re trying to move America forward.”

It’s not clear if Tlaib thought the MoveOn reception was private. Several journalists were in attendance and multiple activists were filming her. Representatives for MoveOn did not respond to a request for comment.

AD

Tlaib mostly avoided reporters’ questions at the Capitol on Friday morning; but on Twitter, she seemed to shrug off judgments about her speech.

“I will always speak truth to power,” Tlaib tweeted, adding the hashtag #unapologeticallyMe.

I will always speak truth to power. #unapologeticallyMe

— Rashida Tlaib (@RashidaTlaib) January 4, 2019

This is not just about Donald Trump. This is about all of us. In the face of this constitutional crisis, we must rise.

— Rashida Tlaib (@RashidaTlaib) January 4, 2019

House Speaker Nancy Pelosi (D-Calif.) acknowledged “legitimate” outrage over Trump but said it was premature to be talking about impeachment. Pelosi has often said lawmakers need to let special counsel Robert S. Mueller III’s investigation into Russian interference in the 2016 election play out.

“It’s about the facts and the law, and where that takes you,” Pelosi told MSNBC’s Joy Ann Reid at the taping of an MSNBC town hall Friday morning.

AD

Pelosi also said she didn’t like Tlaib’s language but was “not in the censorship business” — and suggested there wouldn’t have been so much hand-wringing over Tlaib’s comments if she were a man.

“What she said is less offensive than what President Trump said about John McCain,” Pelosi told Reid. (It’s unclear exactly which instance Pelosi was referencing, as the president insulted and snubbed the late senator multiple times during their years-long feud.)

Several of Tlaib’s new Democratic colleagues, called upon to respond to the comments, cautioned against talking about impeachment before there was evidence to support it. Rep. Jerry Nadler (D-N.Y.) said it was “too early to talk about that intelligently.” Rep. Elijah E.

Cummings (D-MD) characterized the speech as “inappropriate” and potentially distracting and counterproductive for Democrats.

AD

“Well, passions are running high. Let’s just leave it at that, okay?” Rep. Cheri Bustos (D-Ill.) said on CNN, before echoing Pelosi in saying they needed to wait for Mueller to finish his investigation. “Then we’ll take it from there.”

Rep. Debbie Dingell (D-Mich.) was careful to emphasize Tlaib was but one member of a large caucus.

“The House of Representatives is representative of the people of the United States of America. [Tlaib] represents a group of people that have strong feelings. She had strong feelings and she expressed it,” Dingell said. “But that’s what great about our caucus. We’re diverse but we all come together when we’ve got to get things done.”

AD

Several other Democrats said they disapproved of Tlaib’s language — while also being quick to point out Trump had not been a shining example of verbal decorum while campaigning and in office. By Friday afternoon, [video](#) of Trump using the same profanity in a 2011 speech about China had resurfaced online.

“Nobody has heightened [partisan conflict] more than the president of the United States with the rhetoric he has used over the last two or three years,” Rep. Steny H. Hoyer (D-Md.) said Friday.

Tlaib made the remarks Thursday night shortly after the House’s late-night votes, at a reception for new members sponsored by MoveOn.

She was mobbed when she arrived; an emcee had to ask the crowd to clear out the hallway, as a wave of selfie-cravers had clogged it up.

AD

It was a raucous event before that, with a dance floor and open bar. Earlier, Sen. Bernie Sanders (I-Vt.) gave some brief, uncontroversial remarks.

Dave Weigel, John Wagner and Elise Viebeck contributed to this report.

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The campaign to impeach President Trump has begun

By **Matea Gold**

Jan. 20, 2017 at 12:19 p.m. EST

The effort to impeach President Donald John Trump is already underway.

At the moment the new commander in chief was sworn in, a campaign to build public support for his impeachment went live at ImpeachDonaldTrumpNow.org, spearheaded by two liberal advocacy groups aiming to lay the groundwork for his eventual ejection from the White House.

The organizers behind the campaign, [Free Speech for People](#) and [RootsAction](#), are hinging their case on Trump's insistence on maintaining ownership of his luxury hotel and golf course business while in office. Ethics experts have warned that his financial holdings could potentially lead to constitutional violations and undermine public faith in his decision-making.

AD

Their effort is early, strategists admit. But they insist it is not premature — even if it triggers an angry backlash from those who will argue that they are not giving the new president a chance.

“If we were to wait for all the ill effects that could come from this, too much damage to our democracy would occur,” said Ron Fein, legal director at Free Speech for People. “It will undermine faith in basic institutions. If nothing else, it’s important for Americans to trust that the president is doing what he thinks is the right thing ... not that it would help jump-start a stalled casino project in another country.”

The impeachment drive comes as Democrats and liberal activists are mounting broad opposition to stymie Trump's agenda. Among the groups organizing challenges to the Trump administration is the American Civil Liberties Union, which plans to wield public-records requests and lawsuits as part of an aggressive action plan aimed at protecting immigrants and pushing for government transparency, among other issues.

AD

12/15/2019

The campaign to impeach President Trump has begun - The Washington Post

“We think that President Trump will be in violation of the Constitution and federal statutes on day one, and we plan a vigorous offense to ensure the worst of the constitutional violations do not occur,” said Anthony D. Romero, the ACLU’s executive director.

“We may have a new president, but we have the same old system of checks and balances,” he added.

Strategists behind the campaign for impeachment said they are confident that other groups will soon join their cause. They argue that Trump will immediately be in violation of the U.S. Constitution’s Foreign Emoluments Clause, which prohibits a president from accepting a gift or benefit from a foreign leader or government.

AD

Fein cited several examples, including rent paid by the Industrial & Commercial Bank of China for its space in Trump Tower in New York and potential ongoing spending by foreign diplomats at the Trump International Hotel in Washington and other Trump properties. In addition, he said, royalties collected by the Trump organization from the president’s business partner in the Philippines, who was recently named a special envoy to the United States, could violate the clause.

Trump said this month that he would donate “profits” from foreign business clients to the U.S. Treasury. However, neither Trump nor representatives of the Trump Organization have provided details on how such payments would be tracked, collected and disbursed.

The foreign emoluments clause has never been tested in the courts, and some scholars argue that violating it would not qualify as “treason, bribery or other high crimes and misdemeanors,” the grounds for impeachment of a federal official.

AD

But Fein noted that former Virginia governor Edmund Jennings Randolph, a delegate to the Constitutional Convention and later the first U.S. attorney general, argued during Virginia’s debate over ratifying the constitution that a president who was found to have taken a foreign emolument “may be impeached.”

His group has mapped out a long-shot political strategy to build support for a vote in the House on articles of impeachment.

The first step is fairly simple: getting a resolution introduced that calls for the House Judiciary Committee to investigate whether there are grounds to impeach Trump — a move that Fein said a number of members of Congress are interested in taking.

AD

“Getting it introduced is not going to be a problem,” he said.

Still, the idea that a majority of the GOP-controlled House members would ultimately vote to launch an investigation of the new president seems highly improbable. Fein said he is confident the political climate will change and lawmakers will eventually support the effort.

“I think that at a certain point, the combination of new revelations coming out and, importantly, calls and pressure from constituents in their own districts will be a deciding factor,” he said. “And at some point, they will decide it is in their own interests to support this.”

12/15/2019

The campaign to impeach President Trump has begun - The Washington Post

While half a dozen federal judges in American history have been impeached by the House and successfully convicted in the Senate, no U.S. president has ever been removed from office through such a process. The closest was Andrew Johnson, who narrowly avoided conviction in the Senate in 1868 after the House charged him with removing the secretary of war in violation of the Tenure of Office Act.

In 1974, the House Judiciary Committee approved articles of impeachment against then-President Richard Nixon, but he resigned before they could be voted on by the full House. President Bill Clinton was impeached by the House on charges of perjury and obstruction of justice, but the articles of impeachment were defeated in the Senate in 1999.

AD



Style

The Trump administration has sprung a leak. Many of them, in fact.

By Paul Farhi
February 5, 2017

Every presidential administration leaks. So far, the Trump White House has gushed.

Unauthorized transcripts of phone conversations between President Trump and the leaders of Mexico and Australia went public last week. So did details about the administration's stage-managing of Trump's Supreme Court pick. Drafts of executive orders, including one that would grant legal protection to people and businesses that discriminate against same-sex married couples on moral or religious grounds, also slipped out before they were ready for prime time.

The leaks have been a bonanza for news organizations, particularly mainstream outlets such as the New York Times, The Washington Post, NBC and the Associated Press. The pattern of leaks to these organizations suggests the leakers are seeking not just wide distribution of confidential information but are hoping to gain the credibility conveyed by establishment news organizations — the very news outlets that Trump has frequently derided as purveyors of “fake news.”

They also suggest the extent of rivalries and some possible misgivings within Trump's inner circle about policies and would-be policies. Leaks, after all, are often designed to isolate a rival or to whip up public pressure to derail a decision.

The Post was first to report on Trump's conversation with Australian Prime Minister Malcolm Turnbull, in which Trump blasted a refugee resettlement agreement and bragged about his election victory before abruptly ending the call.

The Times broke the news that the administration was preparing an order permitting the CIA to reopen secret “black site” prisons in which terrorist suspects were once tortured. The newspaper also described the White House’s attempt to set up a reality show-like competition to gin up the suspense about Trump’s Supreme Court appointment.

AP was first with a story that Trump, in a call with Mexican President Enrique Peña Nieto, had threatened to send U.S. troops to Mexico to stop “bad hombres down there.”

Smaller news outlets have tapped into the leaky pipeline, too. The Nation magazine, primarily known for its liberal commentary, reported last week that the White House was circulating the draft of an executive order that would permit “sweeping” discrimination against gay and transgender people based on religious or moral objections; the Nation even reproduced a copy of the leaked draft document.

The breadth of the leaks has surprised — and, of course, delighted — journalists, who say it gives the public an unfiltered view of what those in power are thinking and doing. The leaks of Trump’s calls to Turnbull and Peña Nieto may have been the most surprising of all; it’s rare for transcripts of presidential phone calls or details of meetings with foreign leaders, especially potentially embarrassing exchanges, to leak so soon afterward.

“Given Trump’s erratic nature and lack of experience, especially in foreign affairs, these leaks may be more important than ever,” says David Corn, a reporter with the muckraking *Mother Jones* magazine. “They give us a sense of how he’s doing his job” and what important advisers such as Stephen K. Bannon and Jared Kushner are telling him to do.

Other reporters say the leaks reflect a certain degree of chaos within the new administration, with factions warily circling one another. At the top of the organization is an executive who has himself flouted White House norms, which may be setting a certain tone. “I tend to think chaos begets chaos begets chaos, and that’s what we’re seeing here,” said a reporter familiar with some of the senior players.

But others see the leaks as whistleblowing — an effort to expose Trump’s initiatives before they become policy.

The draft executive order expanding religious objections to gay and transgender people was probably leaked because the leaker was alarmed that such a policy might be enacted, said Sarah Posner, who broke the story for *The Nation*. She notes that there was no leak of Trump’s most controversial order to date, a ban on travel and immigration from seven Muslim-majority countries, and the secrecy caused disruption and controversy. “I think [the proposed religious order] was very concerning to a lot of people inside and outside of government,” she said.

If so, mission accomplished. Trump hasn’t signed the religious-objection order, and the White House hasn’t indicated when or if he will. Similarly, the administration appears to have pulled back its plans to revive the “black site” prisons after the *Times* disclosure of it incited pushback from Congress and Cabinet officials.

Of course, the leaks could also be trial balloons launched by the administration.

Neither Trump nor his top officials have challenged the veracity of any of the major leaks. A few weeks before taking office, however, Trump demanded an investigation into who leaked to NBC News a top-secret report about Russian hacking of Democratic officials during the campaign.

This record suggests that mainstream news organizations are getting a reliable flow of unauthorized information. But reporters say such information needs to undergo the journalistic equivalent of extreme vetting.

“Careful news organizations don’t just throw unverified leaks into the world,” said David Sanger, a veteran White House and national security reporter for the New York Times. “Reporters want to understand the motives [of the leaker] and the context of what’s leaked so that you’re not just simply becoming the handmaiden to someone’s private agenda. You have to dig into it and ask questions about it, starting with, ‘Why am I seeing this?’”

Given Trump’s management style and the competing “power centers” within his administration, “I don’t see [leaks] simmering down anytime soon,” said Corn. “It’s going to be a continuing problem for him and his administration. But it’s going to be good for the public. And it’s going to be very good for journalists.”

Paul Farhi

Paul Farhi is The Washington Post’s media reporter. He started at The Post in 1988 and has been a financial reporter, a political reporter and a Style reporter. Follow 

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National Security

Trump revealed highly classified information to Russian foreign minister and ambassador

By Greg Miller and
Greg Jaffe
May 15, 2017

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President Trump revealed highly classified information to the Russian foreign minister and ambassador in a White House meeting last week, according to current and former U.S. officials, who said Trump's disclosures jeopardized a critical source of intelligence on the Islamic State.

The information the president relayed had been provided by a U.S. partner through an intelligence-sharing arrangement considered so sensitive that details have been withheld from allies and tightly restricted even within the U.S. government, officials said.

The partner had not given the United States permission to share the material with Russia, and officials said Trump's decision to do so endangers cooperation from an ally that has access to the inner workings of the Islamic State. After Trump's meeting, senior White House officials took steps to contain the damage, placing calls to the CIA and the National Security Agency.

"This is code-word information," said a U.S. official familiar with the matter, using terminology that refers to one of the highest classification levels used by American spy agencies. Trump "revealed more information to the Russian ambassador than we have shared with our own allies."

The revelation comes as the president faces rising legal and political pressure on multiple Russia-related fronts. Last week, he fired FBI Director James B. Comey in the midst of a bureau investigation into possible

links between the Trump campaign and Moscow. Trump's subsequent admission that his decision was driven by "this Russia thing" was seen by critics as attempted obstruction of justice.

The day after dismissing Comey, Trump welcomed Russian Foreign Minister Sergei Lavrov and Ambassador Sergey Kislyak — a key figure in earlier Russia controversies — into the Oval Office. It was during that meeting, officials said, that Trump went off script and began describing details of an Islamic State terrorist threat related to the use of laptop computers on aircraft.

For almost anyone in government, discussing such matters with an adversary would be illegal. As president, Trump has broad authority to declassify government secrets, making it unlikely that his disclosures broke the law.

White House officials involved in the meeting said Trump discussed only shared concerns about terrorism.

"The president and the foreign minister reviewed common threats from terrorist organizations to include threats to aviation," said H.R. McMaster, the national security adviser, who participated in the meeting. "At no time were any intelligence sources or methods discussed, and no military operations were disclosed that were not already known publicly."

McMaster reiterated his statement in a subsequent appearance at the White House on Monday and described the Washington Post story as "false," but did not take any questions.

In their statements, White House officials emphasized that Trump had not discussed specific intelligence sources and methods, rather than addressing whether he had disclosed information drawn from sensitive sources.

The CIA declined to comment, and the NSA did not respond to requests for comment.

But officials expressed concern about Trump's handling of sensitive information as well as his grasp of the potential consequences. Exposure of an intelligence stream that has provided critical insight into the Islamic State, they said, could hinder the United States' and its allies' ability to detect future threats.

"It is all kind of shocking," said a former senior U.S. official who is close to current administration officials. "Trump seems to be very reckless and doesn't grasp the gravity of the things he's dealing with, especially when it comes to intelligence and national security. And it's all clouded because of this problem he has with Russia."

In his meeting with Lavrov, Trump seemed to be boasting about his inside knowledge of the looming threat. "I get great intel. I have people brief me on great intel every day," the president said, according to an official with knowledge of the exchange.

Trump went on to discuss aspects of the threat that the United States learned only through the espionage capabilities of a key partner. He did not reveal the specific intelligence-gathering method, but he described how the Islamic State was pursuing elements of a specific plot and how much harm such an attack could cause under varying circumstances. Most alarmingly, officials said, Trump revealed the city in the Islamic State's territory where the U.S. intelligence partner detected the threat.

The Post is withholding most plot details, including the name of the city, at the urging of officials who warned that revealing them would jeopardize important intelligence capabilities.

“Everyone knows this stream is very sensitive, and the idea of sharing it at this level of granularity with the Russians is troubling,” said a former senior U.S. counterterrorism official who also worked closely with members of the Trump national security team. He and others spoke on the condition of anonymity, citing the sensitivity of the subject.

The identification of the location was seen as particularly problematic, officials said, because Russia could use that detail to help identify the U.S. ally or intelligence capability involved. Officials said the capability could be useful for other purposes, possibly providing intelligence on Russia’s presence in Syria. Moscow would be keenly interested in identifying that source and perhaps disrupting it.

Russia and the United States both regard the Islamic State as an enemy and share limited information about terrorist threats. But the two nations have competing agendas in Syria, where Moscow has deployed military assets and personnel to support President Bashar al-Assad.

“Russia could identify our sources or techniques,” the senior U.S. official said.

A former intelligence official who handled high-level intelligence on Russia said that given the clues Trump provided, “I don’t think that it would be that hard [for Russian spy services] to figure this out.”

At a more fundamental level, the information wasn’t the United States’ to provide to others. Under the rules of espionage, governments — and even individual agencies — are given significant control over whether and how the information they gather is disseminated, even after it has been shared. Violating that practice undercuts trust considered essential to sharing secrets.

The officials declined to identify the ally but said it has previously voiced frustration with Washington’s inability to safeguard sensitive information related to Iraq and Syria.

“If that partner learned we’d given this to Russia without their knowledge or asking first, that is a blow to that relationship,” the U.S. official said.

Trump also described measures the United States has taken or is contemplating to counter the threat, including military operations in Iraq and Syria, as well as other steps to tighten security, officials said.

The officials would not discuss details of those measures, but the Department of Homeland Security recently disclosed that it is considering banning laptops and other large electronic devices from carry-on bags on flights between Europe and the United States. The United States and Britain imposed a similar ban in March affecting travelers passing through airports in 10 Muslim-majority countries.

Trump cast the countermeasures in wistful terms. “Can you believe the world we live in today?” he said, according to one official. “Isn’t it crazy?”

Trump and Kislyak were also accompanied by aides.

A Russian photographer took photos of part of the session that were released by the Russian state-owned Tass news agency. No U.S. news organization was allowed to attend any part of the meeting.

Senior White House officials appeared to recognize quickly that Trump had overstepped and moved to contain the potential fallout. Thomas P. Bossert, assistant to the president for homeland security and counterterrorism, placed calls to the directors of the CIA and the NSA, the services most directly involved in the intelligence-sharing arrangement with the partner.

One of Bossert's subordinates also called for the problematic portion of Trump's discussion to be stricken from internal memos and for the full transcript to be limited to a small circle of recipients, efforts to prevent sensitive details from being disseminated further or leaked.

White House officials defended Trump. "This story is false," said Dina Powell, deputy national security adviser for strategy. "The president only discussed the common threats that both countries faced."

But officials could not explain why staff members nevertheless felt it necessary to alert the CIA and the NSA.

Sen. Bob Corker (R-Tenn.) said he would rather comment on the revelations in the Post story after "I know a little bit more about it," but added: "Obviously, they are in a downward spiral right now and have got to figure out a way to come to grips with all that's happening. And the shame of it is, there's a really good national security team in place."

Corker also said, "The chaos that is being created by the lack of discipline is creating an environment that I think makes — it creates a worrisome environment."

Trump has repeatedly gone off-script in his dealings with high-ranking foreign officials, most notably in his contentious introductory conversation with the Australian prime minister earlier this year. He has also faced criticism for seemingly lax attention to security at his Florida retreat, Mar-a-Lago, where he appeared to field preliminary reports of a North Korea missile launch in full view of casual diners.

White House officials said that the National Security Council continues to prepare multi-page briefings for Trump to guide him through conversations with foreign leaders, but that he has insisted that the guidance be distilled to a single page of bullet points — and often ignores those.

“He seems to get in the room or on the phone and just goes with it, and that has big downsides,” the second former official said. “Does he understand what’s classified and what’s not? That’s what worries me.”

Lavrov’s reaction to the Trump disclosures was muted, officials said, calling for the United States to work more closely with Moscow on fighting terrorism.

Kislyak has figured prominently in damaging stories about the Trump administration’s ties to Russia. Trump’s first national security adviser, Michael Flynn, was forced to resign just 24 days into the job over his contacts with Kislyak and his misleading statements about them. Attorney General Jeff Sessions was forced to recuse himself from matters related to the FBI’s Russia investigation after it was revealed that he had met and spoke with Kislyak, despite denying any contact with Russian officials during his confirmation hearing.

“I’m sure Kislyak was able to fire off a good cable back to the Kremlin with all the details” he gleaned from Trump, said the former U.S. official who handled intelligence on Russia.

The White House readout of the meeting with Lavrov and Kislyak made no mention of the discussion of a terrorist threat.

“Trump emphasized the need to work together to end the conflict in Syria,” the summary said. The president also “raised Ukraine” and “emphasized his desire to build a better relationship between the United States and Russia.”

Julie Tate and Ellen Nakashima contributed to this report.

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The Washington Post

Democracy Dies in Darkness

U.S. ends aid to United Nations agency supporting Palestinian refugees

By **Karen DeYoung**, **Ruth Eglash** and **Hazem Balousha**

August 31, 2018 at 5:59 p.m. EDT

The United States will no longer contribute to the United Nations relief agency for Palestinian refugees, the State Department announced Friday, amid widespread Palestinian outrage charging that the decision violates international law and will aggravate an already dire humanitarian situation, particularly in Gaza.

The statement called the U.N. Relief and Works Agency, or UNRWA, an “irredeemably flawed operation” and criticized other countries for not sharing the burden of supporting the Palestinians.

Blaming UNRWA and other international donors for failing to reform the organization’s “way of doing business,” the statement said the United States remained “very mindful of and deeply concerned regarding the impact upon innocent Palestinians, especially school children.”

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Among the administration's many complaints about the agency — to which the United States contributed about one third of a \$1.1 billion 2017 budget — is the way the United Nations calculates the number of Palestinians officially recognized as refugees. It would like to change the number from the more than 5 million who are counted today to the few hundred thousand alive when the agency was created seven decades ago, according to U.S. officials.

The administration has generally tried to cut back foreign aid, refocusing its attention on those countries and organizations that match “U.S. policy priorities,” officials said. The UNRWA pullback is also a response, in the words of Nikki Haley, the U.S. ambassador to the United Nations, to Palestinian hostility toward the United States, which intensified after U.S. policy changes that Palestinians deem pro-Israel.

Saeb Erekat, secretary general of the Palestine Liberation Organization, said the pro-Israel bias of President Trump's administration has disqualified it from any role in the peace process.

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“By cutting aid, the U.S. is violating international law,” Erekat said, speaking several hours before the State Department announcement. He argued that “UNRWA is not a Palestinian agency” but was established by the United Nations, “and there is an international obligation to assist and support it until all the problems of the Palestinian refugees are solved.”

Erekat added: “Some may argue that it is U.S. taxpayers’ money and that it is up to them how it is spent. But by the same token, who gave Trump the damn right to steal my land and my capital and my future and my aspirations and my freedom by deciding to blindly support the occupying power called Israel?”

Erekat also predicted that the potential end of UNRWA, if other funding is not forthcoming, would spell disaster for places where large numbers of Palestinian refugees reside, leaving them at risk for recruitment by extremist groups such as the Islamic State.

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UNRWA provides aid, mostly in the form of education, health care, food security and other essentials, to some 800,000 Palestinians registered as refugees in the West Bank and 1.3 million people in the Gaza Strip, as well as 534,000 in Syria, 464,000 in Lebanon and 2 million in Jordan.

The United Nations, both among Palestinians and others, defines refugees as anyone who has been driven from their homes by war, persecution or violence. Descendants of refugees are included, as long as the displacement continues.

All U.N.-registered refugees maintain an internationally recognized “right of return” to their land and homes, an issue that has long been one of the core points of dispute in the Israeli-Palestinian conflict. Reducing the number of eligible refugees — as the administration would like to see happen, although only the U.N. General Assembly can do it — would drastically change the dynamic as the White House prepares to release its own peace plan to resolve the conflict.

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Separately, the Trump administration said last week that \$200 million slated for direct U.S. aid to the Palestinian Authority would be “redirected” elsewhere.

The loss of funds will be hard on the Palestinians, said Ghassan Khatib of the West Bank’s Birzeit University, but will do little to change these people’s status as refugees, he said.

“It is only the U.N. that is entitled to give legal status or a description of refugees, and not individual countries,” he said. “The change in the American position will not have an impact on the international understanding of refugees.”

In Gaza, Amal Khalil, a 53-year-old widow, is worried. She has relied on aid from UNRWA to feed herself and her family for many years.

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“It has already been reduced more than once. I do not know that it will be further reduced or stopped completely,” she said.

Adnan Abu Hasna, a spokesman for UNRWA in Gaza, told a local radio station that if funds to the organization were suddenly stopped, the entire education system would be in danger of collapsing, with only enough money to last through September.

Hit particularly hard would be Jordan, where the 2 million Palestinian refugees — a fifth of the country’s population — use UNRWA’s services. Providing them all health care, education and shelter would fall to the cash-strapped Jordanian government.

On Friday, Germany and Japan pledged to donate more, but it is unlikely the increases will cover the U.S. withdrawal.

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The agency's now-uncertain future has left Israelis in a quandary, with members of the security establishment expressing fears of a total collapse of Palestinian society's infrastructure and what might come in UNRWA's place.

"In Gaza, I am especially concerned that Hamas will take over, which is worrying because even at kindergarten level they educate their young to hate Israel and not to accept any form of peace," said Amos Gilad, head of the Institute for Policy and Strategy at the Interdisciplinary Center in Herzliya.

But Einat Wilf, a former Israeli lawmaker and co-author of a book on the subject, said she would be happy to see the end of UNRWA, which she described as the No. 1 obstacle to peace.

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“UNRWA has allowed the Palestinian national identity to coalesce around the right to return and the undoing of Israel,” she said.

In Washington, Jeremy Ben-Ami, president of the liberal Jewish group J Street, said the UNRWA announcement “has the potential to harm millions of innocent civilians. This decision will ratchet up the risk of greater destabilization and conflict across the Middle East, undermining the security of Israel and countries throughout the region.”

Eglash reported from Jerusalem. Balousha reported from Gaza City.

AD

**Assertion of Executive Privilege Over Communications
Regarding EPA's Ozone Air Quality Standards and
California's Greenhouse Gas Waiver Request**

The President may lawfully assert executive privilege in response to congressional subpoenas seeking communications within the Executive Office of the President or between the Environmental Protection Agency and the EOP concerning EPA's promulgation of a regulation revising national ambient air quality standards for ozone or EPA's decision to deny a petition by California for a waiver from federal preemption to enable it to regulate greenhouse gas emissions from motor vehicles.

June 19, 2008

THE PRESIDENT
THE WHITE HOUSE

Dear Mr. President:

You have asked for my legal advice as to whether you may assert executive privilege with respect to documents subpoenaed by the Committee on Oversight and Government Reform (the "Committee") of the House of Representatives. The Committee has issued three subpoenas, two directed to the Administrator of the Environmental Protection Agency ("EPA") and one to the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget ("OIRA"), a component of the Executive Office of the President ("EOP"). The subpoena to OIRA and one of the subpoenas to EPA seek documents related to EPA's promulgation of a regulation revising national ambient air quality standards ("NAAQS") for ozone on March 12, 2008. The other subpoena directed to EPA seeks documents reflecting communications between EPA and the EOP concerning the agency's decision to deny a petition by California for a waiver from federal preemption to enable it to regulate greenhouse gas emissions from motor vehicles.

The Office of Legal Counsel of the Department of Justice has reviewed the documents that EPA and OIRA have identified as responsive to the subpoenas but have not provided to the Committee. The great majority of these documents are internal to EOP and were generated in the course of advising and assisting you with respect to your consideration of EPA's proposed ozone regulation. The great majority of the EOP documents are internal OIRA deliberative work product in support of your participation in the ozone decision. The remaining OIRA documents consist of deliberative communications between OIRA and others within the EOP, including White House staff. The EPA documents include unredacted copies of notices for meetings between EPA officials and senior White House staff to discuss the ozone regulation and California waiver decisions; redacted copies of the notices that are being produced to the Committee indicate the time and place of the meetings, but the identities of the meeting participants are redacted. The only other EPA document concerning the ozone regulation is a set of talking points for

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the EPA Administrator to use in a meeting with you. The remaining EPA documents consist of talking points for EPA officials to use in presentations to senior White House staff at meetings at which California's waiver petition was discussed, communications within EPA and with EOP staff concerning the preparation of talking points for you to use in a conversation with the Governor of California, communications with EOP staff regarding how to respond to a letter to you from the Governor, and a response to a request from senior White House staff for a report on EPA's goals and priorities.

The Office of Legal Counsel is satisfied that the subpoenaed documents fall within the scope of executive privilege. For the reasons discussed below, I agree with that determination and conclude that you may properly assert executive privilege in response to the subpoenas.

I.

Documents generated for the purpose of assisting the President in making a decision are protected by the doctrine of executive privilege. *See, e.g., In re Sealed Case*, 121 F.3d 729, 752–53 (D.C. Cir. 1997) (addressing presidential communications component of executive privilege); *Assertion of Executive Privilege With Respect to Clemency Decision*, 23 Op. O.L.C. 1, 1–2 (1999) (opinion of Attorney General Janet Reno) (same). As the Supreme Court recognized in *United States v. Nixon*, 418 U.S. 683 (1974), there is a

necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These . . . considerations justify[] a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.

Id. at 708.

The doctrine of executive privilege also encompasses Executive Branch deliberative communications that do not implicate presidential decisionmaking. As the Supreme Court has explained, the privilege recognizes “the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties.” *Nixon*, 418 U.S. at 705. Based on this principle, the Justice Department—under administrations of both political parties—has concluded repeatedly that the privilege may be invoked to protect Executive Branch deliberations against congressional subpoenas. *See, e.g., Assertion of Executive Privilege With Respect to Prosecutorial*

Assertion of Executive Privilege Over Communications Regarding Air Quality Standards

Documents, 25 Op. O.L.C. 1, 2 (2001) (opinion of Attorney General John D. Ashcroft) (“The Constitution clearly gives the President the power to protect the confidentiality of executive branch deliberations.”); *Assertion of Executive Privilege With Respect to Clemency Decision*, 23 Op. O.L.C. at 2 (explaining that executive privilege extends to deliberative communications within the Executive Branch); *Assertion of Executive Privilege in Response to a Congressional Subpoena*, 5 Op. O.L.C. 27, 30 (1981) (opinion of Attorney General William French Smith) (assertion of executive privilege to protect deliberative materials held by the Department of Interior).¹

The subpoenaed documents implicate both the presidential communications and deliberative process components of executive privilege. The EPA Administrator’s talking points regarding the ozone regulation were provided for your use and are thus subject to the presidential communications component of the privilege. The OIRA documents fall within the scope of the presidential communications component because they are deliberative documents generated by your staff in reviewing a proposed agency regulation on your behalf and developing a position for presentation to you. Among other things, the OIRA documents contain candid assessments of alternative actions that EPA or you could pursue. Addressing the subpoenaed documents in their entirety, I believe that publicly releasing these deliberative materials to the Committee could inhibit the candor of future deliberations among the President’s staff in the EOP and deliberative communications between the EOP and Executive Branch agencies, particularly deliberations concerning politically charged issues. As the Supreme Court explained, “[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.” *Nixon*, 418 U.S. at 705. Accordingly, I conclude that the subpoenaed materials at issue here fall squarely within the scope of executive privilege.

II.

Under controlling case law, a congressional committee may overcome an assertion of executive privilege only if it establishes that the subpoenaed documents are

¹ The Justice Department’s long-standing position finds strong support in various court decisions recognizing that the deliberative process privilege protects internal government deliberations from disclosure in civil litigation. See, e.g., *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975) (“Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions.”); *Landry v. FDIC*, 204 F.3d 1125, 1135–36 (D.C. Cir. 2000) (describing how agencies may assert the “deliberative process” component of executive privilege in litigation); *Dow Jones & Co., Inc. v. Dep’t of Justice*, 917 F.2d 571, 573–74 (D.C. Cir. 1990) (describing the “deliberative process” or “executive” privilege as an “ancient privilege . . . predicated on the recognition that the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl”) (internal quotation marks omitted).

“demonstrably critical to the responsible fulfillment of the Committee’s functions.” *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). Those functions must be in furtherance of Congress’s legitimate legislative responsibilities. *See McGrain v. Daugherty*, 273 U.S. 135, 160 (1927) (Congress has oversight authority “to enable it efficiently to exercise a legislative function belonging to it under the Constitution”). In particular, a congressional committee must “point[] to . . . specific legislative decisions that cannot responsibly be made without access to [the privileged] materials.” *Senate Select Comm.*, 498 F.3d at 733. I do not believe that the Committee has satisfied this high standard with respect to the subpoenaed documents.

In assessing the Committee’s need for the subpoenaed documents, the degree to which the Committee’s stated legislative interest has been, or may be, accommodated through non-privileged sources is highly relevant. *See id.* at 732–33 (explaining that a congressional committee may not obtain information protected by executive privilege if that information is available through non-privileged sources); *United States v. AT&T Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977) (explaining that each branch has a “constitutional mandate to seek optimal accommodation” of each other’s legitimate interests); *Assertion of Executive Privilege*, 23 Op. O.L.C. at 3–4 (finding that documents were not demonstrably critical where Congress could obtain relevant information “through non-privileged documents and testimony”).

With respect to the ozone standards, the Committee asserts that it needs the subpoenaed materials to understand why the White House rejected EPA’s “recommendations regarding the ozone standard” and to determine whether White House staff complied with the Clean Air Act when evaluating EPA’s proposed regulation. Letter for Stephen L. Johnson, Administrator, EPA, from Henry A. Waxman, Chairman, House Committee on Oversight and Government Reform at 2 (May 16, 2008). The Committee offers similar justifications in support of its demand for materials related to the California waiver issue. *See, e.g.*, Letter for Stephen L. Johnson, Administrator, EPA, from Henry A. Waxman, Chairman, House Committee on Oversight and Government Reform at 1 (Dec. 20, 2007) (“Your decision appears to have ignored the evidence before the agency and the requirements of the Clean Air Act.”).

The Committee’s claim that it must have the subpoenaed materials to understand the reasons for EPA’s decision on the ozone regulation is unconvincing given the substantial information already available to the Committee. To date, EPA and OIRA have produced or made available to the Committee approximately 30,000 pages of documents related to the revised ozone NAAQS standard. *See, e.g.*, Memorandum for the Members of the Committee on Oversight and Government Reform, from the Majority Staff of the Committee on Oversight and Government Reform, *Re: Supplemental Information on the Ozone NAAQS* at 1

Assertion of Executive Privilege Over Communications Regarding Air Quality Standards

(May 20, 2008) (30,000 pages of documents received from EPA and the Office of Management and Budget); *see also* Letter for Henry A. Waxman, Chairman, House Committee on Oversight and Government Reform, from Jeffrey A. Rosen, General Counsel, Office of Management and Budget at 1 (May 20, 2008) (OIRA provided the Committee with access to more than 7,558 pages of documents). In particular, EPA and OIRA produced to the Committee copies of all communications between the Administrator of OIRA and the Administrator of EPA concerning the ozone NAAQS regulation. These communications explain in considerable detail the views of OIRA, EPA, the White House, and the President concerning the ozone NAAQS standard. *See, e.g.*, Letter for Stephen L. Johnson, Administrator, EPA, from Susan E. Dudley, Administrator, OIRA at 1 (Mar. 12, 2008) (describing disagreements between OIRA and EPA and advising EPA of the President's decision). Moreover, EPA publicly disclosed the substance of these concerns in the preamble to its Federal Register notice for the final ozone regulation. Finally, the Administrators of both EPA and OIRA testified before the Committee on May 20, 2008, concerning the ozone regulation. At that hearing, the Committee had ample opportunity to explore with the witnesses the decisions and rationale for the regulation.

It is of particular importance in considering the Committee's need for the internal OIRA documents—which constitute the great bulk of the documents at issue—that when the Administrator of OIRA testified before the Committee on May 20, the Committee had the opportunity to ask her about OIRA's role, as well as that of you and the White House staff, in the process leading up to the issuance of final NAAQS ozone regulation. Yet, the Committee asked no such questions. Indeed, Administrator Dudley was asked only four questions during the entire hearing. None of the questions put to the Administrator related to OIRA's internal deliberations or communications with the White House, and none demonstrated a need for additional documents or information from OIRA. *See* Letter for Henry A. Waxman, Chairman, House Committee on Oversight and Government Reform, from Jeffrey A. Rosen, General Counsel, Office of Management and Budget at 2 (June 18, 2008).

EPA made similar accommodations with respect to the California waiver decision. The agency has made available to the Committee approximately 27,000 pages of documents concerning the decision. *See* Memorandum for the Members of the Committee on Oversight and Government Reform, from the Majority Staff of the Committee on Oversight and Government Reform, *Re: EPA's Denial of the California Waiver* at 1 (May 19, 2008). Again, these materials describe in considerable detail—as a memorandum prepared by Committee Staff demonstrates—the reasons behind EPA's decision to deny California's petition. Beyond receiving access to tens of thousands of pages of documents, the Committee also “deposed or interviewed eight key officials from the EPA” concerning the California waiver decision, *id.* at 1, and, as discussed above, the Committee had an

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opportunity to explore the California waiver decision with the EPA Administrator at the public hearing on May 20.

OIRA's and EPA's efforts represent an extraordinary attempt to accommodate the Committee's interest in understanding why EPA denied California's waiver petition, why EPA issued the revised NAAQS for ozone, and the involvement of you and your staff in both decisions. Given the overwhelming amount of material and information already provided to the Committee, it is difficult to understand how the subpoenaed information serves any legitimate legislative need. In any event, when I balance the Committee's attenuated legislative interest in the subpoenaed documents against the Executive Branch's strong interest in protecting their confidentiality, I conclude that the Committee has not established that the subpoenaed documents are "demonstrably critical to the responsible fulfillment" of the Committee's legitimate legislative functions. *Senate Select Comm.*, 498 F.2d at 731.

III.

For these reasons, I conclude that you may properly assert executive privilege in response to the Committee's subpoenas.

MICHAEL B. MUKASEY
Attorney General

**ASSERTION OF EXECUTIVE PRIVILEGE OVER DOCUMENTS
GENERATED IN RESPONSE TO CONGRESSIONAL
INVESTIGATION INTO OPERATION FAST AND FURIOUS**

Executive privilege may properly be asserted in response to a congressional subpoena seeking internal Department of Justice documents generated in the course of the deliberative process concerning the Department's response to congressional and related media inquiries into Operation Fast and Furious.

June 19, 2012

**THE PRESIDENT
THE WHITE HOUSE**

DEAR MR. PRESIDENT: I am writing to request that you assert executive privilege with respect to confidential Department of Justice ("Department") documents that are responsive to the subpoena issued by the Committee on Oversight and Government Reform of the United States House of Representatives ("Committee") on October 11, 2011. The subpoena relates to the Committee's investigation into Operation Fast and Furious, a law enforcement operation conducted by the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") and the United States Attorney's Office for the District of Arizona to stem the illegal flow of firearms from the United States to drug cartels in Mexico ("Fast and Furious"). The Committee has scheduled a meeting for June 20, 2012, to vote on a resolution holding me in contempt of Congress for failing to comply with the subpoena.

I.

The Committee's subpoena broadly sweeps in various groups of documents relating to both the conduct of Operation Fast and Furious and the Department's response to congressional inquiries about that operation. In recognition of the seriousness of the Committee's concerns about both the inappropriate tactics used in Fast and Furious and the inaccuracies concerning the use of those tactics in the letter that the Department sent to Senator Grassley on February 4, 2011 ("February 4 Letter"), the Department has taken a number of significant steps in response to the Committee's oversight. First, the Department has instituted various reforms to ensure that it does not repeat these law enforcement and oversight mistakes. Second, at my request the Inspector General is investigating the conduct of Fast and Furious. And third, to the extent consistent with important Executive Branch confidentiality and separation of powers interests affected by the Committee's investigation into ongoing criminal investigations and prosecutions, as well as applicable disclosure laws, the Department has provided a significant amount of information in an extraordinary effort to accommodate the Committee's legitimate oversight interests, including testimony, transcribed interviews, briefings and other statements by Department officials, and all of the Department's internal documents concerning the preparation of the February 4 Letter.

The Committee has made clear that its contempt resolution will be limited to internal Department "documents from after February 4, 2011, related to the Department's response to Congress." Letter for Eric H. Holder, Jr., Attorney General, from Darrell E. Issa, Chairman,

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Committee on Oversight and Government Reform, U.S. House of Representatives at 1-2 (June 13, 2012) (“Chairman’s Letter”). I am asking you to assert executive privilege over these documents. They were not generated in the course of the conduct of Fast and Furious. Instead, they were created after the investigative tactics at issue in that operation had terminated and in the course of the Department’s deliberative process concerning how to respond to congressional and related media inquiries into that operation.

In view of the significant confidentiality and separation of powers concerns raised by the Committee’s demand for internal documents generated in response to the Committee’s investigation, we consider the Department’s accommodations regarding the preparation of the February 4 Letter to have been extraordinary. Despite these accommodations, however, the Committee scheduled a vote on its contempt resolution. At that point, the Department offered an additional accommodation that would fully address the Committee’s remaining questions. The Department offered to provide the Committee with a briefing, based on documents that the Committee could retain, explaining how the Department’s understanding of the facts of Fast and Furious evolved during the post-February 4 period, as well as the process that led to the withdrawal of the February 4 Letter. The Committee, however, has not accepted the Department’s offer and has instead elected to proceed with its contempt vote.

As set forth more fully below, I am very concerned that the compelled production to Congress of internal Executive Branch documents generated in the course of the deliberative process concerning its response to congressional oversight and related media inquiries would have significant, damaging consequences: It would inhibit the candor of such Executive Branch deliberations in the future and significantly impair the Executive Branch’s ability to respond independently and effectively to congressional oversight. This would raise substantial separation of powers concerns and potentially create an imbalance in the relationship between these two co-equal branches of the Government. Consequently, as the head of the Department of Justice, I respectfully request that you assert executive privilege over the identified documents. This letter sets forth the basis for my legal judgment that you may properly do so.

II.

Executive privilege is “fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.” *United States v. Nixon*, 418 U.S. 683, 708 (1974). It is “a necessary corollary of the executive function vested in the President by Article II of the Constitution.” *Congressional Requests for Confidential Executive Branch Information*, 13 Op. O.L.C. 153, 154 (1989) (“*Congressional Requests Opinion*”) (opinion of Assistant Attorney General William P. Barr); see U.S. Const. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”); U.S. Const. art. II, § 3 (The President shall “take Care that the Laws be faithfully executed . . .”). Indeed, executive privilege “has been asserted by numerous Presidents from the earliest days of our Nation, and it was explicitly recognized by the Supreme Court in *United States v. Nixon*.” *Congressional Requests Opinion*, 13 Op. O.L.C. at 154.

The documents at issue fit squarely within the scope of executive privilege. In connection with prior assertions of executive privilege, two Attorneys General have advised the President that documents of this kind are within the scope of executive privilege. See Letter

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for the President from Paul D. Clement, Solicitor General and Acting Attorney General, *Re: Assertion of Executive Privilege Concerning the Dismissal and Replacement of U.S. Attorneys* at 6 (June 27, 2007) (“*U.S. Attorneys Assertion*”) (“[C]ommunications between the Department of Justice and the White House concerning . . . possible responses to congressional and media inquiries about the U.S. Attorney resignations . . . clearly fall within the scope of executive privilege.”); *Assertion of Executive Privilege Regarding White House Counsel’s Office Documents*, 20 Op. O.L.C. 2, 3 (1996) (“*WHCO Documents Assertion*”) (opinion of Attorney General Janet Reno) (concluding that “[e]xecutive privilege applies” to “analytical material or other attorney work-product prepared by the White House Counsel’s Office in response to the ongoing investigation by the Committee”).

It is well established that “[t]he doctrine of executive privilege . . . encompasses Executive Branch deliberative communications.” Letter for the President from Michael B. Mukasey, Attorney General, *Re: Assertion of Executive Privilege over Communications Regarding EPA’s Ozone Air Quality Standards and California’s Greenhouse Gas Waiver Request* at 2 (June 19, 2008) (“*EPA Assertion*”); see also, e.g., *U.S. Attorneys Assertion* at 2; *Assertion of Executive Privilege with Respect To Clemency Decision*, 23 Op. O.L.C. 1, 1-2 (1999) (“*Clemency Assertion*”) (opinion of Attorney General Janet Reno). The threat of compelled disclosure of confidential Executive Branch deliberative material can discourage robust and candid deliberations, for “[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.” *Nixon*, 418 U.S. at 705. Thus, Presidents have repeatedly asserted executive privilege to protect confidential Executive Branch deliberative materials from congressional subpoena. See, e.g., *EPA Assertion* at 2-3; Letter for the President from Michael B. Mukasey, Attorney General, *Re: Assertion of Executive Privilege Concerning the Special Counsel’s Interviews of the Vice President and Senior White House Staff* at 2 (July 15, 2008) (“*Special Counsel Assertion*”); Letter for the President from John Ashcroft, Attorney General, *Re: Assertion of Executive Privilege with Respect to Prosecutorial Documents* at 2 (Dec. 10, 2001) (“*Prosecutorial Documents Assertion*”); *Clemency Assertion*, 23 Op. O.L.C. at 1-4; *Assertion of Executive Privilege in Response to a Congressional Subpoena*, 5 Op. O.L.C. 27, 29-31 (1981) (“*1981 Assertion*”) (opinion of Attorney General William French Smith).

Because the documents at issue were generated in the course of the deliberative process concerning the Department’s responses to congressional and related media inquiries into Fast and Furious, the need to maintain their confidentiality is heightened. Compelled disclosure of such material, regardless of whether a given document contains deliberative content, would raise “significant separation of powers concerns,” *WHCO Documents Assertion*, 20 Op. O.L.C. at 3, by “‘significantly impair[ing]’” the Executive Branch’s ability to respond independently and effectively to matters under congressional review. *U.S. Attorneys Assertion* at 6 (“the ability of the Office of the Counsel to the President to assist the President in responding to [congressional and related media] investigations ‘would be significantly impaired’ if a congressional committee could review ‘confidential documents prepared in order to assist the President and his staff in responding to an investigation by the committee seeking the documents’”) (quoting *WHCO Documents Assertion*, 20 Op. O.L.C. at 3) (alterations omitted). See generally *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 126-28, 133-35 (1996) (explaining that, under Supreme Court case law, congressional action

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that interferes with the functioning of the Executive Branch, including “attempts to dictate the processes of executive deliberation,” can violate general separation of powers principles); *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977) (congressional enactment that “disrupts the proper balance between the coordinate branches” may violate the separation of powers).

Congressional oversight of the process by which the Executive Branch responds to congressional oversight inquiries would create a detrimental dynamic that is quite similar to what would occur in litigation if lawyers had to disclose to adversaries their deliberations about the case, and specifically about how to respond to their adversaries’ discovery requests. As the Supreme Court recognized in establishing the attorney work product doctrine, “it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.” *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). Were attorney work product “open to opposing counsel on mere demand,” the Court explained, “[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial . . . [a]nd the interests of the clients and the cause of justice would be poorly served.” *Id.* at 511.

Similarly, in the oversight context, as the Department recognized in the prior administration, a congressional power to request information from the Executive Branch and then review the ensuing Executive Branch discussions regarding how to respond to that request would chill the candor of those Executive Branch discussions and “introduce a significantly unfair imbalance to the oversight process.” Letter for John Conyers, Jr., Chairman, Committee on the Judiciary, U.S. House of Representatives, and Linda T. Sanchez, Chairwoman, Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, U.S. House of Representatives, from Richard A. Hertling, Acting Assistant Attorney General, Office of Legislative Affairs at 3 (Mar. 26, 2007). Such congressional power would disserve both Branches and the oversight process itself, which involves two co-equal branches of government and, like litigation, often is, and needs to be, adversarial. We recognize that it is essential to Congress’s ability to interact independently and effectively with the Executive Branch that the confidentiality of internal deliberations among Members of Congress and their staffs be protected against incursions by the Executive Branch. See *Gravel v. United States*, 408 U.S. 606, 616 (1972) (“The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch.”). It is likewise essential to the Executive Branch’s ability to respond independently and effectively to matters under congressional review that the confidentiality of internal Executive Branch deliberations be protected against incursions by Congress.

Moreover, there is an additional, particularized separation of powers concern here because the Committee’s inquiry into Fast and Furious has sought information about ongoing criminal investigations and prosecutions. Such information would itself be protected by executive privilege, see, e.g., *Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files*, 6 Op. O.L.C. 31, 32 (1982) (opinion of Attorney General William French Smith) (“[I]t has been the policy of the Executive Branch throughout this Nation’s history generally to decline to provide committees of Congress with access to or copies of law enforcement files except in the most extraordinary circumstances.”). Consequently,

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the Department's deliberations about how to respond to these congressional inquiries involved discussion of how to ensure that critical ongoing law enforcement actions are not compromised and that law enforcement decisionmaking is not tainted by even the appearance of political influence. *See, e.g., id.* at 33 (noting "substantial danger that congressional pressures will influence the course of the investigation . . . [and] potential damage to proper law enforcement which would be caused by the revelation of sensitive techniques, methods, or strategy") (quotation marks omitted). Maintaining the confidentiality of such candid internal discussions helps preserve the independence, integrity, and effectiveness of the Department's law enforcement efforts.

III.

A congressional committee "may overcome an assertion of executive privilege only if it establishes that the subpoenaed documents are 'demonstrably critical to the responsible fulfillment of the Committee's functions.'" *Special Counsel Assertion* at 5-6 (quoting *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc) (emphasis added)); *see also, e.g., U.S. Attorneys Assertion* at 2 (same); *Clemency Assertion*, 23 Op. O.L.C. at 2 (same); *Nixon*, 418 U.S. at 707 ("[I]t is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch."). "Those functions must be in furtherance of Congress's legitimate legislative responsibilities," *Special Counsel Assertion* at 5 (emphasis added), for "[c]ongressional oversight of Executive Branch actions is justifiable only as a means of facilitating the legislative task of enacting, amending, or repealing laws." *1981 Assertion*, 5 Op. O.L.C. at 30-31. *See also, e.g., Special Counsel Assertion* at 5; *U.S. Attorneys Assertion* at 2-3; *McGrain v. Daugherty*, 273 U.S. 135, 176 (1927) (congressional oversight power may be used only to "obtain information in aid of the legislative function"); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 n.15 (1975) ("The subject of any [congressional] inquiry always must be one on which legislation could be had.") (quotation marks omitted).

A.

The Committee has not satisfied the "demonstrably critical" standard with respect to the documents at issue. The Committee has said that it needs the post-February 4 documents "related to the Department's response to Congress" concerning Fast and Furious in order to "examine the Department's mismanagement of its response to Operation Fast and Furious." Chairman's Letter at 1-2. More specifically, the Committee has explained in the report that it is scheduled to consider at its June 20 contempt meeting that it needs these documents so that it can "understand what the Department knew about Fast and Furious, including when and how it discovered its February 4 letter was false, and the Department's efforts to conceal that information from Congress and the public." Comm. on Oversight and Gov't Reform, U.S. House of Representatives, *Report* at 33 (June 15, 2012). House leaders have similarly communicated that the driving concern behind the Committee's scheduled contempt vote is to determine whether Department leaders attempted to "mislead or misinform Congress" in response to congressional inquiries into Fast and Furious. *See Letter for Eric H. Holder, Jr., Attorney General, from John A. Boehner, Speaker, U.S. House of Representatives, et al.* at 1 (May 18, 2012) ("Speaker's Letter").

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At the threshold, it is not evident that the Committee's asserted need to review the management of the Department's response to congressional inquiries furthers a *legislative* function of Congress. See *WHCO Documents Assertion*, 20 Op. O.L.C. at 4 (noting the question of "the extent of Congress's authority to conduct oversight of the executive branch's response to oversight . . . must be viewed as unresolved as a matter of law in light of the requirement that there be a nexus to Congress's legislative authority"). In any event, the purported connection between the congressional interest cited and the documents at issue is now highly attenuated as a result of the Department's extraordinary efforts to accommodate the Committee's interest in this regard. Through these efforts, the Department has amply fulfilled its constitutional "obligation . . . to make a principled effort to acknowledge, and if possible to meet, the [Committee's] legitimate needs." *1981 Assertion*, 5 Op. O.L.C. at 31; see also, e.g., *United States v. AT&T*, 567 F.2d 121, 127, 130 (D.C. Cir. 1977) ("[E]ach branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation. . . . Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme.").

Specifically, the Department has already shared with the Committee over 1300 pages of documents concerning the drafting of the February 4 Letter, in acknowledgment that the February 4 Letter contained inaccurate information. In addition, numerous Department officials and employees, including the Attorney General, have provided testimony and other statements concerning both the conduct of Fast and Furious and the Department's preparation and withdrawal of the February 4 Letter. This substantial record shows that the inaccuracies in the February 4 Letter were the inadvertent product of the fact that, at the time they were preparing that letter, neither Department leaders nor the heads of relevant Department components on whom Department leaders reasonably relied for information knew the correct facts about the tactics used in Fast and Furious. Department leaders first learned that flawed tactics may have been used in Fast and Furious when public allegations about such tactics surfaced in early 2011, after such tactics had been discontinued. But Department leaders were mistakenly assured by the heads of relevant Department components that those allegations were false. As the Department collected and reviewed documents to provide to the Committee during the months after submitting the February 4 Letter, however, Department leaders came to understand that Fast and Furious was in fact fundamentally flawed and that the February 4 Letter may have been inaccurate. While the Department was developing that understanding, Department officials made public statements and took other actions alerting the Committee to their increasing concern about the tactics actually used in Fast and Furious and the accuracy of the February 4 Letter. When the Department was confident that it had a sufficient understanding of the factual record, it formally withdrew the February 4 Letter. All of this demonstrates that the Department did not in any way intend to mislead the Committee.

The Department continued its extraordinary efforts at accommodating the Committee by recently offering to provide the Committee with a briefing, based on documents that the Committee could retain, explaining further how the Department's understanding of the facts of Fast and Furious evolved during the post-February 4 period, as well as the process that led to the withdrawal of the February 4 Letter. The Department believes that this briefing, and the accompanying documents, would have fully addressed what the Committee described as its remaining concerns related to the February 4 Letter and the good faith of the Department in

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responding to the Committee's investigation. The Committee, however, has not accepted this offer of accommodation.

Finally, the Committee's asserted need for post-February 4 documents is further diminished by the Inspector General's ongoing investigation of Fast and Furious, which was undertaken at my request. As an Executive Branch official, the Inspector General may obtain access to documents that are privileged from disclosure to Congress. The existence of this investigation belies any suspicion that the Department is attempting to conceal important facts concerning Fast and Furious from the Committee. Moreover, in light of the Inspector General's investigation, congressional oversight is not the only means by which the management of the Department's response to Fast and Furious may be scrutinized.

In brief, the Committee received all documents that involved the Department's preparation of the February 4 Letter. The Committee's legitimate interest in obtaining documents created after the February 4 Letter is highly attenuated and has been fully accommodated by the Department. The Committee lacks any "demonstrably critical" need for further access to the Department's deliberations to address concerns arising out of the February 4 Letter.

B.

The Department's accommodations have concerned only a subset of the topics addressed in the withheld post-February 4 documents. The documents and information provided or offered to the Committee address primarily the evolution of the Department's understanding of the facts of Fast and Furious and the process that led to the withdrawal of the February 4 Letter. Most of the withheld post-February 4 documents, however, relate to other aspects of the Department's response to congressional and related media inquiries, such as procedures or strategies for responding to the Committee's requests for documents and other information. The Committee has not articulated *any* particularized interest in or need for documents relating to such topics, let alone a need that would further a legislative function.

"Broad, generalized assertions that the requested materials are of public import are simply insufficient under the 'demonstrably critical' standard." *U.S. Attorneys Assertion* at 3; *see also, e.g., Congressional Requests Opinion*, 13 Op. O.L.C. at 160 ("A specific, articulated need for information will weigh substantially more heavily in the constitutional balancing than a generalized interest in obtaining information.") (quoting *1981 Assertion*, 5 Op. O.L.C. at 30)). Moreover, "Congress's legislative function does not imply a freestanding authority to gather information for the sole purpose of informing 'the American people.'" *Special Counsel Assertion* at 6. The "only informing function" constitutionally vested in Congress "is that of informing itself about subjects susceptible to legislation, not that of informing the public." *Id.* (quoting *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 531 (9th Cir. 1983)). In the absence of any particularized legitimate need, the Committee's interest in obtaining additional post-February 4 documents cannot overcome the substantial and important separation of powers and Executive Branch confidentiality concerns raised by its demand.

* * * *

In sum, when I balance the Committee's asserted need for the documents at issue against the Executive Branch's strong interest in protecting the confidentiality of internal documents generated in the course of responding to congressional and related media inquiries and the separation of powers concerns raised by a congressional demand for such material, I conclude that the Committee has not established that the privileged documents are demonstrably critical to the responsible fulfillment of the Committee's legitimate legislative functions.

IV.

For the reasons set forth above, I have concluded that you may properly assert executive privilege over the documents at issue, and I respectfully request that you do so.

Sincerely,

/s/

ERIC H. HOLDER, JR.
Attorney General

Assertion of Executive Privilege Regarding White House Counsel's Office Documents

Executive privilege may properly be asserted with respect to certain White House Counsel's Office documents that have been subpoenaed by the Committee on Government Reform and Oversight of the House of Representatives in connection with the Committee's investigation of the White House Travel Office matter.

May 23, 1996

THE PRESIDENT THE WHITE HOUSE

My Dear Mr. President: You have requested my legal advice as to whether executive privilege may properly be asserted with respect to certain confidential White House Counsel's Office documents that are responsive to subpoenas issued by the Committee on Government Reform and Oversight of the House of Representatives. The subpoenas have been issued in connection with the Committee's investigation of the White House Travel Office matter.

By letter dated May 8, 1996, I advised you that, based on the circumstances described in that letter,

executive privilege may properly be asserted with respect to the entire set of White House Counsel's Office documents currently being withheld from the Committee, pending a final Presidential decision on the matter. This would be a protective assertion of executive privilege designed to ensure your ability to make a final decision, after consultation with the Attorney General, as to which specific documents are deserving of a conclusive claim of executive privilege.

Protective Assertion of Executive Privilege Regarding White House Counsel's Office Documents, 20 Op. O.L.C. 1, 1 (1996).

The Counsel to the President has now identified the specific White House Counsel's Office documents with respect to which he recommends that you assert executive privilege. The documents are identified on an index of privileged documents attached to his memorandum to you dated May 23, 1996. His memorandum to you of May 8, 1996 describes the efforts the White House has made to accommodate the Committee's information needs.

The Office of Legal Counsel of the Department of Justice has reviewed the documents for which assertion of executive privilege has been recommended and is satisfied that they fall within the scope of executive privilege. I concur in that assessment.

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The documents are in three categories. Most of the documents are analytical material or other attorney work-product prepared by the White House Counsel's Office in response to the ongoing investigation by the Committee. A second category consists of similar material prepared in connection with the ongoing criminal investigation by Independent Counsel Kenneth Starr. Finally, a small number of documents are analytical documents that do not concern either the Travel Office matter or these investigations, and which were prepared by the White House Counsel's Office in order to provide legal advice within the White House.

The Counsel to the President is appropriately concerned that the Committee's demand raises significant separation of powers concerns and that compliance with it beyond the accommodations already reached with the Committee would compromise the ability of his Office to advise and assist the President in connection with the pending Committee and Independent Counsel investigations. It would also have a chilling effect on the Office's discharge of its responsibilities in future congressional investigations, and in all of its other areas of responsibility. I agree that the ability of the White House Counsel's Office to serve the President would be significantly impaired if the confidentiality of its communications and work-product is not protected, especially where the confidential documents are prepared in order to assist the President and his staff in responding to an investigation by the entity seeking the documents. Impairing the ability of the Counsel's Office to perform its important functions for the President would in turn impair the ability of you and future Presidents to carry out your constitutional responsibilities.

The Supreme Court has expressly (and unanimously) recognized that the Constitution gives the President the power to protect the confidentiality of White House communications. This power is rooted in the "need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties." *United States v. Nixon*, 418 U.S. 683, 705 (1974). "A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *Id.* at 708. Executive privilege applies to these White House Counsel's Office documents because of their deliberative nature, and because they fall within the scope of the attorney-client privilege and the work-product doctrine, *see Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Hickman v. Taylor*, 329 U.S. 495 (1947). Both the attorney-client privilege and the work-product doctrine are subsumed under executive privilege. *See Response to Congressional Requests for Information Regarding Decisions made Under the Independent Counsel Act*, 10 Op. O.L.C. 68, 78 & n.17 (1986); *Confidentiality of the Attorney General's Communications in Counseling the President*, 6 Op. O.L.C. 481, 490 & n.17, 494 & n.24 (1982).

Under controlling case law, in order to justify a demand for confidential White House documents, a committee is required to demonstrate that the information

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sought is “demonstrably critical to the responsible fulfillment of the Committee’s functions.” *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). And those functions must be in furtherance of legitimate legislative responsibilities of Congress. See *McGrain v. Daugherty*, 273 U.S. 135, 160 (1927) (Congress has oversight authority “to enable it efficiently to exercise a legislative function belonging to it under the Constitution”); *Barenblatt v. United States*, 360 U.S. 109, 111 (1959) (“Congress may only investigate into those areas in which it may potentially legislate or appropriate”).

The confidential White House Counsel’s Office documents for which privilege would be asserted are not contemporaneous documents concerning the White House Travel Office matter being investigated by the Committee, or even documents generated as part of the White House review of that matter, but rather were created in connection with other matters or the response of the White House to subsequent investigations of the Travel Office and other matters by the Committee and the Independent Counsel. Whatever may be the extent of Congress’s authority to conduct oversight of the executive branch’s response to oversight—a question that must be viewed as unresolved as a matter of law in light of the requirement that there be a nexus to Congress’s legislative authority—it is clear that congressional needs for information in that context will weigh substantially less in the constitutional balancing than a specific need in connection with the consideration of legislation. As for documents concerning the White House response to an ongoing criminal investigation by an Independent Counsel, we can identify little, if any, legitimate legislative need for such information. In sum, based on the Office of Legal Counsel’s review of the documents for which assertion of executive privilege has been requested, and conducting the balancing required by the case law, see *Senate Select Committee*, 498 F.2d at 729–30; *United States v. Nixon*, 418 U.S. at 706–07, I do not believe that access to these documents would be held by the courts to be “demonstrably critical to the responsible fulfillment of the Committee’s functions.” *Senate Select Committee*, 498 F.2d at 731.

In conclusion, it is my legal judgment that executive privilege may properly be asserted in response to the Committee’s subpoenas.

Sincerely,

JANET RENO
Attorney General

Assertion of Executive Privilege With Respect To Clemency Decision

Executive privilege may properly be asserted in response to a congressional subpoena seeking documents and testimony concerning the deliberations in connection with President's decision to offer clemency to sixteen individuals.

Executive privilege may properly be asserted in response to a congressional subpoena seeking testimony by the Counsel to the President concerning the performance of official duties on the basis that the Counsel serves as an immediate adviser to the President and is therefore immune from compelled congressional testimony.

September 16, 1999

THE PRESIDENT

THE WHITE HOUSE

My Dear Mr. President: You have requested my legal advice as to whether executive privilege may properly be asserted in response to several subpoenas issued by the Committee on Government Reform and Oversight of the House of Representatives to the White House, the Department of Justice, and certain White House and Department officials seeking documents and testimony concerning your decision to offer clemency to sixteen individuals.

I.

The documents and testimony proposed to be subject to a claim of executive privilege consist of (1) advice and other deliberative communications to the President and (2) deliberative documents and communications generated within and between the Department of Justice and the White House in connection with the preparation of that advice. Documents falling into the former category consist of memoranda and other documents submitted to you by officials and components of the Department and offices within the White House concerning the clemency decision. The documents falling into the latter category include documents containing confidential advice, analysis, recommendations and statements of position that the Pardon Attorney generated in connection with the clemency review, or that other executive branch officials and employees submitted to the offices of the Pardon Attorney or the Deputy Attorney General in connection with that review. For the reasons set forth below, it is my legal judgment that executive privilege may properly be asserted with respect to the foregoing documents and with respect to testimony by Department and White House officials concerning the deliberations in connection with your clemency decision.

Advice to the President and other deliberative communications and materials fall within the scope of executive privilege. *See generally United States v. Nixon,*

418 U.S. 683, 705–13 (1974); *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 446–55 (1977). The Supreme Court has recognized

the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.

United States v. Nixon, 418 U.S. at 708. It is thus well established that not only does executive privilege apply to confidential communications to the President, but also to “communications between high Government officials and those who advise and assist them in the performance of their manifold duties.” *Id.* at 705.

The White House staff and the Department of Justice act as confidential advisors to the President as part of the clemency review process, and executive privilege has long been understood to protect confidential advice generated during that process. Under controlling case law, in order to justify a demand for information protected by executive privilege, a congressional committee is required to demonstrate that the information sought is “demonstrably critical to the responsible fulfillment of the Committee’s functions.” *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). And those functions must be in furtherance of legitimate legislative responsibilities of Congress. See *McGrain v. Daugherty*, 273 U.S. 135, 160 (1927) (Congress has oversight authority “to enable it efficiently to exercise a legislative function belonging to it under the Constitution”).

The Committee’s letter to the Department, dated September 10, 1999, which requested the designation of a witness for the Committee’s hearing, indicated that the hearing is entitled “Clemency for the FALN: A Flawed Decision?” and that the Committee is “specifically interested in hearing about information germane to the process of the . . . grant of executive clemency” regarding the sixteen individuals. A compelling argument can be made, however, that Congress has no authority whatsoever to review a President’s clemency decision. “Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government.” *Barenblatt v. United States*, 360 U.S. 109, 111–12 (1959). The granting of clemency pursuant to the pardon power is unquestionably an exclusive province of the executive branch. U.S. Const. art. II, § 2, cl. 1. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147

Assertion of Executive Privilege With Respect To Clemency Decision

(1871) (“To the executive alone is intrusted the power of pardon”); see also *Public Citizen v. Department of Justice*, 491 U.S. 440, 485 (1989) (Kennedy, J., concurring) (reaffirming that pardon power is “commit[ted] . . . to the exclusive control of the President”).

In exercising his clemency power, the President may seek to obtain the views of various advisors as he deems appropriate. Historically, he has sought the advice of the Department of Justice. In response to previous inquiries, the Department has repeatedly emphasized the exclusivity of the President’s pardon power. In a letter responding to a request for pardon papers by the Chairman of the House Committee on Claims in 1919, the Attorney General refused to provide Congress with the Attorney General’s report, observing:

[T]he President, in his action on pardon cases, is not subject to the control or supervision of anyone, nor is he accountable in any way to any branch of the government for his action, and to establish a precedent of submitting pardon papers to Congress, or to a Committee of Congress, does not seem to me to be a wise one.

Letter from A. Mitchell Palmer, Attorney General, to Hon. George W. Edmonds, Chairman, House Committee on Claims (Sept. 25, 1919). This position was reasserted by the Pardon Attorney in 1952 in response to an inquiry from Senator Styles Bridges concerning the publication of details of clemency cases. Noting that “the President’s exercise of the pardoning power is not subject to statutory regulation or control,” the Pardon Attorney explained that,

[i]n the exercise of the pardoning power, the President is amenable only to the dictates of his own conscience, unhampered and uncontrolled by any person or branch of Government. In my judgment it would be a serious mistake and highly detrimental to the public interest to permit Congress, or any Branch thereof, to encroach upon any prerogative, right or duty of the President conferred upon him by the Constitution, or to assume that he is in the slightest respect answerable to it for his action in pardon matters.

Letter from Daniel Lyons, Pardon Attorney, to Hon. Styles Bridges, U.S. Senator (Jan. 10, 1952) (citation and internal quotation marks omitted). The executive branch has on occasion provided Congress with information relating to particular clemency decisions, but to our knowledge it has done so only voluntarily and without conceding congressional authority to compel disclosure.

Accordingly, it appears that Congress’ oversight authority does not extend to the process employed in connection with a particular clemency decision, to the materials generated or the discussions that took place as part of that process, or to the advice or views the President received in connection with a clemency deci-

sion. In any event, even if the Committee has some oversight role, I do not believe its oversight needs would be viewed by the courts as outweighing the President's interest in the confidentiality of the deliberations relating to his exercise of this exclusive presidential prerogative. Conducting the balancing required by the case law, *see Senate Select Comm.*, 498 F.2d at 729-30; *United States v. Nixon*, 418 U.S. at 706-07, I do not believe that access to documents relating to or testimony about these deliberations would be held by the courts to be "demonstrably critical to the responsible fulfillment of the Committee's functions." *Senate Select Comm.*, 498 F.2d at 731. Indeed, this conclusion is confirmed by the fact that the Committee can satisfy any oversight need to investigate the impact of the clemency decision on law enforcement goals by obtaining information concerning the individuals offered clemency and any threat they might pose through non-privileged documents and testimony.

II.

The Counsel to the President is one of several individuals subpoenaed to provide testimony to the Committee. Much, but not necessarily all, of what the Counsel might be asked to testify about at the Committee's hearing would presumably fall within the scope of information that would be covered by your assertion of executive privilege over deliberations leading up to your clemency decision. However, there is a separate legal basis that would support a claim of executive privilege for the entirety of the Counsel's testimony, thereby eliminating any need for her to appear at the hearing. Executive privilege is assertable in response to a congressional subpoena seeking testimony by the Counsel to the President concerning the performance of official duties on the basis that the Counsel serves as an immediate adviser to the President and is therefore immune from compelled congressional testimony.

It is the longstanding position of the executive branch that "the President and his immediate advisers are absolutely immune from testimonial compulsion by a Congressional committee."¹ This position is constitutionally based. As Assistant Attorney General Theodore Olson observed in 1982:

The President is a separate branch of government. He may not compel congressmen to appear before him. As a matter of separation of powers, Congress may not compel him to appear before it. The President's close advisors are an extension of the President.²

¹ Memorandum from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re. Executive Privilege* at 5 (May 23, 1977)

² Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel at 2 (July 29, 1982) (discussing subpoena for testimony of the Counsel to the President). *See also* Memorandum from Roger C. Cramton, Assistant Attorney General, Office of Legal Counsel, *Re. Availability of Executive Privilege Where*

Assertion of Executive Privilege With Respect To Clemency Decision

Accordingly, "[n]ot only can the President invoke executive privilege to protect [his personal staff] from the necessity of answering questions posed by a congressional committee, but he can also direct them not even to appear before the committee."³

An often-quoted statement of this position is contained in a memorandum by then-Assistant Attorney General William Rehnquist:

The President and his immediate advisers—that is, those who customarily meet with the President on a regular or frequent basis—should be deemed absolutely immune from testimonial compulsion by a congressional committee. They not only may not be examined with respect to their official duties, but they may not even be compelled to appear before a congressional committee.⁴

It is our understanding that the Counsel to the President falls within Assistant Attorney General Rehnquist's description of the type of Presidential advisers who are immune from testimonial compulsion.

Given the close working relationship that the President must have with his immediate advisors as he discharges his constitutionally assigned duties, I believe that a court would recognize that the immunity such advisers enjoy from testimonial compulsion by a congressional committee is absolute and may not be overcome by competing congressional interests. For, in many respects, a senior advisor to the President functions as the President's alter ego, assisting him on a daily basis in the formulation of executive policy and resolution of matters affecting the military, foreign affairs, and national security and other aspects of his discharge of his constitutional responsibilities. Subjecting a senior presidential advisor to the congressional subpoena power would be akin to requiring the President himself to appear before Congress on matters relating to the performance of his constitutionally assigned executive functions. Because such a result would, in my view, violate the constitutionally mandated separation of powers principles, it would seem to follow that compelling one of the President's immediate advisers

Congressional Committee Seeks Testimony of Former White House Official on Advice Given President on Official Matters at 6 (Dec. 21, 1972) (since "[a]n immediate assistant to the President may be said to serve as his alter ego . . . the same considerations that were persuasive to former President Truman [when he declined to comply with a congressional subpoena for his testimony] would apply to justify a refusal to appear by . . . a former staff member"), Letter from Edward C. Schmults, Deputy Attorney General at 2 (Apr. 19, 1983) ("[O]ur concern regarding your desire for the sworn testimony of [the Counsel to the President] is based upon important principles relative to the powers, duties and prerogatives of the Presidency. We share with previous Presidents and their advisers serious reservations regarding the implications for established constitutional doctrines arising from the separation of powers of a Congressional demand for the sworn testimony of close presidential advisers on the White House staff").

³ Memorandum from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re Dual-purpose Presidential Advisers*, Appendix at 7 (Aug 11, 1977)

⁴ Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff"* at 7 (Feb 5, 1971)

Opinion of the Attorney General in Volume 23

to testify on a matter of executive decision-making would also raise serious constitutional problems, no matter what the assertion of congressional need.

At a minimum, however, I believe that, even if a court were to conclude that the immunity the Counsel to the President enjoys from testimonial compulsion by a congressional committee is subject to a balancing test, you may properly instruct the Counsel that she need not appear in response to the present congressional subpoena. In my view, a court would, at a minimum find that the constitutional interests underlying the immunity outweigh Congress' interest, if any, in obtaining information relating to the particular process followed, or the advice and other communications the President received, in connection with the President's exercise of his exclusive constitutional authority to grant clemency.

In conclusion, it is my legal judgment that executive privilege may properly be asserted with respect to the entirety of the testimony of the Counsel of the President, based on the immunity that position has with respect to compelled congressional testimony.

JANET RENO
Attorney General

OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

From: [redacted]
Sent: Mon, 29 Feb 2016 12:43:18 -0500
To: [redacted]
Cc: [redacted]
Subject: RE: Burisma

RELEASE IN
PART B6

CLEARED
WITH EUR

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Appreciate it. U/S Novelli's meeting is tomorrow afternoon – so would be great to get something today if at all possible.

From: [redacted]
Sent: Friday, February 26, 2016 5:58 PM
To: [redacted]
Cc: [redacted]
Subject: RE: Burisma

B6
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B6

Not yet. I will ask again. [redacted]

Declassified
by Donald K.
Holm, Senior
Reviewer,
October 9,
2019

B6

Sensitive
This email is UNCLASSIFIED.

From: [redacted]
Sent: Friday, February 26, 2016 3:07 PM
To: [redacted]
Cc: [redacted]
Subject: RE: Burisma

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B6

Patrick,

Checking in with you as to whether you have anything back from Post on this.

Thanks!

Best,

[redacted]

B6

From: [redacted]
Sent: Wednesday, February 24, 2016 5:18 PM
To: [redacted]
Cc: [redacted]
Subject: RE: Burisma

B6
B6
B6

[redacted] We will send it to Post overnight. My goal is to have an answer for you by Friday morning our time. In the meantime, please let me know if you have any questions or need further information.

B6

Cheers, [redacted]

B6

Sensitive
This email is UNCLASSIFIED.

From: [redacted]
Sent: Wednesday, February 24, 2016 5:09 PM
To: [redacted]
Cc: [redacted]
Subject: RE: Burisma

B6

B6

B6

Appreciate it – just to flag, the meeting is on Tuesday, March 1 at 4pm.

From: [redacted]
Sent: Wednesday, February 24, 2016 5:07 PM
To: [redacted]
Cc: [redacted]
Subject: RE: Burisma

B6

B6

B6

Thanks [redacted] Give me a day or say and we'll check with Post. Cheers, [redacted]

B6

Sensitive
This email is UNCLASSIFIED.

From: [redacted]
Sent: Wednesday, February 24, 2016 5:03 PM
To: [redacted]
Cc: [redacted]
Subject: Burisma

B6

B6

B6

~~(C)~~ Per our conversation, Karen Tramontano of Blue Star Strategies requested a meeting to discuss with U/S Novelli USG remarks alleging Burisma (Ukrainian energy company) of corruption. She noted that two high profile U.S. citizens are affiliated with the company (including Hunter Biden as a board member). Tramontano would like to talk with U/S Novelli about getting a better understanding of how the U.S. came to the determination that the company is corrupt. According to Tramontano, there is no evidence of corruption, has been no hearing or process, and evidence to the contrary has not been considered. Would appreciate any background you may be able to provide on this issue and suggested TPs for U/S Novelli's meeting.

Thanks!

Best regards,

[Redacted]

Special Assistant

Office of the Under Secretary for Economic Growth, Energy, and the Environment

Office: 202-647-4092

Cell: [Redacted]

Email: [Redacted]

B6

B6

B6



Attorney John Buretta: In the case of Burisma and Zlochevskiy I met with Prosecutor General Yury Lutsenko

1 February 2017

In mid-January, Burisma Group announced that all cases against its president, Nikolay Zlochevskiy, and Burisma companies were fully closed. The former Minister Nikolay Zlochevskiy is one of the few public officials from the previous government who voluntarily subjected himself to the investigation in Ukraine. After reviewing the evidence in London and Kiev, the criminal proceedings against Mr. Zlochevskiy were dismissed. In the Ukrainian media, opinions about the need for presenting the public report and reviewing the decision have been voiced multiple times. An American lawyer and former U.S. Deputy Assistant Attorney General, John Buretta, was one of the key attorneys on Mr. Zlochevskiy's defense team. In an exclusive interview, John Buretta talks about how the defense strategy was developed in Ukraine, whether all cases are closed, and if legal proceedings can be renewed.

Why were the cases against Nikolay Zlochevskiy in Ukraine closed? And, what is the relevance of the 2015 decision by the UK criminal court?

The U.K. Central Criminal Court held a formal hearing during December 3-5, 2014, and considered voluminous evidence presented by the U.K. Serious Fraud Office (SFO) and by Mr. Zlochevskiy. The evidence included thousands of pages of material produced by Ukrainian authorities at the request of the SFO, relevant documents produced by financial institutions, and affidavits and a large volume of documents produced on behalf of Mr. Zlochevskiy. In January 2015, the U.K. Central Criminal Court, in a lengthy written decision, concluded that there was no reasonable cause to believe that Mr. Zlochevskiy's assets were unlawfully acquired



a result of misconduct while he served in public office. In addition, the U.K. court found that the SFO materially and significantly failed to disclose relevant documents favorable to Mr. Zlochevskiy.

In August 2014, the Office of the Prosecutor General (PGO) opened a criminal proceeding as to the same matters adjudicated by the U.K. Central Criminal Court. With regard to the PGO's investigation, Mr. Zlochevskiy produced voluminous materials addressing the allegations, as he had before the U.K. Central Criminal Court. Over the two years the PGO matter was open, no evidence was presented supporting any claim that Mr. Zlochevskiy had abused his position while in public office. In September 2016, the Pechersk District Court of the City of Kyiv concluded that no criminal procedures should be taken against Mr. Zlochevskiy. In other words, the Pechersk District Court reached the same conclusion as the U.K. Central Criminal Court.

Recently, Burisma paid a large amount in "back taxes". Some have questions whether the payment of UAH 180 million was a payoff for the case to be closed.

The matter of Burisma's tax obligations pertains to Burisma. In regard to the Burisma tax matter, **Burisma agreed to cooperate fully with the PGO, accept an unscheduled documentary tax inspection, assist in a pre-trial investigation, and provide all necessary documents, materials and information. The tax obligations that were assessed** were the result of an audit that the PGO conducted of Burisma, which the PGO carried out jointly with other government agencies, including the State Fiscal Service of Ukraine and independent experts.

Did you meet Yuriy Lutsenko personally?

I met with numerous PGO personnel, including Prosecutor General Lutsenko. I conveyed that Mr. Zlochevskiy had provided voluminous evidence to the PGO with respect to his assets, that a U.K. court had also analyzed a large volume of evidence and found no reasonable basis to conclude that there had been any wrongdoing, expressed Mr. Zlochevskiy's willingness to cooperate with Ukrainian authorities and noted that the PGO had presented no evidence of wrongdoing by Mr. Zlochevskiy. I took the same approach on this matter that I would take on a similar matter before any law enforcement authority or court.



When and how did you meet Nikolay Zlochevskyi? Who did invite you to join Burisma's legal team?

I was retained by Burisma and agreed to the assignment after thoroughly examining the history of Burisma and Mr. Zlochevskyi and on the recommendation of other highly-regarded U.S. advisers. I met with Mr. Zlochevskyi, Burisma's management and legal team, and Burisma's distinguished Board of Directors.

You used to hold the position of the U.S. Deputy Assistant Attorney General. Why did you decide to manage Ukrainian cases? Do you have work experience with similar individuals and/or companies?

I have extensive experience with assessing allegations of corruption, both from the government side while serving in the Department of Justice, and from the private side. I have served as an expert witness in proceedings outside the U.S. in such matters and have handled a broad range of matters for companies and individuals involving various countries. Regardless of the country, it is important that prosecutors follow the law and the evidence. When the law and evidence dictates the result, as it did before the U.K. Central Criminal Court and the Pechersk District Court, the rule of law flourishes.

Will Nikolay Zlochevskyi return to Ukraine, and when?

This question should be addressed directly to Mr. Zlochevskyi. From a legal point of view, today there are no restrictions for his travel both within the country and abroad. All cases against Mr. Zlochevskyi have been closed in Ukraine.

**UKRAINIAN
NEWS**

UN

Energy security for the future
#EnergySecurityUkraine



info@burisma.com

UNCLASSIFIED U.S. Department of State Case No. F-2018-01904 Doc No. C06744972 Date: 05/16/2019

From: Chris Heinz <[REDACTED]>
Sent: Tuesday, May 13, 2014 5:54 PM
To: Summers, Matt <SummersMR@state.gov>; Wade, David E. <WadeDE@state.gov>
Subject: Ukraine

RELEASE IN PART B6

B6

Apparently Devon and Hunter both joined the board of Burisma and a press release went out today. I cant to speak why they decided to, but there was no investment by our firm in their company.

UNCLASSIFIED U.S. Department of State Case No. F-2018-01904 Doc No. C06744972 Date: 05/16/2019

2014 WL 298661 (D.D.C.) (Trial Motion, Memorandum and Affidavit)
United States District Court, District of Columbia.

COMMITTEE ON OVERSIGHT AND GOVERNMENT
REFORM, United States House of Representatives, Plaintiff,

v.

Eric H. HOLDER, Jr., in his official capacity as Attorney General of the United States, Defendant.

No. 1:12-cv-1332 (ABJ).
January 21, 2014.

**Memorandum in Support of Defendant's Motion for Summary Judgment
and in Opposition to Plaintiff's Motion for Summary Judgment**

Stuart F. Delery, Assistant Attorney General, Kathleen R. Hartnett, Deputy Assistant Attorney General, Joseph H. Hunt, Director, Federal Programs Branch, John R. Tyler, Assistant Branch Director, Eric R. Womack, (IL Bar No. 6279517), Gregory Dworkowitz, (NY Bar Registration No. 4796041), Luke M. Jones, (VA Bar No. 75053), Trial Attorneys, U.S. Department of Justice, Civil Division, Federal Programs Branch, Washington, D.C. 20001, Tel: (202) 514-4020, Fax: (202) 616-8470.

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INTRODUCTION

The core issue presented by this lawsuit is whether the President may validly assert Executive Privilege “in response to a Congressional subpoena for the particular set of records involved” in this case, “which do not implicate advice to the President.” Mem. Op. (ECF No. 52) at 36. The answer to that question is “yes.” The Committee’s contrary position would give Congress unfettered access to all Executive information other than presidential communications, in contravention of both the constitutional separation of powers and well over two centuries of dealings between the Legislative and Executive Branches.

Congress has an unquestioned ability to obtain information from the Executive Branch and other sources in aid of its legislative function. But the President also has constitutional responsibilities, including the duty under the Constitution to “take Care that the Laws be faithfully executed” -- a responsibility for which candid deliberations and independent decisionmaking by Executive Branch officials are critical. The need for an Executive sphere of confidentiality is particularly strong in the present context, which involves a congressional demand for information that would reveal the process by which the Executive responds to congressional inquiries. The absence of confidentiality in these circumstances would impair Executive officials’ ability to perform their constitutional functions, which include responding independently and effectively to requests for information and participating in the negotiation and accommodation process that is an integral part of the constitutional framework and separation of powers. *United States v. AT&T Co. (“AT&T II”)*, 567 F.2d 121, 130 (D.C. Cir. 1977).

Unlike cases arising in the context of civil or criminal litigation, this case presents a direct conflict between the political Branches: Congress claims that it should have absolute access to all Executive information other than presidential communications, notwithstanding the President’s assertion of Executive Privilege. If Congress were to assume absolute power to control the ability of the Executive to maintain privileges or otherwise establish appropriate limits on Executive disclosures, it would necessarily take that power at the expense of the Executive, its co-equal Branch. See THE FEDERALIST NO. 51 (James Madison). The separation of powers would be directly impacted, and forever disrupted, if the Committee were to gain unfettered access to Executive documents despite an assertion of Executive Privilege by the President himself. Such documents

could reveal, for example, the deliberative process of Executive Branch officials, the Executive's work product in responding to Congress, open law enforcement investigations, or matters concerning national security and foreign relations. No court has ever held Executive Privilege to be so limited, or the power of Congress to extend so far.

What preserves the separation and balance of powers under the Constitution, including in the context of Congress seeking information from the Executive Branch, is that neither Branch has absolute power in the negotiation and accommodation process. Rather, consistent with precedent and history, a President is constitutionally entitled to assert a qualified Executive Privilege in response to a congressional demand for information about the Executive Branch's response to a congressional request for information. That framework reserves to the Legislature the ability to demand information in furtherance of its legislative function, while providing the Executive with the corresponding ability to resist congressional requests on those infrequent occasions when the President determines it necessary to protect the Executive's function.

The Department takes seriously its responsibility to respond to congressional requests for information, and has satisfied the Committee's inquiries regarding the underlying law enforcement operations at issue in this particular matter -- the original basis for the Committee's investigation. It also has addressed the flawed law enforcement activities that were at issue. The Attorney General referred the matter to the Department's Inspector General, who issued a voluminous report that the Committee Chair described as "comprehensive" and "independent." The Department also has acknowledged and addressed the inaccurate information in the February 4, 2011 letter, and the IG report did not conclude that there was an intent to obstruct. And, in an extraordinary accommodation, the Department has provided the Committee with over 1,300 pages of internal documents regarding how the erroneous February 4, 2011 letter came to be drafted. The Department thus has recognized and addressed the problems associated with both the underlying law enforcement operations and that response to Congress.

What the President determined should be protected by his assertion of Executive Privilege in this case are the Department's internal records related to its response to Congress -- essentially its "work file" on how it responds to this ongoing inquiry -- generated *after* the drafting of the February 4 letter. These documents were properly the subject of an Executive Privilege claim for two related reasons: first, the Executive Branch's deliberative process with respect to its engagement with Congress is a core part of the constitutional scheme, and one that requires Executive Branch independence and confidentiality; and, second, the adversarial investigatory context presented by this case requires a sphere of Executive confidentiality for its congressional response "work product," in order to preserve the negotiation and accommodation process with Congress and safeguard the separation of powers. Because the President validly invoked Executive Privilege over the documents at issue, judgment should be entered for Defendant.¹

FACTUAL BACKGROUND

The Department dedicated significant resources to responding to the dozens of inquiries it received from Congress as part of its broad and evolving investigation into Operation Fast and Furious. *See* Letter from Deputy Attorney General Cole to Chairman Issa 3 (May 15, 2012) ("Cole May 15 Letter") (attached to Def's Mot. for Summ. J. as Ex. A). The Department professionals who were tasked with this responsibility endeavored to provide responsive, accurate information to Congress in a timely manner. *See* Burton Decl. (attached to Def's Mot. for Summ. J.) ¶¶ 3, 8, 14, 21-23; Letter from Deputy Attorney General Cole to Chairman Issa 1 (Nov. 16, 2011) (attached to Def's Mot. for Summ. J. as Ex. B). When the Department had concerns about the nature and scope of various aspects of the congressional requests, it took steps quickly to make its concerns known to Congress, and to seek compromise solutions that would enable Congress to meet its investigative goals while simultaneously protecting important institutional interests of the Executive Branch. *See* Burton Decl. ¶¶ 4, 11-12, 14-18, 21; *see also, e.g.* Letter from Assistant Attorney General Weich to Chairman Issa 1-2 ("Weich Apr. 8 Letter") (attached to Def.'s Mot. for Summ. J. as Ex. C); Letter from Assistant Attorney General Weich to Chairman Issa 1-2 (Oct. 11, 2011) ("Weich Oct. 11 Letter") (ECF No. 61-17). The Department ultimately produced thousands of pages of documents to Congress, a large number of written letter responses, and numerous witnesses both for interviews with Committee staff and to testify at hearings. *See* Cole May 15 Letter at 3-5. Far from supporting the Committee's allegations of "obstruction," the record shows that the Department responded to

the congressional investigation into Operation Fast and Furious in a serious and detailed manner. *See* Burton Decl. ¶¶ 8, 22-23; Cole May 15 Letter at 3-5.

The Committee has since indicated that it was able to complete to its satisfaction its investigation concerning ATF's Fast and Furious law enforcement operation -- the basis for the Committee's investigation in the first place. Pl.'s Mem. at 18 n.26. With respect to the inaccurate information in a letter sent to Congress on February 4, 2011, the Department has provided the Committee with comprehensive information and documents about how that letter was drafted. *See* Letter from Deputy Attorney General Cole to Chairman Issa ("Cole Dec. 2 Letter") (ECF No. 17-2). As those documents make clear, and consistent with the conclusions of the Report of the Inspector General (IG) for the Department of Justice, *see* U.S. Dep't of Justice, Office of the Inspector Gen., A Review of ATF's Operation Fast and Furious and Related Matters at 395-414 (2012) ("IG Report"), available at <http://www.justice.gov/oig/reports/2012/s1209.pdf>, the inclusion of inaccurate information in the February 4 letter was unintentional. And the IG report, which the Department publicly released along with over 300 pages of documents referred to by that report, *see* Burton Decl. ¶ 22, does not conclude that the Department intended to obstruct or thwart the investigation.

A. The Inception of Congressional Oversight and the February 4, 2011 Letter

Congressional inquiries related to Operation Fast and Furious began on January 27, 2011, when Senator Grassley sent a letter to ATF seeking information about allegations by ATF whistleblowers regarding the use of inappropriate law enforcement tactics. *See* Letter from Senator Grassley to ATF Acting Director Melson (Jan. 27, 2011) (ECF No. 61-2).² Four days later, Senator Grassley again wrote to ATF, outlining his concern that such whistleblowers were not getting appropriate treatment within the Department. *See* Letter from Senator Grassley to ATF Acting Director Melson (Jan. 31, 2011) (ECF No. 61-3).

When the Department receives requests from Congress, it typically identifies the components within the Department that would have substantive information about the subject matter, and then works with those components to prepare a response. *See* Burton Decl. ¶ 3. That is precisely what the Department did upon receipt of Senator Grassley's January 2011 letters, resulting in the Department's initial February 4, 2011 response to Congress regarding this matter. *See* IG Report at 329-60.

It is undisputed that the February 4 letter contained inaccurate information about the tactics used in Operation Fast and Furious; that inaccurate information has been acknowledged by the Department and ultimately was the basis for the Department's formal withdrawal of the February 4 letter on December 2, 2011. *See* Cole Dec. 2 Letter. That formal withdrawal occurred after the Department's extensive effort to get to the bottom of the matter. *See* Burton Decl. ¶¶ 19-21. On February 28, 2011, the Attorney General asked the Department's Acting Inspector General to review the issues that had arisen regarding Fast and Furious. *See* Cole May 15 Letter at 10. On several occasions during the spring and summer of 2011, Department officials made public statements reflecting their increasing concern about Fast and Furious. *See id.* at 10-11. In October 2011, the Attorney General acknowledged the "fundamentally flawed" nature of the tactics employed in Operation Fast and Furious. *See* Letter from Attorney General Holder to Chairman Issa, *et al.*, 2 (Oct. 7, 2011) (ECF No. 13-3). And on December 2, 2011, the Department provided the Committee with a written explanation of what had occurred, along with more than 1,300 pages documenting how the February 4 letter had been drafted. *See* Cole Dec. 2 Letter; *see also* Burton Decl. ¶¶ 19-21; IG Report at 389-90; Letter from Deputy Attorney General Cole to Chairman Issa 1 (June 19, 2012) ("Cole June 19 Letter") (ECF No. 13-6).

The Report of the IG's independent and thorough investigation was consistent with what the December 2011 letter and the documents related to the drafting of the February 4 letter had conveyed to Congress: that the inaccurate information in the February 4 letter was simply a product of a flawed fact-gathering and drafting process. *See* IG Report at 395-414. Although critical of the Department, the IG Report also did not conclude that there was an intent to obstruct by the Department during the time period between the February 4 letter and the December 2, 2011 formal withdrawal, including with respect to the Department's May 2, 2011 letter, or the timing of its December 2, 2011 formal withdrawal of the February 4 letter. *See id.* at 414-17. Chairman Issa praised the IG report as "extremely comprehensive, strong and independent." *Hearing Before the H. Comm. on Oversight and Gov't Reform*, 112th Cong. (2012) (ECF No. 13-8 at 1) (statement of Chairman Issa).

B. The Department's Efforts to Accommodate the Committee's Legitimate Oversight Needs

It was not until after the exchange of letters between the Department and Senator Grassley in January and February 2011 that the House Committee formally began its investigation into Operation Fast and Furious. The Committee sent its first letter on the matter to the Department on March 16, 2011, *see* Letter from Chairman Issa to ATF Acting Director Melson (Mar. 16, 2011) (ECF No. 61-5), and issued its first subpoena, addressed to Acting ATF Director Kenneth Melson, on March 31, 2011.

The Melson subpoena sought documents regarding the genesis of Operation Fast and Furious and related operations, the authorization of and concerns about so-called “gunwalking,” whether the shooting of United States Customs and Border Protection Agent Brian Terry was related to “gunwalking,” and communications with a cooperating gun dealer. *See* Comm. on Oversight & Gov't Reform, Subpoena (Mar. 31, 2011) (ECF No. 61-6). The Department quickly initiated communication with the Committee regarding the subpoena, including discussion of significant confidentiality concerns raised by the subpoena, which sought a large amount of information about ongoing criminal investigations and other sensitive law enforcement matters. *See* Letter from Assistant Attorney General Weich to Chairman Issa 1 (Apr. 1, 2011) (attached to Def's Mot. for Summ. J. as Ex. E); Weich Apr. 8 Letter at 1-2. The Department ultimately produced or made available *in camera*, over six months, 3,245 pages of material in response to this subpoena. *See* Weich Oct. 11 Letter at 1. In so doing, the Department made an extraordinary exception to its longstanding policy regarding the confidentiality of records relating to pending law enforcement matters. *See id.* at 1-2; Burton Decl. ¶¶ 4-5, 14-15.

On October 11, 2011, the Committee issued a second subpoena, directed to the Attorney General. The October subpoena, portions of which are the subject of this suit, contained twenty-two broad requests for documents and reflected a shift in the focus of the Committee's investigation to include the Department's response to Congress. *See* Comm. on Oversight & Gov't Reform, Subpoena at 2-5 (Oct. 11, 2011) (ECF No. 61-18). The October subpoena sought, among many other things, all communications regarding Operation Fast and Furious to or from 16 senior Department officials, *see id.* at 2 (¶ 1); documents relating to “any instances prior to February 4, 2011” where ATF failed to interdict weapons, *see id.* at 2-3 (¶¶ 4-5); and all Reports of Investigation (“ROIs”), *see id.* at 3 (¶ 8). *See also* Letter from Chairman Issa to Attorney General Holder 1-2, 5 (Oct. 9, 2011) (ECF No. 13-2).

Shortly after the Department received the subpoena, it engaged in extensive telephone discussions with Committee staff regarding the Department's response. *See* Burton Decl. ¶¶ 11-12. The Department made clear during those discussions, as it did both before and after, that the Committee's inquiries implicated sensitive institutional interests of the Executive Branch. *See id.* ¶¶ 4, 11-12, 21; Weich Oct. 11 Letter at 2 (letter sent before receipt of October subpoena); Cole Dec. 2 Letter at 1; Cole May 15 Letter at 5-8. Nevertheless, the Department proceeded with a good-faith response consistent with those interests over the ensuing months, *see* Burton Decl. ¶¶ 8, 14-23, ultimately providing the Committee with more than 5,000 pages of documents responsive to the October subpoena, *see* Cole May 15 Letter at 4.

C. The Focus of the Committee's Demands in Advance of the Contempt Proceedings

Although the October 11, 2011 subpoena contained twenty-two separate and broad requests for documents, as well as a demand for a privilege log, that broad universe was not the material at issue as the Committee moved toward a contempt vote in June 2012. Rather -- consistent with the negotiation and accommodation process that has long governed the Executive Branch's response to congressional inquiries -- the Department and the Committee had negotiated about the response to the subpoena since its issuance, and by June 2012, the Committee had expressly taken a number of topics off the table. Thus, what remained in dispute as the date for a contempt vote neared was a narrower category of documents concerning one aspect of the Committee's investigation: the Department's alleged “obstruction.”

Specifically, on May 3, 2012, Chairman Issa explained that only three questions remained in the Committee's investigation: (1) “How did the Justice Department finally come to the conclusion that Operation Fast and Furious was ‘fundamentally flawed’?”; (2) “What senior officials at the Department of Justice were told about or approved the controversial gunwalking tactics that

were at the core of the operation's strategy?"; and (3) "How did inter-agency cooperation in a nationally designated Strike Force fail so miserably in Operation Fast and Furious?" Mem. from Chairman Issa to Members of the Comm. on Oversight and Gov't Reform 7-10 (May 3, 2012) ("Issa May 3 Mem."), available at <http://oversight.house.gov/wp-content/uploads/2012/05/Update-on-Fast-and-Furious-with-attachment-FINAL.pdf> Chairman Issa referred to these as the "three categories of documents necessary for Congress to complete its investigation." Letter from Chairman Issa to Attorney General Holder 1 (June 13, 2012) ("Issa June 13 Letter") (attached to Def.'s Mot. for Summ. J. as Ex. F).

After further discussions, House Leadership indicated that the Committee's demands had been narrowed further. In a May 18, 2012 letter to the Attorney General, House Leadership stated that only "two key questions" remain unanswered: "first, who on [the Attorney General's] leadership team was informed of the reckless tactics used in Fast & Furious prior to Agent Terry's murder; and, second, did your leadership team mislead or misinform Congress in response to a Congressional subpoena?" Letter from John Boehner, *et al.*, to Attorney General Holder 1 (May 18, 2012) ("Boehner May 18 Letter") (attached to Def.'s Mot. for Summ. J. as Ex. G).

More talks ensued, and soon the Committee agreed to "effectively eliminate [] the dispute over information gathered during the criminal investigation of Operation Fast and Furious, prior to the announcement of indictments." Issa June 13 Letter at 1. It did so because it recognized and wanted "to alleviate the Department's concerns about preserving the integrity of the ongoing prosecutions." H.R. REP. No. 112-546, at 38-39 (2012). As of June 13, 2012, then, the Committee had narrowed its demands to include only "documents from after February 4, 2011, related to the Department's response to Congress and whistleblower allegations." Issa June 13 Letter at 1. The Committee made clear that these documents concerning the Department's response to Congress were the only documents "the Justice Department needed to produce to avoid contempt." *Id.*

The next day, the Attorney General proposed an accommodation to "fully address the remaining concerns identified" by House leadership. Letter from Attorney General Holder to Chairman Issa 2 (June 14, 2012) (ECF No. 13-4). Specifically, the Department proposed to provide the Committee with "a briefing, based on documents that the Committee could retain, explaining how the Department's understanding of the facts of Fast and Furious evolved during the post-February 4 period, and the process that led to the withdrawal of the February 4 letter." *Id.*

On June 19, 2012, the eve of the Committee's scheduled contempt vote, the Attorney General personally met with Chairman Issa and others and reiterated his offer of a briefing and a production of documents in an effort to reach an accommodation and avoid a contempt vote. Cole June 19 Letter at 1. His offer was rejected. *See id.*

D. The Assertion of Executive Privilege and the Contempt Vote

Despite the Department's willingness to continue to try to reach an accommodation, it became clear that the Committee was intent on proceeding with the contempt vote it had scheduled for the following morning. *See id.* at 1-2. On June 19, the Attorney General sent a letter to the President in which he recommended that the President assert Executive Privilege. *See* Letter from Attorney General Holder to the President (June 19, 2012) ("Holder June 19 Letter") (attached to Def.'s Mot. for Summ. J. as Ex. H). Specifically, the Attorney General requested that the President assert Executive Privilege over documents post-dating February 4, 2011, that were responsive to the October subpoena and were "created ... in the course of the Department's deliberative process concerning how to respond to congressional and related media inquiries" about Operation Fast and Furious. *Id.* As the Attorney General explained, consistent with the longstanding position of the Executive Branch, compelled release of such documents "would have significant, damaging consequences" by "inhibit[ing] the candor of such Executive Branch deliberations in the future and significantly impair[ing] the Executive Branch's ability to respond independently and effectively to congressional oversight." *Id.* at 2. In response to the Attorney General's request, the President asserted Executive Privilege, and the Department so informed the Committee on the morning of June 20, 2012. *See* Letter from Deputy Attorney General Cole to Chairman Issa 1 (June 20, 2012) (ECF No. 17-3).

Notwithstanding the assertion of Executive Privilege, the Committee that day voted 23-17 to hold the Attorney General in contempt. Thereafter, on June 22, 2012, the Committee issued its contempt report to the full House, in which it expressly described the narrowing of its demands that had occurred during the preceding weeks. *See* H.R. REP. No. 112-546, at 38-40. The Committee made clear that it recommended contempt based only on the Attorney General's purported "fail[ure] to turn over lawfully subpoenaed documents explaining the Department's role in withdrawing the false letter it sent to Congress." *Id.* at 40.

On June 28, 2012, the House voted, 255-67, to hold the Attorney General in contempt.

E. Department Reforms Addressing Operation Fast and Furious

At the same time that the Department was working to accommodate the congressional investigation in 2011 and 2012, it was also taking steps to address the issues implicated by Operation Fast and Furious. As discussed above, the Attorney General referred the matter to the Department's IG in February 2011, and in September 2012, the IG produced an exhaustive report concerning both the underlying operations and the Department's response to congressional inquiries about the operations. When the IG released its report to Congress and the public, the Department provided Congress with over 300 pages of documents referred to in the report.

However, even before the IG completed his investigation and report, in light of what had come to light about Fast and Furious and related operations, the Department instituted a number of reforms. For example, the Attorney General instructed the Deputy Attorney General to "issue a directive to the field making clear" that the inappropriate tactics employed in Operation Fast and Furious "should not be used again." Cole May 15 Letter at 1. In November 2011, ATF issued a memorandum clarifying its firearms transfer policy. *See* Letter from Deputy Attorney General Cole to Chairman Issa *et al.* 2-3 (Jan. 27, 2012) (attached to Def.'s Mot. for Summ. J. as Ex. I). In the same month, ATF revised its policies governing the use of confidential informants, and strengthened oversight over undercover operations. *See id.* at 3-4.

Also prior to the completion of the IG investigation, the Department took steps to address the manner in which its components handle congressional requests for information. Specifically, the Deputy Attorney General in January 2012 issued a memorandum requiring components to, among other things, assign to senior managers the ultimate responsibility for fact-checking and vetting responses to Congress; solicit information from employees with detailed personal knowledge of the relevant issues; and consult relevant records if available. *See id.* at 7-8. The Department also took personnel action with respect to officials who were involved in the Operation and the congressional response. *See* Statement by Attorney General Holder (Sept. 19, 2012), available at <http://www.justice.gov/opa/pr/2012/September/12-ag-1134.html>.

ARGUMENT

I. The Long-Recognized Executive Privilege Under the Constitution Is Founded Upon the Separation of Powers and Ensures the Independent Functioning of the Executive Branch

The historical analysis that permeates the Committee's brief is one-sided, incomplete, and unsupported by the caselaw, resulting in a cramped and novel notion of the constitutionally based Executive Privilege. Defendant does not dispute that, flowing from its constitutional authority to legislate, Congress may gather information and conduct investigations as necessary to further legitimate legislative ends, including through investigations into the activities of the Executive Branch. *See* Pl.'s Mem. at 5-10. However, missing from the Committee's analysis is the equally vital role that the Executive Branch plays in our constitutional system, and the resulting consequences for congressional demands for information. As courts have long recognized, the Executive Branch's role in enforcing the law requires that some materials remain confidential so that the Executive's proper functioning under the Constitution is preserved and protected. In select cases, the President preserves this fundamental constitutional balance by asserting Executive Privilege, a constitutionally-based privilege that is "a necessary corollary of the executive function vested in the President by Article II of the Constitution." Congressional Requests for

Confidential Executive Branch Info., 13 Op. O.L.C. 153, 154 (1989); *see also United States v. Nixon*, 418 U.S. 683, 712-13 (1974).

“[N]umerous Presidents from the earliest days of our nation” have asserted Executive Privilege to protect certain confidential Executive Branch information. 13 Op. O.L.C. at 154. As early as 1792, President Washington, in response to a congressional inquiry into a campaign by General St. Clair, expressed the position that records could be withheld from Congress in the public interest. *See Nixon v. Sirica*, 487 F.2d 700, 733-34 (D.C. Cir. 1973) (per curiam) (MacKinnon, J., concurring in part and dissenting in part). In a separate matter just two years later, President Washington responded to a Senate request by withholding “those particulars which, in [his] judgment, for public considerations, ought not to be communicated.” History of Refusals by Executive Branch Officials to Provide Info. Demanded by Congress: Part I -- Presidential Invocations of Exec. Privilege Vis-A-Vis Congress, 6 Op. O.L.C. 751, 753 (1982).

Consistent with historical practice from President Washington forward, administrations have long based their withholding of certain information from Congress on the ground that disclosure would interfere with the constitutional functioning of the Executive Branch. Such withholdings include:

- President Jackson's refusal in 1837 to comply with a Senate investigation into the “integrity and efficiency of the executive departments,” explaining that he would “repel all such attempts as an invasion of the principles of justice, as well as of the Constitution” *Sirica*, 487 F.2d at 734 (MacKinnon, J., concurring in part and dissenting in part).
- President Tyler's refusal in 1843 to provide to the House certain information regarding an Executive investigation into allegations of fraud against the Cherokee Nation, explaining that “it is well settled, and the doctrine has been fully recognized in this country, that ... the head of a department cannot be compelled to produce any papers, or to disclose any transactions relating to the executive functions of the Government which he declares are confidential, or such as the public interest requires should not be divulged” John Tyler, Special Message (January 31, 1843), *available at* <http://www.presidency.ucsb.edu/ws/?pid=67367>.
- President Cleveland's “confrontation” with Congress over a request for the papers and reasons related to the dismissals of numerous officeholders by the incoming administration, in which President Cleveland asserted that the Senate was assuming “the right ... to sit in judgment upon the exercise of my exclusive discretion and Executive function, for which I am solely responsible to the people.” *Sirica*, 487 F.2d at 735 (MacKinnon, J., concurring in part and dissenting in part).
- President Theodore Roosevelt's instruction, in 1909, that the Attorney General refuse to state reasons for his nonaction with respect to a merger involving the United States Steel Corporation. *Id.* at 735-36.
- President Eisenhower's restriction in 1954 on the testimony of Executive Branch officials or the production of documents related to the Army-McCarthy hearings. He explained that “it is essential to efficient and effective administration that employees of the Executive Branch be in a position to be completely candid in advising with each other on official matters” in order “to maintain the proper separation of powers between the Executive and Legislative Branches.” Dwight D. Eisenhower, Letter to the Secretary of Defense Directing Him To Withhold Certain Information from the Senate Committee on Government Operations (May 17, 1954), *available at* <http://www.presidency.ucsb.edu/ws/?pid=9890>.

“In each of these instances,” and numerous others not listed, “the Congress sought information from the President or the executive branch in order to enable it to legislate upon subjects within its constitutional power, and in each instance the request was refused by the President, who determined that to furnish the information would be an unconstitutional intrusion into the functioning of the executive branch and contrary to the public interest.” *Sirica*, 487 F.2d at 737 (MacKinnon, J., concurring in part and dissenting in part). Indeed, through political history leading up to Watergate, “[w]hen made, the Executive assertion of privilege ha[d] always prevailed.” *Id.* at 778 (Wilkey, J., dissenting).

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Watergate, though posing a unique set of challenges, led to the reaffirmation of these same principles: the congressional inquiries into Watergate-related activities were clearly legitimate, but the courts nonetheless recognized the importance of Executive Branch confidentiality where disclosure would interfere with the functioning of the Executive Branch. Thus, in the era following Watergate and the rulings in the *Nixon* line of cases, *see infra*, presidential administrations of both parties have continued the longstanding practice of safeguarding Executive interests vital to the separation of powers, including in situations where such safeguarding counsels against disclosure to Congress. Indeed, in the last four decades, Executive Privilege has been asserted over varying types of information, including congressional demands for:

- Presidential communications, *see, e.g.*, Assertion of Exec. Privilege Concerning the Special Counsel's Interviews of the Vice President and Senior White House Staff, 2008 WL 5458939 (U.S.A.G. July 15, 2008);
- Deliberations of Executive officials, including lower-level officials engaged in execution of the laws of the United States, *see id.*; Assertion of Exec. Privilege over Commc'ns Regarding EPA's Ozone Air Quality Standards & Cal.'s Greenhouse Gas Waiver Request, 2008 WL 5506397, *2 (U.S.A.G. June 19, 2008); The President, 43 Op. Att'y Gen. 327, 329-30 (1981);
- Records concerning the Executive's response to congressional investigations and related media inquiries, *see* Assertion of Exec. Privilege Concerning the Dismissal and Replacement of U.S. Attorneys, 2007 WL 5038036, *1 (U.S.A.G. June 27, 2007); Assertion of Exec. Privilege Regarding White House Counsel's Office Docs., 1996 WL 34386607 (U.S.A.G. May 23, 1996);
- Information relating to law enforcement efforts by the Executive Branch (including clemency determinations and open law enforcement investigations), *see, e.g.*, 2008 WL 5458939; Letter for the President from John Ashcroft, Attorney General, Re: Assertion of Executive Privilege with Respect to Prosecutorial Documents at 2, 25 O.L.C. 1 (Dec. 10, 2001), *available at* <http://www.justice.gov/olc/2001/executive-privilege-2001-12-10.pdf>; Assertion of Exec. Privilege with Respect to Clemency Decision, 1999 WL 33490208 (U.S.A.G. Sept. 16, 1999); Assertion of Exec. Privilege in Response to Congressional Demands for Law Enforcement Files, 6 Op. O.L.C. 31 (1982); and
- Information concerning national security and foreign affairs, *see, e.g.*, 13 Op. O.L.C. at 154; 43 Op. Att'y Gen. 327; *see also United States v. AT&T Co.* ("*AT&T I*"), 551 F.2d 384, 387-88, 392 (D.C. Cir. 1976).

These disputes varied in subject matter, but the Executive Privilege assertions were all based on the same fundamental proposition: that disclosure of confidential Executive Branch information to Congress would interfere with the functioning of the Executive Branch and would therefore be contrary to the public interest. *See, e.g., Sirica*, 487 F.2d at 737 (MacKinnon, J., concurring in part and dissenting in part).

The longstanding concern about congressional intrusion into the Executive's independent functioning has been recognized by past administrations as particularly acute when a committee of Congress demands Executive Branch records generated in the course of responding to a congressional investigation and related media inquiries. In 1996, for example, Attorney General Janet Reno explained that Executive Privilege applies to documents prepared in response to an ongoing congressional investigation. *See* 1996 WL 34386607. Attorney General Reno noted that "it is clear that congressional needs for information in that context will weigh substantially less in the constitutional balancing than a specific need in connection with the consideration of legislation." *Id.* at *2. In 2007, Acting Attorney General Paul Clement explained in connection with "possible responses to congressional and media inquiries about the dismissal[]" of United States Attorneys, *see* 2007 WL 5038036 at *1, that compelled disclosure of such material to Congress would "significantly impair []" the ability of the Executive Branch to respond to congressional inquiries. *See id.* (quoting Attorney General Reno).

In short, an assertion of Executive Privilege is not -- as the Committee's account claims -- a sign that the Executive is trying to "obstruct" or "thwart" the Committee's investigation. Rather, the Executive Privilege invocation at issue in this case is part of an established history of Executive Privilege invocations deemed necessary by the President, over a range of confidential materials,

during disputes of the sort that have existed for more than two centuries between the Executive and Legislative Branches, where -- as here -- compelled disclosure of information would interfere with the Executive's constitutional function.

**II. Executive Privilege Is Not Limited to Presidential Communications,
and Was Validly Asserted by the President in This Matter**

The Committee's core legal argument is that Executive Privilege exists as a constitutional matter only to protect presidential communications, *see* Pl.'s Mem. at 19-20, that recognition by Congress of any other privilege assertion is a matter of grace, and that the privilege is abrogated whenever Congress demands information, *see id.* at 32-33.³ The Committee's cramped conception of Executive Privilege, if accepted, would fundamentally interfere with the functioning of the Executive Branch and upend the essential separation and balance of power between the Branches. Whatever the specific basis for a President's assertion of Executive Privilege in response to a congressional subpoena -- be it the need to protect the confidentiality of presidential communications or Executive deliberations; to protect law enforcement operations, foreign affairs, or national security; to protect the process by which the Executive responds to a congressional subpoena; or a combination of such interests -- the President's assertion of Executive Privilege in response to a congressional demand is consistently grounded in the "executive function vested in the President by Article II of the Constitution."⁴ Holder June 19 Letter at 2; *see also Nixon*, 418 U.S. at 711 (describing the interest in "confidentiality" relating to the effective discharge of President's powers as "constitutionally based"); *Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 541 (D.C. Cir. 1977) (recognizing that a claim of Executive Privilege concerning "diplomatic or military secrets" or "intra-governmental documents reflecting policy deliberations" "may have constitutional underpinnings"); *Soucie v. David*, 448 F.2d 1067, 1072 n.9 (D.C. Cir. 1971) ("The doctrine of executive privilege is to some degree inherent in the constitutional requirement of separation of powers.").

A ruling to the contrary would place the Executive Branch at the mercy of Congress in a context in which the ability of each political Branch to negotiate with the other, and the corresponding benefit to the constitutional design, is directly at stake. The Committee ignores this context, and the implications for the separation of powers, by labeling the assertion of Executive Privilege here as nothing more than an attempted assertion of the common law "deliberative process" privilege. In so doing, the Committee conflates the President's assertion of the constitutionally-based Executive Privilege with the justifications for its assertion in a particular case. There is only one Executive Privilege, grounded in the Constitution, with at least two underlying justifications in this context.

First, the Executive Branch's deliberative process with respect to its engagement with Congress is a core part of the constitutional scheme, and one that requires Executive Branch independence and confidentiality. In the specific context of congressional investigation, the process of preparing the Executive Branch's response to a request for information is inherently deliberative, and necessarily entails consideration of how to balance Congress' desire for information against the constitutional prerogatives of the Executive Branch. "Compelled disclosure of such material, regardless of whether a given document contains deliberative content, would raise 'significant separation of powers concerns,' by 'significantly impair[ing]' the Executive Branch's ability to respond independently and effectively to matters under congressional review." Holder June 19 Letter at 3; *see also, e.g.*, 2007 WL 5038036 at *1.

Second, when Congress subpoenas records from the Executive Branch, the often adversarial investigatory context in which such records are sought mirrors the litigation context, in which parties are assured confidentiality in the material that they generate and assemble in anticipation of litigation. Just as confidentiality over attorney work product is necessary to preserve the integrity of the Judicial or administrative process, *see Hickman v. Taylor*, 329 U.S. 510 (1947), confidentiality over the materials related to the Executive's response to Congress -- its congressional response work product -- is necessary to preserve the integrity of the negotiation and accommodation process and the separation of powers. *See* Holder June 19 Letter at 4.

Executive Privilege is a qualified privilege that may be overcome by an appropriate showing of sufficient need. Thus, Executive Privilege preserves, rather than disrupts, the separation of powers and the process of negotiation and accommodation. Were

Congress to have absolute discretion whether to accept a claim of Executive Privilege beyond presidential communications -- the position that the Committee takes here -- the negotiation and accommodation process would become entirely one-sided, disrupting the separation and balance of powers and enabling Congress to insert itself at will into the internal affairs of a co-equal Branch. See *AT&T II*, 567 F.2d at 129, 130.

A. The Assertion of Executive Privilege Here Was Properly Based on the Need to Protect Documents Created in the Course of the Executive's Deliberative Process of Responding to a Congressional Investigation and Related Media Inquiries

In the litigation context, there has been a “longstanding judicial recognition of Executive privilege” over Executive deliberative process, where courts have “responded to Executive pleas to protect from the light of litigation ‘intra-governmental documents reflecting ... deliberations comprising part of a process by which governmental decisions and policies are formulated,’ ” in order to protect “the candor of Executive aides and functionaries.” *Sirica*, 487 F.2d at 713 (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966)); see also *Cheney v. U.S. Dist. Ct. for Dist. of Columbia*, 542 U.S. 367, 385 (2004) (“[S]pecial considerations control when the Executive Branch’s interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated.”); *Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8-9 (2001) (internal citations and quotation marks omitted) (noting that the “object” of the common law deliberative process privilege is to “enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government”).

For most of this Nation’s history, the question whether deliberative process -- or any other justification -- could support a constitutionally-based Executive Privilege assertion against another Branch was not the subject of judicial decision. Rather, where the issue arose -- in connection with congressional requests for information from the Executive -- it was a political matter for resolution between the Branches. It took Watergate to prompt the Supreme Court’s seminal decision on the constitutional dimension of Executive Privilege, *Nixon*, 418 U.S. 683, where the information was sought through a formal request pursuant to established judicial process in a pending criminal case. In *Nixon*, the Supreme Court recognized the constitutional basis for one aspect of Executive Privilege -- the presidential communications component -- in the context of President Nixon’s response to a criminal subpoena. See *id.* Contrary to the Committee’s argument, however, *Nixon* did not limit the constitutionally-based Executive Privilege to the context of presidential communications; that was simply the aspect of Executive Privilege before the Court in *Nixon*. See *AT&T I*, 551 F.2d at 392 (referring to the presidential communications component of Executive Privilege as “another executive privilege”). Notably, the Court’s explanation of the constitutional foundation of Executive Privilege in *Nixon* was based on the same principles of effective Executive functioning and separation of powers that have historically animated assertions of Executive Privilege over other types of information -- such as the documents concerning the Executive’s response to Congress at issue in this case.

In *Nixon*, the Court emphasized the “valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties,” noting that “the importance of this confidentiality is too plain to require further discussion”:

Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process. Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties.

418 U.S. at 705; see *Ass'n of Am. Physicians and Surgeons Inc. v. Clinton*, 997 F.2d 898, 909 (D.C. Cir. 1993) (“The ability to discuss matters confidentially is surely an important condition to the exercise of executive power.”); *Sirica*, 487 F.2d at 713 (“[T]he candor of Executive aides and functionaries would be impaired if they were persistently worried that their advice and deliberations were later to be made public.”).

The Court in *Nixon* then proceeded to evaluate these general principles about the need for Executive confidentiality as they related to the particular type of records sought in that case -- presidential communications -- and explained that “[t]he privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.” 418 U.S. at 708. Although the Court noted that there is no “explicit reference to a privilege of confidentiality” in the Constitution, the Court nevertheless recognized that the privilege “is constitutionally based” to the extent there is an interest that “relates to the effective discharge of a President’s powers.” *Id.* at 711.

The concerns expressed in *Nixon* about the confidentiality of Executive deliberations, rooted in the separation of powers, have equal application in the present case, where the President has asserted Executive Privilege to protect confidential Executive Branch information that was generated in response to a congressional subpoena, placing the separation of powers between the political Branches -- and the independence of those Branches -- at the heart of the dispute.⁵ “[D]isclosure to Congress could ... deter the candor of future Executive Branch deliberations, because officials at all levels would know that they could someday be called by Congress to account for the tentative policy judgments which they had earlier advanced in the councils of the Executive Branch.” 43 Op. Atty Gen. at 330. And unlike criminal prosecutions implicating Executive Branch documents, “congressional requests for executive branch deliberative information are anything but infrequent,” 13 Op. O.L.C. at 156, and they often sweep quite broadly. See also *In re Sealed Case*, 121 F.3d 729, 753 (D.C. Cir. 1997) (recognizing that the unique “constitutional considerations” in the “congressional-executive context” render limitations on Executive Privilege in the Judicial context inapposite); *Senate Select*, 498 F.2d at 732 (“[L]egislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events.... In contrast, the responsibility of the grand jury turns entirely on its ability to determine whether there is probable cause to believe that certain named individuals did or did not commit specific crimes.”).⁶

Moreover, when these concerns give rise to a presidential assertion of the constitutional Executive Privilege against Congress (as opposed to an agency invocation of the common-law privilege against individuals under FOIA or in civil litigation), that assertion does not merely implicate a generalized need for confidentiality, but relates directly to the Executive’s independence from the other political Branch and its relationship with Congress in a process of negotiation and accommodation that is itself derived from the Constitution. See *AT&T I*, 551 F.2d at 394; see also *AT&T II*, 567 F.2d at 127.

Indeed, the assumption of power contemplated by the Committee in this case (*i.e.*, the unfettered power to peer into and abrogate all confidentiality of Executive Branch deliberations about how the Executive Branch will respond to the Committee itself) is directly contrary to the separation of powers, which protects against the aggregation of powers in any particular Branch of government by “giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.” THE FEDERALIST NO. 51 (James Madison); see also *Mistretta v. United States*, 488 U.S. 361, 382 (1989) (“[W]e have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch.”).

The threat to the proper functioning of the Executive Branch and the separation of powers that would be posed by unfettered congressional access to Executive deliberations about the process by which it communicates with a coordinate Branch of government is demonstrated by the types of documents at issue here. Such documents include deliberations by officials (including senior Department officials) about how to accommodate the asserted congressional interest in the investigation while at the same time safeguarding Executive Branch prerogatives. Among other things, the documents reveal: the thought processes behind decisions about providing witnesses or documents; discussions about how to develop media strategies in response to the investigation; and even negotiations with Members of Congress about means of resolving nomination holds

placed on individuals in connection with the Department's response. *See* Colborn Decl. (attached to Def's Mot. for Summ. J.) ¶¶ 18-26. Even purely "factual" information in such documents, such as records of meetings involving particular individuals or time stamps showing when an email was received and read, when taken together, can reveal information about how and when decisions in the Department were made.⁷ *See id.* ¶ 25.

Under the Committee's view, however, the Executive Branch must engage in the constitutionally-rooted process of negotiation and accommodation with Congress without any protection of confidentiality whatsoever for the Executive's deliberations about how to respond (short of communications involving the President or his senior advisors). Such an unprecedentedly narrow view of Executive Privilege would not only chill Executive deliberations (decreasing the openness and quality of those deliberations), but also would provide Congress overwhelming leverage in any investigation or request for information. The ability of the Executive Branch to negotiate effectively would be impaired, knowing that Congress would be privy to all of the Executive's internal deliberations and negotiation strategies, particularly when Congress would presumably claim absolute confidentiality over its own internal deliberative process. Indeed, there would be no reason for Congress to negotiate at all, and the accommodation process would be drastically undermined. If the Committee's cramped vision of Executive Privilege were the law, then the "constructive *modus vivendi*" characterizing the process governing congressional requests for information, which "positively promotes the functioning of our [constitutional] system," would be reduced to a demand by Congress and unthinking acquiescence by the Executive Branch. *AT&T II*, 567 F.2d at 130.

B. The Assertion of Executive Privilege Here was Properly Based on the Executive's Protection of the Process for Responding to a Congressional Subpoena

Not only is the assertion of Executive Privilege grounded in the need to preserve the functioning of the Executive Branch by protecting the confidentiality of the Executive's deliberative process, but it is further supported by the particular context of those deliberations: the Executive's response to an ongoing congressional investigation. In that context, in which the danger of congressional encroachment on the Executive sphere is particularly acute, Executive Privilege plays an important role in maintaining the independence of the Executive Branch and the proper balance of power between the Branches.

The attorney work product doctrine provides an apt analogy for understanding the importance of the constitutional interests at stake. Ordinarily, the work of an attorney engaged in litigation, including the potential defense of a client in response to a subpoena, is entitled to confidentiality pursuant to the attorney work product privilege, which applies to work performed "in anticipation of litigation." FED. R. CIV. P. 26(b)(3)(A); *see also In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998).

At its core, the attorney work product doctrine recognizes that confidentiality is necessary to allow for an attorney's independent functioning, which is critical for discharging the attorney's obligations and ensuring the integrity of the Judicial process. In recognizing this privilege, the Supreme Court explained that "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). Indeed, "[w]ere such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own." *Id.* The result for the legal process would be "demoralizing," and "the interests of the clients and the cause of justice would be poorly served," as "[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice."⁸ *Id.*; *see also Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980) ("The purpose of the privilege ... is not to protect any interest of the attorney ... but to protect the adversary trial process itself."). Consequently, the attorney work product privilege applies broadly to protect documents prepared in anticipation of litigation, regardless of whether the documents are factual or deliberative in nature. *See, e.g., Judicial Watch, Inc. v. Dep't of Justice*, 432 F.3d 366, 371 (D.C. Cir. 2005).

For analogous reasons, disclosure to Congress of the documents at issue here would interfere with the Executive Branch's ability to perform its constitutional functions, including, but not limited to, engaging with Congress regarding its requests for information. Like attorneys engaged in litigation or an administrative process, attorneys and other agency professionals

responsible for responding to congressional requests within the Executive Branch consult with one another on the specifics of that response, including deciding how best to accommodate the congressional interest without sacrificing important Executive interests. Such consultation may include advice from the Office of Legal Counsel on these issues. *See* Colborn Decl. ¶¶ 2, 4-8. Executive Privilege serves to protect against the harm that disclosure of such material would have on the negotiation and accommodation process and on the independence of the Executive Branch as it engages with a coordinate Branch that would insist on the confidentiality of its own internal deliberations and work product.

Like litigation, the investigation of the Executive Branch by Congress often is an adversarial process, because the potential for disagreement is inherent and the prospect of a need for active engagement very real. *See* 13 Op. O.L.C. at 157 (“Finally, when Congress is investigating, it is by its own account often in an adversarial position to the executive branch and initiating action to override judgments made by the executive branch.”); *see also In re Rail Freight Fuel Surcharge Anti-Trust Litigation*, 268 F.R.D. 114, 117 (D.D.C. 2010) (noting that the crux of whether work product attaches is the adversarial nature of the proceeding). Accordingly, it is vital that (as in the Judicial process) each of the opposing sides be able to operate assured that it will not be required to disclose its confidential preparations to the other side. Otherwise, each side’s critical independence and freedom from intrusion would be undermined by the ability to “probe each other’s thoughts and plans.” *Hickman*, 329 U.S. at 511; *Coastal States Gas*, 617 F.2d at 864. Such a negative impact would be magnified were only *one side* to the process able to probe and access the other side’s thoughts and plans.

As the D.C. Circuit has recognized, “[n]egotiation between the two branches should ... be viewed as a dynamic process affirmatively furthering the constitutional scheme.” *AT&T*, 567 F.2d at 130. That process would be undercut if Congress were, as the Committee envisions, given license to employ a two-step strategy in which it demanded information from the Executive Branch about a matter, and then subsequently requested all documents prepared by the Executive Branch in the course of responding to the previous demand for information. A congressional right of access to the Executive’s congressional response work product would enable Congress to intimidate or exert coercive influence over the Executive in a context where the Executive’s independence is essential, weakening the dynamic accommodation process and thus harming both the separation of powers and the constitutional system that it supports.

C. The Documents Covered by the President’s Assertion of Executive Privilege Were Properly Withheld

As the Colborn Declaration details, the President’s June 2012 claim of Executive Privilege covered documents dated after February 4, 2011 that were responsive to the October 2011 subpoena and were created in the course of the Department’s deliberative process concerning the Department’s response to congressional and related media inquiries. *See* Colborn Decl. ¶¶ 13, 19; Holder June 19 Letter at 1-2. Accordingly, among the privileged materials are a variety of documents, including ones relating to “the receipt, dissemination, and analysis of congressional inquiries; the drafting of letters, testimony, and other statements to Congress; strategic deliberations on how to engage with Congress; the Department’s internal review to discover the facts regarding the events that were the subject of the congressional inquiries; the logistics of the response effort, including document review efforts; and the Department’s response to media coverage arising from the Congressional inquiries.” Colborn Decl. ¶ 19.

The general categories of documents to which the assertion of privilege applies include:

- Documents reflecting “the receipt, dissemination, and analysis of Congressional inquiries,” ranging from the transmission of congressional requests to substantive discussions regarding the content of the congressional requests and how the Department might appropriately act in response. *Id.* ¶ 20.
- Documents concerning the preparation, review, and revising of letters to Congress, witness testimony, and responses to Questions for the Record. *See id.* ¶ 21.
- Documents implicating the Department’s engagement approach regarding the Committee’s various demands for information—that is, how the Department decided to communicate information to Congress and the media, what offers of accommodation

to make, and how to weigh various priorities, such as management of internal resources, preservation of Executive Branch institutional interests, and political considerations. *See id.* ¶ 22.

- Documents generated in the course of the Department's internal review to discover the facts concerning the subject matter of the Committee's inquiries. *See id.*
- Documents reflecting the logistics of the Department's response, including materials reflecting the process by which the Department assembled personnel to engage in the document collection, review, and production effort, as well as documents reflecting the process of arranging for Department personnel to be made available to Congress for testimony, briefings or interviews. *See id.* ¶ 23.
- Documents relating to the Department's response to media coverage arising from the Congressional inquiries. *See id.* ¶ 24.

Such documents are at the heart of the Department's response to a congressional investigation and the related media inquiries, revealing the Department's decisionmaking process throughout the entire investigation.

The assertion of Executive Privilege also encompasses factual material connected with the deliberations about responding to Congress, *see* Holder June 19 Letter at 3, including documents showing meeting times or the time and date that emails were received and read, as well as documents aggregating relevant news articles for agency decisionmakers, *see* Colborn Decl. ¶ 25. Although such documents do not reflect the core deliberations of Department employees (and presumably are not the documents that the Committee is focused on in its investigation and this suit), turning over such documents on demand would still have a chilling effect on Executive employees in responding to congressional requests because, taken together, they reveal various facets of the Department's actions taken in responding to Congress, such as which employees were involved in various meetings and the date and time that decisionmakers met to discuss aspects of the congressional response.

Also subject to the assertion of Executive Privilege are Department documents that were not specifically prepared in the course of responding to congressional or related media inquiries, but were prepared to address issues that arose as a result of the Committee's investigation.⁹ Such documents may indirectly reveal aspects of the Department's approach for responding to that investigation, such that producing these documents would vitiate the confidentiality interest that the privilege assertion was intended to protect. *See id.* ¶ 26.

For the reasons set forth above, *see supra* Sections II.A-B, such documents are properly protected by the President's Executive Privilege assertion, notwithstanding that they do not involve presidential communications.

III. LIMITATIONS ON COMMON-LAW AND STATUTORY PRIVILEGES ARE INAPPLICABLE TO THE EXECUTIVE PRIVILEGE ASSERTION HERE

The Committee spends the majority of its summary judgment brief rebutting a straw man, arguing that the common law (or statutory) deliberative process privilege could not be asserted, or was asserted improperly, by the Executive in the present context. *See* Pl.'s Mem. at 19-44. However, this case is not about the common law deliberative process privilege. It is about the constitutionally-based Executive Privilege, which here is grounded in the Executive's need to protect information about its internal deliberative processes in responding to congressional inquiries.¹⁰ Thus, the Committee's various arguments about rules applicable to common-law and statutory privileges are inapplicable to this dispute.

A. The Committee's Reliance on Rules Applicable to Common Law and Statutory Privileges Is Mispliced

As Chief Justice Marshall admonished in 1807, if the President were to "subject[]" information to "certain restrictions, and state[]" that in his judgment the public interest required certain parts of it to be kept secret," then "all proper respect would [be]

paid to" that decision. *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.Va. 1807) (Marshall, C.J.). The Committee's notion -- that the President's invocation of Executive Privilege should be treated no differently than that of an ordinary individual or litigant -- would render this principle a nullity. Rather, when the President is asserting Executive Privilege against the co-equal political Branch of Government, common law and statutory rules must yield to fundamental separation of powers principles.¹¹ See Statement of Antonin Scalia, Assistant Attorney General, Hrg. on S. 2170, The Congressional Right to Information Act, at 110 (Oct. 23, 1975) ("The Constitutional basis of Executive privilege means that the President may exercise it without Congressional leave and in spite of Congressional disapproval."); see also *In re Sealed Case*, 121 F.3d at 753.

Certainly the House has important investigative authority in aid of its legislative function. But that does not mean that Congress has the power to treat the Executive's constitutionally-based invocation of Executive Privilege as nothing more than a common law or statutory privilege that can be overridden by unilaterally-imposed congressional exceptions. As courts have recognized, the separation of powers is preserved not by subjecting an assertion of Executive Privilege to common law or statutory standards, but by giving a presidential assertion of Executive Privilege the "proper respect" that it is due, which is to recognize the Executive Privilege, but also to recognize that it is qualified. See *Senate Select*, 498 F.2d at 731.

B. The President Did Not Waive His Ability to Assert Executive Privilege

In the Committee's view, the President's assertion of Executive Privilege is invalid because the Executive did not, in the span of fourteen days, complete its search for all documents, conclude negotiations with the Committee, produce every responsive page, analyze every privilege that could be asserted, assert all applicable privileges, and submit a privilege log. See, e.g., Pl.'s Mem. at 33-34. The Committee does not cite a case to support that remarkable, novel and erroneous proposition that would imperil the accommodations process.¹²

As the Supreme Court has recognized, "[e]xecutive privilege is an extraordinary assertion of power 'not to be lightly invoked.'" *Cheney*, 542 U.S. at 389 (quoting *United States v. Reynolds*, 345 U.S. 1, 7 (1953)). "Once executive privilege is asserted, coequal branches of the Government are set on a collision course." *Id.* Accordingly, the Court has opposed the requirement that Executive Privilege must be asserted before alternative avenues have been explored, as "[t]hese 'occasion[s] for constitutional confrontation between the two branches' should be avoided whenever possible." *Id.* at 389-90 (quoting *Nixon*, 418 U.S. at 692).

The Committee's claim that a mandatory and premature assertion deadline (*i.e.*, the subpoena return date unilaterally established by the Committee) is required to protect the negotiation and accommodation process is nonsensical. See Pl.'s Mem. at 35-36. The accommodation process would be short-circuited, not enhanced, by such an abbreviated period for resolving all issues. See Colborn Decl. ¶ 7. As a matter of longstanding practice, as in this case, the Executive Branch generally negotiates with Congress past the subpoena return date -- largely in an effort to work toward an agreement that accommodates congressional needs, thereby avoiding the constitutional conflict entailed in a presidential assertion of Executive Privilege. See *id.* It was the Committee's scheduling of a contempt vote -- not the timing of the privilege assertion -- that short-circuited the accommodation and negotiation process.¹³

Moreover, the Committee's argument ignores the fact that the accommodation process in this case involved discussions about the sensitivity of the very documents at issue well before the privilege was asserted and the contempt vote was held. See, e.g., Weich Oct. 11 Letter at 2; Burton Decl. ¶¶ 11-12.

C. The Committee's Allegation of Wrongdoing Does Not Override the Executive Privilege Assertion

Drawing on common law and statutory standards, the Committee claims that the assertion of Executive Privilege should be invalidated "because the Committee is investigating DOJ misconduct." Pl.'s Mem. at 21-25. This contention is wrong as a matter of historical practice and judicial precedent. Indeed, were a constitutionally-based assertion of Executive Privilege invalidated by a congressional claim of "misconduct," then numerous Presidents throughout history, including Washington,

Jackson, Roosevelt, and Eisenhower, would have invalidly resisted legislative demands for information related to claimed "misconduct" by the Executive.

In the context of Executive Privilege, the D.C. Circuit already has decided that, contrary to the Committee's argument, a claim of "misconduct" does not invalidate an assertion of Executive Privilege. In *Senate Select*, the Senate Committee sought documents and tape recordings from the President to resolve conflicts in testimony "relating to 'the extent of malfeasance in the executive branch,'" and argued that such an interest "alone must defeat any presumption of privilege that might otherwise prevail." 498 F.2d at 731. Rejecting that argument, the D.C. Circuit explained that "the showing required to overcome the presumption favoring confidentiality turned, not on the nature of the presidential conduct that the subpoenaed material might reveal, but, instead, on the nature and appropriateness of the function in the performance of which the material was sought, and the degree to which the material was necessary to its fulfillment." *Id.*; *see also id.* ("On the contrary, we think the sufficiency of the Committee's showing must depend solely on whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions."). Thus, even in the context of Watergate, with a pending impeachment proceeding, the D.C. Circuit made clear that a claim of "wrongdoing" was not dispositive of a claim of Executive Privilege.

No other holding would suffice to preserve the separation of powers. Congressional investigations rely, as a matter of course, on allegations of wrongdoing: "Congress cannot control the officers of the executive without disgracing them. Its only whip is investigation, semi-judicial examination into corners suspected to be dirty." WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 278 (1885), available at <http://www.gutenberg.org/files/35861/35861-h/35861-h.htm>. Thus, if the Committee's proposed standard applied in the context of constitutionally-based Executive Privilege assertions by the President in response to congressional demands for information, there would be few, if any, instances in which Executive Privilege would apply.¹⁴

In the present context, for example, the purported "wrongdoing" -- the basis for the Committee's "obstruction" investigation -- was inaccurate information provided by the Department in a February 4, 2011 letter to Congress and the amount of time that followed before withdrawing the letter. But the Department indicated to Congress on several occasions after submitting that letter that it had doubts about the information contained therein, and, after conducting its own review, ultimately withdrew the letter and provided the Committee with more than 1,300 pages of internal documents detailing the preparation of that letter. In addition, the Attorney General referred the matter to the Department's Inspector General, who issued a voluminous report detailing, *inter alia*, the Department's response to Congress between February 4 and December 2, 2011, without concluding that there was an intent to deceive or obstruct. *See* IG Report at 395-417. The Department also produced over 300 pages of documents referred to by that report, *see* Burton Decl. ¶ 22, further confirming the lack of an intent to obstruct.

Thus, the alleged "wrongdoing" -- if any -- represented by the February 4 letter has already been fully investigated by the Committee. And to the extent the Committee seeks to investigate the reasons for why the Department did not formally withdraw the February 4 letter prior to December 2011 -- in the face of an IG report lauded by the Committee Chairman that covered events during that time period -- the Committee has not established that such information is "demonstrably critical" to the "responsible fulfillment" of an "appropriate" congressional function. *Senate Select*, 498 F.2d at 731. To the contrary, the Committee's continued demands amount to a fishing expedition in an investigation that has long since run its course.

The President invoked Executive Privilege to preserve important confidentiality interests, the preservation of which are vital to the separation of powers, not to "hide" evidence of wrongdoing. To the extent the Committee now asks this Court to reject those interests in light of the Committee's assertion of need for the documents, the Committee asks this Court to engage in the same balancing of interests that it previously made clear would be inappropriate. *See infra*.

**D. This Court Should Reject the Committee's Attempt to Expand the Scope
of the Relief It Seeks Following Denial of Defendant's Motion to Dismiss**

The Committee's Motion for Summary Judgment concludes by arguing that, even assuming the conceptual validity of the President's assertion of Executive Privilege in this case, the assertion is invalid because the privilege has not been applied on a document-by-document basis, and that the "privilege must give way where, as here, 'the public's interest in effective government would be furthered by disclosure.'" Pl.'s Mem. at 44; *see also id.* at 36-44. Thus, the Committee now asks this Court to engage in a document-by-document privilege analysis, as well as the very weighing of the interests of the Legislative and Executive Branches that the Court deemed unnecessary in denying Defendant's motion to dismiss. The Committee's attempt to expand the scope of its requested relief should be rejected.

In its Amended Complaint, the Committee indicated that "[t]he principal legal issue presented here is whether the Attorney General may withhold that limited subset [of documents] on the basis of 'Executive privilege' where ... the Department's actions do not involve core constitutional functions of the President." Am. Compl. (ECF No. 35) at 3. Thus, the Committee sought only a declaration that the privilege asserted by the President "may not validly be asserted," that the Attorney General's objection to production of the documents on the basis of the President's assertion of Executive Privilege is "rejected," that the Attorney General's failure to produce is "without legal justification," and an "order [that] the Attorney General forthwith ... produce" the documents at issue. *Id.* ¶ 76; *see id.* at 41-42.

Moreover, in response to the assertion in the Defendant's Motion to Dismiss that "[a] court would have to weigh the relative interests of the political Branches and decide which interest prevails, either by elevating one over the other on a categorical basis or by enmeshing the court in the minutiae of the dispute between the Branches," Def's Mot. to Dismiss (ECF No. 13-1) at 43, the Committee again emphasized that the issue presented by its lawsuit was narrow. Indeed, the Committee asserted that the issue presented was "quintessentially legal" -- "whether the Attorney General may withhold this responsive subset [of documents] that reflect no advice to or communications with [the President]." Pl.'s Opp. to Def's Mot. to Dismiss (ECF No. 17) at 3.

In light of these representations by the Committee, this Court denied the Motion to Dismiss, explaining that "Count I [of the Amended Complaint] simply asks whether the privilege that was asserted ... -- the executive privilege -- may be validly asserted by the Attorney General in response to a Congressional subpoena for the particular set of records involved." Mem. Op. at 36. Indeed, the Court expressly rejected Defendant's assertion that the Committee "now asks this Court to enter the fray and decide whether the Committee's remaining interest ... outweighs the Executive's interest in protecting its internal deliberations regarding how to interact with a coordinate Branch of government." *Id.* at 27 n.7. Rather, the Court held that the issue presented by the Committee was "a narrow legal question," *i.e.* whether the Executive may properly assert the privilege at issue. *Id.*; *see also id.* at 40-41 (rejecting the applicability of "*AT&T I*" because "the case did not involve a purely legal question about the availability of the privilege").

The Committee now ignores its own Amended Complaint and the Court's ruling on the Department's motion to dismiss, asking the Court to do exactly what Defendant warned this case would involve: a weighing of the respective institutional interests of the political Branches. In light of the Court's ruling on Defendant's Motion to Dismiss, and the Committee's own framing of its Amended Complaint, the Committee should not now be permitted to transform its claim into one calling for a document-by-document balancing analysis.

In contrast, guided by this Court's motion-to-dismiss ruling and the Committee's claims in the Amended Complaint, Defendant moves for summary judgment on the "legal question" of the validity of the President's assertion of Executive Privilege -- *i.e.*, whether the Privilege can be maintained over documents generated in the course of the Department's response to congressional and related media inquiries involving Operation Fast and Furious, which "do not implicate advice to the President." Mem. Op. at 36. A more detailed description of the documents that have been withheld pursuant to that Privilege assertion, numbering roughly 15,000 (a figure that accounts for, among other things, duplicate documents based on multiple custodians, multiple emails that together comprise larger email chains, and attachments), *see Colborn Decl.* ¶ 19, is unnecessary to answer that legal issue concerning the scope of the qualified Executive Privilege and is unwarranted here, never mind unrequested by the Amended Complaint.¹⁵ And the evaluation of the competing interests of the Branches in these materials would draw the Court -- impermissibly and unwisely -- into an inherently political dispute, as the Department earlier emphasized.

To the extent the Court deems it relevant, however, the Department strongly disputes that the Committee has shown the level of need required to overcome the President's assertion of Executive Privilege. *See Senate Select*, 498 F.2d at 731. If the Court allows the Committee to refashion its Amended Complaint to add the question of whether the Committee has shown a sufficient need to overcome Executive Privilege, Defendant respectfully requests the opportunity to submit supplemental briefing on that question.

**IV. ALTHOUGH NO RELIEF IS WARRANTED, THE COURT SHOULD IN NO
EVENT GRANT ANY RELIEF BEYOND THE MATERIAL SOUGHT BY THE
COMMITTEE AT THE TIME THE HOUSE AUTHORIZED THE LAWSUIT**

As explained above, in the weeks leading up to the House votes for contempt and to authorize this suit, the Committee and House Leadership, through a series of letters, “narrow[ed] the scope of documents the Department needed to provide in order to avoid contempt proceedings.” H.R. REP. No. 112-546, at 4, 38 (2012); *see also, e.g.*, Am. Compl. ¶ 46(ii); Issa May 3 Mem.; Boehner May 18 Letter; Issa June 13 Letter. Many of the documents the Committee had previously been seeking during the negotiation and accommodation process were determined by the Committee to be “outside the scope of the narrowed request,” and production of others, particularly materials relating to law enforcement efforts, could be deferred “to alleviate the Department's concerns about preserving the integrity of the ongoing prosecutions.” H.R. REP. No. 112-546, at 38-39. Because these materials had been taken off the table, the President was not asked to, and did not, assert Executive Privilege over them.

The Committee instead reported to the House that it was recommending contempt only for the Attorney General's purported “fail[ure] to turn over lawfully subpoenaed documents explaining the Department's role in withdrawing the false letter it sent to Congress.”¹⁶ *Id.* at 40. Consistent with that narrowing of the Committee's demands, the Complaint says that the Committee seeks to enforce the subpoena “only as to a limited subset of responsive documents, namely those documents relevant to the Department's efforts to obstruct the Committee's investigation.” Am. Compl. at 3; *see also id.* ¶ 7 (defining the Obstruction Component). But the Complaint elsewhere appears to ask the Court to compel the production of *all* documents responsive to categories 1, 4, 5, and 10 of the subpoena that were “dated or ... created after February 4, 2011.” *Id.* ¶ 67; *see also* Proposed Order (ECF No. 61-36) at 2.

If read broadly, the Committee's request could sweep in materials having nothing to do with the “Obstruction Component” of the Committee's investigation and that are therefore unrelated to the legal issue the Committee seeks to litigate in this case (*i.e.*, the viability of the claim of Executive Privilege). *See* H.R. REP. No. 112-546, at 40. Such material would include law enforcement documents—documents whose sensitivity the Committee already has acknowledged and expressly taken off the table, and that are related to the closed “Operations” component of the Committee's investigation. *See id.* at 38-39; *see also* Colborn Decl. ¶ 12. Also included would be nonpublic information regarding Department deliberations that were determined to be unrelated to the Department's response to Congress concerning Operation Fast and Furious. *See* Colborn Decl. ¶ 12.

There is no basis for reading the Amended Complaint in such a broad fashion or providing such broad relief.¹⁷ After all, the Committee itself states in the Complaint that it seeks to enforce the subpoena “only as to a limited subset of responsive documents, namely those documents relevant to the Department's efforts to obstruct the Committee's investigation.” Am. Compl. at 3. Moreover, as past decisions of this Court have made clear, the exercise of jurisdiction over suits like this one is appropriate, if at all, only to the extent they concern “access to *sought-after* information.” *Comm. on Judiciary, U.S. House of Reps. v. Miers*, 558 F. Supp. 2d 53, 96 (D.D.C.) (emphasis added); *see also id.* at 98. In this case, the Court premised its assumption of jurisdiction in part on its conclusion that there was an “impasse” between the Committee and the Department. Mem. Op. at 42-43. Any impasse between the parties could, of course, concern only documents over which they were *actually negotiating*. Accordingly, the Court should decline to exercise its jurisdiction in any way that would provide the Committee material beyond what it was seeking at the time of the votes for contempt and authorization to sue, especially when the Committee recommended contempt for failure to produce only that smaller set. *See AT&TI*, 551 F.2d at 394.

In short, whatever its ultimate view of the merits, the Court should not compel the Department to produce information that the Committee was not seeking at the time of the vote authorizing this suit, including confidential information unrelated to the "Obstruction Component" of the Committee's investigation.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this Court deny Plaintiff's Motion for Summary Judgment and grant Defendant's Motion for Summary Judgment.

Dated: January 21, 2014

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Footnotes

- 1 This brief accepts this Court's ruling on the motion to dismiss as the law of the case, without waiving the Department's position that the Court lacks jurisdiction and that this suit otherwise is not properly before the Court, or its right to make such arguments on appeal.
- 2 Although a Ranking Member does not have independent authority to conduct oversight, the Chairman of the Senate Judiciary Committee subsequently made a formal request to the Department. See Letter from Chairman Leahy to Attorney General Holder I (June 23, 2011) (attached to Def.'s Mot. for Summ. J. as Ex. D).
- 3 Even with respect to the presidential communications component of Executive Privilege, the Committee provides an incomplete account. Discussing the privilege in the context of presidential communications, the Committee states that the Supreme Court "rejected the proposed application" in two cases. Pl.'s Mem. at 19. However, in *United States v. Nixon* the Supreme Court did not reject the "application" of the privilege, but rather held that the privilege applied but was overcome by the needs of the criminal justice system in a specific pending case. See 418 U.S. 683 (1974). Moreover, the D.C. Circuit upheld the application of the privilege to withhold information when a congressional committee sought information generally relating to "the extent of malfeasance in the executive branch" during Watergate. *Senate Select Comm. on Pres. Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974).
- 4 Indeed, as opposed to the assertion of common law evidentiary privileges by the Executive, which happens frequently by lower-level Executive Branch officials in the context of litigation, an assertion of Executive Privilege is made by the President himself, demonstrating the constitutional dimension of the Privilege and ensuring public awareness and political accountability for its assertion.
- 5 This case illustrates the overly rigid dichotomy the House seeks to draw between direct presidential communications on the one hand and agency deliberations on the other. Issues that ultimately require presidential attention often originate within an Executive Branch department or agency before reaching the White House, and the options for deciding the issue are first shaped by agency officials. Ensuring that agency deliberations remain candid and robust is therefore important to the functioning of the Executive and the quality of presidential decision-making even when direct presidential communications are not at issue.
- 6 In *In re Sealed Case*, 121 F.3d 729, the D.C. Circuit engaged in a lengthy comparison of the differences between the constitutionally-based presidential communications component of Executive Privilege and the common-law form of deliberative process privilege, but had no occasion to address whether the constitutionally-based Executive Privilege could be invoked by the Executive to protect its deliberative process and work product against congressional incursion. Indeed, the D.C. Circuit went to great lengths to note that its opinion "should not be read as in any way affecting the scope of the privilege in the congressional-executive context, the arena where conflict over the privilege of confidentiality arises most frequently." *Id.* at 753. As this important caveat in *In re Sealed Case* reflects, and for the reasons discussed throughout this brief, the Executive Privilege has a constitutional foundation -- one necessary to protect the separation of powers and the proper functioning of the Executive -- when asserted against Congress in circumstances such as those presented here.
- 7 Indeed, in the context of the constitutionally-based Executive Privilege (there, the presidential communications component), the D.C. Circuit has explained that, unlike the common-law form of deliberative process privilege, the Executive Privilege "applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones." *In re Sealed Case*, 121 F.3d at 745. According to the D.C. Circuit, "[t]he release of final and post-decisional materials would also limit the President's ability to communicate his decisions privately, thereby interfering with his ability to exercise control over the executive branch." *Id.* at 746.
- 8 The Committee has made clear that the documents it seeks in this suit concern the mental processes of agency decisionmakers regarding their views as to Congress's prior requests for information. See Am. Compl. (ECF No. 35), Attachment A, Subpoena ¶ 1. Of course, these are the interests that lie at the very core of the protections provided by both the deliberative process and work product privileges at common law. See *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 789 F.2d 26, 44 (D.C. Cir. 1986); *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 947 (Ct. Claims 1958); see also FED. R. CIV. P. 26(b)(3) (B); *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *FTC v. Boehringer Ingelheim Pharm., Inc.*, 286 F.R.D. 101, 107 (D.D.C. 2012).

- 9 To the extent that a document in this category, although causally related to the overall investigation into Operation Fast and Furious, does not specifically reveal information about the Department's response to Congress, it does not appear that the Committee seeks such documents in this litigation. *See infra* Section IV.
- 10 Although the President's assertion of Executive Privilege is dispositive here, and thus questions concerning common-law and statutory privileges need not be considered, such privileges could well further protect the documents at issue here from disclosure, in light of the Committee's decision to attempt to enforce its subpoena in a judicial forum. *See* FED. R. EVID. 501, 1101.
- 11 The lack of historical support for the Committee's conception of Executive Privilege is demonstrated by the very Presidents whom the Committee quotes for the supposed proposition that Congress may "peer[] inside" Executive Branch agencies whenever it sees fit. *See* Pl.'s Mem. at 27-28. Certainly President Wilson (writing in support of Congress long before he became President) recognized, as Defendant acknowledges here, the ability of Congress to investigate the Executive Branch. But President Wilson also acknowledged the practical limits on congressional investigations, outside the context of impeachment. *See* WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 270 (1885). And President Wilson further recognized that every congressional investigation is supposedly aimed at "malfeasance," which inevitably creates a chilling effect on the Executive. *See id.* at 278. Such distrust of an overly deferential approach to Congress was evinced by Presidents Polk and Jackson as well, both of whom refused to comply with a congressional demand for information. *See* Pl.'s Mem. at 28. Indeed, as the Committee fails to note, the statement of President Polk cited by the Committee was specific to Congress's power of impeachment, and the passage was made in the context of his *refusal* to provide certain information to Congress. *See* President Polk, Statement to the House of Representatives (Apr. 20, 1846), available at <http://www.gutenberg.org/files/12463/12463.txt>. President Jackson similarly used Executive Privilege to resist wide ranging investigations into purported government malfeasance. *See* LOUIS FISHER, THE POLITICS OF EXECUTIVE PRIVILEGE 53, 55 (2004), available at http://www.loc.gov/law/help/usconlaw/pdf/fisher_politics_ch_03.pdf.
- 12 The Committee cites *Sikorsky Aircraft Corp. v. United States*, 106 Fed. Cl. 571, 580-82 (2012), for the proposition that there is a timeliness requirement for the assertion of the common-law deliberative process privilege. Pl.'s Mem. at 36 n.38. However, the court in *Sikorsky* expressly noted that such a requirement may be "inapplicable or, at least, unwise," for constitutionally-based assertions of Executive Privilege. 106 Fed. Cl. at 582. Moreover, even if the Federal Rules were applicable to the present subpoena when issued by the Committee, the Committee could prove no prejudice as a result of the timing of the Executive Privilege assertion in the present case, where the Committee filed the present suit and amended the subpoena, all the while knowing that the President had asserted Executive Privilege over the documents at issue. *See In re Sealed Case*, 121 F.3d at 741 ("Nor did the White House have an obligation to formally invoke its privileges in advance of the motion to compel."). Indeed, Defendant advised the Committee throughout the negotiation and accommodation process of its concerns about the sensitivity of the documents at issue. *See* Burton Decl. ¶¶ 4-5, 11-12, 21.
- 13 Likewise, the Committee's insistence that the Executive Privilege assertion is invalid for lack of providing a privilege log or similar specification of withheld documents by the subpoena return date is equally unsupported (and unwise) in the context of an Executive Privilege assertion. *See Comm. on Judiciary, House of Reps. v. Miers*, 558 F. Supp. 2d 53, 107 (D.D.C. 2008) ("[I]n the absence of an applicable statute or controlling case law, the Court does not have a ready ground by which to force the Executive to [provide a privilege log] strictly in response to a congressional subpoena.").
- 14 The Committee's reliance on the "misconduct" language in *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997), concerning the common-law form of the deliberative process privilege, is inapplicable to the present context of a dispute between the political Branches, which presents a constitutional context not at issue in *In re Sealed*. *See id.* at 753 (noting that its opinion "should not be read as in any way affecting the scope of the privilege in the congressional-executive context, the arena where conflict over the privilege of confidentiality arises most frequently"). Moreover, even in the context of the common-law deliberative process privilege, the so-called "misconduct" exception applies much more narrowly than the Committee claims: Whatever the boundaries of the misconduct exception, they cannot be as expansive as [plaintiff] declares them to be. The exception runs counter to the purposes that animate the deliberative process privilege, and it thus makes sense to apply it narrowly. If every hint of marginal misconduct sufficed to erase the privilege, the exception would swallow the rule. In the rare cases that have actually applied the exception, the "policy discussions" sought to be protected with the deliberative process privilege were so out of bounds that merely discussing them was evidence of a serious breach of the responsibilities of representative government. The very discussion, in other words, was an act of government misconduct, and the deliberative process privilege disappeared. *JCM Registry, LLC v. U.S. Dep't of Commerce*, 538 F. Supp. 2d 130, 133 (D.D.C. 2008); *see also Nat'l Whistleblower Cr. v. HHS*, 903 F. Supp. 2d 59, 69 (D.D.C. 2012); *Tax Reform Research Grp. v. IRS*, 419 F. Supp. 415, 426 (D.D.C. 1976). The Committee cannot contest the legitimacy of Executive Branch "policy discussions" related to negotiating with and responding to congressional and related media inquiries. Whatever "wrongdoing" the Committee alleges with regard to the February 4, 2011 letter that was

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subsequently withdrawn, that allegation cannot suffice to eliminate any interest in confidentiality with respect to documents created over the ensuing nine months.

- 15 In *Miers*, the district court did not order the Executive Branch to produce a privilege log. Indeed, counsel for the Committee in that case “candidly admitted that there is ‘no statute or case law’ that dictates that those individuals must produce privilege logs.” *Comm. on Judiciary, House of Reps. v. Miers*, 558 F. Supp. 2d 53, 107 (D.D.C. 2008). Rather, after rejecting the defendants’ immunity claims, the court held that the “Executive should produce a more detailed list and description of the nature and scope of the documents it seeks to withhold on the basis of executive privilege sufficient to enable resolution of any privilege claims.” *Id.*
- 16 The Committee phrased this ultimate interest in different ways. See H.R. REP. No. 112-546, at 38 (2012) (seeking documents regarding “How the Department Concluded that Fast and Furious was ‘Fundamentally Flawed’ ”); Issa June 13, 2012 Letter (focusing on “documents from after February 4, 2011, related to the Department’s response to Congress and whistleblower allegations”).
- 17 The scope of the documents over which the Attorney General requested that the President assert Executive Privilege was not a concession that these documents were all relevant to the Committee’s purported need for information about the “Obstruction Component” of the investigation. See Colborn Decl. ¶ 13. Rather, the Attorney General noted in his letter to the President that the documents included materials as to which the Committee had not “articulated *any* particularized interest in or need ..., let alone a need that would further a legislative function.” Holder June 19 Letter at 7.

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Congressional Requests for Confidential Executive Branch Information

This memorandum summarizes the principles and practices governing congressional requests for confidential executive branch information.

June 19, 1989

MEMORANDUM OPINION FOR THE GENERAL COUNSEL'S CONSULTATIVE GROUP

This memorandum summarizes the principles and practices governing congressional requests for confidential executive branch information. As discussed below, the executive branch's general practice has been to attempt to accommodate whatever legitimate interests Congress may have in obtaining the information, while, at the same time, preserving executive branch interests in maintaining essential confidentiality. Only when the accommodation process fails to resolve a dispute and a subpoena is issued does it become necessary for the President to consider asserting executive privilege.

I. Congress' Oversight Authority

The constitutional role of Congress is to adopt general legislation that will be implemented — “executed” — by the executive branch. The courts have recognized that this general legislative interest gives Congress investigatory authority. Both Houses of Congress have power, “through [their] own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution.” *McGrain v. Daugherty*, 273 U.S. 135, 160 (1927). The issuance of subpoenas in aid of this function “has long been held to be a legitimate use by Congress of its power to investigate,” *Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 504 (1975), provided that the investigation is “related to, and in furtherance of, a legitimate task of the Congress.” *Watkins v. United States*, 354 U.S. 178, 187 (1957). The inquiry must pertain to subjects “on which legislation could be had.” *McGrain v. Daugherty*, 273 U.S. at 177. Thus, Congress' oversight authority

is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.

Broad as it is, the power is not, however, without limitations. Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government.

Barenblatt v. United States, 360 U.S. 109, 111-12 (1959).

II. Executive Privilege

If it is established that Congress has a legitimate legislative purpose for its oversight inquiry, the executive branch's interest in keeping the information confidential must be assessed. This subject is usually discussed in terms of "executive privilege," and that convention is used here. The question, however, is not strictly speaking just one of executive privilege. While the considerations that support the concept and assertion of executive privilege apply to any congressional request for information, the privilege itself need not be claimed formally vis-a-vis Congress except in response to a lawful subpoena; in responding to a congressional request for information, the executive branch is not necessarily bound by the limits of executive privilege.

Executive privilege is constitutionally based. To be sure, the Constitution nowhere expressly states that the President, or the executive branch generally, enjoys a privilege against disclosing information requested by the courts, the public, or the legislative branch. The existence of such a privilege, however, is a necessary corollary of the executive function vested in the President by Article II of the Constitution.¹ It has been asserted by numerous Presidents from the earliest days of our Nation, and it was explicitly recognized by the Supreme Court in *United States v. Nixon*, 418 U.S. 683, 705-06 (1974).

There are at least three generally-recognized components of executive privilege: state secrets, law enforcement, and deliberative process. Since most disputes with Congress in this area in recent years have concerned the privilege for executive branch deliberations, this memorandum will focus on that component. See *generally Confidentiality of the Attorney General's Communications in Counseling the President*, 6 Op. O.L.C. 481, 484-90 (1982).

¹The privilege to withhold information is implicit in the scheme of Article II and particularly in the provisions that "[t]he executive Power shall be vested in a President of the United States of America," U.S. Const. art. II, § 1, cl. 1, and that the President shall "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3.

The first congressional request for information from the executive branch occurred in 1792, in the course of a congressional investigation into the failure of an expedition under the command of one General St. Clair. President Washington called his Cabinet together to consider his response, stating that he could conceive that there might be papers of so secret a nature that they ought not be given up. The President and his Cabinet concluded "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.*" 1 *Writings of Thomas Jefferson* 304 (1903) (emphasis added). While President Washington ultimately determined in the St. Clair case that the papers requested could be furnished without injury to the public, he refused four years later to comply with a House committee's request for copies of instructions and other documents employed in connection with the negotiation of a treaty with Great Britain.

The practice of refusing congressional requests for information, on the ground that the national interest would be harmed by the disclosure, was employed by many Presidents in the ensuing years. *See generally History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress, Part I - Presidential Invocations of Executive Privilege Vis-a-Vis Congress*, 6 Op. O.L.C. 751 (1982). The privilege was most frequently asserted in the areas of foreign affairs and military and national security secrets; it was also invoked in a variety of other contexts, including executive branch investigations. In 1954, in instructing the Secretary of Defense concerning a Senate investigation, President Eisenhower asserted that the privilege extends to deliberative communications within the executive branch:

Because it is essential to efficient and effective administration that employees of the Executive Branch be in a position to be completely candid in advising with each other on official matters, and because it is not in the public interest that any of their conversations or communications, or any documents or reproductions, concerning such advice be disclosed, you will instruct employees of your Department that in all of their appearances before the Subcommittee of the Senate Committee on Government Operations regarding the inquiry now before it they are not to testify to any such conversations or communications or to produce any such documents or reproductions.

Pub. Papers of Dwight D. Eisenhower 483-84 (1954).

The Supreme Court has recognized that the Constitution gives the President the power to protect the confidentiality of executive branch deliberations. *See generally Nixon v. Administrator of Gen. Servs.*, 433

U.S. 425, 446-55 (1977). This power is independent of the President's power over foreign affairs, national security, or law enforcement; it is rooted instead in "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." *United States v. Nixon*, 418 U.S. at 708.

It necessarily follows — and the Supreme Court so held in *United States v. Nixon* — that communications among the President and his advisers enjoy "a presumptive privilege" against disclosure in court. *Id.*² The reasons for this privilege, the *Nixon* Court explained, are "plain." "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *Id.* at 705. Often, an adviser's remarks can be fully understood only in the context of a particular debate and of the positions others have taken. Advisers change their views, or make mistakes which others correct; this is indeed the purpose of internal debate. The result is that advisers are likely to be inhibited if they must anticipate that their remarks will be disclosed to others, not party to the debate, who may misunderstand the significance of a particular statement or discussion taken out of context. Some advisers may hesitate — out of self-interest — to make remarks that might later be used against their colleagues or superiors. As the Court stated, "[a] president and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *Id.* at 708.

These reasons for the constitutional privilege have at least as much force when it is Congress, instead of a court, that is seeking information. The possibility that deliberations will be disclosed to Congress is, if anything, more likely to chill internal debate among executive branch advisers. When the Supreme Court held that the need for presidential communications in the criminal trial of President Nixon's close aides outweighed the constitutional privilege, an important premise of its decision was that it did not believe that "advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." *Id.* at 712. By contrast, congressional requests for executive branch deliberative information are anything but infrequent.

² The *Nixon* Court explained that the privilege is constitutionally based:

[T]he privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

418 U.S. at 705-06 (footnote omitted). The Court also acknowledged that the privilege stems from the principle of separation of powers: "The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Id.* at 708.

Moreover, compared to a criminal prosecution, a congressional investigation is usually sweeping; its issues are seldom narrowly defined, and the inquiry is not restricted by the rules of evidence. Finally, when Congress is investigating, it is by its own account often in an adversarial position to the executive branch and initiating action to override judgments made by the executive branch. This increases the likelihood that candid advice from executive branch advisers will be taken out of context or misconstrued. For all these reasons, the constitutional privilege that protects executive branch deliberations against judicial subpoenas must also apply, perhaps even with greater force, to Congress' demands for information.

The United States Court of Appeals for the District of Columbia Circuit has explicitly held that the privilege protects presidential communications against congressional demands. During the Watergate investigation, the Court of Appeals rejected a Senate committee's efforts to obtain tape recordings of conversations in President Nixon's offices. The court held that the tapes were constitutionally privileged and that the committee had not made a strong enough showing to overcome the privilege. *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (*en banc*). Indeed, the court held that the committee was not entitled to the recordings unless it showed that "the subpoenaed evidence is *demonstrably critical* to the responsible fulfillment of the Committee's functions." *Id.* at 731 (emphasis added).³

Finally, history is replete with examples of the executive's assertion of privilege in the face of congressional requests for deliberative process information. We have previously recounted the incidents in which Presidents, beginning with President Washington, have withheld from Congress documents that reflected deliberations within the executive branch. *History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress, Part II - Invocations of Executive Privilege by Executive Officials*, 6 Op. O.L.C. 782 (1982).

III. Accommodation Process

Where Congress has a legitimate need for information that will help it legislate, and the executive branch has a legitimate, constitutionally recognized need to keep certain information confidential, at least one court

³ The Supreme Court has assumed that the constitutional privilege protects executive branch deliberations against Congress to some degree. See *United States v. Nixon*, 418 U.S. at 712 n.19. Moreover, the Court held in *Administrator of General Services*, that the constitutional privilege protects executive branch deliberations from disclosure to members of the *same* branch in a later administration, the Court rejected the specific claim of privilege in the case not because the privilege was inapplicable but because the intrusion was limited and the interests justifying the intrusion were strong and nearly unique. See 433 U.S. at 446-55. Since the Court has held that the privilege protects executive branch communications against compelled disclosure to the judicial branch and to later members of the executive branch, there is every reason to believe that the Court would hold that it protects against compelled disclosure to Congress

has referred to the obligation of each branch to accommodate the legitimate needs of the other. This duty to accommodate was described by the D.C. Circuit in a case involving a House committee's request to a private party for information which the executive branch believed should not be disclosed. The court said:

The framers ... expect[ed] that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system. Under this view, the coordinate branches do not exist in an exclusively adversary relationship to one another when a conflict in authority arises. Rather, each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.

....

[Because] it was a deliberate feature of the constitutional scheme to leave the allocation of powers unclear in certain situations, the resolution of conflict between the coordinate branches in these situations must be regarded as an opportunity for a constructive *modus vivendi*, which positively promotes the functioning of our system. The Constitution contemplates such accommodation. Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme.

United States v. AT&T, 567 F.2d 121, 127, 130 (D.C. Cir. 1977) (footnotes omitted).

In an opinion he issued in connection with a 1981 executive privilege dispute involving a committee of the House of Representatives and the Department of Interior, Attorney General William French Smith captured the essence of the accommodation process:

The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch.

Assertion of Executive Privilege in Response to a Congressional Subpoena, 5 Op. O.L.C. 27, 31 (1981) ("Smith Opinion").

The process of accommodation requires that each branch explain to the other why it believes its needs to be legitimate. Without such an explanation, it may be difficult or impossible to assess the needs of one branch and relate them to those of the other. At the same time, requiring such an explanation imposes no great burden on either branch. If either branch has a reason for needing to obtain or withhold information, it should be able to express it.

The duty of Congress to justify its requests not only arises directly from the logic of accommodation between the two branches, but it is established in the case law as well. In *United States v. Nixon*, the Supreme Court emphasized that the need for evidence was articulated and specific. 418 U.S. at 700-02, 713. Even more to the point is *Senate Select Committee on Presidential Campaign Activities*. In that case, the D.C. Circuit stated that the sole question was “whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee’s functions.” 498 F.2d at 731. The court held that the Committee had not made a sufficient showing. It pointed out that the President had already released transcripts of the conversations of which the Committee was seeking recordings. The Committee argued that it needed the tape recordings “in order to verify the accuracy of” the transcripts, to supply the deleted portions, and to gain an understanding that could be acquired only by hearing the inflection and tone of voice of the speakers. *Id.* at 723-33. But the court answered that, in order to legislate, a committee of Congress seldom needs a “precise reconstruction of past events.” *Id.* at 732. The court concluded:

The Committee has ... shown no more than that the materials deleted from the transcripts may possibly have some arguable relevance to the subjects it has investigated and to the areas in which it may propose legislation. It points to no specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in the tapes or without resolution of the ambiguities that the transcripts may contain.

Id. at 733. For this reason, the court stated, “the need demonstrated by the Select Committee ... is too attenuated and too tangential to its functions” to override the President’s constitutional privilege. *Id.*

Senate Select Committee thus establishes Congress’ duty to articulate its need for particular materials — to “point[] to ... specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in” the privileged document it has requested. Moreover, this case suggests that Congress will seldom have any legitimate legislative interest in knowing the precise predecisional positions and statements of particular executive branch officials. When Congress demands such information, it must explain its need carefully and convincingly.

It is difficult to generalize about the kind of accommodation with respect to deliberative process information that may be appropriate in particular cases. Whether to adhere to the consistent general policy of confidentiality for such information will depend on the facts of the specific situation. Certain general principles do apply, however. As Attorney General Smith explained in advising President Reagan:

[T]he interest of Congress in obtaining information for oversight purposes is ... considerably weaker than its interest when specific legislative proposals are in question. At the stage of oversight, the congressional interest is a generalized one of ensuring that the laws are well and faithfully executed and of proposing remedial legislation if they are not. The information requested is usually broad in scope and the reasons for the request correspondingly general and vague. In contrast, when Congress is examining specific proposals for legislation, the information which Congress needs to enable it to legislate effectively is usually quite narrow in scope and the reasons for obtaining that information correspondingly specific. A specific, articulated need for information will weigh substantially more heavily in the constitutional balancing than a generalized interest in obtaining information.

Smith Opinion, 5 Op. O.L.C. at 30. Moreover, Attorney General Smith explained, information concerning ongoing deliberations need rarely be disclosed:

[T]he congressional oversight interest will support a demand for predecisional, deliberative documents in the possession of the Executive Branch only in the most unusual circumstances. It is important to stress that congressional oversight of Executive Branch actions is justifiable only as a means of facilitating the legislative task of enacting, amending, or repealing laws. When such "oversight" is used as a means of participating directly in an ongoing process of decisionmaking within the Executive Branch, it oversteps the bounds of the proper legislative function. Restricted to its proper sphere, the congressional oversight function can almost always be properly conducted with reference to information concerning decisions which the Executive Branch has already reached. Congress will have a legitimate need to know the preliminary positions taken by Executive Branch officials during internal deliberations only in the rarest of circumstances. Congressional demands, under the

guise of oversight, for such preliminary positions and deliberative statements raise at least the possibility that the Congress has begun to go beyond the legitimate oversight function and has impermissibly intruded on the Executive Branch's function of executing the law. At the same time, the interference with the President's ability to execute the law is greatest while the decisionmaking process is ongoing.

Id. at 30-31.

IV. Procedures

President Reagan's November 4, 1982 Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information" ("Reagan Memorandum") sets forth the long-standing executive branch policy in this area:

The policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch.... [E]xecutive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary. Historically, good faith negotiations between Congress and the executive branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches.

Reagan Memorandum at 1. The Reagan Memorandum also sets forth the procedures for asserting executive privilege in response to a congressional request for information. Under the terms of the Memorandum, an agency must notify and consult with the Attorney General, through the Assistant Attorney General for the Office of Legal Counsel, as soon as it determines that compliance with the request raises a "substantial question of executive privilege." The Memorandum further provides that executive privilege cannot be asserted without specific authorization by the President, based on recommendations made to him by the concerned agency head, the Attorney General, and the Counsel to the President.

In practice, disputes with Congress in this area typically commence with an informal oral or written request from a congressional committee or subcommittee for information in the possession of the executive branch. Most such requests are honored promptly; in some cases, however, the executive branch official may resist supplying some or all of the

requested information either because of the burden of compliance or because the information is of a sensitive nature. The executive branch agency and the committee staff will typically negotiate during this period to see if the dispute can be settled in a manner acceptable to both sides. In most cases this accommodation process is sufficient to resolve any dispute. On occasion, however, the process breaks down, and a subpoena is issued. At that point, if further negotiation is unavailing, it is necessary to consider asking the President to assert executive privilege.

If after assertion of executive privilege the committee remains unsatisfied with the agency's response, it may vote to hold the agency head in contempt of Congress. If the full Senate or House of Representatives then votes to hold the official in contempt, it might attempt to impose sanctions by one of three methods. First, it might refer the matter to a United States Attorney for reference to a grand jury. *See* 2 U.S.C. §§ 192, 194. Second, the Sergeant-at-Arms theoretically could be dispatched to arrest the official and detain him in the Capitol; if this unlikely event did occur, the official would be able to test the legality of this detention through a habeas corpus petition, thereby placing in issue the legitimacy of his actions in refusing to disclose the subpoenaed information. Third, and the most likely option due to legal and practical difficulties associated with the first two options, the Senate or House might bring an action in court to obtain a judicial order requiring compliance with the subpoena and contempt of court enforcement orders if the court's order is defied.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

U.S. House Committee on
THE JUDICIARY
 CHAIRMAN JERROLD NADLER

(f)

FACT SHEET: GOP Attacks on IRS Commissioner are Not Impeachment Proceedings

Sep 21, 2016

Impeachment Hearings Entail an Independent Investigation and Due Process for the Accused

"Under the modern practice, an impeachment is normally instituted by the House by the adoption of a resolution calling for a committee investigation. This committee may, after investigation, recommend the dismissal of charges or it may recommend impeachment."^[1] (https://edit-democrats.judiciary.house.gov/#_ftn1) The effort to impeach Internal Revenue Service Commissioner John Koskinen contains none of the hallmarks of actual impeachment hearings—which would entail an independent investigation and due process for the accused.

The Impeachment Process:

- In the modern era, the impeachment process begins in the House of Representatives *only* after the House has voted to authorize the Judiciary Committee to investigate whether charges are warranted.
- This rule holds even when the underlying charges have been under investigation by other authorities and other congressional committees for years. For example, in the 93d Congress, the House adopted H. Res. 803, authorizing and directing the Committee on the Judiciary to inquire whether to impeach President Nixon; in the 105th Congress, H. Res. 581 authorized and directed the Committee to inquire into the impeachment of President Clinton; and in the 110th Congress, H. Res. 1448 directed the Committee to inquire whether to impeach Judge Porteous.
 - The sole exception for a successful impeachment occurred in the 99th Congress—when the judge under investigation was *already in jail* by the time he was convicted by the U.S. Senate.
- In all modern cases, the Committee has conducted an independent, formal investigation into the charges underlying a resolution of impeachment—again, even when other authorities and other congressional committees have already investigated the underlying issue.
- Chairman Bob Goodlatte summarized the importance of this practice in 2010, when the Committee's Task Force on Judicial Impeachment unanimously recommended four articles of impeachment against Judge G. Thomas Porteous. Goodlatte said, "This recommendation was the culmination of an exhaustive investigation

by the task force, which included reviewing the records of past proceedings, rooting out new evidence that was never considered in previous investigations, conducting numerous interviews and depositions with firsthand witnesses, and conducting hearings to take the testimony of firsthand witnesses and federal scholars."

Prepared by Democratic Staff of the House Committee on the Judiciary

Representative John Conyers, Jr., Ranking Member

[1] (https://edit-democrats.judiciary.house.gov/#_ftnref1) H. Comm. on the Judiciary, H. Doc. No. 93-7 (Oct. 1973), at 699. See also W. Holmes Brown *et al.*, *House Practice, A Guide to the Rules, Precedents, and Procedures of the House* (2011).

114th Congress

FINAL VOTE RESULTS FOR ROLL CALL 21(Republicans in roman; Democrats in *italic*; Independents underlined>)**HR 3547** YEA-AND-NAY 15-Jan-2014 4:18 PM**QUESTION:** Concurring in the Senate Amendments with an Amendment**BILL TITLE:** To extend the application of certain space launch liability provisions through 2014

	YEAS	NAYS	PRES	NY
REPUBLICAN	166	64		3
DEMOCRATIC	193	3		4
INDEPENDENT				
TOTALS	359	67		7

--- YEAS 359 ---

Aderholt	Graves (GA)	<i>Pallone</i>
Amodei	Graves (MO)	<i>Pascrell</i>
<i>Andrews</i>	<i>Grayson</i>	<i>Pastor (AZ)</i>
Bachus	<i>Green, Al</i>	Paulsen
<i>Barber</i>	<i>Green, Gene</i>	<i>Payne</i>
Barletta	Griffin (AR)	<i>Pelosi</i>
Barr	Griffith (VA)	<i>Perlmutter</i>
<i>Barrow (GA)</i>	Grimm	Perry
<i>Bass</i>	Guthrie	<i>Peters (CA)</i>
<i>Beatty</i>	<i>Gutiérrez</i>	<i>Peters (MI)</i>
<i>Becerra</i>	<i>Hahn</i>	<i>Peterson</i>
Benishek	<i>Hanabusa</i>	<i>Pingree (ME)</i>
<i>Bera (CA)</i>	Hanna	Pittenger
Bilirakis	Harper	Pitts
<i>Bishop (GA)</i>	Harris	<i>Pocan</i>
<i>Bishop (NY)</i>	Hartzler	<i>Polis</i>
Bishop (UT)	<i>Hastings (FL)</i>	Price (GA)
Black	Hastings (WA)	<i>Price (NC)</i>
Blackburn	Heck (NV)	<i>Quigley</i>
<i>Blumenauer</i>	<i>Heck (WA)</i>	Radel
Boehner	Hensarling	<i>Rahall</i>
<i>Bonamici</i>	Herrera Beutler	<i>Rangel</i>
Boustany	<i>Higgins</i>	Reed
<i>Brady (PA)</i>	<i>Himes</i>	Reichert
Brady (TX)	<i>Hinojosa</i>	Renacci
<i>Braley (IA)</i>	<i>Honda</i>	Rice (SC)
Brooks (IN)	<i>Horsford</i>	<i>Richmond</i>
<i>Brown (FL)</i>	<i>Hoyer</i>	Rigell
<i>Brownley (CA)</i>	Hudson	Roby
Bucshon	<i>Huffman</i>	Roe (TN)
<i>Bustos</i>	Huizenga (MI)	Rogers (AL)
<i>Butterfield</i>	Hultgren	Rogers (KY)
Calvert	Hunter	Rogers (MI)
Camp	Hurt	Rokita

Campbell
 Cantor
 Capito
 Capps
 Capuano
 Cárdenas
 Carney
 Carson (IN)
 Carter
 Cartwright
 Cassidy
 Castor (FL)
 Castro (TX)
 Chaffetz
 Chu
 Cicilline
 Clark (MA)
 Clarke (NY)
 Clay
 Clyburn
 Coble
 Cohen
 Cole
 Collins (GA)
 Collins (NY)
 Conaway
 Connolly
 Conyers
 Cook
 Cooper
 Costa
 Courtney
 Cramer
 Crenshaw
 Crowley
 Cuellar
 Culberson
 Cummings
 Davis (CA)
 Davis, Danny
 Davis, Rodney
 DeFazio
 DeGette
 Delaney
 DeLauro
 DelBene
 Denham
 Dent
 Deutch
 Diaz-Balart
 Dingell
 Doggett
 Doyle
 Duckworth

Israel
 Issa
 Jackson Lee
 Jeffries
 Jenkins
 Johnson (GA)
 Johnson (OH)
 Johnson, E. B.
 Joyce
 Kaptur
 Keating
 Kelly (IL)
 Kelly (PA)
 Kennedy
 Kildee
 Kilmer
 Kind
 King (NY)
 Kinzinger (IL)
 Kirkpatrick
 Kline
 Kuster
 Lance
 Langevin
 Larsen (WA)
 Larson (CT)
 Latham
 Latta
 Lee (CA)
 Levin
 Lewis
 Lipinski
 LoBiondo
 Loeb sack
 Lofgren
 Lowenthal
 Lowey
 Lucas
 Luetkemeyer
 Lujan Grisham (NM)
 Luján, Ben Ray (NM)
 Lynch
 Maffei
 Maloney, Carolyn
 Maloney, Sean
 Marino
 Matheson
 Matsui
 McAllister
 McCarthy (CA)
 McCaul
 McCollum
 McDermott
 McGovern

Rooney
 Ros-Lehtinen
 Roskam
 Ross
 Rothfus
 Roybal-Allard
 Royce
 Ruiz
 Runyan
 Ruppertsberger
 Ryan (OH)
 Ryan (WI)
 Sánchez, Linda T.
 Sanchez, Loretta
 Sarbanes
 Schakowsky
 Schiff
 Schneider
 Schock
 Schrader
 Schwartz
 Scott (VA)
 Scott, David
 Serrano
 Sessions
 Sewell (AL)
 Shea-Porter
 Sherman
 Shimkus
 Shuster
 Simpson
 Sinema
 Sires
 Slaughter
 Smith (NJ)
 Smith (TX)
 Smith (WA)
 Southerland
 Speier
 Stewart
 Stivers
 Stutzman
 Swalwell (CA)
 Takano
 Thompson (CA)
 Thompson (MS)
 Thompson (PA)
 Thornberry
 Tiberi
 Tierney
 Titus
 Tonko
 Tsongas
 Turner

12/15/2019

Final Vote Results for Roll Call 21

Duffy	McHenry	Upton
Edwards	McKeon	Valadao
Ellison	McKinley	Van Hollen
Ellmers	McMorris Rodgers	Vargas
Engel	McNerney	Veasey
Enyart	Meehan	Vela
Eshoo	Meeks	Velázquez
Esty	Meng	Visclosky
Farenthold	Messer	Wagner
Farr	Mica	Walberg
Fattah	Michaud	Walden
Fincher	Miller (FL)	Walorski
Fitzpatrick	Miller (MI)	Walz
Fleischmann	Miller, Gary	Wasserman Schultz
Fleming	Miller, George	Walters
Flores	Moore	Waxman
Forbes	Moran	Webster (FL)
Fortenberry	Mulvaney	Welch
Foster	Murphy (FL)	Westmoreland
Fox	Murphy (PA)	Whitfield
Frankel (FL)	Nadler	Wilson (FL)
Frelinghuysen	Napolitano	Wilson (SC)
Fudge	Neal	Wittman
Galleo	Negrete McLeod	Wolf
Garamendi	Noem	Womack
Garcia	Nolan	Woodall
Gerlach	Nunes	Yarmuth
Gibbs	Nunnelee	Yoder
Gibson	O'Rourke	Yoho
Goodlatte	Olson	Young (AK)
Gowdy	Owens	Young (IN)
Granger	Palazzo	

--- NAYS 67 ---

Amash	Gosar	Nugent
Bachmann	Grijalva	Pearce
Barton	Hall	Petri
Bentivolio	Holding	Poe (TX)
Bridenstine	Holt	Pompeo
Brooks (AL)	Huelskamp	Posey
Broun (GA)	Johnson, Sam	Ribble
Burgess	Jordan	Rohrabacher
Byrne	King (IA)	Salmon
Chabot	Kingston	Sanford
Coffman	Labrador	Scalise
Cotton	LaMalfa	Schweikert
Crawford	Lamborn	Scott, Austin
Daines	Lankford	Sensenbrenner
DeSantis	Long	Smith (MO)
DesJarlais	Lummis	Smith (NE)
Duncan (SC)	Marchant	Terry
Duncan (TN)	Massie	Tipton

clerk.house.nov/nays/2014/roll021.xml

3/4

12/15/2019

Final Vote Results for Roll Call 21

Franks (AZ)	McClintock	Weber (TX)
Gardner	<i>McIntyre</i>	Wenstrup
Garrett	Meadows	Williams
Gingrey (GA)	Mullin	
Gohmert	Neugebauer	

--- NOT VOTING 7 ---

Buchanan	Jones	Stockman
<i>Cleaver</i>	<i>McCarthy (NY)</i>	
<i>Gabbard</i>	<i>Rush</i>	

History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress

[The following two memoranda, prepared by the Office of Legal Counsel at the request of the Attorney General, describe instances since the founding of the Republic in which officials in the Executive Branch have refused to disclose information or produce documents requested by Congress. The first memorandum, dated December 14, 1982, sets forth examples of situations in which a President has personally directed that information be withheld, relying on the doctrine of executive privilege. The second memorandum, dated January 27, 1983, documents incidents where the Attorney General or some other executive official refused to provide information or documents to Congress in situations involving law enforcement, security, or personnel investigations. . . .]

PART I—Presidential Invocations of Executive Privilege Vis-à-Vis Congress

December 14, 1982

MEMORANDUM FOR THE ATTORNEY GENERAL

This memorandum briefly describes those incidents in which a President personally directed the withholding of information from Congress.¹ Included are incidents in which a President found it necessary to withhold specific documents or information, as well as general directives of a President concerning the withholding of information from Congress.

No effort has been made to catalogue the numerous instances in which information was withheld from Congress by executive officers other than the President; nor does this survey discuss the countless examples of full disclosure by the Executive. The objective of the memorandum is neither to show how frequently the Executive Branch has refused congressional requests for information, nor to demonstrate how often an accommodation between the branches has been achieved. Rather, the memorandum seeks to show that presidentially

¹ Although an attempt has been made to be as thorough as possible, no claim is made that the following list is comprehensive. In this regard, we note Deputy Assistant Attorney General Mary Lawton's statement in a memorandum to Rep. William S. Moorhead, dated Apr 25, 1973.

In response to your request . . . I regret that it is not physically possible to furnish you with a comprehensive list of presidential refusals of information to Congress. To give you all of the instances of such refusals since the beginning of the Republic would require an amount of historical research which the Office of Legal Counsel lacks the resources for handling. In addition, there is a categorization problem of distinguishing the relatively few instances of exercise of Executive Privilege *per se* [i.e., a refusal to disclose by the President personally] from the many instances of agreed accommodations . . . for nonappearance of witnesses, nondisclosure or partial disclosure.

mandated refusals to disclose information to Congress—though infrequent—are by no means unprecedented acts of this or any other Administration.

I. Washington Administration

St. Clair Incident

On March 27, 1792, the House of Representatives established a congressional committee to investigate the failure of General St. Clair's military expedition against the Indians. The House authorized the committee "to call for such persons, papers, and records, as may be necessary to assist their inquiries."²

The committee subsequently asked the President for those papers pertaining to the St. Clair campaign. Since this was the first occasion in which Congress had established a committee to investigate the performance of the Executive and had authorized it to request documents from the President, and wishing "that so far as it should become a precedent, it should be rightly conducted,"³ President Washington held a meeting with his Cabinet, attended by Jefferson, Hamilton, Randolph and Knox. Jefferson described the conclusions reached by the Nation's first Cabinet:

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 committees 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.^[4]

Although the Cabinet "agreed in this case, that there was not a paper which might not be properly produced,"⁵ the President apparently felt it advisable nevertheless to negotiate with Congress a non-confrontational resolution of the problem. Jefferson thereupon agreed to speak individually to members of the House committee in order to "bring them by persuasion into the right channel."⁶ Jefferson's conciliation efforts were successful, for on April 4, 1792, the House resolved,

that the President of the United States be requested to cause the proper officers to lay before this House *such papers of a public*

² 3 Annals of Cong. 493 (1792)

³ 1 The Writings of Thomas Jefferson 303 (Lipscomb ed., 1905).

⁴ *Id.* at 303-04 (emphasis added)

⁵ *Id.* at 305.

⁶ *Id.* See generally Younger, "Congressional Investigations and Executive Secrecy. A Study in the Separation of Powers," 20 U Pitt L. Rev. 755, 757 (1959).

nature, in the Executive Department, as may be necessary to the investigation of the causes of the failure of the late expedition under Major General St. Clair.⁷

Correspondence Involving United States Minister to France

In 1794, the Senate requested by resolution correspondence between the United States Minister to France and the Republic of France, and between the Minister and the State Department.⁸ President Washington submitted certain of the correspondence requested, but withheld “those particulars which, in my judgment, for public considerations, ought not to be communicated.”⁹

The Jay Treaty

On March 24, 1796, the House of Representatives requested by resolution that the President disclose to the House his instructions to the United States Minister who negotiated the Jay Treaty with Great Britain, along with correspondence and documents relative to that Treaty. Implementation of the Treaty apparently required an appropriation which the House was called upon to vote.¹⁰ President Washington denied the House’s right to demand and receive any of the papers requested. Though the President had provided “all the papers affecting the negotiation with Great Britain” to the Senate in the course of its deliberations on the Treaty, Washington determined that the House had no legitimate claim to those papers:

The nature of foreign negotiations requires caution; and their success must often depend on secrecy; and even, when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic: for this might have pernicious influence on future negotiations; or produce immediate inconveniences, perhaps danger and mischief, in relation to other Powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making Treaties in the President with the advice and consent of the Senate; the principle on which the body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand, and to have, as a matter of course, all the papers respecting a negotiation with a foreign Power, would be to establish a dangerous precedent.

⁷ 3 Annals of Cong. 536 (1792) (emphasis added).

⁸ Senate Journal, 3d Cong., 1st Sess. 42 (1794).

⁹ I J Richardson, Messages and Papers of the Presidents 152 (1896)

¹⁰ See W. Binkley, *President and Congress* 53–4 (3d rev. 1947).

Subsequently, the House debated Washington's refusal for a full month, but took no action.¹¹ It is highly instructive, however, that during the debate Rep. James Madison, although disagreeing with President Washington's message in some respects, acknowledged on the House floor,

that the Executive had a right, under a due responsibility, also, to withhold information, when of a nature that did not permit a disclosure of it at the time. And if the refusal of the President had been founded simply upon a representation, that the state of the business within his department, and the contents of the papers asked for, required it, although he might have regretted the refusal, he should have been little disposed to criticize it.¹²

2. Adams Administration

Diplomatic Material Concerning United States Representatives to France

In 1798 the House of Representatives by resolution requested from the President documents containing instructions to, and dispatches from, representatives of the United States to France.¹³ On April 3, 1798, President Adams transmitted some of that material to both Houses, but omitted "some names and a few expressions descriptive of the persons" involved.¹⁴

3. Jefferson Administration

The Burr Conspiracy

In January 1807, the House of Representatives by resolution requested that the President

lay before this House any information in possession of the Executive, *except such as he may deem the public welfare to require not to be disclosed*, touching any illegal combination of private individuals against the peace and safety of the Union, or any military expedition planned by such individuals against the territories of any Power in amity with the United States; together

¹¹ 5 Annals of Cong. 760 (1796); see *id.* at 426-783. The House did pass two resolutions, one declaring that the House had authority to consider the expediency of carrying a treaty into effect, the second that the House need not state the purpose for which it required information from the Executive. See *id.* at 771, 782-83.

¹² *Id.* at 773.

¹³ House Journal, 5th Cong., 2d Sess. 249 (1798).

¹⁴ 1 Richardson, *supra*, at 265.

with the measures which the Executive has pursued and proposes to take for suppressing or defeating the same.¹⁵

President Jefferson replied by detailing the activities of Aaron Burr, but declined to mention the names of other alleged participants. Jefferson declared:

The mass of what I have received in the course of these transactions is voluminous, but little has been given under the sanction of an oath so as to constitute formal and legal evidence. It is chiefly in the form of letters, often containing such a mixture of rumors, conjectures, and suspicions as renders it difficult to sift out the real facts and unadvisable to hazard more than general outlines, strengthened by concurrent information or the particular credibility of the relator. In this state of the evidence, delivered sometimes, too, under the restriction of private confidence, neither safety nor justice will permit the exposing names, except that of the principal actor, whose guilt is placed beyond question.¹⁶

4. Monroe Administration

Stewart Incident

In 1825, the House of Representatives requested by resolution that the President provide the Congress with documents concerning charges against certain naval officers, so far as he deemed such disclosure compatible with the public interest.¹⁷ President Monroe refused to submit the documents, stating:

In consequence of several charges which have been alleged against Commodore Stewart, touching his conduct while com-

¹⁵ 16 Annals of Cong. 336 (1806) (emphasis added). Professor Raoul Berger has argued that the exception clause in the House resolution refutes any argument that Jefferson's subsequent withholding of documents was based on an executive privilege. R. Berger, *Executive Privilege: A Constitutional Myth* 179-81 (1974) (describing Jefferson's explanation for withholding information as "gratuitous"). See also Cox, *Executive Privilege*, 122 U Pa L. Rev. 1383, 1397-98 (1974) (arguing that those historical examples of executive withholding which are preceded by a congressional authorization to withhold do not qualify as examples of executive privilege) One could just as well read the exception clause, however, as an early illustration of congressional recognition of the executive privilege. See § 1, C, *supra*, note 19 *infra*.

Moreover, it is highly unlikely Jefferson actually relied upon the exception clause as the basis for withholding information from the House, given the conclusions he reached while serving in President Washington's Cabinet, see § 1, A, *supra*, and given the views he expressed in a letter to the United States District Attorney for Virginia, who was then in charge of the Burr prosecution:

Reserving the necessary right of the President of the U.S. to decide, *independently of all other authority, what papers, coming to him as President, the public interests permit to be communicated, & to whom*, I assure you of my readiness under that restriction, voluntarily to furnish . . . whatever the purposes of justice may require.

9 The Writings of Thomas Jefferson 55 (P. Ford ed 1898) Professor Berger also fails to note other occasions on which President Jefferson let it be known that he regarded himself free to withhold certain "confidential" information "given for my information in the discharge of my executive functions, and which my duties & the public interest forbid me to make public." *Id.* at 63-64 (certificate to the court in Burr prosecution).

¹⁶ 1 Richardson, *supra*, at 412.

¹⁷ House Journal, 18th Cong. 2d Sess. 102-03 (1825).

manding the squadron of the United States [at] sea, it has been deemed proper to suspend him from duty and to subject him to trial on those charges. It appearing also that some of those charges have been communicated to the Department by Mr. Prevost, political agent at this time of the United States at Peru . . . and that charges have likewise been made against him by citizens of the United States engaged in commerce in that quarter, it has been thought equally just and proper that he should attend here, as well to furnish the evidence in his possession applicable to the charges exhibited against Commodore Stewart as to answer such as have been exhibited against himself.

In this stage the publication of those documents might tend to excite prejudices which might operate to the injury of both. It is important that the public servants in every station should perform their duty with fidelity, according to the injunctions of the law and the orders of the Executive in fulfillment thereof. It is peculiarly so that this should be done by the commanders of our squadrons, especially on distant seas, and by political agents who represent the United States with foreign powers. . . . It is due to their rights and to the character of the Government that they be not censured without just cause, which cannot be ascertained until, on a view of the charges, they are heard in their defense, and after a thorough and impartial investigation of their conduct. Under these circumstances it is thought that a communication at this time of those documents would not comport with the public interest nor with what is due to the parties concerned.^[18]

5. Jackson Administration¹⁹

Correspondence Between United States and the Republic of Buenos Aires

On December 28, 1832, President Jackson refused to provide the House of Representatives with the copies of correspondence between the United States and the Republic of Buenos Aires and instructions given to the United States chargé d'affaires there, that it had requested. President Jackson replied that since negotia-

¹⁸ 2 Richardson, *supra*, at 278.

¹⁹ Former Columbia Law Professor and current Federal District Judge Abraham D. Sofaer has noted:

Available historical sources reveal that, although much information was provided voluntarily, all Presidents from Washington to Jackson withheld large quantities of material, especially diplomatic correspondence, from their voluntary transmittals. Congress frequently requested the information thus withheld, and Presidents usually complied. Far more often than not, requests for information on sensitive issues contained qualifications authorizing the President to withhold material the disclosure of which might prejudice the nation. Qualifications of information requests dealing with such important issues as the Burr conspiracy exemplify a tradition of legislative deference and trust, surely worth considerable weight in the debate about the discretion inherently possessed by the President.

Sofaer, Book Review, 88 Harv. L. Rev 281, 289 (1974) (reviewing R. Berger, *Executive Privilege: A Constitutional Myth*)

tions with the Republic had only been suspended and not broken off, it would “not be consistent with the public interest to communicate the correspondence and instructions requested by the House so long as the negotiation shall be pending.”²⁰

Negotiations with Great Britain Over the Northeastern Boundary

In response to the Senate’s request for information regarding negotiations carried on with Great Britain over the Northeastern Boundary, and particularly with respect to the Maine settlement, President Jackson informed the Senate on March 2, 1833, that negotiations with Great Britain were in progress and that in the meantime it was “not deemed compatible with the public interest” to communicate the conditional arrangements made with the State of Maine.²¹ The House of Representatives also requested information concerning the settlement of the Northeastern Boundary, and on January 6, 1835, President Jackson advised the House that it would be “incompatible with the public interest” to communicate such information.²² However, the President did furnish this information to the Senate at the next session, stating that “as the negotiation was undertaken under the special advice of the Senate, I deem it improper to withhold the information which the body has requested, submitting to them to decide whether it will be expedient to publish the correspondence before the negotiation has been closed.”²³

Bank of the United States Document

On December 12, 1833, President Jackson responded to a resolution of the Senate requesting him to provide “‘a copy of the paper which has been published, and which purports to have been read by him to the heads of the Executive Departments . . . relating to the removal of the deposits of the public money from the Bank of the United States and its offices.’” President Jackson declined to provide the document on the ground that the Legislature had no constitutional authority to “require of me an account of any communication, either verbally or in writing, made to the heads of Departments acting as a Cabinet council . . . [nor] might I be required to detail to the Senate the free and private conversations I have held with those officers on any subject relating to their duties and my own.”²⁴

Correspondence with France

On February 6, 1835, President Jackson furnished extracts from the dispatches between the United States and the government of France that the House of

²⁰ 2 Richardson, *supra*, at 608–09

²¹ *Id.* at 637.

²² 3 Richardson, *supra*, at 127

²³ *Id.* at 229–30.

²⁴ *Id.* at 36.

Representatives had requested, declining to send the full documents on the ground that it was not at that time in the public interest to do so.²⁵

Removal of the Surveyor General

On February 10, 1835, President Jackson sent a message to the Senate declining to comply with its resolution which requested the production of copies of charges made to the President against Gideon Fitz, the Surveyor General, which resulted in Mr. Fitz's removal from office. The resolution based the Senate's need for the documents on: 1) the need to nominate Mr. Fitz's successor, and 2) a pending Senate investigation into fraud in the sale of lands.

The President refused to furnish the documents on the ground that they related to subjects which belonged exclusively to the functions of the Executive. In addition, the President said that disclosure of the documents would subject the motives of the President in removing Mr. Fitz to the review of the Senate when not sitting as judges in an impeachment proceeding, and that the Executive's acquiescence in the Fitz case might be used by Congress as a precedent for similar and repeated requests. The President said:

This is another of those calls for information made upon me by the Senate which have, in my judgment, either related to the subjects exclusively belonging to the executive department or otherwise encroached on the constitutional powers of the Executive. Without conceding the right of the Senate to make either of these requests, I have yet, for the various reasons heretofore assigned in my several replies, deemed it expedient to comply with several of them. It is now, however, my solemn conviction that I ought no longer, from any motive nor in any degree, to yield to these unconstitutional demands. Their continued repetition imposes on me, as the representative and trustee of the American people, the painful but imperious duty of resisting to the utmost any further encroachment on the rights of the Executive.

. . . . Such a result, if acquiesced in, would ultimately subject the independent constitutional action of the Executive in a matter of great national concernment to the domination and control of the Senate. . . .

I therefore decline a compliance with so much of the resolution of the Senate as requests "copies of the charges, if any," in relation to Mr. Fitz, and in doing so must be distinctly understood as neither affirming nor denying that any such charges were made. . . .^[26]

²⁵ *Id.* at 129

²⁶ *Id.* at 132-34.

6. Tyler Administration

Correspondence Regarding Negotiations with Great Britain Over the Northeastern Boundary

In response to the House of Representatives' request for all correspondence not previously communicated regarding the United States' negotiation with Great Britain over the Northeastern Boundary, President Tyler withheld the documents and sent a February 26, 1842, message to Congress saying that "in my judgment no communication could be made by me at this time on the subject of its resolution without detriment or danger to the public interests."²⁷

Information Regarding Executive Appointments

On March 23, 1842, President Tyler refused to comply with a House resolution requesting that the President and the heads of departments communicate the names of such Members of the 26th and 27th Congresses who had applied for office, what office, and whether such application had been made in person, in writing, or through friends. President Tyler refused to disclose such information on the ground that it was by nature confidential, the disclosure of which could serve no "useful object connected with a sound and constitutional administration of the Government in any of its branches," and further, that

compliance with the resolution which has been transmitted to me would be a surrender of duties and powers which the Constitution has conferred exclusively on the Executive, and therefore such compliance can not be made by me nor by the heads of Departments by my direction. The appointing power, so far as it is bestowed on the President by the Constitution, is conferred without reserve or qualification. The reason for the appointment and the responsibility of the appointment rest with him alone. I can not perceive anywhere in the Constitution of the United States any right conferred on the House of Representatives to hear the reasons which an applicant may urge for an appointment to office under the executive department, or any duty resting upon the House of Representatives by which it may become responsible for any such appointment.^[28]

Treaty to Suppress Slave Trade

In response to the House of Representatives' request to furnish, "so far as may be compatible with the public interest," a copy of the quintuple treaty between the five powers of Europe for the suppression of the African slave trade

²⁷ 4 Richardson, *supra*, at 101.

²⁸ *Id.* at 105-06.

and certain correspondence with respect to it, President Tyler replied on June 20, 1842, that he had not received an authentic copy of the treaty and that “[i]n regard to the other papers requested, although it is my hope and expectation that it will be proper and convenient at an early day to lay them before Congress, . . . yet in my opinion a communication of them to the House of Representatives at this time would not be compatible with the public interest.”²⁹

Information Regarding Steps Taken to Obtain Recognition of American Claims by Mexican Government

The Senate had requested the President to provide information, “so far as he might deem it compatible with the public interest,” concerning what measures, if any, had been taken to obtain recognition by the Mexican government of certain claims of American citizens. President Tyler replied on August 23, 1842, that “[i]n the present state of the correspondence and of the relations between the two Governments on these important subjects it is not deemed consistent with the public interest to communicate the information requested. The business engages earnest attention, and will be made the subject of a full communication to Congress at the earliest practicable period.”³⁰

Negotiations Regarding Northwestern Boundary

In response to the Senate’s request for information concerning the United States’ negotiations with Great Britain for settlement of the Northwest Boundary, President Tyler replied on December 23, 1842, that measures had been taken to settle the dispute and that “under these circumstances I do not deem it consistent with the public interest to make any communication on the subject.”³¹

Hitchcock Investigation

On January 31, 1843, President Tyler invoked executive privilege against a request by the House of Representatives to the Secretary of War to produce investigative reports submitted to the Secretary by Lieutenant Colonel Hitchcock concerning his investigations into frauds perpetrated against the Cherokee Indians. The Secretary of War consulted with the President and under the latter’s direction informed the House that negotiations were then pending with the Indians for settlement of their claims, and that in the opinion of the President and the Department, publication of the report at that time would be inconsistent with the public interest. The Secretary of War further stated that the reports sought by the House contained information which was obtained by Colonel Hitchcock through *ex parte* questioning of persons whose statements were not made under oath, and which implicated persons who had no opportunity to contradict the

²⁹ *Id.* at 158

³⁰ *Id.* at 178–79.

³¹ *Id.* at 210–11

allegations or provide any explanation. The Secretary of War expressed the opinion that to publicize such statements at that time would be unjust to the persons mentioned, and would defeat the object of the inquiry. He also stated that the Department had not yet been given a sufficient opportunity to pursue the investigation, to call the affected parties for explanations, or to make any other determinations regarding the matter. The President stated:

The injunction of the Constitution that the President 'shall take care that the laws be faithfully executed,' necessarily confers an authority, commensurate with the obligation imposed to inquire into the manner in which all public agents perform the duties assigned to them by law. To be effective these inquiries must often be confidential. They may result in the collection of truth or of falsehood, or they may be incomplete and may require further prosecution. To maintain that the President can exercise no discretion as to the time in which the matters thus collected shall be promulgated . . . would deprive him at once of the means of performing one of the most salutary duties of his office. . . . To require from the Executive the transfer of this discretion to a coordinate branch of the Government is equivalent to the denial of its possession by him and would render him dependent upon that branch in the performance of a duty purely executive.³²

In response to the House's claim that it had a right to demand from the Executive and heads of departments any information in the possession of the Executive which pertained to subjects under the House's deliberations, President Tyler stated that the House could not exercise a right to call upon the Executive for information, even though it related to a subject of the deliberations of the House, if, by so doing, it would interfere with the discretion of the Executive.³³

Instructions to Navy Officers

In response to the House of Representatives' request for copies of instructions given to British and American commanding officers who were charged, pursuant to a treaty with Great Britain, with suppressing the slave trade off the coast of Africa, President Tyler sent a May 18, 1844, message to the House declining to provide the information on the ground that to do so would be incompatible with the public interest.³⁴

Foreign Correspondence Regarding the Ownership and Occupation of Oregon Territory

In June 1844, President Tyler sent a message to the Senate explaining his refusal to comply with its request for documents relating to the ownership and

³² *Id.* at 222.

³³ *Id.* at 222-23.

³⁴ *Id.* at 320.

occupation of the Oregon Territory. “[I]n the present state of the subject-matter,” the President wrote, “it is deemed inexpedient to communicate the information requested. . . .”³⁵

7. Polk Administration

Foreign Relations Expenditures of Prior Administration

In 1846, President Polk refused to provide the House of Representatives with confidential memoranda regarding certain expenses incurred for the conduct of foreign relations during the Tyler Administration. In refusing to comply with a House resolution requesting documentation of these expenses, President Polk stated that where a past President had placed a seal of confidentiality upon an expenditure, and the matter was terminated before he entered office,

[a]n important question arises, whether a subsequent President, either voluntarily or at the request of one branch of Congress, can without a violation of the spirit of the law revise the acts of his predecessor and expose to public view that which he had determined should not be “made public.” If not a matter of strict duty, it would certainly be a safe general rule that this should not be done. Indeed, it may well happen, and probably would happen, that the President for the time being would not be in possession of the information upon which his predecessor acted, and could not, therefore, have the means of judging whether he had exercised his discretion wisely or not.^[36]

Polk concluded that the President making an expenditure, deemed by him confidential, may, if he chooses, keep all the information and evidence upon which he acts in his own possession. If, for the information of his successors, he leaves some evidence upon which he acts in the confidential files of one of the executive departments, such evidence does not thereby become publicly available.

Military and Diplomatic Instructions with Respect to Mexico

On January 12, 1848, President Polk sent a message to the House transmitting reports of the Secretaries of State, War, and the Navy in response to a congressional resolution seeking copies of all instructions given to American military and diplomatic officers relating to the return of President General Lopez de Santa Anna to Mexico. President Polk stated that he was transmitting the documents,

³⁵ *Id.* at 327.

³⁶ *Id.* at 433.

which contain all the information in the possession of the Executive which it is deemed compatible with the public interests to communicate. . . .

The customary and usual reservation contained in calls of either House of Congress upon the Executive for information relating to our intercourse with foreign nations has been omitted in the resolution before me. The call of the House is unconditional. It is that the information requested be communicated, and thereby be made public, whether in the opinion of the Executive (who is charged by the Constitution with the duty of conducting negotiations with foreign powers) such information, when disclosed, would be prejudicial to the public interest or not. It has been a subject of serious deliberation with me whether I could, consistently with my constitutional duty and my sense of the public interests involved and to be affected by it, violate an important principle, always heretofore held sacred by my predecessors, as I should do by a compliance with the request of the House. President Washington, in a message to the House of Representatives of the 30th of March, 1796, declined to comply with a request contained in a resolution of that body, to lay before them "a copy of the instructions to the minister of the United States who negotiated the treaty with the King of Great Britain, together with the correspondence and other documents relative to that treaty, excepting such of the said papers as any existing negotiation may render improper to be disclosed."

. . . Indeed, the objections to complying with the request of the House contained in the resolution before me are much stronger than those which existed in the case of the resolution in 1796. This resolution calls for the "instructions and orders" to the minister of the United States to Mexico which relate to negotiations which have not been terminated, and which may be resumed. The information called for respects negotiations which the United States offered to open with Mexico immediately preceding the commencement of the existing war. The instructions given to the minister of the United States relate to the differences between the two countries out of which the war grew and the terms of adjustment which we were prepared to offer to Mexico in our anxiety to prevent the war. These differences still remain unsettled, and to comply with the call of the House would be to make public through that channel, and to communicate to Mexico, now a public enemy engaged in war, information which could not fail to produce serious embarrassment in any future negotiation between the two countries. I have heretofore communicated to Congress all the correspondence of the minister of the United States to Mexico which in the existing state of our relations with

that Republic can, in my judgment, be at this time communicated without serious injury to the public interest.

Entertaining this conviction, and with a sincere desire to furnish any information which may be in possession of the executive department, and which either House of Congress may at any time request, I regard it to be my constitutional right and my solemn duty under the circumstances of this case to decline a compliance with the request of the House contained in their resolution.^{37]}

Diplomatic Instructions Relating to United States–Mexico Treaty

On July 29, 1848, President Polk refused to comply with a request by the House of Representatives for copies of instructions provided to commissioners who negotiated the treaty with Mexico on the ground that “it would be ‘inconsistent with the public interests’ to give publicity to these instructions at the present time.” He added that, “as a general rule applicable to all our important negotiations with foreign powers, it could not fail to be prejudicial to the public interest to publish the instructions of our ministers until some time had elapsed after the conclusion of such negotiations.”³⁸

President Polk did transmit these documents to the House on February 8, 1849, at which time he reaffirmed the general rule enunciated on July 29, but stated that, notwithstanding that, “as [the documents] have been again called for by the House, and called for in connection with other documents, to the correct understanding of which they are indispensable, I have deemed it my duty to transmit them.”³⁹

8. Fillmore Administration

Diplomatic Instructions

Upon receipt of a request from the Senate to furnish, if not inconsistent with the public interest, information concerning the seizure of the American steamship *Prometheus* by a British war vessel and the measures taken to vindicate “the honor of the country,” President Fillmore, on December 15, 1851, transmitted excerpts from a communication giving the facts of the case, but without the instructions given to the United States Minister in London. He declared that “[s]ufficient time has not elapsed for the return of any answer to this dispatch from him, and in my judgment it would at the present moment be inconsistent with the public interest to communicate those instructions. A communication, however, of all the correspondence will be made to the Senate at the earliest moment at which a proper regard to the public interest will permit.”⁴⁰

³⁷ *Id.* at 565, 566, 567.

³⁸ *Id.* at 602.

³⁹ *Id.* at 679.

⁴⁰ 5 Richardson, *supra*, at 139–40.

Documents Involving American Claims Against the Mexican Government

In response to a Senate request for papers and proofs on file with the Executive Branch regarding the claim of Samuel A. Belden & Co. against the Mexican government, on May 29, 1852, President Fillmore forwarded all documents save those of a diplomatic nature, and stated that because the claim was still being negotiated it was therefore "not deemed expedient . . . to make public the documents which have been reserved."⁴¹

Sandwich Islands

On August 14, 1852, President Fillmore refused to provide information to the Senate regarding a proposition made by the King of the Sandwich Islands to transfer the islands to the United States, as not comporting with the public interest.⁴²

9. Buchanan Administration

Law Enforcement Files

On January 11, 1859, President Buchanan responded to a request by the Senate for information relating to the landing of a slave ship on the coast of Georgia. The President transmitted a report from the Attorney General which stated that an offense had been committed and that measures were being taken to enforce the law. However, he concurred with the opinion of the Attorney General that "it would be incompatible with the public interest at this time to communicate the correspondence with the officers of the Government at Savannah or the instructions which they have received."⁴³

10. Lincoln Administration

Fort McHenry Arrests

On July 27, 1861, President Lincoln refused to provide to the House of Representatives documents revealing the grounds, reasons, and evidence upon which Baltimore police commissioners were arrested at Fort McHenry for the reason that disclosure at that time would be incompatible with the public interest.⁴⁴

Arrest of Brigadier General Stone

On May 1, 1862, President Lincoln refused to comply with a request by the Senate for more particular information regarding the evidence leading to the

⁴¹ *Id.* at 151.

⁴² *Id.* at 159.

⁴³ *Id.* at 534.

⁴⁴ 6 Richardson, *supra.* at 33.

arrest of Brigadier General Stone on the ground that the determination to arrest and imprison him was made upon the evidence and in the interest of public safety, and that disclosure of more particular information was incompatible with the public interest.⁴⁵

Negotiations with New Granada

The House of Representatives had requested the Secretary of State to communicate to it, "if not in his judgment incompatible with the public interest," information concerning American relations with New Granada, and what negotiations, if any, had been had with General Herran of that country. President Lincoln, on January 14, 1863, replied to the resolution giving a résumé of developments in New Granada. However, with respect to official communications with General Herran, he stated that "[n]o definitive measure or proceeding has resulted from these communications, and a communication of them at present would not, in my judgment, be compatible with the public interest."⁴⁶

11. Johnson Administration

Military Correspondence

On January 26, 1866, President Johnson refused to disclose to the Senate certain communications from military officers regarding violations of neutrality on the Rio Grande on the ground that such disclosure would not be consistent with the public interest.⁴⁷

Confinement of Jefferson Davis

On February 9, 1866, President Johnson refused, on advice from the Secretary of War and the Attorney General, to comply with a request by the House of Representatives for a report by the Judge Advocate General concerning the confinement of Jefferson Davis, and others, on the ground that disclosure would not be in the public interest.⁴⁸

New Orleans Investigations

On May 2, 1866, President Johnson refused to provide the House of Representatives with a copy of a report that it had requested concerning General Smith's and James T. Brady's New Orleans investigations, citing the public interest in nondisclosure.⁴⁹

⁴⁵ *Id.* at 74.

⁴⁶ *Id.* at 147, 149.

⁴⁷ *Id.* at 376-77.

⁴⁸ *Id.* at 378.

⁴⁹ *Id.* at 385.

12. Grant Administration

Performance of Executive Functions

In April 1876, President Grant was requested by the House of Representatives to provide information which would show whether any executive acts or duties had been performed away from Washington, the lawfully established seat of government. (This was an attempt to embarrass the President for having spent the hot summer at Long Beach.) On May 4, 1876, the President refused on the ground that the Constitution did not give the House of Representatives authority to inquire of the President where he performed his executive functions, and that, moreover, the House's lawful demands on the Executive were limited to information necessary for the proper discharge of its powers of legislation or impeachment.⁵⁰

13. Cleveland Administration

Dismissal of District Attorney

In response to a resolution by the Senate requesting the Attorney General to provide certain documents concerning the administration of the United States Attorney's Office (then District Attorney) for the Middle District of Alabama, and the President's dismissal of the incumbent district attorney, President Cleveland sent a message on March 1, 1886, to the Senate stating that he was withholding the requested documents because they contained information addressed to him and to the Attorney General by private citizens concerning the former district attorney, and that the documents related to an act (the suspension and removal of an Executive Branch official) which was exclusively a discretionary executive function.⁵¹

"Rebecca" Schooner Incident

On February 26, 1887, President Cleveland refused to provide the Senate with information that it requested regarding the seizure and sale of the American schooner *Rebecca* at Tampico, and the resignation of the Minister of the United States to Mexico, on the ground that publication of the requested correspondence would be inconsistent with the public interest.⁵²

14. Harrison Administration

International Conference on the Use of Silver

In response to the Senate's request for information regarding the steps taken toward holding an international conference on the use of silver, President Har-

⁵⁰ 7 Richardson, *supra*, at 361-66

⁵¹ 8 Richardson, *supra*, at 375.

⁵² *Id.* at 538

rierson stated on April 26, 1892, that "in my opinion it would not be compatible with the public interest to lay before the Senate at this time the information requested, but that at the earliest moment after definite information can properly be given all the facts and any correspondence that may take place will be submitted to Congress."⁵³

15. Cleveland Administration

Cuba Matters

In response to a request by the House of Representatives for copies of all correspondence relating to affairs in Cuba since February 1895, President Cleveland transmitted on February 11, 1896, a communication from the Secretary of State and such portions of the correspondence requested as he deemed it not inconsistent with the public interest to communicate.⁵⁴

Correspondence with Spain

On May 23, 1896, President Cleveland transmitted to the Senate a requested copy of the protocol with Spain, but withheld copies of certain correspondence with Spain on the ground that it would be incompatible with the public good to furnish such correspondence.⁵⁵

16. McKinley Administration

War Department Investigations

In response to a request made by the Senate to the Secretary of War for a report on the War Department's investigation into receipts and expenditures of Cuban funds, President McKinley informed the Senate on January 3, 1901, that it was not deemed compatible with the public interest to transmit the document at that time.⁵⁶

17. Theodore Roosevelt Administration

United States Steel Proceedings

On January 4, 1909, the Senate passed a resolution directing the Attorney General to inform the Senate whether certain legal proceedings had been instituted against the United States Steel Corporation, and if not, the reasons for its non-action. A request was also made for the opinions of the Attorney General regarding this matter, if any had been written. President Roosevelt replied to the Senate on January 6, 1909, stating that he had been orally advised by the Attorney

⁵³ 9 Richardson, *supra*, at 238-39.

⁵⁴ *Id.* at 666.

⁵⁵ *Id.* at 669.

⁵⁶ 9 Richardson, *supra*, at 6458 (Bur of Nat'l Literature ed. 1911).

General that there were insufficient grounds for instituting legal action against U.S. Steel, and that he had

instructed the Attorney General not to respond to that portion of the resolution which calls for a statement of his reasons for nonaction. I have done so because I do not conceive it to be within the authority of the Senate to give directions of this character to the head of an executive department, or to demand from him reasons for his action. Heads of the executive departments are subject to the Constitution, and to the laws passed by the Congress in pursuance of the Constitution, and to the directions of the President of the United States, but to no other direction whatever.⁵⁷

When the Senate was unable to get the documents from the Attorney General, it subpoenaed the Commissioner of Corporations to produce all papers and documents regarding U.S. Steel in his possession. The Commissioner reported the request to the President, who sought an opinion from Attorney General Bonaparte regarding the Commissioner's statutory obligation to withhold such information except upon instruction by the President. The Attorney General advised the Commissioner that the discretion to make public the requested documents was vested in the President and that, accordingly, he should turn over all documents within the scope of the subpoena to the President.⁵⁸ The Commissioner did so, and President Roosevelt then informed the Judiciary Committee that he had the papers and that the only way the Senate could get them was through his impeachment. President Roosevelt also explained that some of the facts were given to the government under a pledge of secrecy and that the government had an obligation to keep its word.⁵⁹

18. Coolidge Administration

Bureau of Internal Revenue Oversight

On April 11, 1924, President Coolidge responded to a request by the Senate for a list of all companies in which the Secretary of the Treasury "was interested" (for the purpose of investigating their tax returns) as a part of a general oversight investigation of the Bureau of Internal Revenue. President Coolidge refused to provide the information on the ground that it was confidential information the disclosure of which would be detrimental to public service, calling the Senate's investigation an "unwarranted intrusion," born of a desire other than to secure information for legitimate legislative purposes.⁶⁰

⁵⁷ 43 Cong. Rec. 528 (1909).

⁵⁸ 27 Op. Att'y Gen. 150 (1909).

⁵⁹ E. Corwin, *The President—Office and Powers* 429 (1957).

⁶⁰ 65 Cong. Rec. 6087 (1924).

19. Hoover Administration

London Treaty Letters

On July 11, 1930, President Hoover responded to a request addressed to the Secretary of State from the Senate Foreign Relations Committee for certain confidential telegrams and letters leading up to the London Naval Conference and the London Treaty. The Committee members had been permitted to see the documents with the understanding that the information contained therein would be kept confidential. The Committee asserted its right to have full and free access to all records touching on the negotiation of the Treaty, basing its right on the constitutional prerogative of the Senate in the treaty-making process. In his message to the Senate, President Hoover pointed out that there were a great many informal statements and reports which were given to the government in confidence. The Executive was under a duty, in order to maintain amicable relations with other nations, not to publicize every negotiating position and statement which preceded final agreement on the Treaty. He stated that the Executive must not be guilty of a breach of trust, nor violate the invariable practice of nations. "In view of this, I believe that to further comply with the above resolution would be incompatible with the public interest."⁶¹

20. Franklin D. Roosevelt Administration

FBI Records

On April 30, 1941, at the direction of President Roosevelt, Attorney General Jackson wrote the Chairman of the House Committee on Naval Affairs, stating his refusal to provide the Committee with certain FBI records. Attorney General Jackson declared that "all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to 'take care that the laws be faithfully executed,' and that congressional or public access to them would not be in the public interest."⁶²

Radio Intelligence Material

Pursuant to a January 19, 1943, resolution, a House Select Committee to Investigate the Federal Communications Commission (FCC) subpoenaed the Director of the Bureau of the Budget on July 9, 1943, to appear before the Select Committee and produce Bureau files and correspondence dealing with requests by the War and Navy Departments to the President for an executive order transferring the functions of the FCC's Radio Intelligence Division to the military establishments. The Director refused, citing Attorney General Jackson's letter of

⁶¹ S. Doc. No. 216, 71st Cong., Special Sess. 2 (1930).

⁶² 40 Op. Att'y Gen. 45, 46 (1941)

April 30, 1941, and a presidential instruction that the Bureau's files were to be kept confidential, because disclosure would not comport with the public interest.⁶³

In addition, the Acting Secretary of War was requested to appear before the Select Committee to produce documents bearing on the War and Navy Departments' requests to the President and to bring several Army officers to testify. The Acting Secretary refused to provide the documents on the President's direction, on the ground that doing so would be incompatible with the public interest, and, pursuant to his own judgment, refused to permit the Army officers to appear.⁶⁴

FBI Records

In 1944, the same Select Committee subpoenaed the Director of the Federal Bureau of Investigation to testify concerning fingerprint records and activities at Pearl Harbor, and also to identify a certain document which he was alleged to have received in the course of his duties. The Director refused to give testimony or to exhibit a copy of the President's directive requiring him, in the interest of national security, to refrain from testifying or disclosing the contents of the Bureau's files.⁶⁵ Attorney General Biddle wrote a letter to the Select Committee, dated January 22, 1944, informing the Committee that communications between the President and the heads of departments were privileged and not subject to inquiry by congressional committees.⁶⁶

21. Truman Administration

Condon Incident

In March 1948, the House Committee on Un-American Activities issued a subpoena to the Secretary of Commerce directing him to appear before the Committee and to bring with him a letter from the Director of the FBI concerning the loyalty of Dr. Condon, Director of the National Bureau of Standards, together with all records, files, and transcripts of the loyalty board relating to Dr. Condon. On March 13, 1948, President Truman issued a directive providing for the confidentiality of all loyalty files and requiring that all requests for such files from sources outside the Executive Branch be referred to the Office of the President, for such response as the President may determine. 13 Fed. Reg. 1359 (1948). At a press conference held on April 22, 1948, President Truman indicated that he would not comply with the request to turn the papers over to the Committee.⁶⁷

Steelman Incident

On March 6, 1948, during an investigation into a strike among employees of Government Services, Inc., a subcommittee of the House Committee on Educa-

⁶³ *Study and Investigation of the Federal Communications Commission Hearings on H. Res. 21 Before the House Select Comm. to Investigate the Federal Communications Commission, 78th Cong., 1st Sess. 37 (1943).*

⁶⁴ *Id.* at 67-68.

⁶⁵ *Id.* at 2304-05.

⁶⁶ *Id.* at 2337-39.

⁶⁷ *The Public Papers of the Presidents, Harry S. Truman, 1948, at 228.*

tion and Labor issued a subpoena to presidential assistant John R. Steelman.⁶⁸ Mr. Steelman returned the subpoena to the chairman of the subcommittee on the ground that "the President directed me, in view of my duties as his assistant, not to appear before your subcommittee."⁶⁹ The minority report to H.R. Rep. No. 1595 commented on Mr. Steelman's failure to comply with the subpoena as follows:

the purpose of the subpoena on Mr. Steelman was to obtain from him the contents of any oral or written communications which had been made to him by the President with reference to the strike prevailing in the restaurants maintained by Government Services, Inc. I cannot believe that any congressional committee is entitled to make that kind of investigation into the private conferences of the President with one of his principal aides. I cannot conceive that the views of a Senator or Congressman on a pending bill may be extracted by a court or by a congressional committee by subpoenaing the Senator's or [sic] Congressman's administrative assistant or any other assistant, secretary, or confidential employee. Likewise, I regard it as a direct invasion of the Executive's prerogative to invade the work and time of his assistant in this manner. Dr. Steelman I think acted with the utmost propriety in referring the matter to the President. The Chief Executive very naturally and properly directed Dr. Steelman not to appear before the subcommittee.⁷⁰

State Department Employee Loyalty Investigation

On March 28, 1950, a subcommittee of the Senate Foreign Relations Committee investigating allegations of disloyalty among State Department employees served subpoenas on the Secretary of State, the Attorney General, and the Chairman of the Civil Service Commission, demanding the production of all files bearing on the loyalty of certain State Department employees. After reference of the subpoena to the President pursuant to the directive of March 13, 1948, the President on April 3, 1950, directed the officials not to comply with the subpoena.⁷¹ Thereafter it appeared that the subpoenaed documents had been made available to the preceding Congress prior to the issuance of the March 13, 1948, directive. President Truman thereupon agreed to make the files available to the subcommittee on the theory that this would not constitute a precedent for subsequent exceptions from the March 13, 1948, directive.⁷²

⁶⁸ *Investigation of GSI Strike: Hearings on H. Res. 111 Before a Special Subcomm. of the House Comm. on Education and Labor*, 80th Cong., 2d Sess. 347-53 (1948).

⁶⁹ H. R. Rep. No. 1595, 80th Cong., 2d Sess. 3 (1948); see *id.* Pt. 2, at 8.

⁷⁰ *Id.* Pt. 1, at 12.

⁷¹ *The Public Papers of the Presidents, Harry S. Truman*, 1950, at 240.

⁷² S. Rep. No. 2108, 81st Cong., 2d Sess. 9 (1950).

General Bradley Incident

During the investigation into the circumstances surrounding the dismissal of General Douglas MacArthur held by the Senate Committees on Armed Services and Foreign Relations in 1951, General Bradley refused to testify about a conversation with President Truman in which he had acted as the President's confidential adviser. The Chairman of the Committee, Senator Russell, recognized Bradley's claim of privilege. When that ruling was challenged, the Committee upheld it by a vote of 18 to 8.⁷³ At a press conference held on May 17, 1951, President Truman indicated that he had previously taken the position that his conversation with General Bradley was privileged and that he was "happy" with the Committee's action.⁷⁴

Refusal to Comply with an Excessively Burdensome Demand for Information

During an investigation into the administration of the Department of Justice by a special subcommittee of the House Judiciary Committee, the chairman of the subcommittee requested a number of departments and agencies to furnish the following information:

A list of all cases referred to the Department of Justice or U.S. Attorneys for either criminal or civil action by any governmental department or agency within the last six years, in which:

a. Action was declined by the Department of Justice, including in each such case the reason or reasons assigned by said Department for such refusal to act.

b. Said cases were returned by the Department of Justice to the governmental Department or agency concerned for further information or investigation. In such cases, a statement of all subsequent action taken by the Department of Justice should be included.

c. Said cases have been referred to the Department of Justice and have been pending in the Department for a period of more than one year and are not included in b. above.⁷⁵

President Truman instructed the heads of all agencies and departments not to comply with that request for the following reasons set forth in his letter, dated March 7, 1952, to the chairman of the subcommittee:

[T]his request of yours is so broad and sweeping in scope that it would seriously interfere with the conduct of the Government's business if the departments and agencies should undertake to

⁷³ *Military Situation in the Far East: Hearings Before the Senate Comm. on Armed Services and the Senate Comm. on Foreign Relations*, 82d Cong., 1st Sess. 763, 832-72 (1951).

⁷⁴ *The Public Papers of the Presidents, Harry S Truman*, 1951, at 289.

⁷⁵ *The Public Papers of the Presidents, Harry S Truman*, 1952-53, at 199.

comply with it. I am advised that it would require the examination of hundreds of thousands of files, that it would take hundreds of employees away from their regular duties for an extensive period of time, and that it would cost the Government millions of dollars. All this would be done, not for the purpose of investigating specific complaints, not for the purpose of evaluating credible evidence of wrongdoing, but on the basis of a dragnet approach to examining the administration of the laws.

I do not believe such a procedure to be compatible with those provisions of the Constitution which vest the executive power in the President and impose upon him the duty to see that the laws are faithfully executed.¹⁷⁶

Confidentiality of Administration of Loyalty Security Program

In the spring of 1952 members of a Senate Appropriations subcommittee sought detailed information on the administration of the Loyalty Security Program. In response to a request for guidance by the Department of State, President Truman on April 3, 1952, issued detailed instructions which provided for the confidentiality of the Loyalty Security Program. These instructions provided, *inter alia*:

There is no objection to making available the names of all members of an agency loyalty board, but it is entirely improper to divulge how individual board members voted in particular cases or to divulge the members who sat on particular cases. If this type of information were divulged freely, the danger of intimidation would be great, and the objectivity, fairness and impartiality of board members would be seriously prejudiced.¹⁷⁷

22. Eisenhower Administration

Executive Branch Deliberative Discussions

During the Army-McCarthy Hearings, the counselor of the Army was questioned about discussions which had taken place during a conference of high-level government officials.

On May 17, 1954, President Eisenhower directed the Secretary of Defense to instruct the employees of his Department not to testify on those issues. The President's letter stated:

Because it is essential to efficient and effective administration that employees of the Executive Branch be in a position to be completely candid in advising with each other on official matters,

⁷⁶ *Id.*

⁷⁷ *Id.* at 235-36.

and because it is not in the public interest that any of their conversations or communications, or any documents or reproductions, concerning such advice be disclosed, you will instruct employees of your Department that in all of their appearances before the Subcommittee of the Senate Committee on Government Operations regarding the inquiry now before it they are not to testify to any such conversations or communications, or to produce any such documents or reproductions. This principle must be maintained regardless of who would be benefited by such disclosures.⁷⁸

This letter was interpreted as requiring every officer and employee of the government to claim privilege on his own in any situation covered by that letter. Hence there were a considerable number of invocations of executive privilege during the Eisenhower Administration which were not referred to, or specifically authorized by, the President.

Conversation with Presidential Assistant Sherman Adams

During hearings in July 1955 on the Dixon-Yates Contract before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, Securities and Exchange Commission Chairman Armstrong was questioned on various issues. During most of his testimony, questions of privilege were disposed of without reference to the White House. When questioned about a telephone conversation with Presidential Assistant Sherman Adams, he sought the advice of the Special Counsel to the President who, upon advice of the Attorney General, directed that Mr. Armstrong could testify as to existence of the conversation, but not as to matters discussed during the conversation.⁷⁹

Killian and Gaither Panel Reports

In connection with an investigation into satellite and missile programs in January 1958, then-Senator Lyndon Johnson asked for the release of the so-called Killian and Gaither Panel reports. President Eisenhower denied the request in part on the ground that the reports had been prepared with the understanding that the advice contained in them would be kept confidential. The President added that "these reports are documents of the National Security Council. Never have the documents of this Council been furnished to the Congress."⁸⁰

Confidentiality of ICA Country Reports

Between 1957 and 1959 the International Cooperation Administration (ICA), the predecessor to the Agency for International Development (AID), repeatedly

⁷⁸ The Public Papers of the Presidents, Dwight D. Eisenhower, 1954, at 483-84.

⁷⁹ *Power Policy. Dixon-Yates Contract: Hearings on S. Res. 61 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 84th Cong., 1st Sess. 751 (1955).

⁸⁰ The Public Papers of the Presidents, Dwight D. Eisenhower, 1958, at 117-18.

denied to Congress and to the Comptroller General access to its country evaluation reports on the ground that they contained confidential opinions and tentative recommendations on matters involving foreign policy. These refusals were made without express presidential authorization.

When this issue came up at President Eisenhower's news conference of July 1, 1959, the President approved these withholdings largely on the ground that the release of the reports would jeopardize the ability of the United States to obtain confidential information.⁸¹

The Mutual Security legislation of 1959-1961 provided in effect that the ICA could withhold information from Congress or the Comptroller General only upon a presidential certification that he had forbidden the document be furnished and stated the reason for so doing. President Eisenhower made the following certifications:

November 12, 1959, relating to an evaluation report on Vietnam;⁸²

December 22, 1959, relating to evaluation reports on Iran and Thailand;⁸³

December 2, 1960, relating to evaluation reports on several South American countries. These reports apparently were made available to the Comptroller General during the following Administration.⁸⁴

23. Kennedy Administration

Confidentiality of Names of Specific Government Employees

During an investigation into military cold war education and speech review policies conducted by the Senate Committee on Armed Services, Senator Thurmond requested the names of individual government employees of the Department of Defense and the Department of State who made or recommended changes in specific speeches.

On February 8, 1962, President Kennedy directed the Secretary of Defense and all personnel under the jurisdiction of his Department not to give any testimony or produce any documents which would disclose such information. The letter stated:

[I]t would not be possible for you to maintain an orderly Department and receive the candid advice and loyal respect of your subordinates if they, instead of you and your senior associates, are to be individually answerable to the Congress, as well as to you, for their internal acts and advice.

* * * * *

I do not intend to permit subordinate officials of our career

⁸¹ *Id.*, 1959, at 488, 489.

⁸² *Id.* at 776.

⁸³ *Id.* at 874.

⁸⁴ *Id.*, 1960-61, at 881.

services to bear the brunt of congressional inquiry into policies which are the responsibilities of their superiors.¹⁸⁵

Chairman Stennis upheld the claim of privilege. The ruling was upheld by the Subcommittee.⁸⁶ On February 9, 1962, President Kennedy sent a similar letter to the Secretary of State.⁸⁷

Confidentiality of National Security Council Papers

Later, during the same investigation into military cold war education and speech review policies, Senator Thurmond demanded certain National Security Council papers. In a letter to Chairman Stennis dated June 23, 1962, President Kennedy refused to release those papers on the ground that "the unbroken precedent of the National Security Council is that its working papers and policy documents cannot be furnished to the Congress."⁸⁸

24. Johnson Administration

Exemption of Presidential Assistants from Appearance Before Congressional Committees

In 1968, during hearings on the nomination of Justice Fortas to be Chief Justice of the United States, Treasury Under Secretary Barr, Associate Special Counsel to the President DeVier Pierson, and Secretary of Defense Clark Clifford were invited to appear before the Senate Committee on the Judiciary to testify on the question whether Justice Fortas had participated in high-level White House meetings dealing with the development of legislation authorizing the Secret Service to protect presidential candidates.

By letters dated September 16, 1968, Mr. Barr and Mr. DeVier Pierson both declined the invitation. Mr. Barr's letter contained the following pertinent language:

In the development of this legislation, I participated in meetings with representatives of the White House and discussed the matter directly with the President.

Based on long-standing precedents, it would be improper for me under these circumstances to give testimony before a Congressional committee concerning such meetings and discussions. Therefore, I must, with great respect, decline your invitation to appear and testify.

Mr. DeVier Pierson stated:

⁸⁵ *Military Cold War Education and Speech Review Policies: Hearings Before the Special Preparedness Subcomm. of the Senate Comm. on Armed Services, 87th Cong., 2d Sess. 508-509 (1962).*

⁸⁶ *Id.* at 513-14.

⁸⁷ *Id.* at 725.

⁸⁸ *Id.* at 2951-57, 3160-61.

As Associate Special Counsel to the President since March of 1967, I have been one of the "immediate staff assistants" provided to the President by law. (3 U.S.C. 105, 106.) It has been firmly established, as a matter of principle and precedents, that members of the President's immediate staff shall not appear before a Congressional committee to testify with respect to the performance of their duties on behalf of the President. This limitation, which has been recognized by the Congress as well as the Executive, is fundamental to our system of government. I must, therefore, respectfully decline the invitation to testify in these hearings.

The Secretary of Defense also asked to be excused from a personal appearance before the Committee, stating that "because of the complexities of the current world situation, my time is fully occupied in meeting my obligations and responsibilities as Secretary of Defense."⁸⁹

25. Nixon Administration

FBI Investigative Files

On November 21, 1970, the Attorney General, with the specific approval of the President, refused to release certain investigative files of the Federal Bureau of Investigation to Rep. L. H. Fountain, Chairman of the Intergovernmental Relations Subcommittee of the House Government Operations Committee. The reports discussed certain scientists nominated by the President to serve on advisory boards of the Department of Health, Education and Welfare.⁹⁰

Military Assistance Plan

On August 30, 1971, President Nixon declined to make available to the Senate Foreign Relations Committee the Five-Year Plan for the Military Assistance Program.⁹¹ In a memorandum to the Secretaries of State and Defense, the President stated:

The Senate Foreign Relations Committee has requested "direct access to the Executive Branch's basic planning data on Military Assistance" for future years and the several internal staff papers containing such data. The basic planning data and the various

⁸⁹ *Nominations of Abe Fortas and Homer Thornberry: Hearings Before the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. 1347, 1348, 1363 (1968).

⁹⁰ Memorandum for Honorable William S. Moorhead, Chairman, Subcommittee on Foreign Operations and Government Information of the House Committee on Government Operations, from Deputy Assistant Attorney General Mary Lawton (Apr. 25, 1973) (Lawton Memorandum); U.S. Government Information Policies and Practices—The Pentagon Papers, Part 2, House Comm. on Government Operations, 92d Cong., 1st Sess. 362-63 (1971).

⁹¹ *Executive Privilege. The Withholding of Information By the Executive: Hearing Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 45-46 (1971).

internal staff papers requested by the Senate Foreign Relations Committee do not, insofar as they deal with future years, reflect any approved program of this Administration. . . .

I am concerned, as have been my predecessors, that unless privacy of preliminary exchange of views between personnel of the Executive Branch can be maintained, the full frank and healthy expression of opinion which is essential for the successful administration of Government would be muted.

I have determined, therefore, that it would not be in the public interest to provide to the Congress the basic planning data on military assistance as requested by the Chairman. . . .^{92]}

AID Information Concerning Foreign Assistance to Cambodia

On March 15, 1972, the President directed the Secretary of State to withhold from the Foreign Operations and Government Information Subcommittee of the House Government Operations Committee the Agency for International Development (AID) country field submissions for Cambodian foreign assistance for fiscal year 1973.⁹³

USIA Memoranda

On the same date the President instructed the Director of the United States Information Agency (USIA) to decline to provide to the Senate Foreign Relations Committee all USIA country program memoranda.⁹⁴

Watergate

President Nixon, asserting executive privilege during 1973 and 1974, refused to provide to the Senate Select Committee on Presidential Campaign Activities (Watergate Committee) and to the House Judiciary Committee various tape recordings of conversations involving the President, and other materials relating to the involvement of 25 named individuals in criminal activities connected with the 1972 presidential election.⁹⁵

26. Carter Administration

Department of Energy Gas Conservation Fee Documents

In April 1980 the Subcommittee on Environment, Energy and Natural Resources of the House Committee on Government Operations subpoenaed docu-

⁹² *Id.* at 46.

⁹³ 118 Cong. Rec. 8694 (1972); Lawton Memorandum. *supra*.

⁹⁴ *Id.*

⁹⁵ See J. Hamilton, *The Power to Probe* 23-26, 65 (1976); Cox, *Executive Privilege*, 122 U. Pa. L. Rev. 1383, 1420 (1974). Although the tape recordings were eventually turned over to the House Judiciary Committee, the President's refusal to make those same tapes available to the Senate Watergate Committee was unanimously affirmed by the U.S. Court of Appeals for the District of Columbia Circuit. *Senate Select Committee v. Nixon*, 498 F.2d 725 (1974) (*en banc*). President Nixon's refusal to disclose Watergate-related tapes and documents in response to a subpoena in a criminal case is beyond the scope of this memorandum. See generally *United States v. Nixon*, 418 U.S. 683 (1974).

ments reflecting intra-Executive Branch deliberations concerning the President's decision to impose a conservation fee on imports of crude oil and gasoline.⁹⁶ For several weeks representatives of the Executive Branch negotiated with the Subcommittee about releasing the documents. On April 25, 1980, Secretary of Energy Duncan informed the Subcommittee that "the President has instructed me to pursue all reasonable grounds of accommodation. If there are no further reasonable avenues of negotiation, the President has instructed me to assert a privilege with respect to these documents."⁹⁷ Ultimately, some but not all of the documents were given to the Subcommittee, which tacitly withdrew its request for documents that reflected deliberations directly involving the Executive Office of the President.⁹⁸

27. Reagan Administration

Secretary Watt's Implementation of the Mineral Lands Leasing Act

On October 2, 1981, the Oversight and Investigations Subcommittee of the House Committee on Energy and Commerce served a subpoena on Secretary of the Interior James Watt for all documents relative to his determination of Canadian reciprocity under the Mineral Lands Leasing Act, 30 U.S.C. § 181. Among the material covered by the subpoena were a number of Cabinet-level predecisional deliberative documents, while other documents contained classified, diplomatic information. On October 13, 1981, President Reagan directed Secretary Watt not to release 31 particular documents whose disclosure would be inconsistent with the confidential relationship among Cabinet officers and the President, and which would violate the constitutional doctrine of separation of powers. While protecting the confidentiality of these documents, Secretary Watt made repeated efforts to accommodate the Subcommittee's needs through certain limited document disclosures, testimony, and correspondence.

On February 8, 1982, a contempt resolution against Secretary Watt was passed by the Subcommittee; on February 25 the full Committee supported this conclusion by a vote of 23 to 19. By this time, however, Secretary Watt had reached a decision finding Canada to be a "reciprocal" national under the Mineral Lands Leasing Act. Immediately thereafter he informed all members of the Subcommittee that since the deliberative process had concluded, he was "hopeful" that additional documents might be released.

On March 16, 1982, Fred F. Fielding, Counsel to the President, together with members of the Subcommittee, reached an agreement pursuant to which all of the disputed documents were made available for one day at Congress under the

⁹⁶ Proclamation No. 4744, 16 Weekly Comp. Pres. Doc. 592 (1980).

⁹⁷ Memorandum for the Attorney General, from Assistant Attorney General John Harmon, 6 (Jan. 13, 1981).

⁹⁸ *Id.* at 8.

custody of a representative from the Office of Counsel to the President. Minimal notetaking, but no photocopying, was permitted; the documents were available for examination by Members Only.⁹⁹

THEODORE B. OLSON
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⁹⁹ See generally H.R. Rep. No. 898, 97th Cong., 2d Sess. 73-84 (1982); *Contempt of Congress. Hearings Before the Subcomm. on Oversight and Investigations of the House Comm on Energy and Commerce*, 97th Cong., 2d Sess. (1982)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

COMMITTEE ON OVERSIGHT AND)
 GOVERNMENT REFORM,)
 UNITED STATES HOUSE OF)
 REPRESENTATIVES,)
)
 Plaintiff,)
)
 v.)
)
 ERIC H. HOLDER, JR.,)
 in his official capacity as)
 Attorney General of the United States,)
)
 Defendant.)
 _____)

Case No. 1:12-cv-1332 (ABJ)

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant hereby moves for summary judgment pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 7 on the remaining claim presented by the Committee's Amended Complaint. In support of this Motion, defendant respectfully refers the Court to the accompanying Memorandum of Law and the attached declarations of Paul Colborn and Faith Burton. A proposed order is also attached.

Dated: January 21, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2014, I caused a true and correct copy of the foregoing Motion for Summary Judgment and the attached materials to be served on plaintiff's counsel electronically by means of the Court's ECF system.

/s/ Eric Womack
ERIC R. WOMACK

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
COMMITTEE ON OVERSIGHT AND)	
GOVERNMENT REFORM, UNITED STATES)	
HOUSE OF REPRESENTATIVES,)	
)	
	<i>Plaintiff,</i>)	
)	
v.		)	Case No. 1:12-cv-1332 (ABJ)
)	
ERIC H. HOLDER, JR.,)	
in his official capacity as Attorney General of the)	
United States,)	
)	
	<i>Defendant.</i>)	
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PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION TO DISMISS

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November 21, 2012

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INTRODUCTION

The Committee on Oversight and Government Reform of the U.S. House of Representatives (“Committee” or “Oversight Committee”) seeks to enforce a Committee subpoena issued to Attorney General Eric H. Holder, Jr. for Department of Justice (“DOJ”) records.¹ The Committee issued the Holder Subpoena in connection with its investigation of Operation Fast and Furious, a DOJ law-enforcement operation that involved “gun walking,” a controversial and now discredited tactic of knowingly permitting firearms purchased illegally in this country to be unlawfully transferred to third-party possessors, with those illegally-purchased and unlawfully-transferred firearms intentionally not being interdicted by law enforcement authorities.

DOJ has acknowledged that the Committee’s investigation is appropriate and legitimate. Compl. ¶¶ 6, 35. DOJ also publicly has acknowledged – principally as a result of the Committee’s investigation – that Operation Fast and Furious was fundamentally flawed and that its tactics must not be repeated. *Id.* ¶ 9. DOJ did so, however, only after initially denying – in response to two written congressional inquiries to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”), a DOJ component bureau – *that any gun walking operations even existed*:

[T]he allegation . . . that [ATF] “sanctioned” or otherwise knowingly allowed the sale of assault weapons to a straw purchaser who then transported them into Mexico – is false. ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico.

Letter from Ronald Weich, Ass’t Att’y Gen., to Hon. Charles E. Grassley, Ranking Member, Comm. on the Judiciary, U.S. Senate, at 1 (Feb. 4, 2011) (“Feb. 4, 2011 False Statement Letter”), attached as Ex. 1. DOJ later – although not until 10 months later – acknowledged publicly that

¹ See Subpoena to Hon. Eric H. Holder, Jr., Att’y Gen. (Oct. 11, 2011) (“Holder Subpoena”), attached as Ex. A to Compl. (Aug. 13, 2012) (ECF No. 1).

these statements were false. *See* Letter from James M. Cole, Dep’y Att’y Gen., to Hon. Darrell E. Issa, Chairman, Oversight Comm., & Hon. Charles E. Grassley, Ranking Member, Comm. on the Judiciary, U.S. Senate, at 1 (Dec. 2, 2011), attached as Ex. 2.

Notwithstanding these acknowledgements, DOJ actively resisted cooperating fully with the Committee’s investigation from the very outset, and it has taken the extraordinary position that the Committee lacks authority to investigate DOJ’s concededly false statements to Congress. The Attorney General’s response to the Holder Subpoena has been consistent with DOJ’s overall response to the Committee’s investigation – only more so. In particular, the Attorney General drew a hard temporal line in the sand and refused to produce documents dated or created after February 4, 2011 (or otherwise to provide information about events that occurred after February 4, 2011), the exact date DOJ made the false statements to Congress.

Notwithstanding the Attorney General’s intransigence, the Committee repeatedly sought an accommodation (including on May 18, 2012, June 13, 2012, June 15, 2012, and June 19, 2012). Compl. ¶ 46. In particular, the Committee offered to narrow the focus of the Holder Subpoena in order to obtain documents relevant to the Obstruction Component of the Committee’s investigation – without ever obtaining a positive response. *Id.* ¶¶ 7, 13, 39, 46.

More than eight months *after* the Holder Subpoena was issued, the Attorney General enlisted the White House – which previously had stood at the periphery of the Committee’s investigation and disclaimed any responsibility for Operation Fast and Furious – to support his defiance of the Holder Subpoena. On June 20, 2012, the Committee was informed – indirectly through the Deputy Attorney General – that the President, at the behest of the Attorney General, asserted “Executive privilege” over those responsive post-February 4, 2011 internal DOJ documents that the Attorney General refused to produce. *See* Letter from James M. Cole, Dep’y

Att’y Gen., to Hon. Darrell E. Issa, Chairman, Oversight Comm. (June 20, 2012), attached as Ex.

3. This eleventh-hour assertion of Executive privilege came absent any suggestion during the preceding eight-plus months that any documents responsive to the Holder Subpoena were subject to Executive privilege; absent any suggestion that the documents at issue implicate or otherwise involve any advice to the President; and absent any suggestion that the withheld documents implicate any core constitutional function of the President.

The Committee legally is entitled to all documents responsive to the Holder Subpoena that have not been produced. Nevertheless, in this action, the Committee seeks to enforce that subpoena only as to a subset of post-February 4, 2011 responsive documents (the “Post-February 4 Subset,” Compl. ¶ 62). That subset is particularly relevant to the Committee’s efforts to determine whether DOJ deliberately attempted to obstruct the Committee’s investigation by, among other things, lying to the Committee or otherwise providing it with false information.

The principal legal issue presented in this case is whether the Attorney General may withhold this responsive subset on the basis of the President’s assertion of Executive privilege over internal agency documents that reflect no advice to or communications with him. The Attorney General would prefer that this Court not address this quintessentially legal issue – not surprisingly given that no court ever has held that Executive privilege extends anywhere near as far as the Attorney General now claims that it does. Accordingly, in an effort to keep this Court from considering the Committee’s claims, the Attorney General has moved to dismiss the Complaint on the grounds that (i) the Committee lacks standing; (ii) the Committee has no cause of action; (iii) the Court should exercise its discretion to decline to hear this case; and (iv) the Court lacks statutory jurisdiction. *See* Mem. in Supp. of Def.’s Mot. to Dismiss at 22-45 (Oct. 15, 2012) (ECF No. 13-1) (“AG Mem.”).

This is not the first time DOJ has attempted to side-step a congressional subpoena under the guise of an assertion of Executive privilege coupled with an assertion that a congressional committee cannot enforce a subpoena against an Executive official in court. Four years ago, the House Committee on the Judiciary sued to enforce subpoenas it had issued to Harriet Miers and Joshua Bolten (then the former White House Counsel and the sitting White House Chief of Staff, respectively) in connection with that committee's investigation into the mid-Administration resignations of nine U.S. Attorneys. Ms. Miers and Mr. Bolten – like the Attorney General here – not only wrapped themselves in a very expansive interpretation of Executive privilege in refusing to comply with their respective congressional subpoenas, but they also raised the same panoply of jurisprudential arguments in contending that this Court could not even consider the Judiciary Committee's suit. This Court firmly and meticulously rejected each and every one of those arguments. *See Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008) (Bates, J.), *appeal dismissed*, No. 08-5357, 2009 WL 3568649 (D.C. Cir. Oct. 14, 2009). In particular, Judge Bates held as follows:

Standing: “Clear judicial precedent, along with persuasive reasoning in [DOJ Office of Legal Counsel (“OLC”)] opinions, establishes that the Judiciary Committee has standing to pursue this action and, moreover, that this type of dispute is justiciable in federal court.” *Id.* at 78.

Cause of action: The Judiciary Committee has a cause of action under the Declaratory Judgment Act, *id.* at 82, and “an implied cause of action derived from Article I to seek a declaratory judgment concerning the exercise of its subpoena power,” *id.* at 94.

Discretion: Closing the courthouse doors to Congress impermissibly would tilt the balance of power between the two political branches toward the Executive: “[The Supreme

Court in *United States v. Nixon*, 418 U.S. 683 (1974), already] adjusted this balance by clarifying that [the federal courts] must be available to resolve executive privilege claims.” *Miers*, 558 F. Supp. 2d at 96. Judge Bates emphasized that the Executive frequently has sought judicial relief against the Legislative Branch and “separation of powers principles are [no] more offended when the Article I branch sues the Article II branch than when the Article II branch sues the Article I branch.” *Id.*; *see also id.* (hearing cases of this type will not “paralyze the accommodations process between the political branches”).

Statutory Jurisdiction: The Court has jurisdiction under 28 U.S.C § 1331. *Miers*, 558 F. Supp. 2d at 64; *see also id.* at 64 n.8 (noting that “Defendants do not dispute that the Court has statutory subject-matter jurisdiction under 28 U.S.C § 1331”).

Just as the Attorney General has prevented the Committee from carrying out its constitutional oversight responsibilities by relying on an insupportably broad assertion of Executive privilege, so too does he now ask this Court to refrain from performing *its* constitutional responsibility “to say what the law is” with respect to that assertion of Executive privilege. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

The Attorney General’s Motion to Dismiss – which is virtually identical to the White House officials’ motion in *Miers* – relies to a very significant degree on an ungrounded notion of “separation of powers” that reduces essentially to the proposition that the Executive may not be called to account before the Judiciary with respect to its dealings with the Legislative Branch. This extreme notion, if accepted, would significantly hamstring Congress’s ability to oversee – and thus to guard against – malfeasance, abuses of authority, and mismanagement by the Executive. By advocating for this Court to avoid reaching the merits here, the Attorney General really is asking this Court to tilt the balance of powers between the two political branches

radically in favor of the Executive. Acceding to the Attorney General's position would require this Court to do the following:

1. *Disregard the Case Law.* The D.C. Circuit already has determined that a House of Congress has standing to enforce its subpoenas in court. See *United States v. AT&T*, 551 F.2d 384, 391 (D.C. Cir. 1976) ("*AT&T P*") ("It is clear that the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf.").

2. *Disregard Congress's Constitutional Oversight Role.* The Attorney General seeks to minimize the power of Congress to conduct oversight of the Executive, while the Supreme Court has described in the most expansive terms Congress's authority to investigate and oversee the Executive in furtherance of Congress's legislative responsibilities under Article I. See, e.g., *Watkins v. United States*, 354 U.S. 178, 187 (1957). It is Congress's constitutional obligation to investigate Executive Branch malfeasance and obstruction, like the conduct that appears to have occurred here, so that Congress may remedy by legislation or other means any serious problems that are unmasked. If the Executive can obstruct legitimate congressional investigations and ignore associated demands for information, with no functional recourse available to the Committee, the constitutional check afforded by congressional oversight disappears.

3. *Disregard the Quintessentially Judicial Nature of the Issues Presented.* This type of case – at bottom, a *subpoena enforcement case* – has been brought in and addressed by the courts in this Circuit many times before – most notably in *Miers*, *AT&T*, and a series of cases culminating in *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) ("*Senate Select III*"). Moreover, this case involves the purely legal question of the scope and application of Executive privilege, and the federal courts have been addressing that issue at least since *Nixon*, 418 U.S. 683.

4. *Disregard What Is at Stake in the Committee's Investigation.* The outstanding issue in the Committee's investigation is whether DOJ intentionally obstructed the Committee's concededly legitimate investigation. That is a serious matter, particularly where, as here, the investigation concerns a failed gun walking operation that contributed to the death of an American border patrol agent. If the Court turns away the Committee, as the Attorney General urges, Congress and the American people never will learn whether DOJ intended to obstruct the Committee, and Congress will be unable to fix that wrong if it did. Obviously, it is no answer to say that a grand jury is an adequate alternative because the agency principally responsible for enforcing federal law is itself the subject of the Committee's investigation; the nation's top law enforcement officer has refused to comply with a Committee subpoena; and the U.S. Attorney charged by statute with convening a grand jury to investigate the Attorney General's actions flatly has refused to do so. Compl. ¶¶ 54-59. The Executive's breathtaking flight from accountability here makes a mockery of our nation's core democratic principles. The Executive should have, but regretfully has not, heeded what President Andrew Jackson once told Congress: "If you are able to point to any case where there is the slightest reason to suspect corruption or abuse of trust, . . . [t]he offices of all the departments will be opened to you, and every proper facility furnished for this purpose." 13 Reg. Deb. app. 202 (1837).

5. *Disregard DOJ's Own Previous Positions.* DOJ itself has brought this type of case to this Court before. *AT&T I* was a case *it* brought, and *it* argued in *United States v. U.S. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983) ("Gorsuch"), that *it* was entitled to sue to determine the power of a congressional subpoena. Moreover, OLC lawyers twice have opined formally that Congress is entitled to initiate civil litigation against Executive Branch officials to enforce congressional subpoenas – exactly what the Committee has done here. *See Resp. to*

Cong. Requests for Info. Regarding Decisions Made under the Indep. Counsel Act, 10 Op. O.L.C. 68, 88 n.33 (1986); Prosecution for Contempt of Cong. of an Exec. Branch Official Who Has Asserted a Claim of Exec. Privilege, 8 Op. O.L.C. 101, 137 (1984).

In short, this Court should deny the Motion to Dismiss and proceed directly to the merits.

CONSTITUTIONAL CONTEXT

Congress's authority to obtain information – including by use of compulsory process – flows directly from its Article I legislative function. *See, e.g., Eastland v. U.S. Serviceman's Fund*, 421 U.S. 491, 504 n.15 (1975) (“[T]he scope of [Congress’s] power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.” (quotation marks omitted; ellipsis in original)); *Barenblatt v. United States*, 360 U.S. 109, 111 (1959) (“The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate.”); *McGrain v. Daugherty*, 273 U.S. 135, 161, 174 (1927) (“[T]he power to secure needed information by such means [i.e., compulsory process] has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament We are of [the] opinion that the power of inquiry – with process to enforce it – is an essential and appropriate auxiliary to the legislative function.”).

In *Watkins*, the Supreme Court emphasized the breadth of Congress's power of investigation: “The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes.” 354 U.S. at 187. *Watkins* specifically noted that the first Congresses held “inquiries dealing with suspected corruption or mismanagement of government officials,” *id.* at 192, and stressed that this constitutional power

to investigate is at its peak where, as here, Congress is focusing on alleged waste, fraud, abuse, or maladministration within a government department, *see id.* at 187, 200 n.33 (“The power of Congress to conduct investigations . . . comprehends probes into departments of the federal government to expose corruption, inefficiency, or waste”; noting “power of the Congress to inquire into and publicize corruption, maladministration, or inefficiencies in the agencies of Government”).² And, according to the Supreme Court:

It is unquestionably the duty of *all citizens* to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation.

Id. at 187-88 (emphasis added).

The House, pursuant to the Rulemaking Clause, U.S. Const. art. I, § 5, cl. 2, has delegated this substantial and wide-ranging oversight and investigative authority to its standing committees including, in particular, the Oversight Committee. *See* Rule XI.1(b)(1), Rules of the House of Representatives (112th Cong.) (“Each committee may conduct at any time such investigations and studies as it considers necessary or appropriate in the exercise of its responsibilities under rule X.”); Rule X.1(n) (vesting Oversight Committee with legislative authority over, among other things, “[g]overnment management and accounting measures generally,” “[o]verall economy, efficiency, and management of government operations and activities,” and “[r]eorganizations in the executive branch of the Government”); Rule X.4(c)(2) (vesting Oversight Committee with specific authority to “at any time conduct investigations of

² *See also* Woodrow Wilson, *Congressional Government* 297-303 (1885) (“Quite as important as legislation is vigilant oversight of administration . . . It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents.”).

any matter without regard to clause 1, 2, 3, or this clause conferring jurisdiction over the matter to another standing committee”).³

A necessary corollary of Congress’s oversight and investigative authority is the power to issue and enforce subpoenas: “Issuance of subpoenas . . . has long been held to be a legitimate use by Congress of its power to investigate.” *Eastland*, 421 U.S. at 504. This is so because

[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.

McGrain, 273 U.S. at 175; *see also Buckley v. Valeo*, 424 U.S. 1, 138 (1976); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 228 (1821) (recognizing Congress’s authority to hold persons in contempt as inherent attribute of its legislative authority; if Congress lacked that power, it “would be exposed to every indignity and interruption that rudeness, caprice or even conspiracy may mediate against it”).

FACTUAL BACKGROUND

The factual allegations in the Complaint (and all fair inferences therefrom) must be accepted as true for purposes of the Motion to Dismiss. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975); *RSM Prod. Corp. v. Freshfield Bruckhaus Deringer U.S. LLP*, 682 F.3d 1043, 1048 (D.C. Cir. 2012); *Rudder v. Williams*, 666 F.3d 790, 794 (D.C. Cir. 2012); *Browning v. Clinton*,

³ The Rules of the U.S. House of Representatives, 112th Cong., are available at http://rules.house.gov/Media/file/PDF_112_1/legislativetext/112th%20Rules%20Pamphlet.pdf.

292 F.3d 235, 242 (D.C. Cir. 2002). In accordance with this Court's November 20, 2012 Minute Order, we have not included here a separate statement of the facts. Rather, we simply incorporate by reference all of the factual allegations in the Complaint. *See* Compl. ¶¶ 1-62.⁴

ARGUMENT

The Attorney General seeks dismissal here ostensibly on four grounds. He says (i) the Committee lacks standing; (ii) the Committee lacks a cause of action; (iii) even if this Court is entitled to hear this case, it should exercise its discretion to decline to do so; and (iv) this Court

⁴ By not including a separate factual statement here, we do not concede the accuracy of the Attorney General's Background section. *See* AG Mem. at 5-18. Many of the characterizations in that section are misleading or inaccurate. For example:

- The Attorney General says he "testified before Congress about Operation Fast and Furious on seven separate occasions before May 2012." AG Mem. at 11. In fact, he testified before the Oversight Committee only *once* about Operation Fast and Furious – on February 2, 2012. *See Operation Fast & Furious: Mgmt. Failures at the Dep't of Justice: Hr'g Before the H. Comm. on Oversight & Gov't Reform*, 112th Cong. 124 (2012) ("Feb. 2 Hr'g"), available at <http://oversight.house.gov/wp-content/uploads/2012/04/2-2-12-Full-Committee-Hearing-Transcript.pdf>.
- The Attorney General seeks to excuse the provision of false information to Congress in the February 4, 2011 False Statement Letter on the ground that DOJ "had sought to provide a thorough and accurate response in a tight timeframe." AG Mem. at 9. First, while Senator Grassley's January 27, 2011 letter to Acting ATF Director Melson, to which the February 4, 2011 False Statement Letter responded, requested a staff briefing by February 3, 2011, *see* Compl. ¶ 2(v) n.3, DOJ was not under any legal compulsion to write any letter by February 4, 2011. (Indeed, the course of the Committee's investigation is littered with instances in which DOJ simply ignored deadlines set or proposed by the Committee. *See, e.g.*, Compl. ¶¶ 31, 33, 34, 42.) More fundamentally, no time constraint ever would excuse the provision to Congress of false information.
- The Attorney General asserts that, "on May 3, 2012, Chairman Issa sent a memorandum . . . that reflected a sharp escalation in his approach." AG Mem. at 11. In fact, the May 3 memorandum followed numerous warnings to DOJ that the Attorney General's continuing refusal to comply with the Holder Subpoena could lead to contempt proceedings (as, eventually, it did). *See, e.g.*, Feb. 2 Hr'g at 136; Letter from Hon. Darrell E. Issa, Chairman, House Comm. on Oversight & Gov't Reform, to Att'y Gen. Eric H. Holder, Jr. (Jan. 31, 2012), attached as Ex. 4; Letter from Hon. Darrell E. Issa, Chairman, House Comm. on Oversight & Gov't Reform, to Att'y Gen. Eric H. Holder, Jr. at 1 (Feb. 14, 2012), attached as Ex. 5.

lacks statutory jurisdiction. Permeating all of these arguments, however, is an ungrounded, abstract, and exceedingly self-serving conception of “separation of powers.” The Attorney General’s “separation of powers” notion – which, he says, requires this Court not to adjudicate the legitimacy of the President’s improper Executive privilege assertion in this case – has several inter-related components: (a) the Committee and Attorney General are engaged “in an ongoing political dispute” and the Court must stay out of such “political” disputes, AG Mem. at 1, 22-24; (b) judicial intervention here will upset the traditional balance of power between the Legislative and Executive Branches, *id.* at 25, 28; and (c) the Committee has available to it self-help remedies that supplant the Court’s role in this case, *id.* at 1-2, 19-20. Because these flawed “separation of powers” notions are so pervasive in the Attorney General’s Memorandum, we address them first, and then rebut each of his four traditional legal arguments in turn.

I. The Attorney General’s Ungrounded, Abstract, and Self-Serving “Separation of Powers” Notions Are Wrong.

A. The Attorney General’s “It’s All Politics” Argument Is Wrong.

The Attorney General repeatedly characterizes the dispute between the Committee and the Attorney General as “political.” Indeed, the word “political” appears no less than 56 times in his Memorandum. But labeling a dispute “political” is not a legal argument; it is a talking point masquerading (poorly) as an argument.

The Legislative Branch of the federal government is inherently “political” because its Members are elected directly by the people. U.S. Const. art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States”); *id.* at amend. XVII, cl. 1 (“The Senate . . . shall be composed of two Senators from each State, elected by the people thereof”). The Executive Branch, likewise, is inherently “political” because the President is elected, albeit indirectly, also by the people. *Id.*

at art. II, § 1, cl. 2; amend. XII. It follows, therefore, that virtually all interactions of significance between the Legislative and Executive Branches have some “political” component or overtone, either in the inter-branch sense of “politics,” in the political party sense of “politics,” or both. This is a simple fact of life that derives from the nature and structure of our tripartite system of government.

This reality, however, most emphatically is not a doctrinal reason for the Judiciary to abstain from discharging its constitutionally-mandated functions. Accepting the Attorney General’s contention that courts cannot adjudicate “political disputes” would permanently shut the courthouse doors to virtually all inter-branch disputes, despite longstanding jurisprudence to the contrary. Indeed, federal courts have decided countless cases that, like this one, have political overtones and, also like this one, involve the allocation of power between the branches.⁵ Moreover, the elements making up this purported “political” dispute between the Committee and the Attorney General are some of the most basic and common to this country’s conception of what courts do.

⁵ See, e.g., *Morrison v. Olsen*, 487 U.S. 654 (1988) (resolving constitutionality of independent counsel statute); *Bowsher v. Synar*, 478 U.S. 714 (1986) (adjudicating role of Comptroller General *viz* Executive Branch); *INS v. Chadha*, 462 U.S. 919 (1983) (adjudicating constitutionality of one-house legislative veto); *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935) (adjudicating scope of President’s removal power *viz* Congress); *Pocket Veto Case*, 279 U.S. 655 (1929) (holding that adjournment of Congress prevented President from returning bill within 10 days as required by Constitution and prohibits its becoming law); *Myers v. United States*, 272 U.S. 52 (1926) (adjudicating scope of President’s removal power *viz* Congress); *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (upholding judicial appointment by President under Recess Appointments Clause during intra-session recess of Congress); *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974) (holding that bill became law despite President’s failure to return it to Congress during recess when originating chamber designated its officials to receive messages from President); *Miers*, 558 F. Supp. 2d 53 (former White House counsel compelled to appear in response to Judiciary Committee subpoena); see also *Mistretta v. United States*, 488 U.S. 361 (1988) (adjudicating ability of members of Judiciary Branch to serve on U.S. Sentencing Commission, an agency with regulatory authority).

First, federal courts routinely have reviewed the validity of congressional inquiries, similar to the one at issue here. *See, e.g., McGrain*, 273 U.S. at 161 (“In actual legislative practice, power to secure needed information by such means has long been treated as an attribute of the power to legislate.”); *Watkins*, 354 U.S. at 182 (accepting jurisdiction in congressional subpoena case where “[t]he controversy thus rests upon fundamental principles of the power of Congress and limitations on that power”); *Eastland*, 421 U.S. at 504 (“The power to investigate and to do so through compulsory process plainly falls within [the legitimate legislative sphere].”).

Second, federal courts have been deciding cases regarding the Executive’s compliance with subpoenas since the earliest days of the Republic. *See, e.g., United States v. Burr*, 25 F. Cas. 30, 37 (C.C.D. Va. 1807) (Marshall, C.J.) (Executive Branch bound to comply with duly issued subpoenas; claims that compliance will reveal national security or privileged presidential information “will have its due consideration on the return of the subpoena”); *Clinton v. Jones*, 520 U.S. 681, 696 n.23 (1997) (“[T]he prerogative [President] Jefferson claimed [in *Burr*] was denied him by the Chief Justice in the very decision Jefferson was protesting, and this Court has subsequently reaffirmed that holding.”); *Miers*, 558 F. Supp. 2d at 72 (“Federal precedent dating back as far as 1807 contemplates that even the Executive is bound to comply with duly issued subpoenas.”); *U.S. House of Representatives v. U.S. Dep’t of Commerce*, 11 F. Supp. 2d 76, 96 (D.D.C. 1998) (“That a house of Congress may turn to the federal courts for vindication of certain concrete and particularized interests without violating separation of powers is well established. . . . [L]egislative bodies have been permitted to invoke the power of the federal courts to enforce a subpoena without violating separation of powers.”).

Third, federal courts have resolved many cases involving Executive privilege claims.

See, e.g., Nixon, 418 U.S. at 706 (holding that Judiciary is ultimate arbiter of Executive privilege claims and concluding that “neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances”); *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 455 (1977) (holding Presidential Recordings and Materials Preservation Act does not violate Executive privilege); *Senate Select III*, 498 F.2d at 731 (“Executive cannot, any more than the other branches of government, invoke a general confidentiality privilege to shield its officials and employees from investigations by the proper governmental institutions into possible criminal wrongdoing.”); *Judicial Watch v. Dep’t of Justice*, 365 F.3d 1108, 1116-17 (D.C. Cir. 2004) (“Further extension of [Executive] privilege to internal Justice Department documents that never make their way to the Office of the President on the basis that the documents were created for the sole purpose of advising the President on a non-delegable duty is unprecedented and unwarranted.”); *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997) (“[Executive] privilege only applies to communications that [presidential] advisers and their staff author or solicit and receive in the course of performing their function of advising the President on official government matters.”); *Miers*, 558 F. Supp. 2d at 72 (“[M]ere fact that the President himself – let alone his advisors, as here – is the subject of the subpoena in question has not been viewed historically as an insurmountable obstacle to judicial resolution.”).

Accordingly, characterizing as “political” the differences between the Committee and the Attorney General regarding the Holder Subpoena is beside the point. This case presents no threat to the separation of powers doctrine; rather, a decision here will serve the interests of both “political” branches by clarifying the law regarding congressional access to information in the possession of the Executive.

B. The Attorney General's "Balance of Power" Argument Is Wrong.

The Attorney General's suggestion that judicial intervention here will upset the balance of power between the Legislative and Executive Branches has it exactly backwards. If this Court were to abstain, it effectively would grant the Executive Branch *carte blanche* to deny Congress access to vast realms of information critical to Congress's oversight function, a free pass the Executive often has sought and always has been denied. *See, e.g., Nixon*, 418 U.S. at 692-97; *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 915 (8th Cir. 1997); *Miers*, 558 F. Supp. 2d at 71. That is, judicial restraint here would be, in actuality, judicial *acquiescence* to Executive Branch recalcitrance with respect to the Congress. *See, e.g., Miers*, 558 F. Supp. 2d at 95 (“[A] decision to foreclose access to the courts, as the Executive urges, would tilt the balance of power in favor of the Executive here, the very mischief the Executive purports to fear.”); Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 53 S. Cal. L. Rev. 863, 897 (1983) (“The Court’s refusal to consider challenges to executive power is an implicit decision in favor of broad inherent Presidential authority.”).

Indeed, it is no exaggeration to say that if the courthouse door is closed to Congress in subpoena enforcement cases of this nature, the Executive’s incentive to respond to congressional requests for information largely will disappear and, with it, effective congressional oversight of the Executive Branch. As Judge Bates correctly observed in *Miers*:

Rather than running roughshod over separation of powers principles, the Court believes that entertaining this case will reinforce them. Two parties cannot negotiate in good faith when one side asserts legal privileges but insists that they cannot be tested in court in the traditional manner. That is true whether the negotiating partners are private firms or the political branches of the federal government.

Miers, 558 F. Supp. 2d at 99.

C. The Attorney General's "Alternative Remedies" Argument Is Wrong.

The third element of the Attorney General's generic "separation of powers" triad is that Congress has alternative remedies available to it that should counsel this Court not to hear this case. See AG Mem. at 1, 19-20, 29-30. This is a rehash of alternative remedy arguments that Judge Bates pointedly rejected in *Miers*. See *Miers*, 558 F. Supp. 2d at 91-93. Indeed, while the Attorney General's four "alternative remedies" might make for a robust discussion at a political science seminar, they are anything but a practical and functional way for Congress to obtain information in the face of an astoundingly broad claim of Executive privilege.

The Attorney General first blithely suggests that the Committee can "tie up nominations." AG Mem. at 29. The Constitution, however, grants the power over nominations exclusively to the Senate. See U.S. Const. art. II, § 2, cl. 2 ("... and he shall nominate, and by and with the Advice and Consent of the *Senate*, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law" (emphasis added)); see also *Miers*, 558 F. Supp. 2d at 93 n.29 (noting DOJ concession that its suggestion of power over nominations as an alternative is unavailable to House Committee). The Attorney General either has confused the constitutionally prescribed powers of the two Houses of Congress or he asks this Court to assume, with no support whatsoever, that the Senate would hold up nominations because the Executive has thwarted the constitutional prerogative of a House committee. Either way, this argument manifests a woeful ignorance of the way Congress actually works.⁶

⁶ The authority the Attorney General cites – *Tucker v. Commissioner*, 676 F.3d 1129, 1132 (D.C. Cir. 2012) – is not even relevant here, much less does it support the bizarre notion that the House can force the Attorney General to produce subpoenaed documents by refusing to act on nominations. *Tucker* concerned the issue of whether appointments of IRS Appeals employees
(Continued . . .)

Equally absurd is the Attorney General's second suggestion that the Committee "slash the budget in the area of concern." AG Mem. at 29. Such an action would require the consent of *both* Houses of Congress, and the President's signature. *See* U.S. Const. art. I, § 7, cl. 2. Given the certainty that no President who asserted Executive privilege then would turn around and sign such legislation (even assuming for the sake of argument that the other House of Congress cooperated in passing such legislation in the first instance), Congress would need to override a presidential veto – which requires a two-thirds majority in both chambers. *Id.* Judge Bates properly rejected out-of-hand DOJ's "just-cut-the-budget" argument:

The remaining alternative suggested by the Executive branch – . . . including the exercise of other political tools such as withholding appropriations – is not sufficient to remedy the injury to Congress's investigative power. . . . [T]he appropriations process is too far removed, and the prospect of successful compulsion too attenuated, from this dispute to remedy the Committee's injury to its investigative function in a manner similar to a civil action for declaratory relief.

Miers, 558 F. Supp. 2d at 92-93.

Ultimately, the Executive's argument sweeps too broadly. Short of withholding *all* appropriations entirely and shutting down the federal government, the Executive could always claim that the House has alternative remedies that it has failed to explore.

Id. at 93 n.29 (emphasis in original).

The Attorney General suggests thirdly that he and the Committee negotiate and accommodate. AG Mem. at 27-29. That sounds good, except that the Committee already tried that, for many months, and it did not work. *See* Compl. ¶¶ 2-18, 28-36, 42-46, 50-51. The Attorney General adamantly refused to produce the limited subset of documents at issue here; the Committee's repeated efforts to reach an accommodation as to that subset repeatedly were rebuffed by the Attorney General; and there is no realistic possibility that such efforts will be

were subject to the Appointments Clause.

successful in the future. It takes two to negotiate and, in this case, there has been only one. The Attorney General's refusal to negotiate in good faith underscores why this Court should deny his Motion to Dismiss. When the Court addresses the merits of the Committee's claim, it necessarily will clarify the scope and proper application of Executive privilege – or what the Attorney General is trying to pass off as Executive privilege in this case – in the context of congressional subpoenas. That, in turn, will make negotiation and accommodation between the branches *more* likely, not less. Both clarity in the law, and the recognized availability of a judicial remedy, will significantly reduce the incentives for one branch to stake out an untenable legal position, which is exactly what the Attorney General has done here.

Fourthly, the Attorney General says, without explanation, that the Committee can just “make its case to the public.” AG Mem. at 44. Whatever that means, it obviously is not a particularly salutary way to resolve an inter-branch dispute about access to information.

At bottom, the self-help remedies the Attorney General recommends would be extremely disruptive to the country and the functioning of our government, likely would have adverse collateral consequences for uninvolved third parties, would be very time-consuming, and ultimately would not be particularly effective – and the D.C. Circuit has so recognized:

Where the dispute consists of a clash of authority between the two branches, . . . judicial abstention does not lead to orderly resolution of the dispute. . . . If negotiation fails as in a case where one party, because of chance circumstance, has no need to compromise, a stalemate will result, with the possibility of detrimental effect on the smooth functioning of government.

United States v. AT&T, 567 F.2d 121, 126 (D.C. Cir. 1977).

II. The Oversight Committee Has Standing.

A. Binding Circuit Precedent Establishes That the Committee Has Standing.

“Article III of the Constitution confines the federal courts to adjudicating actual cases and controversies.” *Allen v. Wright*, 468 U.S. 737, 750 (1984) (quotation marks omitted). To

determine whether a “case” or “controversy” exists, the Court must assess whether a party has “standing” to bring its lawsuit; i.e.,

a plaintiff must show (1) it has suffered an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Where constitutional questions arise as to the actions of the Legislative or Executive Branches, “[p]roper regard for the complex nature of our constitutional structure requires . . . that the Judicial Branch [not] shrink from a confrontation with [those] coequal branches.” *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982).

Courts in this Circuit repeatedly have recognized that a House of Congress, or its authorized agent, has standing to bring suit to enforce a duly authorized and issued subpoena. “It is clear that the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf.” *AT&T I*, 551 F.2d at 391. *AT&T I* was a suit by the Executive Branch to enjoin AT&T from complying with a congressional subpoena for documents concerning warrantless wiretaps the company had undertaken at the FBI’s request. *Id.* at 385. Despite President Ford’s designation of AT&T as an “agent of the United States” and his instruction to the company to ignore the subpoena, AT&T made clear that it intended to comply, and the Executive sued. *Id.* at 385-87. The D.C. Circuit held that the fact that the suit had been brought by the Executive against a private entity was of no moment because the suit properly was viewed “as a clash of powers of the legislative and executive branches of the United States.” *Id.* at 389; *see also id.* at 388-89 (“Although this suit was brought in the name of the United States against AT&T, AT&T has no interest in this case . . .”). The *AT&T I*

Court noted specifically that “the mere fact that there is a conflict between the legislative and executive branches over a congressional subpoena does not preclude judicial resolution of the conflict.” *Id.* at 390; *see also In re Application of U.S. Senate Permanent Subcomm. on Investigations*, 655 F.2d 1232 (D.C. Cir. 1981) (permitting Senate subcommittee to obtain order enforcing subpoena for testimony); *Senate Select III*, 498 F.2d 725 (entertaining merits of Senate committee’s subpoena enforcement claim).

In *Miers* – a case legally indistinguishable from this one – this Court stated that “the starting point for [standing] analysis is *AT&T I*,” and held that the House Judiciary Committee “ha[d] standing to enforce its duly issued subpoena[s] to White House staffers Miers and Bolten through a civil suit.” 558 F. Supp. 2d at 68; *see also id.* at 69 (“[T]he House has standing to invoke the federal judicial power to aid its investigative function”); *id.* at 78 (“Clear judicial precedent . . . establishes that the Committee has standing to pursue this action and, moreover, that this type of dispute is judiciable in federal court.”); *Walker v. Cheney*, 230 F. Supp. 2d 51, 68 (D.D.C. 2002) (noting “authority in this Circuit indicating that a House of Congress or a committee of Congress would have standing to sue to retrieve information to which it is entitled”); *U.S. Dep’t of Commerce*, 11 F. Supp. 2d at 86 (noting “well established” proposition “that a legislative body suffers a redressable injury when that body cannot receive information necessary to carry out its constitutional responsibilities”); *id.* (such injuries “arise[] primarily in subpoena enforcement cases, where a house of Congress or a congressional committee seeks to compel information in aid of its legislative function”).

While the Attorney General urges this Court to disregard *Miers*, saying it is at odds with *Walker*, AG Mem. at 32, he ignores the fact that *Walker* was decided by the same judge who decided *Miers* (Judge Bates), and that Judge Bates took great pains to distinguish his decision in

Walker, effectively a suit by an individual member of Congress, from his decision in *Miers*, a suit, like this one, effectively brought by the House itself through a duly authorized committee. *See Miers*, 558 F. Supp. 2d at 69-71 (“This case stands in marked contrast to *Walker*. Indeed, all of the missing factors identified in *Walker* are present here . . .”).

As to the standing elements, first, the Committee’s inability to obtain documents from the Attorney General plainly is an injury both “actual” and “concrete and particularized.” *Lujan*, 504 U.S. at 560 (quotation marks omitted). The responsive documents the Attorney General possesses, if disclosed, will assist the Committee in obtaining answers critical to its investigation. *See, e.g.*, H.R. Rep. No. 112-546, at 31 (2012). The Attorney General’s refusal to comply with the Holder Subpoena has inflicted on the Committee “an informational injury,” which this Court has held “sufficiently concrete so as to satisfy the irreducible constitutional minimum of Article III.” *U.S. Dep’t of Commerce*, 11 F. Supp. 2d at 85 (quotation marks omitted); *see also id.* at 86 (“[A] failure to receive sought-after information constitutes an Article III injury to the legislative body.”); *Miers*, 558 F. Supp. 2d at 67-68, 77-78.

Moreover, the Committee has a sufficiently “‘personal stake’ in the alleged dispute,” *Raines v. Byrd*, 521 U.S. 811, 819 (1997), because the Committee has invested a significant amount of time and resources in examining the conduct of DOJ and its officials in an effort to determine what happened and whether remedial measures are called for. The Committee conducted hearings, interviewed witnesses, authorized and issued subpoenas, and now waits for the necessary documents to be provided. Unlike the lawsuits brought by *individuals* to vindicate institutional interests in cases such as *Raines* (six Members of Congress), *Walker* (Comptroller General, backed by a single Member of Congress), and *Kucinich v. Bush*, 236 F. Supp. 2d 1 (D.D.C. 2002) (thirty-two individual House Members), in this instance the Committee *itself* is

seeking to obtain judicial relief.

The Committee also satisfies the second and third prongs of the standing analysis. The Committee's injury – being denied information critical to its lawful investigation – is caused directly by (and thus is clearly traceable to) the Attorney General's failure to comply with the Holder Subpoena. It is also virtually certain – and thus not “merely speculative,” *Friends of the Earth, Inc.*, 528 U.S. at 181 – that a declaration and injunction by this Court mandating the Attorney General's compliance with the Holder Subpoena will redress the Committee's informational injury. Indeed, the Attorney General does not contend otherwise with respect to the causation and redressability prongs of the standing analysis. *See* AG Mem. at 24 (limiting argument to injury prong); *see also Miers*, 558 F. Supp. 2d at 66 n.11 (noting DOJ's concession that “[Judiciary] Committee can satisfy the causation and redressability elements”).

Thus, all on-point authority supports the Oversight Committee's standing to enforce its subpoena here. The Committee knows of no case, and the Attorney General certainly has cited none, holding that the issuer of a congressional subpoena lacks standing to enforce its subpoena in court. *None*. That should be the end of the matter.

Finally, we note that the Executive Branch has “standing” to enforce subpoenas when it is denied information that it seeks to present to a grand or petit jury. The Executive's standing to do so is identical to the Committee's in this action; it presents “the kind of controversy courts traditionally resolve.” *Nixon*, 418 U.S. at 696.

Here at issue is the production or nonproduction of specified evidence . . . sought by one official of the Executive Branch within the scope of his express authority; it is resisted by the Chief Executive on the ground of his duty to preserve the confidentiality of the communications of the President. Whatever the correct answer on the merits, these issues are of a type which are traditionally justiciable.

Id. at 696-97 (quotation marks and citation omitted). Extrapolating from *Nixon*, Judge Bates

correctly concluded in *Miers* that “the fact that the litigants are the political branches of our government is not a barrier to the Committee’s standing and a justiciable controversy.” *Miers*, 558 F. Supp. 2d at 73.

B. The Attorney General’s “No Standing” Arguments Are Wrong.

1. The Committee Plainly Has Suffered an Informational Injury.

Notwithstanding the binding precedent cited above, the Attorney General asserts that the Oversight Committee has not suffered an “informational” injury because, he says, (i) the Committee has no “right” to obtain information from the Executive Branch, and (ii) the documents at issue “are not documents pertaining to [DOJ’s] performance of its duties.” AG Mem. at 34 (quotation marks omitted). Both contentions are wrong.

The Oversight Committee certainly has a right to obtain documents from the Attorney General. Time and again the Judiciary has reviewed Congress’s power to obtain information via subpoena, from all sources, including the Executive, and each time it has found that this power is derived directly from and is coextensive with Congress’s Article I power to legislate. *See, e.g., McGrain*, 273 U.S. at 174 (“[T]he power of inquiry – with process to enforce it – is an essential and appropriate auxiliary to the legislative function.”); *Barenblatt*, 360 U.S. at 111 (“The scope of the power of inquiry, in short, is as penetrating and far reaching as the potential power to enact and appropriate under the Constitution.”); *Eastland*, 421 U.S. at 504-05 (“The issuance of a subpoena pursuant to an authorized investigation is similarly an indispensable ingredient of lawmaking. . . .”). No matter how many times the Executive attempts to dispute this firmly-established tenet of our constitutional law, it remains the fact that, “[s]o long as the Committee is investigating a matter on which Congress can ultimately propose and enact legislation, the Committee may issue subpoenas in furtherance of its power of inquiry.” *Miers*, 558 F. Supp. 2d

at 77; *see also supra* pp. 8-10.

Here, Congress plainly possesses plenary legislative power regarding DOJ, including its component entities. Congress created DOJ in 1870, *see* An Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870), and it placed ATF within DOJ effective in 2003, *see* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002). Accordingly, Congress, which legislatively could abolish DOJ and/or any of its component entities if it so chose (impractical as that may be), certainly possesses the power to legislate the management structure, administrative responsibilities, internal oversight mechanisms, and ultimately the funding provided to these entities. As a result, it possesses the constitutional *right* to investigate *any* aspect of their operations.

The second of the Attorney General's arguments seems to reprise his wrong-headed earlier statements to the Committee that it lacks a sufficient investigatory interest in the Obstruction Component of its investigation. *See* Compl. ¶ 11. That argument was wrong before and it is wrong now:

[T]he subject to be investigated was the administration of the Department of Justice – whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers; specific instances of alleged neglect being recited. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General, and the duties of his assistants are all subject to congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year.

McGrain, 273 U.S. at 177-78.⁷

Congress repeatedly has investigated DOJ's inner workings, organizational structure, management, and administration.⁸ In circumstances that are particularly analogous to those of this case, the House in 1983 specifically investigated DOJ's role in an Executive agency's inadequate response to a House investigation. Two House committees issued document subpoenas to Environmental Protection Agency ("EPA") Administrator Anne Gorsuch Burford in connection with the committees' investigation into EPA's enforcement of the "Superfund" law. See H.R. Rep. No. 99-435 (1985). Ms. Burford relied on an assertion of Executive privilege to withhold certain responsive documents, and the House held her in contempt. See *id.* at 4. Believing DOJ had provided inappropriate guidance to Ms. Burford, the House Judiciary Committee then commenced an investigation *into DOJ's role* in her contumacious conduct. See

⁷ *McGrain* arose out of the Teapot Dome scandal. While Teapot Dome originated as a Senate investigation into leases of government owned, oil-rich land in Wyoming, the focus of the investigation shifted when Senate investigators discovered that the leases were the result of corruption and collusion among high-ranking government officials. See John C. Grabow, Congressional Investigations: Law & Practice, § 2.3[a], [b] (1988); Hasia Diner, *Teapot Dome 1924*, in IV Congress Investigates: A Documented History 1792-1974, at 6-7 (Arthur Schlesinger, Jr. & Roger Burns eds., 1975). The Senate empowered a select committee to investigate "charges of misfeasance and nonfeasance in the Department of Justice" for the failure to bring criminal prosecutions against the various wrongdoers. *McGrain*, 273 U.S. at 151. DOJ resisted providing the select committee access to internal reports and other investigative documents, see *Investigation of Hon. Harry M. Daugherty, Formerly Att'y Gen. of the U.S.: Hr'gs Pursuant to S. Res. 157 Before the Sen. Select Comm. on Investigation of the Att'y Gen.*, 68th Cong. 1015-16 & 1159-60 (1924), just as the Attorney General in this case has resisted providing the Oversight Committee with post-February 4, 2011 documents that are responsive to the Holder Subpoena. Ultimately, DOJ produced the documents the select committee sought. *Id.* at 2389-90.

⁸ For example, in 1952, a special subcommittee of the House Judiciary Committee investigated "the administration of the Department of Justice and the Attorney General of the United States," including allegations of abuses and inefficiencies. H.R. Res. 95, 82d Cong. (1952) (enacted), quoted in H.R. Rep. No. 83-1079, at 3 (1953). Similarly, in 1982, a Senate select committee investigated DOJ conduct in connection with undercover law enforcement activities by the FBI and other DOJ components. See generally S. Rep. No. 97-682 (1982), available at <https://www.ncjrs.gov/pdffiles1/Digitization/124269NCJRS.pdf>.

id. at 3. That committee sought from DOJ, among other things, “all documents prepared by or in the possession of the Department in any way relating to the withholding of documents that Congressional committees have subpoenaed from the EPA.” *Id.* at 605 (quotation marks omitted). In that case, DOJ sensibly agreed to cooperate and ultimately produced to the committee internal documents from DOJ’s Land and Natural Resources Division, Civil Division, Office of Legal Counsel, Office of Legislative Affairs, Office of Public Affairs, and the offices of the Attorney General, Deputy Attorney General, and Solicitor General. *See id.* at 605, 606, 608.

Here, the fact that DOJ provided two letters to Congress that contained blatantly false information – *see* Feb. 4, 2011 False Statement Letter; Letter from Ronald Weich, Ass’t Att’y Gen., to Charles E. Grassley, Ranking Member, Comm. on the Judiciary, U.S. Senate (May 2, 2011), attached as Ex. 6 – and the fact that such false information remained unretracted for so long, provides the Committee with more than ample justification to pursue the Obstruction Component of its investigation. Moreover, the questions to which the Oversight Committee still is seeking answers are akin to the questions presented in *McGrain*, namely, whether DOJ’s response to legitimate oversight requests from Congress is being “properly discharged,” 273 U.S. at 177, and whether remedial legislation (e.g., statutorily enhanced internal DOJ oversight mechanisms), or other actions (e.g., impeachment of Senate-confirmed individual determined to be responsible for obstructing the Committee), are necessary to ensure that prompt and accurate information is provided to Congress when requested in the future.

2. *Raines v. Byrd* Supports the Committee’s Standing.

The Attorney General also contends that *AT&TI*, which held expressly that “the House as a whole has standing to assert its investigatory power, and can designate a member to act on

its behalf,” 551 F.2d at 391, “is now an historical artifact, having been overtaken by the Supreme Court’s decision in *Raines* [v. *Byrd*].” AG Mem. at 31. That is patently incorrect. *Raines* – which concerned the standing of *individual legislators* to challenge a law they had voted against as legislators, rather than the institutional standing of a House of Congress – never discussed, let alone expressly overruled, *AT&TI* or, for that matter, any other case involving the judicial enforcement of congressional subpoenas. If anything, *Raines* supports the Committee’s standing here.

In *Raines*, two House Members and four Senators sought a declaratory judgment that the Line Item Veto Act of 1997, which they each had voted against, was unconstitutional. See 521 U.S. at 814. The District Court, following the D.C. Circuit’s then-applicable doctrine of legislator standing, held that the individual Members had standing. *Id.* at 816-17. On direct appeal, the Supreme Court reversed, concluding that the injury asserted by the Members was not to “themselves as individuals” but rather an “institutional injury” and, therefore, that the individual Members lacked a “sufficient ‘personal stake’ in th[e] dispute and ha[d] not alleged a sufficiently concrete injury to have established Article III standing.” *Id.* at 829-30. *Raines* specifically highlighted that, unlike here (i) the suing Members “ha[d] not been authorized to represent their respective Houses of Congress in th[e] action,” and indeed (ii) “both Houses actively oppose[d the] suit.” *Id.* at 829 (citing cases).⁹

There are many distinctions between *AT&TI*, *U.S. Dep’t of Commerce*, and *Miers* on the

⁹ In *Walker*, this Court similarly noted that “the Comptroller General here has not been expressly authorized by Congress to represent its interests in this lawsuit,” and the Comptroller General “has not identified any Member of Congress (other than [one Senator]), who has explicitly endorsed his recourse to the Judicial Branch.” 230 F. Supp. 2d at 68; see also *Kucinich*, 236 F. Supp. 2d at 11 (noting that individual Members suing President and others “have not been authorized, implicitly or explicitly, to bring this lawsuit on behalf of the House, a committee of the House, or Congress as a whole”).

one hand, and *Raines* and its progeny on the other. For example, “the virtue of denying standing in *Raines* was only confirmed by the certainty that a private suit would surely follow,” *U.S. Dep’t of Commerce*, 11 F. Supp. 2d at 89, unlike here where there is no other party that could vindicate the Committee’s informational interests. “Consequently, if the House does not have standing, this question might evade review” *Id.*

Ultimately, however, what distinguishes these cases is that *Raines* involved the attempt by individual Members of Congress to litigate an institutional injury, whereas *AT&T I*, *U.S. Dep’t of Commerce*, and *Miers* each involved institutional plaintiffs – committees of the House (*AT&T I* and *Miers*) and the full House (*U.S. Dep’t of Commerce*) – acting with express authorization to vindicate an institutional injury. See *AT&T I*, 551 F.2d at 391 (“On August 26, 1976, the House of Representatives passed H. Res. 1420, authorizing Chairman Moss’s intervention on behalf of the Committee and the House”); *Miers*, 558 F. Supp. 2d at 70 (“[A] congressional subpoena has been issued seeking precisely that information, and the full House has specifically authorized filing suit.”); *id.* at 71 (“[T]he fact that the House has . . . explicitly authorized this suit . . . is the key factor that moves this case from the impermissible category of an individual plaintiff asserting an institutional interest (*Raines*, *Walker*) to the permissible category of an institutional plaintiff asserting an institutional injury (*AT&T I*, *Senate Select Comm.*.”); *U.S. Dep’t of Commerce*, 11 F. Supp. 2d at 84 (finding informational injury based on House’s “right to timely receive from the President census information that complies with the Census Act and the Constitution”). In this case, of course, as in *Miers*, the full House has authorized the Committee to file suit to vindicate the House’s institutional interests. See H.R. Res. 706, 112th Cong. (2012) (enacted); Compl. ¶ 53.

Indeed, it is worth reiterating that, after *Raines* was decided, this Court twice expressly

relied on *AT&T I* to find institutional standing. *See Miers*, 558 F. Supp. 2d at 68-78 (“The Committee and several supporting amici are correct that *AT&T I* is on point and establishes that the Committee has standing to enforce its duly issued subpoena through a civil suit. Moreover, *Raines* and subsequent cases have not undercut either the precedential value of *AT&T I* or the force of its reasoning.”); *U.S. Dep’t of Commerce*, 11 F. Supp. 2d at 86 (“In [*AT&T I*], the House sought information ‘necessary for the formulation of new legislation,’ and the Executive Branch asserted its authority to maintain control over the information. [551 F.2d] at 385. The court held that ‘[i]t is clear that *the House as a whole has standing* to assert its investigatory power,’ thereby holding that a failure to receive sought-after information constitutes an Article III injury to the legislative body. *Id.* at 391.” (emphasis in original)); *see also Lardner v. U.S. Dep’t of Justice*, No. 1:03-cv-00180, 2005 WL 758267, at *15 n.25 (D.D.C. Mar. 31, 2005) (noting significance of continued reliance by other District Courts on authority assertedly undermined by superseding Supreme Court decision).¹⁰

¹⁰ The Attorney General suggests that *Raines* was focused “on the nature of the injury asserted – a claimed diminution of congressional authority in relation to the Executive.” AG Mem. at 32. That reading of *Raines* is wholly inconsistent with the Supreme Court’s own description of the nature of the injury presented. *See* 521 U.S. at 830 n.11 (“[T]he alleged cause of [Member plaintiffs’] injury is not [the Executive’s] exercise of legislative power but the actions of their own colleagues in Congress in passing the [Line Item Veto] Act.”). Separation of powers principles, the Court held, counsel against the Judiciary involving itself in matters *internal* to one of the political branches, especially when those individuals bringing suit already had an opportunity to vindicate their interests through recognized internal channels (i.e., voting), and still possessed other reasonable means of convincing their colleagues to support their position. *See id.* This is very different that the *inter-branch* dispute presented by this case.

Despite repeatedly trumpeting his concern for separation of powers concepts, the Attorney General fails to recognize that, while “*Raines* . . . is best understood as a decision seeking to preserve separation of powers by restricting congressional [i.e., individual legislator] standing,” taken too far “such special restrictions might result in *inadequate* enforcement of the principle of separation of powers.” Note, *Standing in the Way of Separation of Powers: The Consequences of Raines v. Byrd*, 112 Harv. L. Rev. 1741, 1758 (1999) (emphasis added); *see also* Carlin Meyer, *Imbalance of Powers: Can Congressional Lawsuits Serve As*
(Continued . . .)

3. The Other Cases the Attorney General Cites Do Not Support His “No Standing” Argument.

The remaining cases cited by the Attorney General – both those that pre-date *Raines*, such as *Moore v. U.S. House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984), *abrogation recognized by Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999), and *Barnes v. Kline*, 759 F.2d 21, 28 (D.C. Cir. 1985), as well as those that post-date *Raines* such as *Chenoweth, Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000), and *Walker*, 230 F. Supp. 2d 51 – are all equally inapposite. Like *Raines*, each involved *individual legislators* attempting to litigate institutional injuries, and the respective Courts rejected the invitation to involve themselves in what were essentially *intra-branch* disputes. *See, e.g., Barnes*, 759 F.2d at 28 (“[A] concern for the separation of powers has led this court consistently to dismiss actions by individual congressmen whose real grievance consists of their having failed to persuade *their fellow legislators* of their point of view” (emphasis added)); *Kucinich*, 236 F. Supp. 2d at 17-18 (“delicate balance of powers under the Constitution” would be “undermine[d]” by hearing such intra-branch matters, because they “might simply encourage congressmen to run to court any time they disagreed with Presidential action”). Judge Bates recognized this fact in *Miers* and correctly noted that “the now-defunct doctrine of ‘legislative standing’ is more accurately described as ‘*legislator standing*.’” 558 F. Supp. 2d at 70 n.13 (emphasis added).

Obviously, these intra-branch issues were not present in *AT&T I* or *Miers*, and they certainly are not present here where the Committee actively has been investigating Operation Fast and Furious since February 2011; has been focused on the Obstruction Component of that

Counterweight?, 54 U. Pitt. L. Rev. 63, 73 (1992) (“Many, if not most, congressional lawsuits are aimed at ensuring that our government remains a government of three branches in the face of the rise of executive power, which was so feared by the Framers.”).

investigation since prior to October 2011, when it issued the Holder Subpoena; and has attempted for eight months, without success, to find a way to persuade the Attorney General to fulfill his legal obligations to the Committee. *See* Compl. ¶¶ 1-18, 28-45.

* * *

“In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.” *Warth*, 422 U.S. at 498. The Supreme Court long ago in *McGrain* recognized that “[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.” 273 U.S. at 175. Based on the unwavering precedents of this Court and the Court of Appeals, the Oversight Committee plainly has been injured by the Attorney General’s contumacious conduct and is entitled to seek redress from this Court.

III. The Oversight Committee Has a Cause of Action.

The Attorney General says the “Committee lacks any cause of action.” AG Mem. at 38. That is incorrect. The Committee has a cause of action under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (“DJA”), and, separately, directly under the Constitution.

A. The Committee Has a Cause of Action under the Declaratory Judgment Act.

The Attorney General devotes barely a page and a half to his “no DJA-cause-of-action” argument. *See* AG Mem. at 38-39. This is not surprising. In *Miers*, DOJ also contended that the Judiciary Committee lacked a cause of action under the DJA. Judge Bates addressed the issue at considerable length, and meticulously rejected each and every one of DOJ’s arguments. *See Miers*, 558 F. Supp. 2d at 78-88. The plain language of the DJA, the Supreme Court’s unwavering application of the statute (even where no other cause of action exists), and the statute’s legislative history and purpose all make clear that the Committee has a cause of action under the DJA.

Plain Language. As an initial matter, the plain language of the statute – which must “be liberally construed to achieve the objectives of the declaratory remedy,” *Miers*, 558 F. Supp. 2d at 82 (quoting *McDougal v. Jenson*, 786 F.2d 1465, 1481 (11th Cir. 1986)) – makes clear that,

[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

28 U.S.C. § 2201(a); *see also* Fed. R. Civ. P. 57. Thus, to be entitled to bring suit under the DJA, the Committee need only demonstrate (1) “a case of actual controversy,” i.e., that it has standing, which it does, *see supra* p. 19-32; (2) that this Court has jurisdiction, which it does, *see infra* pp. 47-53; and (3) that the Committee filed “an appropriate pleading,” which it clearly did, *see Compl.* Having established those three elements, the Committee is entitled to have its “rights and other legal relations” declared “whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a). In this case, those “rights and other legal relations” stem from the investigative authority granted to the Congress under Article I of the Constitution, as definitively interpreted by the Supreme Court. *See Miers*, 558 F. Supp. 2d at 84-88 (“[T]here can be no question that Congress has a right – derived from its Article I legislative function – to issue and enforce subpoenas, and a corresponding right to the information that is the subject of such subpoenas.”).

Supreme Court Precedent. The Supreme Court has proceeded for more than 60 years under the premise that the DJA creates a cause of action, and it has articulated only two limitations to the application of that statute. First, the Court has made clear that the DJA does not provide federal courts with an independent source of *jurisdiction*. *See, e.g., Schilling v. Rogers*, 363 U.S. 666, 677 (1960) (citing *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950)). Second, the Court has made clear that there must be an “actual controversy” before

the Judiciary may review a party's action under the DJA. *See, e.g., Coffman v. Breeze Corp.*, 323 U.S. 316, 324 (1945) ("The declaratory judgment procedure is available in the federal courts only in cases involving an actual case or controversy, where the issue is actual and adversary, and it may not be made the medium for securing an advisory opinion in a controversy which has not arisen." (citations omitted)); *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941); *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 239-41 (1937).

The Supreme Court never has expressed doubt that a party that meets all three statutory elements – as the Committee does here – has a *cause of action* for declaratory and other ancillary relief. Indeed, the Court has entertained many suits where no traditional cause of action had accrued. For example, *Haworth*, the first case to reach the Supreme Court that tested the DJA's constitutionality, concerned an action brought by an insurer to secure a declaration that several policies held by the defendant had lapsed and that the insurer only was responsible for a minimum payment upon the defendant's death (which had not yet occurred). *See id.* at 237-38. The Court held that the DJA provided the insurer with a right to seek a declaratory judgment. *Id.* at 242 ("[This case] calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts."). With each prerequisite met, the Court concluded that "the complaint presented a controversy to which the judicial power extends and that authority to hear and determine it has been conferred upon the District Court by the [DJA]." *Id.* at 244; *see also Miers*, 558 F. Supp. 2d at 85 (noting that DJA supplied cause of action, not only in *Gorsuch* where Executive sought declaration that EPA Administrator lawfully refused to comply with congressional subpoena, but also in *AT&T I* where Executive sought to enjoin compliance with congressional subpoena: "[The] only difference . . . is that the parties are reversed; here [in *Miers*], the House stands in the position of the plaintiff and the Executive is the

defendant. This Court fails to see why that fact should alter the DJA analysis in any material respect.”).

This suit brought by the Committee presents nearly identical elements. The Committee claims that it has a “present, specific right” to documents the Attorney General possesses. 28 U.S.C. § 2201(a). The Attorney General says those documents are protected by Executive privilege and, on that basis, refuses to produce them. The Complaint is the “appropriate pleading” that brings this matter clearly and unequivocally to the Court. *Id.* The Committee has demonstrated above that it has standing, *see supra* pp. 19-32, and below that this Court has jurisdiction, *see infra* pp. 47-53. Under the terms of the DJA, *nothing more is necessary*. This case is “manifestly susceptible of judicial determination. It calls . . . for an adjudication of present right upon established facts.” *Haworth*, 300 U.S. at 242. The statute makes abundantly clear that no other cause of action need exist: “[C]ourt[s] . . . may declare the rights and other legal relations . . . whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a).

Legislative History and Purpose. The DJA was enacted primarily to “sanction[] the trial of controversies *before* a conventional cause of action has accrued and another remedy has become available.” *Developments in the Law: Declaratory Judgments – 1941-1949*, 62 Harv. L. Rev. 787, 808 (1949) (emphasis added); *see also* Donald L. Doernberg & Michael B. Mushlin, *The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action & Expanded Federal Jurisdiction While the Supreme Court Wasn’t Looking*, 36 UCLA L. Rev. 529, 582-83 (1989) (Act provides cause of action where none existed before); 69 Cong. Rec. 1683 (1928) (“[In a case where] even though . . . there is no existing cause of action upon which a hearing could be had at the time; but there is a substantial controversy as to the [legal rights involved, federal courts may entertain the matter].”).

The Committee's suit is precisely the type to which the DJA was intended to apply. Just as the DJA permits a business that intends to pursue a certain course of conduct that DOJ threatens to prosecute criminally to seek declaratory relief under the DJA, *see, e.g., Navegar, Inc. v. United States*, 103 F.3d 994, 998-99 (D.C. Cir. 1997), so too the Committee is entitled to seek declaratory relief under the statute without awaiting a court action initiated by the Attorney General in response to his arrest, and/or an inherent contempt trial, by the House. *See Miers*, 558 F. Supp. 2d at 82-83. Indeed, were the House to exercise its inherent right to arrest and try the Attorney General, he could seek *habeas corpus* review in this Court, and thus exactly the same legal issues would be presented. Just as a business is entitled to seek declaratory relief before it is charged with a crime, so too the Committee is entitled to seek declaratory relief without going through an extremely disruptive and acrimonious trial before the bar of the House, and without waiting for the Attorney General to seek *habeas* relief in this Court, as Judge Bates recognized:

By invoking the DJA to gain anticipatory review . . . , the Committee can obtain judicial resolution regarding its subpoena power without the unseemly scenario of the arrest and detention of high-ranking executive branch officials, which would carry the possibility of precipitating a serious constitutional crisis.

Miers, 558 F. Supp. 2d at 83.

The cases the Attorney General cites highlight the distinctions between this case and those where resort to the DJA is not allowed. For example, *Schnapper v. Foley*, 667 F.2d 102, 116-17 (D.C. Cir. 1981), held that declaratory (and other) relief was unauthorized because the remedies the plaintiffs sought were proscribed by statute. This comports with other cases that recognize that, when Congress expressly "excludes a judicial remedy," the DJA cannot provide one. *Schilling*, 363 U.S. at 676-77; *see also C&E Servs., Inc. of Wash. v. D.C. Water & Sewer*

Auth., 310 F.3d 197, 201-02 (D.C. Cir. 2002).¹¹

Here, of course, there is no statutory scheme that excludes a judicial remedy for the Committee. Therefore, the Committee has a cause of action under the DJA.

B. The Committee Possesses an Implied Right under the Constitution to Seek This Court’s Aid in Enforcing the Holder Subpoena.

“It is settled that the power of inquiry – with process to enforce it – is an essential and appropriate auxiliary to the legislative function.” *Shelton v. United States*, 404 F.2d 1292, 1296 (D.C. Cir. 1968). As part of that power of inquiry, Congress possesses a constitutionally implied right to compel the production of documents:

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*. . . . [S]ome means of compulsion are essential to obtain what is needed.

McGrain, 273 U.S. at 175 (emphasis added). Indeed, “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.” *Id.* To further effectuate these wide-ranging powers, the Supreme Court also has implied in the Constitution an “unremitting obligation” on those called to testify and produce documents to Congress – as the Attorney General was here –

¹¹ The other cases the Attorney General cites are equally unavailing. In *Seized Property Recovery, Corp. v. U.S. Customs & Border Protection*, 502 F. Supp. 2d 50, 64 (D.D.C. 2007), the Magistrate Judge declined to hear the plaintiffs’ DJA claim because they failed to identify a source of that Court’s *subject matter jurisdiction*. See *Miers*, 558 F. Supp. 2d at 81 (distinguishing *Seized Property Recovery*). *Superlease Rent-A-Car, Inc. v. Budget Rent-A-Car, Inc.*, No. 1:89-cv-00300, 1989 WL 39393, at *3 (D.D.C. Apr. 13, 1989), held that the DJA did not provide plaintiffs with *standing*. The language the Attorney General cites from two non-D.C. Circuit cases – *Buck v. Am. Airlines, Inc.*, 476 F.3d 29 (1st Cir. 2007), and *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) – is dicta and, in any event, rests on misreadings of earlier cases, as Judge Bates pointed out in *Miers*. See *Miers*, 558 F. Supp. 2d at 80, 81 n.19.

to do so. *Watkins*, 354 U.S. at 187.

Marshall v. Gordon, 243 U.S. 521 (1917), establishes a framework for implying remedies pursuant to Congress's Article I powers:

What does this implied power [of inherent contempt] embrace? is thus the question. In answering, it must be borne in mind that the [implied] power rests simply upon the implication that the right has been given to do that which is essential to the execution of some other and substantive authority expressly conferred. The power is therefore but a force implied to bring into existence the conditions to which constitutional limitations apply. It is a means to an end, and not the end itself. *Hence it rests solely upon the right of self-preservation to enable the public powers given to be exerted.*

....

... [T]he implied power . . . rests only upon the right of self-preservation; that is, the right to prevent acts which, in and of themselves, inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed.

Id. at 541-42 (emphasis added). *Marshall* makes clear that inherent contempt is only one remedy implied under the Constitution to effectuate Congress's exercise of its legislative powers. The same constitutional logic also encompasses permitting Congress, under certain circumstances (i.e., when a case is otherwise justiciable), to enforce its subpoenas civilly through the courts.¹²

Indeed, it borders on the nonsensical to suggest that the Judiciary may review Congress's exercise of its inherent contempt power (which the Supreme Court has implied from the Constitution) – by which Congress may enforce demands for information in aid of its investigatory powers (also implied from the Constitution), from witnesses who have an

¹² The law long has recognized in many contexts that the greater power includes the lesser (*a maiore ad minus*). See, e.g., *Ferry v. Ramsey*, 277 U.S. 88, 94 (1928) (Holmes, J.); *Nuvio Corp. v. FCC*, 473 F.3d 302, 311 (D.C. Cir. 2006) (Kavanaugh, J., concurring). Thus, if Congress has the right and power to imprison and try a contumacious witness without resort to the Courts (albeit with judicial review available by way of *habeas corpus*), as *Marshall* held that it does, then Congress also has the lesser included authority to seek from the Judiciary less coercive relief in the form of a civil enforcement order.

“unremitting obligation” to comply with such demands (also implied from the Constitution) – but the Judiciary may not entertain an ordinary civil enforcement action by which Congress seeks to enforce those very same rights and obligations. Accordingly, this Court should recognize that the Committee has a constitutionally implied cause of action to seek declaratory and injunctive relief to enforce its subpoena, just as Judge Bates did in *Miers*. See *Miers*, 558 F. Supp. 2d at 88-94.

The Attorney General’s contrary arguments, such as they are, do not counsel a different result. He says, *first*, that a plaintiff seeking to imply a cause of action from a statute bears a heavy burden. AG Mem. at 39. However, “[t]he inquiry involved in implying a cause of action from the Constitution itself . . . is much different.” *Miers*, 558 F. Supp. 2d at 88.

Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition, who may enforce them and in what manner. For example, statutory rights and obligations are often embedded in complex regulatory schemes, so that if they are not enforced through private causes of action, they may nevertheless be enforced through alternative mechanisms, such as criminal prosecutions or other public causes of actions. In each case, however, the question is the nature of the legislative intent informing a specific statute

The Constitution, on the other hand, does not “partake of the prolixity of a legal code.” *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819). It speaks instead with a majestic simplicity. One of “its important objects,” *ibid.*, is the designation of rights. And in “its great outlines,” *ibid.*, the judiciary is clearly discernible as the primary means through which these rights may be enforced.

Davis v. Passman, 442 U.S. 228, 241 (1979) (citations omitted). Moreover:

When a plaintiff asserts constitutional rather than statutory rights, the Court is more willing to imply a private right to sue, both on the theory that defining the means for the enforcement of constitutional rights is the federal judiciary’s special focus, and because these cases lack the separation-of-powers concern that the judiciary might find itself essentially rewriting congressional legislation by tacking on implied remedies that Congress could have enacted explicitly but did not.

1 Laurence H. Tribe, *American Constitutional Law* 483-84 (3d ed. 2000); see also *Miers*, 558 F.

Supp. 2d at 89 (explaining “straightforward” analysis for implying cause of action for enforcing congressional subpoenas).

Second, the Attorney General seems to suggest that *Reed v. County Commissioners of Delaware County, Pennsylvania*, 277 U.S. 376, 388 (1928), forecloses implying a cause of action under the Constitution for congressional subpoena enforcement. AG Mem. at 40. That is incorrect. *Reed* involved an attempt by a Senate committee to bring suit to enforce a subpoena for ballot boxes following a disputed senatorial election. When one Pennsylvania county refused to comply with the committee’s request, the committee sued to enforce its subpoena. When the case arrived at the Supreme Court, the issue was whether the federal courts had *jurisdiction* to hear the case under 28 U.S.C. § 41(1) (1926) (a predecessor to 28 U.S.C. § 1345), which provided “that the District Courts shall have original jurisdiction ‘of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue.’” 277 U.S. at 386 (quoting § 41(1)). The Senate petitioners asserted that the Senate resolution creating the committee and authorizing it “to do such other acts as may be necessary in the matter of said investigation” constituted “authoriz[ation] by law to sue” for purposes of § 41(1). 277 U.S. at 386. The Supreme Court disagreed, holding that the resolution language did not *expressly* grant the committee the right to sue, that it thus was not “authorized by law to sue” within the meaning of § 41(1), and thus that the case had to be dismissed for *lack of jurisdiction*. 277 U.S. at 389. The Court did not reach or even discuss the question of whether the committee had a cause of action. Because *Reed* says absolutely nothing about implied causes of action, it is not an impediment to this Court’s implying a cause of action in this case (just as Judge Bates did

in *Miers*).¹³

Third, the Attorney General says the Court may not imply a cause of action because “Congress has authority to create a cause of action for itself.” AG Mem. at 40. However, the Attorney General cites no authority that so holds. *Wilkie v. Robbins*, 551 U.S. 537 (2007), which the Attorney General does cite, concerned the implication of a damages remedy from a statute. But, as we just pointed out, “the question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution.” *Davis*, 442 U.S. at 241 (emphasis in original). Furthermore, this argument is, to put it charitably, ironic in light of the fact that the Attorney General’s own subordinate – the U.S. Attorney for the District of Columbia – flatly has refused to comply with the statutory scheme that Congress has enacted. See Compl. ¶¶ 54-59; see also *Miers*, 558 F. Supp. 2d at 91 (noting that “[Judiciary] Committee’s attempt to proceed with a criminal contempt prosecution was thwarted by the executive branch”).

Finally, the Attorney General says the “Constitution provides Congress with means of compelling compliance unavailable to a typical plaintiff,” and that “there are ‘special factors counseling hesitation’ here.” AG Mem. at 41 (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)). Aside from referring vaguely to “separation of powers issues,” AG Mem. at 41, the Attorney General does not specify what these other “means” or “special factors” are. To the extent he is referring to “self-help” remedies mentioned elsewhere, see, e.g., *id.* at 19-20, we already have addressed those. See *supra* pp. 17-19. We note also that Judge Bates rejected out-of-hand the

¹³ The day after *Reed* was decided, the Senate adopted a resolution that expressly authorized the committee to file suit. See S. Res. 262, 70th Cong. (1928) (enacted). The Senate obviously understood that it had a cause of action inasmuch as the only action it took on the heels of *Reed* was passage of S. Res. 262, which resolved the jurisdictional issue the Supreme Court had identified.

same self-help and special factors notions DOJ advanced in *Miers*. See *Miers* 558 F. Supp. 2d at 92-93 & n.29.¹⁴

IV. The Court Should Reach the Merits of the Oversight Committee's Claims.

The Attorney General says that if this Court concludes, as Judge Bates did in *Miers*, that the Committee has a cause of action, it nevertheless should exercise its discretion – whether under the DJA or a doctrine known as “equitable” or “remedial” discretion – to decline to hear this case. See AG Mem. at 42-45. This argument, which largely recycles the ungrounded, abstract, and self-serving separation of powers notions the Attorney General has raised elsewhere, must be rejected.

A. The Court Should Exercise Its Discretion under the Declaratory Judgment Act.

Whether this Court should exercise its discretion under the DJA to reach the merits of the Committee's claims turns on

whether [declaratory relief] would finally settle the controversy between the parties; whether other remedies are available or other proceedings pending; the convenience of the parties; the equity of the conduct of the declaratory judgment plaintiff; prevention of procedural fencing; the state of the record; the degree of adverseness between the parties; and the public importance of the question to be decided.

Mittleman v. U.S. Dep't of the Treasury, 919 F. Supp. 461, 470 (D.D.C. 1995) (quotation marks

¹⁴ The Attorney General also says cryptically that Congress has passed “legislation that excludes the very suit the Committee now seeks to maintain.” AG Mem. at 41. That, of course, is not true. Indeed, aside from one citation to 2 U.S.C. § 288d, that argument goes no further. To the extent the Attorney General intended to resurrect a misguided argument advanced by DOJ in *Miers* – see Mem. . . . in Supp. of Defs.' Mot. to Dismiss and in Opp'n to Pl.'s Mot. for Partial Summ. J. . . . at 41-42, *Comm. on the Judiciary v. Miers*, No. 1:08-cv-00409 (D.D.C. May 9, 2008) (ECF No. 16-2) – the Oversight Committee incorporates here the Judiciary Committee's response in *Miers* to that argument. See Mem. . . . in Opp'n to Defs.' Mot. to Dismiss and in Reply to Defs.' Opp'n to Pl.'s Mot. for Partial Summ. J. at 44-47, *Comm. on the Judiciary v. Miers*, No. 1:08-cv-00409 (D.D.C. May 29, 2008) (ECF No. 26); see also *Miers*, 588 F. Supp. 2d at 86-87 (dismantling DOJ's § 288d argument in that case).

omitted); *see also Nat'l R.R. Passenger Corp. v. Consol. Rail Corp.*, 670 F. Supp. 424, 431 (D.D.C. 1987) (“Two criteria are ordinarily relied upon to determine whether a court should, in its discretion, render a declaratory judgment: (1) whether the judgment will ‘serve a useful purpose in clarifying the legal relations in issue’ or (2) whether the judgment will ‘terminate and afford relief from the uncertainty, insecurity, and controversy, giving rise to the proceeding.’” (quoting *President v. Vance*, 627 F.2d 353, 364 n.76 (D.C. Cir. 1980))).¹⁵ Here, all these factors weigh heavily in favor of the Court reaching the merits of the Committee’s claims. *See Miers*, 558 F. Supp. 2d at 95-100 (exercising discretion to hear Judiciary Committee claims).

First, the Court’s rendering a declaratory judgment plainly will “serve a useful purpose in clarifying the legal relations in issue.” *Nat'l R.R. Passenger Corp.*, 670 F. Supp. at 431. The dispute here revolves around the applicability of the deliberative process privilege – which the Attorney General casts as a form of Executive privilege – to a congressional subpoena. By determining (i) whether this privilege may validly be asserted in response to the Holder Subpoena, and (ii) whether the Attorney General’s failure to produce to the Committee the Post-February 4 Subset of documents is without legal justification and violates his legal obligations to the Committee, *see* Compl. ¶¶ 62-81, the Court definitively will resolve the controversy between the parties.

Second, for exactly the same reasons, the Court’s rendering a declaratory judgment here

¹⁵ *See also* Fed. R. Civ. P. 57 advisory committee’s note (“A declaratory judgment is appropriate when it will ‘terminate the controversy’ giving rise on undisputed or relatively undisputed facts.”); Edwin Borchard, *Declaratory Judgments* 296 (2d ed. 1941) (to exercise authority to grant declaratory relief, “the court must have concluded that its judgment will ‘terminate the uncertainty or controversy giving rise to the proceeding’ and that it will serve a useful purpose in stabilizing legal relations” (quoting *Gov’t Emps. Ins. Co. v. Pizol*, 108 F.3d 999, 1013 (9th Cir. 1997) (Schroeder, J., dissenting), *opinion vacated on reh’g en banc*, 133 F.3d 1220 (9th Cir. 1998))).

will terminate the “uncertainty, insecurity, and controversy, giving rise to the proceeding.” *Nat’l R.R. Passenger Corp.*, 670 F. Supp. at 431. Once the limits and application of the deliberative process privilege in the context of the Holder Subpoena have been declared, the parties will know how to proceed. If the Attorney General’s claim is found to be legitimate, that will end the matter. If his claim is found to be inapplicable or not validly asserted, we expect the Attorney General will comply with the Court’s order and immediately produce to the Committee the responsive documents it has been seeking – and which the Attorney General has been withholding – since October 2011.

Third, the issues raised unquestionably are of great public importance. No court ever has held that Executive privilege extends anywhere near as far as the Attorney General here contends that it does. The breathtakingly expansive conception of Executive privilege that the Attorney General advances here, were it to be accepted, would eviscerate congressional oversight of the Executive to the very great detriment of the Nation and our constitutional structure.

Fourth, the Committee’s conduct has been exemplary. It has gone to extraordinary lengths to attempt to reach an accommodation with the Attorney General. *See* Compl. ¶¶ 46-51. While the Attorney General suggests that the Committee rushed to the courthouse, AG Mem. at 44, that is untrue. The Committee initiated its investigation in February 2011. Compl. ¶¶ 1, 28. It issued the Holder Subpoena in October 2011. *Id.* ¶¶ 8, 40. Over the next eight months, against the backdrop of an uncooperative Attorney General and his subordinates, *id.* ¶¶ 5-6, 30-36, 42-43, the Committee repeatedly tried to reach an accommodation with the Attorney General regarding the documents at issue here, *id.* ¶¶ 46, 50-51. Only when all of those efforts failed, did the House proceed to a contempt vote on June 28, 2012. *Id.* ¶¶ 52-53. The Committee did not file suit until August 13, 2012. Plainly, there was no rush to the courthouse. *See Miers*, 558 F.

Supp. 2d at 97 (“equity of the conduct of the [Judiciary Committee]” weighs in favor of judicial resolution).¹⁶

Fifth, the convenience factor clearly militates in favor of this Court’s exercising its discretion to resolve the quintessentially legal issues in dispute between the Committee and the Attorney General. The Committee has exhausted the normal remedies, including extensive efforts to negotiate an accommodation, Compl. ¶¶ 46, 50-51, and certification of the Attorney General’s contumacious conduct to the U.S. Attorney for referral to a grand jury, *id.* ¶ 55 – a referral that was not made, notwithstanding the U.S. Attorney’s statutory obligation to do so. *See* 2 U.S.C. § 194; Compl. ¶¶ 54, 56-59.¹⁷

¹⁶ The Attorney General argues that the Committee should content itself with a report on Operation Fast and Furious issued on September 19, 2012, by the DOJ Inspector General. AG Mem. at 45; *see* DOJ, Office of the Inspector General Oversight & Review Division, A Review of ATF’s Operation Fast & Furious & Related Matters (Sept. 2012) (“IG Report”), *available at* <http://www.justice.gov/oig/reports/2012/s1209.pdf>. The IG Report is not relevant to the Motion to Dismiss for at least the following reasons. First, it was only after the Committee began its investigation of Operation Fast and Furious in early February 2011, that DOJ undertook its own internal review, which led to the IG Report. More fundamentally, an investigation conducted by a statutory Executive Branch officer simply has no bearing on Congress’s discharge of its constitutional oversight responsibilities. (The Inspector General’s investigative authority is, for example, substantially more limited than the Committee’s: e.g., the Inspector General does not have subpoena power and may require only current DOJ employees to be interviewed; the cooperation of former employees and non-DOJ personnel is strictly voluntary). Finally, with respect to the Attorney General’s observation that DOJ produced to the Committee certain documents in conjunction with the release of the IG Report, AG Mem. at 18, those documents serve only to confirm that the Attorney General has been withholding responsive documents that could not fairly be thought to fall within any conception of “Executive privilege,” whether of the presidential communications variety or the asserted deliberative process variety – a point that only reinforces why this Court should deny the Motion to Dismiss and proceed to the merits.

¹⁷ While the House has inherent contempt authority, that remedy is politically unwieldy and has not been used for seven decades. *See, e.g.,* *Jurney v. MacCracken*, 294 U.S. 125, 151 (1935) (last use of inherent contempt authority); Michael A. Zuckerman, *The Court of Congressional Contempt*, 25 J.L. & Pol. 41, 43 (2009) (“Congress has not exercised its direct contempt powers in any significant way since 1935.”). Moreover, were the House to arrest the Attorney General and bring him before the bar of the House for trial, that process would, among other things, divert congressional resources and attention from other pressing legislative matters and almost

(Continued . . .)

B. The Court Should Not Decline to Hear This Case on the Basis of the Attorney General's Generic and Self-Serving Separation of Powers Notions.

The Attorney General's second "discretion" argument is that this Court should stand aside because this suit "pits the two political Branches against each other," AG Mem. at 43; "political solutions to this dispute remain," *id.* at 44; and "200 years of political history and court decisions make clear that the process of negotiation and accommodation is not simply the preferred option to resolve inter-Branch disputes over information, but the one that best preserves the separation of powers," *id.* at 45. This is a recycled version of the same generic and self-serving separation of powers notions that we already have addressed. *See supra* pp. 12-19.¹⁸

certainly escalate tensions between the Legislative and Executive Branches. Further, were the House to imprison the Attorney General – either during the pendency of or at the conclusion of such an inherent contempt trial – he almost certainly would petition this Court for a writ of *habeas corpus*, which would simply bring the matter full circle, and once again place the legality of the Attorney General's Executive privilege assertion squarely before this Court. *See Miers*, 558 F. Supp. 2d at 91-92 (rejecting idea that House must utilize inherent contempt proceedings before it can invoke Court's jurisdiction). Finally, and in any event, the DJA itself makes clear that declaratory relief is available "whether or not further relief is [available] or could be sought." 28 U.S.C. § 2201(a); *see also* Fed. R. Civ. P. 57 ("The existence of another adequate remedy does not preclude declaratory judgment that is otherwise appropriate."); Fed. R. Civ. P. 57 advisory committee's note ("The fact that a declaratory judgment may be granted 'whether or not further relief could be prayed' indicates that declaratory relief is alternative or cumulative and not exclusive or extraordinary. . . . [T]he fact that another remedy would be equally effective affords no ground for declining declaratory relief."). Indeed, as discussed above, OLC has asserted that the appropriate method to resolve these kinds of disputes is through a civil action initiated by Congress. *See supra* pp. 7-8.

¹⁸ The Attorney General refers to the doctrine of "remedial" or "equitable" discretion, AG Mem. at 42-43, but that doctrine is essentially a dead letter in light of *Raines*, 521 U.S. 811. *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir. 1983), which the Attorney General cites and which predates *Raines*, involved fourteen individual Members of the minority party in the House suing to enjoin the majority party leadership of the House from reducing the number of seats on House committees and subcommittees. *See Vander Jagt*, 699 F.2d at 1167. The D.C. Circuit found that, while the individual Members had Article III standing, it would invoke its "remedial discretion" to decline to decide the case. *See id.* at 1175 ("We invoke our remedial discretion in this setting because this case raises separation of powers concerns . . . and the remedial discretion approach . . . provides a more candid and coherent way of addressing those concerns."). After *Raines*, the remedial discretion doctrine no longer has any vitality because individual Members

(Continued . . .)

This lawsuit is a direct result of the Attorney General's *refusal* to attempt in good faith to accommodate the Committee's legitimate need for information, both by adamantly refusing to produce post-February 4, 2011 documents, and by exhorting the President to assert an extraordinarily expansive notion of Executive privilege that has no basis in law. *See* Compl. ¶¶ 46-47. Accordingly, a decision by this Court to decline to hear this case, far from promoting accommodation between the branches, would do just the opposite because it effectively would remove all incentives for the Executive to parlay with Congress regarding information access. On the other hand, if the Court reaches the merits of the Committee's claims, it necessarily will reinforce the separation of powers principles to which the Attorney General purports to pledge such fealty:

Rather than running roughshod over separation of powers principles, the Court believes that entertaining this case will reinforce them. Two parties cannot negotiate in good faith when one side asserts legal privileges but insists that they cannot be tested in court in the traditional manner. That is true whether the negotiating partners are private firms or the political branches of the federal government.

Miers, 558 F. Supp. 2d at 99.

V. The Court Has Statutory Jurisdiction.

A. The Court Has Jurisdiction under 28 U.S.C. § 1331.

In *Miers*, DOJ wisely and correctly acknowledged that the Court had statutory jurisdiction under 28 U.S.C § 1331. *See Miers*, 558 F. Supp. 2d at 64 n.8 (“Defendants do not dispute that the Court has statutory subject-matter jurisdiction under 28 U.S.C § 1331.”). This time around, with his department having lost in *Miers* on every jurisprudential argument it

no longer have standing to assert institutional injuries in the first instance. *See, e.g., Campbell*, 203 F.3d at 24; *Chenoweth*, 181 F.3d at 117; *Kucinich*, 236 F. Supp. 2d at 17-18; *see also supra* pp. 27-30.

raised, the Attorney General affirmatively challenges the Court's statutory jurisdiction. AG Mem. at 36-38. DOJ had it right the first time.

This Court plainly has jurisdiction under § 1331 because the case “arise[s] under the Constitution [and] laws . . . of the United States,” 28 U.S.C. § 1331, both because the Committee has causes of action under Article I, *see supra* pp. 37-42, and the DJA, *see supra* pp. 32-37, and because the right the Committee seeks to vindicate is inherently constitutional, *see supra* pp. 8-10. This conclusion is buttressed by the legislative history of the statute and a series of cases that begins with *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 366 F. Supp. 51 (D.D.C. 1973) (Sirica, J.) (“*Senate Select I*”).

In *Senate Select I*, Judge Sirica indicated that the Court would have had § 1331 jurisdiction over the Senate Select Committee's action to enforce its subpoena to President Nixon but for the then-existing \$10,000 amount-in-controversy requirement. “[F]inding no possible valuation of the matter which satisfies the \$10,000 minimum, the Court cannot assert jurisdiction by virtue of § 1331.” *Senate Select I*, 366 F. Supp. at 61. Immediately thereafter, Congress enacted a special statute giving the District Court for the District of Columbia jurisdiction over the Senate Select Committee suits. *See Senate Select III*, 498 F.2d at 727; *see also* 119 Cong. Rec. 36,472 (1973) (Statement of Sen. Ervin) (“The amendment is necessary because Judge Sirica held that the District Court . . . had no jurisdiction to entertain the original suit of the select committee.”).

Following President Nixon's resignation, Congress sought to enact a more permanent fix to the jurisdictional issue identified by Judge Sirica. In 1976, it did so; Congress amended § 1331 to eliminate the \$10,000 amount-in-controversy requirement for “any action brought against the United States, any agency thereof, or any officer or employee thereof in his official

capacity.” Pub. L. No. 94-574, 90 Stat. 2721 (1976). The D.C. Circuit specifically noted this amendment to § 1331 in its *AT&TI* decision in 1976. *See AT&TI*, 551 F.2d at 389 n.7 (noting “recent addition to 28 U.S.C. §1331(a) of the following: [‘]except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity[’]”). Subsequently, in 1980, Congress eliminated the \$10,000 amount-in-controversy requirement for all matters, *see* Pub. L. No. 96-486, 94 Stat. 2369 (1980), which is where matters stand today.

Following the 1976 amendment to § 1331, the D.C. Circuit held, in a case it treated “as a clash of the powers of the legislative and executive branches of the United States” regarding a congressional subpoena, that the District Court had jurisdiction under § 1331 because “fundamental constitutional rights are involved.” *AT&TI*, 551 F.2d at 389.¹⁹ And, in *Miers*, even though DOJ had conceded the issue, this Court satisfied itself, as it was required to do, of its statutory jurisdiction to hear the case under § 1331. *See Miers*, 558 F. Supp. 2d at 64 (“[T]his case arises under the Constitution for purposes of § 1331.”).

The Attorney General’s jurisdictional argument is predicated entirely on 28 U.S.C. § 1365 (which vests this Court with jurisdiction regarding certain *Senate* subpoenas). *See* AG Mem. at 36-38. As best we can tell, the Attorney General’s argument proceeds as follows: (i) “prior to 1978, Section 1331 did not provide a basis for subject matter jurisdiction for a suit to enforce a congressional subpoena . . . because Section 1331 contained an amount-in-controversy requirement of \$10,000,” AG Mem. at 36; (ii) Congress addressed that problem in the Ethics in

¹⁹ Because the Court in *AT&TI* concluded that the jurisdictional amount-in-controversy requirement was satisfied “where fundamental constitutional rights [we]re involved,” it did not reach the question of whether the October 1976 amendment to § 1331 applied retroactively or applied where AT&T was the technical defendant in the case. *See AT&TI*, 551 F.2d at 389 n.7.

Government Act of 1978 (which included the current 28 U.S.C. § 1365), but only in part by granting this Court, via § 1365, subject matter jurisdiction in connection with certain Senate subpoenas, AG Mem. at 36-37; and, therefore, (iii) when Congress “eliminated the amount-in-controversy requirement from Section 1331” in 1980, the House necessarily was left on the sidelines, AG Mem. at 37. This argument is badly flawed – for at least three reasons.

First, 28 U.S.C. § 1365, by its plain language, applies only to the Senate; it does not apply to, and has nothing to do with, the House.

Second, and perhaps most importantly, the Attorney General’s chronology of § 1331’s legislative history is wrong. His argument is predicated on the presumption that “Section 1331 contained an amount-in-controversy requirement of \$10,000” at the time Congress enacted the Ethics in Government Act in 1978 (which included the current 28 U.S.C. § 1365). AG Mem. at 36. But, as noted above, Congress already had eliminated, in 1976, the \$10,000 amount-in-controversy requirement with respect to “any action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.” Pub. L. No. 94-574, 90 Stat. 2721 (1976). Thus, the federal district courts have had statutory jurisdiction under § 1331 to entertain subpoena enforcement suits by the House – and the Senate – since 1976 with respect to subpoenas directed to the “United States, any agency thereof, or any officer or employee thereof in his official capacity.” *See* S. Rep. No. 95-170, at 91-92 (1977) (“This exception in [§ 1365] is not intended to be a congressional finding that the federal courts do not now have the authority to hear a civil action to enforce a subpoena against an officer or employee of the federal government.”).

Properly understood, therefore, § 1365 simply removed the amount-in-controversy requirement with respect to Senate subpoena enforcement actions against *private individuals and*

entities because, as of 1978, that amount-in-controversy requirement still existed in § 1331 with respect to *private individuals and entities* (inasmuch as the 1976 amendment only removed the amount-in-controversy requirement for suits directed to the “United States, any agency thereof, or any officer or employee thereof in his official capacity”). That § 1365, as then enacted, excluded subpoena enforcement actions (by the Senate) against officers or employees of the federal government merely reflected the fact that § 1365 was not needed for such jurisdiction given the then-existing (and recently modified) § 1331. *See, e.g.*, S. Rep. No. 95-170, at 91-92.

Third, in light of this legislative history, the fact that, in the context of certain Senate subpoenas, there now may be some overlap between § 1331 and § 1365 as a result of the 1980 amendment to § 1331, *see Miers*, 558 F. Supp. 2d at 86-87 (“28 U.S.C. § 1365 provides jurisdiction for actions that also likely fall within the scope of 28 U.S.C. § 1331 – hence, the Senate can likely proceed on either basis where appropriate.”), is simply irrelevant. It most assuredly does not constitute, as the Attorney General would have it, an “exclu[sion of] the action the Committee seeks to bring here.” AG Mem. at 37.

B. The Court Has Jurisdiction under 28 U.S.C. § 1345.

This Court also has jurisdiction under 28 U.S.C. § 1345 (“Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States . . .”) because this action was commenced “by the United States” against one of its officers. The Legislative Branch (and its authorized agent) clearly is as much “the United States” as the Executive Branch. Any argument that the Congress is not part of the United States ultimately “presumes that there is more than one ‘United States’ . . . and that the United States is something other than ‘the sovereign composed of the three branches.’” *United States v. Providence Journal Co.*, 485 U.S. 693, 701 (1988) (quoting *Nixon*,

418 U.S. at 696). When presented with that contention in another context, the Supreme Court dubbed it “somewhat startling,” and asserted that “the three branches are but ‘co-ordinate parts of one government.’” *Id.* (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928)).

In *Senate Select I*, Judge Sirica held that a subcommittee of the Senate was not authorized to sue as “the United States.” 366 F. Supp. at 56. In reaching that conclusion, he relied on 28 U.S.C. § 516, which states: “Except as otherwise authorized by law, the conduct of litigation in which the United States . . . is a party, or is interested . . . is reserved to officers of [DOJ].” The Court ruled that § 516’s language indicates that only DOJ has “the right to sue as the United States when jurisdiction derives from § 1345.” *Id.*

This ruling was incorrect because, among other reasons, § 516 – which is codified with other provisions dealing with the internal administration of DOJ – was not intended to deal with legal representation of Congress. Rather, § 516 is a housekeeping statute designed to resolve conflicts between Executive entities and DOJ over who will represent the former. *See, e.g., Mail Order Ass’n of Am. v. U.S. Postal Serv.*, 986 F.2d 509, 527 (D.C. Cir. 1993); *FTC v. Guignon*, 390 F.2d 323, 324-35 (8th Cir. 1968).

However, even if *Senate Select I* was correct on this issue when it was decided, this aspect of that decision no longer is good law in light of subsequent legal developments impacting the “[e]xcept as otherwise authorized by law” language in § 516. In particular, in 1992, pursuant to its authority under the Rulemaking Clause, U.S. Const. art. I, § 5, cl. 2, the House established an Office of General Counsel. H.R. Res. 423, 102d Cong. (1992) (enacted); *see also* H.R. Res. 5, 103d Cong. (1993) (enacted) (incorporating into House Rule I – now House Rule II.8 – provision regarding “Office of General Counsel for the purpose of providing legal assistance and

representation to the House”). That rule has continued in force ever since. *See, e.g.*, Rule II.8, Rules of the House of Representatives (112th Cong.). And “[House] rules have the force of law . . .” *Shape of Things to Come, Inc. v. Kane Cnty.*, 588 F. Supp. 1192, 1193 (N.D. Ill. 1984); *accord Randolph v. Willis*, 220 F. Supp. 355, 358 (S.D. Cal. 1963).²⁰

As a means to effectuate this representation, in 1999 Congress enacted, and the President signed into law, 2 U.S.C. § 130f, which provides that:

The General Counsel of the House of Representatives and any other counsel in the Office of the General Counsel of the House of Representatives . . . shall be entitled, for the purpose of performing the counsel’s functions, to enter an appearance in any proceeding before any court of the United States

§ 130f(a). This statute addresses, among other things, matters such as this one for which the House requires its own representation. *See also, e.g.*, 28 U.S.C. § 530D(a)(1)(B)(ii).

Accordingly, House Rule II.8 and § 130f “otherwise authorize[] by law” the Office of General Counsel to sue as “the United States” on behalf of the Congress – or an authorized committee of Congress – for purposes of § 516, thereby obviating *Senate Select I*’s concern about the House suing as the “United States” under § 1345.

CONCLUSION

For all of the foregoing reasons, the Attorney General’s Motion to Dismiss should be denied.

²⁰ While House Rules may not ignore constitutional restraints or violate fundamental rights, they otherwise are “absolute and beyond the challenge of any other body or tribunal.” *United States v. Ballin*, 144 U.S. 1, 5 (1892); *see also Consumer’s Union of U.S., Inc. v. Periodical Correspondent’s Ass’n*, 515 F.2d 1341, 1343 (D.C. Cir. 1975) (Rulemaking Clause is “broad grant of authority”); *Walker v. Jones*, 733 F.2d 923, 938 (D.C. Cir. 1984) (MacKinnon, J., concurring in part and dissenting in part) (Rulemaking Clause sits at “the very core of our constitutional separation of powers”).

Respectfully submitted,

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November 21, 2012

CERTIFICATE OF SERVICE

I certify that on November 21, 2012, I served one copy of the foregoing Plaintiff's Opposition to Defendant's Motion to Dismiss by CM/ECF on all registered parties and by electronic mail (.pdf format), on:

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Immunity of the Counsel to the President from Compelled Congressional Testimony

Executive privilege is assertable in response to a congressional subpoena seeking the testimony of the Counsel to the President because the Counsel serves as one of the President's immediate advisers and is therefore immune from compelled congressional testimony.

September 3, 1996

LETTER OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked whether it would be consistent with precedent and governing legal principles to assert executive privilege should a subpoena be issued by a congressional committee to you, in your capacity as Counsel to the President, to compel your testimony at a committee hearing concerning the performance of your official duties. We believe that executive privilege would be assertable on the basis that you serve as an immediate adviser to the President and are therefore immune from compelled congressional testimony.

It is the longstanding position of the executive branch that "the President and his immediate advisors are absolutely immune from testimonial compulsion by a Congressional committee."¹ This position is constitutionally based:

The President is a separate branch of government. He may not compel congressmen to appear before him. As a matter of separation of powers, Congress may not compel him to appear before it. The President's close advisors are an extension of the President.²

Accordingly, "[n]ot only can the President invoke executive privilege to protect [his personal staff] from the necessity of answering questions posed by a congress-

¹ Memorandum for all Heads of Offices, Divisions, Bureaus, and Boards of the Department of Justice, from John M. Harmon, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Executive Privilege* at 5 (May 23, 1977).

² Memorandum for Edward C. Schmults, Deputy Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel at 2 (Jul. 29, 1982) (discussing subpoena for testimony of the Counsel to the President). See also Memorandum for the Honorable John W. Dean, III, Counsel to the President, from Roger C. Cramton, Assistant Attorney General, Office of Legal Counsel, *Re: Availability of Executive Privilege Where Congressional Committee Seeks Testimony of Former White House Official on Advice Given President on Official Matters* at 6 (Dec. 21, 1972) (since "[a]n immediate assistant to the President may be said to serve as his alter ego . . . the same considerations that were persuasive to former President Truman [when he declined to comply with a congressional subpoena for his testimony] would apply to justify a refusal to appear by . . . a former staff member"); Letter for Senator Orrin G. Hatch, Chairman, United States Senate, Committee on Labor and Human Resources and Senator Edward M. Kennedy, Ranking Minority Member, United States Senate, Committee on Labor and Human Resources, from Edward C. Schmults, Deputy Attorney General at 2 (Apr. 19, 1983) ("[O]ur concern regarding your desire for the sworn testimony of [the Counsel to the President] is based upon important principles relative to the powers, duties and prerogatives of the Presidency. We share with previous Presidents and their advisers serious reservations regarding the implications for established constitutional doctrines arising from the separation of powers of a Congressional demand for the sworn testimony of close presidential advisers on the White House staff.').

Immunity of the Counsel to the President from Compelled Congressional Testimony

sional committee, but he can also direct them not even to appear before the committee."³

An often-quoted statement of this position is contained in an opinion by Assistant Attorney General William Rehnquist:

The President and his immediate advisers—that is, those who customarily meet with the President on a regular or frequent basis—should be deemed absolutely immune from testimonial compulsion by a congressional committee. They not only may not be examined with respect to their official duties, but they may not even be compelled to appear before a congressional committee.⁴

There is no question that the Counsel to the President falls within Assistant Attorney General Rehnquist's description of the type of Presidential advisers who are immune from testimonial compulsion.

CHRISTOPHER H. SCHROEDER
*Acting Assistant Attorney General
Office of Legal Counsel*

³ Memorandum for Margaret McKenna, Deputy Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Dual-purpose Presidential Advisers*, Appendix at 7 (Aug. 11, 1977).

⁴ Memorandum for the Honorable John D. Ehrlichman, Assistant to the President for Domestic Affairs, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff"* at 7 (Feb. 5, 1971).

IMMUNITY OF FORMER COUNSEL TO THE PRESIDENT FROM COMPELLED CONGRESSIONAL TESTIMONY

The former Counsel to the President is immune from compelled congressional testimony about matters that arose during her tenure as Counsel to the President and that relate to her official duties in that capacity and is not required to appear in response to a subpoena to testify about such matters.

July 10, 2007

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked whether Harriet Miers, the former Counsel to the President, is legally required to appear and provide testimony in response to a subpoena issued by the Committee on the Judiciary of the House of Representatives. The Committee, we understand, seeks testimony from Ms. Miers about matters arising during her tenure as Counsel to the President and relating to her official duties in that capacity. Specifically, the Committee wishes to ask Ms. Miers about the decision of the Justice Department to request the resignations of several United States Attorneys in 2006. See Letter for Harriet E. Miers from the Hon. John Conyers, Jr., Chairman, House Committee on the Judiciary (June 13, 2007). For the reasons discussed below, we believe that Ms. Miers is immune from compulsion to testify before the Committee on this matter and, therefore, is not required to appear to testify about this subject.

Since at least the 1940s, Administrations of both political parties have taken the position that “the President and his immediate advisers are absolutely immune from testimonial compulsion by a Congressional committee.” *Assertion of Executive Privilege With Respect to Clemency Decision*, 23 Op. O.L.C. 1, 4 (1999) (opinion of Attorney General Janet Reno) (quoting Memorandum from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Executive Privilege* at 5 (May 23, 1977)). This immunity “is absolute and may not be overcome by competing congressional interests.” *Id.*

Assistant Attorney General William Rehnquist succinctly explained this position in a 1971 memorandum:

The President and his immediate advisers—that is, those who customarily meet with the President on a regular or frequent basis—should be deemed absolutely immune from testimonial compulsion by a congressional committee. They not only may not be examined with respect to their official duties, but they may not even be compelled to appear before a congressional committee.

Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Power of Congressional Committee to Compel Appearance or Testimony of “White House Staff”* at 7 (Feb. 5, 1971) (“*Rehnquist Memo*”). In a 1999 opinion for President Clinton, Attorney General Reno concluded that the Counsel to the President “serves as an immediate adviser to the President and is therefore immune from compelled congressional testimony.” *Assertion of Executive Privilege*, 23, Op. O.L.C. at 4.

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The rationale for the immunity is plain. The President is the head of one of the independent Branches of the federal Government. If a congressional committee could force the President's appearance, fundamental separation of powers principles—including the President's independence and autonomy from Congress—would be threatened. As the Office of Legal Counsel has explained, “[t]he President is a separate branch of government. He may not compel congressmen to appear before him. As a matter of separation of powers, Congress may not compel him to appear before it.” Memorandum for Edward C. Schmults, Deputy Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel at 2 (July 29, 1982) (“*Olson Memorandum*”).

The same separation of powers principles that protect a President from compelled congressional testimony also apply to senior presidential advisers. Given the numerous demands of his office, the President must rely upon senior advisers. As Attorney General Reno explained, “in many respects, a senior advisor to the President functions as the President’s alter ego, assisting him on a daily basis in the formulation of executive policy and resolution of matters affecting the military, foreign affairs, and national security and other aspects of his discharge of his constitutional responsibilities.” *Assertion of Executive Privilege*, 23 Op. O.L.C. at 5.¹ Thus, “[s]ubjecting a senior presidential advisor to the congressional subpoena power would be akin to requiring the President himself to appear before Congress on matters relating to the performance of his constitutionally assigned functions.” *Id.*; see also *Olson Memorandum* at 2 (“The President’s close advisors are an extension of the President.”).²

The fact that Ms. Miers is a former Counsel to the President does not alter the analysis. Separation of powers principles dictate that former Presidents and former senior presidential advisers remain immune from compelled congressional testimony about official matters that occurred during their time as President or senior presidential advisers. Former President Truman explained the need for continuing immunity in November 1953, when he refused to comply with a subpoena directing him to appear before the House Committee on Un-American Activities. In a letter to that committee, he warned that “if the doctrine of separation of powers and the independence of the Presidency is to have any validity at all, it must be equally applicable to a President after his term of office has expired when he is sought to be examined with respect to any acts occurring while he is President.” *Texts of Truman Letter and Velde Reply*, N.Y. Times, Nov. 13, 1953, at 14 (reprinting November 12, 1953 letter by President Truman). “The doctrine

¹ In an analogous context, the Supreme Court held that the immunity provided by the Speech or Debate Clause of the Constitution to Members of Congress also applies to congressional aides, even though the Clause refers only to “Senators and Representatives.” U.S. Const. art I, § 6, cl. 1. In justifying expanding the immunity, the Supreme Court reasoned that “the day to day work of such aides is so critical to the Members’ performance that they must be treated as the latter’s alter egos.” *Gravel v. United States*, 408 U.S. 606, 616-17 (1972). Any other approach, the Court warned, would cause the constitutional immunity to be “inevitably . . . diminished and frustrated.” *Id.* at 617.

² See also *History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress*, 6 Op. O.L.C. 751, 771-72 (1982) (documenting how President Truman directed Assistant to the President John Steelman not to respond to a congressional subpoena seeking information about confidential communications between the President and one of his “principal aides”).

Immunity of Former Counsel to the President from Compelled Congressional Testimony

would be shattered, and the President, contrary to our fundamental theory of constitutional government, would become a mere arm of the Legislative Branch of the Government if he would feel during his term of office that his every act might be subject to official inquiry and possible distortion for political purposes.” *Id.* In a radio speech to the Nation, former President Truman further stressed that it “is just as important to the independence of the Executive that the actions of the President should not be subjected to the questioning by the Congress after he has completed his term of office as that his actions should not be questioned while he is serving as President.” *Text of Address by Truman Explaining to Nation His Actions in the White Case*, N.Y. Times, Nov. 17, 1953, at 26.

Because a presidential adviser’s immunity is derivative of the President’s, former President Truman’s rationale directly applies to former presidential advisers. We have previously opined that because an “immediate assistant to the President may be said to serve as his alter ego . . . the same considerations that were persuasive to former President Truman would apply to justify a refusal to appear [before a congressional committee] by . . . a former [senior presidential adviser], if the scope of his testimony is to be limited to his activities while serving in that capacity.” Memorandum for the Counsel to the President from Roger C. Cramton, Assistant Attorney General, Office of Legal Counsel, *Re: Availability of Executive Privilege Where Congressional Committee Seeks Testimony of Former White House Official on Advice Given President on Official Matters* at 6 (Dec. 21, 1972).

Accordingly, we conclude that Ms. Miers is immune from compelled congressional testimony about matters, such as the U.S. Attorney resignations, that arose during her tenure as Counsel to the President and that relate to her official duties in that capacity, and therefore she is not required to appear in response to a subpoena to testify about such matters.

/s/

STEVEN G. BRADBURY
Principal Deputy Assistant Attorney General

Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach From Congressional Subpoena

The Assistant to the President and Director of the Office of Political Strategy and Outreach (“OPSO”) is immune from the House Committee on Oversight and Government Reform’s subpoena to compel him to testify about matters concerning his service to the President in the OPSO.

July 15, 2014

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked whether Assistant to the President and Director of the Office of Political Strategy and Outreach (“OPSO”) David Simas is legally required to appear to testify at a congressional hearing scheduled for July 16, 2014, in response to a subpoena issued to Mr. Simas by the House Committee on Oversight and Government Reform on July 10, 2014. We understand that the Committee seeks testimony about “whether the White House is taking adequate steps to ensure that political activity by Administration officials complies with relevant statutes, including the Hatch Act,” and about “the role and function of the White House Office of Political Strategy and Outreach.” Letter for David Simas from the Hon. Darrell Issa, Chairman, Committee on Oversight and Government Reform, House of Representatives (July 3, 2014) (“Invitation Letter”). For the reasons set forth below, we believe that Mr. Simas is immune from compulsion to testify before the Committee on these matters, and therefore is not required to appear to testify in response to this subpoena.

I.

A.

The Executive Branch’s longstanding position, reaffirmed by numerous Administrations of both political parties, is that the President’s immediate advisers are absolutely immune from congressional testimonial process. *See, e.g.*, Memorandum for the Hon. John D. Ehrlichman, Assistant to the President for Domestic Affairs, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Power of Congressional Committee to Compel Appearance or Testimony of “White House Staff”* at 7 (Feb. 5, 1971) (“Rehnquist Memorandum”).¹ This immunity is rooted in the constitutional separation of powers, and in

¹ *See also* Letter to Fred F. Fielding, Counsel to the President, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel (Aug. 1, 2007); *Immunity of Former Counsel to the President from Compelled Congressional Testimony*, 31 Op. O.L.C. __ (July 10, 2007) (“Bradbury Memorandum”), available at <http://www.justice.gov/olc.opinions.htm>; *Assertion of Execu-*

the immunity of the President himself from congressional compulsion to testify. As this Office has previously observed, “[t]he President is the head of one of the independent Branches of the federal government. If a congressional committee could force the President’s appearance” to testify before it, “fundamental separation of powers principles—including the President’s independence and autonomy from Congress—would be threatened.” *Immunity of Former Counsel to the President from Compelled Congressional Testimony*, 31 Op. O.L.C. ___, at *2 (July 10, 2007) (“Bradbury Memorandum”), available at <http://justice.gov/olc/opinions.htm>. In the words of one President, “[t]he doctrine [of separation of powers] would be shattered, and the President, contrary to our fundamental theory of constitutional government, would become a mere arm of the Legislative Branch of the Government if he would feel during his term of office that his every act might be subject to official inquiry and possible distortion for political purpose.” Texts of Truman Letter and Velde Reply, N.Y. Times, Nov. 13, 1953, at 14 (reprinting November 11, 1953 letter by President Truman). Thus, just as the President “may not compel congressmen to appear before him,” “[a]s a matter of separation of powers, Congress may not compel him to appear before it.” *Assertion of Executive Privilege with Respect to Clemency Decision*, 23 Op. O.L.C. 1, 4 (1999) (“*Assertion of Executive Privilege*”) (quoting Memorandum for Edward C. Schmults, Deputy Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel at 2 (July 29, 1982)).

For the President’s absolute immunity to be fully meaningful, and for these separation of powers principles to be adequately protected, the President’s immediate advisers must likewise have absolute immunity from congressional compulsion to testify about matters that occur during the course of discharging their official duties. “Given the numerous demands of his office, the President must rely upon senior advisers” to do his job. Bradbury Memorandum at *2. The President’s immediate advisers—those trusted members of the President’s inner circle “who customarily meet with the President on a regular or frequent basis,” Rehnquist Memorandum at 7, and upon whom the President relies directly for candid and sound advice—are in many ways an extension of the President himself.

ive Privilege with Respect to Clemency Decision, 23 Op. O.L.C. 1 (1999); *Immunity of the Counsel to the President from Compelled Congressional Testimony*, 20 Op. O.L.C. 308 (1996); Memorandum to Edward C. Schmults, Deputy Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel (July 29, 1982); Letter for Rudolph W. Giuliani, Associate Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Demand for Deposition of Counsel to the President Fred F. Fielding* (July 23, 1982); Memorandum for Fred F. Fielding, Counsel to the President, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Congressional Testimony by Presidential Assistants* (Apr. 14, 1981); Memorandum for Margaret McKenna, Deputy Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Dual-Purpose Presidential Advisers* (Aug. 11, 1977); Memorandum for the Hon. John W. Dean III, Counsel to the President, from Ralph E. Erickson, Assistant Attorney General, Office of Legal Counsel, *Re: Appearance of Presidential Assistant Peter A. Flanigan Before a Congressional Committee* (Mar. 15, 1972).

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They “function[] as the President’s alter ego, assisting him on a daily basis in the formulation of executive policy and resolution of matters affecting the military, foreign affairs, and national security and other aspects of his discharge of his constitutional responsibilities,” including supervising the Executive Branch and developing policy. *Assertion of Executive Privilege*, 23 Op. O.L.C. at 5; see also *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982) (the Constitution “establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity,” including “the enforcement of federal law” and the “management of the Executive Branch”); *In re Sealed Case*, 121 F.3d 729, 750 (D.C. Cir. 1997) (“The President himself must make decisions relying substantially, if not entirely, on the information and analysis supplied by advisers.”). “Given the close working relationship that the President must have with his immediate advisors as he discharges his constitutionally assigned duties,” “[s]ubjecting [those advisors] to the congressional subpoena power would be akin to requiring the President himself to appear before Congress on matters relating to the performance of his constitutionally assigned executive functions.” *Assertion of Executive Privilege*, 23 Op. O.L.C. at 5.

In particular, a congressional power to compel the testimony of the President’s immediate advisers would interfere with the President’s discharge of his constitutional functions and damage the separation of powers in at least two important respects. First, such a power would threaten the President’s “independence and autonomy from Congress.” Bradbury Memorandum at *2; cf. *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 370, 385 (2004) (citing the President’s need for autonomy and confidentiality in holding that courts must consider constraints imposed by the separation of powers in fashioning the timing and scope of discovery directed at high-level presidential advisers who “give advice and make recommendations to the President”). Absent immunity for a President’s closest advisers, congressional committees could wield their compulsory power to attempt to supervise the President’s actions, or to harass those advisers in an effort to influence their conduct, retaliate for actions the committee disliked, or embarrass and weaken the President for partisan gain. Such efforts would risk significant congressional encroachment on, and interference with, the President’s prerogatives and his ability to discharge his duties with the advice and assistance of his closest advisers. They also would promote a perception that the President is subordinate to Congress, contrary to the Constitution’s separation of governmental powers into equal and coordinate branches.

Second, a congressional power to subpoena the President’s closest advisers to testify about matters that occur during the course of discharging their official duties 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. The Supreme Court has recognized “the necessity for protection of the public interest

in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking.” *United States v. Nixon*, 418 U.S. 683, 708 (1974). “A President and those who assist him,” the Court has explained, “must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.” *Id.* The prospect of compelled interrogation by a potentially hostile congressional committee about confidential communications with the President or among the President’s immediate staff could chill presidential advisers from providing unpopular advice or from fully examining an issue with the President or others.

To be sure, the President’s advisers could invoke executive privilege to decline to answer specific questions if they were required to testify. *See, e.g.*, Rehnquist Memorandum at 8 & n.4. But the ability to assert executive privilege during live testimony in response to hostile questioning would not remove the threat to the confidentiality of presidential communications. An immediate presidential adviser could be asked, under the express or implied threat of contempt of Congress, a wide range of unanticipated and hostile questions about highly sensitive deliberations and communications. In the heat of the moment, without the opportunity for careful reflection, the adviser might have difficulty confining his remarks to those that do not reveal such sensitive information. Or the adviser could be reluctant to repeatedly invoke executive privilege, even though validly applicable, for fear of the congressional and media condemnation she or the President might endure. These concerns are heightened because, in a hearing before a congressional committee, there is no judge or other neutral magistrate to whom a witness can turn for protection against questions seeking confidential and privileged information. The committee not only poses the questions to the witness, but also rules on any objections to its own questions according to procedures it establishes. The pressure of compelled live testimony about White House activities in a public congressional hearing would thus create an inherent and substantial risk of inadvertent or coerced disclosure of confidential information relating to presidential decisionmaking—thereby ultimately threatening the President’s ability to receive candid and carefully considered advice from his immediate advisers. To guard against these harms to the President’s ability to discharge his constitutional functions and to the separation of powers, immediate presidential advisers must have absolute immunity from congressional compulsion to testify about matters that occurred during the course of the adviser’s discharge of official duties.²

² A number of senior presidential advisers have voluntarily testified before Congress as an accommodation to a congressional committee’s legitimate interest in investigating certain activities of the Executive Branch. These instances of voluntary testimony do not undermine the Executive Branch’s long-established position on absolute immunity. Unlike compelled testimony, voluntary testimony by a senior presidential adviser represents an affirmative exercise of presidential autonomy. It reflects a decision by the President and his immediate advisers that the benefit of providing such testimony as an accommodation to a committee’s interests outweighs the potential for harassment and harm to Executive Branch confidentiality. Such testimony, moreover, may be provided on terms negotiated to

B.

This longstanding Executive Branch position is consistent with relevant Supreme Court case law. The Court has not yet considered whether Congress may secure the testimony of an immediate presidential adviser through compulsory process. But in an analogous context, the Court did conclude that legislative aides are entitled to immunity under the Speech or Debate Clause that is co-extensive with the immunity afforded Members of Congress themselves. See *Gravel v. United States*, 408 U.S. 606 (1972). “It is literally impossible,” the Court explained, “for Members of Congress to perform their legislative tasks without the help of aides and assistants.” *Id.* at 616. Legislative aides must therefore “be treated as . . . alter egos” of the Members they serve. As a result, they must be granted the same immunity as those Members in order to preserve “the central role of the Speech or Debate Clause,” which is “to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary.” *Id.* at 617.

The Court’s reasoning in *Gravel* supports the position that the President’s immediate advisers must share his absolute immunity from congressional compulsion to testify. As noted above, the President’s immediate advisers are his “alter egos,” allowing him to fulfill the myriad responsibilities of his office in a way it would be “literally impossible” for him to do alone. A congressional power to compel their testimony would (as we have discussed) undermine the President’s independence, create the appearance that the President is subordinate to Congress, and impair the President’s ability to receive sound and candid advice, thereby hindering his ability to carry out the functions entrusted to him by the Constitution. Subjecting immediate presidential advisers to congressional testimonial process would thus “diminish[] and frustrate[]” the purpose of the President’s own absolute immunity from such process—just as in *Gravel*, denying “Speech or Debate” immunity to legislative aides would have “diminished and frustrated” the protections granted to Members of Congress under that clause. *Gravel*, 408 U.S. at 617.

To be sure, in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court rejected a claim of absolute immunity made by senior presidential advisers. But it did so in the context of a civil suit against those advisers for money damages. In our view, *Harlow*’s holding that presidential advisers are generally entitled to only qualified immunity in suits for money damages should not be extended to the context of congressional subpoenas for the testimony of immediate presidential advisers, because the separation of powers concerns that underlie the need for absolute immunity from congressional testimonial compulsion are not present to the same

focus and limit the scope of the questioning. Because voluntary testimony represents an exercise of presidential autonomy rather than legally required compliance with congressional will, it does not implicate the separation of powers in the same manner, or to anything like the same extent, as compelled testimony.

degree in civil lawsuits brought by third parties. *But see Comm. on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 100–02 (D.D.C. 2008) (reading *Harlow* to preclude absolute immunity for senior presidential advisers from compulsion to testify before Congress).

As explained above, subjecting an immediate presidential adviser to Congress’s subpoena power would threaten the President’s autonomy and his ability to receive sound and candid advice. Both of these prospective harms would raise acute concerns related to the separation of powers. A suit for damages brought by a private party does not raise comparable separation of powers concerns. It is true that such a suit involves a judicially supervised inquiry into the actions of presidential advisers, and that the threat of financial liability from such a suit may chill the conduct of those advisers. *See Harlow*, 457 U.S. at 814; *Miers*, 558 F. Supp. 2d at 101–02. But, in civil damages actions, the Judiciary acts as a disinterested arbiter of a private dispute, not as a party in interest to the very lawsuit it adjudicates. Indeed, the court is charged with impartially administering procedural rules designed to protect witnesses from irrelevant, argumentative, harassing, cumulative, privileged, and other problematic questions. *Cf., e.g.*, Fed. R. Civ. P. 26(b); Fed. R. Evid. 103. And mechanisms exist to eliminate unmeritorious claims. *See, e.g.*, Fed. R. Civ. P. 12(b), (c), (e), (f); Fed. R. Civ. P. 56. In contrast, in the congressional context (as noted earlier), the subpoenaing committee is both the interested party and the presiding authority, asking questions that further its own interests, and setting the rules for the proceeding and judging whether a witness has failed to comply with those rules. In part for these reasons, a congressional proceeding threatens to subject presidential advisers to coercion and harassment, create a heightened impression of presidential subordination to Congress, and cause public disclosure of confidential presidential communications in a way that the careful development of evidence through the judicially monitored application of the Federal Rules of Civil Procedure does not.

Harlow also contains a discussion of *Gravel*, in which the Court rejected the defendants’ argument that, as “alter egos” of the President, they should be entitled to absolute immunity from civil claims for damages, derivative of the absolute immunity afforded the President. But we do not think *Harlow*’s discussion undermines the relevance of *Gravel* to the issue of immunity from congressional compulsion to testify. In *Harlow*, the Court conceded that the defendants’ claim of absolute immunity based on *Gravel* was “not without force,” but concluded that the argument would “sweep[] too far,” because it would imply that Cabinet officials too should enjoy derivative absolute immunity, and the Court had already decided (in *Butz v. Economou*, 438 U.S. 478 (1978)) that Cabinet officials—“Presidential subordinates some of whose essential roles are acknowledged by the Constitution itself”—were entitled to only qualified immunity. *Harlow*, 457 U.S. at 810.

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Given the dissimilarities between civil suits for damages and compelled congressional testimony just discussed, it is doubtful that this discussion in *Harlow* (or the holding in *Butz*) bears much on the question of whether immediate presidential advisers have absolute immunity from congressional compulsion to testify. Further, even if it is appropriate to harmonize the immunity afforded Cabinet officials and presidential advisers in the context of suits for damages, the same is not true in the context of compelled congressional testimony. This is because the prospect of compelled congressional testimony by a President's immediate advisers would, as a general matter, be significantly more damaging to the separation of powers than the prospect of compelled testimony by a Cabinet official. As a Department head, a Cabinet officer is confirmed by the Senate, and her authority and functions are generally established by statute. It may be a significant part of her regular duties to testify before Congress about the implementation of laws that Congress has passed. *Cf.* Rehnquist Memorandum at 8–9. By contrast, an immediate presidential adviser is appointed solely by the President, without Senate confirmation, and his role is to advise and assist the President in the performance of the President's constitutionally assigned functions. The separation of powers concerns identified above—the threats to both the independence of the presidency and the President's ability to obtain candid and sound advice—are significantly more acute in the case of close personal advisers than high-ranking Executive Branch officials who do not function as the President's "alter egos." *Cf. Harlow*, 457 U.S. at 828 (Burger, C.J., dissenting) (faulting the Court majority for "fail[ing] to distinguish the role of a President or his 'elbow aides' from the role of Cabinet officers, who are department heads rather than 'alter egos,'" and stating that "[i]t would be in no sense inconsistent to hold that a President's personal aides have greater immunity than Cabinet officers"); *id.* at 810 n.14 (majority) (acknowledging Chief Justice Burger's argument and noting that "it is impossible to generalize about the role of 'offices' in an individual President's administration" because some individuals have served simultaneously in both presidential advisory and Cabinet positions).³

Similarly, in *United States v. Nixon*, the Supreme Court expressly distinguished the privilege issues arising in criminal cases from the privilege issues that would

³ The *Harlow* Court also observed that civil suits for money damages against presidential advisers "generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself." 457 U.S. at 811 n.17. This observation is consistent with *Nixon v. Fitzgerald*, a case decided the same day as *Harlow*, in which the Court held that the President "is entitled to absolute immunity from damages liability predicated on his official acts." 457 U.S. 731, 749 (1982). This logic too suggests that the President's immediate advisers should be absolutely immune from congressional compulsion to testify, because (as we have explained) compelling immediate presidential advisers to testify before Congress would risk serious harm to the separation of powers that is closely related to the harm that would be caused by compelling the President himself to appear, and because absolute immunity for the President's immediate advisers is necessary to render the President's own immunity fully meaningful.

arise in the context of compelled congressional testimony. In *Nixon*, the Court held that the President could assert only a qualified, rather than an absolute, privilege to resist a subpoena for tape recordings and documents issued in the course of a criminal proceeding brought against certain third parties. 418 U.S. 683; *see also Sealed Case*, 121 F.3d at 753–57 (presidential communications privilege may be overcome by need for information in a grand jury investigation). But the Court made clear that it was “not . . . concerned with the balance between the President’s . . . confidentiality interest and congressional demands for information.” *Nixon*, 418 U.S. at 712 n.19; *see also id.* (“We address only the conflict between the President’s assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials.”); *Sealed Case*, 121 F.3d at 753 (recognizing that the unique “constitutional considerations” in the “congressional-executive context” render limitations on executive privilege in the judicial context inapposite). Particularly in light of this explicit statement, we do not believe *Nixon* casts doubt on the President’s—and by extension his immediate advisers’—immunity from congressional compulsion to testify. As with liability for private suits for damages, requiring the President to comply with a third-party subpoena in a criminal case is very different from—and has very different separation of powers implications than—requiring him to comply with a congressional subpoena for testimony. This is so in at least two respects.

First, as the Court explained in *Cheney*, “the need for information in the criminal context is” particularly weighty “because ‘our historic[al] commitment to the rule of law . . . is nowhere more profoundly manifest than in our view that the twofold aim of [criminal justice] is that guilt not escape or innocence suffer.’” 542 U.S. at 384 (quoting *United States v. Nixon*, 418 U.S. at 708–09) (internal quotation marks omitted) (alterations in original). Outside the criminal context, “the need for information . . . does not share the [same] urgency or significance.” *Id.* Comparing the informational need of congressional committees with that of grand juries, for instance, the en banc Court of Appeals for the D.C. Circuit explained that “while factfinding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events. . . . In contrast, the responsibility of the grand jury turns entirely on its ability to determine whether there is probable cause to believe that certain named individuals did or did not commit specific crimes.” *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974) (en banc).

Second, the potentially harmful effect on the President’s ability to carry out his duties and on the separation of powers is more serious in the context of subpoenaed congressional testimony than in the context of compulsory judicial process in a criminal case. As in the civil context, the criminal justice system imposes “various constraints, albeit imperfect, to filter out insubstantial legal claims” and minimize the damage to the President’s ability to discharge his duties, such as

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prosecutorial discretion (with its attendant ethical constraints) and Federal Rule of Criminal Procedure 17. *Cheney*, 542 U.S. at 386. Congress is not subject to such constraints. And, of course, a criminal subpoena does not raise the prospect of the President (or one of his immediate advisers) being summoned at Congress's will to appear before it to respond to a hearing conducted entirely on the terms and in the manner Congress chooses.

Two lower-court cases also bear mention. In *Senate Select Committee*, the Court of Appeals for the D.C. Circuit addressed a President's obligation to comply with a congressional subpoena, and concluded that the President could not assert a generalized claim of executive privilege to absolutely immunize himself from turning over certain tape recordings of presidential conversations. 498 F.2d 725. Again, we do not believe this holding undermines our conclusion that the President and his immediate advisers are absolutely immune from congressional compulsion to testify. In our view, Congress summoning a President to appear before it would suggest, far more than Congress compelling a President to turn over evidence, an Executive subordinate to the Legislature. In addition, when Congress issues a subpoena for documents, the Executive Branch may take time to review the request and object to any demands that encroach on privileged areas. Any documents that are produced may be redacted where necessary. By contrast (and as already discussed), a witness testifying before Congress may, in the heat of the moment and under pressure, inadvertently reveal information that should remain confidential.

Finally, in *Committee on Judiciary v. Miers*, the District Court for the District of Columbia considered a question very similar to the one raised here, and concluded that a former Counsel to the President was not entitled to absolute immunity from congressional compulsion to testify. 558 F. Supp. 2d at 99. The court's analysis relied heavily on *Harlow*, *Harlow's* discussion of *Gravel*, and *Nixon*. See 558 F. Supp. 2d at 99–105. For the reasons set forth above, we believe those cases do not undermine the Executive Branch's longstanding position that the President's immediate advisers are immune from congressional compulsion to testify. We therefore respectfully disagree with the *Miers* court's analysis and conclusion, and adhere to the Executive Branch's longstanding view that the President's immediate advisers have absolute immunity from congressional compulsion to testify.

C.

Applying this longstanding view, we believe that Mr. Simas has such immunity. We understand that Mr. Simas spends the majority of his time advising or preparing advice for the President. He is a member of a group of the President's closest advisers who regularly meet with the President, as often as several times a week. In addition, Mr. Simas frequently meets with the President alone and with other advisers, at the President's or Mr. Simas's request. See Rehnquist Memorandum

dum at 7 (President’s “immediate advisers” are “those who customarily meet with the President on a regular or frequent basis”). Mr. Simas is responsible for advising the President on such matters as what policy issues warrant his attention. He also advises the President on how his policies are being received, and on how to shape policy to align it with the needs and desires of the American public. Mr. Simas thus plays a crucial role in deciding how best to formulate and communicate the President’s agenda across a wide range of policy issues. In these respects, Mr. Simas’s duties are comparable to those of other immediate advisers who we have previously recognized are entitled to absolute immunity from congressional compulsion to testify. *See, e.g.*, Letter to Fred F. Fielding, Counsel to the President, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel (Aug. 1, 2007) (immunity of President Bush adviser Karl Rove); Bradbury Memorandum (immunity of Counsel to President Bush Harriet Miers). Consistent with these precedents, we likewise conclude that Mr. Simas has absolute immunity from compulsion to testify before Congress about his service to the President in the Office of Political Strategy and Outreach.

II.

For the reasons discussed above, we believe that Mr. Simas is entitled to immunity that is “absolute and may not be overcome by [the Committee’s] competing interests.” *Assertion of Executive Privilege*, 23 Op. O.L.C. at 4. But even if Mr. Simas were only entitled to qualified immunity, which could be overcome by a sufficient showing of compelling need, we would conclude that the Committee had not made the requisite showing.

A.

No court has yet considered the standard that would be used to determine whether a congressional committee’s interests overrode an immediate presidential adviser’s immunity from congressional compulsion to testify, assuming that immunity were qualified rather than absolute. But two decisions of the Court of Appeals for the D.C. Circuit suggest possible standards. In *Senate Select Committee*, in the context of a presidential assertion of executive privilege against a congressional subpoena for tape recordings of conversations between the President and his Counsel, the court held that the Committee could overcome the assertion only by showing that “the subpoenaed evidence is demonstrably critical to the responsible fulfillment of [its] functions.” 498 F.2d at 731; *see also McGrain v. Daugherty*, 273 U.S. 135, 176 (1927) (congressional oversight power may be used only to “obtain information in aid of the legislative function”). And in *Sealed Case*, the court held that “in order to overcome a claim of presidential privilege raised against a grand jury subpoena, it is necessary to specifically demonstrate why it is likely that the evidence contained in presidential communications is

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important to the ongoing grand jury investigation and why this evidence is not available from another source.” 121 F.3d at 757. (To be “important” to an investigation, “the evidence sought must be directly relevant to issues that are expected to be central to the trial.” *Id.* at 754.)

In our view, *Senate Select Committee* would provide the more appropriate standard for assessing whether a congressional committee’s assertion of need had overcome an immediate presidential adviser’s qualified testimonial immunity. As explained above, judicial proceedings—including criminal proceedings—differ in fundamental ways from congressional hearings. Because the *Senate Select Committee* standard was articulated in the congressional oversight context, and because it seeks to preserve the President’s prerogatives while recognizing Congress’s legitimate interest in information crucial to its legislative function, we believe it would be an appropriate standard for evaluating whether an immediate presidential adviser’s qualified testimonial immunity has been overcome.

In applying this standard, it would be important to bear in mind the “implicit constitutional mandate” that the coordinate branches of government “seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.” *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977). Through this accommodation process, which has been followed for decades, the political branches strive to avoid the “constitutional confrontation” that erupts when the President must make an assertion of privilege, or when an immediate presidential adviser’s testimonial immunity must be invoked. *See Cheney*, 542 U.S. at 389–90 (quoting *United States v. Nixon*, 418 U.S. at 692); *see also id.* (“[C]onstitutional confrontation between the two branches should be avoided whenever possible.”) (quotation marks omitted). Accordingly, before an immediate presidential adviser’s compelled testimony could be deemed demonstrably critical to the responsible fulfillment of a congressional committee’s legislative function, a congressional committee would, at a minimum, need to demonstrate why information available to it from other sources was inadequate to meet its legitimate needs. *See Senate Select Committee*, 498 F.2d at 732–33 (noting that, in light of the President’s public release of partially redacted transcripts of the subpoenaed tapes, the court had asked the Select Committee to state “in what specific respects the [publicly available] transcripts . . . are deficient in meeting [its] need,” and then finding that the Committee “points to no specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in the tapes”).

B.

The Committee has not shown that Mr. Simas’s testimony is demonstrably critical to the responsible fulfillment of its legislative function. The Committee’s investigation began with a broad request for “all documents and communications, including e-mails, related or referring to the Office of Political Strategy and

Outreach or the reopening of the Office of Political Affairs,” along with a request that White House officials brief Committee staff. Letter for Denis McDonough, White House Chief of Staff, from the Hon. Darrell E. Issa, Chairman, Committee on Oversight and Government Reform, House of Representatives at 4 (Mar. 18, 2014). Over the course of letters exchanged during the next three months, the White House explained that the Office engages only in activities that are permissible under the Hatch Act, and that the White House has taken steps to ensure that OPSO staff are trained in Hatch Act compliance. In response to those letters, the Committee reiterated its broad request for documents, but did not articulate particular unanswered questions or identify incidents in which OPSO staff may have violated the Hatch Act or related statutes. *See* Letter for the Hon. Darrell E. Issa, Chairman, Committee on Oversight and Government Reform, House of Representatives, from Kathryn H. Ruemmler, Counsel to the President (Mar. 26, 2014); Letter for Denis McDonough, White House Chief of Staff, from the Hon. Darrell E. Issa, Chairman, Committee on Oversight and Government Reform, House of Representatives at 1 & n.5 (May 27, 2014); Letter for the Hon. Darrell E. Issa, Chairman, Committee on Oversight and Government Reform, House of Representatives, from W. Neil Eggleston, Counsel to the President at 1–2 (June 13, 2014).

On July 3, 2014, the Committee requested Mr. Simas’s testimony at a public hearing to understand “whether the White House is taking adequate steps to ensure that political activity by Administration officials complies with relevant statutes, including the Hatch Act,” and to understand “the role and function of the White House Office of Political Strategy and Outreach.” Invitation Letter. The Committee did not, however, identify any specific unanswered questions that Mr. Simas’s testimony was necessary to answer. The White House responded with a letter providing additional information about White House efforts to ensure that OPSO was operating in a manner consistent with applicable statutes, and explaining that the activities cited by the Committee did not violate those statutes. *See* Letter for the Hon. Darrell E. Issa, Chairman, Committee on Oversight and Government Reform, House of Representatives, from W. Neil Eggleston, Counsel to the President (July 10, 2014). At that time, the White House also provided various documents reflecting its efforts to ensure that OPSO staff comply with relevant laws, including materials on the Hatch Act used in a mandatory training for all staff assigned to OPSO, e-mail correspondence demonstrating that OPSO staff were directed to read critical reports issued by the Office of Special Counsel and the Committee regarding the activities of the previous Administration’s Office of Political Affairs, documentation of a meeting between lawyers from the White House Counsel’s Office and the Office of Special Counsel concerning compliance with the Hatch Act, and a memorandum sent to all White House staff from the President’s Counsel reminding them of the law governing political activity by federal employees. *See id.* at 3. Finally, the White House Counsel’s Office offered

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to brief the Committee to address any outstanding questions regarding OPSO's activities. *See id.*

After receiving these responses, the Committee, on Friday, July 11, 2014, subpoenaed Mr. Simas to testify at a public hearing on Wednesday, July 16. At the same time, the Committee indicated that it would accept the White House Counsel's Office's offer to brief the Committee, and would determine after the briefing whether to withdraw the subpoena for Mr. Simas's testimony. *See* Letter for W. Neil Eggleston, Counsel to the President, from the Hon. Darrell E. Issa, Chairman, Committee on Oversight and Government Reform, House of Representatives (July 11, 2014). The White House provided that briefing on Tuesday, July 15, the day before the hearing was to occur. Following the briefing, the Committee indicated that Mr. Simas's testimony remained necessary. It explained that, during the briefing, White House staff "declined to discuss compliance with the Committee's document requests or even describe the process and identify relevant officials involved in the decision to reopen the White House political office." Letter for W. Neil Eggleston, Counsel to the President, from the Hon. Darrell E. Issa, Chairman, Committee on Oversight and Government Reform, House of Representatives at 1 (July 15, 2014).

The Committee has not adequately explained why, despite the information it has already received concerning OPSO's activities and the White House's efforts to ensure compliance with relevant statutes, it requires Mr. Simas's public testimony in order to satisfy the legitimate aims of its oversight investigation. Although the Committee has now indicated that it needs additional information on two specific topics, it has not explained why it must obtain that information from Mr. Simas at a Committee hearing. And to the extent that the Committee has other "outstanding questions for Mr. Simas," *id.* at 2, the Committee has not identified them, let alone explained why he must answer them at a public hearing. At this point, it is not evident that further efforts at accommodation would be futile, and hence that compelling an immediate presidential adviser to testify before Congress is a justifiable next step. Because the Committee has not explained why (and it is not otherwise clear that) Mr. Simas's live testimony is "demonstrably critical" to the responsible fulfillment of the Committee's functions, we conclude that the Committee has not met the standard that would apply for overcoming Mr. Simas's immunity from congressional compulsion to testify, assuming that immunity were qualified rather than absolute.⁴

⁴ Even if it were appropriate to apply the *Sealed Case* standard for overcoming qualified executive privilege in the context of congressional testimonial immunity, Mr. Simas's testimonial immunity would not have been overcome here. For the reasons set forth in the text, we do not believe that the Committee could show that the testimony it demands from Mr. Simas is directly relevant to issues that are central to the Committee's investigation *and* that the information that would be obtained through that testimony is not available from another source.

III.

For the foregoing reasons, we conclude that Mr. Simas is immune from the House Committee on Oversight and Government Reform's subpoena to compel him to testify about matters concerning his service to the President in the Office of Political Strategy and Outreach.

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Office of Legal Counsel



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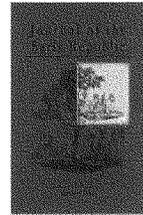
**Private Letters and Public Diplomacy: The Adams Network and
the Quasi-War, 1797-1798**

Nathan Perl-Rosenthal

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Private Letters and Public Diplomacy

The Adams Network and the Quasi-War, 1797–1798

NATHAN PERL-ROSENTHAL

In January, 1797, war between France and the United States seemed imminent. Angered by perceived diplomatic slights, the government in Paris had issued a number of sharply worded statements complaining of American perfidy; meanwhile, U.S. newspapers were reporting more and more French attacks on American shipping in the West Indies. A concerned John Adams, about to assume the presidency, set out to determine the French government's true intentions. Yet even though he was vice president and the de facto president-elect, Adams did not seek the counsel of Secretary of State Timothy Pickering, the nation's chief diplomat, or of any other member of the official cabinet. Instead, Adams wrote a series of letters to personal friends and family members. He asked them to supply him with information about the likelihood of war, give their opinion about the motives of the French government, and speculate on the hidden springs of its actions. Only months later, in April, after he had collected the news from his friends and relatives and gotten their opinion of events, did he finally seek the advice of the cabinet.

Adams's behavior in early 1797 raises an important question: Why did he and other early national politicians so often turn to private correspondence for political information and advice? What exactly did private networks offer that the official channels did not? Though historians have long relied on private letters as a source for the political history of the

Nathan Perl-Rosenthal is a PhD candidate at Columbia University. He would like to thank Eric Foner, Eran Shalev, Herbert Sloan, Andrew Shankman, Jessica M. Marglin, and the anonymous reviewers for the *Journal of the Early Republic* for their comments on drafts of this paper during various stages of its development.

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early republic, no study has looked systematically at these questions. This is all the more surprising given the focus on private life and personal self-fashioning in much of the recent scholarship on early national politics. John Adams's conduct of the Quasi-War with France in 1797 and 1798 offers a useful case study for deciphering the distinctive contribution that private epistolary networks made to public politics in the early republic. Drawing primarily on the unpublished Adams Family Papers, this essay shows that Adams relied on two distinct and quite different networks to acquire and process the information he needed to resolve the diplomatic crisis with France: an official network, centered on his cabinet and built around formal political structures, and a private one of friends and family that rested on relationships of personal trust. The private network, moreover, had distinctive assumptions about how to collect and evaluate information and developed its own principles for interpreting it. These shared beliefs, together with the trust that bound its members together, led Adams to regard the information and advice that the private network provided him as considerably more accurate and reliable than what came via official channels.¹

My analysis of the Adams correspondence draws on methods for studying early modern knowledge networks developed by historians of science and the European republic of letters. Like politicians, early modern scientists had a hunger for reliable information and relied on private epistolary networks to get it. Historians of science have shown that these

1. Edith B. Gelles, *Abigail Adams: A Writing Life* (New York, 1998), esp. 130–65, examines the mechanics of private political correspondence in early America though it does not explicitly compare public and private networks. On the importance of intimate relationships in the politics of the early republic, see Catherine Allgor, *Parlor Politics: In Which the Ladies of Washington City Help Build A City and a Government* (Charlottesville, VA, 2000); Susan Branson, *These Fiery Frenchified Dames: Women and Political Culture in Early National Philadelphia* (Philadelphia, 2001); and Andrew Burstein and Nancy Isenberg, *Madison and Jefferson* (New York, 2010). For political self-fashioning in the early republic, see Joanne B. Freeman, *Affairs of Honor: National Politics in the New Republic* (New Haven, CT, 2001), esp. xvi–xix and 38–48. For women in the politics of the early republic, see the studies cited above and Edith B. Gelles, *Portia: The World of Abigail Adams* (Bloomington, IN, 1992); Jan Lewis, “The Republican Wife: Virtue and Seduction in the Early Republic,” *William and Mary Quarterly* 44 (Oct. 1987), 689–721; and Rosemarie Zagari, *Revolutionary Backlash: Women and Politics in the Early American Republic* (Philadelphia, 2007).

scholars developed tightly knit communities, which had high barriers to entry and were knit together by what sociologists call “strong ties,” such as long-term friendship or even family alliance. Newcomers might need anything from a letter of introduction to a precise socioprofessional status to gain entry. Within these closed circles, underpinned by trust, scholars developed shared standards for collecting, managing, and evaluating the reliability of information, which enabled them to have confidence in information transmitted over great distances. Shared standards, moreover, made it possible for individual savants to gather information via their own “weak ties” (e.g., with acquaintances, associates, social inferiors) and add it, appropriately filtered and evaluated, to the circle’s common fund of knowledge.²

From the point of view of political history, perhaps the most important insight of this scholarship is that knowledge networks were deeply collaborative. Though they usually had nodes—that is, individuals or groups who had more connections than others or presided over parts of the network—each network’s distinctive standards and norms were a product of collective judgment and consideration. The nodal members did not impose their ideas on everyone else. Peripheral individuals, together, played an important part in shaping the network’s collective assumptions. Thus, we can and indeed must look at statements by all the

2. David Lux and Harold C. Cook, “Closed Circles or Open Networks? Communicating at a Distance during the Scientific Revolution,” *History of Science* 36 (June 1998), 180–211, is an elegant discussion of the at-once closed and open nature of scientific networks. See also Harold C. Cook, *Matters of Exchange: Commerce, Medicine, and Science in the Dutch Golden Age* (New Haven, CT, 2007), esp. 200–207. On shared standards of judgment, see especially Steven Shapin, *A Social History of Truth: Civility and Science in Seventeenth-Century England* (Chicago, 1994), 193–242, esp. 202–211; Pierre-Yves Beaurepaire, Jens Häselser, and Anthony McKenna, eds., *Réseaux de correspondance à l’âge classique (XVIe–XVIIIe siècle)* (Saint-Etienne, France, 2006), 147–59, esp. 158–59; and Anne Goldgar, *Impolite Learning: Conduct and Community in the Republic of Letters, 1680–1750* (New Haven, CT, 1995), 3–6 and 167–73. Many of these scholars draw on sociological studies of networks. Overviews of this scholarship can be found in Stanley Wasserman and Katherine Faust, *Social Network Analysis: Methods and Applications* (Cambridge, UK, 1994); Vincent Buskens, “The Social Structure of Trust,” *Social Networks* 20 (July 1998) 265–89; and Charles Kadushin, *Making Connections: Introduction to Social Network Theory* (Oxford, UK, forthcoming). I am grateful to Professor Kadushin for sharing portions of his book manuscript with me.

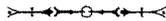
members of the network, not just the main players, in order to understand what assumptions and principles were animating its participants. Similarly, the production of information depended as much on weak ties operating at the periphery as it did on the strong ties that bound together the main participants in the network. The process of information collection and transmission thus also foregrounds the contributions of little-studied peripheral individuals.³

This article describes the official and private networks on which Adams relied, discusses the social ties that created them, and analyzes the confidence that Adams had in each one. Case studies of two key moments in 1797 and 1798 show how the private network played an important role in shaping Adams's response to diplomatic crisis. Adams's decision to send a peace mission to France in 1797 and his selection of emissaries illustrate aspects of the private network's mechanics and its role in public politics. The discussions leading to a new mission to France show how the private network developed distinctive principles, which helped guide Adams's decision-making. This case, along with an earlier episode, also illustrates how the mechanisms of information collection and transmission provided Adams with earlier and more accurate news than was available to other political actors. The process of choosing the emissaries, on the other hand, highlights the crucial role that strong

3. For a discussion of the collaborative ideal, see works cited above and L. W. B. Brockliss, *Calvet's Web: Enlightenment and the Republic of Letters in Eighteenth-Century France* (Oxford, UK, 2002), 104–12. For examples of collaboration in practice, see the above; Rob Iliffe, "Material Doubts: Hooke, Artisan Culture and the Exchange of Information in 1670s London," *British Journal for the History of Science* 28 (Sept. 1995), 285–318; and Shapin, *Social History*, esp. 253–66. For an interesting counterperspective, which questions the collaborative ideal of the republic of letters, see Noel Malcolm, "Private and Public Knowledge: Kircher, Esotericism, and the Republic of Letters," in *Athanasius Kircher: The Last Man Who Knew Everything*, ed. Paula Findlen (New York, 2004), 297–308. For a sociological perspective on the collective shaping of opinion in networks, see Ronald S. Burt, "Bandwidth and Echo: Trust, Information, and Gossip in Social Networks," in *Networks and Markets*, ed. J. E. Rauch and Alessandra Casella (New York, 2001), 30–74. In its emphasis on collaboration, this essay differs from Richard D. Brown's approach, which emphasizes the role of information as an instrument of social power; see Brown, *Knowledge Is Power: The Diffusion of Information in Early America, 1700–1865* (New York, 1989), 3, 26–34 and 129–31.

ties of personal trust, created and sustained through the private network, played in Adams's diplomatic practice. Both cases reveal that the private network did not work alone: It interacted with and complemented the official network centered on the cabinet.

Recovering the role of Adams's private network has implications for the reputation of the Adams presidency, the history of politics in eighteenth-century America more broadly, and the history of knowledge networks in the early modern Atlantic world. In the narrowest sense, it presents a revised account of John Adams's diplomatic decision-making. Seen through the lens of his private network, Adams's decisions in 1797 appear more consistent and less subservient to the wishes of the cabinet than has usually been thought. This study also offers a possible model for thinking about high politics in eighteenth-century America. Most early U.S. politicians had similar private epistolary networks and, like Adams, depended on them (in conjunction with official networks) to make decisions. The political history of the early republic, even at the highest levels, depended on those less-studied family members, friends, and clients. A network approach to politics emphasizes their role as both contributors of information and co-creators of the intellectual frameworks that statesmen used to interpret it. Finally, by extending some of the key insights of recent scholarship on the history of science and the republic of letters in early modern Europe to the political history of the United States, it intervenes in those literatures as well. It opens up new questions, in particular, about the distinctiveness of scholarly/scientific as opposed to political networks in the early modern period.



The Adams diplomatic correspondence network was a complex structure that integrated official and unofficial communications from correspondents with varying degrees of trustworthiness. In theory, the heart of the system was the official diplomatic network run by the Secretary of State, Timothy Pickering. Pickering himself had some strong ties with Adams. He was originally from Salem, Massachusetts, and like Adams a graduate of Harvard College. By the early 1770s, he had become an important figure in local patriot politics, and he and his brother, John, were well known to Adams. He served in the Continental Army throughout the entire war, rising by 1780 to be Quartermaster General. Yet even though he was well known to Adams and his friends, he was never a

favorite. In 1781, Adams and his close friend, Francis Dana, exchanged some words about Pickering. Dana suggest that he had “much Integrity, Industry and good Sense,” but in his reply Adams expressed considerable skepticism.⁴

Adams’s mixed feelings about Pickering remained unchanged, or perhaps affirmed, at the beginning of his presidency. Though he did not criticize Pickering outright, Adams made clear that the secretary did not have his confidence. In a letter to his son John Quincy, a diplomat in Europe, he told him to continue his “practice of writing freely to me and cautiously to the office of state.” Adams also made clear that he had serious doubts about the trustworthiness of the official diplomatic corps, which Pickering ran, and the quality of the information it provided. Adams felt that most U.S. diplomatic agents were lacking in the “industry, vigilance and zeal” necessary for truly successful diplomacy. Some, he noted, lacked even the basic necessities of “judgment and discernment.” The information they provided would be equally suspect.⁵

Adams had only weak ties with the other three members of his cabinet, and he had even less reason to have confidence in them than he did in Pickering. These three men, Secretary of the Treasury Oliver Wolcott, Secretary of War James McHenry, and Attorney General Charles Lee, were Adams’s main group of official advisors, charged by the Constitu-

4. Francis Dana to John Adams (hereafter JA), Feb. 12, 1781, *Papers of John Adams*, ed. Robert J. Taylor et al. (13 vols., Cambridge, MA, 1977–), 11: 144. On Pickering, see Gerard H. Clarfield, *Timothy Pickering and the American Republic* (Pittsburgh, PA, 1980) and Clarfield, “Timothy Pickering” in *American National Biography*, ed. John A. Garraty and Mark C. Carnes (24 vols., New York, 1999). On Adams’s friendship with Dana, see James Grant, *John Adams: Party of One* (New York, 2005), 232, and also below, note 30.

5. JA to John Quincy Adams (hereafter JQA), June 2, 1797, in *The Works of John Adams, Second President of the United States*, ed. Charles Francis Adams (1850–1856; repr. Freeport, NY, 1969), 8: 545. JA to Elbridge Gerry, Feb. 20, 1797, Adams Family Papers, Massachusetts Historical Society, Boston (“industry, vigilance”). See also Gerry’s response: Elbridge Gerry to JA, Mar. 7, 1797, Adams Family Papers. For more on the failings of the diplomatic network, see JQA to JA, Jan. 14, 1797, *Writings of John Quincy Adams*, ed. Worthington Chauncey Ford (7 vols., New York, 1913–1917), 2: 88–89. On Adams and Pickering, see Stephen G. Kurtz, *The Presidency of John Adams: The Collapse of Federalism, 1795–1800* (Philadelphia, 1957), 270–75; and Clarfield, *Pickering and the American Republic*, 180–81.

tion with giving him their “Opinion, in writing” on any matter in which he requested their advice. Yet the three men did not have deep connections with Adams; they had gotten to know him well only during the previous few years. Of the three, only McHenry had been old enough to enjoy a position of responsibility during the Revolution before Adams left the United States in 1778 for his long sojourn in Europe. Adams’s wry remark to Elbridge Gerry, in February, 1797, that the cabinet secretaries were “as much attached to me as I desire” reflects his tepid enthusiasm for them. His discovery a few weeks later that all three of them had worked with Alexander Hamilton to try to throw the presidential election to Thomas Pinckney cannot have helped build the trust between him and them.⁶

Alongside these official structures for information collection and evaluation, Adams had an informal network of informants and advisers spread across Europe and America. Knit together by bonds of trust, it operated as a sort of shadow state department. Abigail Adams was a key link in the web of relationships that formed this informal network. Her role as a political advisor to her husband on domestic issues is well known. She was also instrumental at times in managing the flow of diplomatic information and connecting John to his supporters in Massachusetts. In the summer of 1797, for instance, all the substantive letters that John Quincy received from his parents were written by his mother, not his father. June and July, 1797, saw her corresponding with some of her husband’s colleagues and diffusing sensitive information that they had received from their sons in Europe.⁷

6. JA to Gerry, Feb. 13, 1797, *Adams Works*, ed. Adams, 8: 523. For Adams’s lack of confidence in the cabinet, see John E. Ferling, *John Adams: A Life* (New York, 1996), 333–34. On Hamilton’s efforts to throw the election to Pinckney and Adams’s knowledge of it, see Ferling, *John Adams*, 330–31; Stanley N. Elkins and Eric McKittrick, *The Age of Federalism: The Early American Republic, 1788–1800* (New York, 1993), 523–28; and Adams, ed., *Adams Works*, 8: 524n1.

7. On Abigail’s role as an advisor as well as her assumption of some of John’s political duties, see Phyllis Lee Levin, *Abigail Adams: A Biography* (New York, 1987), 334–37; Page Smith, *John Adams* (2 vols., Garden City, NY, 1962), 937–39; and Woody Holton, *Abigail Adams: A Life* (New York, 2009). For her assumption of correspondence with John Quincy and others, see Abigail Adams (hereafter AA) to JQA of June 15, June 23, and July 14, 1797, Adams Family Papers; and AA to Francis Dana, June 29, 1797, Adams Family Papers; AA to Elizabeth Dana, June 5, 1797, Adams Family Papers; and AA to Elbridge Gerry,

The Adams sons, John Quincy and Thomas, served as the informal network's main conduit for European news. A diplomat in Europe since 1794, John Quincy was by 1797 the U.S. representative to Prussia. His brother Thomas served as his personal secretary, sharing in his private and official correspondence. In addition to the observations they made themselves, the sons employed their own network of informants in other European capitals. This reliance on friends and clients for unofficial diplomatic news was commonplace among European diplomats. John Quincy relied particularly heavily in this period on two friends: William Vans Murray, who became Minister at The Hague in March, 1797 and Joseph Pitcairn, the U.S. vice-consul in Paris. John Quincy had first gotten to know Murray in 1784 while in Europe as his father's secretary; they traveled together and became fast friends. How he met Joseph Pitcairn, a British subject naturalized as an American, is less clear. Most likely, Pitcairn had become friends with John Quincy during his stay in England in 1796. By late 1796, they were regularly exchanging several letters per month. "Your information is always interesting," John Quincy assured him in February, "and may become at present particularly important."⁸

Murray and Pitcairn, in turn, drew information from a wide range of local and regional informants, most of whose identities are unknown to us. Pitcairn's letters, in particular, are filled with oblique references to his sources. He rarely identified them by name, but always told his friend how reliable he thought them to be. A report he heard in February, that France would not provoke the United States any further, came "from

July 7, 1797, Adams Family Papers; and, for diffusing sensitive information, AA to Thomas B. Adams (hereafter TBA), June 20, 1797, Adams Family Papers.

8. JQA to Joseph Pitcairn, Feb. 10, 1797, *Adams Writings*, ed. Ford, 2: 118. On how JQA became acquainted with Murray, see JQA to JA, June 15, 1785, *Adams Family Correspondence*, ed. L.H. Butterfield, Marc Friedlaender, and Richard Alan Ryerson (9 vols., Boston, 1963-), 5: 344. For JQA's biography, see Paul C. Nagel, *John Quincy Adams: A Public Life, A Private Life* (New York, 1997). The first mention of JQA's acquaintance with Pitcairn is in April, 1796: "Call at Pitcairn's," Apr. 5, 1796, JQA diary 23, Adams Family Papers. The best study of European intelligence-gathering in this period, although focused on British India, is C. A. Bayly, *Empire and Information: Intelligence Gathering and Social Communication in India, 1780-1870* (Cambridge, UK, 1996), esp. 58-69. See also Lucien Bély and Isabelle Richefort, *Invention de la diplomatie: Moyen Age-temps modernes* (Paris, 1998).

considerable authority.” An April report that “American vessels were to be taken even coming to France” was contradicted by the word of “the bankers and people in general [who] say the worst is over.” “A few days,” he added hopefully, “will perhaps clear up these mysteries.” On receiving news the same month that the French Treasury had blocked payments to U.S. subjects, he went in person to find out “the truth” and “from M de Clerck fils the chief of the comptability received the assurance of its reality.” These details served to assure John Quincy of the accuracy and truthfulness of the information Pitcairn was passing him.⁹

John and Abigail Adams considered the duly filtered and weighted information that their sons sent from Europe to be particularly reliable and actionable. Shortly after his inauguration, John wrote that the brothers’ correspondence “contained more satisfactory information than all the other letters from Europe” (including, presumably, the official diplomatic letters). Abigail Adams added a few months later that the information in the brothers’ letters was “so accurate that great dependance is placed upon them.” It was, moreover, not just accurate but also earlier and often more sensitive than what came through official channels. In early 1797, for example, American diplomats in France learned that some of the privateers attacking American ships were crewed by Americans. Joseph Pitcairn informed John Quincy Adams of this in March of 1797 and warned him that he thought it had “done us . . . harm [in the French] councils, in giving a very disgraceful air to our national character.” John Quincy passed this sensitive information on to his father in the same month, but only mentioned it to Secretary of State Pickering in a letter written five months later.¹⁰

In addition to the private European information network, an informal network of political advisors in the United States helped the Adamses decide what to do with the information they received. This, too, was commonplace among contemporary European political leaders. For John

9. Pitcairn to JQA, Feb. 18, 1797, Adams Family Papers; Pitcairn to JQA, Apr. 23, 1797, Adams Family Papers; Pitcairn to JQA, Apr. 9, 1797, Adams Family Papers.

10. JA to TBA, Mar. 31, 1797, Adams Family Papers; AA to TBA, June 20, 1797, Adams Family Papers; Pitcairn to JQA, Mar. 3, 1797, Adams Family Papers. For JQA’s delay in passing sensitive information to Pickering, see JQA to JA, Mar. 18, 1797, *Adams Writings*, ed. Ford, 2: 142 and JQA to Pickering, Oct. 31, 1797, *Adams Writings*, ed. Ford, 2: 219.

Adams, the most important of these informal advisors was certainly Elbridge Gerry, his “dear friend” of many years’ standing. Like Pickering and Adams himself, Gerry was from Massachusetts and a graduate of Harvard. He had been a leader of the patriot movement there, became acquainted with Adams as early as 1772, and served with him in the Second Continental Congress. The trust between them ran very deep. “That man must have more skill in intrigue than any that I have been acquainted with,” Adams wrote melodramatically in 1797, “who can sap the foundation of the confidence I have in Mr. Gerry.”¹¹

Aside from Gerry, Adams relied most on private individuals with whom he was linked by family ties, long friendship, or both. Two of them, Josiah Quincy, Jr., and Thomas Welsh, were connected in both ways. Quincy was the scion of a prominent family from near Adams’s hometown of Braintree. The families shared a long history together, both in and out of politics. Before he married Abigail, John Adams had courted Quincy’s aunt. His father had been Adams’s co-counsel during the trial of the soldiers accused of perpetrating the Boston Massacre and had been a leading member of the Boston Committee of Correspondence. Quincy’s grandfather, yet another Josiah Quincy, served in the Continental Army and was a longtime correspondent of Adams’s. All of this provided ample reason to have confidence in the young man. Thomas Welsh, also a Massachusetts man and Harvard graduate, was a medical doctor who in 1777 married Abigail Adams’s first cousin. He and the Adamses quickly became close, and he maintained a correspondence with them—especially with Abigail—over the next two decades. By 1797, he was one of the most important figures in the Boston medical commu-

11. JA to Gerry, July 17, 1797, *Adams Works*, ed. Adams, 8: 549. For date of their acquaintance, see *Diary and Autobiography of John Adams*, ed. L. H. Butterfield et al. (4 vols., Cambridge, MA, 1961), 2: 74–75. European princes frequently relied on unofficial advisors, often “favorites” and royal spouses and mistresses. In the French context, see Sarah Maza, *Private Lives and Public Affairs: The Causes Célèbres of Prerevolutionary France* (Berkeley, CA, 1993), 172–74, 178–83. In the English context, George III’s reliance on his tutor, Lord Bute, early in his reign was a form of this behavior; see Jeremy Black, *George III: America’s Last King* (New Haven, CT, 2006), 14–21 and 51–54; and John Brewer, *Party Ideology and Popular Politics at the Accession of George III* (Cambridge, UK, 1976), 119–21.

nity. A third frequent correspondent in the first half of 1797 was the Adamses' son-in-law, William Smith. A New Yorker and former officer in the Continental Army, he had met the Adamses in London in 1785 and married their eldest daughter, Nabby, the following year. Smith turned out to be a poor husband in every sense of the word. But he corresponded regularly with his father-in-law and although Adams expressed doubts about him from time to time there was no breach between them until 1798.¹²

This web of personal relationships was crucial because the Adamses and their correspondents regarded information as trustworthy only when it came from a trustworthy person. They were skeptical of news and opinions that came from uncertain or anonymous sources. They gave little credence to rumors, for instance, unless substantiated by "information of a more positive authority." Newspapers, which anonymously published bits of information, extracts of letters and items from other newspapers, were a slightly more difficult case. The Adams network regarded reading the newspapers as absolutely "necessary to form an accurate opinion of current events." Yet they also maintained a healthy suspicion of them. Elbridge Gerry thought the newspapers were generally "superficial" in their treatment of political events. John Quincy, among others, did not consider that the information they conveyed

12. On Quincy, see Josiah Quincy, *Memoir of the Life of Josiah Quincy, Jun. of Massachusetts* (Boston, 1825), 33; William Vail Kellen, ed., "Journal of Josiah Quincy, Jr., during His Voyage and Residence in England," *Proceedings of the Massachusetts Historical Society* (1917), 443-71; Ferling, *John Adams*, 26-27. On Welsh, see "Thomas Welsh" in *Sibley's Harvard Graduates*, ed. John Langdon Sibley and Clifford Keyon Shipton (18 vols., Boston, 1873-1999), 18: 183-88. Welsh's correspondence with AA, 1785-1787, can be found in *Adams Family Correspondence*, vols. 6-8. By the late 1790s, Smith's reputation in the family was already somewhat sullied; see, e.g., AA to Mary Cranch, May 16, 1797, *New Letters of Abigail Adams, 1788-1801*, ed. Stewart Mitchell (Boston, 1947), 89-91. But it was only in 1798, after he embarrassed Adams by demanding an army post and then was revealed to have made more bad investments, that Adams bitterly disavowed him. For the family's early impressions of Smith, see David McCullough, *John Adams* (New York, 2001), 338. For the family's doubts about him, see McCullough, *Adams*, 454; and Page Smith, *John Adams* (2 vols., Garden City, NY, 1962), 837; for the breach, see McCullough, *Adams*, 520; and Smith, *Adams*, 991-92.

constituted a truly “authentic account” of political events. The Adams circle instead looked for other sources of information, particularly correspondence, to confirm the published reports.¹³

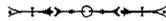
To be fully credible, however, information had to be disinterested as well as coming from a trusted source. Reliable news was only that which was “uncontaminated by intrigue, private views, a party spirit, or foreign influence,” as Elbridge Gerry put it. A vivid illustration of the process by which the network sought to construct this sort of information was the effort by Adams just after his election as president to determine whether France was likely to go to war with the United States. Adams first attempted to “read” the intentions of the French government by studying the progress of commerce raiding in the West Indies. He knew that privateers in the West Indies often acted on the basis of private directions from their government or its agents. Even if the French government was not revealing its intentions to the United States through official diplomatic channels, its intentions might be divined from the behavior of its citizens. This information, if one could collect it, would therefore be more accurate and less liable to “intrigue” than the government’s official statements. So on January 19, Adams sent letters to two trusted correspondents, Thomas Welsh and John Trumbull (the latter had studied law with him in 1773–1774) stating that France might “declare war against us or force a defensive war upon us,” and asking them to send him the latest news regarding French and Spanish treatment of U.S. “commerce in the West Indies.” Their replies indicated no upsurge in privateering activity.¹⁴

Adams’s second strategy for acquiring disinterested information was

13. Fred Delius to JQA, June 28, 1797, Adams Family Papers (“information”); JQA to JA, June 7, 1797, *Adams Writings*, ed. Ford, 2: 179 (“necessary”); Elbridge Gerry to JA, Jan. 30, 1797, Adams Family Papers; JQA to JA, Mar. 18, 1797, *Adams Writings*, ed. Ford, 2: 142. For other examples of dismissal of rumors, see JQA to JA, Feb. 3, 1797, *Adams Writings*, ed. Ford, 2: 103; and Joseph Pitcairn to JQA, Apr. 8, 1797, Adams Family Papers.

14. Elbridge Gerry to JA, Apr. 25, 1797, Adams Family Papers; JA to Welsh, Jan. 19, 1797, Adams Family Papers; and JA to John Trumbull, Jan. 19, 1797, Adams Family Papers. The French government often issued secret orders; see, e.g., Pickering to JA, May 1, 1797, Adams Family Papers. On Trumbull, see Ferling, *Adams*, 426; and Edward Watts, “John Trumbull” in *American National Biography*.

to tap the collective knowledge of the business community, this time with the help of Josiah Quincy, Jr. He knew that if businessmen thought war was imminent, the price of maritime insurance would rise and merchants would try to limit their exposure to the increased risks. So on January 23, Adams wrote to Quincy to ask what reaction, if any, had registered in Boston insurance and stock market to the news that France had refused to receive Charles Cotesworth Pinckney as the new U.S. representative. Quincy replied that he had spoken with “one or two principal underwriters of an office alledged to be in the opposition,” who had declared that one could not get insurance for voyages to the British West Indies. But Quincy thought this was the “language of men well disposed at least to encourage the idea of a French war, and not an opinion resulting from any investigation of danger or calculation of chances.” Their opinions could be discounted, in other words, because their political interests were so strong as to make them unable to reliably estimate the risk of war based on their commercial interests. After consulting with what he felt were more reliable sources, Quincy reported that there was in fact no indication of any appreciable rise in interest rates as a result of the “hostile relation[s]” between the two countries. He hammered this conclusion home by adding that he detected no “general sentiment pervading the mercantile interest . . . that a war between France and America is a thing probable.” This “sentiment,” because it was “general,” in principle avoided any taint of individual bias. The network thus worked together, even before John Adams had taken office as president, to produce useful information about France’s intentions toward the United States.¹⁵



The private network’s mettle was tested more fully as soon as Adams assumed office in March, 1797, when he found himself faced with a major diplomatic crisis: The French government’s rejection of Charles Cotesworth Pinckney. The crisis had been brewing since the previous administration. In July, 1796, Washington had recalled Republican James Monroe from his post as Minister to France and sent Pinckney, a

15. Josiah Quincy to JA, Feb. 2, 1797, Adams Family Papers; and JA to Josiah Quincy, Jan. 23, 1797, Adams Family Papers. Of course, Quincy’s winnowing of witnesses could itself introduce bias, but that is a danger of any effort at objectivity.

staunch Federalist, to replace him. But when Pinckney arrived in France, the Directory (France's plural executive) refused to receive him and, in December, expelled him from the country. This "dishonorable" treatment was a major breach of diplomatic protocol. More seriously, it could be seen as a violation of the law of nations (i.e., international law). According to the leading theorist of the period, Swiss jurist Emmerich de Vattel, the law of nations guaranteed every "sovereign state" the right to send embassies and have them received. In Vattel's view, a government that refused an ambassador without excellent reasons "commits a crime" worthy of "severe punishment"—up to and including war. So when the news of Pinckney's rejection reached the United States in mid-March, 1797, Adams had to decide whether to interpret the rejection as a violation of the law of nations, and thus a just cause of war, or as merely a negotiating tactic, to be met with forbearance and fresh negotiations.¹⁶

Adams's deliberations on this question show that he turned first to his private network and suggest that he gave greater weight to its advice, shaped by shared assumptions and principles, than to that of his cabinet. This modifies the dominant opinion in the literature, which holds that Adams's decision to reopen negotiations was shaped primarily by the

16. Pickering to JQA, Mar. 15, 1797, Adams Family Papers. Emmerich de Vattel, *The Law of Nations; or, Principles of the Law of Nature; Applied to the Conduct and Affairs of Nations and Sovereigns* (London, 1793), 412, 415, 422 and Book III, Ch. 3, passim. Official word from Pinckney of his refusal arrived on Mar. 23, 1797, for which see James McHenry to George Washington, Mar. 24, 1797, *Papers of George Washington: Retirement Series*, ed. W. W. Abbot (4 vols., Charlottesville, VA, 1997–1998), 1: 47. For an account of Pinckney's mission, see Alexander DeConde, *Entangling Alliance: Politics and Diplomacy under George Washington* (Durham, NC, 1958), 383–91, and his own correspondence in *American State Papers: Foreign Relations* (1832–1861; repr. Buffalo, NY, 1998), 2: 5ff. The French government's perspective on the diplomatic crisis, which does not figure in this article, has been well studied in the works by Bowman, Stinchcombe, and DeConde cited throughout and William Stinchcombe, "The Diplomacy of the WXYZ Affair," *William and Mary Quarterly* 34 (Oct. 1977), 590–617. For excellent overviews of Vattel's theories, as well as his relations with earlier thinkers, see Peter S. Onuf and Nicholas G. Onuf, *Federal Union, Modern World: The Law of Nations in an Age of Revolutions, 1776–1814* (Madison, WI, 1993), 11–19; Daniel Lang, *Foreign Policy in the Early Republic: The Law of Nations and the Balance of Power* (Baton Rouge, LA, 1985), 16–19; and Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford, UK, 1999), 158–65 and 193–94.

advice proffered by his cabinet at the secret urging of Alexander Hamilton. In fact, Adams began consulting with his private network in January, even before there was firm information about whether Pinckney had been rejected. During the first months of 1797, he and his circle decided that France's leaders were not following the law of nations, but instead pursuing a policy driven by pure national interest. The United States, they thought, could continue negotiations so long as it did not have to sacrifice either of its key interests, which they defined as national honor and independence. Information provided by the network helped confirm this analysis, so that by April 14, when Adams finally solicited the cabinet's opinion, he had most likely already decided to send a new mission to France. Yet he still took careful note of his secretaries' advice and reasoning and incorporated their arguments into the May 16 speech in which he presented his policy of new negotiations to Congress. In this first episode, then, Adams showed his confidence in his private network while also integrating the advice and information it gave him with the contributions of the official network.¹⁷

For the Adamses' circle, there could be no question of judging France's conduct on the basis of the law of nations. Even before the news of Pinckney's rejection reached the United States, members of the informal network did not think the French government felt itself bound by those rules. In a letter to John Quincy Adams in early 1797, Joseph Pitcairn asserted that "the musty volumes of Puffendorf and Vatel [sic] with all their antiquated adherence to rule" were no longer relevant. Another writer, in a letter to John Adams a month later, dismissed Vattel's maxims as a "compilation of discordant precedents from antient

17. For interpretations of events that see the secretaries' advice playing a dominant role in Adams's response, see William C. Stinchcombe, *The XYZ Affair* (Westport, CT, 1980), 19–22; Alexander DeConde, *The Quasi-War: The Politics and Diplomacy of the Undeclared War with France, 1797–1801* (New York, 1966), 18–20, 67, 80–89; Albert H. Bowman, *The Struggle for Neutrality: Franco-American Diplomacy during the Federalist Era* (Knoxville, TN, 1974), 279–84; Smith, *John Adams*, 922–34; Elkins and McKittrick, *Age of Federalism*, 544–46; and Gerard H. Clarfield, *Timothy Pickering and American Diplomacy, 1795–1800* (Columbia, MO, 1969), 107. On John Adams's queries to his cabinet, see JA notes, dated Mar. 19, 1797, Adams Family Papers; and JA to Heads of Department, Apr. 14, 1797, *Adams Works*, ed. Adams, 8: 540–41. There is no evidence in the Adams Papers of a reply from any of the cabinet secretaries to his queries of Mar. 19, suggesting they were not sent.

usages.” Writing to his father in January, 1797, John Quincy asserted that the lawless French government would not hesitate to use “*any means*” to achieve what it regarded as a “desirable end.” Pickering, in turn, observed repeatedly to the President that the French had “laid aside all the rules of fair procedure which have hitherto directed and still govern the other civilized nations of the world.”¹⁸

The cabinet secretaries Wolcott and Lee, whose opinion Adams sought in mid April, did not share the private network’s skepticism about the relevance of the law of nations. Wolcott asserted confidently that the obligations of international law were “demandable of the United States as well as of France.” Lee echoed Wolcott’s claim and spelled out in more detail the potential legal consequences of France’s violation of the law of nations:

If a nation to whom a Minister Plenipotentiary is sent by another nation, refuse him residence, it is a just cause of displeasure, but if he be refused an audience and the refusal circumstanced with rudeness and indignity, the offense is more serious. *The latter has been sometimes productive of war and in the opinion of some has been thought a sufficient cause of war*, it being considered by them a violation of one of the perfect rights of an independant nation.

Lee went on to say that he did not think France’s refusal of Pinckney was “of itself a just cause of war.” The clear implication of his analysis, nonetheless, was that he believed the law of nations to be applicable to France, and that the French government could be condemned for not following it. Oliver Wolcott, reaching the same conclusion, was more blunt. “The personal treatment which Mr. Pinckney received in Paris,” he wrote indignantly, “was . . . a violation of the Law of Nations.”¹⁹

18. Joseph Pitcairn to JQA, Jan. 22, 1797, Adams Family Papers; and Thomas Law to JA, Feb. 26, 1797 (“*compilation*”), Adams Family Papers. JQA to JA, Jan. 14, 1797, *Adams Writings*, ed. Ford, 2: 87. Pickering to JA, May 1, 1797 [Memo], 21, in Adams Family Papers. See also Pickering to JA, July 17, 1797, Adams Family Papers. In October, JQA told Pickering that France “has disclaimed most of the received and established ideas upon the laws of nations and considered herself as liberated from all the obligations towards other states.” See JQA to Pickering, Oct. 31, 1797, *Adams Writings*, ed. Ford, 2: 219

19. Wolcott to JA, Apr. 21, 1797, Adams Family Papers; and Charles Lee to JA [Memo], Apr. 30, 1797, Adams Family Papers. Secretary McHenry, for his part, argued that the law of nations was not relevant to judging France’s actions, but his argument was based on a misapprehension: “It is presumed,” he wrote,

In his private statements, John Adams suggested that he was inclined to side with his private advisors and dismiss the law of nations as a useful way to think about French diplomacy. In a letter sent to Henry Knox shortly before the news of Pinckney's rejection arrived in the United States, Adams complained that the French "have no other rule but to give reputation to their tools, and to destroy the reputation of all who will not be their tools." They think, he wrote, "that France ought to govern all nations," and they were willing to do whatever it took to achieve that end. Months later, Adams remarked darkly that the French government's maxim seemed to be, "There is no treaty [binding] on a nation that is dying of hunger." He attributed this maxim to his onetime friend the Abbé Gabriel Bonnot de Mably, another celebrated writer on diplomacy. Mably had argued, in a well-known foreign policy manual, that each nation's diplomacy was and ought to be guided by the pursuit of its own interest. A nation's needs, in this conception, easily overrode its treaties and commitments in international law. By mid 1798, Adams had grown so doubtful of the value of the law of nations that he dismissed outright the "visionary . . . projects of universal and perpetual peace, which some ingenious and benevolent writers have amused themselves in composing."²⁰

If the law of nations was not driving the French government's behavior, what was? Adams and his private network believed that the Directory was consulting France's "interest" in determining its diplomatic course, and that the U.S. government should do the same. This view was widely shared by members of the private network. William Smith observed to Adams that "nations, like many individuals, are actuated in

"that every nation is free to receive or reject a minister sent to it by another nation. The right to send by no means imposes [an] obligation to receive." On this incorrect view, the Directory's rejection of Pinckney was not a major offense at all. See McHenry to JA, Apr. 29, 1797, *Adams Family Papers*.

20. JA to Henry Knox, Mar. 30, 1797, *Adams Works*, ed. Adams, 8: 536; JA to Timothy Pickering, Oct. 14, 1797, *Adams Works*, ed. Adams, 554 (Adams quoted the maxim as "Il n'y a point de traité pour une nation qui meurt de faim"); JA, "To the Inhabitants of Dedham and Other Towns in the County of Norfolk, Massachusetts," July 14, 1798, *Adams Works*, ed. Adams, 9: 209. For Vattel as one of the writers on perpetual peace, see the discussion of Immanuel Kant, *Perpetual Peace: A Philosophical Essay* (1795), in Tuck, *Rights of War and Peace*, 209. On Mably, see J. K. Wright, *A Classical Republican in Eighteenth-Century France: The Political Thought of Mably* (Stanford, CA, 1997).

their friendships towards each other wholly by interest.” John Quincy frequently expressed similar opinions. In late 1796, he observed to Joseph Pitcairn, as though stating the obvious, that “interest” was “the only honest language upon a political concern.” A few months later, in February, 1797, he wrote to his father that he had “conversed with several intelligent men here, engaged in the public affairs” and that all had agreed that France was justified in capturing American vessels because it could help them achieve their main foreign policy goal, forcing Britain to sue for peace. John Quincy explained that, as far as they were concerned, “rigorous justice is not always practicable among nations, and that when policy prescribes a certain system, it cannot be expected that great regard will be paid to the rights and interests of a neutral nation.” France’s pursuit of its interests, in short, justified it in violating the “rights and interests” of *other* nations. Whether one liked it or not, interest—and interest alone—had become the only arbiter of right in international relations.²¹

Adams and his network identified two main interests that they believed should drive U.S. policy toward France in the wake of the rejection of Pinckney. The first was maintaining the peace. Virtually every political leader agreed that keeping the United States at peace was highly desirable. Indeed, it was one of the few points on which the High Federalist Timothy Pickering, who reminded Adams in mid-1797 of the “inestimable value of peace,” could agree with Thomas Jefferson, the leading Republican. A letter written by Abigail Adams to her sons on

21. William Smith to JA, Mar. 1, 1797, Adams Family Papers; JQA to Pitcairn, Nov. 13, 1796, *Adams Writings*, ed. Ford, 2: 41; JQA to JA, Feb. 16, 1797, *Adams Writings*, ed. Ford, 121–22. For other examples of JQA using the language of interest, see Ford, ed., *Adams Writings*, 2: 13, 18, 149, 184–86. The belief that “interest” was the driving force of international relations jibed with Mably’s theory of international relations. Mably argued that the goal of statecraft was to determine the “true” or “fundamental interests” of the state and to pursue them at all costs; see Abbé Gabriel Bonnot de Mably, *Principes des Négociations, pour servir d’introduction au droit public de l’Europe, fondé sur les traités*, vol. 5, *Oeuvres complètes de l’Abbé Mably* (London, 1789), 17. His works were well known to the network. In June of 1797, Rufus King asked John Quincy Adams to send him a copy of Mably’s treatise on foreign policy. A few months later, John Adams suggested to Timothy Pickering that “all Frenchmen” shared his “old friend” Mably’s views. See Rufus King to JQA, June 16, 1797, Adams Family Papers; and JA to Timothy Pickering, Oct. 14, 1797, *Adams Works*, ed. Adams, 8: 554.

June 20, 1797, from Philadelphia, suggests that John Adams concurred. “If peace depend upon our government,” she wrote, likely speaking for him as well, “it will be preserved, *there is but one wish, it is to avoid war* if it can be done without prostrating our nations honour, or sacrificing our independence.”²²

As the June letter suggests, however, the Adamses and their network did not regard peace as the sole U.S. interest. Just as important, in their view, was maintaining the nation’s “honour” and “independence.” The nation’s honor, as Adams conceived it, was similar to that of an individual: “reputation is of as much importance to nations, in proportion as to individuals,” he wrote in 1798, and “honor is a higher interest than reputation. . . . What is animal life, or national existence, without them?” Just as for an individual, a nation’s honor depended on the nation’s keeping its word—which, in the case of a state, consisted of its treaties. Referring in a March, 1797, letter to Henry Knox to the Directory’s hints that the United States ought to abrogate the Jay Treaty with Britain, he wrote that he would not accept “a violation of our faith” in order to achieve peace. In a letter to John Quincy soon after, Adams reiterated that he would “endeavor to reconcile, provided that no violation of faith, no stain upon honor, is exacted.” Keeping its treaties, then, was one of the nation’s fundamental interests. Only by doing so could it ensure that other nations would continue to see it as a worthy and reliable partner.²³

The Adams correspondents shared the widespread belief that internal divisions, fostered and encouraged by foreign powers, posed the greatest threat to the nation’s independence. This belief was grounded in early American statesmen’s shared classical republican heritage, which identified internal divisions as the greatest danger to a republic. Avoiding or at

22. Pickering to JA, May 1, 1797 [Memo], Adams Family Papers; and AA to TBA, Jun. 20, 1797, Adams Family Papers. Dumas Malone asserts that Jefferson’s “main concern was and continued to be the maintenance of peace.” See Dumas Malone, *Jefferson and the Ordeal of Liberty* (Charlottesville, VA, 2005), 369. Henry Knox also asserted that “every experiment which would afford the least hope” of peace ought to be tried; Henry Knox to JA, Mar. 19, 1797, *Adams Works*, ed. Adams, 8 :533.

23. To the Students of New Jersey College (n.d.), *Adams Works*, ed. Adams, 9: 206; JA to Knox, Mar. 30, 1797, *Adams Works*, ed. Adams, 8: 535; JA to JQA, Mar. 31, 1797, *Adams Works*, ed. Adams, 8: 537. On discourses of honor in the early republic, see Freeman, *Affairs of Honor*, passim.

least managing “divisions fatal to our peace,” as John Adams put it, was widely agreed to be an essential goal of U.S. policy. (Or, as Joseph Pitcairn had it, “Union at home is our egis abroad.”) Even on this point, though, the network’s analysis differed at the margins from that of the cabinet. For Secretary McHenry, an actual invasion by France was a distinct possibility that posed a crucial existential threat to U.S. independence. He suggested as much to Adams in April, arguing that Britain might sue for peace and leave the United States “alone to contend with the conquerors of Europe.” In a letter to George Washington two months later, he argued that France might force England to yield back Canada, putting a French army on the U.S. border. Adams and his private network, on the other hand, rejected the idea that U.S. independence was threatened by French arms. “Let her triumph upon the continent,” John Quincy wrote to Pitcairn in early 1797. “Between us and her, thank Heaven, there is a great gulf.” John Adams put it even more bluntly in a letter to McHenry the following year: “There is no more prospect of seeing a French army here,” he wrote, “than there is in Heaven.” For the network, preventing France from exploiting internal divisions in the United States was the key to protecting the nation’s independence.²⁴

Given the principles he and the network had outlined, the question Adams had to answer in March and April, 1797 was whether further negotiations with the French government would smudge the “honor” of the United States or compromise its “independence.” By the middle of April, before he consulted with his cabinet, two trusted correspondents had supplied Adams with enough information to judge that the network’s

24. JA Message to Congress, May 16, 1797, *Adams Works*, ed. Adams, 9: 114; Pitcairn to JQA, Feb. 1, 1797, Adams Family Papers; McHenry to JA [Memo], 29 Apr 1797, Adams Family Papers; McHenry to Washington, June 15, 1797, *Papers of George Washington: Retirement Series*, 1: 188; JQA to Pitcairn, Jan. 31, 1797, *Adams Writings*, ed. Ford, 2: 97; JA to McHenry, Oct. 22, 1798, *Adams Works*, ed. Adams, 8: 613. On faction, and especially John Adams’s obsession with its dangers, see Elkins and McKittrick, *Age of Federalism*, 531–37 and 533. Note that McHenry’s invasion fear was his own addition to the memorandum, most of which was actually written by Alexander Hamilton; see Bernard C. Steiner, *The Life and Correspondence of James McHenry* (New York, 1979), 216–22. For his worries about the prospect of invasion even before 1797, see Steiner, *Life and Correspondence*, 182.

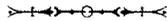
conditions had been met. Three recently arrived letters from John Quincy Adams reported that the “design” of the Directory, in refusing to receive Pinckney, was indeed to instigate a “rupture of our treaty with Great Britain.” But the French government, in his view, was not committed to that goal: it would be content as well to “influence the American election, or to embarrass the new administration.” Moreover, John Quincy reported, his informants indicated that the French government would not push the United States beyond its tolerance and into war. France’s hostile acts were “bluster,” he wrote; they had “no inclination to increase the number of their enemies.” John Adams singled out one of these “fine” letters for praise in a mid-April note to Abigail. Elbridge Gerry offered a concurring opinion in a series of letters to Adams in March and April. Gerry argued that the rejection of Pinckney was an attempt on the part of the French government to counteract an imagined Federalist plot to “fill all the foreign office with antigallicans.” He interpreted the Directory’s behavior as a basically reasonable response to the information they had: It just happened that the incorrect information they had received resulted in inappropriate and hostile-seeming behavior.²⁵

On May 16, Adams delivered a message to Congress in which he formally announced Pinckney’s rejection and proposed a new mission to France. It offers an elegant illustration of how public and private networks and advice fit into Adams’s political decision-making. Adams first borrowed a page from Lee and Wolcott by framing Pinckney’s rejection as a violation of international law: “The right of embassy is well known and established by the law and usage of nations. The refusal on the part of France to receive our minister, is . . . to treat us neither as allies, nor as friends, nor as a sovereign State.” But, he continued, “more alarming than the refusal of a minister” was the threat of an attack on U.S. inter-

25. JQA to JA, Jan. 14, 1797, *Adams Writings*, ed. Ford, 2: 82 (“design”); JQA to JA, Dec. 24, 1796, *Adams Writings*, ed. Ford, 64–65 (“influence”); JQA to JA, Jan. 14, 1797, *Adams Writings*, ed. Ford, 84 (“bluster”). JA to AA, Apr. 13, 1797, Adams Family Papers. Gerry to JA, Apr. 25, 1797, Adams Family Papers. See also Gerry to JA, Mar. 8, 1797, Adams Family Papers; and Wolcott to JA, Apr. 21, 1797, Adams Family Papers. When JQA reversed himself on the prospect of war with France in March, he explained that the Directory was inclined to do so “unless the Americans will submit to sacrifice their interest, their honor, and their independence.” JQA to JA, *Adams Writings*, ed. Ford, 2: 142.

ests, especially its “independence.” He then hammered home this interest-based analysis in looking at every facet of the situation. The diplomatic crisis had begun, Adams said, because the Directory thought the United States was acting against “the interests of France.” In crafting a response, he urged the representatives to carefully consider the “rights, duties, interests, and honor of the nation.” Yet so long as France respected its “national honor, character, and interest” and “neither the honor nor the interest of the United States” would be compromised, he concluded, further negotiation was desirable.²⁶

The decision to reopen negotiations reveals the complex intertwining of two separate networks of advisors and informants in Adams’s diplomatic practice. His first step in the crisis, as we have seen, was to consult with his private advisors. Interpreting France’s behavior through the lens of national interest, they came to the conclusion that the United States should continue to negotiate. Only once this analysis was in place, and he had privately received information that allowed him to interpret France’s intentions, did Adams consult his official advisors. This suggests, though it cannot be definitively proven, that Adams had already decided to give negotiations another try before he queried his cabinet. Yet in his public statement to Congress and the people in May, Adams was careful to incorporate the cabinet’s reasoning as well: Indeed, he began by invoking the law of nations before settling into an interest-based analysis. So even when Adams listened to his private network, it did not make him deaf to the advice of his formal advisors. The networks coexisted, providing Adams with two separate—and in this case, concurring—opinions.



Having decided to dispatch a new mission to France, Adams had to settle on whom to send. Choosing the new mission proved to be a knotty problem, or rather series of problems. Should he send a single representative or a group of emissaries? Should they be Francophiles or Francophobes, or some combination of the two? Should he or they be high-ranking government officials or not? Over the course of the spring, Adams made four different proposals for the mission before ultimately

26. JA, “Speech to Both Houses of Congress,” May 16, 1797, *Adams Works*, ed. Adams, 9: 112–14.

sending a politically mixed three-man commission, comprising Pinckney, John Marshall, and Gerry. Most scholarly analysis of these deliberations has interpreted Adams's actions primarily through the lens of party politics. The private network offers another optic, which allows us to see how personal relationships and trust played a crucial role in Adams's deliberations. Though bonds of trust did not trump partisan politics, choosing individuals whom he trusted enabled Adams to bend to political pressures without damaging the likelihood of a successful mission. Adams's deliberations also provide some additional insight into the structure of trust within the network. Rather than consisting primarily of one-on-one bonds, it shows, the network was an extended web of trust-based relationships that both reached outside the circle of Adams's immediate friends and deepened the bonds within it.

Adams first considered the possibility of sending Vice President Thomas Jefferson as a one-man mission. Jefferson was one of Adams's old friends and allies from the days of the Revolutionary War. And though they were already on divergent political paths by early 1797, Adams still considered him a trusted friend. The idea, moreover, was suggested to him by so many people that Adams remarked that "the thought is a natural one." But he soon decided that it would not do to send Jefferson, invoking familiar concerns about the nation's honor and reputation. "Upon more mature reflection," he wrote in a letter to Gerry explaining his decision, "it would be a degradation of our government in the eyes of our own people, as well as of all Europe" to send the Vice President on a "diplomatic errand." Doing so would show the United States to be a "pitiful country indeed." Jefferson himself also proved unwilling to accept the mission, possibly on the same grounds.²⁷

Once it became clear that sending Jefferson was out of the question, Adams returned to the idea of a three-person mission. He first floated the idea of sending Pinckney, Republican leader James Madison, and Elbridge Gerry. This mission, dominated by Francophiles, seems to have represented an effort on Adams's part to win over both Republicans and the French government. It also ran directly counter to his cabinet's

27. JA to Gerry, Apr. 6, 1797, *Adams Works*, ed. Adams, 8: 538–40. In March, after seeing Jefferson, John made his famous enigmatic remark to Abigail that "he is as he was." See JA to AA, Mar. 13, 1797, *Letters of John Adams, Addressed to His Wife*, ed. Charles Francis Adams (2 vols., Boston, 1841), 2: 250. On Jefferson's refusal to go to France, see Bowman, *Struggle*, 279–80.

advice. Both Attorney General Lee and Secretary of the Treasury Wolcott had expressed opposition in their April memoranda to adding Republicans to the mission. Wolcott even spent several pages trying to convince Adams not to stack the peace mission with individuals who had particular “credit and influence with France”—a category that certainly included Madison and Gerry. When the cabinet then expressed its entirely predictable opposition to this Francophile mission, Adams immediately withdrew the proposal and suggested instead two staunch Federalists, Francis Dana and John Marshall, to join Pinckney in Europe. The cabinet and leading Federalists were pleased with this new proposal; Republicans, predictably, were disgusted. But when Dana refused to serve, citing his poor health, Adams turned back to Gerry to replace him and sent his nomination to the Senate over the cabinet’s reiterated objections.²⁸

From the point of view of ideology, Adams’s four proposed missions were a model of inconsistency. He first proposed two Republican-dominated missions, then whipsawed back along the ideological spectrum, at the urging of his cabinet, to an all-Federalist mission. When a chance occurrence gave him the opportunity to create an ideologically mixed mission, he took it over his cabinet’s strenuous objections. Historians looking at Adams’s actions through the lens of partisanship and political ideology have inevitably accused him of vacillating, weak leadership. In this interpretation, Adams’s first two proposals were a sop to Republicans, who wanted to send a mission of Francophiles that would have the Directory’s ear. He then “yielded,” as historian William Stinchcombe put it, “to the cabinet . . . a step that gave the commission geographical but not political balance.” The third, all-Federalist mission reflected the strongly anti-French agenda of the cabinet and its secret advisor, Alexander Hamilton. Dana’s refusal of the nomination gave Adams the chance to stubbornly renominate his friend Gerry, whom he knew the cabinet opposed, and partially restore his original plan. The ideologically mixed final mission, Stinchcombe and others suggest, was thus a chance outcome that owed little to Adams’s weak leadership, which allowed partisans on both sides to dictate his actions.²⁹

28. For a narrative of the selection process, see Bowman, *Struggle*, 280–84. On the Cabinet’s reaction to Gerry, see Elkins and McKittrick, *Age of Federalism*, 555–56; Clarfield, *Timothy Pickering and the American Republic*, 184–85.

29. For this analysis, see especially Stinchcombe, *The XYZ Affair*, 22. See also James R. Sharp, *American Politics in the Early Republic: The New Nation in Crisis*

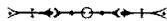
If we look at his decision in the terms of the private network, however, the picture is different: trust, as the unifying principle that ran through all of his deliberations, makes it possible to read them as both deliberate and coherent. Marshall, Dana, Gerry, and Madison stood at very different points on the political spectrum, but all of them were connected to Adams's private network, which made him ready to entrust them with the sensitive mission to France regardless of their partisan allegiances. This is obvious in the cases of Marshall, Dana, and Gerry, all of whom were old friends. Madison's inclusion is a bit more puzzling, since he was neither Adams's close friend nor, by the late 1790s, a political ally or fellow-traveler. Yet as we have seen in the case of John Quincy Adams's correspondents, trust in the network was not simply a matter of one-on-one personal acquaintance. Individuals in the network trusted not only their own friends, but also their friends' friends (though personal credit, like financial credit, was somewhat discounted at second hand). This fact helps explain why Adams proposed Madison in particular. Like everyone else in Philadelphia, Adams was aware that Madison was Jefferson's closest political ally and collaborator. With Jefferson himself unwilling to go, choosing Madison was a way for Adams to make a gesture toward the Republican party while keeping the appointment somewhat within the orbit of his private network.

The structure of trust within the network also played a more complex role in the nominations of Dana and Gerry than is evident at first glance. John himself had solid relationships with both Dana and Gerry. But he was also strongly connected to them through Abigail. She had known both men for as long as John and had corresponded independently with Gerry and with Dana's wife, Elizabeth, since the early 1780s. Moreover, Abigail was involved in her husband's deliberations about the mission. In addition to commenting extensively on the nominees (including in letters to her sister), she participated actively in recruiting them. Shortly after John wrote to Francis Dana to ask him to serve, Abigail wrote separately to Elizabeth, urging her to let her husband take the position. She wrote to Gerry immediately after he accepted the post, telling him that she had taken a "sincere . . . interest . . . in the result of your deliberations" and affirming the "great pleasure" his acceptance had caused her. Her strong connections to the two emissaries offered one

(New Haven, CT, 1993), 164–66; Ferling, *John Adams*, 345; and Elkins and McKittrick, *Age of Federalism*, 555–56.

more point of assurance to John that the two Massachusetts men, in spite of their different political affiliations, could both be trusted to carry out the mission to France.³⁰

John Adams's deliberations show that networks of personal trust alone did not determine whom he considered appointing as emissaries to France. Party politics, the advice of his cabinet, and his own stubbornness all contributed to Adams's repeated self-reversals in the spring of 1797. Yet in spite of their widely varying ideological positions, the emissaries he proposed were all to one degree or another linked to his circle of trusted advisors and informants. As such, Adams felt he could count on them to serve the nation honestly, regardless of their political affiliation. Private interpersonal connections and relationships of trust built through his private epistolary network, in other words, did not override partisanship; they gave Adams a way to bend to it without sacrificing the greater interests of the nation.



A somewhat altered picture of President John Adams's diplomacy emerges from this rereading of episodes in the Quasi-War through the lens of his private epistolary network. Scholars have argued that the cabinet's advice and influence were a dominant factor in Adams's decision to reopen negotiations with France and his selection of emissaries to send on the new mission. Yet as we have seen, Adams solicited advice and information about whether to reopen negotiations from the private network well before he consulted with his cabinet, and privileged the network's reasoning over the cabinet's. When it came time to pick the members of the new mission, moreover, Adams negotiated among the competing partisan agendas by drawing on individuals in whom his private network gave him reason to have confidence. At the same time as it shows that the influence of the cabinet and Hamilton has been signifi-

30. AA to Gerry, July 7, 1797, Adams Family Papers; and AA to Elizabeth Dana, Jun. 5, 1797, Adams Family Papers. See also the elegant analysis of AA's letter to Dana in Gelles, *Abigail Adams*, 140–41. AA's correspondence with Elizabeth Dana dated to 1781, at least, and her correspondence with Gerry began in 1780; see AA to Gerry, Mar. 13, 1780, *Adams Family Correspondence*, 3: 297–300 and Elizabeth Dana to AA, Mar. 6, 1781, *Adams Family Correspondence*, 4: 89. For her comments on the nominees, see AA to Mary Cranch, Jun. 3, 1797, in *New Letters*, ed. Mitchell, 94.

cantly overstated, it suggests that other figures—like Joseph Pitcairn, Josiah Quincy, Thomas Welsh, and their informants—played a neglected but very important role in shaping the principles and providing the information that Adams used in shaping his diplomatic course. These individuals may well repay further study in future work on the Adams network.

These specific revisions aside, the model of focusing on private networks and their political function may be profitably extended to the politics of the early republic more broadly. In his reliance on a private network for information and advice, Adams was the rule rather than the exception among early U.S. political leaders. George Washington and Thomas Jefferson, to name only two of the most obvious figures, created and relied upon similar unofficial networks. The famous Jefferson–Madison collaboration, for instance, was entirely unofficial for decades, until Jefferson appointed his friend Secretary of State in 1801. These similarities suggest that due attention to the role played by private networks may enable us to see diplomatic practice and political decision-making anew and to recover the contributions of some marginal and minor figures. At the same time, the uncannily similar way that public figures in eighteenth-century Europe relied on private networks suggests the need for more work on the European roots of early American diplomatic practice. Though the European basis of diplomatic theory in the early United States is well known, relatively little work has been done to connect the actual practice of diplomacy in the early American republic to its European antecedents. This would complement and extend recent scholarship that has demonstrated the similarities between early modern Europe and early American political practice in studies of electioneering, festive culture, and the workings of Congress.³¹

31. Discussions of the early republic in relation to early modern Europe appear in three influential recent books; see Freeman, *Affairs of Honor*, xxi–xxiv; David Waldstreicher, *In the Midst of Perpetual Fetes: The Making of American Nationalism, 1776–1820* (Chapel Hill, NC, 1997), 18–24; and Simon P. Newman, *Parades and Politics of the Street: Festive Culture in the Early American Republic* (Philadelphia, 1997), 2–9. See also Andrew W. Robertson, “Voting Rights and Voting Acts: Electioneering Ritual, 1790–1820” in *Beyond the Founders: New Approaches to the Political History of the Early American Republic*, ed. Jeffrey L. Pasley, Andrew W. Robertson, and David Waldstreicher (Chapel Hill, NC, 2004), 58–59. Felix Gilbert’s classic study, *To the Farewell Address: Ideas of Early American Foreign Policy* (Princeton, NJ, 1961), traced the intellectual bases of the early

Extending the methods developed in studies of early modern knowledge networks to high politics in North America may also open up new questions for historians of science and the republic of letters. Scholars in those fields have begun in recent years to examine the relationship between knowledge networks and the networks created by states and empires. By showing how politicians used strategies similar to those employed by scientists, this essay further erodes the conceptual boundary between the two kinds of networks. Indeed, it raises the question of whether scholarly networks were that distinctive at all. Perhaps information networks, rather than scholarly ones, are the real object of study. The essay also suggests, however, that the rules for producing knowledge in the political sphere did differ from the prevailing rules in scientific milieux. Politicians like Adams had to take seriously information and advice from public channels that they regarded as less reliable than their own networks—something few scientists were obliged to do. Paradoxically, Adams's private network also rested on a basis of much more deeply rooted trust relationships than those which held together many scientific and literary networks. A new history of knowledge networks, which aims to see the field whole, would have to account for these variations.³²

Finally, though it has not been its focus, this essay suggests the need for political historians to pay renewed attention to the shaping role of early modern epistolary practices in the politics of the new republic. Many of the features of the Adams network that made it so useful for

republic's foreign policy back to Europe, but he said very little about the practice of diplomacy. See also Onuf and Onuf, *Federal Union*. For examples of Washington's reliance on networks of friends, see John E. Ferling, *First of Men: A Life of George Washington* (Knoxville, TN, 1988), 377–79.

32. Of recent studies that connect national and imperial networks with scholarly ones, see in particular Jacob Soll, *The Information Master: Jean-Baptiste Colbert's Secret State Intelligence System* (Ann Arbor, MI, 2009); James Delbourgo and Nicholas Dew, eds., *Science and Empire in the Atlantic World* (New York, 2008). This is distinct from histories of the relationship between ideologies of power and knowledge, for which the locus classicus is Steven Shapin and Simon Schaffer, *Leviathan and the Air-Pump: Hobbes, Boyle and the Experimental Life* (Princeton, NJ, 1989). See also Margaret C. Jacob, *Living the Enlightenment: Freemasonry and Politics in Eighteenth Century Europe* (New York, 1991) and Pierre-Yves Beaurepaire, *L'Espace des francs-maçons. Une sociabilité européenne au XVIIIe siècle* (Rennes, France, 2003).

diplomatic work—including its collective standards of reliability, its basis in trust, its collection and filtering of information—were linked directly to characteristics, habits and customs of early modern letter-writing. One might even say that the Adams network was successful because of its underlying epistolary habits. This, in turn, suggests the need for further research into the epistolary practices of early American politicians and a closer study, drawing on the literature on early modern epistolarity, of how it shaped American political culture.³³

33. See Konstantin Dierks, *In My Power: Letter Writing and Communications in Early America* (Philadelphia, 2009); Kate Davies, *Catharine Macaulay and Mercy Otis Warren: The Revolutionary Atlantic and the Politics of Gender* (Oxford, UK, 2005); Dena Goodman, *Becoming a Woman in the Age of Letters* (Ithaca, NY, 2009); Roger Chartier et al., eds., *La correspondance: les usages de la lettre au XIXe siècle* (Paris, 1991); Eve Tavor Bannett, *Empire of Letters: Letter Manuals and Transatlantic Correspondence, 1688–1820* (Cambridge, UK, 2005). See also Gelles, *Abigail Adams*.



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The Kitchen Cabinet and Andrew Jackson's Advisory System

RICHARD B. LATNER

FEW subjects in Jacksonian politics have been more frequently mentioned and less carefully analyzed than Andrew Jackson's kitchen cabinet. The reason is not hard to find. Influence and power, difficult enough to measure in the present, are particularly resistant to historical investigation. Data concerning confidential relationships are spotty and the interviewing of participants is synonymous with necromancy. The shadowy nature of presidential advising thus promotes the growth of legends that obscure the reality of political influence.¹

By tradition, historians claim that the label "kitchen cabinet" was first applied derogatorily by Jackson's opposition, to describe an informal group of advisers who maintained great influence over the President, particularly on matters of party and patronage. Claude G. Bowers, in his popular study of Jackson's presidency, called "the small but loyal and sleepless group of the Kitchen Cabinet . . . the first of America's great practical politicians."² Leonard White's standard administrative account of the Jacksonian period reinforced this conventional view; according to him, Jackson's interest in politics and personality, rather than in administration, naturally prompted the appearance of "a group of personal advisers, primarily concerned with patronage and party manipulation."³ References to the kitchen cabinet generally imply that the members worked together closely, shared similar political objectives, especially the promotion of Martin Van Buren's political fortunes, and attained their greatest influence in the

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¹ On the kitchen cabinet, see Richard P. Longaker, "Was Jackson's Kitchen Cabinet a Cabinet?" *Mississippi Valley Historical Review*, XLIV (June 1957), 94-108.

² Claude G. Bowers, *The Party Battles of the Jackson Period* (Boston, 1922), 144.

³ Leonard D. White, *The Jacksonians: A Study in Administrative History, 1829-1861* (New York, 1954), 94-95. See also Marquis James, *The Life of Andrew Jackson* (Indianapolis, 1938), 498; John Spencer Bassett, *The Life of Andrew Jackson* (New York, 1931), 540.

first two years of Jackson's presidency, when the Eaton affair prevented Jackson from calling upon his regular cabinet officers for counsel.⁴

This portrait of a tightly knit group of aides specializing in political manipulation, wire-working, and patronage, however, has not gone unchallenged. Twenty years ago, Richard P. Longaker subjected the "legend" of the kitchen cabinet to close scrutiny and raised serious objections to traditional accounts. Longaker denied that the kitchen cabinet was "an institutional entity," and argued instead that the term simply described an "amorphous advisory pattern," a "procedure, the random choice of a variety of advisers rather than a specific, organized body of men." To Longaker, the large number of alleged members (some of whom were also cabinet officers), as well as a lack of evidence of regular meetings, distinguished the kitchen cabinet from an authentic institution, such as the regular cabinet. "[T]here was no hierarchy of advisers, just as there was no institutionalized entity—a Kitchen Cabinet—meeting regularly with a firmly established membership," he concluded. "The evidence suggests that decisions were made by the President in a haphazard manner with the assistance of those who had his ear at a particular time and who could, in turn, convince him of the wisdom of their position. . . . a Kitchen Cabinet as a stable and regularized institution, did not exist." Longaker hoped to demonstrate that Jackson maintained a firm control over policy making during his presidency, and he found the idea of a kitchen cabinet incompatible with presidential leadership.⁵

Longaker's distinction between an informal advisory pattern and a regularized, institutional structure such as the cabinet has been echoed by other historians and political scientists.⁶ But the concept of a kitchen cabinet as something more than a casual "procedure" or a legendary figment of the opposition's imagination persists. Lynn L. Marshall, for example, has recently suggested that Jackson's kitchen cabinet served as an early version of a national political committee, performing a variety of important non-cabinet functions, especially the construction of an efficient, extensive, and deeply rooted political party.⁷

⁴ Charles M. Wiltse, *John C. Calhoun* (3 vols., Indianapolis, 1944–1951), II, 25, 108; Bassett, *Life of Jackson*, 540; J. T. Adams and R. V. Coleman, eds., *Dictionary of American History* (5 vols., New York, 1940), III, 213; Richard B. Morris, ed., *Encyclopedia of American History* (New York, 1953), 163.

⁵ Longaker, "Jackson's Kitchen Cabinet," 97, 100, 101, 107–08.

⁶ Glyndon G. Van Deusen, *The Jacksonian Era: 1828–1848* (New York, 1959), 34; Robert V. Remini, *Andrew Jackson* (New York, 1966), 110; Louis W. Koenig, *The Invisible Presidency* (New York, 1950), 40.

⁷ Lynn L. Marshall, "The Strange Stillbirth of the Whig Party," *American Historical Review*, LXXII (Jan. 1967), 450–51.

Although White House advising during Jackson's presidency remains obscure, traditional historical methods can combine with selective conceptual borrowings from social sciences to help illuminate the advisory process. Since insight into presidential decision making is essential to a full understanding of presidential style and national politics, there is sufficient inducement to hazard an attempt.

The notion that Jackson would fall under the influence of a group of aides was widespread at the time of his election. Old Hickory was then sixty-two years old, in precarious health, and inexperienced in national politics. Indeed, John Quincy Adams and his supporters had made Jackson's lack of qualifications one of the major issues of their campaign, and Van Buren later recalled that many of Jackson's own supporters had latent misgivings "of his unfitness for the place." Such suspicions were doubtless responsible for the advice proffered by politicians like Van Buren that Jackson avoid controversial issues. "Our people do not like to see publications from candidates," he blandly explained.⁸ While Jackson was by no means a passive spectator during the contest, his campaign was managed largely by a network of local, state, and national committees. Overseeing this rudimentary organization were the Washington central committee of twenty-four, which distributed election material printed at the center of government, and, especially, the Nashville central committee, which consisted of Jackson's closest personal friends and advisers, including John Overton, William B. Lewis, and John Eaton.⁹

The assumption that the newly elected President was impressionable had immediate political consequences. For one thing, it intensified the rivalry between the followers of Van Buren and John C. Calhoun for access to Jackson. The importance of being close by when the President reeled under the pressures of office or when his inexperience threw him into the hands of more skilled politicians seemed obvious. Members of the two factions eyed each other jealously, estimated their relative

⁸ Robert V. Remini, *The Election of Andrew Jackson* (Philadelphia, 1963), 192; John William Ward, *Andrew Jackson: Symbol for an Age* (New York, 1955), 64–68; Bassett, *Life of Jackson*, 396–97, 703; Martin Van Buren, *The Autobiography of Martin Van Buren*, John C. Fitzpatrick, ed., *Annual Report of the American Historical Association for the Year 1918* (2 vols., Washington, 1920), II, 232, 244; Martin Van Buren to Andrew Jackson, Sept. 14, 1827, Martin Van Buren Papers (Manuscript Division, Library of Congress).

⁹ For a full discussion of the Jackson organization in 1828, see Remini, *Election of Jackson*, 51–120; James C. Curtis, *Andrew Jackson and the Search for Vindication* (Boston, 1976), 85–90.

strength, and, in the words of one Calhounite, vied for “the controlling influence in the Cabinet.”¹⁰

The President’s alleged vulnerability also helped to provoke the Eaton affair. When Jackson first arrived in Washington, he consulted primarily with his longtime Tennessee associates, Eaton, Lewis, and Senator Hugh Lawson White, but when he appointed Eaton as his secretary of war in order to “have near him a personal and confidential friend to whom he could embosom himself on all subjects,” the selection stirred considerable opposition.¹¹

Historians are familiar with the story of Washington society’s snub of Eaton’s wife, the outspoken and allegedly wayward daughter of a local tavern keeper. While acknowledging the incident’s social dimensions, they have correctly emphasized its political source, particularly the fear of Calhounites that Eaton was using his influence to further Van Buren’s presidential aspirations. Less well-known is the participation by anti-tariff radicals and opponents of Van Buren who had no formal ties with Calhoun.

Both Eaton and Van Buren were popularly associated with the recently enacted tariff of 1828, and in the South, where the tariff was regarded as an abomination, their activity in sponsoring, promoting, and voting for the bill was duly noted. Consequently, to anti-tariff radicals, Eaton’s special relationship with Jackson and his apparent partiality for Van Buren’s political interests were doubly disturbing. Eaton’s presumed influence implied that Jackson would do nothing to bring about immediate tariff reform, while his attachment to Van Buren augured ill for future relief. The Eaton affair, then, was inspired by many considerations, but much of its energy derived from the suspicion that Jackson was a political novice, overly reliant on the advice of others, especially his Tennessee cronies. Eaton’s enemies hoped to remove this influence by compelling him to resign.¹²

¹⁰ Duff Green to John Pope, Dec. 11, 1828, Duff Green Papers (Manuscript Division, Library of Congress); Jonathan Degraff to Azariah Flagg, Dec. 21, 1828, Azariah Flagg Papers (New York Public Library); Alfred Balch to Van Buren, Nov. 27, 1828, Van Buren Papers; *U.S. Telegraph*, Jan. 20, 1829; *Niles’ Weekly Register*, XXXV (Nov. 22, 1828), 194.

¹¹ Bassett, *Life of Jackson*, 410; James Parton, *Life of Andrew Jackson* (3 vols., New York, 1883), III, 176; Charles Sellers, *James K. Polk: Jacksonian, 1795–1843* (Princeton, 1957), 137–42; Amos Kendall to Francis Blair, March 7, 1829, Blair-Lee Papers (Princeton University Library); “Letters of William T. Barry,” *William and Mary College Quarterly*, XIII (April 1905), 239.

¹² For the association of John Eaton and Van Buren with the Tariff of Abominations, see Robert Y. Hayne to Levi Woodbury, July 10, 1828, Levi Woodbury Papers (Manuscript Division, Library of Congress); Richard K. Crallé, ed., *Works of John C. Calhoun* (6 vols., New York, 1854–1857), III, 50, 52–53; Green to John C. Calhoun, Aug. 1, 1830, Duff Green Papers (University of North Carolina); *U.S. Telegraph*, March 18, Aug. 23, 1831. See also Richard B. Latner, “The Eaton Affair Reconsidered,” *Tennessee Historical Quarterly*, XXXVI (Fall 1977), 330–51.

Until the winter of 1830–1831, the allegations of backstairs influence remained a distinctly minor theme in national politics. To be sure, opposition presses blamed the President’s proscription and appointment policies on his inexperience and the advice of “bad counsellors” who made him “instrumental in gratifying their petty malignity, instead of consulting his true glory.”¹³ But in February 1831 Calhoun’s publication of his correspondence with Jackson, concerning the Seminole invasion, first brought the issue before the public in full force. Calhoun directed his attack, not against Jackson, but against William Harris Crawford and Crawford’s followers, now led by Van Buren. In an obvious reference to Van Buren, Calhoun labeled the affair “a base political intrigue, got up by those who regard your [Jackson’s] reputation and the public interest much less than their own personal advancement.”¹⁴

Calhoun’s theme was immediately broadcast by Duff Green’s *U.S. Telegraph*, a paper that had served as the Jackson administration’s official organ until Green’s partiality for Calhoun led to its replacement in December 1830 by Francis Blair’s *Washington Globe*. Green referred to the alienation of Jackson from Calhoun as the product of a “conspiracy” inspired by Van Buren to serve his own political interests, and he accused the *Globe* of being “the organ of the plotters and contrivers of this affair, and not of the President.” Green’s editorials portrayed the projected downfall of Calhoun as a plot to advance Van Buren by undermining his major rival. At the same time, Green tried to distinguish the contrivers of the conspiracy from Jackson himself. He announced that he supported Calhoun, “not against Gen. Jackson, but against the conspirators,” and he endorsed Jackson’s reelection “as the surest means of defeating” Van Buren. He continued to hope that “the voice of truth” could be made to reach the President, and that Jackson would “soon see and understand the artifices which have been practised upon him. . . .”¹⁵

Although one historian has claimed that as early as March 1831, the term kitchen cabinet was applied to the “plotters” against Calhoun, the *Telegraph* never used that term.¹⁶ Instead it tagged the conspirators with such labels as “Amos Kendall & Co.,” and “Amos Kendall, Martin Van Buren, William B. Lewis, & Co.” In accusing pro-Jackson

¹³ *National Intelligencer*, May 13, March 26, 1829.

¹⁴ *Niles’ Weekly Register*, XL (March 5, 1831), 18.

¹⁵ *U.S. Telegraph*, Feb. 26, 28, March 18, 1831. See also *ibid.*, March 14, 17, 1831.

¹⁶ Marshall, “Strange Stillbirth of the Whig Party,” 450n. A check of the editorials cited by Lynn Marshall reveals that the idea of a kitchen cabinet but not the phrase itself appeared in Green’s newspaper.

newspapers of taking “their ORDERS” from Washington, for example, Green identified the culprits as “Mr. Van Buren, Major Lewis, and Mr. Kendall,” calling them “secret agents” who directed the attack against Calhoun.¹⁷

Jackson’s cabinet reorganization of April 1831, involving the dismissal of three secretaries who had participated in the rebuff of the Eatons, further embellished the picture of a White House where advisers manipulated the President. Former Secretary of the Navy John Branch, an anti-tariff radical and opponent of Van Buren, was the first of the dismissed cabinet members to charge that his downfall was due to “malign influences” promoting Van Buren’s ambitions; he complained bitterly that Van Buren “had become latterly the almost sole confidant and adviser” of Jackson. “How he obtained this influence might be a subject of curious and entertaining inquiry,” he darkly suggested. Green quickly seized upon the phrase “malign influence” as a suitable one for Van Buren and his allies, and claimed that this “irresponsible ‘malign influence’” had brought disillusionment to many of Jackson’s supporters. “That that influence does exist is corroborated by the positive assertion of Gov. Branch, and the unerring testimony of admitted facts,” Green contended. “That influence yet surrounds the President. It is beneath, but it controls the cabinet. It has dismissed able and faithful public ministers; it has corrupted a portion of the public press. . . .”¹⁸

Even after the cabinet reorganization, Green tried to distinguish between Jackson and his evil counselors, hoping for a reconciliation between the President and Calhoun. “There are many reasons . . . which dispose us to separate the President, himself, as much as possible from the intrigues passing around him,” Green explained to his readers; one reason was the plan of “Van Buren, Kendall, & Co.” to organize “a great *northern* confederacy upon . . . the high tariff policy.” Van Buren, he claimed, had established the *Globe* “to drive the South, and particularly the friends of Mr. Calhoun, into a position where they could not, consistently with a due regard to their own honor . . . support the re-election of Gen. Jackson.” The editor complained of efforts to brand him as disloyal to Jackson and denied that he was engaged in a war against the President. “Have we not endeavored to separate him from

¹⁷ *U.S. Telegraph*, March 25, 1831. See also *ibid.*, March 21, 22, April 13, 14, 1831.

¹⁸ John Branch to Alex. W. Mebane, Geo. B. Outlaw, &c., Aug. 20, 1831, *Niles' Weekly Register*, XLI (Sept. 17, 1831), 38; Branch to Edmund B. Freeman, Aug. 22, 1831, *Washington Globe*, Aug. 31, 1831; Branch to Outlaw, Robt. C. Watson, &c., May 31, 1831, *Niles' Weekly Register*, XL (June 11, 1831), 253; *U.S. Telegraph*, June 2, 1831.

Eaton, Kendall, Lewis, Van Buren, & Co.?" he asked. "When these men have retreated behind him we have labored to pull them from their hiding place, and by separating him from them, leave him his character, his public services, and his popularity, for himself and his country."¹⁹ Gradually, however, Green was compelled to accept as permanent the schism between Jackson and Calhoun. By the close of 1831, he conceded the impossibility of a reconciliation between the two men. "It is now too late," he announced publicly in the *Telegraph*.²⁰

The concept of a kitchen cabinet, then, was largely the work of alienated Jacksonians, particularly of Calhounites like Green. As portrayed in the *Telegraph*, the President was under the influence of a group of schemers, commanded by "the Kinderhook intriguer," Van Buren, who served the New Yorker's political interests. Van Buren's faction had provoked conflict with Calhoun, established the *Globe*, undercut the *Telegraph*, organized a national convention to nominate Van Buren as Jackson's running mate, and planned to leave the party in Van Buren's hands after Jackson's retirement. "Gen. Jackson is the nominal head, while Mr. Van Buren is the real head of the party," Green declared after Van Buren's nomination at the Democratic party's Baltimore convention. "This party is under the effectual control of Kendall, Lewis, & Co., who are charged with the conscience of Gen. Jackson, and who control the affiliated presses through their organ and by their correspondence from this place," he continued. In many respects, Green pictured the President's advisers as a branch of Van Buren's Albany Regency: "there is a regular regency established at this place, consisting of Lewis, Kendall, and several less prominent officers of the Government," he asserted.²¹

The idea of a controlling influence in the White House received extensive circulation after the tumultuous cabinet upheaval in the spring of 1831. Henry Clay's official organ, the *National Intelligencer*, borrowed Green's label "Amos Kendall & Co." for the "ruling party," while leading Jacksonians reported "rumours . . . of the President's being under the influence of certain persons who abuse & have his ear." Alfred Balch, one-time member of the Nashville central committee, suggested to Jackson that if he wanted to scotch reports of a power behind the throne greater than the throne itself, then Lewis

¹⁹ *U.S. Telegraph*, July 11, Oct. 6, 1831.

²⁰ *Ibid.*, Dec. 12, 1831. See also Green to Carter Beverly, July 8, 1831, Green Papers, University of North Carolina.

²¹ *U.S. Telegraph*, April 27, May 29, April 11, 1832.

should move out of the White House and Kendall “should attend only to the duties of his office & let you wholly alone.”²²

Jackson, of course, vigorously denied such allegations. “In regard . . . to these complaints and others of a similar character founded on a pretended distrust of *influences* near or around me, I can only say that they spring from . . . [a] false view of my character,” he wrote to one worried correspondent. And the *Globe* repudiated insinuations of Jackson’s enfeeblement. “The President is, as the nation knows, amidst the able and accomplished counsellors who now surround him, what he was among the aids with whom he acted on the plains of New Orleans. He is, himself, the presiding genius that conducts the administration and directs the destiny of the Republic,” Blair wrote reassuringly.²³

Administration disclaimers proved futile, and references to “Amos Kendall & Co.” or the “malign influence” continued unabated. By the spring of 1832, the concept of a kitchen cabinet was firmly established in the political dialogue of the day. The phrase itself, however, had not yet entered the public domain. Admittedly, one finds it mentioned on a few occasions in private correspondence. As early as the summer of 1831, for example, Blair assured his sister-in-law of the President’s independence of both “the *kitchen* . . . [and] *parlor* cabinets.” And a few months later, Nicholas Biddle, upon receiving an informant’s opinion that “Blair, Lewis, Kendall & Co. . . . still rule the Chief Magistrate,” acknowledged this “very melancholy” news, which confirmed his fear that “the kitchen . . . predominate[s] over the Parlor.”²⁴ But the first public use of the phrase came in an editorial by Senator George Poindexter of Mississippi, which appeared in the *Telegraph* of March 27, 1832.

Poindexter, a Virginia-born, self-made man, had achieved meteoric success in Mississippi politics after arriving in Natchez in 1802 with neither friends nor resources. He had served both the territorial and state governments in prominent positions, and, in the summer of 1830, he capped his impressive accomplishments by filling a senate seat

²² *National Intelligencer*, May 19, 1831; Thomas Ritchie to Van Buren, April 20, 21, 1831, Van Buren Papers; Balch to Jackson, July 21, 1831, Andrew Jackson Papers (Manuscript Division, Library of Congress).

²³ John Spencer Bassett, ed., *Correspondence of Andrew Jackson* (7 vols., Washington, 1926–1935), IV, 372; *Washington Globe*, Sept. 9, 1831.

²⁴ Thomas H. Clay, “Two Years with Old Hickory,” *Atlantic Monthly*, LX (Aug. 1887), 198; Robert M. Gibbes to Nicholas Biddle, Dec. 11, 1831, Nicholas Biddle Papers (Manuscript Division, Library of Congress). See also J. S. Barbour to James Barbour, March 25, 1832, James Barbour Papers (New York Public Library).

vacated by the sudden death of the incumbent.²⁵ Poindexter was, by reputation, a man of extraordinary abilities and talents. He was also, by reputation, a man of singular moral laxity. It was alleged that he had, among other things, killed an opponent in a duel by firing prematurely, fled ignobly from the battle of New Orleans, falsely accused his first wife of infidelity when divorcing her, disinherited their son, and given himself up to drinking, gambling, and general dissipation. The famous Methodist leader, William Winans, remarked that Poindexter “would have been . . . one of the greatest men I ever knew, had moral principles exercised control over his actions. But of this, I considered him *utterly* destitute. . . . Moral corruption and great talents rendered him a very dangerous man in Society. . . .” Van Buren recalled the “remarkably sinister expression of his countenance” at their first interview—the Mississippian was said to look a great deal like Clay—and noted that reports on the senator’s character differed “only in the degree of odium that was heaped upon it. . . .” Poindexter was one of the very few people with whom Van Buren could not establish friendly social relations, and at one time, as president of the Senate, he so feared Poindexter’s enmity that he carried a pair of loaded pistols.²⁶

Politically, Poindexter had been a late arrival in the Jackson camp, having initially supported Adams’ administration. By 1828 he had moved into the Jackson ranks, but Jackson remained uncertain of his loyalty, and, when the new senator arrived in Washington in December 1830, the President predicted that it was only a matter of time before Poindexter went into open opposition.²⁷

The prediction was accurate, but Poindexter did not desert the Democrats for Clay, Adams, or economic nationalism. Instead, he revealed himself to be an enthusiast for southern rights, an anti-tariff zealot, a friend of Calhoun and nullification, and a bitter foe of Van Buren. Although Poindexter first chose to fight Jackson over matters of patronage in Mississippi, these broader issues dictated his alienation from the President.²⁸

²⁵ Biographical material on George Poindexter is found in Edwin Arthur Miles, *Jacksonian Democracy in Mississippi* (Chapel Hill, 1960), 44–45; and Allen Johnson and Dumas Malone, eds., *Dictionary of American Biography* (21 vols., New York, 1943), XV, 29–30.

²⁶ P. L. Rainwater, ed., “Notes on Southern Personalities,” *Journal of Southern History*, IV (May 1938), 226; Van Buren, *Autobiography*, II, 755, 761–62.

²⁷ Miles, *Jacksonian Democracy in Mississippi*, 46; Van Buren, *Autobiography*, II, 755.

²⁸ Miles, *Jacksonian Democracy in Mississippi*, 61–68. For Poindexter’s patronage battles with Jackson, see Edwin A. Miles, “Andrew Jackson and Senator George Poindexter,” *Journal of Southern History*, XXIV (Feb. 1958), 51–66.

In the spring of 1831, after Calhoun's publication of the Seminole correspondence, Poindexter privately complained that Jackson was "surrounded by a few favorites who controlled and directed all things," and that the President's policies were undermining the South and its "Virginia principles." His criticism of the administration thereafter became more frequent and venomous, and he participated conspicuously in the Senate's rejection of Van Buren's appointment as minister to England. He justified his vote in part by reminding his constituents that Van Buren was the man who had "fixed on them the tariff of 1828."²⁹

Poindexter's break with the Jackson administration was therefore complete when in mid-March 1832, the *Telegraph* published a vitriolic attack on the *Globe*. It accused the *Globe* of employing a "trained band of letter writers, who lounge about the public offices, and live on the bounty of the government," to slander Poindexter and others for voting against Van Buren's confirmation. The *Globe* then accused Poindexter of writing the editorial and denounced him for engaging in personal and political warfare against the President. It was in the *Telegraph*'s response to Blair that the expression kitchen cabinet first appeared. "The President's press, edited under his own eye, by 'a pair of deserters from the Clay party,' and a few others, familiarly known by the appellation of the 'Kitchen Cabinet,' is made the common reservoir of all the petty slanders which find a place in the most degraded prints in the Union, on the majority of the Senate of the United States, and particular members of that body," the paper charged. It did not deny the *Globe*'s allegation that Poindexter was the author of recent editorials defending his vote against Van Buren and other presidential appointments.³⁰

The novelty of the public use of the expression kitchen cabinet was immediately seized upon by Blair, who again charged Poindexter with attacking the President for being under the influence of a "*Kitchen Cabinet*." Making obvious reference to Poindexter's unsavory reputation, Blair continued: "This last elegant specimen of the honorable Senator's talent in giving names, might claim the merit of great originality, if certain anecdotes of his habits of life, did not give assurance that he borrowed the idea from scenes and associations quite familiar to him."³¹ Blair identified Poindexter as the originator of the

²⁹ Charles H. Ambler, ed., *The Life and Diary of John Floyd: Governor of Virginia, an Apostle of Secession, and the Father of the Oregon Country* (Richmond, Va., 1918), 129-30; *Niles' Weekly Register*, XLI (Nov. 19, 1831), 222; *U.S. Telegraph*, April 21, 1832; *Washington Globe*, April 24, 1832.

³⁰ *U.S. Telegraph*, March 17, 27, 1832; *Washington Globe*, March 24, 1832.

³¹ *Washington Globe*, March 29, 1832.

phrase on other occasions as well. In the fall of 1832, responding to opposition charges of irresponsible influences in the White House, the *Globe* asserted that such criticism gave "countenance to Poindexter's imputation of backstairs influence, which that *honest Elevé*, from one of the Old Dominion's sooty quarters, calls the kitchen cabinet." Blair claimed that it had been "those dark scenes" of Poindexter's private life, "which first suggested to . . . [him] the cant phrase of Kitchen Cabinet, as bringing up all that he remembered as most disgusting in his own course of life, to begrim [*sic*] the characters of those, whom his malice prompted him to degrade." Blair's attribution of responsibility to Poindexter was never denied.³²

Since the expression had been used occasionally in private correspondence earlier than March 1832, it is apparent that Poindexter gave widespread circulation to an already extant phrase. But the importance of his contribution to the political lexicon was evident as the term began to appear more and more frequently in opposition newspapers, inspired, it would seem, by the heated presidential campaign of 1832 and by rumors of further actions against the Bank of the United States. By the summer of 1833, the *Globe* was bemoaning a state of affairs where "Nothing is thought of or talked of, but the 'Kitchen Cabinet' and the public deposits, stock-jobbers and malignant partisans, the solvency of the Bank and the Bankruptcy of the Treasury." By no means did the new phrase replace other labels, and references to the "IMPROPER" cabinet and to "Kendall and Co." continued. But after the spring of 1832, the cry of kitchen cabinet became part of the Jacksonian opposition's stock in trade.³³

A description of the origin of the political expression "kitchen cabinet" says little, of course, about the reality that prompted its use. Were the estranged Jackson men like Green, Branch, and Poindexter, who did so much to popularize the idea, accurately portraying White

³² *Ibid.*, Sept. 8, 1832, Nov. 29, 1833.

³³ *Ibid.*, Aug. 9, 1833; *U.S. Telegraph*, Sept. 29, Oct. 6, 11, 15, 16, Nov. 1, 1832. The *National Intelligencer* first used the phrase on January 10, 1833, and acknowledged that it had appeared earlier in another press. See *National Intelligencer*, Jan. 10, Oct. 2, 1833. The only newspaper reference to the kitchen cabinet that this author has come across, which was written before Poindexter's essay in the *U.S. Telegraph* of March 27, 1832, appears in the *Charleston Courier*. On March 27, 1832, the *Courier* quoted an editorial referring to "the 'kitchen' influence" that had previously appeared in another newspaper. See *Charleston Courier*, March 27, 1832. The contention here, however, is not that the term was never used prior to Poindexter's editorial, but that he was responsible for making it prominent. For the continued use of other expressions in describing backstairs influences, see *National Intelligencer*, June 16, 1832, Jan. 4, 1833; *U.S. Telegraph*, Nov. 20, Dec. 27, 1832.

House politics? For the most part, Jacksonian editors, led by the *Globe*, denied the existence of a kitchen cabinet; only rarely did a Democratic journal affirm its authenticity.³⁴ But Democratic disclaimers were as self-serving as the opposition's contentions. It is therefore necessary to examine more closely Jackson's advisory system, not only better to comprehend the nature of the kitchen cabinet, but, more significantly, the centrality of Jackson to his own administration.

As depicted by the opposition, the kitchen cabinet did not exist. Scholars like Longaker are correct in repudiating the idea of an advisory group with a firm membership, a hierarchical structure, and set meetings. In terms of self-identification, rules of procedure, group interdependence, cohesiveness, and other attributes of an institution, the kitchen cabinet must be distinguished from the regular cabinet.³⁵ But such qualifications by no means rule out the existence of an entity that could be called a kitchen cabinet. Even the cabinet, an institution for Presidents to use (or not use) as they see fit, often fails to meet the rigid criteria for an institution.³⁶

Rather than compare the kitchen cabinet with the regular cabinet, it would be more useful to conceptualize it as an early prototype of the President's White House staff, a group of personal aides providing the President with a variety of services. The staff includes policy advisers, lobbyists, liaison people, publicity experts, speech writers, and friends. Members are chosen to serve the President's needs and to talk his language. They share his perspective in overseeing the general direction of his administration, instead of the more limited perspective of department heads.³⁷ Some Presidents, like Dwight D. Eisenhower, have adopted a pyramidal advisory structure emphasizing order, efficiency, and specialization; others, like Franklin D. Roosevelt, have adopted a highly competitive organization of delegated responsibility and overlapping authority resembling a circle with the President at the center, surrounded by generalists used for specific assignments. Some have organized variants between these two models.³⁸ Certain White

³⁴ *Washington Globe*, Nov. 29, 1833, July 14, 1834; *National Intelligencer*, April 20, 1833, quoting the *Pennsylvanian*.

³⁵ Longaker, "Jackson's Kitchen Cabinet," 100; Richard F. Fenno, Jr., *The President's Cabinet: An Analysis in the Period from Wilson to Eisenhower* (Cambridge, 1959), 4–5.

³⁶ Fenno, *The President's Cabinet*, 5; Stephen Hess, *Organizing the Presidency* (Washington, 1976), 206.

³⁷ Lester G. Seligman, "Presidential Leadership: The Inner Circle and Institutionalization," *Journal of Politics*, 18 (Aug. 1956), 413; Theodore C. Sorensen, *Decision-Making in the White House: The Olive Branch or the Arrows* (New York, 1963), 70–71. See also Matthew A. Crenson, *The Federal Machine: Beginnings of Bureaucracy in Jacksonian America* (Baltimore, 1975), 57–58.

³⁸ Hess, *Organizing the Presidency*, 174–75; Richard T. Johnson, "Presidential Style," Aaron Wildavsky, ed., *Perspectives on the Presidency* (Boston, 1975), 263–66.

House aides have great authority, not only participating in policy making but also in issuing instructions to cabinet officers. Propinquity to the President becomes a determining consideration in establishing influence, as a cabinet member of the 1960s recognized when he reported his preference to return to government as a presidential assistant rather than as a department head.³⁹ Indicatively, warnings in the 1970s about “unelected, and unratified aides” who assumed “ever-growing” policy-making roles were anticipated by complaints about the power of Jackson’s kitchen cabinet.⁴⁰

The analogy with the modern White House staff is, admittedly, imperfect. The modern presidential staff is a complex organization of more than 500 people that merges into the even larger and burgeoning network of the Executive office.⁴¹ The Jackson White House was much more primitive, since Congress provided no funds for administrative aides or private secretaries until 1857.⁴² More significantly, the inclusion of cabinet members, especially Van Buren, in the kitchen cabinet precludes a neat comparison. Nevertheless, there is a resemblance between the two organizations. Members of Jackson’s kitchen cabinet performed most of the functions of a modern staff, serving his personal and political needs. They also stirred resentments by encroaching on the traditional provinces of cabinet secretaries. The *National Intelligencer*, for example, condemned Jackson for removing the deposits “upon the wisdom of the Kitchen Cabinet, his Cabinet proper protesting against it in vain,” and chided him for having “other financial *counsellors* . . . than the Secretary of the Treasury.”⁴³ The kitchen cabinet was not the advance guard of the evolving Democratic party organization, as Marshall’s comparison with the national committee implies, but, rather, an agency of the President. It was a part of the enlargement of presidential power that occurred under Jackson, whose efforts to make the entire executive office—cabinet and non-cabinet—conform to his will continually elicited protests from tradition-bound observers.⁴⁴

³⁹ Thomas E. Cronin, *The State of the Presidency* (Boston, 1975), 138; Hess, *Organizing the Presidency*, 1–11, 160–62, 174–75; Koenig, *Invisible Presidency*, 22.

⁴⁰ Cronin, *State of the Presidency*, 138.

⁴¹ *Ibid.*, 118–40; Hess, *Organizing the Presidency*, 158–62; Thomas E. Cronin and Sanford D. Greenberg, eds., *The Presidential Advisory System* (New York, 1969), xvii–xviii.

⁴² White, *Jacksonians*, 82–83.

⁴³ *National Intelligencer*, Jan. 4, Oct. 2, 1833.

⁴⁴ Hezekiah Niles, for example, complained that even the language describing executive power changed during Jackson’s presidency: “The words first used . . . were ‘THE *administration*’—next ‘THIS *administration*’—then ‘MY *administration*’—and now it is with apparent gravity asserted, and claimed to be the true democracy, that *the president* is THE ‘GOVERNMENT.’” Niles’ *Weekly Register*, XLV (Nov. 30, 1833), 209. For Jackson’s expansion of presidential powers, see White, *Jacksonians*, 20–49; Robert V. Remini, *Andrew Jackson and the Bank War: A Study in the Growth of Presidential Power* (New York, 1967), 176–78; Ralph M. Goldman, *The Democratic Party in American Politics* (New York, 1966), 45–46.

Despite the prominence of the kitchen cabinet, evidence concerning its membership, structure, and functioning is sketchy. Green maintained that membership was subject to change and that the names of all except its most conspicuous participants were "known only to a few." He never published a complete list. Opposition journals and politicians invariably mentioned Kendall, Lewis, and Blair among its members, but they also included the names of such relative obscurities as John Campbell, treasurer of the United States, Major Thomas L. Smith, register of the Treasury, and Elijah Hayward, commissioner of the General Land Office.⁴⁵ Longaker, who, after extensive study, found more than a dozen people associated with the kitchen cabinet, reasoned that the uncertainty about its membership was persuasive evidence of its nonexistence. Such skepticism seems exaggerated. Despite the impossibility of attaining a complete understanding of the network of presidential advising, a number of suggestions can be offered regarding this shadowy realm of power.⁴⁶

At the beginning of his presidency, Jackson consulted primarily with his longtime Tennessee associates, Eaton, Lewis, and White. Politicians in Washington recognized the special access to the President of this inner group, and, in early 1829, Kendall, for example, referred to them as Jackson's "immediate friends" and "principle friends." But the Tennessee clique was ill-suited to Jackson's political program. Except on the issue of Indian removal, where the experienced Eaton provided able assistance, Jackson's early inner circle resisted his major decisions, especially his attack on the BUS and his commitment to limiting internal improvements expenditures. Gradually, during the first two years of his administration, they were displaced by Kendall, Blair, and Van Buren.⁴⁷

Unlike the Tennesseans, the kitchen cabinet's new inner circle was fully compatible with Jackson's program. Of the three, Kendall and Blair shared the greatest influence. They were intimately involved with the issue that most concerned Jackson, the bank war. Their position as

⁴⁵ *U.S. Telegraph*, Aug. 2, 1833, March 25, April 13, 1831, Feb. 14, April 27, 1832; Branch to Andrew Jackson Donelson, May 8, 1831, Andrew Jackson Donelson Papers (Manuscript Division, Library of Congress); J. S. Barbour to James Barbour, June 27, 1832, Barbour Papers.

⁴⁶ Longaker, "Jackson's Kitchen Cabinet," 97-98, 100. "Institutions," Harold J. Laski has noted, "are living things, and they do not easily yield their secrets to the printed word. Predominantly, that is not because they are in themselves mysterious. It is rather because they change with changes in the environment within which they operate, and partly because they differ, from one moment to the other, in terms of the men who operate them." Harold J. Laski, *The American Presidency, An Interpretation* (New York, 1940), 1.

⁴⁷ Bassett, *Life of Jackson*, 410; Sellers, *James K. Polk*, 137; Kendall to John Pope, Jan. 11, 1829, Blair-Lee Papers; William Stickney, ed., *Autobiography of Amos Kendall* (Boston, 1872), 281.

administration propagandists and directors of the official Jackson newspaper brought them into frequent and confidential communication with him on numerous issues. And it would seem that personal and psychological considerations also mattered. Like Jackson, Kendall and Blair were westerners, outsiders to the Washington community, and somewhat ill at ease with the capital's social set. Lacking independent political backing, they tied their fortunes exclusively to the President and regarded him with almost filial devotion. This Jackson found congenial, since he habitually preferred to command subordinates and to exercise parental authority.⁴⁸

The urbane Van Buren, by contrast, was skilled in navigating the turbulent waters of Washington's social and political world. He also possessed his own political base and presidential ambitions. Temperamentally cautious, he was unlike the doctrinaire and zealous Kentuckians who shared Jackson's flair for the dramatic and conclusive stroke. Thus, even though Van Buren exerted considerable influence and always retained Jackson's personal trust and affection, his contribution was somewhat eclipsed by that of Jackson's western advisers, Kendall and Blair.⁴⁹

While Jackson's inner circle was composed of those intimates whom he regularly consulted on a variety of major decisions, there also existed an outer circle of less influential kitchen cabinet advisers, aides who contributed little to decision making, but who performed personal, political, and administrative chores. They gathered information on the political climate, occasionally intervened in local party matters to help loyal Jacksonian candidates, assisted in establishing local Jackson newspapers, and advised Jackson on appointments and removals.⁵⁰

⁴⁸ Billy Gratz to Blair, May 31, 1831, Blair Family Papers (Manuscript Division, Library of Congress); Amos Kendall, "Anecdotes of General Jackson," *United States Magazine and Democratic Review*, XI (Sept. 1842), 273-74; Bassett, *Correspondence of Andrew Jackson*, IV, 79, 309; Kendall to Gideon Welles, April 1, 1831, Gideon Welles Papers (Manuscript Division, Library of Congress); Clay, "Two Years with Old Hickory," 192; Kendall to Blair, Oct. 29, 1830, Blair-Lee Papers; William C. Rives to wife, Dec. 4, 1836, William C. Rives Papers (Manuscript Division, Library of Congress); Bassett, *Life of Jackson*, 540, 705. Jackson's desire to control events is sensitively rendered in Curtis, *Andrew Jackson and the Search for Vindication*, ix-x, 11-12, 82, 144. For a discussion of the relative influence of Kendall, Blair, and Van Buren, see Richard B. Latner, "A New Look at Jacksonian Politics," *Journal of American History*, LXI (March 1975), 943-69.

⁴⁹ Nathaniel Niles to Rives, July 23, 1833, Rives Papers; Clay, "Two Years with Old Hickory," 193.

⁵⁰ George M. Dallas to Samuel Ingham, May 15, 1831, George M. Dallas Papers (Historical Society of Pennsylvania, Philadelphia); James K. Polk to Donelson, April 28, 1835, Donelson Papers; William B. Lewis to Blair, Aug. 23, 1832, J. S. Barbour to Blair, Nov. 9, 1831, T. Bland to Blair, July 2, 1835, Thomas P. Moore to Blair, Sept. 4, 1833, Blair-Lee Papers; Lewis to Jackson, Aug. 20, 1834, Jackson Papers; Lewis to Blair, May 17, 1831, Blair-Lee Papers; *U.S. Telegraph*, Aug. 13, 1831.

Of those in this outer circle, Andrew Jackson Donelson and Lewis had the greatest access to Jackson. Donelson, the President's nephew, served as his private secretary, drafting letters, notes, and presidential messages, and could be relied upon to keep a confidence. Lewis, in Van Buren's words, was "an intimate personal friend" of the President, and, unlike Eaton, he remained in Washington after the cabinet reorganization of 1831, where he attended to party and patronage matters. But Lewis acted only at Jackson's direction, and his diminished position in the administration was evident when he moved out of the White House in early 1832.⁵¹

No enumeration of all kitchen cabinet members can be offered with great confidence. On some matters, Jackson consulted with such men as Postmaster General William T. Barry, Isaac Hill, James A. Hamilton, Reuben M. Whitney, and, at least at the beginning of his administration, Green, sufficiently often to make them occasional and peripheral members of the kitchen cabinet. But there is no evidence that they performed services for Jackson with the regularity of Donelson, who lived at the White House throughout Jackson's presidency, and Lewis, who lived there for most of Jackson's first term.⁵² Hill, for example, is generally accorded great influence, and there is evidence that he was consulted by Jackson on certain New England appointments; but on a major issue such as the removal of the deposits, Hill was kept in the dark until after Jackson made his decision. Similarly, Green found the political footing treacherous even in the early days of the administration. He quarreled incessantly with cabinet members and was unable to exert much influence on patronage or policy. "Some of those who have the confidence of the President are jealous of my influence and seek for opportunities to mortify my pride," he lamented.⁵³

⁵¹ Bassett, *Correspondence of Andrew Jackson*, IV, 247–48, 252–54; Van Buren to Lewis, Jan. 17, 1856, Jackson-Lewis Papers (New York Public Library); Lewis to Allen A. Hall, July 12, 1837, *ibid.*; Van Buren to Benjamin F. Butler, June 1835, Benjamin F. Butler Papers (Princeton University Library); James, *Life of Andrew Jackson*, 579. Donelson's assistance in drafting presidential messages is apparent from a study of those papers. See, for example, Presidential Messages, First Annual Message, Jackson Papers.

⁵² Green to Worden Pope, Aug. 15, 1829, Green Papers, Library of Congress; *Niles' Weekly Register*, XXXVII (Oct. 10, 1829), 97–98; *ibid.*, XLII (June 16, 1832), 292; Jeremiah Mason to Daniel Webster, Feb. 8, 1830, Daniel Webster Papers (Manuscript Division, Library of Congress); John Niven, *Gideon Welles: Lincoln's Secretary of the Navy* (New York, 1973), 69–70; James A. Hamilton, *Reminiscences of James A. Hamilton* (New York, 1869), 212, 250; Bassett, *Correspondence of Andrew Jackson*, IV, 347; "Letters of William T. Barry," *William and Mary College Quarterly*, XIV (April 1906), 231, 232, 239–40; Dallas to George M. Wolf, March 31, 1835, George M. Wolf Papers (Historical Society of Pennsylvania, Philadelphia); [W. J. Duane] *Narrative and Correspondence Concerning the Removal of the Deposits and Occurrences Connected Therewith* (Philadelphia, 1838), 57.

⁵³ Welles to Isaac Hill, March 25, 1829, Isaac Hill Papers (New Hampshire Historical Society, Concord); Hill to A. A. Burk, Nov. 16, 1833, New Hampshire Whig Papers (Harvard University);

The difficulty in identifying the kitchen cabinet's composition precisely attests to the flexibility of Jackson's advisory system. Jackson brought new men, Roger B. Taney, for example, into his confidence when circumstances warranted, and freely consulted old friends like John Coffee and acquaintances like Whitney. Not only was there movement between the inner and outer circles of the kitchen cabinet, but Jackson also continued to seek counsel elsewhere, whether from cabinet members or friends and associates outside of government. Thus, while certain men, especially Kendall, Blair, and Van Buren, maintained a constant influence in the administration, they never monopolized access to the President, and the kitchen cabinet, though a central feature of Jackson's White House, was not the only element in his advisory system.⁵⁴

Indeed, schematically, the whole White House advisory network resembled a series of interlocking circles surrounding Jackson, who stood at the center. Cabinet members, government officials, members of Congress, friends, and, on occasion, acquaintances moved in complex patterns around the President. Cabinet members, like Van Buren and Taney, could find themselves alongside minor officials and non-officeholders, like Kendall and Blair, or members of Congress, like Senator Thomas Hart Benton of Missouri, within Jackson's inner circle. Disagreement with Jackson's program could lead to exclusion from the inner circle, as happened with Lewis, whose resistance to Jackson's bank war and friendship with conservative Democrats led one cabinet member to remark in January 1834 that Lewis was "not now called of the Kitchen Cabinet." Moreover, functions were not clearly differentiated and specialized, and members of the kitchen cabinet's inner circle often worked with members of its outer ring in performing political chores.⁵⁵

Francis O. Smith to Blair, July 11, 1834, Blair-Lee Papers; Hill to unknown correspondent, Aug. 15, 1833, New Hampshire Whig Papers; Green to Ninian Edwards, Aug. 19, 1829, Green Papers, Library of Congress; Green to Worden Pope, Aug. 15, 1829, *ibid.*; Green to Calhoun, Aug. 1, 1830, Green Papers, University of North Carolina; Green to Jas. Callan, Jan. 24, 1830, Green Papers, Library of Congress; Kendall to Blair, March 14, 1829, Oct. 2, 1830, Blair-Lee Papers; Bassett, *Correspondence of Andrew Jackson*, IV, 156.

⁵⁴ "Letters of Andrew Jackson to Roger Brooke Taney," *Maryland Historical Magazine*, IV (Dec. 1909), 303, 304, 305; Bassett, *Correspondence of Andrew Jackson*, IV, 309-10, 400-02; John M. McFaul and Frank Otto Gatell, "The Outcast Insider: Reuben M. Whitney and the Bank War," *Pennsylvania Magazine of History and Biography*, XCI (April 1967), 120-24; Kendall to unknown correspondent, April 10, 1831, Welles Papers; Clay, "Two Years with Old Hickory," 192; *Washington Globe*, Nov. 16, 1835; Kendall to Jackson, Dec. 3, 1831, Blair-Lee Papers.

⁵⁵ [Thomas Hart Benton] *Thirty Years' View or A History of the Working of the American Government for Thirty Years, From 1820 to 1850* (2 vols., New York, 1854), I, 678; Levi Woodbury, "Sundry Exercises or Moral Self-examinations, Resolutions, and Intimate Memoranda, January 19, 1823-March 9, 1834," Jan. 10, 1834, Box 29, Woodbury Papers; Jackson to Kendall, n.d. [Sept.-Oct. 1833?], Andrew DeCoppett Collection (Princeton University Library); Richard H. Wilde to Gulian Verplanck, May 1, 1834, Gulian Verplanck Papers (New-York Historical Society, New York City); Reuben M. Whitney to Blair, Aug. 16, 1833, Blair-Lee Papers.

An observation about contemporary White House practice seems equally applicable to that of Jackson's day: "The orbits of advisers . . . that revolve around the President do not, like the heavenly bodies, follow a fixed and settled course."⁵⁶

To recognize the presence of a proto-White House staff alongside other advisory resources by no means diminishes Jackson's centrality to his administration. Not only did status and influence depend primarily upon agreement with Jackson, but a flexible and interlocking system of advising demanded a dominant President if decisions were to be made. The picture that emerges is not that of an inexperienced and vacillating executive, prone to manipulation by those who gained his confidence. Rather, it is that of an astute and skillful President, who consulted widely on matters of policy and politics and who reached beyond formal institutions for assistance.⁵⁷

Jackson's confidant and editor, Blair, affirmed the President's predominant authority in his administration. "Whenever anything involves what he conceives the *permanent interest* of the country, his patriotism becomes an all-absorbing feeling, and neither *kitchen* nor *parlor* cabinets can move him," Blair asserted. Kendall's conclusion was the same. "They talk of a Kitchen Cabinet, etc.," he explained to James Gordon Bennett. "There are a few of us who have always agreed with the President in relation to the Bank and other essential points of policy, and therefore they charge us with having an influence over him! Fools!! They can not beat the President out of his long-cherished opinions, and his firmness they charge to our influence!" For Jackson to be manipulated by others was out of character for a man who had always reserved to himself the final determination and responsibility for a decision. "I should loath myself did any act of mine afford the slightest colour for the insinuation that I follow blindly the judgment of any friend in the discharge of my proper duties . . .," he assured one supporter.⁵⁸

While Jackson's reliance on a kitchen cabinet is often attributed to the divisiveness of his first cabinet, it can more usefully be explained by his style of leadership. To be sure, the Eaton affair so polarized Jackson's secretaries that they rarely met, and he generally consulted them separately when making or implementing policy. But recent scholarship

⁵⁶ Johnson, "Presidential Style," 262.

⁵⁷ Hess, *Organizing the Presidency*, 175; Johnson, "Presidential Style," 296.

⁵⁸ Clay, "Two Years with Old Hickory," 198; Frederic Hudson, *Journalism in the United States from 1690 to 1872* (New York, 1873), 448; Bassett, *Correspondence of Andrew Jackson*, IV, 372. See also *Washington Globe*, March 12, 1831.

has demonstrated conclusively that after the spring of 1831, when Jackson refashioned his cabinet, it assembled regularly once a week, first on Saturdays, later on Tuesdays. During crises, such as the removal of the deposits, it met every day.⁵⁹ Despite its ceremonial rehabilitation, however, the cabinet never became the focus of presidential decision making. It advised and deliberated on major policy questions, but the more important the issue to Jackson, the more he used it only as a strategic means of gaining public support for a predetermined policy. According to Blair, Jackson would "sacrifice his own predilections, and indeed his determinations, in regard to appointments, to the preferences of his secretaries," but when "important principles are concerned . . . he is inexorable." Years later, Blair summarized Jackson's procedure for the benefit of Abraham Lincoln: "Leading measures resolved on, the cabinet should be accommodated to them & those who hoped for any thing as party men would follow in the wake. . . ."⁶⁰

Jackson's presidential style derived in part from his military experience. As a general, Jackson had rarely summoned councils, preferring instead to consult his aides informally, to hear them out, and to make his own judgment. His military reputation preceded him to Washington, and even before inauguration day, Kendall reported his expectation that Jackson would continue his former method of seeking advice but never submitting anything to the decision of a council. The persistent influence of Jackson's military career was evident throughout his presidency in his distaste for cabinet sessions, leading one cabinet member to comment in 1834 that Jackson "shuns consulting all, as he is so military & dislikes councils of . . . cabinet." Jackson always preferred to concentrate power in his own hands, to reserve final decisions and responsibility for himself, and to control and dominate his surroundings.⁶¹

⁵⁹ James C. Curtis, "Andrew Jackson and His Cabinet: Some New Evidence," *Tennessee Historical Quarterly*, XXVII (Summer 1968), 157-64; *U.S. Telegraph*, Nov. 28, 1831; Edward Livingston to James Barbour, n.d. [1831], Barbour Papers; Jackson to Kendall, n.d., Amos Kendall Papers (Massachusetts Historical Society, Boston); Mahlon Dickerson, *Diary, 1832-1845*, Mahlon Dickerson Papers (New Jersey Historical Society, Newark); Reginald C. McGrane, ed., *The Correspondence of Nicholas Biddle dealing with National Affairs: 1807-1844* (New York, 1919), 223.

⁶⁰ Clay, "Two Years with Old Hickory," 197-98; Blair to [Abraham Lincoln], n.d., Blair-Lee Papers. See also Stickney, *Autobiography of Amos Kendall*, 635; *Washington Globe*, March 12, Sept. 9, 1831; Benton, *Thirty Years' View*, I, 678. James C. Curtis argues that Jackson occasionally polled his cabinet, but the evidence is not conclusive. See Curtis, "Andrew Jackson and His Cabinet," 161.

⁶¹ Albert Somit, "Andrew Jackson as Administrator," *Public Administration Review*, VIII (Summer 1948), 188-89, 194; Kendall to Blair, Feb. 14, 1829, Blair-Lee Papers; Stickney, *Autobiography of Amos Kendall*, 635; Woodbury, "Sundry Exercises," Jan. 10, 1834, Woodbury Papers.

Moreover, Jackson's temperament and psychology fostered this system of informal advising. Jackson placed an unusual emphasis on qualities like personal loyalty and devotion in relationships with people. His suspicion of human nature made his confidence hard to gain, for he was ever alert to the danger of deceit and betrayal; but once his trust was granted, he withdrew it reluctantly.⁶² Jackson related his high standards of friendship to the lessons taught by the vicissitudes of his early life. "I have been Tossed upon the waves of fortune from youth[h]ood, I have experienced prosperity and adversity," he once explained. "It was this that gave me a knowledge of human nature. . . . [Y]ou will find many, professedly, friends . . . in many Instances these professions are made with a view to obtain your confidence that it may be betrayed. To guard against such impositions there is but one safe rule—have apparent confidence in all, but never make a confidant of any untill [*sic*] you have proven him worthy of it." On another occasion, he similarly recalled that "The best lesson learnt me in my youth, was to . . . treat all with complacency, but make confidants [*sic*] of but few."⁶³ Thus, although cabinet members might obtain Jackson's confidence as individuals, he would not easily confide in an institution composed of so many strangers and political aspirants. Instead, he would, in Kendall's words, seek advice "from those who he thinks able to give it, whether they are Heads of Departments or not."⁶⁴

There were, of course, liabilities to Jackson's system. Inevitably, cabinet members resented the influence of advisers who, though formally of lower status and authority, had special access and made substantial contributions to programmatic and political decisions. Consequently, Jackson's White House was the scene of constant infighting between competing groups seeking to persuade the President to a course of action. Treasury secretary William Duane, who was eventually dismissed for refusing to carry out Jackson's command to remove the deposits, was mortified to learn from Kendall, Whitney, and probably Blair what he was expected to do. "I had heard rumours of the existence of an influence, at Washington, unknown to the constitution and to the country; and the conviction, that they were well founded, now became irresistible," Duane announced in his published defense; "I knew that four of the six members of the last cabinet, and that four of the six members of the present cabinet, opposed a removal of the deposits [*sic*];

⁶² Curtis, *Andrew Jackson and the Search for Vindication*, 31, 79.

⁶³ Bassett, *Correspondence of Andrew Jackson*, III, 130, 270.

⁶⁴ Kendall to Blair, Feb. 14, 1829, Blair-Lee Papers.

and yet their exertions were nullified by individuals, whose intercourse with the President was clandestine."⁶⁵

Other cabinet members had similar difficulties. Louis McLane, a conservative Democrat who owed his prominence largely to Van Buren's continuing solicitude, bitterly complained of Blair's efforts to undercut his support of the Bank. In early 1832, he vented his anger in an unsuccessful attempt at a palace revolution to force Blair from the *Globe*. When Blair in turn accused some cabinet officers of failing to provide him with the patronage needed to ensure the paper's financial security, Jackson pointedly reminded his cabinet of its needs.⁶⁶

Inevitably, too, there was friction among members of the outer circle of aides, like Lewis, and presidential favorites, like Blair, as well as among members of the inner circle themselves, particularly between Kendall and Blair, on the one hand, and Van Buren, on the other.⁶⁷ Rumors of such clashes were eagerly seized upon by the opposition as evidence of the administration's impending collapse, and the *Globe* was compelled to issue public denials of any division among the President's counselors. The situation doubtless irritated and frustrated Jackson, who does not seem to have relished the competitive atmosphere congenial to Roosevelt, but it is apparent that he preferred to rely on his flexible advisory system rather than on the formal cabinet or a more hierarchical arrangement of official and unofficial aides.⁶⁸

Jackson's reliance on a kitchen cabinet is particularly noteworthy in light of other research on his administrative ideas and practices. As Albert Somit has argued, in administrative matters, Jackson preferred neatness and order. Concentration of authority, hierarchical structures with clear-cut chains of command, strict accountability, limited administrative discretion, and the efficient organization of activities by function were fundamental considerations in his military and administrative practices.⁶⁹ Indeed, to a surprising extent, Jacksonian

⁶⁵ [Duane] *Narrative and Correspondence Concerning the Removal of the Deposits*, 9–10.

⁶⁶ Blair to [Secretary of the Navy], Nov. 1831, Blair-Lee Papers; Blair to Livingston, June 18, 1832, June 21 [1832], *ibid.*; Blair to Jackson, n.d. [1832], with endorsement by Jackson, Jackson Papers; Louis McLane to Van Buren, Dec. 14, 1831, Van Buren Papers; Lewis to Blair, July 24, 1833, Blair-Lee Papers. For a discussion of McLane's intrigue, see Latner, "A New Look at Jacksonian Politics," 953–54.

⁶⁷ Lewis to Blair, Aug. 12, 1830 [1832?], Blair-Lee Papers; Blair to Van Buren, Aug. 17, 1833, Van Buren Papers. For a more extended discussion of the differences between Van Buren and Kendall and Blair, see Latner, "A New Look at Jacksonian Politics," 951–66.

⁶⁸ Washington *Globe*, Jan. 16, Nov. 29, 1833, March 21, July 14, 1834; *U.S. Telegraph*, March 20, 1834.

⁶⁹ Somit, "Andrew Jackson as Administrator," 189–93; Albert Somit, "The Political and Administrative Ideas of Andrew Jackson" (doctoral dissertation, University of Chicago, 1947), 119–26, 226.

administrative policy stimulated the process of bureaucratization that increasingly marked government organization in the nineteenth century. According to Matthew Crenson, a significant shift in administrative priorities occurred during Jackson's presidency from an initial emphasis on traditional notions of personal organization, unity of command, and the maxim that good men make good administration, to a bureaucratic form of government with impersonal rules, elaborate systems of checks and balances, and explicitly defined jurisdictions.⁷⁰

The kitchen cabinet, however, only partially conforms to this newly emerging picture of the Jacksonian administrative model. Jackson's advisory network was too informal, personal, and flexible to fit neatly into a bureaucratic administrative structure. The paradox of such an informal institution coexisting with an increasingly bureaucratized civil service is clear, and it shows the persistence of Jackson's own commitment to an old-fashioned and personal system of governing even as he placed his stamp of approval on the administrative reorganization plans of his cabinet officers. But however incompatible with other administrative goals, the appearance of a close-knit, informal group of aides within a flexible advisory system was consonant with Jackson's determination to direct his administration and to make himself the center of the decision-making process.

⁷⁰ Crenson, *Federal Machine*, 1-10, 49-54, 57-62, 70-71, 158-74.

Congress of the United States
Washington, DC 20515

October 11, 2019

Mr. Michael Duffey
Associate Director for National Security Programs
Office of Management and Budget
725 17th Street, N.W.
Washington, DC 20503

Dear Mr. Duffey:

Pursuant to the House of Representatives' impeachment inquiry, we write to request your appearance at a deposition on **October 23, 2019, at 9:30 a.m. at The Capitol, HVC-304.**

This deposition will be conducted jointly by the Permanent Select Committee on Intelligence, the Committee on Foreign Affairs, and the Committee on Oversight and Reform. The deposition transcript shall be part of the impeachment inquiry and shared among the Committees. Your failure or refusal to appear at the deposition, including at the direction or behest of the President or the White House, shall constitute evidence of obstruction of the House's impeachment inquiry and may be used as an adverse inference against the President.

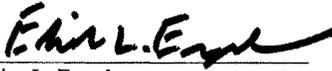
The Committees are investigating the extent to which President Trump jeopardized U.S. national security by pressing Ukraine to interfere with our 2020 election and by withholding a White House meeting with the President of Ukraine and military assistance provided by Congress to help Ukraine counter Russian aggression, as well as any efforts to cover up these matters.

Based upon public reporting and evidence gathered as part of the impeachment inquiry, we believe you may have information relevant to these matters.

If you have any questions, please contact staff for the Permanent Select Committee on Intelligence at (202) 225-7690.

Mr. Michael Duffey
Page 2

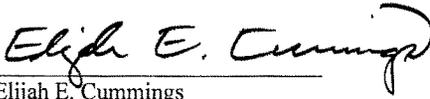
Sincerely,



Eliot L. Engel
Chairman
House Committee on Foreign Affairs



Adam B. Schiff
Chairman
House Permanent Select Committee
on Intelligence



Elijah E. Cummings
Chairman
House Committee on Oversight and Reform

Enclosure

cc: The Honorable Michael McCaul, Ranking Member
House Committee on Foreign Affairs

The Honorable Devin Nunes, Ranking Member
House Permanent Select Committee on Intelligence

The Honorable Jim Jordan, Ranking Member
House Committee on Oversight and Reform

Congress of the United States
Washington, DC 20515

November 1, 2019

Mr. Brian McCormack
Associate Director for Natural Resources, Energy & Science
Office of Management and Budget
725 17th Street, N.W.
Washington, D.C. 20503

Dear Mr. McCormack:

Pursuant to the House of Representatives' impeachment inquiry, we are hereby transmitting a subpoena that compels you to appear at a deposition on **November 4, 2019, at 2:00 p.m. at The Capitol, HVC-304.**

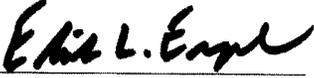
This deposition will be conducted jointly by the Permanent Select Committee on Intelligence, the Committee on Foreign Affairs, and the Committee on Oversight and Reform. The deposition transcript shall be part of the impeachment inquiry and shared among the Committees. Your failure or refusal to appear at the deposition, including at the direction or behest of the President or the White House, shall constitute evidence of obstruction of the House's impeachment inquiry and may be used as an adverse inference against the President.

On October 24, 2019, the Committees sent a letter to you requesting that you voluntarily appear for a deposition on November 4, 2019. We have not received a substantive response from you or your personal counsel. The Committees, therefore, have no choice but to issue a subpoena compelling your mandatory appearance.

If you have any questions, please contact staff for the Permanent Select Committee on Intelligence at (202) 225-7690.

Mr. Brian McCormack
Page 2

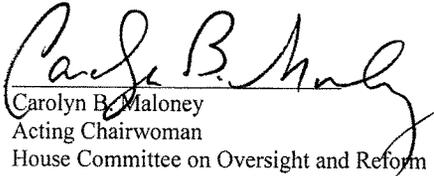
Sincerely,



Eliot L. Engel
Chairman
House Committee on Foreign Affairs



Adam B. Schiff
Chairman
House Permanent Select Committee
on Intelligence



Carolyn B. Maloney
Acting Chairwoman
House Committee on Oversight and Reform

Enclosure

cc: The Honorable Michael McCaul, Ranking Member
House Committee on Foreign Affairs

The Honorable Devin Nunes, Ranking Member
House Permanent Select Committee on Intelligence

The Honorable Jim Jordan, Ranking Member
House Committee on Oversight and Reform

Congress of the United States
Washington, DC 20515

October 24, 2019

Brian McCormack
Associate Director for Natural Resources, Energy & Science
Office of Management and Budget
725 17th Street, N.W.
Washington, DC 20503

Dear Mr. McCormack:

Pursuant to the House of Representatives' impeachment inquiry, we write to request your appearance at a deposition on **November 4, 2019, at 9:30 a.m. at The Capitol, HVC-304.**

This deposition will be conducted jointly by the Permanent Select Committee on Intelligence, the Committee on Foreign Affairs, and the Committee on Oversight and Reform. The deposition transcript shall be part of the impeachment inquiry and shared among the Committees. Your failure or refusal to appear at the deposition, including at the direction or behest of the President or the White House, shall constitute evidence of obstruction of the House's impeachment inquiry and may be used as an adverse inference against the President.

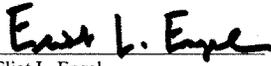
The Committees are investigating the extent to which President Trump jeopardized U.S. national security by pressing Ukraine to interfere with our 2020 election and by withholding a White House meeting with the President of Ukraine and military assistance provided by Congress to help Ukraine counter Russian aggression, as well as any efforts to cover up these matters.

Based upon public reporting and evidence gathered as part of the impeachment inquiry, we believe you may have information relevant to these matters.

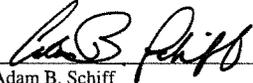
If you have any questions, please contact staff for the Permanent Select Committee on Intelligence at (202) 225-7690.

Mr. Brian McCormack
Page 2

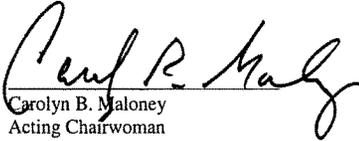
Sincerely,



Eliot L. Engel
Chairman
House Committee on Foreign Affairs



Adam B. Schiff
Chairman
House Permanent Select Committee
on Intelligence



Carolyn B. Maloney
Acting Chairwoman
House Committee on Oversight and Reform

Enclosure

cc: The Honorable Michael McCaul, Ranking Member
House Committee on Foreign Affairs

The Honorable Devin Nunes, Ranking Member
House Permanent Select Committee on Intelligence

The Honorable Jim Jordan, Ranking Member
House Committee on Oversight and Reform

Congress of the United States
Washington, DC 20515

November 3, 2019

Paul W. Butler, Esq.
Akin Gump Strauss Hauer & Feld LLP
2001 K Street, N.W.
Washington, DC 20006-1037

Dear Mr. Butler:

Pursuant to the House of Representatives' impeachment inquiry, we are hereby transmitting a subpoena that compels your client, Michael Ellis, to appear at a deposition on **Monday, November 4, 2019, at 2:00 p.m. at The Capitol, HVC-304.**

This subpoena is being issued by the Permanent Select Committee on Intelligence under the Rules of the House of Representatives in exercise of its oversight and legislative jurisdiction and after consultation with the Committee on Foreign Affairs and the Committee on Oversight and Reform. The deposition transcript shall be collected as part of the House's impeachment inquiry and shared among the Committees, as well as with the Committee on the Judiciary as appropriate.¹ Mr. Ellis' failure or refusal to comply with the subpoena, including at the direction or behest of the President or the White House, shall constitute further evidence of obstruction of the House's impeachment inquiry and may be used as an adverse inference against Mr. Ellis and the President. Moreover, Mr. Ellis' failure to appear shall constitute evidence that may be used against him in a contempt proceeding.

Baseless White House Order to Block Witness Testimony

On October 30, 2019, the Committees sent a letter requesting that Mr. Ellis appear voluntarily for a deposition, as we have with many other witnesses.² On November 2, 2019, you informed us that Mr. Ellis would not appear because the White House now takes issue with agency counsel being excluded from congressional depositions—a procedure that is enshrined in House Rules and has been used by both Republicans and Democrats for decades. You wrote:

[W]e are in receipt of an opinion from the Office of Legal Counsel providing guidance on the validity of a subpoena under the current

¹ See Letter from Chairman Jerrold Nadler, House Committee on the Judiciary, to Chairman Adam B. Schiff, House Permanent Select Committee on Intelligence; Chairwoman Maxine Waters, House Committee on Financial Services; Chairman Elijah E. Cummings, House Committee on Oversight and Reform; and Chairman Eliot L. Engel, House Committee on Foreign Affairs (Aug. 22, 2019) (online at <https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/FiveChairsLetter8.22.pdf>).

² Letter from Chairman Eliot L. Engel, House Committee on Foreign Affairs, Chairman Adam B. Schiff, House Permanent Select Committee on Intelligence, and Acting Chairwoman Carolyn B. Maloney, House Committee on Oversight and Reform, to Michael Ellis, Esq., Senior Associate Counsel to the President and Deputy Legal Advisor, National Security Council (Oct. 30, 2019).

Mr. Paul W. Butler, Esq.
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terms and conditions and based on that guidance we are not in a position to appear for a deposition at this time.³

Committee staff requested that you provide a copy of the Office of Legal Counsel (OLC) opinion upon which your client's refusal to appear for a deposition, even pursuant to subpoena, is based. Committee staff also requested that you provide a copy of any written direction from the White House. On November 3, you refused to provide a copy of the OLC opinion or White House correspondence. You wrote:

I'm not authorized to provide any further information at this time other than our guidance is that the failure to permit agency counsel to attend a deposition of Mr. Ellis would not allow sufficient protection of relevant privileges and therefore render any subpoena constitutionally invalid. As an Executive branch employee Mr. Ellis is required to follow this guidance.⁴

This argument has no merit. Instead, it is the latest in a long line of baseless procedural challenges to the House of Representatives' authority to fulfill one of its most solemn responsibilities under the Constitution. The deposition rule that excludes agency counsel is intended for exactly these types of circumstances—to prevent agency officials who are directly implicated in the abuses we are investigating from trying to prevent their own employees from coming forward to tell the truth to Congress. This rationale applies with the same force to the Executive Office of the President as it does to any other Executive Branch agency.

The White House's frivolous challenge to the House deposition rules contradicts decades of precedent in which Republicans and Democrats have used exactly the same procedures to depose Executive Branch officials without agency counsel present, including some of the most senior aides to multiple previous Presidents.

These are the same deposition procedures that were supported by Acting White House Chief of Staff Mick Mulvaney when he served as a Member of the Oversight Committee and by Secretary of State Mike Pompeo when he served as a Member of the Benghazi Select Committee. In fact, some of the same Members and staff currently conducting depositions as part of the present impeachment inquiry participated directly in depositions without agency counsel during the Clinton, Bush, and Obama Administrations. There should not be a different standard now because Donald Trump is in the White House.

³ Email from Paul Butler, Counsel to Michael Ellis, to Daniel Noble, Senior Investigative Counsel, House Permanent Select Committee on Intelligence (Nov. 2, 2019).

⁴ Email from Paul Butler, Counsel to Michael Ellis, to Daniel Noble, Senior Investigative Counsel, House Permanent Select Committee on Intelligence (Nov. 3, 2019).

Mr. Paul W. Butler, Esq.
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Chairman Dan Burton

When Republican Rep. Dan Burton served as Chairman of the Committee on Government Reform, the Committee deposed 141 Clinton Administration officials without agency counsel present—including the following top advisors to President Bill Clinton:

- White House Chief of Staff Mack McLarty;
- White House Chief of Staff Erskine Bowles;
- White House Counsel Bernard Nussbaum;
- White House Counsel Jack Quinn;
- Deputy White House Counsel Bruce Lindsey;
- Deputy White House Counsel Cheryl Mills;
- Deputy White House Chief of Staff Harold Ickes;
- Chief of Staff to the Vice President Roy Neel; and
- Chief of Staff to the First Lady Margaret Williams.⁵

Chairman Henry Waxman

When Democratic Rep. Henry Waxman became Chairman, the Committee on Oversight and Government Reform continued conducting depositions without agency counsel during the George W. Bush Administration. For example, the Committee deposed five White House officials, including the White House Political Director, during investigations of the White House Office of Political Affairs and the use of private email accounts;⁶ eight State Department officials, including a U.S. Ambassador, during investigations of misconduct by the Inspector General and others;⁷ two Justice Department Officials during investigations into lobbying contacts by Jack Abramoff;⁸ and an EPA official during an investigation of EPA's decision to

⁵ Committee on Government Reform, Democratic Staff, *Congressional Oversight of the Clinton Administration* (Jan. 17, 2006) (online at <https://wayback.archive-it.org/4949/20141031200116/http://oversight-archive.waxman.house.gov/documents/20060117103516-91336.pdf>).

⁶ House Committee on Oversight and Government Reform, Deposition of Matthew Aaron Schlapp (Aug. 27, 2007); House Committee on Oversight and Government Reform, Deposition of Sara Taylor (July 27, 2007); House Committee on Oversight and Government Reform, Deposition of Mindy McLaughlin (Apr. 3, 2008); House Committee on Oversight and Government Reform, Deposition of Monica V. Kladakis (Apr. 14, 2008); House Committee on Oversight and Government Reform, Deposition of Jennifer Farley (Jan. 9, 2008).

⁷ House Committee on Oversight and Government Reform, Deposition of Mark Duda, Assistant Inspector General for Audits, Department of State (Sept. 26, 2007); House Committee on Oversight and Government Reform, Deposition of Erich Hart (Oct. 3, 2007); House Committee on Oversight and Government Reform, Deposition of Gail Voshell (Oct. 5, 2007); House Committee on Oversight and Government Reform, Deposition of Terry Heide, Director of Congressional and Public Affairs for the Office of the Inspector General, Department of State (Nov. 8, 2007); House Committee on Oversight and Government Reform, Deposition of Robert Peterson, Assistant Inspector General, Department of State (Sept. 27, 2007); House Committee on Oversight and Government Reform, Deposition of William Edward Todd, Deputy Inspector General, Department of State (Oct. 12, 2007); House Committee on Oversight and Government Reform, Deposition of Elizabeth Koniuszkow, Department of State (Nov. 2, 2007); House Committee on Oversight and Government Reform, Deposition of Ambassador John L. Withers, Department of State (Aug. 20, 2008).

⁸ House Committee on Oversight and Government Reform, Deposition of Susan Johnson (Oct. 4, 2007);

Mr. Paul W. Butler, Esq.
Page 4

deny California's request to regulate greenhouse gases.⁹

Chairman Darrell Issa

When Rep. Darrell Issa became Chairman, the Oversight Committee continued conducting depositions without agency counsel present during the Obama Administration. For example, during the investigation of the attacks in Benghazi, the Committee conducted depositions of Ambassador Thomas Pickering and a diplomatic security agent, both of which were personally attended by Rep. Jim Jordan.¹⁰ The Committee also conducted a deposition of John C. Beale, a former senior official at the Office of Air and Radiation at the EPA.¹¹

Chairman Jason Chaffetz

When Rep. Jason Chaffetz became Chairman, the Oversight Committee continued conducting depositions during the Obama Administration without agency counsel present. For example, the Committee conducted a deposition of Dr. William Thompson, a senior scientist at the Centers for Disease Control and Prevention, during an investigation of the safety of vaccines,¹² as well as a deposition of Stephen Siebert, a program manager at the State Department, during an investigation of embassy construction and security.¹³

Chairman Trey Gowdy

When Rep. Trey Gowdy became Chairman, the Oversight Committee continued conducting depositions without agency counsel present during the Obama Administration. For example, the Committee conducted a deposition of Joseph Maher, the Principal Deputy General Counsel for the Department of Homeland Security, during an investigation of the Department's policies for addressing whistleblower investigations by the Office of Special Counsel.¹⁴

Benghazi Select Committee

House Republicans felt so strongly during the Obama Administration about conducting

House Committee on Oversight and Government Reform, Deposition of Tracy Henke (June 20, 2007).

⁹ House Committee on Oversight and Government Reform, Deposition of Jason Burnett, Associate Deputy Administrator, Environmental Protection Agency (May 15, 2008).

¹⁰ House Committee on Oversight and Government Reform, Deposition of Ambassador Thomas R. Pickering, Department of State (June 4, 2013); House Committee on Oversight and Government Reform, Deposition of Diplomatic Security Agent #3, Department of State (Oct. 8, 2013).

¹¹ House Committee on Oversight and Government Reform, Deposition of John Beale (Dec. 19, 2013).

¹² House Committee on Oversight and Government Reform, Deposition of William W. Thompson, Centers for Disease Control and Prevention, Department of Health and Human Services (Nov. 22, 2016).

¹³ House Committee on Oversight and Government Reform, Deposition of Stephen W. Siebert, Department of State (May 26, 2016).

¹⁴ House Committee on Oversight and Government Reform, Deposition of Joseph P. Maher, Department of Homeland Security (Sept. 25, 2018).

Mr. Paul W. Butler, Esq.
Page 5

depositions of Executive Branch officials without agency counsel present that they extended this authority to the Benghazi Select Committee, which was also chaired by Rep. Gowdy. On May 8, 2014, the House passed a resolution establishing the Benghazi Select Committee, and the accompanying regulations issued by the Rules Committee provided: “No one may be present at depositions except members, committee staff designated by the chair or ranking minority member, an official reporter, the witness, and the witness's counsel. Observers or counsel for other persons, or for agencies under investigation, may not attend.”¹⁵

Expansion of Deposition Authority to Other Committees

The following year, also during the Obama Administration, House Republicans expanded this deposition authority to additional committees. In January 2015, the House voted to approve H. Res. 5, which, along with the accompanying regulations from the Committee on Rules, authorized the Committee on Financial Services, the Committee on Energy and Commerce, the Committee on Ways and Means, and the Committee on Science, Space, and Technology to conduct depositions without agency counsel present.¹⁶

Pursuant to this authority, under Chairman Kevin Brady, the Committee on Ways and Means conducted a deposition of David Fisher, the Chief Risk Officer of the Internal Revenue Service, without allowing agency counsel to attend.¹⁷ The Committee later reported: “The answers this witness provided in a compelled deposition—without Treasury counsel present—provided more insight into the Administration’s decision-making process than did any other individual.”¹⁸

Similarly, under Chairman Jeb Hensarling, the Committee on Financial Services conducted depositions of 12 witnesses from the Consumer Financial Protection Bureau without agency counsel present.¹⁹

¹⁵ Deposition Procedures for the Select Committee on the Events Surrounding the 2012 Terrorist Attack in Benghazi, Congressional Record, H4056 (May 9, 2014) (online at www.congress.gov/113/crec/2014/05/09/CREC-2014-05-09-pt1-PgH4056.pdf).

¹⁶ H. Res. 5, 114th Cong. (online at www.congress.gov/bill/114th-congress/house-resolution/5).

¹⁷ House Committee on Ways and Means, Deposition of David Fisher, Internal Revenue Service (May 11, 2016).

¹⁸ House Committee on Energy and Commerce and House Committee on Ways and Means, *Joint Investigative Report into the Source of Funding for the ACA’s Cost Sharing Reduction Program* (July 2016) (online at https://gop-waysandmeans.house.gov/wp-content/uploads/2016/07/20160707Joint_Congressional_Investigative_Report-2.pdf).

¹⁹ House Committee on Financial Services, Deposition of James Keegan, Consumer Financial Protection Bureau (May 31, 2017); House Committee on Financial Services, Deposition of Melissa Heist, Consumer Financial Protection Bureau (June 6, 2017); House Committee on Financial Services, Deposition of J. Anthony Ogden, Consumer Financial Protection Bureau (June 14, 2017); House Committee on Financial Services, Deposition of Brian Patrick O’Brien, Consumer Financial Protection Bureau (June 27-28, 2017); House Committee on Financial Services, Deposition of Jacqueline Becker, Consumer Financial Protection Bureau (July 11, 2017); House Committee on Financial Services, Deposition of Julia Lynn Szybala, Consumer Financial Protection Bureau (July 17-18, 2017 and Oct. 11, 2017); House Committee on Financial Services, Deposition of Greg Evans, Consumer

Mr. Paul W. Butler, Esq.
Page 6

Authority for Deposition Rule

The Constitution authorizes Congress to “determine the Rules of its Proceedings.”²⁰ The regulations that govern House depositions state:

Witnesses may be accompanied at a deposition by personal, nongovernmental counsel to advise them of their rights. Only members, Committee staff designated by the chair or ranking minority member, an official reporter, the witness, and the witness’s counsel are permitted to attend. Observers or counsel for other persons, including counsel for government agencies, may not attend.²¹

The basis for this process is straightforward: it ensures that the Committees are able to depose witnesses in furtherance of our investigation without having in the room representatives of the agency or office under investigation. The rule nevertheless protects the rights of witnesses by allowing them to be accompanied in the deposition by personal counsel, and you will be permitted to accompany Mr. Ellis in his deposition on Monday.

Your emails do not indicate that the President has asserted any valid constitutional privilege to direct Mr. Ellis to defy this subpoena. To the extent the White House believes that an issue could be raised at the deposition that may implicate a valid privilege, the White House may seek to assert that privilege with the Committee. To date, the White House has not done so.

Instead, your emails assert only that Mr. Ellis plans to comply with the White House’s order not to participate in the deposition, despite the failure of the President to assert any valid privilege. This is not a valid basis to defy the Committee’s subpoena.

Financial Protection Bureau (July 21, 2017); House Committee on Financial Services, Deposition of Anne Harden Tindall, Consumer Financial Protection Bureau (July 27-28, 2017); House Committee on Financial Services, Deposition of Catherine D. Galicia, Consumer Financial Protection Bureau (July 31, 2017); House Committee on Financial Services, Deposition of Mary E. McLeod, Consumer Financial Protection Bureau (Aug. 3, 2017 and Oct. 18, 2017); House Committee on Financial Services, Deposition of Stephen Bressler, Consumer Financial Protection Bureau (Oct. 23, 2017 and Oct. 25, 2017); House Committee on Financial Services, Deposition of Stephen Bressler, Consumer Financial Protection Bureau (Nov. 6, 2017 and Nov. 7, 2017).

²⁰ U.S. Const., Art. I, sec. 5, cl. 2.

²¹ 116th Congress Regulations for Use of Deposition Authority, Congressional Record, H1216 (Jan. 25, 2019) (online at www.congress.gov/116/crec/2019/01/25/CREC-2019-01-25-pt1-PgH1216-2.pdf).

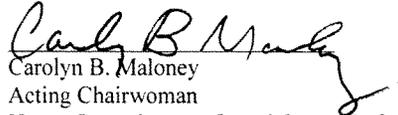
Mr. Paul W. Butler, Esq.
Page 7

For all of the reasons set forth above, the enclosed subpoena compels Mr. Ellis to appear tomorrow for his deposition. Please contact staff for the Permanent Select Committee on Intelligence at (202) 225-7690 with any questions.

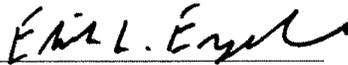
Sincerely,



Adam B. Schiff
Chairman
House Permanent Select Committee
on Intelligence



Carolyn B. Maloney
Acting Chairwoman
House Committee on Oversight and Reform



Eliot L. Engel
Chairman
House Committee on Foreign Affairs

Enclosure

cc: The Honorable Devin Nunes, Ranking Member
House Permanent Select Committee on Intelligence

The Honorable Jim Jordan, Ranking Member
House Committee on Oversight and Reform

The Honorable Michael McCaul, Ranking Member
House Committee on Foreign Affairs

Congress of the United States
Washington, DC 20515

November 1, 2019

Mr. John Eisenberg, Esq.
Deputy Counsel to the President for National Security Affairs and
Legal Advisor to the National Security Council
Eisenhower Executive Office Building
Washington, D.C. 20504

Dear Mr. Eisenberg:

Pursuant to the House of Representatives' impeachment inquiry, we are hereby transmitting a subpoena that compels you to appear at a deposition on **November 4, 2019, at 9:00 a.m. at The Capitol, HVC-304.**

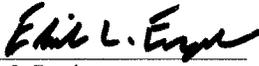
This deposition will be conducted jointly by the Permanent Select Committee on Intelligence, the Committee on Foreign Affairs, and the Committee on Oversight and Reform. The deposition transcript shall be part of the impeachment inquiry and shared among the Committees. Your failure or refusal to appear at the deposition, including at the direction or behest of the President or the White House, shall constitute evidence of obstruction of the House's impeachment inquiry and may be used as an adverse inference against the President.

On October 30, 2019, the Committees sent a letter to you requesting that you voluntarily appear for a deposition on November 4, 2019. We did not receive any response. The Committees, therefore, have no choice but to issue a subpoena compelling your mandatory appearance.

If you have any questions, please contact staff for the Permanent Select Committee on Intelligence at (202) 225-7690.

Mr. John Eisenberg, Esq.
Page 2

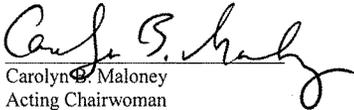
Sincerely,



Eliot L. Engel
Chairman
House Committee on Foreign Affairs



Adam B. Schiff
Chairman
House Permanent Select Committee
on Intelligence



Carolyn B. Maloney
Acting Chairwoman
House Committee on Oversight and Reform

Enclosure

cc: The Honorable Michael McCaul, Ranking Member
House Committee on Foreign Affairs

The Honorable Devin Nunes, Ranking Member
House Permanent Select Committee on Intelligence

The Honorable Jim Jordan, Ranking Member
House Committee on Oversight and Reform

Congress of the United States
Washington, DC 20515

October 30, 2019

Mr. John Eisenberg, Esq.
Deputy Counsel to the President for National Security Affairs and
Legal Advisor to the National Security Council
Eisenhower Executive Office Building
Washington, D.C. 20504

Dear Mr. Eisenberg:

Pursuant to the House of Representatives' impeachment inquiry, we write to request your appearance at a deposition on **November 4, 2019, at 9:30 a.m. at The Capitol, HVC-304.**

This deposition will be conducted jointly by the Permanent Select Committee on Intelligence, the Committee on Foreign Affairs, and the Committee on Oversight and Reform. The deposition transcript shall be part of the impeachment inquiry and shared among the Committees. Your failure or refusal to appear at the deposition, including at the direction or behest of the President or the White House, shall constitute evidence of obstruction of the House's impeachment inquiry and may be used as an adverse inference against the President.

The Committees are investigating the extent to which President Trump jeopardized U.S. national security by pressing Ukraine to interfere with our 2020 election and by withholding a White House meeting with the President of Ukraine and military assistance provided by Congress to help Ukraine counter Russian aggression, as well as any efforts to cover up these matters.

Based upon public reporting and evidence gathered as part of the impeachment inquiry, we believe you have information relevant to these matters.

If you have any questions, please contact staff for the Permanent Select Committee on Intelligence at (202) 225-7690.

Mr. John Eisenberg, Esq.
Page 2

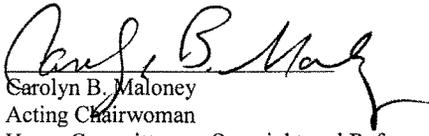
Sincerely,



Eliot L. Engel
Chairman
House Committee on Foreign Affairs



Adam B. Schiff
Chairman
House Permanent Select Committee
on Intelligence



Carolyn B. Maloney
Acting Chairwoman
House Committee on Oversight and Reform

Enclosure

cc: The Honorable Michael McCaul, Ranking Member
House Committee on Foreign Affairs

The Honorable Devin Nunes, Ranking Member
House Permanent Select Committee on Intelligence

The Honorable Jim Jordan, Ranking Member
House Committee on Oversight and Reform

Congress of the United States
Washington, DC 20515

October 30, 2019

Mr. Michael Ellis, Esq.
Senior Associate Counsel to the President and
Deputy Legal Advisor to the National Security Council
Eisenhower Executive Office Building
Washington, D.C. 20504

Dear Mr. Ellis:

Pursuant to the House of Representatives' impeachment inquiry, we write to request your appearance at a deposition on **November 4, 2019, at 9:30 a.m. at The Capitol, HVC-304.**

This deposition will be conducted jointly by the Permanent Select Committee on Intelligence, the Committee on Foreign Affairs, and the Committee on Oversight and Reform. The deposition transcript shall be part of the impeachment inquiry and shared among the Committees. Your failure or refusal to appear at the deposition, including at the direction or behest of the President or the White House, shall constitute evidence of obstruction of the House's impeachment inquiry and may be used as an adverse inference against the President.

The Committees are investigating the extent to which President Trump jeopardized U.S. national security by pressing Ukraine to interfere with our 2020 election and by withholding a White House meeting with the President of Ukraine and military assistance provided by Congress to help Ukraine counter Russian aggression, as well as any efforts to cover up these matters.

Based upon public reporting and evidence gathered as part of the impeachment inquiry, we believe you have information relevant to these matters.

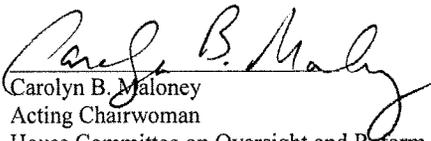
If you have any questions, please contact staff for the Permanent Select Committee on Intelligence at (202) 225-7690.

Mr. Michael Ellis, Esq.
Page 2

Sincerely,


Eliot L. Engel
Chairman
House Committee on Foreign Affairs


Adam B. Schiff
Chairman
House Permanent Select Committee
on Intelligence


Carolyn B. Maloney
Acting Chairwoman
House Committee on Oversight and Reform

Enclosure

cc: The Honorable Michael McCaul, Ranking Member
House Committee on Foreign Affairs

The Honorable Devin Nunes, Ranking Member
House Permanent Select Committee on Intelligence

The Honorable Jim Jordan, Ranking Member
House Committee on Oversight and Reform

Congress of the United States
Washington, DC 20515

November 5, 2019

The Honorable John Michael “Mick” Mulvaney
Acting Chief of Staff
The White House
1600 Pennsylvania Avenue N.W.
Washington, D.C. 20500

Dear Mr. Mulvaney:

Pursuant to the House of Representatives’ impeachment inquiry, we hereby write to request your appearance at a deposition on **November 8, 2019 at 9:00 a.m. at The Capitol, HVC-304.**

This deposition will be conducted jointly by the Permanent Select Committee on Intelligence under the Rules of the House of Representatives in exercise of its oversight and legislative jurisdiction and after consultation with the Committee on Foreign Affairs and the Committee on Oversight and Reform. The deposition transcript shall be collected as part of the House’s impeachment inquiry and shared among the Committees, as well as with the Committee on the Judiciary as appropriate.¹ Your failure or refusal to appear at the deposition, including at the direction or behest of the President, shall constitute further evidence of obstruction of the House’s impeachment inquiry and may be used as an adverse inference against you and the President.

The Committees are investigating the extent to which President Donald J. Trump jeopardized U.S. national security by pressing Ukraine to interfere with our 2020 election and by withholding a White House meeting with the President of Ukraine and security assistance provided by Congress to help Ukraine counter Russian aggression, as well as any efforts to cover up these matters.

Based on evidence gathered in the impeachment inquiry and public reporting, we believe that you possess substantial first-hand knowledge and information relevant to the House’s impeachment inquiry. Specifically, the investigation has revealed that you may have been directly involved in an effort orchestrated by President Trump, his personal agent, Rudolph Giuliani, and others to withhold a coveted White House meeting and nearly \$400 million in security assistance in order to pressure Ukrainian President Volodymyr Zelensky to pursue investigations that would benefit President Trump’s personal political interests, and jeopardized our national security in attempting to do so.

¹ See Letter from Chairman Jerrold Nadler, House Committee on the Judiciary, to Chairman Adam B. Schiff, House Permanent Select Committee on Intelligence; Chairwoman Maxine Waters, House Committee on Financial Services; Chairman Elijah E. Cummings, House Committee on Oversight and Reform; and Chairman Eliot L. Engel, House Committee on Foreign Affairs (Aug. 22, 2019) (online at <https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/FiveChairsLetter8.22.pdf>).

The Hon. John Michael “Mick” Mulvaney
Page 2

Evidence gathered in the impeachment inquiry and public reporting suggest that you may have coordinated with U.S. Ambassador to the European Union Gordon Sondland, Mr. Giuliani, and others to carry out President Trump’s scheme to condition a White House meeting with President Zelensky on the Ukrainians’ pursuit of investigations of the Bidens, Burisma Holdings, a natural gas company on whose board former Vice President Joseph R. Biden Jr.’s son, Hunter Biden, once sat, and purported Ukrainian interference in the 2016 U.S. presidential election.

For example, it has been publicly reported that during a July 10, 2019, meeting at the White House, Ambassador Sondland “told Ukraine officials ... that Kyiv needed to deliver specific investigations in order to get a hoped-for meeting with Mr. Trump.”² Following that meeting, former National Security Advisor John R. Bolton told a National Security Council (NSC) staffer “to notify the chief lawyer for the National Security Council about a rogue effort by Mr. Sondland, Mr. Giuliani, and Mick Mulvaney” to pressure Ukraine for political help.³

Ambassador Bolton, who appears to have believed that you were directly involved in the President’s scheme, reportedly instructed the NSC staffer to tell the NSC lawyers, “I am not part of whatever drug deal Sondland and Mulvaney are cooking up.”⁴ The “drug deal” appears to be a reference to the scheme to pressure Ukraine to pursue the investigations for the political benefit of President Trump.

In addition, the evidence and public reporting suggest that you played a central role in President Trump’s attempt to coerce Ukraine into launching his desired political investigations by withholding nearly \$400 million in vital security assistance from Ukraine that had been appropriated by Congress and approved by the national security interagency for disbursement. According to multiple press reports, at some point in July 2019, President Trump ordered you to freeze security assistance to Ukraine, and you reportedly conveyed the President’s order “through the budget office to the Pentagon and the State Department, which were told only that the administration was looking at whether the spending was necessary.”⁵

Moreover, at a White House press briefing on October 17, 2019, you admitted publicly that President Trump ordered the hold on Ukraine security assistance to further the President’s own personal, political interests, rather than the national interest. Specifically, in discussing the reasons President Trump ordered the hold, you stated, “Did [President Trump] also

² *Gordon Sondland’s Testimony About Ukraine Investigations Under Scrutiny*, Wall Street Journal (Oct. 29, 2019) (online at www.wsj.com/articles/gordon-sondlands-testimony-about-ukraine-investigations-under-scrutiny-11572378583).

³ *Bolton Objected to Ukraine Pressure Campaign, Calling Giuliani ‘a Hand Grenade,’* New York Times (Oct. 14, 2019) (online at www.nytimes.com/2019/10/14/us/politics/bolton-giuliani-fiona-hill-testimony.html)

⁴ *Id.*

⁵ *Trump Said to Have Frozen Aid to Ukraine Before Call with Its Leader*, New York Times (Sept. 23, 2019) (online at www.nytimes.com/2019/09/23/us/politics/trump-un-biden-ukraine.html).

The Hon. John Michael “Mick” Mulvaney
Page 3

mention to me in pass [sic] the corruption related to the DNC server? Absolutely. No question about that. But that’s it. And that’s why we held up the money.”⁶

President Trump’s desire for Ukraine to investigate the “DNC server”—which President Trump specifically demanded President Zelensky pursue during their July 25, 2019, phone call—appears to be an allusion to a thoroughly debunked conspiracy theory that the Democratic National Committee’s server that was hacked by Russia during the 2016 U.S. election was actually hacked by Ukraine in order to frame Russia and was thereafter secreted to Ukraine.⁷ After referencing the baseless DNC server conspiracy theory, you then engaged in the following colloquy with a reporter:

Q: So the demand for an investigation into the Democrats was part of the reason that he ordered to withhold funding to Ukraine?

A: The look back to what happened in 2016—

Q: The investigation into Democrats.

A: —certainly was part of the thing that he was worried about in corruption with that nation. And that is absolutely appropriate.

Q: And withholding the funding?

A: Yeah. Which ultimately, then, flowed. By the way, there was a report that we were worried that the money wouldn’t—that if we didn’t pay out the money, it would be illegal, okay? It would be unlawful. That is one of those things that has the little shred of truth in it, that makes it look a lot worse than it really is.

...

Q: But to be clear, what you just described is a quid pro quo. It is: Funding will not flow unless the investigation into the Democratic server happens as well.

A: We do that all the time with foreign policy. ... And I have news for everybody: Get over it. There’s going to be political influence in foreign policy.⁸

⁶ The White House, *Press Briefing by Acting Chief of Staff Mick Mulvaney* (Oct. 17, 2019) (online at www.whitehouse.gov/briefings-statements/press-briefing-acting-chief-staff-mick-mulvaney/).

⁷ *President Trump’s Alternate Reality on Ukraine*, Washington Post (Oct. 29, 2019) (online at www.washingtonpost.com/politics/2019/10/29/president-trumps-alternative-reality-ukraine/).

⁸ The White House, *Press Briefing by Acting Chief of Staff Mick Mulvaney* (Oct. 17, 2019) (online at www.whitehouse.gov/briefings-statements/press-briefing-acting-chief-staff-mick-mulvaney/).

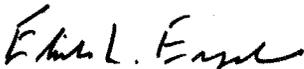
The Hon. John Michael “Mick” Mulvaney
Page 4

Despite your subsequent attempts to walk-back this clear admission,⁹ your statements to the American public on October 17 were nothing less than a televised confession that President Trump’s order to freeze Ukraine security assistance was explicitly linked to Ukraine pursuing investigations as part of an effort to bolster the President’s 2020 re-election campaign.

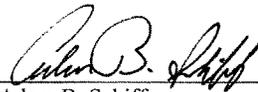
Accordingly, we hereby request your appearance at a deposition on November 8, 2019, at 9:00 a.m. Because the House deposition regulations do not permit agency counsel to participate in depositions, please have your personal counsel contact us to arrange for your appearance. As you know from your previous service in the House of Representatives, both Republican and Democratic-led committees have conducted depositions without agency counsel for decades with high-level White House aides—including White House Chiefs of Staff.¹⁰

If you have any questions, please contact staff for the Permanent Select Committee on Intelligence at (202) 225-7690.

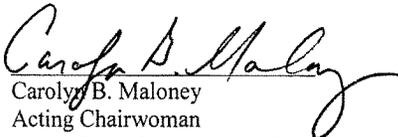
Sincerely,



Eliot L. Engel
Chairman
House Committee on Foreign Affairs



Adam B. Schiff
Chairman
House Permanent Select Committee
on Intelligence



Carolyn B. Maloney
Acting Chairwoman
House Committee on Oversight and Reform

Enclosure

⁹ See, e.g., *Read Mulvaney’s Conflicting Statements on Quid Pro Quo*, New York Times (Oct. 17, 2019) (quoting statement released by the White House from Acting Chief of Staff Mick Mulvaney) (online at www.nytimes.com/2019/10/17/us/politics/mulvaney-transcript-quid-pro-quo.html).

¹⁰ See House Committee on Oversight and Reform, *Congressional Depositions in the House of Representatives: Longstanding Republican and Democratic Practice of Excluding Agency Counsel* (Nov. 5, 2019) (online at https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Committee%20Depositions%20in%20the%20House%20of%20Representatives_Longstanding%20Republican%20and%20Democratic%20Practice%20of%20Excluding%20Agency%20Counsel.pdf) (describing depositions of previous White House Chiefs of Staff Mack McLarty and Erskine Bowles, among other White House officials).

The Hon. John Michael "Mick" Mulvaney
Page 5

cc: The Honorable Michael McCaul, Ranking Member
House Committee on Foreign Affairs

The Honorable Devin Nunes, Ranking Member
House Permanent Select Committee on Intelligence

The Honorable Jim Jordan, Ranking Member
House Committee on Oversight and Reform

Congress of the United States
Washington, DC 20515

October 24, 2019

Robert B. Blair
Assistant to the President and Senior Adviser to the Chief of Staff
The White House
Washington, DC 20504

Dear Mr. Blair:

Pursuant to the House of Representatives' impeachment inquiry, we write to request your appearance at a deposition on **November 1, 2019, at 9:30 a.m. at The Capitol, HVC-304.**

This deposition will be conducted jointly by the Permanent Select Committee on Intelligence, the Committee on Foreign Affairs, and the Committee on Oversight and Reform. The deposition transcript shall be part of the impeachment inquiry and shared among the Committees. Your failure or refusal to appear at the deposition, including at the direction or behest of the President or the White House, shall constitute evidence of obstruction of the House's impeachment inquiry and may be used as an adverse inference against the President.

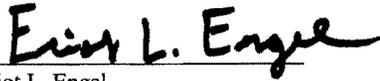
The Committees are investigating the extent to which President Trump jeopardized U.S. national security by pressing Ukraine to interfere with our 2020 election and by withholding a White House meeting with the President of Ukraine and military assistance provided by Congress to help Ukraine counter Russian aggression, as well as any efforts to cover up these matters.

Based upon public reporting and evidence gathered as part of the impeachment inquiry, we believe you may have information relevant to these matters.

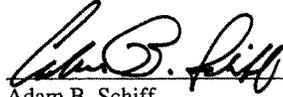
If you have any questions, please contact staff for the Permanent Select Committee on Intelligence at (202) 225-7690.

Mr. Robert B. Blair
Page 2

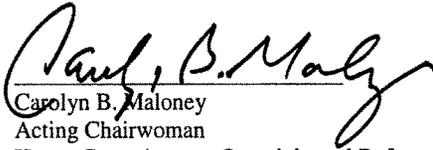
Sincerely,



Eliot L. Engel
Chairman
House Committee on Foreign Affairs



Adam B. Schiff
Chairman
House Permanent Select Committee
on Intelligence



Carolyn B. Maloney
Acting Chairwoman
House Committee on Oversight and Reform

Enclosure

cc: The Honorable Michael McCaul, Ranking Member
House Committee on Foreign Affairs

The Honorable Devin Nunes, Ranking Member
House Permanent Select Committee on Intelligence

The Honorable Jim Jordan, Ranking Member
House Committee on Oversight and Reform

Congress of the United States
Washington, DC 20515

October 11, 2019

The Honorable Russell T. Vought
Acting Director
Office of Management and Budget
725 17th Street, N.W.
Washington, DC 20503

Dear Acting Director Vought:

Pursuant to the House of Representatives' impeachment inquiry, we write to request your appearance at a deposition on **October 25, 2019, at 9:30 a.m. at The Capitol, HVC-304.**

This deposition will be conducted jointly by the Permanent Select Committee on Intelligence, the Committee on Foreign Affairs, and the Committee on Oversight and Reform. The deposition transcript shall be part of the impeachment inquiry and shared among the Committees. Your failure or refusal to appear at the deposition, including at the direction or behest of the President or the White House, shall constitute evidence of obstruction of the House's impeachment inquiry and may be used as an adverse inference against the President.

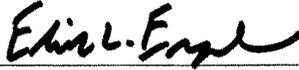
The Committees are investigating the extent to which President Trump jeopardized U.S. national security by pressing Ukraine to interfere with our 2020 election and by withholding a White House meeting with the President of Ukraine and military assistance provided by Congress to help Ukraine counter Russian aggression, as well as any efforts to cover up these matters.

Based upon public reporting and evidence gathered as part of the impeachment inquiry, we believe you may have information relevant to these matters.

If you have any questions, please contact staff for the Permanent Select Committee on Intelligence at (202) 225-7690.

The Honorable Russell T. Vought
Page 2

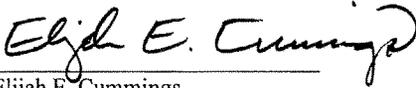
Sincerely,



Eliot L. Engel
Eliot L. Engel
Chairman
House Committee on Foreign Affairs



Adam B. Schiff
Adam B. Schiff
Chairman
House Permanent Select Committee
on Intelligence



Elijah E. Cummings
Elijah E. Cummings
Chairman
House Committee on Oversight and Reform

Enclosure

cc: The Honorable Michael McCaul, Ranking Member
House Committee on Foreign Affairs

The Honorable Devin Nunes, Ranking Member
House Permanent Select Committee on Intelligence

The Honorable Jim Jordan, Ranking Member
House Committee on Oversight and Reform

Congress of the United States
Washington, DC 20515

November 3, 2019

Whitney C. Ellerman
Ellerman Enzinna PLLC
1050 30th Street, N.W.
Washington, D.C. 20007

Dear Mr. Ellerman:

Pursuant to the House of Representatives' impeachment inquiry, we are hereby transmitting a subpoena that compels your client, Robert B. Blair, to appear at a deposition on **Monday, November 4, 2019, at 9:00 a.m. at The Capitol, HVC-304.**

This subpoena is being issued by the Permanent Select Committee on Intelligence under the Rules of the House of Representatives in exercise of its oversight and legislative jurisdiction and after consultation with the Committee on Foreign Affairs and the Committee on Oversight and Reform. The deposition transcript shall be collected as part of the House's impeachment inquiry and shared among the Committees, as well as with the Committee on the Judiciary as appropriate.¹ Mr. Blair's failure or refusal to comply with the subpoena, including at the direction or behest of the President or the White House, shall constitute further evidence of obstruction of the House's impeachment inquiry and may be used as an adverse inference against Mr. Blair and the President. Moreover, Mr. Blair's failure to appear shall constitute evidence that may be used against him in a contempt proceeding.

Baseless White House Order to Block Witness Testimony

On October 24, 2019, the Committees sent a letter requesting that Mr. Blair appear voluntarily for a deposition, as we have with many other witnesses.² On November 2, 2019, you informed us that Mr. Blair would not appear because the White House now takes issue with agency counsel being excluded from congressional depositions—a procedure that is enshrined in House Rules and has been used by both Republicans and Democrats for decades. You wrote:

Mr. Blair has been directed by the White House not to appear and testify at the Committees' proposed deposition, based on the Department of Justice's advice that the

¹ See Letter from Chairman Jerrold Nadler, House Committee on the Judiciary, to Chairman Adam B. Schiff, House Permanent Select Committee on Intelligence; Chairwoman Maxine Waters, House Committee on Financial Services; Chairman Elijah E. Cummings, House Committee on Oversight and Reform; and Chairman Eliot L. Engel, House Committee on Foreign Affairs (Aug. 22, 2019) (online at <https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/FiveChairsLetter8.22.pdf>).

² Letter from Chairman Eliot L. Engel, House Committee on Foreign Affairs, Chairman Adam B. Schiff, House Permanent Select Committee on Intelligence, and Acting Chairwoman Carolyn B. Maloney, House Committee on Oversight and Reform, to Robert B. Blair, Assistant to the President and Senior Advisor to the Chief of Staff, The White House (Oct. 24, 2019).

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Committees may not validly require an executive branch witness to appear at such a deposition without the assistance of agency counsel. In light of the clear direction he has been given by the Executive Branch, Mr. Blair must respectfully decline to testify, as you propose, on Monday, November 4, 2019.³

This argument has no merit. Instead, it is the latest in a long line of baseless procedural challenges to the House of Representatives' authority to fulfill one of its most solemn responsibilities under the Constitution. The deposition rule that excludes agency counsel is intended for exactly these types of circumstances—to prevent agency officials who are directly implicated in the abuses we are investigating from trying to prevent their own employees from coming forward to tell the truth to Congress. This rationale applies with the same force to the Executive Office of the President as it does to any other Executive Branch agency.

The White House's frivolous challenge to the House deposition rules contradicts decades of precedent in which Republicans and Democrats have used exactly the same procedures to depose Executive Branch officials without agency counsel present, including some of the most senior aides to multiple previous Presidents.

These are the same deposition procedures that were supported by Acting White House Chief of Staff Mick Mulvaney when he served as a Member of the Oversight Committee and by Secretary of State Mike Pompeo when he served as a Member of the Benghazi Select Committee. In fact, some of the same Members and staff currently conducting depositions as part of the present impeachment inquiry participated directly in depositions without agency counsel during the Clinton, Bush, and Obama Administrations. There should not be a different standard now because Donald Trump is in the White House.

Chairman Dan Burton

When Republican Rep. Dan Burton served as Chairman of the Committee on Government Reform, the Committee deposed 141 Clinton Administration officials without agency counsel present—including the following top advisors to President Bill Clinton:

- White House Chief of Staff Mack McLarty;
- White House Chief of Staff Erskine Bowles;
- White House Counsel Bernard Nussbaum;
- White House Counsel Jack Quinn;
- Deputy White House Counsel Bruce Lindsey;
- Deputy White House Counsel Cheryl Mills;
- Deputy White House Chief of Staff Harold Ickes;
- Chief of Staff to the Vice President Roy Neel; and
- Chief of Staff to the First Lady Margaret Williams.⁴

³ Letter from Whitney Ellerman, Counsel to Robert B. Blair, to Chairman Eliot L. Engel, House Committee on Foreign Affairs, Chairman Adam B. Schiff, House Permanent Select Committee on Intelligence, and Acting Chairwoman Carolyn B. Maloney, House Committee on Oversight and Reform (Nov. 2, 2019).

⁴ Committee on Government Reform, Democratic Staff, *Congressional Oversight of the Clinton*

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Chairman Henry Waxman

When Democratic Rep. Henry Waxman became Chairman, the Committee on Oversight and Government Reform continued conducting depositions without agency counsel during the George W. Bush Administration. For example, the Committee deposed five White House officials, including the White House Political Director, during investigations of the White House Office of Political Affairs and the use of private email accounts;⁵ eight State Department officials, including a U.S. Ambassador, during investigations of misconduct by the Inspector General and others;⁶ two Justice Department Officials during investigations into lobbying contacts by Jack Abramoff;⁷ and an EPA official during an investigation of EPA's decision to deny California's request to regulate greenhouse gases.⁸

Chairman Darrell Issa

When Rep. Darrell Issa became Chairman, the Oversight Committee continued conducting depositions without agency counsel present during the Obama Administration. For example, during the investigation of the attacks in Benghazi, the Committee conducted depositions of Ambassador Thomas Pickering and a diplomatic security agent, both of which were personally attended by Rep. Jim Jordan.⁹ The Committee also conducted a deposition of John C. Beale, a former senior official at the Office of Air and Radiation at the EPA.¹⁰

Administration (Jan. 17, 2006) (online at <https://wayback.archive-it.org/4949/20141031200116/http://oversight-archive.waxman.house.gov/documents/20060117103516-91336.pdf>).

⁵ House Committee on Oversight and Government Reform, Deposition of Matthew Aaron Schlapp (Aug. 27, 2007); House Committee on Oversight and Government Reform, Deposition of Sara Taylor (July 27, 2007); House Committee on Oversight and Government Reform, Deposition of Mindy McLaughlin (Apr. 3, 2008); House Committee on Oversight and Government Reform, Deposition of Monica V. Kladakis (Apr. 14, 2008); House Committee on Oversight and Government Reform, Deposition of Jennifer Farley (Jan. 9, 2008).

⁶ House Committee on Oversight and Government Reform, Deposition of Mark Duda, Assistant Inspector General for Audits, Department of State (Sept. 26, 2007); House Committee on Oversight and Government Reform, Deposition of Erich Hart (Oct. 3, 2007); House Committee on Oversight and Government Reform, Deposition of Gail Voshell (Oct. 5, 2007); House Committee on Oversight and Government Reform, Deposition of Terry Heide, Director of Congressional and Public Affairs for the Office of the Inspector General, Department of State (Nov. 8, 2007); House Committee on Oversight and Government Reform, Deposition of Robert Peterson, Assistant Inspector General, Department of State (Sept. 27, 2007); House Committee on Oversight and Government Reform, Deposition of William Edward Todd, Deputy Inspector General, Department of State (Oct. 12, 2007); House Committee on Oversight and Government Reform, Deposition of Elizabeth Koniuszkow, Department of State (Nov. 2, 2007); House Committee on Oversight and Government Reform, Deposition of Ambassador John L. Withers, Department of State (Aug. 20, 2008).

⁷ House Committee on Oversight and Government Reform, Deposition of Susan Johnson (Oct. 4, 2007); House Committee on Oversight and Government Reform, Deposition of Tracy Henke (June 20, 2007).

⁸ House Committee on Oversight and Government Reform, Deposition of Jason Burnett, Associate Deputy Administrator, Environmental Protection Agency (May 15, 2008).

⁹ House Committee on Oversight and Government Reform, Deposition of Ambassador Thomas R. Pickering, Department of State (June 4, 2013); House Committee on Oversight and Government Reform, Deposition of Diplomatic Security Agent #3, Department of State (Oct. 8, 2013).

¹⁰ House Committee on Oversight and Government Reform, Deposition of John Beale (Dec. 19, 2013).

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Chairman Jason Chaffetz

When Rep. Jason Chaffetz became Chairman, the Oversight Committee continued conducting depositions during the Obama Administration without agency counsel present. For example, the Committee conducted a deposition of Dr. William Thompson, a senior scientist at the Centers for Disease Control and Prevention, during an investigation of the safety of vaccines,¹¹ as well as a deposition of Stephen Siebert, a program manager at the State Department, during an investigation of embassy construction and security.¹²

Chairman Trey Gowdy

When Rep. Trey Gowdy became Chairman, the Oversight Committee continued conducting depositions without agency counsel present during the Obama Administration. For example, the Committee conducted a deposition of Joseph Maher, the Principal Deputy General Counsel for the Department of Homeland Security, during an investigation of the Department's policies for addressing whistleblower investigations by the Office of Special Counsel.¹³

Benghazi Select Committee

House Republicans felt so strongly during the Obama Administration about conducting depositions of Executive Branch officials without agency counsel present that they extended this authority to the Benghazi Select Committee, which was also chaired by Rep. Gowdy. On May 8, 2014, the House passed a resolution establishing the Benghazi Select Committee, and the accompanying regulations issued by the Rules Committee provided: "No one may be present at depositions except members, committee staff designated by the chair or ranking minority member, an official reporter, the witness, and the witness's counsel. Observers or counsel for other persons, or for agencies under investigation, may not attend."¹⁴

Expansion of Deposition Authority to Other Committees

The following year, also during the Obama Administration, House Republicans expanded this deposition authority to additional committees. In January 2015, the House voted to approve H. Res. 5, which, along with the accompanying regulations from the Committee on Rules, authorized the Committee on Financial Services, the Committee on Energy and Commerce, the

¹¹ House Committee on Oversight and Government Reform, Deposition of William W. Thompson, Centers for Disease Control and Prevention, Department of Health and Human Services (Nov. 22, 2016).

¹² House Committee on Oversight and Government Reform, Deposition of Stephen W. Siebert, Department of State (May 26, 2016).

¹³ House Committee on Oversight and Government Reform, Deposition of Joseph P. Maher, Department of Homeland Security (Sept. 25, 2018).

¹⁴ Deposition Procedures for the Select Committee on the Events Surrounding the 2012 Terrorist Attack in Benghazi, Congressional Record, H4056 (May 9, 2014) (online at www.congress.gov/113/crec/2014/05/09/CREC-2014-05-09-pt1-PgH4056.pdf).

Mr. Whitney C. Ellerman
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Committee on Ways and Means, and the Committee on Science, Space, and Technology to conduct depositions without agency counsel present.¹⁵

Pursuant to this authority, under Chairman Kevin Brady, the Committee on Ways and Means conducted a deposition of David Fisher, the Chief Risk Officer of the Internal Revenue Service, without allowing agency counsel to attend.¹⁶ The Committee later reported: “The answers this witness provided in a compelled deposition—without Treasury counsel present—provided more insight into the Administration’s decision-making process than did any other individual.”¹⁷

Similarly, under Chairman Jeb Hensarling, the Committee on Financial Services conducted depositions of 12 witnesses from the Consumer Financial Protection Bureau without agency counsel present.¹⁸

Authority for Deposition Rule

The Constitution authorizes Congress to “determine the Rules of its Proceedings.”¹⁹ The regulations that govern House depositions state:

Witnesses may be accompanied at a deposition by personal, nongovernmental counsel to advise them of their rights. Only members, Committee staff designated by the chair or ranking minority member, an official reporter, the witness, and the witness’s counsel are permitted to attend. Observers or counsel for other persons, including counsel for

¹⁵ H. Res. 5, 114th Cong. (online at www.congress.gov/bill/114th-congress/house-resolution/5).

¹⁶ House Committee on Ways and Means, Deposition of David Fisher, Internal Revenue Service (May 11, 2016).

¹⁷ House Committee on Energy and Commerce and House Committee on Ways and Means, *Joint Investigative Report into the Source of Funding for the ACA’s Cost Sharing Reduction Program* (July 2016) (online at https://gop-waysandmeans.house.gov/wp-content/uploads/2016/07/20160707Joint_Congressional_Investigative_Report-2.pdf).

¹⁸ House Committee on Financial Services, Deposition of James Keegan, Consumer Financial Protection Bureau (May 31, 2017); House Committee on Financial Services, Deposition of Melissa Heist, Consumer Financial Protection Bureau (June 6, 2017); House Committee on Financial Services, Deposition of J. Anthony Ogden, Consumer Financial Protection Bureau (June 14, 2017); House Committee on Financial Services, Deposition of Brian Patrick O’Brien, Consumer Financial Protection Bureau (June 27-28, 2017); House Committee on Financial Services, Deposition of Jacqueline Becker, Consumer Financial Protection Bureau (July 11, 2017); House Committee on Financial Services, Deposition of Julia Lynn Szybala, Consumer Financial Protection Bureau (July 17-18, 2017 and Oct. 11, 2017); House Committee on Financial Services, Deposition of Greg Evans, Consumer Financial Protection Bureau (July 21, 2017); House Committee on Financial Services, Deposition of Anne Harden Tindall, Consumer Financial Protection Bureau (July 27-28, 2017); House Committee on Financial Services, Deposition of Catherine D. Galicia, Consumer Financial Protection Bureau (July 31, 2017); House Committee on Financial Services, Deposition of Mary E. McLeod, Consumer Financial Protection Bureau (Aug. 3, 2017 and Oct. 18, 2017); House Committee on Financial Services, Deposition of Stephen Bressler, Consumer Financial Protection Bureau (Oct. 23, 2017 and Oct. 25, 2017); House Committee on Financial Services, Deposition of Stephen Bressler, Consumer Financial Protection Bureau (Nov. 6, 2017 and Nov. 7, 2017).

¹⁹ U.S. Const., Art. I, sec. 5, cl. 2.

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government agencies, may not attend.²⁰

The basis for this process is straightforward: it ensures that the Committees are able to depose witnesses in furtherance of our investigation without having in the room representatives of the agency or office under investigation. The rule nevertheless protects the rights of witnesses by allowing them to be accompanied in the deposition by personal counsel, and you will be permitted to accompany Mr. Blair in his deposition on Monday.

Your letter does not indicate that the President has asserted any valid constitutional privilege to direct Mr. Blair to defy this subpoena. To the extent the White House believes that an issue could be raised at the deposition that may implicate a valid privilege, the White House may seek to assert that privilege with the Committee. To date, the White House has not done so.

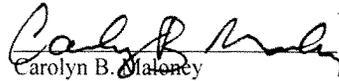
Instead, your letter asserts only that Mr. Blair plans to comply with the White House's order not to participate in the deposition, despite the failure of the President to assert any valid privilege. This is not a valid basis to defy the Committee's subpoena.

For all of the reasons set forth above, the enclosed subpoena compels Mr. Blair to appear tomorrow for his deposition. Please contact staff for the Permanent Select Committee on Intelligence at (202) 225-7690 with any questions.

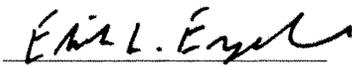
Sincerely,



Adam B. Schiff
Chairman
House Permanent Select Committee
on Intelligence



Carolyn B. Maloney
Acting Chairwoman
House Committee on Oversight and Reform



Eliot L. Engel
Chairman
House Committee on Foreign Affairs

Enclosure

²⁰ 116th Congress Regulations for Use of Deposition Authority, Congressional Record, H1216 (Jan. 25, 2019) (online at www.congress.gov/116/crec/2019/01/25/CREC-2019-01-25-pt1-PgH1216-2.pdf).

Mr. Whitney C. Ellerman
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cc: The Honorable Devin Nunes, Ranking Member
House Permanent Select Committee on Intelligence

The Honorable Jim Jordan, Ranking Member
House Committee on Oversight and Reform

The Honorable Michael McCaul, Ranking Member
House Committee on Foreign Affairs

Congress of the United States
Washington, DC 20515

October 24, 2019

Preston Wells Griffith
Senior Director for International Energy & Environment
National Security Council
Eisenhower Executive Office Building
Washington, DC 20504

Dear Mr. Griffith:

Pursuant to the House of Representatives' impeachment inquiry, we write to request your appearance at a deposition on **November 5, 2019, at 9:30 a.m. at The Capitol, HVC-304.**

This deposition will be conducted jointly by the Permanent Select Committee on Intelligence, the Committee on Foreign Affairs, and the Committee on Oversight and Reform. The deposition transcript shall be part of the impeachment inquiry and shared among the Committees. Your failure or refusal to appear at the deposition, including at the direction or behest of the President or the White House, shall constitute evidence of obstruction of the House's impeachment inquiry and may be used as an adverse inference against the President.

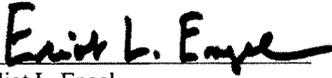
The Committees are investigating the extent to which President Trump jeopardized U.S. national security by pressing Ukraine to interfere with our 2020 election and by withholding a White House meeting with the President of Ukraine and military assistance provided by Congress to help Ukraine counter Russian aggression, as well as any efforts to cover up these matters.

Based upon public reporting and evidence gathered as part of the impeachment inquiry, we believe you may have information relevant to these matters.

If you have any questions, please contact staff for the Permanent Select Committee on Intelligence at (202) 225-7690.

Mr. Preston Wells Griffith
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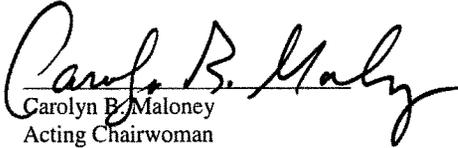
Sincerely,



Eliot L. Engel
Chairman
House Committee on Foreign Affairs



Adam B. Schiff
Chairman
House Permanent Select Committee
on Intelligence



Carolyn B. Maloney
Acting Chairwoman
House Committee on Oversight and Reform

Enclosure

cc: The Honorable Michael McCaul, Ranking Member
House Committee on Foreign Affairs

The Honorable Devin Nunes, Ranking Member
House Permanent Select Committee on Intelligence

The Honorable Jim Jordan, Ranking Member
House Committee on Oversight and Reform



OFFICE OF THE VICE PRESIDENT
WASHINGTON

October 15, 2019

VIA ELECTRONIC MAIL ONLY

The Honorable Elijah E. Cummings
Chairman
House Committee on Oversight and Reform
Washington, D.C. 20515

The Honorable Eliot L. Engel
Chairman
House Committee on Foreign Affairs
Washington, D.C. 20515

The Honorable Adam B. Schiff
Chairman
House Permanent Select Committee on Intelligence
Washington, D.C. 20515

Dear Chairmen:

The Office of the Vice President has received the Committees' Letter to the Vice President, dated October 4, 2019, which requests a wide-ranging scope of documents, some of which are clearly not vice-presidential records, pursuant to a self-proclaimed "impeachment inquiry." As noted in the October 8, 2019 letter from the White House Counsel to each of you and to Speaker Nancy Pelosi,¹ the purported "impeachment inquiry" has been designed and implemented in a manner that calls into question your commitment to fundamental fairness and due process rights.

The Office of the Vice President recognizes the oversight role of your respective committees in Congress. Please know that if the Committees wish to return to the regular order of legitimate legislative oversight requests, and the Committees have appropriate requests for information solely in the custody of the Office of the Vice President, we are prepared to work with you in a manner consistent with well-established bipartisan constitutional protections and a respect for the separation of powers. Until that time, the Office of the Vice President will continue to reserve all rights and privileges that may apply, including those protecting executive privileges, national security, attorney-client communications, deliberations, and communications among the President, the Vice President, and their advisors.

As detailed in the White House Counsel Letter, the House of Representatives has not authorized any "impeachment inquiry." Specifically, the operative House rules do not delegate to any committee the authority to conduct an inquiry under the impeachment power of Article I, Section 2 of the Constitution. Instead of being accountable to the American people and casting a vote to authorize what all agree is a substantial constitutional step, you have instead attempted to

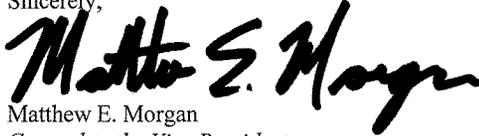
¹ Letter from Pat A. Cipollone, White House Counsel, to Speaker Nancy Pelosi and Chairmen Adam B. Schiff, Eliot L. Engel, and Elijah E. Cummings (Oct. 8, 2019).

Committee Chairmen
October 15, 2019
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avoid this fundamental requirement by invoking the Speaker's announcement of an "official impeachment inquiry" at a press conference.² Never before in history has the Speaker of the House attempted to launch an "impeachment inquiry" against a President without a majority of the House of Representatives voting to authorize a constitutionally acceptable process.

The Office of the Vice President encourages the Committees to forgo their request to the Office of the Vice President, or hold it in abeyance, pending your discussion with the White House Counsel's Office concerning compliance with constitutionally mandated procedures. Similarly the Office of the Vice President encourages the Committees to first seek information from primary sources that may be responsive to your broad requests.

Sincerely,

A handwritten signature in black ink that reads "Matthew E. Morgan". The signature is written in a cursive, slightly slanted style.

Matthew E. Morgan
Counsel to the Vice President

cc: Hon. Kevin McCarthy, Minority Leader, House of Representatives
Hon. Jim Jordan, Ranking Member, House Committee on Oversight and Reform
Hon. Michael McCaul, Ranking Member, House Committee on Foreign Affairs
Hon. Devin Nunes, Ranking Member, House Permanent Select Committee on Intelligence

² Speaker of the House Nancy Pelosi, *Press Release: Pelosi Remarks Announcing Impeachment Inquiry* (Sept. 24, 2019), www.speaker.gov/newsroom/92419-0.

Assertion of Executive Privilege for Documents Concerning Conduct of Foreign Affairs with Respect to Haiti

Executive privilege may properly be asserted with respect to certain documents subpoenaed by the Committee on International Relations of the House of Representatives that concern the Administration's conduct of foreign affairs with respect to Haiti.

September 20, 1996

THE PRESIDENT THE WHITE HOUSE

My Dear Mr. President: You have requested my legal advice as to whether executive privilege may properly be asserted with respect to documents that are the subject of a subpoena issued to the Executive Secretary of the National Security Council ("NSC") by the Committee on International Relations of the House of Representatives. The documents concern the Administration's conduct of foreign affairs with respect to Haiti.

The Counsel to the President and the National Security Adviser recommend that you assert executive privilege with respect to all but four of the subpoenaed documents. Several of the documents record diplomatic meetings or other communications between the President, the Vice President, the National Security Adviser, or the Deputy National Security Adviser and the President or Prime Minister of Haiti. Other documents constitute confidential communications from NSC or State Department officials to the President or the Vice President. The remaining documents reflect and constitute the deliberations of the NSC and its staff in connection with their advice and assistance to the President regarding his policy and activities in Haiti. I understand that efforts have been made to accommodate the Committee's information needs with respect to these documents, but they have proven unavailing. The Counsel to the President and the National Security Adviser are appropriately concerned that the Committee's demand raises significant separation of powers concerns and that compliance with it would compromise your ability to conduct the foreign affairs of the United States, as well as the ability of the NSC to advise and assist you in discharging that constitutional responsibility.

The Office of Legal Counsel of the Department of Justice has reviewed the documents for which assertion of executive privilege has been recommended and is satisfied that they fall within the scope of executive privilege. I concur in that assessment. The Supreme Court has confirmed that the Constitution gives the President the authority to assert executive privilege to protect the confidentiality of diplomatic communications, Presidential communications, and White House deliberative communications. *See generally United States v. Nixon*, 418 U.S. 683, 705-13 (1974); *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 446-55 (1977). "The privilege is fundamental to the operation of Government and

inextricably rooted in the separation of powers under the Constitution.” *United States v. Nixon*, 418 U.S. at 708.

More specifically, the Supreme Court has acknowledged the settled application of executive privilege with respect to “diplomatic secrets,” such as the diplomatic communications with the leaders of Haiti that are subject to the Committee’s subpoena, stating that “[a]s to th[is] area[] of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.” *Id.* at 710; *see also id.* at 706. “[I]t is elementary that the successful conduct of international diplomacy . . . require[s] both confidentiality and secrecy. . . . [I]t is the constitutional duty of the Executive . . . to protect the confidentiality necessary to carry out its responsibilities in the field[] of international relations” *New York Times Co. v. United States*, 403 U.S. 713, 728–30 (1971) (Stewart, J., concurring).

As Assistant Attorney General William H. Rehnquist concluded almost thirty years ago, “the President has the power to withhold from [Congress] information in the field of foreign relations or national security if in his judgment disclosure would be incompatible with the public interest.” Memorandum from John R. Stevenson, Legal Adviser, Department of State, and William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: The President’s Executive Privilege to Withhold Foreign Policy and National Security Information* at 7 (Dec. 8, 1969). History is replete with examples of the Executive’s refusal to produce to Congress diplomatic communications and related documents because of the prejudicial impact such disclosure could have on the President’s ability to conduct foreign relations. *See* Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, 6 Op. O.L.C. 751 (1982) (compiling historical examples).

It is equally well established that executive privilege applies to confidential communications to and from the President or Vice President and to White House and NSC deliberative communications. The Supreme Court has recognized “the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.” *United States v. Nixon*, 418 U.S. at 708.

Under controlling case law, in order to justify a demand for material protected by executive privilege, a congressional committee is required to demonstrate that the information sought is “demonstrably critical to the responsible fulfillment of the Committee’s functions.” *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). And those functions must be in furtherance of legitimate legislative responsibilities of Congress. *See McGrain v. Daugherty*, 273 U.S. 135, 160 (1927) (Congress has over-

Assertion of Executive Privilege for Documents Concerning Conduct of Foreign Affairs with Respect to Haiti

sight authority "to enable it efficiently to exercise a legislative function belonging to it under the Constitution").

"Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government." *Barenblatt v. United States*, 360 U.S. 109, 111-12 (1959). The Committee has sought to justify its demand based on its need for information on "Administration policy toward human rights abuses in Haiti" and "the Administration's knowledge of death squad activities in Haiti over the last two years." Letter for Jack Quinn, Counsel to the President, from Benjamin A. Gilman, Chairman, Committee on International Relations at 2 (Sept. 19, 1996). However, the conduct of foreign affairs is an exclusive prerogative of the executive branch. *See, e.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (the President is "the sole organ of the federal government in the field of international relations"); *Chicago and Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (the President is "the Nation's organ for foreign affairs"); 5 Paul L. Ford, *The Writings of Thomas Jefferson* 161 (New York, The Knickerbocker Press 1895) ("[t]he transaction of business with foreign nations is executive altogether"). Thus, there is a substantial question of the executive branch's conduct of foreign affairs or its deliberations relating thereto.

Although the question of Congress's oversight authority in this context must be viewed as unresolved as a matter of law, it is clear that congressional needs for information in this context will weigh substantially less in the constitutional balancing than a specific need in connection with the considerations of legislation. Based on the Office of Legal Counsel's review of the documents for which assertion of executive privilege has been requested, and conducting the balancing required by the case law, *see Senate Select Committee*, 498 F.2d at 729-30; *United States v. Nixon*, 418 U.S. at 706-07, I do not believe that access to these documents would be held by the courts to be "demonstrably critical to the responsible fulfillment of the Committee's functions." *Senate Select Committee*, 498 F.2d at 731.

In conclusion, it is my legal judgment that executive privilege may properly be asserted in response to the Committee's subpoena.

Sincerely,

JANET RENO
Attorney General

United States Senate
WASHINGTON, DC 20510

May 4, 2018

Mr. Yuriy Lutsenko
General Prosecutor
Office of the Prosecutor General of Ukraine
13/15 Riznytska St.
Kyiv, 01011
Ukraine

Dear Mr. Prosecutor General:

We are writing to express great concern about reports that your office has taken steps to impede cooperation with the investigation of United States Special Counsel Robert Mueller. As strong advocates for a robust and close relationship with Ukraine, we believe that our cooperation should extend to such legal matters, regardless of politics. Ours is a relationship built on a foundation of respect for the rule of law and accountable democratic institutions. In four short years, Ukraine has made significant progress in building these institutions despite ongoing military, economic and political pressure from Moscow. We have supported that capacity-building process and are disappointed that some in Kyiv appear to have cast aside these principles in order to avoid the ire of President Trump. If these reports are true, we strongly encourage you to reverse course and halt any efforts to impede cooperation with this important investigation.

On May 2, the New York Times reported that your office effectively froze investigations into four open cases in Ukraine in April, thereby eliminating scope for cooperation with the Mueller probe into related issues. The article notes that your office considered these cases as too politically sensitive and potentially jeopardizing U.S. financial and military aid to Ukraine. The article indicates specifically that your office prohibited special prosecutor Serhiy Horbatiuk from issuing subpoenas for evidence or interviewing witnesses in four open cases in Ukraine related to consulting work performed by Paul Manafort for former Ukrainian president Viktor Yanukovich and his political party.

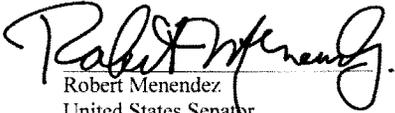
This investigation not only has implications for the Mueller probe, but also speaks to critically important investigations into the corrupt practices of the Yanukovich administration, which stole millions of dollars from the people of Ukraine. Blocking cooperation with the Mueller probe potentially cuts off a significant opportunity for Ukrainian law enforcement to conduct a more thorough inquiry into possible crimes committed during the Yanukovich era. This reported refusal to cooperate with the Mueller probe also sends a worrying signal—to the Ukrainian people as well as the international community—about your government's commitment more broadly to support justice and the rule of law.

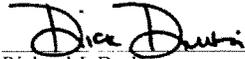
We respectfully request that you reply to this letter answering the following questions:

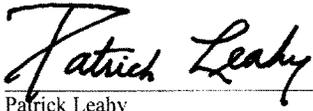
1. Has your office taken any steps to restrict cooperation with the investigation by Special Counsel Robert Mueller? If so, why?

2. Did any individual from the Trump Administration, or anyone acting on its behalf, encourage Ukrainian government or law enforcement officials not to cooperate with the investigation by Special Counsel Robert Mueller?
3. Was the Mueller probe raised in any way during discussions between your government and U.S. officials, including around the meeting of Presidents Trump and Poroshenko in New York in 2017?

Sincerely,


Robert Menendez
United States Senator


Richard J. Durbin
United States Senator


Patrick Leahy
United States Senator

1 4 APR 1981

MEMORANDUM FOR FRED F. FIELDING
Counsel to the PresidentRe: Congressional Testimony by Presidential Assistants

This responds to an inquiry which H. P. Goldfield of your Office made to Geoffrey Miller of this Office regarding the legal implications of an Assistant to the President testifying voluntarily before a Senate Committee. Given the time constraints, we have not researched the subject anew. However, as requested by Mr. Goldfield, I am forwarding herewith certain materials prepared by this Office which bear on the general question of congressional testimony by close presidential assistants.

These materials reflect the consistent view that immediate advisors to the President -- that is, those who customarily meet with the President on a regular or frequent basis -- are absolutely immune from any obligation to testify before a congressional committee. The immunity may be waived, and close presidential assistants have from time to time appeared before congressional committees. However, this Office has suggested that there are several strong reasons for eschewing such voluntary appearances. First, such appearances tend to create, regardless of disclaimers, the impression among some Representatives or Senators that such testimony is a matter of legislative right rather than executive grace. As a result, Congress or individual Members of Congress might become more vigorous in asserting authority to compel the appearance and testimony of presidential assistants. Second, because legal issues of this nature are so rarely submitted to the courts for adjudication, executive and legislative practices take on a degree of precedential value. Thus, each appearance before a congressional committee by a close presidential assistant, even if explicitly made under waiver, has some potential to undermine the legal basis of the immunity. Finally, a practice of appearing before congressional committees might leave the President open to the charge, however unfounded, that when he does assert the immunity it is because he has something to hide.

This Office is, of course, happy to research the matter in greater depth at your request. I have attached the following materials for your information:

1. Memorandum of Assistant Attorney General Erickson
re: "Appearance of Presidential Assistant Peter M.
Flanigan before a Congressional Committee";
2. Memorandum of Assistant Attorney General Rehnquist
re: "Power of Congressional Committee to Compel
Appearance or Testimony of 'White House Staff'";
3. Letter of the Associate Special Counsel to the
President dated September 16, 1968 (reprinted in
Senate Judiciary Hearing on the Nomination of
Abe Fortas to be Chief Justice (1968)).

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

Attachments

bcc: H. P. Goldfield
White House Counsel's Office

MAY 23 1977

**MEMORANDUM TO ALL HEADS OF OFFICES, DIVISIONS,
BUREAUS AND BOARDS OF THE DEPARTMENT OF JUSTICE****Re: Executive Privilege**

The purpose of this memorandum is to outline in a general way the doctrine of Executive privilege as it relates to requests from Congressional committees for Executive branch information and documents.

I. Legal Background

Simply stated, Executive privilege is the term applied to the invocation by the Executive branch of a legal right, derived from the need for confidentiality of its internal communications and the constitutional doctrine of separation of powers, to withhold official documents or information from compulsory process of the Legislative branch. The privilege has a long history, having been first asserted by President Washington against a Congressional request and thereafter by almost every Administration. It aroused relatively little controversy in our early history, but since about 1950 it has become a matter of considerable dispute between the Executive and Legislative branches. Despite its long history, the doctrine until recently had received no authoritative judicial acknowledgment. The right of the Executive to withhold information from the courts in the process of litigation had been recognized by the Supreme Court, but only as a rule of evidence and not as a constitutional prerogative. Even in that context,

the claim was held to be assertable only by "the head of the department which has control over the matter, after actual personal consideration by that officer." United States v. Reynolds, 345 U.S. 1, 8 (1953).

The first and only Supreme Court decision affirming a constitutional basis of Executive privilege involved the controversy over the Special Prosecutor's right to access to the Nixon tapes. The Court's unanimous decision in United States v. Nixon, 418 U.S. 683 (1974), held that President Nixon could not invoke Executive privilege to thwart the production of the tapes pursuant to the Water-gate grand jury's subpoena. The opinion established, however, in the clearest terms, that the privilege is of constitutional stature. The Court rested its ruling, first, on the need for the protection of communications between high government officials and those who assist and advise them:

Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process. Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings. 418 U.S. at 705-6.

The Court also acknowledged that the privilege stemmed from the principle of separation of powers:

The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution. 418 U.S. at 708.

The issue before the Court in Nixon concerned only the availability of the privilege, and the courts' role in evaluating the assertion of such privilege, in the context of a criminal prosecution. It is conceivable, if the matter could be litigated, that the Court would hold that any demand from the Congress is sufficient, as were the circumstances in Nixon, to overcome the privilege. However, the explicit language of the opinion, as well as the Court's rationale supporting its view of the privilege as one of constitutional dimension, would indicate that in at least some circumstances the privilege is available against the Congress as well as in the courts.

II. The Practice Regarding Executive Privilege

Information or testimony is most often elicited from the Executive branch by the Congress by way of committee requests. In most cases the Executive supplies the requested information voluntarily and without any sort of formal legislative compulsion. Since no compulsory processes are undertaken in this context, no occasion exists for the assertion of Executive privilege. From a legal standpoint, the privilege need only be asserted where the Executive would otherwise be under a legal duty to provide information, and such duty can only attach upon the issuance of a subpoena or other similar compulsory order.

In keeping with this Administration's general policy of complying to the fullest extent with Congressional requests for information, however, such requests should be complied with unless there is reason to believe that Executive privilege would afford a valid basis for not doing so. Thus, while the privilege need not be asserted in response to a Congressional request, the principles underlying the doctrine should provide guidance in considering requests by Congress for information.

In earlier years, the Executive branch practice with respect to assertion of Executive privilege as against Congressional demands was not well defined. During the Congressional investigation involving Senator McCarthy, President Eisenhower, by letter to the Secretary of Defense, in effect prohibited all employees of the Defense Department from testifying concerning conversations or communications embodying advice on official internal matters. This eventually produced such a strong Congressional reaction that on March 7, 1962, President Kennedy wrote to Congressman Moss stating that it would be the policy of his Administration that "Executive privilege can be invoked only by the President and will not be used without specific Presidential approval." Mr. Moss sought and received a similar commitment from President Johnson.

President Nixon continued the Kennedy-Johnson policy of barring the assertion of Executive privilege without specific Presidential approval, but formalized it procedurally by a memorandum dated March 24, 1969. The memorandum begins by stating that the privilege will be invoked "only in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise." It specifies the following procedural steps: (1) If the head of a department or agency believes that a Congressional request for information raises a substantial question as to the need for invoking Executive privilege, he should consult the Attorney General through the Office of Legal Counsel; (2) if, as a result of that consultation, the department head and the Attorney General agree that Executive privilege should not be invoked in the circumstances, the information shall be released; (3) if either the department head or the Attorney General, or both, believe that the situation justifies the invocation of Executive privilege, the matter shall be transmitted to the Counsel to the President, who will advise the department head of the President's decision;

(4) if the President decides to invoke Executive privilege, the department head shall advise Congress that the claim of privilege is being made with the specific approval of the President; and (5) pending the procedure outlined above, the department head is to request Congress to hold the request for information in abeyance, taking care to indicate that this request is only to protect the privilege pending determination and that this request does not constitute a claim of privilege.

President Carter has indicated that he will soon issue a memorandum in which he will take the position of Presidents Kennedy, Johnson and Nixon that only the President can assert Executive privilege.

It should be emphasized that the above procedure need only be undertaken if a satisfactory resolution with respect to Congress' demand cannot otherwise be devised. It is often the case that mutually agreeable solutions to Congressional demands can be worked out, and it is of course better to attempt such compromises than to plunge into a constitutional confrontation.

If no such compromise can be reached, the decision whether Executive privilege will be asserted is largely dependent on the particular circumstances involved in the Congressional demand. This determination may depend on such varying factors as the nature and confidentiality of the information sought and the strength of the forces in Congress that are seeking the information. To the extent that any generalizations may be drawn, they are necessarily tentative and sketchy. It has been the position of the Executive branch that the President and his immediate advisors are absolutely immune from testimonial compulsion by a Congressional committee. Lower-level White House officials have been deemed subject to a Congressional subpoena, but might refuse to testify with respect to any matter arising in the course of their official position of advising or formulating advice for the President.

The question is somewhat different with respect to the Department of Justice. The Department has been created by an Act of Congress, and administers and enforces many statutes enacted by Congress. These factors are considered to impose on the Department an obligation to furnish knowledgeable witnesses or information pursuant to Congressional demands. Even here, however, the President is thought to have the authority to direct the officials concerned to decline to testify concerning particular matters for "specific reason."

It is not possible, in what is intended to be a brief exposition, to treat at length the "specific reasons" which would, under present practice, call for withholding from the Congress material which does not consist of communications to or from the President or communications of his immediate advisers. The two most obvious areas are foreign relations and military affairs; the Court in Nixon acknowledged that the courts have traditionally shown the "utmost deference" to the President's exercise of his responsibilities in these matters. 413 U.S. at 710.

Another area subject to Executive privilege, more closely related to the Department's normal functions, is information which would jeopardize pending or contemplated litigation or which would impinge on the confidentiality of investigative files. See 40 Op. A.G. 45 (1941). Disclosure of such information would not only hamper the Department's investigative or prosecutorial efforts; it may also discourage sources of information from coming forward and result in the release of unverified information which may be damaging to individuals. Id. at 46-47.

Finally, Executive privilege also protects intra-governmental discussions even below the Presidential level; the purpose is to protect such discussions from an exposure

which would destroy their candor and hence their worth. Given this purpose, however, this aspect of Executive privilege has been deemed to protect only suggestions, advice, recommendations and opinions, rather than factual and investigatory reports, data, or surveys in government files. See United States v. Leggett & Platt, Inc., 542 F.2d 655 (6th Cir. 1976).

These principles of nondisclosure may be relaxed in situations where the public interest would justify it. For example, materials properly subject to claims of Executive privilege may be disclosed to Congress in cases involving Senatorial confirmation of Presidential nominations or in impeachment proceedings. See 40 Op. A.G. 45, 51 (1941).

John M. Harmon
Acting Assistant Attorney General
Office of Legal Counsel

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For news, speeches or statements published before April 2012, please see our archived sites.

Money laundering investigation opened

28 April, 2014 | [News Releases](#)

Director of the SFO has opened a criminal investigation into possible money laundering arising from suspicions of corruption in Ukraine. The SFO has obtained a restraint order freezing approximately \$23m of assets in the UK in connection with this case. For reasons of confidentiality we cannot say more at this time.

Notes for editors:

1. The \$23 million of assets has been placed under restraint using the Proceeds of Crime Act.
2. The UK is hosting the Ukrainian Forum on Asset Recovery at Lancaster House on 29-30 April in conjunction with the US and Ukraine. In addition and separate to the \$23 million in assets that have been placed under restraint by the SFO, an EU-wide asset freeze against 22 individuals suspected of misappropriating Ukrainian state assets has been approved and has come into force across the EU.
3. The strict liability rule in the Contempt of Court Act 1981 applies.

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Press Releases

Congressman Nadler Resolution of Inquiry into Conflicts of Interest, Ethics Violations, and Russia Ties Voted Down in Party-Line Vote

Washington, DC, February 28, 2017

Tags: *Intellectual Property/Technology*

Today, Congressman Jerrold Nadler (D-NY), senior Member of the House Judiciary Committee, offered a *Resolution of Inquiry* (H.Res. 111) in the House Judiciary Committee directing the Department of Justice to provide the House of Representatives with any and all information relevant to an inquiry into President Trump and his associates' conflicts of interest, ethical violations—including the Emoluments Clause—and connections and contacts with Russia. The *Resolution of Inquiry*, which was reported unfavorably out of the House Judiciary Committee in a party-line vote of 18-16, was the first time Members of Congress had a recorded vote on legislation concerning an investigation of Donald Trump's conflicts and Russia ties.



day, more questions arise concerning President Trump's foreign business interests and his inexplicably cozy relationship with Russia. Each day, Democrats on this Committee, and on other committees, have requested hearings and investigations into these serious issues. And yet, each day, with a few exceptions, we have been met with a deafening silence from our Republican colleagues.

"That is why I introduced this resolution, which directs the Department of Justice to provide the House of Representatives with any and all information it possesses related to any conflicts of interest, any ethical violations, and any improper ties to Russia by President Trump, or by his associates.

"This resolution is particularly important because Attorney General Sessions, who was involved in the Trump campaign, has refused to recuse himself from any investigation, and it is not clear that he could be impartial, or that he will even conduct an investigation at all. Recognizing Mr. Sessions' obvious conflict, one of our own colleagues, Mr. Issa, has called for a special prosecutor, but the White House has dismissed the idea, essentially saying, "Trust us, there's nothing there." Well, that should not be good enough for this House. We must ensure that we get access to any information the Department of Justice has so that we can do our own investigation.

"We also recently learned about coordination between the White House and the Chairmen of the House and Senate Intelligence Committees, which calls into question the impartiality of those Committees' investigations. Our Committee must step up and ensure that there is a thorough and objective investigation of these serious issues.

"With respect to President Trump's breathtaking web of business entanglements, which he has refused even to disclose, here are just a few of the many questions that demand further explanation:

- Just blocks away from the White House sits the Trump International Hotel, on which the President is both the leaseholder, through the General Services Administration, and the lessee, through the Trump Organization. How does this not represent a clear conflict of interest?
- There have been reports that foreign diplomats are booking rooms at this hotel as a means of currying favor with the President. To what extent do these, and other payments to his properties from foreign governments, constitute a violation of the Emoluments Clause of the Constitution?
- The President owns properties, most of which bear his name, in dozens of countries. Is he trading policy favors for access to permits, or other government benefits, in these countries?
- We already saw China award the President a long-sought trademark shortly after he reaffirmed the One-China policy, which he had appeared to question. Could United States policy towards China be subject to the financial needs of the Trump Organization?
- How much of the hundreds of millions of dollars in debt on Mr. Trump's properties, at home and abroad, does he owe to foreign government entities, like the Bank of China, and what sort of leverage over the United States does that provide to those governments?



transparency, it is essential that we get more information on his financial picture, and how it affects government policy.

"The other aspect of this resolution seeks information on the troubling ties between Russia and President Trump, as well as some of his close aides. Once again, the questions multiply by the day:

- Despite the unanimous agreement among the intelligence services that Russia hacked the Democratic National Committee, and released documents intended to sway the election for Donald Trump, why was he so reluctant to accept this conclusion?
- We know that top Trump aides were in communication with senior Russian intelligence officials over the course of the campaign. What did they discuss?
- What did White House Chief of Staff, Reince Priebus, say to the FBI to get them to downplay the seriousness of these charges? Did he violate any laws by doing so?
- More broadly, President Trump has shown no hesitation in challenging and insulting foreign leaders, even our allies like the leaders of Mexico, Australia, and, most recently, Sweden. Why, then, does he refuse to say a single unkind word about Vladimir Putin, who murders his opponents, has invaded Ukraine, and has interfered in our elections, just to name a few concerns?
- Does President Trump simply admire Mr. Putin? Does he not understand the threat that Mr. Putin poses? Or is there something more sinister going on?

"Between Mr. Trump's potential conflicts of interest, and the potential coordination with a foreign power to interfere with our elections, and with our government, the security and integrity of our nation are at stake. It is unfortunate that we must resort to a resolution of inquiry to learn the truth about these serious issues. However, the House has so far abdicated its constitutional responsibility to provide meaningful oversight into the Trump Administration, and it is time that we do our duty.

"This resolution does not pre-judge the outcome of any investigation. All it does is provide us with some of the information we need to draw our own conclusions. The public deserves to know the truth about the President, and we must not stop until we get these answers.

"More than 130 Members have cosponsored this resolution, including every Democratic Member of this Committee. We have gotten phone calls from tens of thousands of our constituents who support it, and I have received over 837,000 signed petitions calling on us to pass it. They expect their representatives in Congress to help them discover the truth. I hope this Committee will take the first step today, rather than bury our heads in the sand.

"I urge the Committee to report this bill favorably, and I yield back the balance of my time."

(/)

PRESS RELEASES (/PRESS-RELEASES)

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**Royce, Engel Press for Swift Action
Following Disappearance of Jamal
Khashoggi (/press?
ID=D5E30F72-857E-4219-BF8F-
971AF415E288)**

October 12, 2018

WASHINGTON—House Foreign Affairs Committee Chairman Ed Royce (R-CA) and Ranking Member Eliot Engel (D-NY) today wrote President Trump urging swift action following the disappearance and likely murder of journalist Jamal Khashoggi.

"Mr. President, we value our relations with Saudi Arabia," Royce and Engel write. "Yet murder and other blatant violations of international norms and agreements cannot be done with impunity."

Read the full letter here (https://hilltop.house.gov/gold/public/files/serve?File_id=BD81B124-CC6C-44E2-BC58-A27EA8FBA985&SK=57E38E0EEE690EAB9BEC95DE585EFF14) or below:

October 12, 2018

Dear Mr. President:

We are deeply concerned about the whereabouts of Jamal Khashoggi, a journalist, a Washington Post columnist and Saudi citizen who has been living in the United States. Based on mounting reports, it appears highly likely Mr. Khashoggi was murdered in the Saudi consulate in Istanbul while attending to a routine consular matter. These are serious and troubling allegations that, if proven true, will impact U.S.-Saudi relations.

As the world's beacon of freedom, America has an obligation and strong interest to uphold basic international standards and human rights. This includes freedom of expression and freedom of the press. We are encouraged you have pledged to "get to the bottom" of what happened to Mr. Khashoggi, and urge you to ensure this investigation is carried out thoroughly and expeditiously. All individuals responsible for this disappearance and likely murder must be identified and held accountable.

Our Senate colleagues have already requested a determination pursuant to the Global Magnitsky Human Rights Accountability Act with respect to any foreign person responsible for human rights violations in this case. We support this request, and hope necessary determinations will be made promptly using findings of the administration's investigation.

We also are concerned about the potential misuse of diplomatic conventions and privileges the allegations purport to show and suggest the maintenance of established norms in this regard is important to U.S. national security and the free exercise of international diplomacy.

At the same time, additional steps should be taken to prevent the targeting of dissidents and journalists at foreign diplomatic facilities in the United States. We urge your administration to review Saudi nationals credentialed to diplomatic and consular posts in the United States and Saudi diplomatic and consular activities within the United States. There should be no chance that what apparently happened in Ankara could happen here.

Finally, we urge you to use all pressure necessary to encourage greater Saudi cooperation in the investigation into this incident. Unless the Saudi government fully discloses what it knows about this disappearance and likely murder, Treasury Secretary Steven Mnuchin should cancel plans to attend the upcoming "Davos in the Desert." Participation in this conference is not critical to our economic security and would potentially undermine efforts to show the Saudi government and others around the world that brazen attacks on civilians inside consular facilities are unacceptable.

Mr. President, we value our relations with Saudi Arabia. Yet murder and other blatant violations of international norms and agreements cannot be done with impunity. We look forward to hearing from you about any investigation on this matter and potential consequences.

Sincerely,

EDWARD R. ROYCE
Chairman

ELIOT L. ENGEL
Ranking Member

#

Permalink: <https://foreignaffairs.house.gov/2018/10/royce-engel-press-for-swift-action-following-disappearance-of-jamal-khashoggi>
(<https://foreignaffairs.house.gov/2018/10/royce-engel-press-for-swift-action-following-disappearance-of-jamal-khashoggi>)

03.20.17

Intelligence Committee Ranking Member Schiff Opening Statement During Hearing on Russian Active Measures

Washington, DC – Today, Rep. Adam Schiff (D-CA), the Ranking Member of the House Permanent Select Committee on Intelligence, delivered the following statement during the Committee’s open hearing on Russian active measures during the 2016 election. Below is his statement (as prepared):

Thank you, Mr. Chairman.

I want to thank Director Comey and Admiral Rogers for appearing before us today as the committee holds this first open hearing into the interference campaign waged against our 2016 Presidential election.

Last summer, at the height of a bitterly contested and hugely consequential Presidential campaign, a foreign, adversarial power intervened in an effort to weaken our democracy, and to influence the outcome for one candidate and against the other. That foreign adversary was, of course, Russia, and it acted through its intelligence agencies and upon the direct instructions of its autocratic ruler, Vladimir Putin, in order to help Donald J. Trump become the 45th President of the United States.

The Russian “active measures” campaign may have begun as early as 2015, when Russian intelligence services launched a series of spearphishing attacks designed to penetrate the computers of a broad array of Washington-based Democratic and Republican party organizations, think tanks and other entities. This continued at least through winter of 2016.

While at first, the hacking may have been intended solely for the collection of foreign intelligence, in mid-2016, the Russians “weaponized” the stolen data and used platforms established by their intel services, such as DC Leaks and existing third party channels like Wikileaks, to dump the documents.

The stolen documents were almost uniformly damaging to the candidate Putin despised, Hillary Clinton and, by forcing her campaign to constantly respond to the daily drip of disclosures, the releases greatly benefited Donald Trump’s campaign.

None of these facts is seriously in question and they are reflected in the consensus conclusions of all our intelligence agencies.

We will never know whether the Russian intervention was determinative in such a close election. Indeed, it is unknowable in a campaign in which so many small changes could have dictated a different result. More importantly, and for the purposes of our investigation, it simply does not matter. What does matter is this: the Russians successfully meddled in our democracy, and our intelligence agencies have concluded that they will do so again.

Ours is not the first democracy to be attacked by the Russians in this way. Russian intelligence has been similarly interfering in the internal and political affairs of our European and other allies for decades. What is striking here is the degree to which the Russians were willing to undertake such an audacious and risky action against the most powerful nation on earth. That ought to be a warning to us, that if we thought that the Russians would not dare to so blatantly interfere in our affairs, we were wrong. And if we do not do our very best to understand how the Russians accomplished this unprecedented attack on our democracy and what we need to do to protect ourselves in the future, we will have only ourselves to blame.

We know a lot about the Russian operation, about the way they amplified the damage their hacking and dumping of stolen documents was causing through the use of slick propaganda like RT, the Kremlin's media arm. But there is also a lot we do not know.

Most important, we do not yet know whether the Russians had the help of U.S. citizens, including people associated with the Trump campaign. Many of Trump's campaign personnel, including the President himself, have ties to Russia and Russian interests. This is, of course, no crime. On the other hand, if the Trump campaign, or anybody associated with it, aided or abetted the Russians, it would not only be a serious crime, it would also represent one of the most shocking betrayals of our democracy in history.

In Europe, where the Russians have a much longer history of political interference, they have used a variety of techniques to undermine democracy. They have employed the hacking and dumping of documents and slick propaganda as they clearly did here, but they have also used bribery, blackmail, compromising material, and financial entanglement to secure needed cooperation from individual citizens of targeted countries.

The issue of U.S. person involvement is only one of the important matters that the Chairman and I have agreed to investigate and which is memorialized in the detailed and bipartisan scope of investigation we have signed. We will also examine whether the intelligence community's public assessment of the

Russian operation is supported by the raw intelligence, whether the U.S. Government responded properly or missed the opportunity to stop this Russian attack much earlier, and whether the leak of information about Michael Flynn or others is indicative of a systemic problem. We have also reviewed whether there was any evidence to support President Trump's claim that he was wiretapped by President Obama in Trump Tower – and found no evidence whatsoever to support that slanderous accusation – and we hope that Director Comey can now put that matter permanently to rest.

Today, most of my Democratic colleagues will be exploring with you the potential involvement of U.S. persons in the Russian attack on our democracy. It is not that we feel the other issues are not important – they are very important – but rather because this issue is least understood by the public. We realize, of course, that you may not be able to answer many of our questions in open session. You may or may not be willing to disclose even whether there is any investigation. But we hope to present to you and the public why we believe this matter is of such gravity that it demands a thorough investigation, not only by us, as we intend to do, but by the FBI as well.

Let me give you a little preview of what I expect you will be asked by our members.

Whether the Russian active measures campaign began as nothing more than an attempt to gather intelligence, or was always intended to be more than that, we do not know, and is one of the questions we hope to answer. But we do know this: the months of July and August 2016 appear to have been pivotal. It was at this time that the Russians began using the information they had stolen to help Donald Trump and harm Hillary Clinton. And so the question is why? What was happening in July/August of last year? And were U.S. persons involved?

Here are some of the matters, drawn from public sources alone, since that is all we can discuss in this setting, that concern us and should concern all Americans.

In early July, Carter Page, someone candidate Trump identified as one of his national security advisors, travels to Moscow on a trip approved by the Trump campaign. While in Moscow, he gives a speech critical of the United States and other western countries for what he believes is a hypocritical focus on democratization and efforts to fight corruption.

According to Christopher Steele, a former British intelligence officer who is reportedly held in high regard by U.S. Intelligence, Russian sources tell him that Page has also had a secret meeting with Igor Sechin (SEH-CHIN), CEO of Russian gas giant Rosneft. Sechin is reported to be a former KGB agent and close friend of Putin's. According to Steele's Russian sources, Page is offered brokerage fees by Sechin on a deal involving a 19 percent share of the company. According to Reuters, the sale of a 19.5 percent share in Rosneft later takes place, with unknown purchasers and unknown brokerage fees.

Also, according to Steele's Russian sources, the Trump campaign is offered documents damaging to Hillary Clinton, which the Russians would publish through an outlet that gives them deniability, like Wikileaks. The hacked documents would be in exchange for a Trump Administration policy that de-emphasizes Russia's invasion of Ukraine and instead focuses on criticizing NATO countries for not paying their fare share – policies which, even as recently as the President's meeting last week with Angela Merkel, have now presciently come to pass.

In the middle of July, Paul Manafort, the Trump campaign manager and someone who was long on the payroll of Pro-Russian Ukrainian interests, attends the Republican Party convention. Carter Page, back from Moscow, also attends the convention. According to Steele, it was Manafort who chose Page to serve as a go-between for the Trump campaign and Russian interests. Ambassador Kislyak, who presides over a Russian embassy in which diplomatic personnel would later be expelled as likely spies, also attends the Republican Party convention and meets with Carter Page and additional Trump Advisors JD Gordon and Walid Phares. It was JD Gordon who approved Page's trip to Moscow. Ambassador Kislyak also meets with Trump campaign national security chair and now Attorney General Jeff Sessions. Sessions would later deny meeting with Russian officials during his Senate confirmation hearing.

Just prior to the convention, the Republican Party platform is changed, removing a section that supports the provision of "lethal defensive weapons" to Ukraine, an action that would be contrary to Russian interests. Manafort categorically denies involvement by the Trump campaign in altering the platform. But the Republican Party delegate who offered the language in support of providing defensive weapons to Ukraine states that

it was removed at the insistence of the Trump campaign. Later, JD Gordon admits opposing the inclusion of the provision at the time it was being debated and prior to its being removed.

Later in July, and after the convention, the first stolen emails detrimental to Hillary Clinton appear on Wikileaks. A hacker who goes by the moniker Guccifer 2.0 claims responsibility for hacking the DNC and giving the documents to Wikileaks. But leading private cyber security firms including CrowdStrike, Mandiant, and ThreatConnect review the evidence of the hack and conclude with high certainty that it was the work of APT28 and APT29, who were known to be Russian intelligence services. The U.S. Intelligence community also later confirms that the documents were in fact stolen by Russian intelligence and Guccifer 2.0 acted as a front. Also in late July, candidate Trump praises Wikileaks, says he loves them, and openly appeals to the Russians to hack his opponents' emails, telling them that they will be richly rewarded by the press.

On August 8th, Roger Stone, a longtime Trump political advisor and self-proclaimed political dirty trickster, boasts in a speech that he "has communicated with Assange," and that more documents would be coming, including an "October surprise." In the middle of August, he also communicates with the Russian cutout Guccifer 2.0, and authors a Breitbart piece denying Guccifer's links to Russian intelligence. Then, later in August, Stone does something truly remarkable, when he predicts that John Podesta's personal emails will soon be published. "Trust me, it will soon be Podesta's time in the barrel. #Crooked Hillary."

In the weeks that follow, Stone shows a remarkable prescience: "I have total confidence that @wikileaks and my hero Julian Assange will educate the American people soon. #Lockherup. "Payload coming," he predicts, and two days later, it does. Wikileaks releases its first batch of Podesta emails. The release of John Podesta's emails would then continue on a daily basis up to election day.

On Election Day in November, Donald Trump wins. Donald Trump appoints one of his high profile surrogates, Michael Flynn, to be his national security advisor. Michael Flynn has been paid by the Kremlin's propaganda outfit, RT, and other Russian entities in the past. In December, Michael Flynn has a secret conversation with Ambassador Kislyak about sanctions imposed by President Obama on Russia over its hacking designed to help the Trump campaign. Michael Flynn lies about this secret conversation. The Vice President,

unknowingly, then assures the country that no such conversation ever happened. The President is informed Flynn has lied, and Pence has misled the country. The President does nothing. Two weeks later, the press reveals that Flynn has lied and the President is forced to fire Mr. Flynn. The President then praises the man who lied, Flynn, and castigates the press for exposing the lie.

Now, is it possible that the removal of the Ukraine provision from the GOP platform was a coincidence? Is it a coincidence that Jeff Sessions failed to tell the Senate about his meetings with the Russian Ambassador, not only at the convention, but a more private meeting in his office and at a time when the U.S. election was under attack by the Russians? Is it a coincidence that Michael Flynn would lie about a conversation he had with the same Russian Ambassador Kislyak about the most pressing issue facing both countries at the time they spoke – the U.S. imposition of sanctions over Russian hacking of our election designed to help Donald Trump? Is it a coincidence that the Russian gas company Rosneft sold a 19 percent share after former British Intelligence Officer Steele was told by Russian sources that Carter Page was offered fees on a deal of just that size? Is it a coincidence that Steele's Russian sources also affirmed that Russia had stolen documents hurtful to Secretary Clinton that it would utilize in exchange for pro-Russian policies that would later come to pass? Is it a coincidence that Roger Stone predicted that John Podesta would be the victim of a Russian hack and have his private emails published, and did so even before Mr. Podesta himself was fully aware that his private emails would be exposed?

Is it possible that all of these events and reports are completely unrelated, and nothing more than an entirely unhappy coincidence? Yes, it is possible. But it is also possible, maybe more than possible, that they are not coincidental, not disconnected and not unrelated, and that the Russians used the same techniques to corrupt U.S. persons that they have employed in Europe and elsewhere. We simply don't know, not yet, and we owe it to the country to find out.

Director Comey, what you see on the dais in front of you, in the form of this small number of members and staff is all we have to commit to this investigation. This is it. We are not supported by hundreds or thousands of agents and investigators, with offices around the world. It is just us and our Senate counterparts. And in addition to this investigation, we still have our day job, which involves overseeing some of the largest and most important agencies in the country, agencies, which, by the way, are trained to keep secrets.

I point this out for two reasons: First, because we cannot do this work alone. Nor should we. We believe these issues are so important that the FBI must devote its resources to investigating each of them thoroughly; to do any less would be negligent in the protection of our country. We also need your full cooperation with our own investigation, so that we have the benefit of what you may know, and so that we may coordinate our efforts in the discharge of both our responsibilities. And second, I raise this because I believe that we would benefit from the work of an independent commission that can devote the staff and resources to this investigation that we do not have, and that can be completely removed from any political considerations. This should not be a substitute for the work that we, in the intelligence committees should and must do, but as an important complement to our efforts, just as was the case after 9/11.

The stakes are nothing less than the future of liberal democracy.

We are engaged in a new war of ideas, not communism versus capitalism, but authoritarianism versus democracy and representative government. And in this struggle, our adversary sees our political process as a legitimate field of battle.

Only by understanding what the Russians did can we inoculate ourselves from the further Russian interference we know is coming. Only then can we help protect our European allies who are, as we speak, enduring similar Russian interference in their own elections.

Finally, I want to say a word about our own committee investigation. You will undoubtedly observe in the questions and comments that our members make during today's hearing, that the members of both parties share a common concern over the Russian attack on our democracy, but bring a different perspective on the significance of certain issues, or the quantum of evidence we have seen in the earliest stages of this investigation. That is to be expected. The question most people have is whether we can really conduct this investigation in the kind of thorough and nonpartisan manner that the seriousness of the issues merit, or whether the enormous political consequences of our work will make that impossible. The truth is, I don't know the answer. But I do know this: If this committee can do its work properly, if we can pursue the facts wherever they lead, unafraid to compel witnesses to testify, to hear what they have to say, to learn what we will and, after exhaustive work, reach a common conclusion, it would be a tremendous public service and one that is very much in the national interest.

12/15/2019

Intelligence Committee Ranking Member Schiff Opening Statement During Hearing on Russian Active Measures

So let us try. Thank you Mr. Chairman, I yield back.

###

2014 Director Compensation Report

*Non-Employee Director Compensation
Across Industries and Size*

OCTOBER 2014

FREDERIC W. COOK & CO., INC.

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EXECUTIVE SUMMARY

Our study indicates modest increases in director compensation and relatively little change in program structure. These findings come amidst the backdrop of a slow but strengthening economic recovery from the depths of the 2009 financial recession.

Compared to last year, total director compensation increased in the mid-single digits (i.e., 4% to 7%) with compensation at small-cap companies continuing to exhibit higher volatility. From a design perspective, the trend is towards streamlining programs in part through (1) eliminating meeting fees and delivering the respective value through higher cash retainers implying that director attendance is a prerequisite of board service; (2) denominating equity grants as a dollar value rather than as a number of shares to mitigate year-over-year valuation changes, and (3) continuing the shift away from stock options to full-value shares to strengthen the alignment of directors' and shareholders' interests.

This report presents our findings on director compensation levels and program structure at 300 public companies across five industry sectors: financial services, industrial, retail, technology, and energy, and three size segments, based on market capitalization: small-, mid- and large-cap companies, as defined later in this report.

The key findings of our 2014 Director Compensation Report are as follows:

Total Compensation Levels

- Total compensation levels are largely dependent on company size while variation across industry sectors shows narrow differences but greater year-over-year volatility; median total compensation for board service by size segments and industry sectors is summarized below:

Median Values	Financial Services	Industrial	Retail	Technology	Energy
Market Capitalization (\$M) - 2014 Study	\$2,554	\$2,927	\$2,238	\$2,351	\$2,644
Market Capitalization (\$M) - 2013 Study	\$2,604	\$3,529	\$2,306	\$2,716	\$2,493
Year-Over-Year Market Cap. Change	-2%	-17%	-3%	-13%	6%
Total Compensation - 2014 Study	\$149,250	\$183,350	\$196,250	\$212,000	\$202,167
Total Compensation - 2013 Study	\$141,655	\$210,000	\$186,333	\$205,833	\$186,417
Year-Over-Year Compensation Change	5%	-13%	5%	3%	8%

Median Values	Small-Cap	Mid-Cap	Large-Cap
	Less than \$1B	\$1B - \$5B	Greater than \$5B
Market Capitalization (\$M) - 2014 Study	\$489	\$2,420	\$16,715
Market Capitalization (\$M) - 2013 Study	\$465	\$2,661	\$17,436
Year-Over-Year Market Cap. Change	5%	-9%	-4%
Total Compensation - 2014 Study	\$133,871	\$189,500	\$250,000
Total Compensation - 2013 Study	\$125,260	\$182,500	\$236,650
Year-Over-Year Compensation Change	7%	4%	6%

EXECUTIVE SUMMARY

- Median total compensation increased at the fastest rate among small-cap companies, followed closely by large-cap companies
- Year-over-year changes among industry sectors are primarily due to changes in the median size of the companies included in an industry sector

Total Compensation Mix

- All three company size segments provide at least 50% of total compensation in equity, on average
- Large-cap companies exhibit more simplified compensation structures composed of retainers for board service and committee leadership, and equity awards delivered in full-value shares
- Financial services companies pay the highest portion of total compensation in cash (51% of total compensation), while technology companies pay the lowest (33% of total compensation)

Board Cash Compensation

- Board retainers do not vary significantly across different industries; however, there is greater variation in board retainers based on company size
- While prevalence of meeting fees continues to decline, board meeting fees increased modestly since last year and range from \$1,800 at small-cap companies to \$2,000 at large-cap companies

Board Equity Compensation

- Full-value awards are the predominant form of equity compensation across all sizes and industries
- Stock option use remains modest across most sectors (utilized by less than 15% of financial services, industrial, retail, and energy companies, compared to 32% of technology companies)
- Full-value awards are typically denominated in terms of dollar value while stock option practice is mixed between fixed-value and fixed-share awards

Committee/Leadership Compensation

- When provided, compensation for committee member service is usually in the form of meeting fees. The median committee meeting fee for the survey sample is \$1,500, with minimal variations based on industry or size
- Audit committee chairs and members continue to receive the highest level of compensation for committee service, relative to the chairs/members of the other standing committees
- Non-executive chair retainers are strongly correlated with company size with large-cap companies paying a median retainer of \$164,400, or more than three times the median retainer of \$50,000 at small-cap companies. Energy companies pay the highest non-executive chair retainers and technology companies pay the lowest
- Median lead director retainers range from \$20,000 to \$25,000 across all industry and size segments analyzed

OVERVIEW AND METHODOLOGY

Research Sample

This study is based on a sample of 300 U.S. public companies equally divided among small-, mid- and large-cap segments (100 companies in each) and further classified into five industries: financial services, industrial, retail, technology, and energy (60 companies in each) based on Standard & Poor's Global Industry Classification Standard (GICS) Industry Group codes. To ensure statistical reliability of year-over-year comparisons, approximately 75% of this year's sample companies were constituents of last year's sample. For a complete list of the companies included in this study, refer to the Research Company List at the end of this report.

Market capitalization and trailing 12-month revenue as of April 30, 2014 are shown below:

Industry	Market Capitalization (\$M)			Trailing 12-Month Revenue (\$M)		
	25th Percentile	Median	75th Percentile	25th Percentile	Median	75th Percentile
Financial Services	\$696	\$2,554	\$9,771	\$296	\$976	\$4,504
Industrials	\$735	\$2,927	\$7,837	\$1,107	\$3,087	\$7,123
Retail	\$869	\$2,238	\$8,894	\$1,231	\$3,227	\$9,258
Technology	\$643	\$2,351	\$9,255	\$401	\$1,586	\$3,017
Energy	\$805	\$2,644	\$15,993	\$804	\$3,405	\$16,035
Size	25th Percentile	Median	75th Percentile	25th Percentile	Median	75th Percentile
Small Cap	\$270	\$489	\$708	\$190	\$468	\$975
Mid Cap	\$1,658	\$2,420	\$3,449	\$1,114	\$1,985	\$3,857
Large Cap	\$9,306	\$16,715	\$34,262	\$4,823	\$10,960	\$28,334

Director compensation program details were sourced from companies' proxy statements and/or annual reports, generally filed with the Securities and Exchange Commission ("SEC") in the one-year period ending May 31, 2014.

OVERVIEW AND METHODOLOGY

Methodology

In addition to compensation for board service, the study analyzes compensation for service on each of the three most common standing committees of the board: audit, compensation, and nominating and governance. Thus, pay components presented in this study include:

- Annual cash retainers and meeting fees for board service
- Equity compensation, in the form of stock options or full-value stock awards (i.e., common shares, restricted shares/units, and deferred stock units)
- Annual cash retainers and meeting fees for committee member and chair service
- Additional compensation for serving as a non-executive chair or lead director

The report also presents our findings on the prevalence of elective cash deferrals, stock ownership guidelines, anti-pledging rules, and mandatory retirement age.

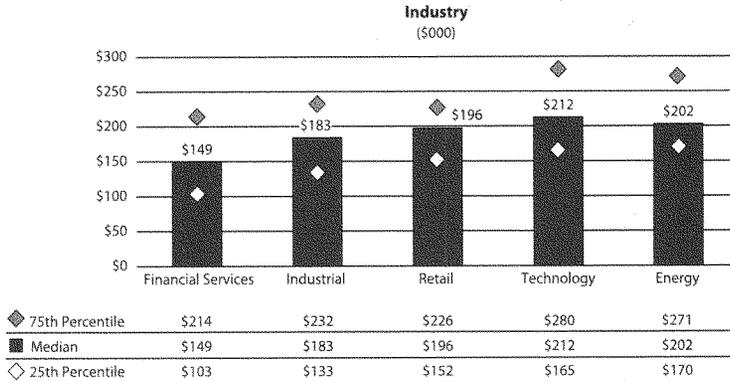
Assumptions used to facilitate comparisons include:

- Each director attends seven board meetings annually (representing a typical board meeting schedule)
- Each director is a member of one committee and attends six committee meetings per year
- If denominated in number of shares (rather than as a fixed-dollar value), equity compensation is valued using closing stock prices as of April 30, 2014
- All equity compensation is annualized over a five-year period (e.g., if a company makes a "larger than normal" equity grant upon initial election to the board followed by smaller annual grants, our analysis includes the five-year average value of the initial grant and the four subsequent annual grants)
- Stock options are valued using each individual company's publicly disclosed Accounting Standards Codification ("ASC") Topic 718 assumptions to align option values used in this study with their accounting costs

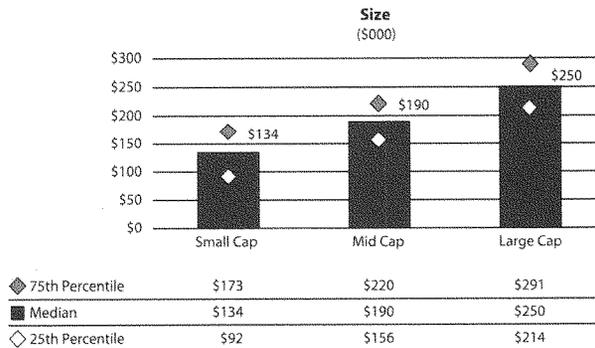
TOTAL BOARD COMPENSATION

Total Compensation – Pay Levels

Total compensation assumes a director attends seven board meetings, holds one committee membership, and attends six committee meetings per year. When segmented by industry, median total compensation levels are highest for the technology industry, followed by energy and retail. The lowest paid industry is financial services.



Company size is the primary determinant of total board compensation levels. The median total compensation received by directors of large-cap companies is 87% higher than that of small-cap companies. Of note, the range between 75th and 25th percentile at large-cap companies is tighter than at small-cap companies (36% versus 88% spread, respectively).

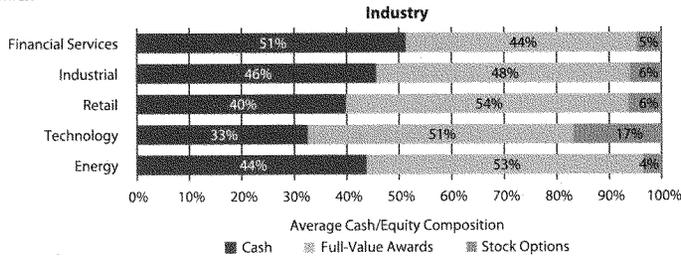


TOTAL BOARD COMPENSATION

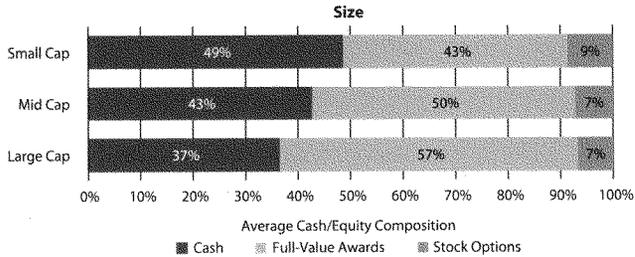
Total Compensation – Cash vs. Equity

Compensation for board service is typically composed of cash and equity. The charts below illustrate average pay mix across industry and company size.

The financial services sector places the most emphasis on cash compensation (51% of total compensation), while the technology sector places the greatest emphasis on equity compensation (68% of total compensation). Across industries, stock options are used to deliver a smaller portion of total compensation than full-value shares with stock options comprising 6% or less of average director total compensation among four of the five sectors, and 17% in technology companies.



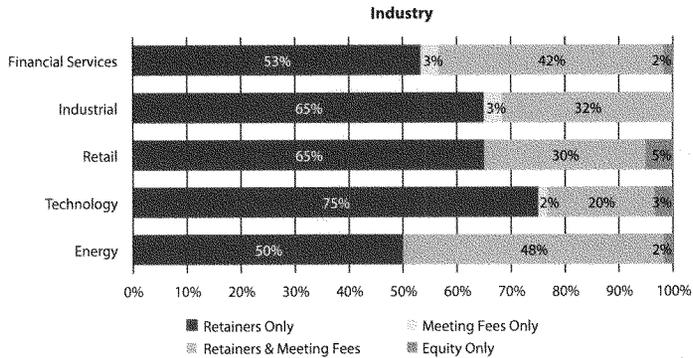
All three company size segments provide on average at least 50% of total compensation in equity, which demonstrates the desire to align directors' interests with those of shareholders.



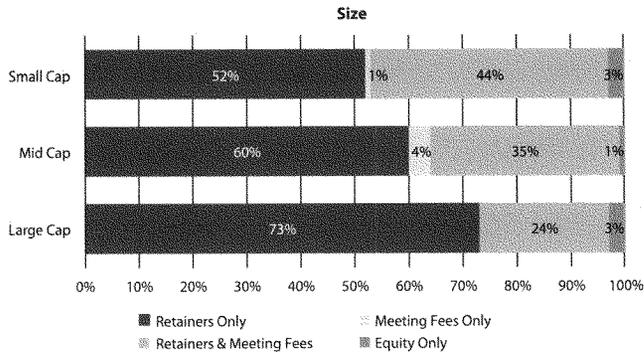
BOARD CASH COMPENSATION

Cash Compensation Pay Structure

Cash compensation for board service is typically provided through an annual board retainer, board meeting fees, or a combination of both. Many companies have eliminated board meeting fees and increased board retainers, as meeting attendance is expected and simplicity in design and administration is preferred. In addition, elimination of meeting fees avoids the challenge of determining what constitutes a meeting. The majority of the companies across all five industries do not pay board meeting fees and prevalence of meeting fees continues to decrease year-over-year.



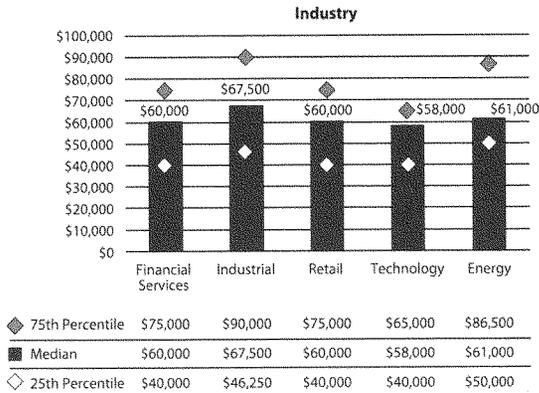
The movement away from board meeting fees started at large-cap companies, but has slowly taken root at mid- and small-cap companies. Seventy-three percent of large-cap companies deliver cash compensation through the sole use of cash retainers, compared to 60% and 52% of the mid- and small-cap companies, respectively.



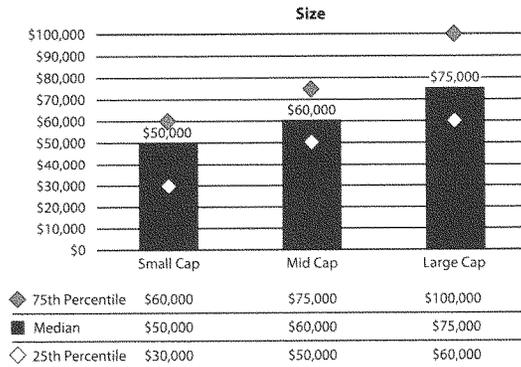
BOARD CASH COMPENSATION

Board Cash Retainers

Board cash retainers appear more highly correlated to size than to industry. Median retainers across industries are clustered at approximately \$60,000 with the exception of the industrial sector at \$67,500.



Median retainers provided by large-cap companies are 50% greater than the retainers provided at small-cap companies.



BOARD CASH COMPENSATION

Board Meeting Fees

Median board meeting fees range from \$1,500 to \$2,000 with little variation by size and industry. Of note, the prevalence of meeting fees decreases significantly as company size increases.

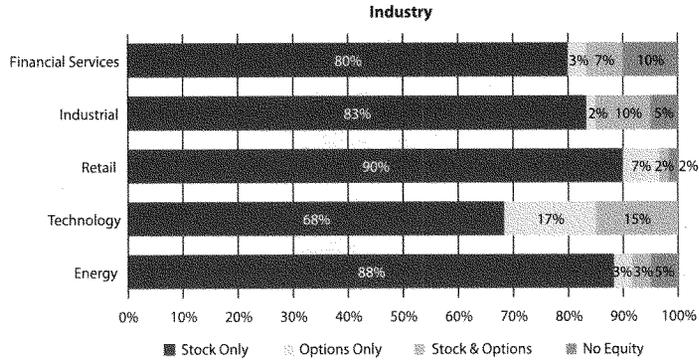
Industry				
	Prevalence	25th Percentile	Median	75th Percentile
Financial Services	45%	\$1,100	\$1,500	\$2,000
Industrial	35%	\$1,500	\$1,500	\$2,000
Retail	30%	\$1,500	\$1,875	\$2,500
Technology	22%	\$2,000	\$2,000	\$3,000
Energy	48%	\$1,500	\$2,000	\$2,000

Size				
	Prevalence	25th Percentile	Median	75th Percentile
Small Cap	45%	\$1,400	\$1,800	\$2,000
Mid Cap	39%	\$1,500	\$2,000	\$2,500
Large Cap	24%	\$1,500	\$2,000	\$2,500

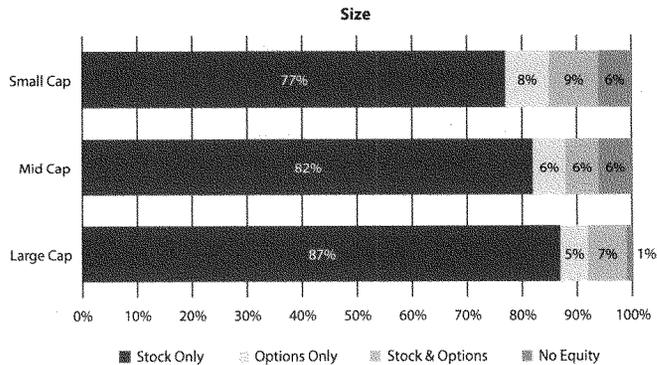
EQUITY AWARD TYPE

Irrespective of industry or size, full-value stock awards are the most prevalent form of equity compensation due to their perceived low-risk profile which reinforces the alignment between directors' compensation and long-term shareholder interests.

Of the five industry segments, technology companies are the heaviest users of stock options, with 17% providing stock options as the sole equity vehicle and 15% using a combination of both stock and options.



Although infrequent in use, stock options are more prevalent at small-cap companies than at large-cap companies.



EQUITY AWARD DENOMINATION

Companies primarily define annual equity grants as a fixed-dollar value rather than as a fixed number of shares. Dollar-denominated equity grants provide for the delivery of the same level of compensation on an annual basis, regardless of fluctuations in stock price.

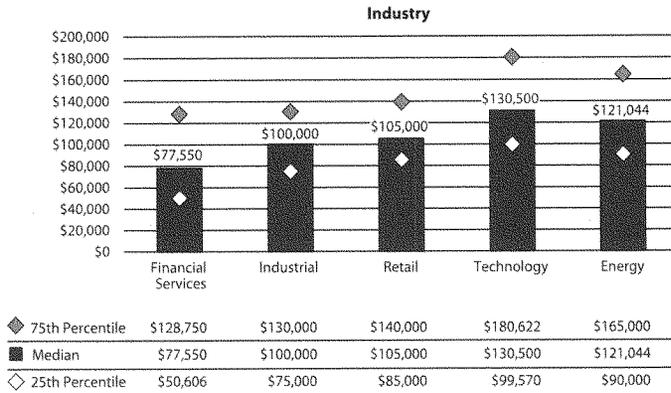
Companies that grant stock options exhibit a split practice of denominating the equity award as a fixed-dollar value or fixed number of shares; however, most energy and technology companies denominate stock option grants, when present, as a fixed number of shares. The vast majority of companies, irrespective of industry or size, denominate stock awards as a fixed-dollar value. The tables below provide additional detail on equity award denomination.

Industry: Percentage of Companies				
	Stock Options		Stock Awards	
	Number of Shares	Dollar Value	Number of Shares	Dollar Value
Financial Services	50%	50%	17%	83%
Industrial	43%	57%	11%	89%
Retail	40%	60%	13%	87%
Technology	74%	26%	22%	78%
Energy	75%	25%	20%	80%

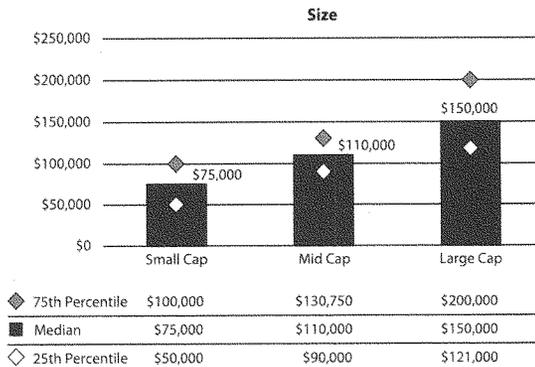
Size: Percentage of Companies				
	Stock Options		Stock Awards	
	Number of Shares	Dollar Value	Number of Shares	Dollar Value
Small Cap	59%	41%	24%	76%
Mid Cap	75%	25%	15%	85%
Large Cap	50%	50%	11%	89%

EQUITY COMPENSATION VALUES

Median equity compensation is highest among technology companies at \$130,500 and lowest among financial services companies at \$77,550. Technology companies pay the lowest board cash retainer, which reinforces the equity culture and cash preservation approach often found at technology companies.



The median equity value at small-cap companies of \$75,000 is half of the median value of \$150,000 at large-cap companies.



COMMITTEE MEMBER COMPENSATION

Directors may receive additional compensation for serving on a board committee. The audit committee is commonly perceived to have the most responsibility and risk exposure; however, heightened scrutiny over executive compensation has increased the time commitment and risk assumed by members of the compensation committee.

The table below shows the prevalence and median values of incremental compensation paid to committee members.

Prevalence of Retainers and Meeting Fees for Committee Service

	Retainers			Meeting Fees		
	Audit	Compensation	Nominating & Governance	Audit	Compensation	Nominating & Governance
Prevalence <i>(All Companies)</i>	38%	32%	30%	38%	38%	38%
Industry						
Financial Services	30%	18%	15%	53%	53%	53%
Industrial	32%	23%	22%	33%	33%	32%
Retail	35%	30%	25%	27%	27%	27%
Technology	70%	63%	57%	23%	23%	20%
Energy	23%	22%	22%	52%	52%	48%
Size						
Small Cap	36%	34%	29%	36%	34%	29%
Mid Cap	39%	31%	29%	40%	40%	38%
Large Cap	39%	29%	26%	28%	28%	27%
Median Pay Levels <i>(All Companies)</i>	\$10,000	\$7,750	\$5,000	\$1,500	\$1,500	\$1,500

Committee member service can be compensated through meeting fees or cash (and more rarely, equity) retainers. As shown above, 38% of companies provide meeting fees to members of all three committees. Prevalence of retainers ranges from 30% for nominating and governance committee members to 38% for audit committee members. Similar to board meeting fees, committee meeting fees have decreased in prevalence, while the prevalence of committee retainers has not changed significantly since last year.

Among industries, committee retainer prevalence varies widely, from 23% of energy companies to 70% of technology companies providing an audit committee member retainer. The prevalence is generally reversed for meeting fees, as most companies compensate for committee service through retainers or meeting fees, rather than through both.

In general, compensation for committee service does not vary significantly by size or industry. Prevalence and values of incremental committee retainers are typically highest for the audit committee while meeting fees are typically identical for all three committees.

COMMITTEE CHAIR COMPENSATION

Most companies provide additional compensation to committee chairs to recognize the substantial time required to lead the committee. Historically, audit chairs received the highest incremental compensation but as scrutiny over executive compensation intensifies, the gap between pay for audit and compensation chairs diminishes. While over 90% of the companies in our research sample provide compensation to both audit and compensation committee chairs, 31% of those companies pay their audit and committee chairs the same, compared to 26% and 23% in our 2013 and 2012 studies, respectively.

The table below shows the prevalence and median levels of retainers and meeting fees paid to directors who chair the audit, compensation, or nominating and governance committees.

Additional Compensation for Committee Chair (Median)

	Median Retainers			Median Meeting Fees		
	Audit	Compensation	Nominating & Governance	Audit	Compensation	Nominating & Governance
Prevalence <i>(All Companies)</i>	95%	92%	89%	38%	39%	39%
Industry						
Financial Services	\$20,000	\$12,000	\$10,000	\$1,225	\$1,100	\$1,225
Industrial	\$15,000	\$10,000	\$10,000	\$1,600	\$1,500	\$1,500
Retail	\$20,000	\$15,000	\$10,000	\$1,500	\$1,500	\$1,500
Technology	\$25,000	\$15,000	\$10,000	\$1,538	\$1,500	\$1,750
Energy	\$15,000	\$15,000	\$10,000	\$2,000	\$1,500	\$1,500
Size						
Small Cap	\$15,000	\$10,000	\$9,500	\$1,538	\$1,500	\$1,750
Mid Cap	\$20,000	\$15,000	\$10,000	\$1,500	\$1,500	\$1,500
Large Cap	\$25,000	\$15,000	\$12,500	\$1,500	\$1,500	\$1,500

Overall, directors who serve as chair of the audit committee receive the highest retainer, followed by those serving as chairs of the compensation committee and the nominating and governance committee.

Technology companies provide slightly higher chair retainers for the audit committee compared to the other industry segments.

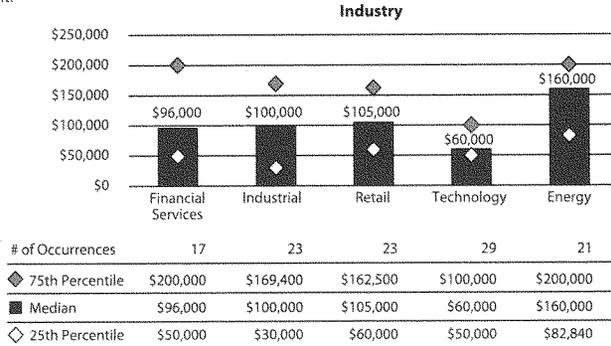
Compensation for committee chairs also varies by size. Large- and mid-cap companies provide median committee chair retainers ranging from \$10,000 to \$25,000, followed by small-cap companies at \$9,500 to \$15,000.

Meeting fees paid to committee chairs and members range from \$1,100 to \$2,000 (up from \$1,500 last year).

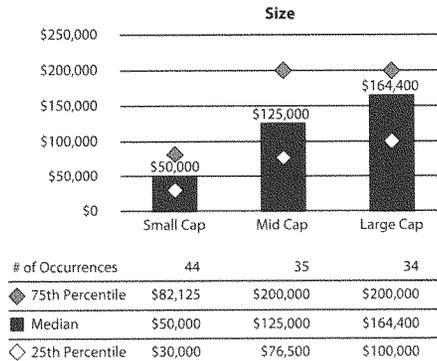
NON-EXECUTIVE CHAIR AND LEAD DIRECTOR COMPENSATION

Non-Executive Chair Retainer

There were 113 non-executive chairs identified in this year's study. Incremental compensation for non-executive chairs is provided in cash, equity, or a combination of both. Energy companies provide the highest additional retainer for board chair service, while technology companies provide the lowest. The wide range between the 25th and 75th percentiles is indicative of the variation in the chair role across companies, which is likely related to leadership structure and time commitment.



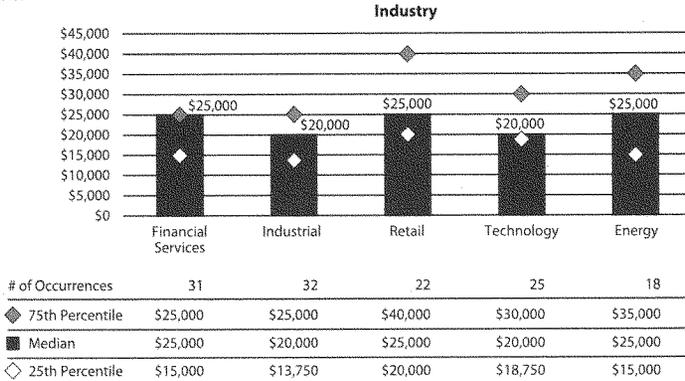
The median chair retainer of \$164,400 at large-cap companies is more than three times the median chair retainer of \$50,000 at small-cap companies.



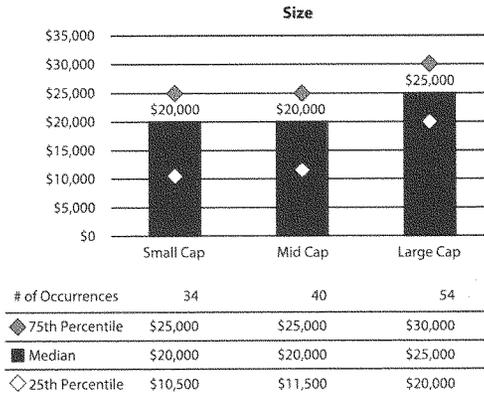
NON-EXECUTIVE CHAIR AND LEAD DIRECTOR COMPENSATION

Lead Director Retainer

Of the 155 lead directors in this year's study, 128 (83%) received additional compensation for their service. The median retainer for the lead director position remains essentially unchanged from last year at \$20,000 to \$25,000 across all industries.



There is no significant variance in lead director retainers based on size, either.



STOCK OWNERSHIP GUIDELINES

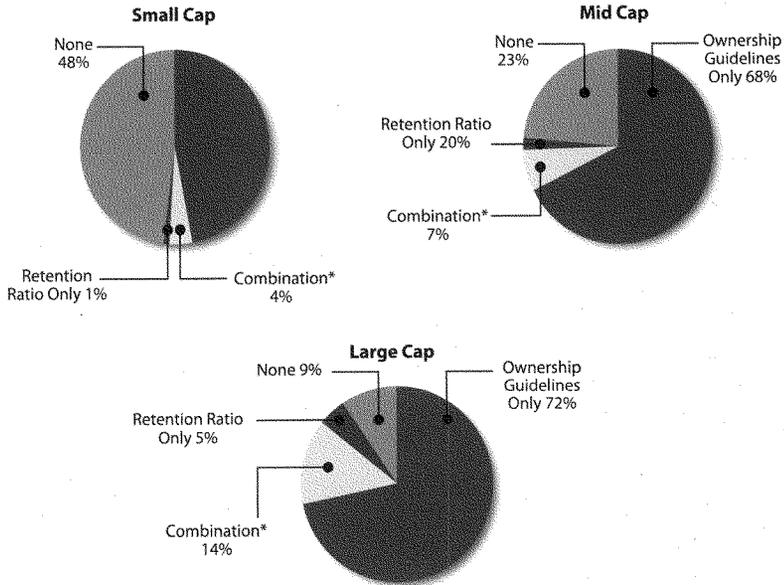
Stock ownership guidelines are universal at large-cap companies and continue to grow in prevalence among smaller companies. Ninety-one percent of large-cap companies in this study have some type of stock ownership guidelines and/or retention ratio practice in place, while half of the small-cap companies maintain an ownership requirement.

Guidelines typically take one of three forms: (1) a multiple of a director's cash board retainer, a dollar value, or a number of shares, (2) a retention ratio expressing ownership requirements as a percentage of "net shares" acquired (i.e., shares retained by the director through the exercise of options or vesting of full-value shares, net of shares used to fulfill tax obligations or (3) a combination of the first two approaches.

In general, directors are given a timeframe within which to comply with the guideline, or are subject to holding periods requiring directors to retain shares for a specified time period (e.g., one year) after vesting of shares or exercise of stock options.

Companies typically require directors to own three to five times the annual cash board retainer within three to five years. However, as external governance pressure has increased, ownership guidelines are trending toward either the higher end of this range and/or a 100% mandatory hold until retirement or termination of board service.

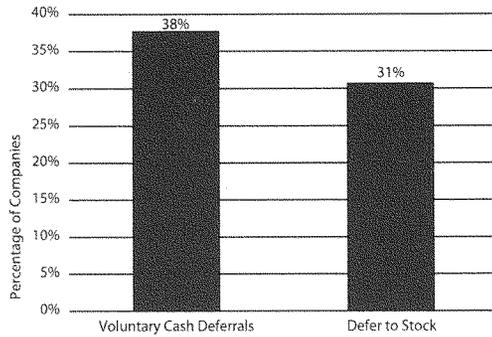
Types of Stock Ownership Guidelines



*Combination means the use of retention ratio in addition to ownership guidelines

VOLUNTARY COMPENSATION DEFERRALS

Approximately 40% of companies in our study allow directors to voluntarily defer cash compensation into alternative investments. The most commonly used investments are similar to those provided in a company's employee 401(k) account or company stock unit accounts that pay out upon a director's retirement or termination from the board.



OTHER GOVERNANCE PROVISIONS

Anti-Pledging Rules

In response to the current corporate governance environment and shareholder pressure, companies continue to implement formal anti-pledging policies that apply not only to executives but also to directors. Pledging company stock may detrimentally impact shareholders in cases where stock price declines require directors to post additional shares as collateral or sell shares held in a margin account. ISS considers "significant pledging" a "failure in risk oversight" and may recommend shareholders vote against the re-election of such directors to the board. Thirty-nine percent of the companies in this year's study have implemented formal anti-pledging policies, an increase from 25% of participants in last year's study.

Mandatory Retirement Age

The presence of a mandatory retirement age ensures a healthy rotation of board members, infusing the board with fresh ideas. During the past few years, mandatory retirement ages have risen as companies have found it increasingly difficult to replace long-tenured directors due to a shrinking pool of qualified candidates. Fear of legal liability, investor scrutiny and increased time commitments have all contributed to this growing shortage of candidates. Sixty-five companies in this year's study disclosed a mandatory retirement age with the minimum disclosed retirement age of 65 years and the maximum of 80 years. However, the average mandatory retirement age remains unchanged from last year at 73 years.

RESEARCH COMPANY LIST

1-800-Flowers.com	Cadence Design Systems	EnPro Industries
3M	Carrizo Oil & Gas	Equal Energy
Abercrombie & Fitch	Cascade Bancorp	Equinix
Adobe Systems	Cathay General Bancorp	Era Group
Advance Auto Parts	CBIZ	EW Scripps
Aéropostale	Cenovus Energy	Expeditors International of Washington
Alamo Group	Conveo	Express
Allstate	Chesapeake Energy	Exterran Holdings
Alon USA Partners	Chevron	ExxonMobil
Alpha Natural Resources	Children's Place Retail Stores	F5 Networks
Amazon.com	Cincinnati Financial	Fairchild Semiconductor International
American Financial Group	Citrix Systems	FalconStor Software
American Midstream Partners	Clayton Williams Energy	FBL Financial Group
Amkor Technology	CNO Financial Group	FBR & Co.
Anadarko Petroleum	Cognex	Finish Line
Analog Devices	Cognizant Technology Solutions	First Acceptance
ANN	Comerica	First Defiance Financial
Apache	Compressco Partners	FirstMerit
Apartment Investment & Management	ComScore	Fluor
Applied Micro Circuits	Comstock Resources	Foot Locker
Argo Group International Holdings	ConocoPhillips	Forbes Energy Services
Armstrong World Industries	Container Store	Forest Oil
Assurant	Con-way	FuelCell Energy
Atlas Air Worldwide Holdings	Core-Mark Holding	Gamco Investors
AutoZone	Cowen Group	GameStop
Axcelis Technologies	Cree	General Dynamics
Babcock & Wilcox	CSG Systems International	General Electric
Baker Hughes	CTS	Genesis Energy
Bancorp	Cummins	Gentex
Barnes Group	Datalink	Gibraltar Industries
Basic Energy Services	DCP Midstream Partners	Global Partners
BB&T	Deere & Co	Goldman Sachs Group
Beacon Roofing Supply	Delek US Holdings	GraffTech International
Bebe Stores	DFC Global	Green Dot
Bed Bath & Beyond	Dick's Sporting Goods	Green Plains Renewable Energy
Belden	Digital River	Griffon
Best Buy	Dillard's	GT Advanced Technologies
BGC Partners	Donnelley (RR) & Sons	Guaranty Bancorp
Big 5 Sporting Goods	Douglas Dynamics	Guess?
Big Lots	Dover	Halliburton
Bloomin' Brands	Dresser-Rand Group	Harris & Harris Group
Bon-Ton Stores	DST Systems	Hartford Financial Services
Bristow Group	Duke Realty	Healthcare Realty Trust
Broadcom	Eagle Rock Energy Partners	Heartland Financial USA
Brown & Brown	EarthLink Holdings	Hercules Offshore
Brown Shoe	Ellington Financial	HFF
Brunswick	Emcore	Home Depot
Build-A-Bear Workshop	Encana	Hub Group
CA	Engility Holdings	ICG Group
Cache	Ennis	Imperial Oil

RESEARCH COMPANY LIST

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Intel	Northrop Grumman	Take-Two Interactive Software
Invesco	Office Depot	Tanger Factory Outlet Centers
Iron Mountain	ONEOK Partners	Tangoe
Itron	Oracle	Targa Resources
Jabil Circuit	Overstock.com	Target
Jacobs Engineering Group	Pacific Sunwear of California	TCF Financial
JAKKS Pacific	Parker Drilling	TD Ameritrade Holding
JDS Uniphase	PBF Energy	TeleTech Holdings
Johnson Outdoors	PC Connection	Tennant
Jos A Bank Clothiers	Penn National Gaming	Tesoro
Joy Global	Penney (J C)	Tetra Tech
Juniper Networks	PHI	Textron
KCG Holdings	Pier 1 Imports	TJX Companies
Kelly Services	Piper Jaffray Companies	Tompkins Financial
Kirkland's	Plug Power	Transocean
KLA-Tencor	PLX Technology	Travelers Companies
Kohl's	Popeyes Louisiana Kitchen	Trimble Navigation
Korn/Ferry International	Precision Drilling	Triumph Group
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Lexmark International	Quanta Services	United Financial Bancorp
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Micron Technology	Smith & Wesson Holding	Webster Financial
Morgan Stanley	Solazyme	Wells Fargo & Co.
Multi-Color	Sovran Self Storage	Western Refining
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NCR	Sun Bancorp	Woodward
NetApp	Superior Energy Services	World Fuel Services
Netflix	Susser Petroleum Partners	WPX Energy
Noble Energy	Swift Energy	Zale Corporation
Nordstrom	Sykes Enterprises	Zions Bancorporation

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Frederic W. Cook & Co., Inc. is an independent consulting firm specializing in executive and director compensation and related corporate governance matters. Formed in 1973, our firm has served more than 2,900 corporations, in a wide variety of industries from our offices in New York, Chicago, Los Angeles, San Francisco, Atlanta, Houston, Boston, and Tarrytown. Our primary focus is on performance-based compensation programs that help companies attract and retain business leaders, motivate and reward them for improved performance, and align their interests with shareholders. Our range of consulting services includes:

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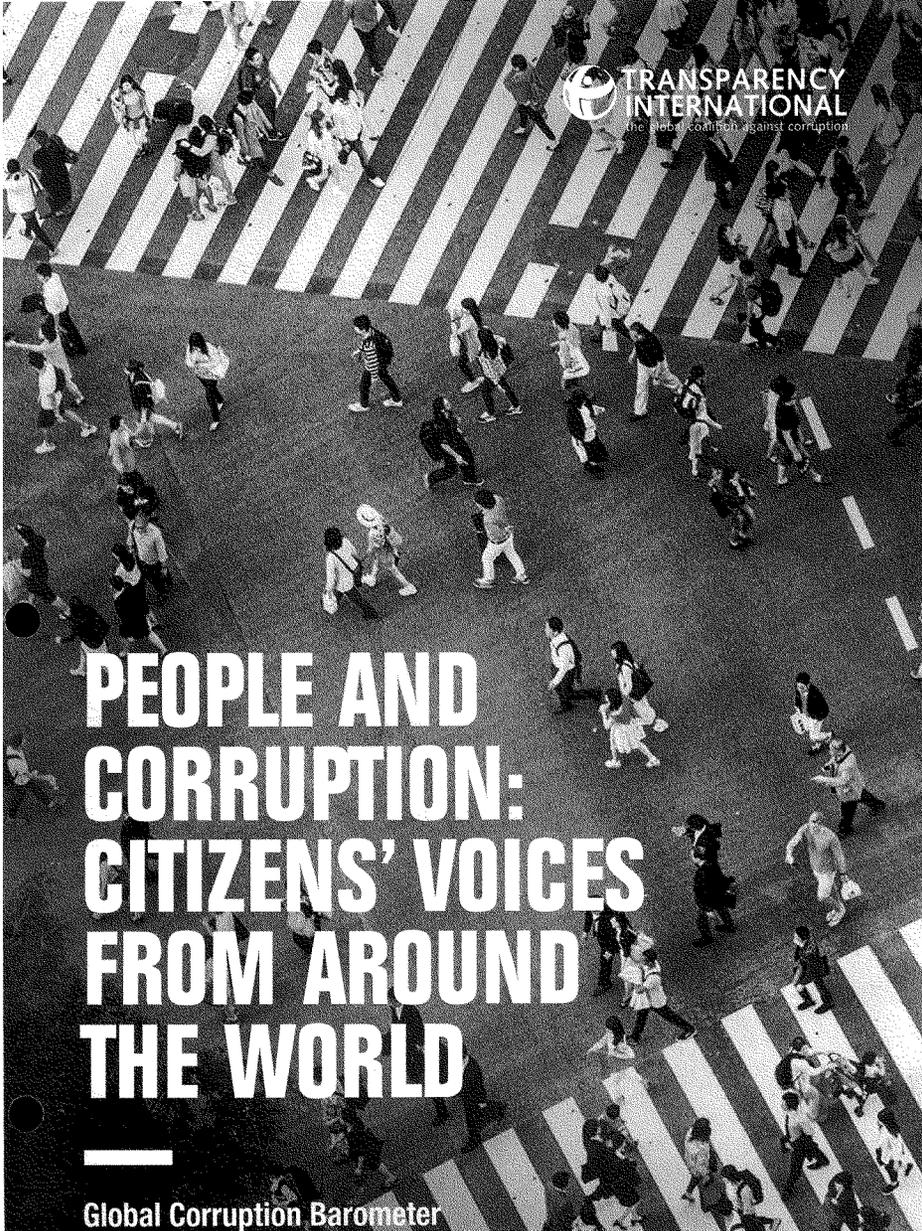
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**TRANSPARENCY
INTERNATIONAL**
the global coalition against corruption

PEOPLE AND CORRUPTION: CITIZENS' VOICES FROM AROUND THE WORLD

Global Corruption Barometer

Transparency International is a global movement with one vision: a world in which government, business, civil society and the daily lives of people are free of corruption. Through more than 100 chapters worldwide and an international secretariat in Berlin, we are leading the fight against corruption to turn this vision into reality.

www.transparency.org

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Every effort has been made to verify the accuracy of the information contained in this report. All information was believed to be correct as of November 2017.

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INTRODUCTION

Ordinary citizens often stand on the front line against corruption. It is citizens who face demands for bribes to access public services, such as school entry for their children or life-saving medical care. Transparency International believes that people's experience and perceptions of corruption are key for understanding corruption risks around the world. The public also plays a vital role in holding governments accountable for their actions – or lack of action – in addressing graft.

This is a summary report of the key findings from the ninth edition of Transparency International's Global Corruption Barometer series – the world's largest survey asking citizens about their direct personal experience of bribery in their daily lives, their perceptions of corruption challenges in their own countries, and their willingness to act against corruption.

The results of this latest edition of the survey have been published via a series of regional reports. This summary brings together those reports and covers 119 countries, territories and regions around the globe. It is based on interviews with 162,136 adults from March 2014 until January 2017 and it identifies the key differences between the regions and key results by place.

This report clearly demonstrates that bribery is a far too common occurrence around the world, with nearly one in every four public service users having to pay a bribe each year. With the United Nations Sustainable Development Goals requiring governments to reduce corruption and bribery in all its forms by 2030, the results from the survey can be used to show governments just how far they must go before these goals will be realised.

GOVERNMENTS' ANTI-CORRUPTION EFFORTS ARE FALLING SHORT

We asked people how well or badly they thought their government was doing at fighting corruption in their country. Around the world, we found that nearly six in ten people thought that their government was doing poorly, while only three in ten thought that their government was doing well.



SAY THEIR GOVERNMENT IS DOING **BADLY**



SAY THEIR GOVERNMENT IS DOING **WELL**

The Middle East and North Africa region had the highest percentage of citizens rating their government as doing a bad job at fighting corruption (68 per cent), followed by Sub Saharan Africa (63 per cent). In the remaining three reports covering Asia Pacific region, Europe and Central Asia and the Americas, half or just over half of citizens gave their government a bad rating (50 per cent, 53 per cent and 53 per cent respectively).

In 76 of the surveyed places, a majority of citizens rated their government as doing poorly at addressing corruption risks, while in only eight places did a majority said that their government had done well. The table below shows places which were most critical and most positive when rating their government's efforts. In Yemen, citizens were particularly critical with 91 per cent saying they had done badly, contrasting strongly with Thailand where 72 per cent rated their government well.

PLACES WHERE GOVERNMENTS ARE PERCEIVED TO BE DOING THE WORST % SAYING **BADLY**

Yemen	– 91%
Madagascar	– 90%
Ukraine	– 87%
Gabon	– 86%
Bosnia and Herz.	– 84%
Moldova	– 84%

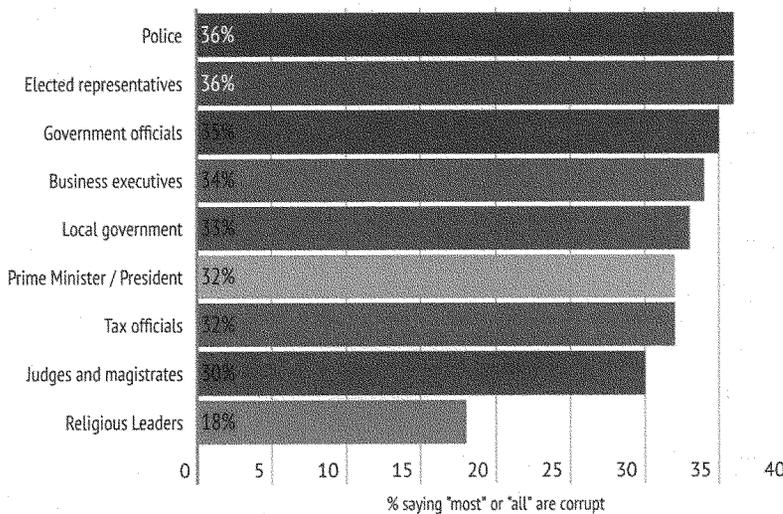
PLACES WHERE GOVERNMENTS ARE PERCEIVED TO BE DOING THE BEST % SAYING **WELL**

Thailand	– 72%
Indonesia	– 64%
Honduras	– 55%
Guatemala	– 54%
Botswana	– 54%
Ecuador	– 54%

Q. How well or badly would you say the current government is handling the following matters, or haven't you heard enough to say? "Fighting corruption in government". Base: all respondents, excluding missing responses. Response categories "Very badly" and "Fairly badly" are combined into "Badly"; and response categories "Very well" and "Fairly well" are combined into "Well".

KEY PUBLIC SECTOR INSTITUTIONS SEEN AS CORRUPT

The survey asked citizens how corrupt they thought various key influential groups and institutions in their country were. Across the globe, the police and elected representatives (such as members of parliament, congressmen, senators etc.) were seen to be most corrupt – followed closely by government officials, business executives and local government officials.



Q. How many of the following people do you think are involved in corruption, or haven't you heard enough about them to say?
Base: all respondents, excluding missing responses. Chart shows percentage of respondents who answered that either "most" or "all" of them are corrupt.

In the 2013 Global Corruption Barometer survey, when we asked a similar question, the police, political parties, public officials and parliament also came top as being perceived as the most corrupt.

When comparing the results between regions, in both Asia Pacific and Sub Saharan Africa police were seen as the most corrupt, with 39 per cent and 47 per cent of people respectively said most or all police officers were corrupt. In Europe and Central Asia elected representatives were seen as the most corrupt (31 per cent). In the Americas both the police and elected representatives fared worst (46 per cent both), while in the Middle East and North Africa elected representatives, tax officials and government officials were thought to be highly corrupt by 45 per cent of the population, a higher percentage than for any other institution.

When we looked at the results by country and took a simple average of the results for the seven public sector categories (the president's office, members of parliament, government officials, tax officials, the police, judges/magistrates and local government councillors), we were able to show in which place people generally perceive their public sector to be highly corrupt and in which places people generally perceive their public sector to be much cleaner. The table below shows the top scoring places in both the corrupt and clean categories. For example, in Moldova almost seven in ten people say that people working in these public sector institutions are highly corrupt compared with just 6 per cent in Germany who said the same.

PLACES WHERE THE PUBLIC SECTOR IS PERCEIVED TO BE **MOST CORRUPT**

Moldova	– 69%
Yemen	– 68%
Lebanon	– 67%
Liberia	– 65%
Venezuela	– 64%

PLACES WHERE THE PUBLIC SECTOR IS PERCEIVED TO BE **LEAST CORRUPT**

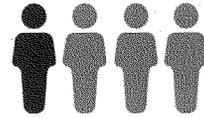
Germany	– 6%
Switzerland	– 8%
Sweden	– 8%
Australia	– 10%
Netherlands	– 11%

Q. How many of the following people do you think are involved in corruption, or haven't you heard enough about them to say? - Percentages refer to the average of the seven public sector institutions, proportion who answered that "most" or "all" are corrupt.

MANY PEOPLE PAY BRIBES FOR PUBLIC SERVICES

The survey asked people about their direct experiences of bribery in the 12 months prior to when the survey took place. In Asia Pacific, Latin America and the Caribbean, Africa and the Middle East, citizens were asked whether they had paid a bribe for any of six services which they may have had contact with. In Europe and Central Asia they were asked whether their household had paid a bribe for any of eight public services.

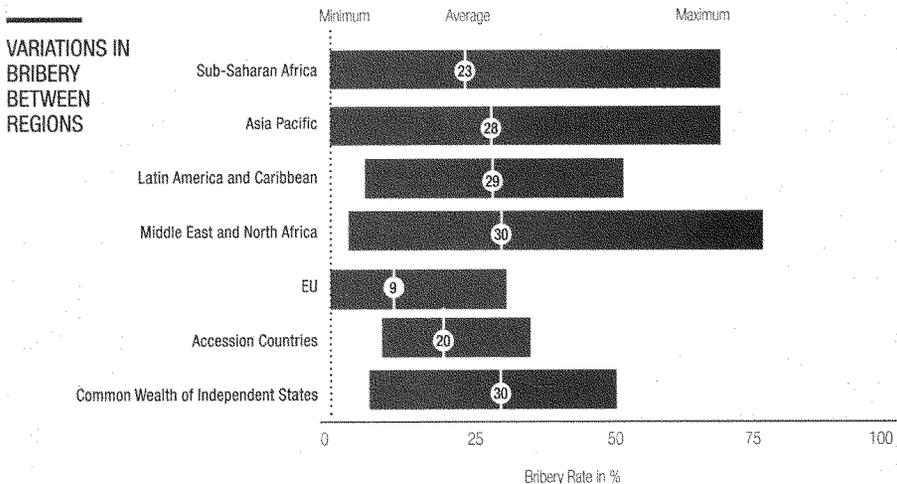
Around the world nearly 1 in 4 people said that they paid a bribe for public services in the 12 months prior to when the survey took place.



When we looked across the various regions surveyed we found that on average the bribery rate in the European Union was lowest (9 per cent), while the Commonwealth of Independent States in Eurasia, and the Middle East and North Africa region had an average bribery rate of 30 per cent, which was the highest of all the regions surveyed. The Latin America and Caribbean region and Asia Pacific region followed closely with an average bribery rate of 29 and 28 per cent respectively.

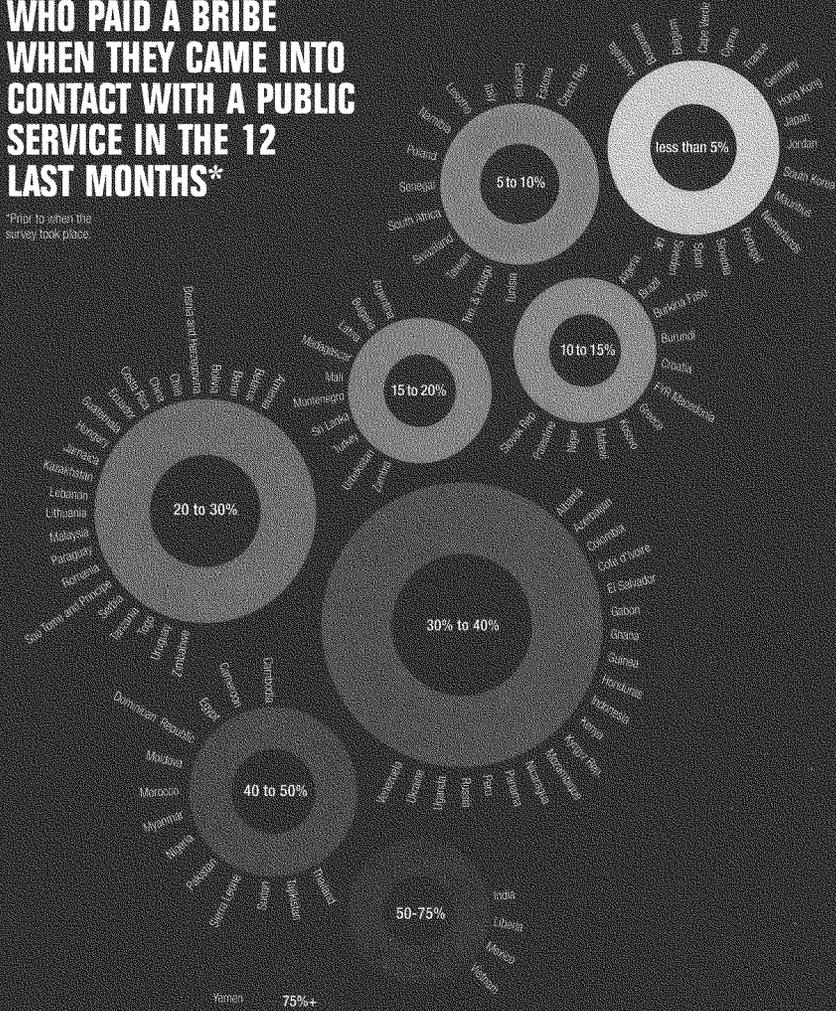
Countries seeking to join the EU and the Sub-Saharan African region have similar average bribery rates to each other (20 and 23 per cent respectively). Yet in Sub-Saharan Africa there is a far greater range in bribery rates by country as shown in the graph below, with some countries doing much worse, and some much better, than Accession countries.

Places with very low bribery rates were found in the Asia Pacific region, Sub-Saharan Africa, the Middle East and the EU.



PERCENTAGE OF PEOPLE WHO PAID A BRIBE WHEN THEY CAME INTO CONTACT WITH A PUBLIC SERVICE IN THE 12 LAST MONTHS*

*Prior to when the survey took place.



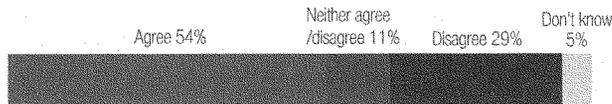
The survey asked about direct experiences of bribery in the 12 months prior to when the survey took place. In Asia Pacific, the Americas, Africa and the Middle East, citizens were asked whether they had paid a bribe for any of six services which they may have had contact with. In Europe and Central Asia they were asked whether their household

ORDINARY PEOPLE CAN MAKE A DIFFERENCE

Despite many people having been affected by bribery around the world, the results still showed that large numbers of people are ready and willing to help in the fight against corruption. More than half the people around the world agreed that ordinary people could make a difference.

Young people aged 24 and under are the most likely to feel empowered to make a difference. Fifty-eight per cent of this age group, compared with 50 per cent of those aged 55 and over, agreed that they could make a difference. Men and women both expressed that they were willing to get involved in anti-corruption (56 per cent men, 53 per cent women).

CAN ORDINARY PEOPLE MAKE A DIFFERENCE?



Q. Please tell me whether you agree or disagree with the following statement: "Ordinary people can make a difference in the fight against corruption". Base: all respondents, excluding missing responses.

There was a high level of engagement among citizens in many places around the world. In 78 of the 117 countries, territories and regions where this question was asked, a majority of citizens said that they felt empowered to fight against corruption. In only 11 places a majority of citizens said that they did not feel empowered. The table below shows where people felt most engaged and where people felt least engaged.

PLACES WHERE PEOPLE FEEL LEAST ENGAGED % AGREEING

Belarus	10%
Czech Republic	12%
Ukraine	14%
Hungary	14%
Slovak Republic	18%

PLACES WHERE THE PEOPLE FEEL MOST ENGAGED % AGREEING

Brazil	83%
Greenland	83%
Costa Rica	82%
Paraguay	82%
Portugal	82%

Q. Please tell me whether you agree or disagree with the following statement: "Ordinary people can make a difference in the fight against corruption". Base: all respondents, excluding missing responses.

CONCLUSION

The findings presented in this report reflect global public opinion on corruption and the experience of bribery. Negative ratings of governments' efforts to curb corruption suggest that more must be done to reduce public sector graft and clean up political institutions so that they act in the interests of citizens rather than in their own interests. There is a clear need to hold the corrupt accountable. Governments and other actors will have to win more trust before ordinary people change their views about the anti-corruption efforts of those in power.

Particularly in countries such as Moldova, Yemen and Lebanon, where people perceived high levels of public sector corruption, and in Mexico, India, Liberia and Vietnam, which have very high rates of bribery for public services, the results suggest real and urgent issues that must be addressed.

The good news is that there are many citizens around the world are ready and willing to help fight against corruption. However, governments must work harder and show progress in their efforts to fight corruption if they are to convince citizens of real progress.

METHODOLOGY NOTE

Data for the 9th Edition of the Global Corruption Barometer was collected by either face to face or telephone interviews with adults living in 119 countries around the world. The fieldwork was conducted between March 2014 and January 2017.

The face to face interviews were conducted with Computer Assisted Personal Interviewing (CAPI) or Paper and Pencil Interviewing (PAPI). A random probability stratified clustered sample was designed in each project country. The sample was stratified by regions and by level of urbanisation. Households were selected at random, either using random walk, or using existing registers. The respondent was selected at random from all adults in the household.

The telephone surveys were conducted with Computer Assisted Telephone Interviews (CATI). Random digital dialling was used to randomly select households and respondents were selected at random from all adults in the household. Both landline telephones and mobile phones were selected for interviewing. Samples were stratified across all regions in the country according to population size.

The GCB questionnaire was translated into all major local languages in each country, and the interviews were conducted in the language of the respondent's choice.

MODE EFFECTS

The report presents the results obtained using two different modes of data collection and may be prone to mode effects, in terms of sampling, the selection of respondents and the propensity to respond using different modes of data collection.

The questions highlighted in the report were asked as part of a longer interview on related topics. This report presents a selection of the results.

WEIGHTING

The survey samples were selected and weighted to be nationally representative of all adults living in each country/territory. The results have margins of sampling error of a maximum +/-2.6 percentage points (for a sample of 1,500) and +/-3.1 percentage points (for a sample of 1,000) for dichotomous questions (for example, yes or no) at a 95 per cent confidence level.

In addition, an extra weight is applied so that the sample sizes for each country/territory are equal. The overall global results and the results for each region are equivalent to an average of the countries surveyed.

For full details on the survey approach including survey companies, sample sizes, fieldwork dates and survey mode, please see www.transparency.org/research/gcb/gcb_2015_16

NOTES

- I. A full methodology note is available online at www.transparency.org/research/gcb/gcb_2015_16
- II. The regions referenced in this report correspond to the regional reports based on the 9th edition of the Global Corruption Barometer, published by Transparency International since 2015, namely Asia Pacific, Europe and Central Asia, Sub Saharan Africa and the Middle East and North Africa. When we refer to the Americas region, this includes the results from Latin America and the Caribbean and the USA.
- III. The regional results presented in this report for Sub Saharan Africa include Mozambique, Gabon and São Tomé and Príncipe. These countries were not included in the “People and Corruption: Africa Survey 2015” report as the results were not finalised then. Therefore, the overall regional figures may vary to those reported in that report.
- IV. This question was not asked in China. The results exclude Tajikistan due to an ongoing assessment of the results.
- V. Due to the high level of “don’t know” responses, of more than 40 per cent, the results for Azerbaijan, Germany and Poland are not shown.
- VI. This question was not asked in Uzbekistan. The results from Tajikistan are not included in the global average due to an on-going assessment of the data.
- VII. Due to the high level of “don’t know” responses, of more than 40 per cent, the results for Azerbaijan, Bulgaria, Estonia, FYR Macedonia, Georgia, Lithuania, Montenegro and Poland are not shown.
- VIII. This question was not asked in Uzbekistan. The results from Tajikistan are not included in the global average due to an on-going assessment of the data.
- IX. The bribery module was implemented with amended wording in Europe and Central Asia including Mongolia as the questions were implemented as part of a longer existing survey. In this region the questions asked about household rather than individual level bribery and are based on contact with eight public services, rather than the six public services asked in the other regions. Care should therefore be taken with direct comparisons of bribery rates between countries from this region and those from other regions. The bribery questions were not asked in Belgium, France, Greenland, the Netherlands, Sweden, Switzerland, the UK and the USA due to funding constraints. The report uses results taken from the 2014 Eurobarometer survey for Belgium, France, the Netherlands, Sweden, and the UK. The full questionnaires are available online at www.transparency.org/research/gcb/gcb_2015_16
- X. This question was not asked in China nor Uzbekistan.

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The Hong Kong ICAC

Transparency International Belgium

Transparency International Cambodia

Transparency International Greenland

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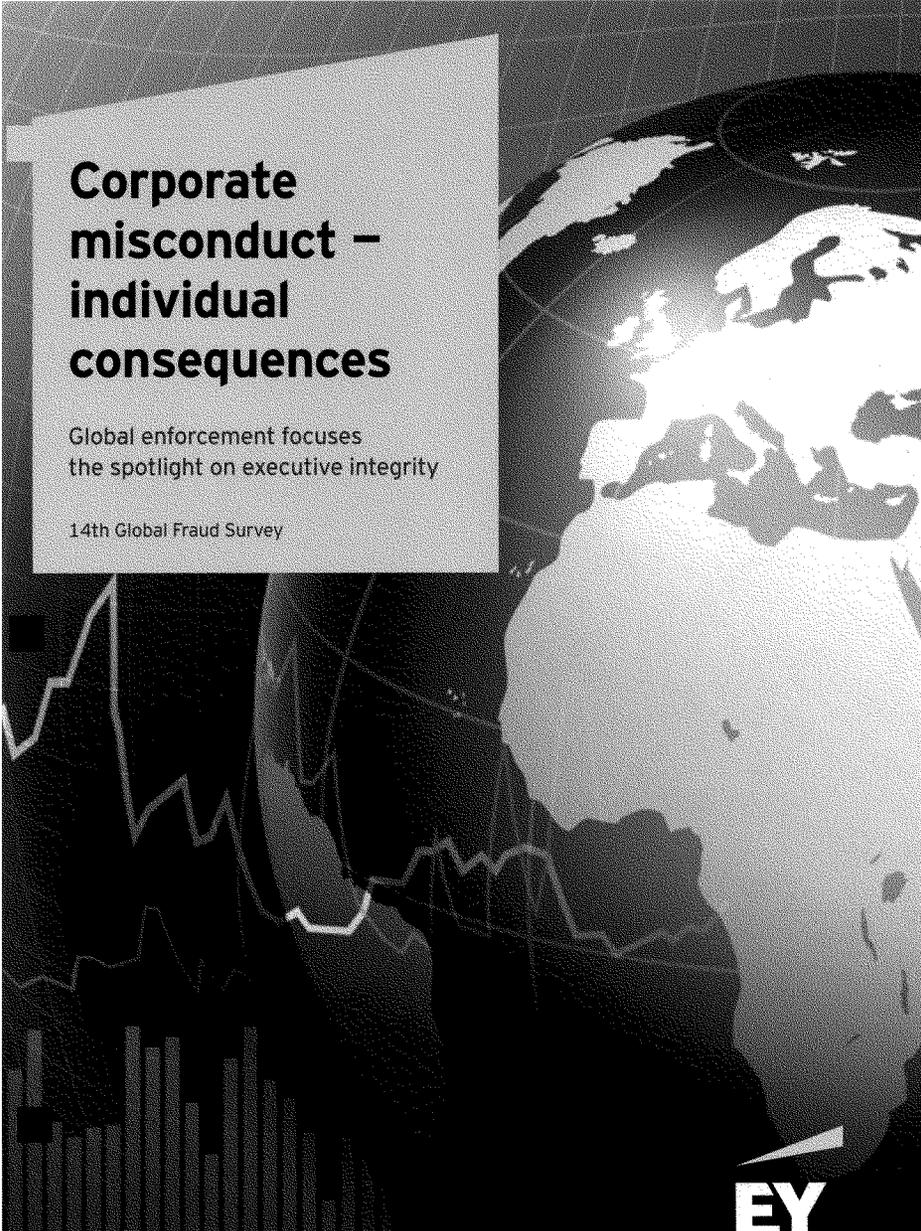
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Corporate misconduct – individual consequences

Global enforcement focuses the spotlight on executive integrity

14th Global Fraud Survey



EY

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Foreword

In the aftermath of recent major terrorist attacks and the revelations regarding widespread possible misuse of offshore jurisdictions, and in an environment where geopolitical tensions have reached levels not seen since the Cold War, governments around the world are under increased pressure to face up to the immense global challenges of terrorist financing, migration and corruption. At the same time, certain positive events, such as the agreement by the P5+1 group (China, France, Russia, the United Kingdom, the United States, plus Germany) with Iran to limit Iran's sensitive nuclear activities are grounds for cautious optimism.

These issues contribute to volatility in financial markets. The banking sector remains under significant regulatory focus, with serious stress points remaining. Governments, meanwhile, are increasingly coordinated in their approaches to investigating misconduct, including recovering the proceeds of corruption. The reason for this is clear. Bribery and corruption continue to represent a substantial threat to sluggish global growth in fragile financial markets.

Law enforcement agencies, including the United States Department of Justice and the United States Securities and Exchange Commission, are increasingly focusing on individual misconduct when investigating impropriety. In this context, boards and executives need to be confident that their businesses comply with rapidly changing laws and regulations wherever they operate.

For this, our 14th Global Fraud Survey, EY interviewed senior executives with responsibility for tackling fraud, bribery and corruption. These individuals included chief financial officers, chief compliance officers, heads of internal audit and heads of legal departments. They are ideally placed to provide insight into the impact that fraud and corruption is having on business globally.

Despite increased regulatory activity, our research finds that boards could do significantly more to protect both themselves and their companies.

Many businesses have failed to execute anti-corruption programs to proactively mitigate their risk of corruption. Similarly, many businesses are not yet taking advantage of rich seams of information that would help them identify and mitigate fraud,

Between October 2015 and January 2016, we interviewed 2,825 individuals from 62 countries and territories. The interviews identified trends, apparent contradictions and issues about which boards of directors should be aware.

Partners from our Fraud Investigation & Dispute Services practice subsequently supplemented the Ipsos MORI research with in-depth discussions with senior executives of multinational companies. In these interviews, we explored the executives' experiences of operating in certain key business environments that are perceived to expose companies to higher fraud and corruption risks. Our conversations provided us with additional insights into the impact that changing legislation, levels of enforcement and cultural behaviors are having on their businesses. Our discussions also gave us the opportunity to explore pragmatic steps that leading companies have been taking to address these risks.

The executives to whom we spoke highlighted many matters that businesses must confront when operating across borders: how to adapt market-entry strategies in countries where cultural expectations of acceptable behaviors can differ; how to get behind a corporate structure to understand a third party's true ownership; the potential negative impact that highly variable pay can have on incentives to commit fraud and how to encourage whistleblowers to speak up despite local social norms to the contrary, to highlight a few.

Our survey finds that many respondents still maintain the view that fraud, bribery and corruption are other people's problems despite recognizing the prevalence of the issue in their own countries. There remains a worryingly high tolerance or

considered inappropriate – particularly among respondents from finance functions. While companies are typically aware of the historic risks, they are generally lagging behind on the emerging ones, for instance the potential impact of cybercrime on corporate reputation and value, while now well publicized, remains a matter of varying priority for our respondents. In this context, companies need to bolster their defenses. They should apply anti-corruption compliance programs, undertake appropriate due diligence on third parties with which they do business and encourage and support whistleblowers to come forward with confidence. Above all, with an increasing focus on the accountability of the individual, company leadership needs to set the right tone from the top. It is only by taking such steps that boards will be able to mitigate the impact should the worst happen.

This survey is intended to raise challenging questions for boards. It will, we hope, drive better conversations and ongoing dialogue with stakeholders on what are truly global issues of major importance.

We acknowledge and thank all those executives and business leaders who participated in our survey, either as respondents to Ipsos MORI or through meeting us in person, for their contributions and insights.

Sincerely,



David L. Stulb
Global Leader

Executive summary

Global commitments to combating corruption and enhanced cooperation by international law enforcement agencies have increased the pressure on companies to mitigate fraud, bribery and corruption risks. While many businesses have made significant progress in tackling these issues, there remains a persistent level of unethical conduct.

Boards need to be aware that regulators are enforcing anti-corruption legislation with vigor, and are increasingly focused on individual misconduct. Boards must respond and confirm that they are doing enough to protect their business from these risks - or both board members and their employees may be held personally responsible for misconduct under their watch.

Combating corruption as a global priority

There is an unprecedented level of support for combating bribery and corruption, from both governments and multilateral institutions.

Such cooperation has led to enhanced collaboration among law enforcement agencies in 2016, with numerous high-profile prosecutions in the past year. There have also been concerted efforts to apply international standards on transparency of company ownership, including by the World Bank and by the Group of 20 (G20) member countries, as part its wider focus on corruption under the Chinese presidency in 2016.

Our survey results show that such initiatives enjoy popular support:



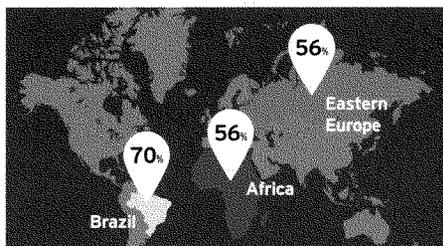
91%

of respondents believe it is important to understand the ultimate beneficial ownership of the entities with which they do business

Bribery and corruption as an ongoing challenge

Our survey identified a perception in emerging markets that individuals responsible for corruption are not held accountable:

Respondents who believe that governments are willing to prosecute, but are not effective in securing convictions



Globally, bribery and corruption are still perceived to occur widely - with a perception that corruption has worsened in developed markets since our last survey

39%



of respondents considered bribery and corrupt practices to happen widely in their country, with no improvement since our last survey

21%



of respondents reported that such behaviors were widespread in developed markets, compared to 17% in our last global survey

32%

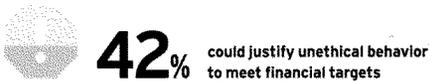


of our respondents reported that they had personal concerns when asked about bribery and corruption in their workplace

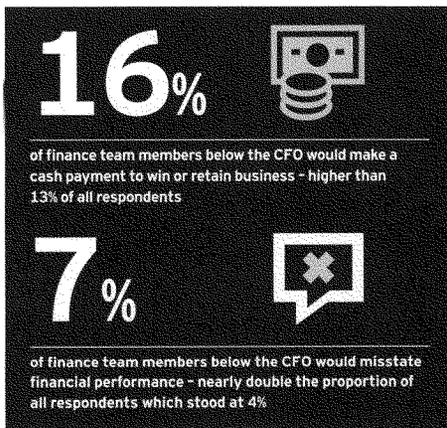
Spotlight on CFOs

A survey of 2,825 executives identified that a significant number are willing to justify unethical behavior when under financial pressure.

Almost half of all respondents could justify unethical behavior to meet financial targets, a greater proportion than the 36% that could justify such behavior to help a company survive in an economic downturn.



While not consistent with the people with whom we work – our survey found that an alarming number of CFOs and finance team members would be willing to engage in unethical behaviors:



The apparent willingness of some CFOs and finance team members to justify such behaviors is concerning, given the reliance that boards and investors place on CFOs and finance team members to provide accurate financial information.

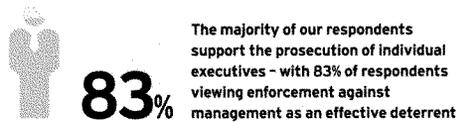
Some CFOs also seem to lack appropriate risk awareness, with only 41% of CFOs viewing cybercrime as a concern.

What does this mean for boards?

The prevalence of such behaviors places businesses at continued risk of illegal conduct, which could lead to subsequent enforcement action. Regulators are focusing particularly on financial fraud,

Regulators are also increasingly focusing their investigations on individual culpability when looking at corporate misconduct. In September 2015, the United States Department of Justice (DoJ) issued prosecutorial guidelines which outlined that, in the context of a DoJ investigation, companies are required to provide the DoJ with any evidence implicating employees in wrongdoing.

Boards should stay alert to fraud, bribery and corruption risks and reinforce expectations of acceptable behavior throughout their organizations. Almost half of our respondents did not believe that boards had an adequate understanding of what the specific risks were to their business.



What does good look like?

With a global focus on combating fraud, bribery and corruption, and regulators scrutinizing executive behavior, companies need to do more. Businesses should take steps to minimize the risk of corruption in their operations, so that it is quickly identified and mitigated in the event that it occurs:

- Adequately resource compliance and investigations functions, so that they can proactively engage before regulatory action
- Establish clear whistleblowing channels and policies that not only raise awareness of reporting mechanisms, but encourage employees to report misconduct
- Undertake regular fraud risk assessments, including an assessment of potential data-driven indicators of fraud and/or forensic data analytics (FDA) indicators of fraud
- Develop a cyber breach response plan that brings all parts of the business together in a centralized response structure
- Undertake robust anti-corruption due diligence on third parties, before entering into a business relationship
- Execute a comprehensive anti-corruption compliance program that incorporates FDA and tailored bribery and corruption training

Companies and their boards need to deliver on these priorities. The risks faced by companies as they continue to expand their global reach are evolving, and the scrutiny under which businesses and individuals now come is greater than ever. Boards must respond proactively and be able to demonstrate that they are stepping up

Combating corruption as a global priority

Never before have governments and multinational institutions cooperated so extensively in combating bribery and corruption. The transnational nature of the issue led the G20 major economies to recognize bribery and corruption as an important impediment to economic growth and the group's focus on corruption has continued under its Chinese presidency in 2016.

The G20 outlined its priorities in the "2015-2016 G20 Anti-Corruption Action Plan" identifying key areas where economies and multinational organizations must strengthen their cooperation.

Among the issues identified, the G20 highlighted the abuse of legal and corporate structures to hide or conceal criminal activity as a "critical issue in the global fight against corruption." It committed to increasing transparency over the beneficial ownership of companies and assets through the application of international standards on the beneficial ownership of legal persons and arrangements set by the intergovernmental body, the Financial Action Task Force.

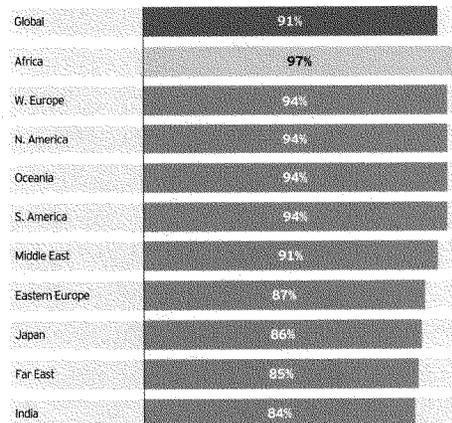
The respondents to our survey suggest this move has popular support - 91% of respondents believe it is important to know the ultimate beneficial ownership of the entities with which they do business.

The World Bank too is aligned with the G20 approach, issuing guidance in 2015 requiring greater beneficial ownership transparency in its contracting processes. Again, the respondents to our survey indicate that they believe this level of transparency would help mitigate the risk of fraud, bribery and corruption, with 83% supportive of the World Bank's guidance.



of respondents believe it is important to know the ultimate beneficial ownership of the entities with which they do business

Figure 1: Support for transparency over company ownership



Q. How important, if at all, do you believe it is to know who ultimately owns and controls the entities that you do business with? Proportion of respondents answering fairly or very important.

Base: Global (2,825); W. Europe (850); Eastern Europe (650); Middle East (175); Africa (150); India (50); N. America (100); S. America (250); Far East (500); Oceania (50); Japan (50).

SEC cross-border enforcement



The G20 has committed to increased international cooperation in areas of particular exposure such as public procurement and customs controls. Major companies from the G20 members, coming together through the Business 20 (B20) platform, have shown their support for these priorities too.

The work of the G20, B20 and others is having an effect. National governments have listened, and cross-border cooperation in enforcement has risen to an unprecedented level. In one recent example, the U.S. Securities and Exchange Commission (SEC) disclosed that it had been working alongside 13 other jurisdictions in pursuing a case involving over US\$100m of alleged bribes in multiple tax havens.

The work of the G20 and others is having an effect. There has been an unprecedented level of cross-border cooperation in enforcement.

“Requiring that all legal entity bidders disclose information on the real people who own or control them would foreclose one of the most common corruption schemes that enable both bidders to hide their conflicts of interest and government officials to illegally enrich themselves.”

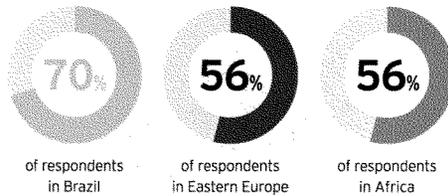
B20 Anti-Corruption Task Force, September 2015

Ongoing challenges of bribery and corruption

Despite the sharp focus of governments on bribery and corruption, and the increasingly coordinated efforts to manage it, the scale of the problem remains significant. Clearly, not all jurisdictions are equally successful in tackling corruption.



Our survey reveals a perceived lack of effective enforcement in key emerging markets - with 70% of respondents in Brazil, 56% in Eastern Europe and 56% in Africa believing governments are willing to prosecute, but are not effective in securing convictions.



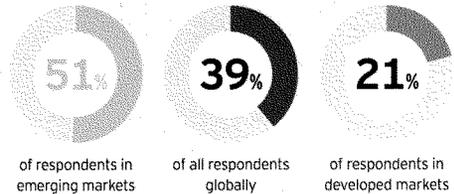
believe that governments are willing to prosecute, but are not effective in securing convictions

The responses in Brazil are surprising given recent high-profile enforcement actions such as the *Lava Jato* investigation. Brazilian anti-corruption institutions, such as the Council for Economic Defense, the Brazilian antitrust agency, have also received global recognition. This may indicate that such negative perceptions take time to catch up with events.

Globally, bribery and corruption are still perceived to occur widely, and our respondents do not believe that the situation has improved since our last survey.

Globally, bribery and corruption are still perceived to occur widely, and our respondents do not believe that the situation has improved since our last survey in 2014. Thirty-nine percent of those surveyed considered bribery and corrupt practices to happen widely in their countries, consistent with 38% in our last survey.

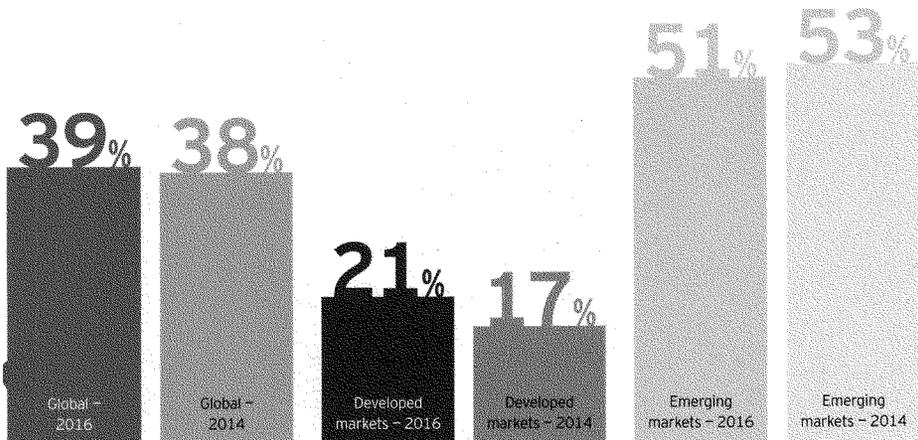
The situation appears to have deteriorated in developed markets where 21% of respondents reported that such behaviors were widespread, increasing from 17% in our last survey. This contrasts with the trend seen in emerging markets, where our results indicate a small improvement, with the perceived prevalence of bribery and corruption down from 53% to 51%.



believe that bribery and corruption are still perceived to occur widely in their countries

The worsening view in developed markets may reflect an increased awareness of bribery and corruption in those markets. This may be a result of numerous high-profile corruption cases affecting major U.S. and European corporations.

Figure 2: Bribery and corruption: an ongoing challenge



Q. For each of the following, can you indicate whether you think it applies, or does not apply, to your country or industry?
 Bribery/corrupt practices happen widely in business in this country.

Someone else's problem?

Consistent with previous years, our respondents continue to believe that bribery and corruption are less likely in their business sector. Only 11% of respondents stated that bribery and corruption happened in their sector, far lower than the 39% of respondents who believed that it happened in their country.

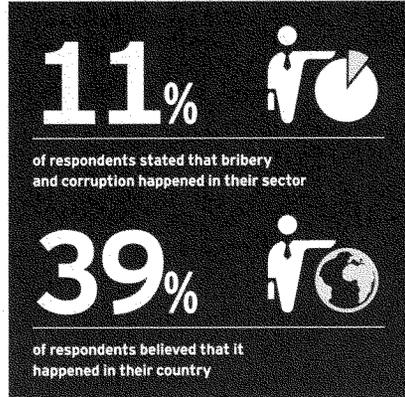
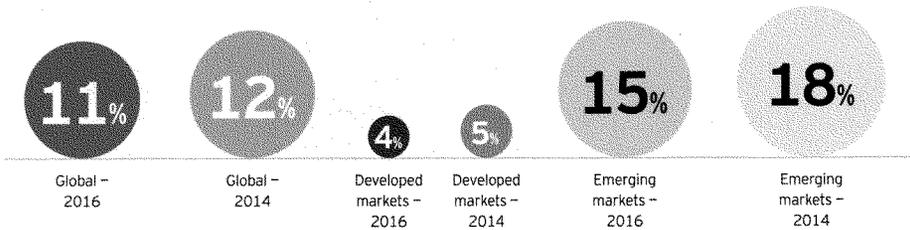


Figure 3: Bribery: not in my sector



Q. For each of the following, can you indicate whether you think it applies, or does not apply, to your country or industry? In our sector, it is common practice to use bribery to win contracts.
 Base: 14th global (2,825); 13th global (2,719); 14th developed (1,100); 13th developed (1,103); 14th emerging (1,725); 13th emerging (1,616)

This sector-level perception also appears at odds with our respondents' observations regarding their personal experience of such risks, with 32% of individuals recognizing that they have had concerns over bribery and corruption at work. Could it be that certain respondents remain unclear as to what constitutes impropriety or that they do not recognize certain corrupt actions as such?

Our survey indicates that a persistent minority of executives continues to justify certain behaviors, including making corrupt payments, when facing an economic downturn or in an effort to improve the perceived financial performance of their company. We highlight significant areas of concern regarding executive behaviors that should raise alarm bells for boards and other stakeholders.



Understanding and managing rising risks associated with terrorist finance

Financial institutions and global corporations should confirm that their risk management functions and remediation efforts consider the potential risks associated with terrorist financing, which remains a financial crime enforcement priority.

Reports surrounding the operational resiliency of foreign terrorist organizations have considerably heightened international efforts and expectations of business relating to disrupting the efforts of terrorist organizations to finance their operations.

Terrorist fundraising - which previously largely relied on individuals and organizations - has given way to informal economies that allow groups to, at least partially, self-fund operations and support other groups and individuals via opaque networks.

Given this evolving landscape, the touch points between the formal and informal economies have become more important. Financial institutions and global corporations should take proactive steps not only to understand their terrorist financing-related risk (internally and from a client perspective), but to take action to

Some specific areas that companies should consider in light of the rise of terrorist financing threats in 2016 include, but are not limited to:

- Undertake an assessment of your organization's terrorist financing risk; consider an internal working group or task force focused on combating terrorist financing
- Review your third-party relationships - many different types of third-parties can serve as a conduit for terrorist financing; the problem is more complex than banks merely monitoring their correspondent networks
- Adopt social media monitoring capabilities and leverage in-house and third-party data to proactively - and forensically - identify terrorist finance-specific red flags

The risk that terrorist financing poses to organizations has increased significantly in recent years. To address this trend, the international community is mobilizing - including the United Nations, the Financial Action Task Force and a number of other multilateral and bilateral working groups. The private sector must also mobilize, and the first step is to look internally and ask: "Are we really on top of terrorist financing-specific risks?"

Justifying unethical behavior and misconduct

Our survey found that a significant minority of executives continue to justify unethical acts to improve a company's performance. When presented with a series of options, more than one-third would be willing to justify inappropriate conduct in an economic downturn, while almost half would justify such conduct to meet financial targets.

While the behaviors that these respondents can rationalize differ between regions, they should be deeply concerning to all companies.

More than one-third would be willing to justify inappropriate conduct, while almost half would justify such conduct to meet financial targets.

1 in 10



One in 10 respondents would make a cash payment to win or retain business in an economic downturn. In some jurisdictions, such as the Far East, a significantly higher proportion of respondents would do so, with 1 in 4 executives able to justify such payments

4%



Four percent, a significant minority of respondents, could justify misstating financial performance in an economic downturn, peaking at 1 in 10 in Africa

16%



Sixteen percent of respondents would change the assumptions determining valuations and reserves, rising to 1 in 4 in Japan

11%



Eleven percent of respondents would extend the monthly reporting period, peaking at 26% in India

7%

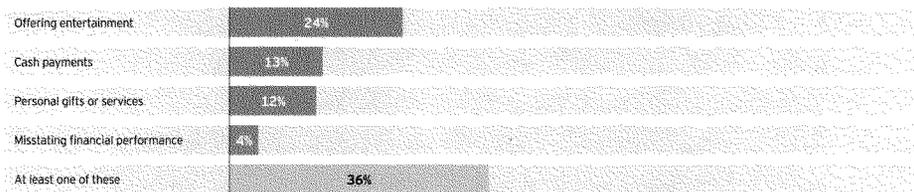


Seven percent of global respondents were willing to backdate contracts, with 10% of respondents in Eastern Europe able to justify such behavior

"The financial reporting area will continue to be a high priority for our enforcement program. Investors depend on comprehensive and accurate financial reporting, and so our fundamental objective is to raise the bar of compliance by issuers and their auditors and we will use all of our tools to do so."

Mary Jo White, U.S. Securities and Exchange Commission

Figure 4: Willingness to act unethically



Q. Which, if any, of the following do you feel can be justified if they help a business survive an economic downturn?

Base: All respondents (2,825)

Financial fraud under the spotlight

The continued prevalence of such unethical behavior places businesses at risk of illegal conduct, which could lead to subsequent enforcement action. Board members and companies' audit committees should be aware that regulators are focusing on these behaviors and are keen to hold individuals accountable.

Building on the creation of the Financial Reporting and Audit Group in 2013, the SEC is investigating fraudulent or improper financial reporting with renewed vigor. Between 2013 and 2015, the SEC more than doubled the number of financial reporting and disclosure actions, greatly increasing the number of parties charged with offenses.

In her February 2016 address to the Practising Law Institute, SEC Chair Mary Jo White confirmed that the SEC would continue to focus on inadequate controls and failures in financial reporting. The SEC has made it clear that the gatekeepers of financial reporting, including audit committee members and external auditors, will be under increased scrutiny. Those whom the SEC finds to have failed to reasonably carry out their responsibilities are likely to face enforcement action.

Respondents believing that the board is giving the correct level of attention to fraud, bribery and corruption risks, but often need to understand their business better



Despite 84% of respondents believing that the board is giving the correct level of attention to fraud, bribery and corruption-related issues, almost half believe that boards need a more detailed understanding of the business if it is to be an effective safeguard against these risks. In this context, awareness of risks is not sufficient – companies need to adapt and strengthen their existing controls to mitigate them.

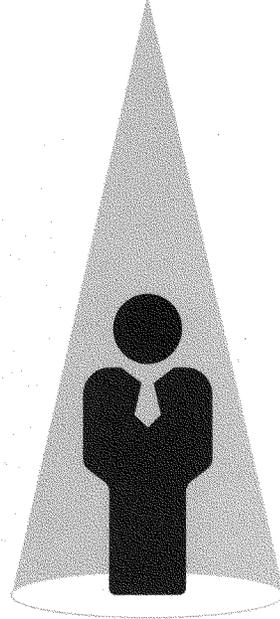
Worryingly, deeper analysis of our survey results identifies that many respondents who are CFOs and finance team members, individuals with key roles in protecting companies from risks, appear ready to justify unethical conduct.

The apparent willingness of these respondents to act unethically when under financial pressure is concerning. Could certain compensation

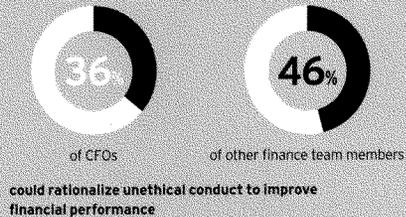
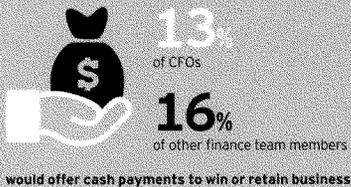
CFOs in the spotlight

A significant percentage of members of finance teams can rationalize potentially unethical conduct when under pressure.

Almost half of all finance team members interviewed stated that they would be prepared to engage in at least one form of unethical behavior to meet financial targets or safeguard a company's economic survival. This reinforces the imperative for boards to adopt controls and mechanisms to confirm that the work of finance team members is challenged and subject to an appropriate level of review.



Specifically our survey found that:



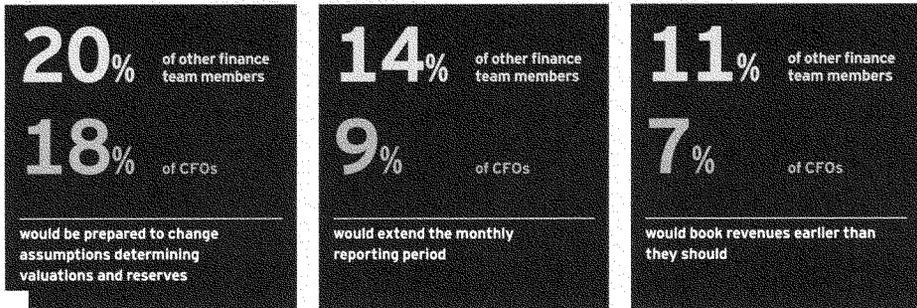
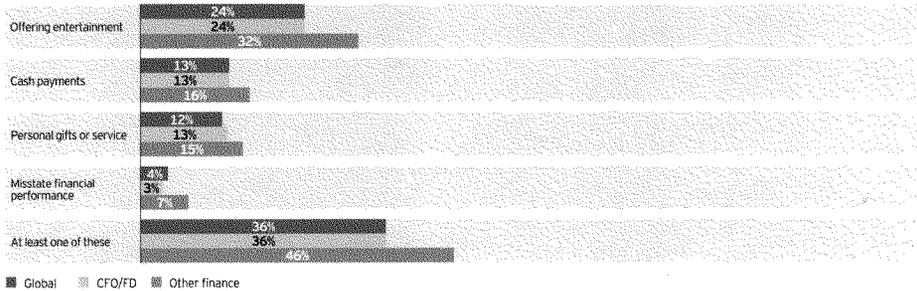


Figure 5: Spotlight on finance



Q. Which, if any, of the following do you feel can be justified if they help a business survive an economic downturn?
 Base: Global (2,825); CFO/FD (655); Other Finance (769)

Given the subjective nature of the accounting judgments often required when preparing financial reports, it is perhaps surprising that members of finance teams can rationalize some actions that might help their companies to meet financial targets as falling within a "grey" area. However, given the potential impact that such behaviors could have on a company, and the reliance that boards place on CFOs and finance teams to provide them with accurate financial information, these results are worrying.

Mitigating fraud risks

CFOs are influential figures in any company and have a crucial role in executing effective fraud risk management.

Under Principle 8 of the 2013 COSO Framework, companies are advised to assess an entity's fraud risks, related fraud control activities and responses to mitigate residual fraud risks. Senior management is expected to provide robust oversight of these risks and challenge lower levels of management on the effectiveness of fraud mitigation programs, ensuring that the right risks have been identified.



41%

Our survey also suggests that finance teams do not appreciate the extent of the threat posed by evolving external risks, such as cybercrime, with only 41% of CFOs viewing it as a concern.



Executive misconduct under the spotlight

To do this effectively, CFOs and senior members of finance teams must lead by example and demonstrate their commitment to fraud prevention and detection.

Our survey also suggests that finance teams do not appreciate the extent of the threat posed by evolving external risks, such as cybercrime, with only 41% of CFOs viewing it as a concern.

Businesses must adapt to new cybercrime risks as technological developments accelerate. As businesses begin to address the risks associated with the cyber theft of information such as intellectual property or customer data, finance teams must increasingly understand the risks associated with their sensitive information.

As detailed in EY's 2015 Global Information Security Survey, "Creating Trust in a Digital World," as custodians of critical data, finance teams need to be aware of cyber business risks, be alert for threats and be ready to escalate and respond in the event of a cyber breach. Without a full appreciation of the wide range of cyber risks that could affect their business, finance teams cannot appropriately manage them.

Figure 6: Respondents from finance teams recognizing cybercrime as a risk



Board members and senior management should be aware that they and their employees are under increased personal scrutiny in matters in which, in the past, only the company might have been held accountable. A 2015 memorandum issued by the Deputy Attorney General of the United States, Sally Yates, ("the Yates Memo") detailed steps that prosecutors will take to strengthen their pursuit of individuals.

Regarded by some as a response to criticism about the lack of executives held accountable for the financial crisis, the Yates Memo prioritizes individual prosecutions. The memo states that individual prosecutions are one of the most effective ways to combat corporate misconduct.

"One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system."

Yates Memo, September 2015

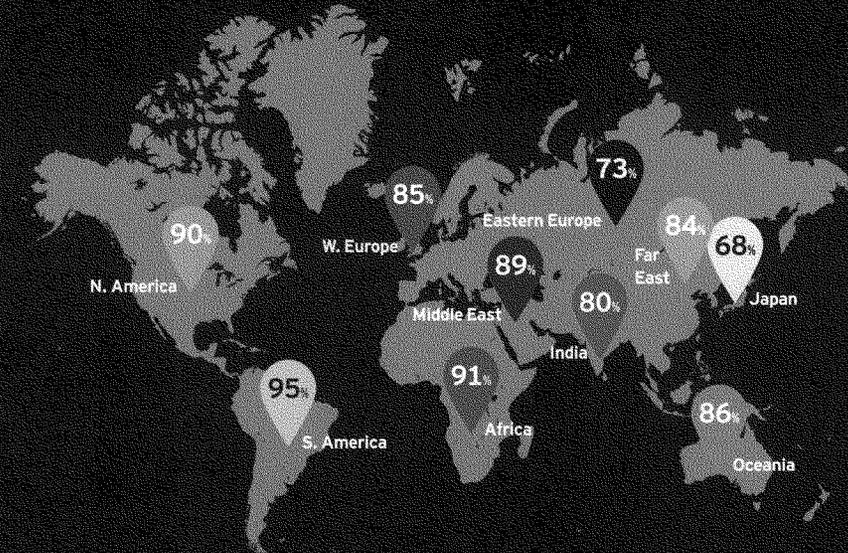
Furthermore, in April 2016, the DoJ announced the introduction of a one-year pilot program which will make companies which come forward and cooperate with it fully - including identifying culpable individuals - eligible for a 50% reduction in fines and potentially avoid being subject to a court-appointed monitor.

These policy initiatives are consistent with recent enforcement trends, with 175 individuals charged by the SEC for financial reporting violations in the past two years. In light of the increased focus on the prosecution of individuals, especially in combination with the SEC's continuing effort to incentivize whistleblowing, companies can increasingly expect their executives to have a clear incentive to cooperate with regulators.

The trend is global. In January 2015 the Serious Fraud Office (SFO) announced its first successful prosecution for an individual under the UK Bribery Act, and it continues to investigate individual executives among its active cases. Many other jurisdictions in Europe, Asia and South America are taking similar actions.

Our survey found that the majority of our respondents support this type of action - with 83% of respondents viewing enforcement

Support for prosecuting individuals



83%

agree that prosecuting individual executives will help deter future fraud, bribery and corruption by executives

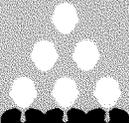
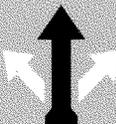
The spotlight on individuals places additional pressure on boards. Boards should confirm that their company's compliance and investigations functions are sufficient and independent enough to manage such eventualities and that procedures are in place when necessary to protect the functions' independence. If not, companies may receive little or no cooperation credit in any eventual settlement.

In this evolving context, board members need to recognize that they may be held accountable in the event that fraud or impropriety happens under their watch. They must therefore be alert to the potential risks their companies face and how they can demonstrate that they have responded appropriately.

Q. To what extent do you agree or disagree that prosecuting individual executives will help deter future fraud, bribery and corruption by executives?

Base: Global (2,825); W. Europe (650); Eastern Europe (650); Middle East (175); Africa (150); India (50); N. America (100); S. America (250); Far East (500); Oceania (50); Japan (50)

Key principles of the Yates Memo

<p>1 </p> <p>To be eligible for any cooperation credit, corporations must provide to the DoJ all relevant facts relating to the individuals involved in misconduct</p>	<p>2 </p> <p>Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation</p>	<p>3 </p> <p>Criminal and civil attorneys handling corporate investigations should be in routine communication with one another</p>
<p>4 </p> <p>Absent extraordinary circumstances or approved DoJ policy, DoJ will not release culpable individuals from criminal or civil liability when resolving a matter with a corporation</p>	<p>5 </p> <p>Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized</p>	<p>6 </p> <p>Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay</p>

Bolstering defenses

With a significant minority of global executives willing to justify unethical activity, and given increased enforcement efforts of regulators, boards need to continuously assess their ability to identify and mitigate fraud, bribery and corruption risk.

Such actions take particular importance as companies enter emerging markets such as Africa, Brazil, China, India and Eastern Europe, where they may be exposed to heightened risks. Companies need to continually update their risk management policies and procedures so that they are able to identify new risks and respond to new challenges.



Between 2011 and 2015, the SEC has awarded more than



US\$54m

to



22 whistleblowers

of which



US\$37m

was paid in 2015 alone.

Whistleblowing

To identify and mitigate risks, companies should utilize both traditional and innovative fraud detection tools. Fraud, bribery and corruption are frequently exposed by whistleblowing. Recognizing this fact, regulators are adopting new tools to support and encourage individuals to come forward. In the U.S., for example, the Dodd Frank Act provides financial incentives for whistleblowers to provide information. The SFO, for example, actively encourages company insiders to provide it with information at the start of any investigation.

Such efforts appear to have paid off – last year the SFO received more tips from whistleblowers than from self-reports.



55%

While our survey finds that 55% of companies have a whistleblowing hotline in place, companies should not assume that such mechanisms are always effective.



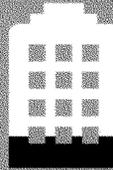
In the U.S. between 2012 and 2015 whistleblowers' tips to the SEC increased by 30%, including 61 tips from countries outside of the U.S.

Despite this progress, there remain obstacles to the use of internal reporting channels. Beyond fear for personal safety, respondents highlighted their loyalty to the company as one of the main deterrents to reporting an incident of fraud, bribery or corruption.

Globally, 19% of our respondents cited loyalty to their company and 18% cited loyalty to their colleagues as impacting them in this way. These issues were more prevalent in emerging markets, with 24% of respondents citing loyalty to their company and 22% citing loyalty to their colleagues as a factor.

Boards need to recognize the role that misplaced loyalty can play in stopping people from coming forward with their concerns and hide unethical behavior. They must also lead by example and demonstrate the same behaviors that they expect of their employees and their business partners. Executives need to be aware that they can raise uncomfortable issues without being perceived as disloyal; the absence of such openness can cause far more harm than good.

Global respondents



19%

of our respondents cited loyalty to their company



18%

cited loyalty to their colleagues as impacting them in this way

Emerging markets



24%

of respondents citing loyalty to their company



22%

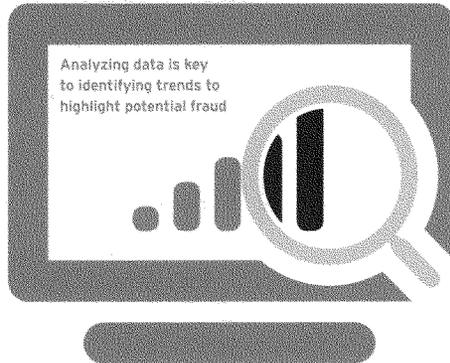
citing loyalty to their colleagues as a factor

Data is becoming an increasingly important monitoring tool

In an environment where employees are reluctant to raise concerns, the data that a company holds can be the key to identifying instances of potential impropriety.

Regulators are using increasingly sophisticated tools to analyze data and identify trends to highlight potential fraud.

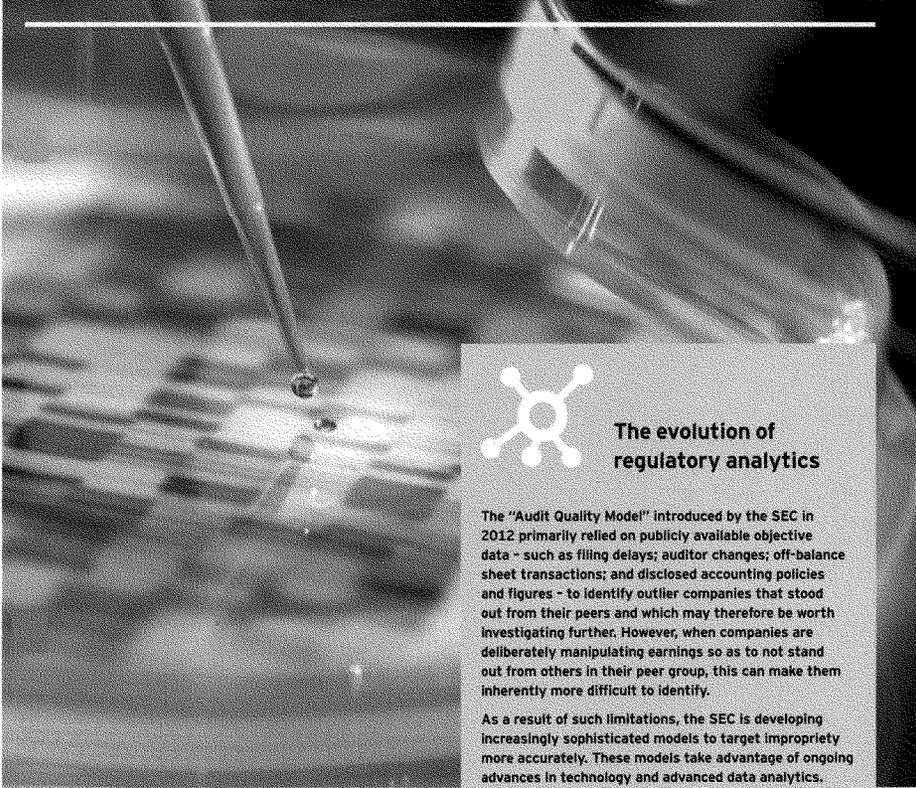
In contrast, our survey found half of respondents did not believe that their companies are utilizing specialist software to identify fraud risks. Our recent Global Forensic Data Analytics Survey, "Shifting into high gear: mitigating risks and demonstrating returns" found the reluctance to fund forensic data analytics was a key hurdle to introducing new software, with only 55% of respondents confident that their company had invested enough. It further identified a lack of awareness of the benefits of FDA for anti-fraud programs, with 68% of respondents identifying a growing need for management awareness (an increase from 62% the previous year). Do companies not yet recognize investing in such technologies as a priority?



of respondents are confident that their company has invested enough in specialized software



of respondents identifying a growing need for management awareness



The evolution of regulatory analytics

The "Audit Quality Model" introduced by the SEC in 2012 primarily relied on publicly available objective data - such as filing delays; auditor changes; off-balance sheet transactions; and disclosed accounting policies and figures - to identify outlier companies that stood out from their peers and which may therefore be worth investigating further. However, when companies are deliberately manipulating earnings so as to not stand out from others in their peer group, this can make them inherently more difficult to identify.

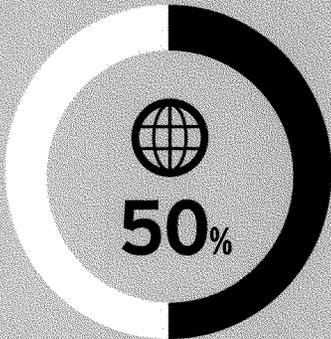
As a result of such limitations, the SEC is developing increasingly sophisticated models to target impropriety more accurately. These models take advantage of ongoing advances in technology and advanced data analytics. In the future it is possible that the SEC's approach could evolve into one that incorporates matters such as the language used by CEOs and management when reporting to investors, unusual absences of disclosures (i.e. it's not what you say, it's what you don't say) and social media data on corporate reputation and activity.

Given the SEC's stated intention to keep holding audit committees and their members to account, those charged with oversight of corporate behavior must be mindful of the increasing breadth of information that will now be analyzed routinely and how such data could potentially be correlated. By taking proactive steps to identify and analyze such data, boards and audit committees can be better prepared to respond in the event that possible impropriety is identified.

"We have attempted in recent years to be more proactive in our enforcement efforts. One of the things we are doing is leveraging the data available to us. CIRA's (Corporate Issuer Risk Assessment) multiple dashboards enable the staff to compare a specific company to its peers in order to detect abnormal, relative results, focus on particular financial reporting anomalies, and generate lists of companies that meet the criteria for further analysis."

Andrew Ceresney, Director of Enforcement,
U.S. Securities and Exchange Commission

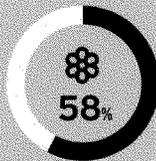
Specialist monitoring software: is financial services leading the way?



of respondents globally are utilizing specialist software



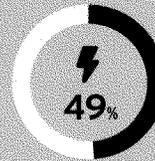
Financial services



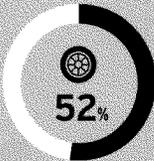
Life sciences



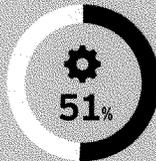
Government and public services



Oil, gas and mining



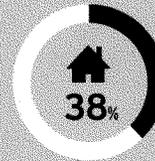
Automotive



Technology



Retail/wholesale



Real estate

Know with whom you are doing business

Despite record levels of M&A activity in recent years, our survey also finds that respondents are not yet taking potential steps to identify and mitigate key corruption risks before entering into joint ventures or local partnerships.

Businesses should be aware that entering into such partnerships can bring additional risks and that there is appetite from regulators to hold companies responsible for the conduct of any third party acting on its behalf. Regardless of whether the inappropriate conduct is by a company itself or a third party acting on its behalf, there is potential liability for the company.



“Agents and intermediaries are of real interests to us. Our natural curiosity is piqued further if those agents or intermediaries take the form of companies based in a jurisdiction that permits beneficial ownership to be concealed.”

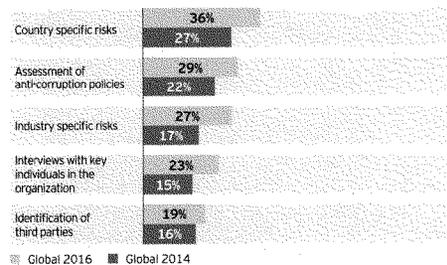
Alun Milford, General Counsel, UK Serious Fraud Office

Foreign Corrupt Practices Act (FCPA) enforcement activity has continued to focus on relationships with third parties, particularly the use of agents to win business in emerging markets. In 2015, the SEC and DoJ revised their guidance on the enforcement and application of the FCPA, providing greater clarity on issuers’ obligations to joint ventures and minority-owned affiliates. The revised guidance made it clear that issuers should use “good faith efforts” to influence these entities to devise and maintain a system of internal accounting controls consistent with the issuer’s obligations.

Despite the DoJ’s focus on relationships with third parties, almost 1 in 5 respondents are not identifying third parties as part of their anti-corruption due diligence. A greater proportion, more than 1 in 3, are not assessing country or industry-specific risks before an investment.

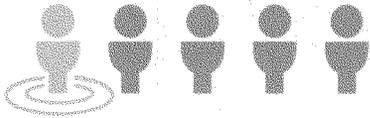
The overall proportion of respondents undertaking any common anti-corruption due diligence measures has decreased since our last survey. Could this be a product of cost constraints or are companies simply becoming complacent?

Figure 7: Companies are doing less due diligence than before



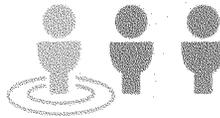
Q. Which, if any, of the following are not included in your forensic or anti-corruption due diligence?

Base: All respondents 14th Fraud (2,825); 13th Fraud (1,067)



1 in 5

respondents are not identifying third parties as part of their anti-corruption due diligence



1 in 3

respondents are not assessing country or industry-specific risks before investment

Protecting your investment over the long term

Identifying and mitigating fraud, bribery and corruption risks at the pre-transaction stage helps businesses to make an informed decision before an acquisition or investment. This initial assessment can also assist the smooth integration of a new business into a company's structure post-acquisition.



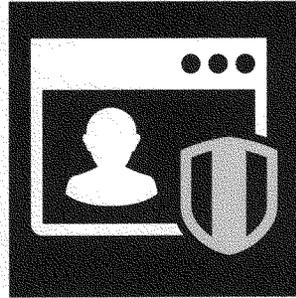
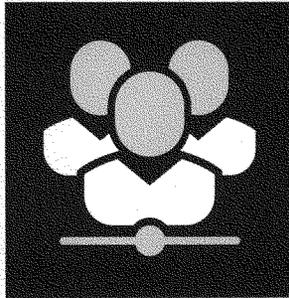
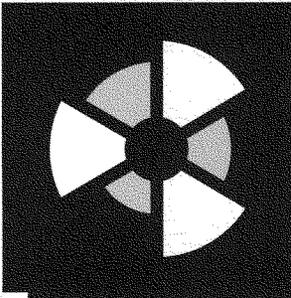
Our survey finds that companies that are able to effectively operate in challenging jurisdictions put in place additional safeguards to protect their investments.

Almost two-thirds of respondents who remained in high-risk jurisdictions undertook enhanced due diligence or more frequent internal audits. Half of our respondents utilized new technologies such as forensic data analytics or transaction monitoring to identify and mitigate such risks.

Our survey found that just over half of all companies that exited investments in Africa, Brazil, China, Eastern Europe or India cited fraud, bribery and corruption risks as a contributory factor. This is in line with our experience; companies that do not identify and mitigate risks at the early stages are more likely to be exposed to bribery and corruption challenges further down the line. In addition to the costly withdrawal from an investment, this can lead to time-consuming and reputation-damaging investigations, remediation action and regulatory fines.

Our survey has shown that local market knowledge is an imperative, and the potential ramifications of ignoring corruption and fraud risks can be significant. In the remainder of this report, we look at companies' experiences of doing business in five key emerging markets, the issues they have faced and how they have responded to them.

Cyber breach response management



A successful cyber attack can represent an existential threat to a business. Destructive attacks can significantly disrupt company operations if data is lost or equipment disabled, stolen information can be devastating.

Given the potential impacts of a cyber breach, businesses must understand their cyber risks. A well-positioned business will tailor its cyber security environment to its unique risk profile, as well as the motivations, tactics, techniques and procedures of its most likely attackers.

While strong, risk-informed cyber security is necessary, it is not sufficient by itself: businesses must be prepared to respond when a breach occurs. Issues that might first appear minor or localized could, in fact, be indicative of a significant and systemic problem.

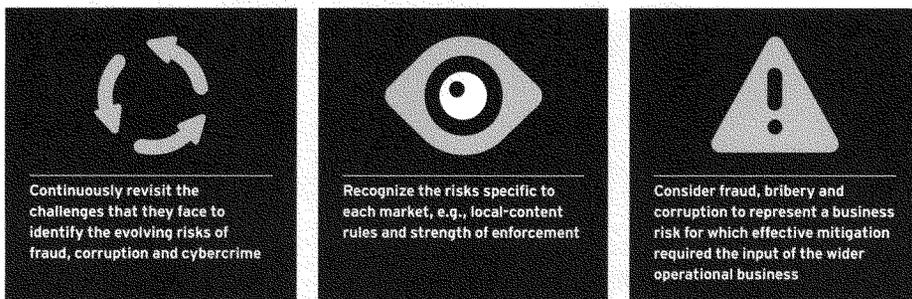
As cyber crime is a business risk, managing a serious breach must involve all parts of the enterprise in a centralized response structure - a cyber breach response program (CBRP). Even as information technology and security personnel may be working to contain, investigate, and remediate a breach, business leadership

must remain involved to direct interaction with employees and legal counsel, as well as, if necessary, regulators and law enforcement. The CBRP brings these stakeholders under a single umbrella that coordinates and oversees the totality of the breach response issues. In short, it provides guidance to all lines of business involved in the response, sets a level of understanding about what information is critical for senior leaders to know - as well as when and how to express it, and allows continuous reaction with precision and speed as a breach continues to unfold over days, weeks or even months.

Finally, a CBRP can only be effective if all stakeholders are aware of their roles and responsibilities in the event of a breach. A real breach cannot be the first time a business assesses whether its response procedures are adequate. All key plans should be tested periodically to allow for

Regional insights

What leading businesses
are experiencing and doing



During February and March 2016, members of our Fraud Investigation & Dispute Services practice held discussions with general counsel, chief compliance officers, heads of internal audit and senior finance executives from leading companies about the survey's findings, their own experiences of fraud and corruption across their markets and how they were addressing the risks they faced.

Our leading practice interviews were conducted with executives at the headquarters level. They focused on issues in Africa, Brazil, China, Eastern Europe and India: markets where businesses continue to look for growth and that are perceived to present higher fraud, bribery and corruption risks.

Our global survey shows that 39% of respondents perceive that bribery and corruption are widespread in their countries, and our leading practice interviewees' views regarding the prevalence of corruption were broadly consistent with those of the respondents to our survey. They highlighted, for example, some positive trends occurring more recently in Brazil. Some interviewees challenged the level of risk recognized by the survey respondents in Russia and China, considering it potentially higher.

Interviewees also noted significant legislative developments around the world. They observed, however, an apparent lack of enforcement in many countries.

In the following sections, we have highlighted a number of key issues that were seen as being particularly challenging or significant and actions that companies can take to mitigate the risks.

We would like to thank the following executives for participating in these frank and illuminating discussions:		
Advance Publications - Steve Markovits	Halliburton - Jeffery Spalding	Novartis - Alisa Harbin
AstraZeneca - Katarina Ageborg and Johan Widestrand	The Hershey Company - Adrian Mebane and Sarah Foley	Orange - Pierre-Antoine Badoz
Baker Hughes - Jay Martin	The Interpublic Group of Companies - Julie Connors	Pernod Ricard - Ian Fitzsimons
Bayer - Dr. Rainer Schwarz	Ipsen - Dominique Laymand	SAP - Hanno Hinzmann
Beam Sunfory - Kenton Rose	Johnson & Johnson - John Crisan	StatOil - Carine Smith-Ihenacho
Bouygues - Jean-François Guillemin	Kinross Gold Corporation - John Vanderbeek	Telecom Italia - Antonino Cusimano
Continental - Dr. Cordula Fitzpatrick	Marathon Oil Company - Richard Kolencik and Steven Gyeszly	Total - Sophie Musso
De Monte Foods - William Reed Sawyers	Marriott International - Edward Ryan	Tyco International - Matthew Heiman
Deutsche Telekom - Manuela Mackert and Sebastian Scheidt	Merck KGaA - Dr. Friederike Rotsch and Markus Bamberger	Visa - John Black
Fiat Chrysler Automobiles -	Nestlé -	W.R. Grace -

Africa

Charles de Chermont, Johannesburg

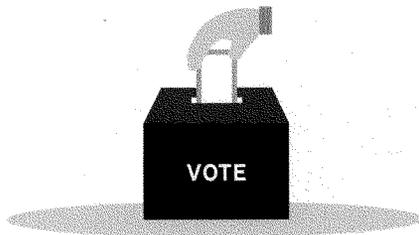
While the recent global fall in commodity prices has created economic shocks in many countries across Africa and resulted in a slowdown in overall activity, longer-term indicators still offer cause for some encouragement.

From a political perspective, the completion of peaceful elections in Nigeria, Ivory Coast and Tanzania during 2015 was significant. From an economic perspective, recent studies continue to report Africa's growing share of global capital investment and job creation.

One striking theme that has emerged in recent elections across the continent is the focus of the electorate on public sector corruption, with voters putting politicians under pressure to do more to stop the misuse of public funds.

However, progress across the continent remains patchy, with South Africa and Kenya facing continued scrutiny over corruption and its impact on economic growth. In South Africa, the OECD reported that no foreign bribery cases have been prosecuted since South Africa joined the Anti-Bribery Convention in 2007 and capital markets responded negatively to the appointment of two replacement finance ministers in the same week in December 2015. In Kenya, a journalist was arrested in November 2015, days after writing an article questioning government spending. The Minister for Planning and Devolution, Anne Waiguru, resigned later that month. More recent attention has focused on allegations of corruption at the Kenya Athletics Federation.

Consistent with these high-profile events, public perception of government action on corruption is mixed, with one-third of respondents in Nigeria describing the government as effective in prosecuting cases of bribery and corruption, compared with only one in ten in Kenya and South Africa. One-quarter of respondents in Kenya and 42% in South Africa thought that the government was not willing to prosecute.



Understanding your business partners

Investment in Africa has seen significant recent growth, reaching US\$128b in 2014, up 136% on the prior year. However, while investment decisions vary based on location and individual circumstances, we consistently find that corruption risk is named by investors as one of the most significant barriers to investing in Africa. As investors consider opportunities in Africa, it is essential that they assess corruption risk by performing proper anti-corruption due diligence on potential partners and intermediaries.

In this context, companies should consider not only acquisition targets and direct business partners but also their third-party relationships, including agents, distributors and recipients of charitable support. In an environment where operations are less established, it is more likely that interactions taking place on behalf of the business will be managed by third parties.

Leading companies we interviewed highlighted what they saw as the increasing risk posed by local content rules in certain jurisdictions. Such rules progressed from being requirements to use local personnel and make purchases from local businesses, to being required to enter into joint ventures with local companies. Identifying the good from the bad is not straightforward. Virtually all respondents to our survey reported that their companies have policies, procedures and controls in place (for example, 95% of respondents in Africa said they had an anti-bribery and anti-corruption code of conduct and were subject to regular internal audits). However, with one in five Kenyan respondents to our survey saying that they would be willing to make cash payments to win business and 24% of Nigerians saying that they would be willing to offer personal gifts, simply having policies and procedures is clearly not enough to win hearts and minds.

Companies should:

- Confirm they understand the ownership, conduct and track record of third parties
- Enforce audit rights
- Treat due diligence as an on-going process
- Confirm that compliance is adequately resourced

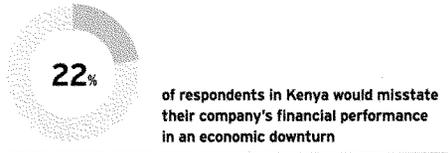
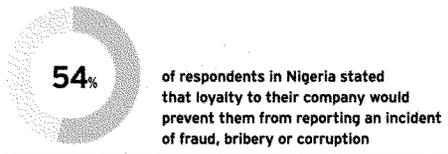


“Yet we also note that most nations that have achieved rapid economic growth in recent decades have one thing in common: they first addressed their breakdown in governance, cracked down on corruption and demonstrated to their own people and the world that to invest in that country is safe. That is where we also must begin.”

Muhammadu Buhari, President, Federal Republic of Nigeria

Whistleblowing

The early identification of issues is critical to a company's ability to manage risk. All evidence suggests that the people best placed to know about the issues facing a business are the employees within the business. So when almost one in four Kenyan respondents and more than 15% of Nigerian respondents said they would be prepared to ignore unethical conduct if it would help their own career progression or remuneration package, this is a serious cause for concern. Equally worrying is that almost one in ten respondents in Nigeria and Kenya said that they felt under pressure not to report concerns they had about business conduct. Similarly, almost half of respondents in Kenya and Nigeria said they would fear for their personal safety if they reported concerns internally.



Companies should:

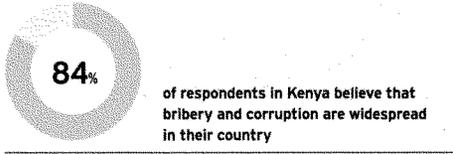
- Have detailed policies and procedures for whistleblowing
- Confirm confidentiality for whistleblowers
- Encourage the use of reporting mechanisms



Monitoring and detection

With many African economies experiencing an increasingly challenging environment, the fact that one in ten in South Africa and one in five in Kenya were willing to misstate their company's performance should be a serious cause for concern.

In Africa, companies should understand the incredible diversity of the data landscape, with huge variation in the quality and nature of data held by both the business and other parties. In Africa, technology (in areas such as mobile banking) exists next to large quantities of handwritten records and electronic data maintained across multiple systems. This data variety has implications for companies considering how best to monitor transactions.



Companies should:

- Apply targeted forensic data analytics as part of proactive monitoring having regard for potential gaps in, and the nature of, data



Brazil

Compagnio, Sao Paulo

Over the last year, Brazil has faced significant economic and political challenges, including severe recession.

Moreover the economy has been impacted by the ongoing operation "Lava Jato" investigation into allegations of corruption and money laundering at the state controlled oil company, Petrobras.

Brazil is under increasing public pressure to address the country's high levels of bribery and corruption. In this context, the level of investigation, prosecution and enforcement has increased significantly over the past year.

Although increased regulation with respect to bribery and corruption is a recent development in Brazil, there has already been a significant increase in enforcement focused on both local and international companies which has led to the arrests of high-level executives and politicians who had previously been considered untouchable. In the context of the *Lava Jato* alone, there have been a total of 133 arrest warrants successfully granted as of spring 2016 and a total of 84 convictions.

Brazilian authorities have conducted investigations in parallel to those in the U.S. and worked closely with authorities in a number of countries to successfully repatriate ill-gotten funds. In this context, there is an urgent need for companies to understand the new compliance landscape, identifying where risks lie and mitigating these as effectively as possible.



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Local legislation and the need for independent risk assessments

Brazil has continued a growing trend in the region focused on setting tougher compliance standards, most notably with the passage of the Clean Company Act in 2014. This was subsequently reinforced by a 2015 decree that established clear guidelines for companies seeking to comply with the Act. Among other things, this decree established standards for anti-corruption compliance programs and how to mitigate potential violations.

For the first time, this legislation holds companies operating in Brazil liable in civil courts for the criminal acts of their executives, employees and agents, making it a key consideration for any business in Brazil.

Companies should:

- Conduct an independent risk assessment taking into account documents, interviews and financial information and considering the use of transaction monitoring software



Know your business partners

Given the size of Brazil and geographic variations between regions and states, a number of sectors typically rely on third parties across the country to assist with the distribution and sale of products or the execution of projects. Although this can pose a daunting task for companies, failure to effectively and regularly apply due diligence procedures can create significant liability.

Companies should:

- Conduct more in-depth, risk-based analysis in their due diligence



Technology monitoring

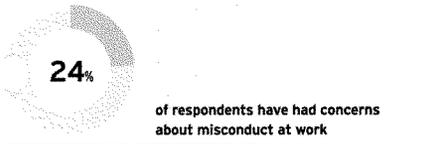
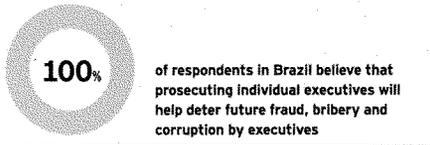
With the increased focus on companies to have effective compliance structures in place, regulatory authorities are also placing emphasis on the need for these structures to allow for companies to respond quickly to any claims of internal fraud or corruption. Under the new legislation, a lack of knowledge of intention to benefit from fraud does not serve as a limitation to liability.

The introduction of the Clean Company Act has reinforced the need for whistleblower hotlines as a critical requirement for a robust compliance program. Although 86% of our Brazilian respondents confirmed they have a whistleblower hotline, only 32% felt that it has become easier in the past three years for employees to report their concerns. If channels are not supported by clear guidance or support from top level management, employees may be deterred from reporting.

Companies should:

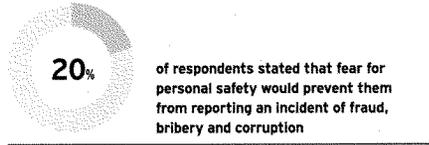
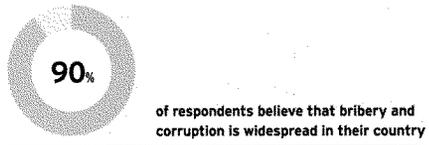
- ▶ Evaluate the accessibility of the whistleblowing channels
- ▶ Confirm that their investigation capabilities are adequately resourced to respond
- ▶ Utilize technology to monitor potential indicators of fraud
- ▶ Confirm their commitment to compliance throughout the organization and reinforce this commitment





“Confronting systematic corruption will bring significant gains for all of us, for companies and for the economy in general. The cost of systematic corruption is extraordinary.”

Sergio Moro, Federal Judge, Brazil



Looking ahead

Although 38% of respondents think efforts by governments and enforcement authorities to combat fraud, bribery and corruption have increased, 70% felt that although there was a willingness to prosecute, authorities are not effective in securing convictions.

However, Brazilian survey respondents were unanimous in thinking that prosecution of individual executives will help deter fraud, bribery and corruption. In the context of the new compliance landscape in Brazil, and recent high-profile enforcement action, this suggests that the country is moving in the right direction. Recent developments have demonstrated an increasing appetite at the board and C-suite levels to address fraud and corruption.

In addition, leading companies informed us that they measure their employees' performance against values and behavior, as opposed to purely financial performance - the intention being that the “motivation to cheat decreases and doing the right thing increases.”

China

Manuel Vignal, Shanghai

In the past four years, the compliance landscape in mainland China has become more complex, with China's own assertive enforcement activities being augmented by the U.S. DoJ's cross-border focus on foreign multinationals.

Foreign and Chinese domestic corporations alike have become keenly aware of President Xi Jinping's proactive anti-graft campaign against "Tigers and Flies," which targets all participants in the corruption food chain. The Chinese Government's commitment to tackle corruption has already resulted in several high profile prosecutions, including senior public officials, and there is no indication that the campaign is losing momentum. Our survey found that 74% of respondents in China believe that enforcement is effective, showing that this campaign is achieving the desired credibility in the business community.

Mainland China's anti-bribery and anti-corruption regulatory framework continues to be refined to strengthen the country's enforcement tools and eliminate potential loopholes. These changes include the Ninth Amendment to China's Criminal Law that took effect in November 2015, which introduced monetary fines for bribe givers and replaced previous monetary thresholds in the sentencing standards with a subjective assessment of the case severity. Most recently, in February 2016, a draft amendment to China's core anti-corruption law, the Anti-Unfair Competition Law, heralding the law's first update since its enactment in 1993, looks to introduce a books and records requirement and makes clear that companies would be held responsible for the business practices of their employees and third parties.



74%

of respondents in China believe that enforcement is effective, showing that the anti-corruption campaign is achieving the desired credibility in the business community

A broad range of sectors will be affected by these changes, but those involving direct interactions with officials and with Chinese consumers, such as life sciences and automotive companies, will be under particular scrutiny.

At the same time, expanding Chinese multinational companies, looking to 'go abroad,' are dealing with the challenge in reverse as they venture from the domestic Chinese market to foreign markets with different anti-corruption regimes. The first DPA under the UK Bribery Act in late 2015, which related to conduct in Tanzania by a former affiliate of a Chinese company, underscores this dynamic.

With China's economy experiencing decelerating growth rates, another layer of complexity has been added to companies already dealing with the evolving enforcement climate. The pressure to cut corners to win business is stronger than ever in this environment, even with the risk of heightened local enforcement.

Responding to the challenge

In this complex environment, it is more important than ever to approach the challenge of monitoring for fraud and corruption risks in an intelligent and cost-effective way.

Companies should:

- Conduct due diligence on ownership, operating history and reputation of third parties
- Apply anti-fraud and corruption training
- Monitor employee and third-party expenses
- Conduct fraud and corruption risk assessments



Dealing with the slowdown

Global instability and slower growth in China mean companies need to proceed more carefully in their operations and acquisitions, or risk reputational loss, low morale, regulatory penalties, or short-seller attacks.

Under growth pressure, companies are looking beyond organic growth and searching for opportunities via acquisitions, with China leading the way in M&A activity across Asia Pacific in 2015. In this context it is imperative that companies conduct robust pre-acquisition due diligence to confirm the integrity of the target's management and books and records.

Internally, companies must also recognize that soft markets encourage fraud and corruption risk-taking. Taken in tandem with the reality of increased anti-corruption enforcement, fraud schemes are becoming more and more sophisticated in efforts to avoid detection. Chinese enforcement agencies have not shown leniency towards companies for well-intentioned compliance programs if violations have nevertheless occurred, so active monitoring is more important than ever.

only do companies have to consider known schemes for financial misstatement and/or misdirection of funds, management and boards have to consider new methods such as indirect collusion with third parties to launder corrupt payments or inflate sales.

Companies should:

- ▶ Apply forensic data analytics to monitor transactions
- ▶ Layer this alongside traditional forensic due diligence





82% of respondents in China believe that prosecuting individual executives will help deter future fraud, bribery and corruption by executives



52% of respondents in China believe that cash payments can be justified to win or retain business in an economic downturn



74% of respondents in China believe that law enforcement agencies are effective in securing convictions



24% of respondents in China believe that bribery and corruption happen widely in their country

TRANSPARENCY

“Transparency is the best precaution against corruption. As we go further in the anti-corruption campaign, we will focus more on institutional building so that officials will not dare and cannot afford to be corrupt and, more importantly, have no desire to take that course.”

Xi Jinping, President, The People's Republic of China

Conclusion - bright future ahead

Overall, China has shown strong and sustained initiative on the global stage with regards to combating corruption, with further encouraging signs from President Xi's trip to the U.S. in September 2015, emphasizing the need to work more closely on anti-corruption measures and to strengthen inter-governmental cooperation. The sea change in attitudes is felt throughout; foreign multinationals and local Chinese companies alike are starting to realize that conducting business ethically is not only a legal requirement but also a commercial advantage.

Chinese companies that look for overseas expansion and have strong compliance mindsets are also better positioned to succeed in highly regulated markets, while reducing the risk of financial loss in less transparent and unfamiliar markets.

Eastern Europe

Przemysław Witalis, Warsaw
Daniel Bican, Prague

Dilek Çilingir, Istanbul
Dima Zhigulfin, Moscow

Eastern Europe continues to be a challenging environment in which to operate for many multinational corporations, and one in which trust in the legislative environment is by no means universal.

Allegations that enforcement actions could be politically motivated damages confidence in their fairness. At the same time, the effectiveness of regulators is being questioned. Over half of the respondents to our survey from this region believed that, although regulators appeared willing to prosecute cases of corruption, they did not consider them effective in securing convictions – the highest of the regions we interviewed.

The robustness with which countries in Eastern Europe are responding to corruption varies widely, with Poland and Romania standing out for the strength of their enforcement. Poland has increased the power of its police and enforcement agencies and enhanced their surveillance capabilities. Over this same period, Romania's national anti-corruption directorate has been highly active in prosecuting corruption, and has secured the convictions of high-ranking politicians and business people.

Russia has continued to develop and extend the scope of its anti-corruption legislation with an increased number of government officials now required to disclose their personal income and potential conflicts of interest. Russia has also maintained a focus on fighting corruption both at a regional level, with several governors and officials under criminal investigation, and also at a multinational level, repatriating several well-known businessmen whose fortunes are alleged to have been accumulated through fraudulent schemes.

While generally lagging behind more developed markets, some of the countries in the region have now started to apply whistleblower protection legislation. Whether such legislation will be enough to give individuals the confidence to speak up is yet to be seen. There remains personal security concerns in the region, with more than half of those interviewed in Slovakia citing personal safety as a reason they would not report an incident of fraud. In addition, cultural factors such as loyalty to colleagues and companies may also restrict its effectiveness; 20% of the Eastern European respondents to our survey cited such loyalties as reasons why they would not report an incident of fraud or corruption.

20%

Cultural factors such as loyalty to colleagues and companies may also deter whistleblowers; 20% of the Eastern European respondents to our survey cited such loyalties as reasons why they would not report an incident of fraud or corruption



Corruption is widely considered to be a deep-rooted problem in the region

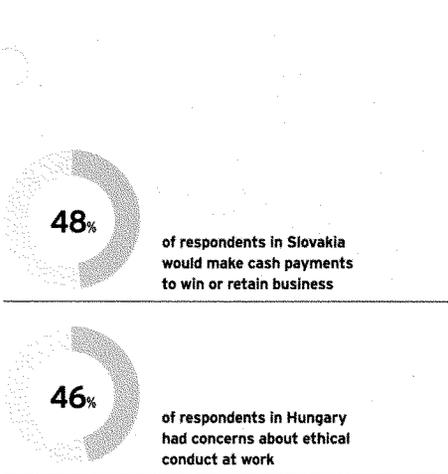
Managing corruption risks

Corruption is widely perceived to be a deep-rooted problem in the region. As a consequence, it is vital that businesses establish the right tone at the top and practice values-based compliance. A representative of one of the leading companies we interviewed observed that in their experience most people want to do the right thing; the key is in making them proud to act ethically.

Companies should:

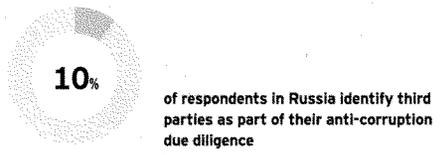
- Execute strong compliance programs, including on-going risk assessments and training (in operational parts of the business, not just compliance)
- Utilize forensic data analytics
- Conduct robust anti-corruption due diligence on third parties





“The fight against bribery is crucial to help our countries overcome the world’s mediocre economic outlook. It is also key to improve public services and address our social challenges.”

José Angel Gurría, Secretary-General, OECD



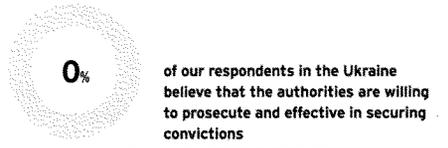
Mergers and acquisitions

with any region perceived to have a high corruption risk, anti-corruption due diligence should be undertaken on the target before entering any business transaction. It was surprising, therefore, that significant proportions of respondents in Eastern Europe reported that their companies did not undertake key elements of effective anti-corruption due diligence before entering into transactions.

Only 36% reported that their companies considered country-specific corruption risks. More than half of respondents reported that their companies sought to identify a target’s third-party relationships as part of their due diligence. Only 10% of respondents from Russia stated their companies undertook either of these procedures. This provides context for the many cases of corruption, financial statement and tax fraud that are discovered during the post-acquisition stage in this region.

Companies should:

- Tailor their due diligence for the market risk
- Focus attention on ownership of third-party business partners



Cyber attacks on Western corporates

Low levels of enforcement and inadequate preventative controls have resulted in an escalation in numbers of organized crime groups turning to cybercrime.

A variety of industries have been targets of cyber attacks in Eastern Europe, including multinational companies in financial services, life sciences and public institutions, among others. Governments and corporations have attempted to respond to these threats but their efforts to date have been neither sufficiently robust nor coordinated to make a significant impact. Despite this environment, only 40% of our respondents from this region indicated that they consider cyber risk as part of their due diligence considerations - a figure which fell to a surprising 4% in Russia.

Companies should:

- Undertake a cyber risk assessment for themselves and their third party business partners



India

Opinder Singh, Mumbai

With its two-trillion dollar economy and a population in excess of one billion people, India continues to attract inbound investment.



Government-led initiatives, including tax reforms, regulatory improvements and the 'Make in India' initiative, have made India a global leader for Foreign Direct Investment (FDI) between October 2014 and April 2015, with a 48% upsurge in FDI.

The regulatory landscape is evolving quickly in India. The 'Make in India' initiative includes a plan for the simplification of regulatory requirements to increase transparency over obtaining licences and approvals. In 2016, as part of its commitment against corruption, the Indian Supreme Court expanded the definition of a public servant to include private bankers. This move, while clearly impacting the financial sector, is expected to have a broader impact on other highly-regulated sectors. Additional legislation focusing on corruption and whistleblower protection is currently going through amendments in the Indian parliament. In addition, a series of bilateral agreements, targeted at uncovering hidden wealth, is underway. At the same time, there has been a notable increase in enforcement activity by Indian authorities.

Such proactive steps could be the reason for India's improved ranking in Transparency International's Corruption Perceptions Index, in which the country stood at 76th place in 2015, up from 85th place in 2014. Our survey findings provide a similarly positive message, with 58% of respondents believing that bribery and corruption happens widely in India, compared to 67% in 2014.

However, it is important to recognize the challenges that businesses operating in India still face. Despite the initiatives and the progress, respondents who exited or considered exiting India still frequently cited fraud, bribery and corruption, as well as inconsistent or arbitrary enforcement of laws and regulations, as key reasons for their exit.

Our survey found that 80% of our respondents in India believe that prosecution of individuals would help deter future fraud, bribery and corruption by executives.

Compliance framework

Corruption continues to be a significant risk for companies working with government bodies. Companies engaging with state-owned businesses and government departments need to have strong compliance programs in place to mitigate these risks. Although 76% of companies have anti-bribery and anti-corruption policies in place, they must realize that "paper-based compliance" will not suffice.

Leading companies in India not only have strong policies but are embedding ethical behavior into their daily business practices, with teams empowered to do the right thing by a strong tone from the top. From an operational perspective, companies can find it a challenge to define key performance indicators for their compliance functions and to demonstrate the value that they deliver to the business.

Leading companies highlighted to us the imperative of the compliance function capturing and reporting data on sanctioned conduct within the company to the board.

In addition, the risk of cybercrime is also rising in India. Our survey found that 42% of the respondents in the region believed that cybercrime has been discussed by the board in the past year.

Companies should:

- Conduct thorough due diligence on third parties
- Recognize the impact of culture on business risk
- Introduce training about cyber threat to employees



42%

of the respondents in the region believed that cybercrime has been discussed by the board in the past year

“While transparency reduces corruption, good governance goes beyond transparency in achieving openness. Openness means involving the stakeholder in the decision-making process. Transparency is the right to information while openness is the right to participation.”

Narendra Modi, Prime Minister, India

Focus on anti-money laundering controls

Indian banks are still under scrutiny for money laundering issues, in particular in relation to international trade and remittances. This re-emphasizes the continual existence of black money and the existence of a parallel economy.

The Government and financial regulators are taking measures to combat black money, such as the 2015 amendment to the Benami Transaction (Prohibition) Bill. Despite this, there remains much to be accomplished.

Financial misstatement and whistleblowing

Our survey found that a significant minority of respondents in India would be willing to manipulate financial information to improve financial performance, while 30% of respondents are prepared to book revenues earlier than they should be recognized, the highest proportion globally.

Almost a third of our respondents in India cited loyalty to their company or to colleagues as a reason to not report any incidents of fraud, bribery or corruption.

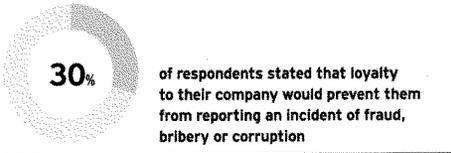
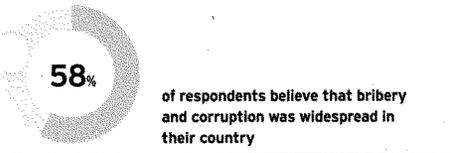
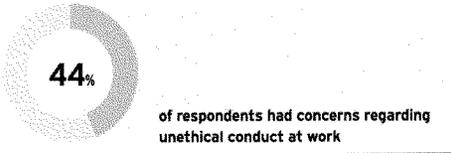
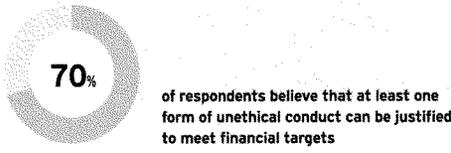
Companies should:

- Upgrade their anti-fraud technologies to support monitoring of suspicious transactions



Companies should:

- Use forensic data analytics to identify irregularities
- Assess the effectiveness of whistleblowing hotlines and awareness amongst employees



Conclusion

The global enforcement landscape is changing. With increased cooperation across borders, information sharing, and insights drawn from analysis of data no longer constrained by man hours, regulators are better armed and informed about corporate misconduct than ever before.

However, our results show that individuals – including some senior executives entrusted with the guardianship of their firms – cannot be assumed to act with integrity if the end might seem to justify the means.

There will always be global hotspots for corruption and impropriety which increase the fraud and corruption risks that company might face.

The regulatory focus on the conduct of individuals requires boards to act collectively for the good of their firms. We have set out elements of leading practice and the actions that boards should take throughout this survey. However our experience tells us that there are three broad categories of question on which boards must maintain a focus:

- **The risks their businesses are exposed to emanating from their global operations.** Are boards confident that those leading on the ground in high-risk markets understand the business culture and how work is won? Are boards confident that management has enough awareness of the key third-parties with which their companies partner and who is really behind them? Is the business focusing the right resources on the right risks in the right locations or is it falling to keep up with the evolving environment?
- **The 'big picture' indicators that could indicate impropriety.** With regulators looking harder at the data companies report, are boards comfortable that management's accounting is reasonable and balanced and that their profits and balance sheets reflect reality? Where there is evidence of systematic minor breaches of financial controls, could this be indicative of a wider tendency towards non-compliance?
- **The drivers of individual behavior in their businesses.** Does the way in which individuals are rewarded incentivize impropriety? What could encourage individuals to act properly in the interests of the business? Which areas of the business are likely to feel under the greatest pressure to perform? How do staff know what is expected of them?

Companies can expect to be exposed to new risks in the years ahead. The implications for business from these key trends are likely to require more focus from management and boards alike:

- Data privacy and its impact on national security, counter-terrorism and anti-fraud/anti-corruption efforts
- The transition of terrorist financing from the black to the mainstream economy
- Increasingly organized and sophisticated cyber attacks targeting corporate and customer data
- Iran and its place in the international system – compliant nation-state or continued target for sanctions?
- Commodity price volatility and its potential to increase the risk of rogue trading and financial statement fraud
- The need to strengthen beneficial ownership transparency, especially in the non-financial sector, and to identify illicit transactions tied to the proceeds of corruption

Survey approach

Between October 2015 and January 2016, our researchers - the global market research agency Ipsos MORI - conducted 2,825 interviews in the local language with senior decision-makers in a sample of the largest companies in 62 countries and territories. The polling sample was designed to elicit the views of executives with responsibility for tackling fraud, mainly CFOs, CCOs, general counsel and heads of internal audit.

Participant profile - region and territory

Number of Interviews		Number of interviews	
Far East Asia		Middle East, India and Africa	
China (mainland)	50	Egypt	25
Hong Kong SAR	50	India	50
Indonesia	50	Israel	25
South Korea	50	Kenya	50
Malaysia	50	Middle East**	75
Philippines	50	Nigeria	50
Singapore	50	Saudi Arabia	50
Taiwan	50	South Africa	50
Thailand	50	North America	
Vietnam	50	Canada	50
Japan	50	U.S.	50
Eastern Europe		Oceania	
Baltic States*	75	Australia	40
Bulgaria	50	New Zealand	10
Croatia	50	Western Europe	
Czech Republic	50	Austria	50
Hungary	50	Belgium	50
Poland	50	Denmark	50
Romania	50	Finland	50
Russia	50	France	50
Serbia	50	Germany	50
Slovakia	50	Greece	50
Slovenia	50	Ireland	50
Turkey	50	Italy	50
Ukraine	25	Luxembourg	50
South America		Netherlands	50
Argentina	50	Norway	50
Brazil	50	Portugal	50
Chile	50	Spain	50
Colombia	50	Sweden	50
Mexico	50	Switzerland	50
		UK	50

* Estonia, Latvia, Lithuania

** Jordan, Oman and the UAE

For the purposes of this report, "developed" countries include Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, UK, U.S., "Emerging" countries and territories include Argentina, Brazil, Bulgaria, Chile, China (mainland), Colombia, Croatia, Czech Republic, Egypt, Estonia, Hong Kong SAR, Hungary, India, Indonesia, Israel, Jordan, Kenya, Latvia, Lithuania, Malaysia, Mexico, Nigeria, Oman, Philippines, Poland, Romania, Russia, Saudi Arabia, Serbia, Slovakia, Slovenia, South Africa, South Korea, Taiwan, Thailand, Turkey, UAE, Ukraine, Vietnam.

Participant profile - job title, sector and revenue

Number of interviews		
Job title		
CFO/FD	655	23%
Other finance	769	27%
Head of Internal Audit	237	8%
Other Internal Audit/risk	353	12%
Head of Compliance	81	3%
Head of Legal	137	5%
Company Secretary	22	1%
Other stakeholder	571	20%
Director		
Automotive	130	5%
Consumer products/retail/wholesale	719	25%
Financial Services	258	9%
Government and public sector	58	2%
Life sciences	117	4%
Manufacturing/chemicals	363	13%
Oil, gas and mining	198	7%
Other transportation	151	5%
Power and utilities	142	5%
Professional firms and services	177	6%
Real estate	224	8%
Technology, communications and entertainment	211	7%
Other sectors	77	3%
Revenue*		
More than US\$5b	168	6%
US\$1b–US\$5b	542	19%
US\$500m–US\$0.99b	372	13%
US\$100m–US\$499m	890	31%
US\$99m or less	813	29%
Above US\$1b	710	25%
Below US\$1b	2075	73%

*40 respondents either refused to provide or did not know the annual turnover of their company

Detailed results

Bribery/corrupt practices happen widely in business in this country

39%

of respondents agree that bribery/corrupt practices happen widely in business in their country



Rank	Country	% Agree
1	Brazil	90
2	Ukraine	88
3	Thailand	86
4	Nigeria	86
5	Kenya	84
6	Mexico	82
7	Colombia	80
8	Indonesia	78
9	South Africa	74
10	Egypt	72
11	Slovakia	70
12	Philippines	68
13	Hungary	66
14	Argentina	66
15	Greece	62
16	Croatia	60
17	India	58
18	Italy	56
19	Chile	54
20	Czech Republic	54
21	Portugal	50
22	Spain	50
23	Serbia	48
24	Vietnam	42
25	Malaysia	40
26	Slovenia	40
All respondents		39

Rank	Country	% Agree
27	Romania	36
28	Turkey	36
29	Middle East	35
30	Poland	34
31	Russia	34
32	U.S.	34
33	Bulgaria	32
34	Hong Kong SAR	30
35	Canada	30
36	Baltic states	29
37	United Kingdom	28
38	Australia	28
39	China (mainland)	24
40	Israel	20
41	Japan	18
42	France	18
43	Norway	16
44	South Korea	14
45	Taiwan	10
46	Austria	10
47	Luxembourg	10
48	Ireland	8
49	Singapore	8
50	Belgium	8
51	Switzerland	8
52	Germany	6
53	Netherlands	6
54	Denmark	4
55	Sweden	4
56	Saudi Arabia	4
57	Finland	0

Actions which can be justified to meet financial targets

Proportion responding that one or more of the following can be justified

- i) More flexible product return policies
- ii) Change assumptions determining valuations/reserves
- iii) Extend monthly reporting period
- iv) Backdate a contract
- v) Book revenues earlier than they should be

Rank	Country	% Would Justify	Rank	Country	% Would justify
1	Malaysia	80	24	Germany	42
2	Indonesia	76	25	Austria	40
3	Nigeria	76	26	Serbia	40
4	Kenya	74	27	South Africa	40
5	Slovakia	74	28	Sweden	40
6	India	70	29	Czech Republic	38
7	Mexico	70	30	Greece	38
8	Singapore	70	31	Netherlands	38
	Hong Kong SAR	64	32	Romania	38
	Philippines	64	33	Switzerland	38
11	Bulgaria	62	34	Baltic states	36
12	South Korea	58	35	France	36
13	Saudi Arabia	56	36	Slovenia	36
14	Thailand	54	37	United Kingdom	36
15	Turkey	54	38	Ukraine	36
16	Egypt	52	39	Croatia	34
17	Finland	52	40	Japan	34
18	Vietnam	52	41	Luxembourg	34
19	China (mainland)	50	42	U.S.	32
20	Ireland	46	43	Belgium	30
21	Spain	46	44	Poland	30
22	Hungary	44	45	Taiwan	30
23	Middle East	44	46	Portugal	28
	Average of all markets	42	47	Russia	26
			48	Australia	25
			49	Canada	24
			50	Norway	20
			51	Chile	16
			52	Colombia	16
			53	Denmark	16
			54	Italy	16
			55	Argentina	8
			56	Israel	8
			57	Brazil	4

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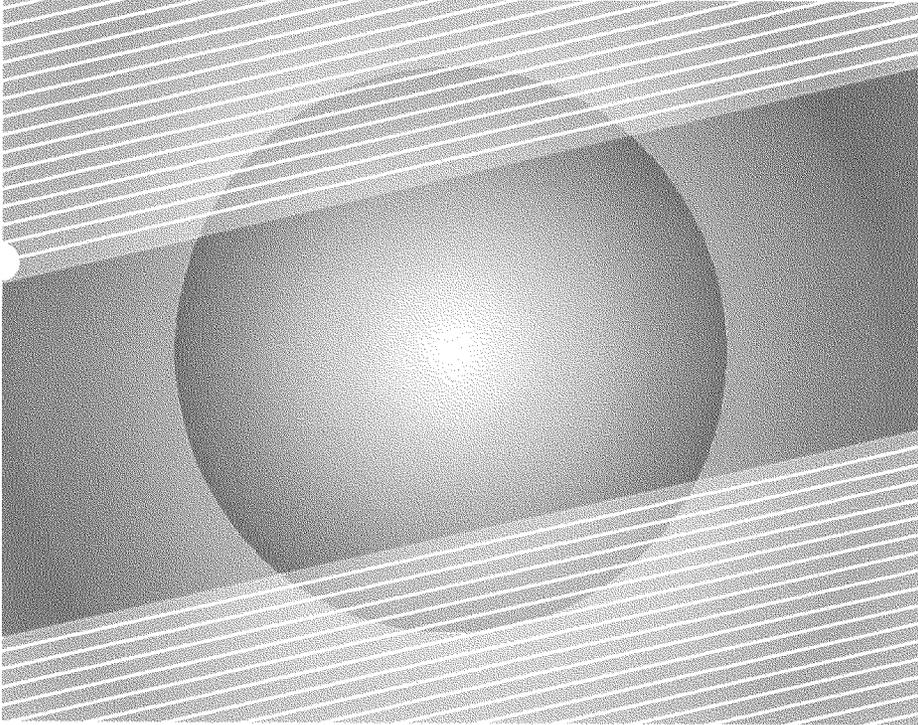
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ey.com/FIDS

Fighting Corruption in Eastern Europe and Central Asia

Anti-corruption reforms in Ukraine

4th round of monitoring of the Istanbul Anti-Corruption Action Plan



Anti-Corruption Reforms in UKRAINE

**Fourth Round of Monitoring of the
Istanbul Anti-Corruption Action Plan**

2017



About the OECD

The OECD is a forum in which governments compare and exchange policy experiences, identify good practices in light of emerging challenges, and promote decisions and recommendations to produce better policies for better lives. The OECD's mission is to promote policies that improve economic and social well-being of people around the world. Find out more at www.oecd.org.

About the Anti-Corruption Network for Eastern Europe and Central Asia

Established in 1998, the Anti-Corruption Network for Eastern Europe and Central Asia (ACN) supports its member countries in their efforts to prevent and fight corruption. It provides a regional forum for the promotion of anti-corruption activities, the exchange of information, elaboration of best practices and donor coordination via regional meetings and seminars, peer-learning programmes, and thematic projects. ACN also serves as the home for the Istanbul Anti-Corruption Action Plan (IAP). Find out more at www.oecd.org/corruption/acn/.

About the Istanbul Anti-Corruption Action Plan

The Istanbul Anti-Corruption Action Plan is a sub-regional peer-review programme launched in 2003 in the framework of the ACN. It supports anti-corruption reforms in Armenia, Azerbaijan, Georgia, Kyrgyzstan, Kazakhstan, Mongolia, Tajikistan, Ukraine and Uzbekistan through country reviews and continuous monitoring of participating countries' implementation of recommendations to assist in the implementation of the UN Convention against Corruption and other international standards and best practice. Find out more at www.oecd.org/corruption/acn/istanbulactionplan/.

This report was adopted at the ACN meeting on 13 September 2017 at the OECD in Paris.

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ACRONYMS

ACN	Anti-Corruption Network for Eastern Europe and Central Asia
AMC	Anti-Monopoly Committee of Ukraine
AntAC	NGO Anti-Corruption Action Center
ARMA	Asset Recovery and Management Agency
AUCP	All Ukrainian Conference of Prosecutors
BOC	Business Ombudsman Council of Ukraine
CC	Criminal Code
CMU	Cabinet of Ministers of Ukraine
CoE	Council of Europe
CoST	Construction Sector Transparency Initiative
CPC	Criminal Procedure Code
CPI	Corruption Perception Index
CPL	Law on Prevention of Corruption of Ukraine
CSL	Law on Civil Service of Ukraine
EBRD	European Bank of Reconstruction and Development
EITI	Extractive Industries Transparency Initiative
EU	European Union
FATF	Financial Action Task Force
FMS	Financial Monitoring Service
FIU	Financial Monitoring Unit
FOI	Freedom of information
GCB	Global Corruption Barometer of Transparency International
GPA	Agreement on Government Procurement
GPO	General Prosecutor's Office of Ukraine
GRECO	Group of States against Corruption
HCJ	High Council of Justice
HQCJ	High Qualifications Commission of Judges
HRMIS	Human Resources Management Information System
HRM	Human Resources Management
IAP	Istanbul Anti-Corruption Action Plan
IMF	International Monetary Fund
IRM	Independent Reporting Mechanism of the OGP
IT	Information technologies
LAP	Law on Administrative Procedures
MEDT	Ministry of Economic Development and Trade of Ukraine
MLA	Mutual Legal Assistance
MOJ	Ministry of Justice of Ukraine
MoU	Memorandum of understanding
MP	Member of Parliament
NABU	National Anti-Corruption Bureau of Ukraine
NACP	National Agency on Prevention of Corruption of Ukraine
NACS	National Agency of Ukraine on Civil Service
NATO	The North Atlantic Treaty Organization

NGO	Non-governmental organisation
NIS	National Integrity System
OGP	Open Government Partnership
OSCE	Organisation for Security and Co-operation in Europe
OECD	Organisation for Economic Co-operation and Development
PG	Prosecutor General of Ukraine
PPL	Law on Public Procurement
QDC	Qualifications and Disciplinary Commission
RPR	NGO Coalition of Ukraine, Reanimation Package of Reforms
RTI	Global Right to Information Rating
SAPO	Specialized Anti-Corruption Prosecutor's Office
SFS	State Fiscal Service of Ukraine
SIGMA	Support for Improvement in Governance and Management, OECD/EU joint initiative
State Programme	2015-2017 State Programme for the implementation of the Anti-Corruption Strategy
SOE	State-owned enterprise
TI	Transparency International
UAH	Ukrainian Hryvnia
Ukravtodor	
Ukrenergo	
UNIC	Ukrainian Network of Integrity and Compliance
UNODC	United National Office on Drugs and Crime
USAID	United States Agency for International Development
USR	United State Register of Legal Entities and Individual Entrepreneurs of Ukraine
Verkhovna Rada	The Parliament of Ukraine
WEF	World Economic Forum
WTO	World Trade Organisation

EXECUTIVE SUMMARY

This report analyses progress made by Ukraine in carrying out anti-corruption reforms and implementing recommendations of the IAP since the adoption of the Third Monitoring Round report in March 2015. The report focuses on three areas: anti-corruption policy, prevention of corruption, enforcement of criminal responsibility for corruption. The in-depth review of the sector will be conducted separately through a bi-procedure and is not part of the adopted report.

This report comes in a very volatile time for Ukraine, which still has a long way to go in terms of establishing functioning democratic anti-corruption institutions and actions and there are serious signs that it is in danger of backsliding into the kleptocracy that it was despite many substantial positive steps since the Revolution of Dignity. The report attempts to do both: point out the achievements and areas of potential risk of regress.

ANTI-CORRUPTION POLICY

Anti-corruption reforms

After the Revolution of Dignity largely instigated by endemic corruption, Ukraine adopted a comprehensive anti-corruption package of laws and established new specialised institutions: NABU, SAPO, NACP and ARMA. Ukraine also achieved unprecedented level of transparency, *inter alia*, by introducing the electronic asset disclosure, e-procurement, opening up the public registries and making a number of datasets publicly available in open data format. Civil society continues to play a significant role in pushing the reforms forward and the international community supports Ukraine's anti-corruption fight. The formation of the legislative, policy and institutional foundations for fighting and preventing corruption and putting in place various transparency initiatives are the main accomplishments in Ukraine since the last monitoring round.

Despite the achievements, the level of corruption remains very high. Anti-corruption enforcement, particularly against the high-level officials, is stalling and meets enormous resistance and the public trust to the Government has further decreased in recent years. Yet, the most pressing challenge for Ukraine now is ensuring the sustainability of the institutional framework and boosting anti-corruption efforts, that are being constantly undermined by the governing elite. The recent measures aimed at discouraging the anti-corruption activism are alarming and must be stopped urgently. Enabling environment for open and full participation of civil society in anti-corruption policy development and monitoring must be ensured.

Ukraine has not yet firmly established itself on its path of steady anti-corruption reforms, but is certainly on a right trail. However, the political will of the Government to genuinely fight corruption is seriously questioned. Resilience, persistency and full determination of the anti-corruption fight of the Ukrainian society at large will be critical in the coming years. Time has long come for Ukraine to take decisive steps to root-out pervasive corruption.

Anti-corruption policy

The State Programme for implementation of the anti-corruption strategy adopted with CSO participation is a sound policy document. It does not have a separate budget, but the anti-corruption institutions have substantial budgetary allocations and the donor assistance supports the implementation as well. The reports on implementation of the State Programme and the Strategy have been adopted recently, however the progress of implementation is not systematically monitored by the Government or the Parliament in accordance with the law. The two thirds of the measures of the State Programme have been implemented,

with the unimplemented measures mainly related to anti-corruption awareness raising. The implementation has been most challenging when it came to the interests of the President and the governing elite. The Public Council of the NACP was recently set up, however, its operation and efficiency has yet to be tested. NGOs carried out alternative monitoring and published shadow reports. Ukraine is encouraged to finalize the implementation of the measures that are still pending and develop a new anti-corruption strategy with a broad and meaningful participation of stakeholders based on the analysis of implementation of the previous policy documents, available surveys and assessments of the corruption situation in the country. The standardized corruption survey methodology and the first survey conducted on its basis are welcome development. Ukraine is encouraged to regularly conduct the survey, use and publish its results. The corruption risk assessments and sectoral anti-corruption programmes in the state agencies are a good practice that should be developed and strengthened further.

Anti-corruption *awareness-raising* and education are part of the anti-corruption policy documents however the implementation is lacking. The NACP recently adopted its communication strategy. Ukraine must proceed swiftly with the implementation, target awareness raising activities to the sectors most vulnerable to corruption, allocate sufficient resources, measure the results and plan the next cycle of activities accordingly.

Corruption prevention and coordination institutions

With some delays, Ukraine has launched its anti-corruption policy coordination and prevention body the National Agency on Corruption Prevention (NACP). Having a broad mandate, substantial budget and staff capacity, the NACP is an important institution that can play an instrumental role in the anti-corruption infrastructure of Ukraine. However, at present it is facing serious challenges ranging from the attempts to manipulate selection of its members, to rejecting the secondary legislation necessary for its operation, to political interference in its enforcement mandate. The establishment and resourcing the NACP in a short period of time and making it operational in most of its functions is a significant achievement. Ukraine is urged to secure independent functioning of the NACP as a matter of priority, including by taking legislative measures if necessary, to free it from outside interference, allow it to build the capacity, experience and authority and establish itself as a strong corruption prevention agency of Ukraine. The vacant positions of the NACP should be filled in by experienced and highly professional candidates with good reputation recruited through an open, transparent, objective and credible competition. The NACP should be provided with the access to all databases held by public agencies and resources necessary to perform its functions, including at the regional level. The coordination role and visibility of the NACP should be substantially enhanced as well. Further measures are needed to strengthen the anti-corruption units/officers, their role and ensure their effective coordination, assistance and methodological guidance by the NACP.

A high-level supervisory body, the National Council for Anti-Corruption Policy was launched and held several meetings. However, it lacks secretariat support and remains passive. The mandate of the Council *vis-a-vis* the NACP should be clarified and coordination and closer interaction established in practice. The Parliament of Ukraine has an important role in anti-corruption policy and its Anti-corruption Committee has reportedly been active. To acquire necessary experience, capacity and confidence the new institutional framework must be strengthened and nurtured, and not confronted and undermined, but this is more often than not against the interests of powerful oligarchs and the well-rooted corrupt high-officials in the government of Ukraine.

PREVENTION OF CORRUPTION

Integrity in the civil service

Ukraine has taken major steps to advance the civil service reform in line with the European standards: the new Civil Service Law (CSL), the secondary legislation, the comprehensive public administration reform strategy and its implementation plan were adopted. Ukraine introduced the position of state secretaries and in contrast with the past bad practices recruited a substantial number of civil servants, including at the senior level, through open and transparent *merit-based competitions*. Ukraine is encouraged to address the

existing challenges, such as low qualification of selection commission members, political interference in their work and difficulties in assessing various competencies of candidates and ensure that the recruitment in the civil service is open, transparent, free from political interference and based on merit allowing to recruit the best candidates in the civil service positions.

The new regulations on salaries represent a step forward to a transparent and fair *remuneration* system in Ukraine. Gradual increase of salaries in civil service is also a positive development that should be continued. However, the important part of the new provisions on bonuses will only enter into force in 2019, the allocation of a large part of bonuses (monthly/quarterly bonuses constituting up to 30% of an annual salary) is not linked to the performance appraisal process and is left at the discretion of heads of state bodies. Furthermore, there is no established cap for annual bonuses. Ukraine is encouraged to link the priority in promotion, increase in salary and bonuses to the results of evaluation and implement the newly adopted *performance appraisal* regulation in practice. Report further recommends to clarify the grounds for disciplinary proceedings and ensure that they are objective, the dismissals are based on the legal grounds and are not politically motivated.

The progress achieved by Ukraine in the area of *conflict of interest* management is apparent. The NACP has issued various methodological guidance, carried out information campaign and training of staff and started enforcement. This is commendable and must be continued. Nevertheless, the questions as to the independent functioning of the NACP free from political interference and bias must be addressed in order the implementation of the conflict of interest rules, as well as other parts of its mandate to be assessed as efficient and seen as politically neutral.

Electronic declaration system is one of the most important anti-corruption measures Ukraine has implemented in recent years. Over 1 271,000 declarations including of top level officials are now publicly accessible. The law enforcement has started criminal proceedings based on its data. The turmoil around the system and various setbacks demonstrates the magnitude of opposition any initiative aimed at uncovering and fighting corruption faces in Ukraine. Civil society, international community and public at large have been mobilised to defend the system from multiple interferences. Now, as the system is showing its first results in practice, it is critical to ensure its full and uninterrupted functioning: adopt necessary bylaws, launch automated verification software, connect the system with the relevant databases to perform this function, allow the NACP to exercise its verification mandate fully and independently and ensure full access by the NABU to its database as envisaged by the law. It is recommended to focus the verification efforts on the high-level officials. The latest amendments to the CPL extending the scope of the declarants to anti-corruption activists depart from the purpose of the asset declaration system and can serve as a tool to discourage and intimidate anti-corruption activism in Ukraine. These amendments should be abolished.

The CPL provides regulations for protecting *whistle-blowers* disclosing corruption. Introducing clear reporting channels and online anonymous reporting by the NACP is a welcome development. The number of reports received so far represents a good start showing the willingness of the citizens to report and cooperate. However, challenges can be noted in ensuring whistle-blower protection in practice. The report recommends Ukraine to set forth clear procedures, further train the responsible staff, raise public awareness to incentivize reporting and consider adoption of a stand-alone law with all necessary guarantees. the whistleblowing practices to increase, the NACP should be seen as an objective and reliable ally to provide information to and receive protection from.

Integrity of political public officials

Integrity of MPs and other political officials is a concern in Ukraine. There is a strong public perception of high level of corruption among the politicians. The CPL applies to political officials including at the high level. The supervision and control is entrusted to the NACP, but there is a distrust to this body as to the impartiality and unbiased implementation of its mandate. A separate ethics code for parliamentarians is needed with the necessary training and guidance for its application. It is also important to clarify the oversight mandate of the NACP vis-a-vis the Parliamentary Committee of Rules and Procedure and how the awareness, training consultations and guidance are provided to the MPs. Moreover, it is crucial that the

NACP exercises its enforcement powers related to the conflict of interest and asset declarations fully and objectively in relation to the political officials at the highest level.

Integrity in the judiciary and public prosecution service

Integrity of judiciary has remained one of the main challenges in the development of democratic governance and the rule of law in Ukraine. Finding a right balance between independence and accountability of judges is a difficult task and Ukraine is still struggling with it. The entire legislative framework of the judiciary was revised through constitutional amendments and a package of laws regulating the judicial system. New legislation simplified the court system and helped address most recommendations given to Ukraine under IAP monitoring, including appointment and dismissal of judges on recommendation of the High Council of Justice instead of the Parliament, abolishment of the five-year probation period for junior judges, changes into the composition of the High Council of Justice to include the majority of judges. It introduced changes into the system of judicial self-governance and disciplining of judges. This being said, the implementation of these laws will be the actual test of the introduced changes, and this is the most challenging task ahead of Ukraine in ensuring integrity of the judiciary.

In addition to legislative changes some other improvements took place. Namely, funding of the judiciary has significantly increased and remuneration of judges has been adequately adjusted to commensurate to their role and reduces corruption risks. All court decisions, including interim ones are now being published and can easily be accessed via Internet. Such steps are welcomed and will likely help ensure transparency of the court proceedings and ultimately will have effect on building up of the positive image of the judiciary in Ukraine.

Despite these positive changes the judiciary continues to be perceived as a weak branch, often lacking independence and suffering from corruption. Multiple factors including the situation with pending 're-appointment' of judges whose 5 years' probation term lapsed after the judicial reform, absence of safety measures for judges and protection in courts, continued pressure through the use of Criminal Code Article 375 "on delivery of the knowingly unfair sentence, judgement, ruling or order by a judge" - undermine judicial independence, making judges vulnerable to various types of outside improper pressure. This report also raises concerns over the number of judicial resignations and the situation with Ukrainian courts simply lacking the judges necessary for panels to hear the cases.

The Ukrainian ***prosecution service*** has been undergoing major reforms, and just like the judiciary, was also affected by the constitutional amendments. Reforms included abolishment of the general supervision function of the prosecution service, for which Ukraine has been criticised for years. New legislation also provides for guarantees of the independence of the prosecutors, identifies more specific criteria and procedures for appointment and disciplining of prosecutors, and establishes the system of self-governance of the prosecution service. All of these are positive developments and should be continued, and any attempts at rollback should be circumvented.

Nevertheless, the prosecution service, along with courts, continues to be one of the least-trusted public administration institutions and remains to be a powerful body with direct links to the President of Ukraine. While the reform of the prosecution service was intended to reduce the General Prosecutor's Office control on many issues involving hiring, advancement and discipline, there is abundant evidence that the highest levels of the General Prosecutor's Office, if not the Prosecutor General himself still exercise inordinate power over such decisions.

The position of the Prosecutor General has been highly volatile and surrounded by much controversy and public discontent. At the moment the General Prosecutor's Office is headed by political appointee, who is a close political ally of the President. This report therefore recommends that process for appointment and dismissal of the Prosecutor General is made more insulated from undue political influence and more oriented towards objective criteria on the merit of the candidate. The reform of the system of prosecutorial self-governance has been launched with some set-backs, it is important now for Ukraine to ensure that the self-governance bodies function independently and proactively represent the interests of all prosecutors. Disciplining proceedings should be further improved with grounds for liability clearly defined but also ensuring that the complaints are diligently investigated, and that statute of limitations, as well as the bodies

responsible for this are adequate. And finally constant underfunding of the prosecution services, as well as the low salaries of prosecutors, with the exception of those in SAPO, require urgent action.

Integrity in public procurement

Ukraine has taken many steps towards ensuring *integrity of the public procurement*. The introduction of the e-procurement system “Prozorro” enhanced the level of transparency in public procurement and made it less susceptible to corruption. This is a notable and important step in the fight against corruption in Ukraine, which can also serve as an example for other countries in the region and beyond. It is of utmost importance that this achievement will not be reversed and the progress made is maintained. The large amount of relevant information related to procurement that is published in Ukraine is also impressive. This creates the possibility for public scrutiny of the Government’s spending through procurement. Anti-corruption measures introduced under the anti-corruption legislation of 2014 have also helped build mechanisms to prevent corruption, including internal anti-corruption programmes and debarment system. Now they should be put in practice and made fully functional.

The report also points out to some actions, tools, policies and practices missing or unsatisfactory. It recommends in particular continuing reform of the public procurement system in minimising the application of non-competitive procedures, to ensure that state owned enterprises use competitive and transparent procurement rules, to extend e-procurement system to cover all public procurement at all levels and stages, to provide sufficient resources to procuring entities, including training for members of tender evaluation committees. And finally it calls for regular training for private sector participants and procuring entities on integrity in public procurement at central and local level and training for law enforcement and state controlled organisations on public procurement procedures and prevention of corruption.

Accountability and transparency in the public sector

Ukraine introduced the obligation of state agencies to publishing data in open format and launched the open data portal now containing around 20 000 datasets. Furthermore, the information on beneficial ownership and various public registries became public. These are significant achievements. Some progress could be observed in relation to the anti-corruption screening of legislation: the NACP approved the related procedure and methodology and the Anti-Corruption Committee made some attempts towards streamlining this function. No tangible progress could be noted in relation to the recommendations on the Law on Administrative Procedure and access to information (oversight body). Parts of the recommendations 3.3 and 3.6 could not be evaluated due to the insufficient information received from the Government.

Business integrity

Ukraine implemented several important measures to simplify business regulations and improve business climate. Moreover, creation of the Business Ombudsman Council (BOC) provided the business with a powerful tool to report corruption cases without fear of prosecution or other unfavourable consequences, to receive protection of legitimate rights, as well as possibility to tackle most common problems in a systematic manner. However, most actions foreseen by the Section 6 of the Anti-corruption Strategy were delayed and remain unimplemented. Therefore for Ukraine it is crucial to include business integrity section to the new National Anticorruption Strategy and ensures active participation of business in the monitoring of the Strategy. In addition, Ukraine should focus on business integrity of SOEs and further promote and implement drafted model compliance programme for SOEs.

Further improvements of the Prozorro e-procurement system to addresses all procurement process and insure transparency of the bidding process remain important. Additional efforts are needed to improve disclosure requirements for companies and adoption of the law on lobbying.

Ukraine should insure further strengthening and development of the BOC, as well as support initiated by local business collective action for compliance and integrity, the UNIC. Greater involvement of other state bodies, such as the Ministry of Economy and Trade and National Agency for Corruption Prevention, in the

business integrity would be important for the sustainability of this work. Moreover, the fundamental challenge of freeing the Ukrainian economy from the control of oligarchs is still to be tackled.

ENFORCEMENT OF CRIMINAL RESPONSIBILITY FOR CORRUPTION

Most of the international requirements on *criminalization of corruption* have been introduced in Ukraine shortly before the adoption of the previous report and the new recommendations pointed out to the shortcomings in the statute of limitations and in the legislation on corporate liability, which unfortunately remained unaddressed since then. The new recommendations heavily focused on increasing the enforcement of the newly introduced offences through adequate training and allocation of resources to the investigators and prosecutors. This has been done through the establishment and appropriate staffing of the NABU and SAPO and their continuous training. Both agencies are very well resourced and fare well compared to other state bodies in the criminal justice system of Ukraine. They subsequently have shown good results in terms of actual enforcement of the new offences. Only investigations in cases on offer and promise of unlawful benefit, or those involving the definition of unlawful benefit which would include intangible and non-pecuniary benefits remain to be a challenge.

Quasi-criminal *corporate liability for corruption offences* was introduced in Ukraine at the time of the 3rd round of IAP monitoring and regrettably since then no changes have been made to ensure its autonomous nature, as was recommended. Corporate liability also remains to be almost entirely unenforced in Ukraine. The novelty of this legal concept is understandable, however, in order for the practice to form the report calls for a concerted push for pursuing of such liability and proposes that it be done both in terms of policy messages and in practical terms of providing training specifically focused on liability of legal persons for corruption offences.

In regards to *confiscation* Ukraine has made considerable progress since the 3rd round of monitoring in enacting legislation and establishing necessary institutions to implement an effective confiscation program to deprive criminals of access to the profits of crime and to recover assets of Ukraine that have been misappropriated. The Asset Recovery and Management Agency of Ukraine (ARMA), which is entrusted with the functions of identification, investigation, evaluation, management and confiscation of criminal assets, was established. It will be important now that ARMA has adequate resources to meet its legislative objectives and that its role and available resources are communicated to the law enforcement and prosecutorial bodies. The report also encourages Ukraine to now step up its efforts to confiscate corruption proceeds from family members, friends or nominees and to continue making progress in the effective use of the newly enacted confiscation authorities. The authorities are also urged to reinforce their action so that concrete and measurable results in terms of *asset recovery* could be shown.

Immunities of judges have been limited from absolute to functional with constitutional reform, this is undeniably a positive development. However practice will become the ultimate test of these changes. It is also recommended to analyse practical application of the judicial reform in order to ensure that it is not subject to misuse and that the functional immunity contributes to effective law enforcement. Regrettably constitutional reform did not address the same concern in regards to the **immunities of the MPs**. Ukraine is urged to review its legislation and ensure that the procedures for lifting immunities of MPs are transparent, efficient, based on objective criteria and not subject to misuse and to revoke additional restrictions on the investigative measures with regard to MPs, which are not provided for in the Constitution of Ukraine.

The issue of *detection* was for the first time addressed by the IAP monitoring and results of the newly created institutions have been highlighted throughout the enforcement sections of the report. NABU became the first law enforcement agency in the modern history of Ukraine that, to such a wide extend, began taking proactive measures in detecting corruption cases. Because many of the investigative techniques require court approval obtained by the SAPO, SAPO also is credited for these achievements. The number of detected cases by NABU is impressive, especially if compared to limited enforcement efforts on high-profile corruption cases before their establishment. The scale of these cases is also a

novelty in Ukraine's enforcement efforts: the cases involve top level officials, many of whom were or remain in the office; use elaborate schemes and structures; and deal with big amounts of funds. NABU and SAPO work, as well as work of other law enforcement bodies has been actively supported by the FIU, and there is hope that newly created ARMA staff will be also effectively contributing to these efforts. Cooperation between law enforcement and other non-law enforcement bodies, such as FIU, ARMA, tax, customs, etc. to ensure detection and swift investigation of corruption should be maintained and further increased through joint trainings. More should be done to ensure swift access to bank, financial and commercial records. To this end Ukraine is recommended to establish a centralised register of bank accounts of legal and natural persons, including information about beneficial owners of accounts, making it accessible for authorised bodies, including NABU, NACP and ARMA, without court order to swiftly identify bank accounts in the course of financial investigations and verification.

This report notes significant work performed by some of the responsible law enforcement and prosecutorial bodies to address *high level corruption*. The publicly filed cases by SAPO working with NABU appear to reflect aggressive and effective investigations and prosecution decisions. But such progress does not seem to be true across all of the responsible bodies. Although there appears to be more commitment by the current Prosecutor General in some areas, the report notes stalling of very serious cases brought by the former office of the general inspectorate against senior and experienced prosecutors. And finally of paramount concern is the absence of fair and effective courts. This threatens to undermine all of the progress made. The absence of a fair and effective judiciary remains a prime impediment to effective enforcement.

Fundamental changes took place in the *institutional* landscape of *criminal justice bodies in the area of anti-corruption* in Ukraine. Establishment of the NABU was finalized and it became fully operational and managed to meet the expectations of delivering real high-profile investigations. The SAPO has also since then was established and became fully operational. Again, just like the NABU is has delivered procedural guidance on NABU cases and submitted high-profile cases to courts. Unfortunately, further progress on these cases stopped there. Nevertheless, these two new institutions (the NABU and the SAPO) demonstrated that high level officials and grand corruption are no longer beyond the remit of the law enforcement in the country. They also sent some unsettling messages to the powerful oligarchs and the well-rooted corrupt high-officials in the public administration of Ukraine. To some extent their rigor in curbing high-profile corruption and their attempts at keeping independence caused a backlash. They are being attacked in various forms: through media and legislative initiatives, investigations and prosecutions launched against their leadership and staff, as well as through various other methods applied to prevent them from doing their job. Measures need to be taken to ensure that their independence is preserved and that the cases that they have accumulated are finally resolved.

The debate on the establishment of the anti-corruption courts was initiated and found its reflection in the judicial reform, which now provides for establishment of the anti-corruption courts. However, the plans seem vague, are viewed as ineffective by many in civil society, and are not being implemented swiftly enough to address this critical failure in the justice system. It is extremely important to ensure that the cases which were investigated and brought to court by the NABU and SAPO are properly adjudicated by the judges with high integrity and independence. The failure to take this on immediately and in a way that the society believes will be fair and just may well spell the end of the anti-corruption reforms Ukraine has undertaken. Ukraine's freedom and economic prosperity depend on it getting this right.

SUMMARY OF COMPLIANCE RATINGS

Table 1. Summary table of compliance ratings for the Third Monitoring round recommendations.

Third Monitoring Round Recommendation	Compliance Rating			
	Fully	Largely	Partially	Not
1. Anti-corruption policy and political will			×	
2. Corruption surveys			×	
3. Public participation			×	
4. Anti-corruption prevention and coordination institutions			×	
5. Offence and Legal persons			×	
6. Confiscation			×	
7. Immunities			×	
8. International cooperation, asset recovery			×	
9. Investigation			×	
10. Specialised anti-corruption law enforcement bodies		×		
13. Integrity of civil service			×	
14. Transparency in public administration			×	
15. Public financial control and audit*	N/A			
16. Public procurement		×		
17. Access to information			×	
18. Political corruption*	N/A			
19. Integrity in the judiciary		×		
20. Business integrity		×		

* “Public financial control and audit” and “Political corruption” are not covered by the Fourth Round of Monitoring.

INTRODUCTION

The Istanbul Anti-Corruption Action Plan (Istanbul Action Plan or IAP) was endorsed in 2003. It is the main sub-regional initiative in the framework of the OECD Anti-Corruption Network for Eastern Europe and Central Asia (ACN). The Istanbul Action Plan covers Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Mongolia, Tajikistan, Ukraine and Uzbekistan; other ACN countries participate in its implementation. The implementation of the Istanbul Action Plan includes a systematic and regular peer review of the legal and institutional framework for fighting corruption in the covered countries.

Ukraine joined the Istanbul Action Plan in 2003. The initial review of legal and institutional framework for the fight against corruption and recommendations for Georgia were endorsed in 2004. The first monitoring round report, which assessed the implementation of initial recommendations and established compliance ratings of Ukraine, was adopted in 2006. The second monitoring round report was adopted in 2010 and the third monitoring round report – in March 2015. The monitoring reports updated compliance ratings of Ukraine with regard to previous recommendations and included new recommendations. In-between of the monitoring rounds Ukraine had provided updates about actions taken to implement the recommendations at all the IAP monitoring meetings. Ukraine has also actively participated and supported other activities of the ACN. All reports and updates are available at the ACN web-site at www.oecd.org/corruption/acn/istanbulactionplancountryreports.htm.

The fourth monitoring round under the Istanbul Action Plan was launched in 2016 according to the methodology adopted by the ACN countries. Ukrainian authorities submitted replies to the country-specific questionnaire in February 2017 along with other requested materials. The on-site visit to Kyiv took place on 27-31 March 2017. After the on-site visit, Ukrainian authorities provided limited additional information.

Mr Daniel Thelesklaf, Director of Financial Intelligence Unit, Principality of Liechtenstein, led the monitoring team. The team included:

- Mrs Inese Kuške, Department of Public Administration Policy, State Chancellery, Latvia;
- Mrs Airi Alakivi, Ministry of Foreign Affairs, Estonia;
- Mrs Mary Butler, Prosecutor, Chief of International Unit of the Money Laundering and Asset Recovery Section, Criminal Division, Department of Justice, USA;
- Mr Dirk Plutz, Associate Director, Policy Advisor at the Procurement Policy Department, EBRD;
- Mr Artur Ginatulin, Associate Director, Project Integrity, EBRD;
- Mr Davor Dubravica, Judge, Croatia, Chairperson of Regional Anti-Corruption Initiative (RAI);
- Mr Arto Honkaniemi, OECD expert, former Senior Financial Counsellor at Ownership Steering Department of the Prime Minister's Office, Finland;
- Mrs Rusudan Mikhelidze, Project Manager, Anti-Corruption Division, OECD;
- Mrs Antonina Prudko, Resident Advisor, Anti-Corruption Project for Ukraine, OECD;
- Ms Tanya Khavanska, Project Manager, Anti-Corruption Division, OECD.

National Agency on Corruption Prevention (NACP) was Ukraine's national co-ordinator for the monitoring. Mr Rouslan Riaboshapka, Commissioner, NACP, Mr Bogdan Shapka, Director of the Anti-Corruption Policy Department, Mr Igor Tkatchenko, Chief of Staff, NACP, and Mr Nazar Grom, Head of the International Department, NACP were in charge of the monitoring on behalf of Ukraine.

During the on-site visit, the monitoring team held 10 thematic panels and 3 special sessions on sector-related issues with representatives of various public authorities of Ukraine organised by the national coordinator. The OECD Secretariat arranged for separate meetings with representatives of civil society, business and international organisations. RPR Anti-Corruption Group hosted and co-organised meeting with representatives of NGOs; the Business Ombudsman Council of Ukraine hosted and co-organised meeting with business community; meeting with international community was organised by the OECD.

This report was prepared on the basis of the government of Ukraine's answers to the questionnaire, the monitoring team's findings from the on-site visit, additional information provided by the civil society, international community, the government of Ukraine, and research by the monitoring team, as well as relevant information received during the plenary meeting.

According to the methodology of the fourth monitoring round, the prevention and prosecution of corruption in state-owned enterprises (SOEs) was selected as the sector for in-depth review, with the case-study of one SOE, Naftogaz of Ukraine. However, the ACN decided that information provided during the monitoring process was not sufficient for the in-depth review of the sector and it will be conducted separately through a bis-procedure. Subsequently, the report was adopted without the in-depth sector Chapter at the ACN/Istanbul Action Plan plenary meeting in Paris on 14 September 2017.

The report contains the following compliance ratings with regard to recommendations of the Third Round of Monitoring of Ukraine: **out of 18 previous recommendations Ukraine was found to be partially compliant with 12 recommendations and largely compliant with 4 recommendations. Two recommendations of the previous round were not evaluated, as the fourth monitoring round does not cover relevant topics (Public financial control and audit, Party financing). The fourth monitoring round report includes 26 recommendations.**

The report is made public after the meeting, including at www.oecd.org/corruption/acn. Authorities of Ukraine are invited to disseminate the report as widely as possible and, in particular, to translate it into national language. To present and promote implementation of the results of the fourth round of monitoring the ACN Secretariat will organize a return mission to Ukraine, which will include a meeting with representatives of the public authorities, civil society, business and international communities. The Government of Ukraine will be invited to provide regular updates on measures taken to implement recommendations at the Istanbul Action Plan plenary meetings.

The fourth round of monitoring under the OECD/ACN Istanbul Anti-Corruption Action Plan is carried out within the ACN Work Programme for 2016-2019 that is financially supported by Latvia, Liechtenstein, Lithuania, the Slovak Republic, Sweden, Switzerland and the United States.

CHAPTER I: ANTI-CORRUPTION POLICY

1.1. Key anti-corruption reforms and corruption trends

Reforms

The Government of Ukraine took bold anti-corruption measures after the Revolution of Dignity, which was largely instigated by the endemic corruption in the country.¹ The first step was the adoption of a comprehensive anti-corruption package of laws, followed by the complete reform of the anti-corruption infrastructure.² The fundamental laws were enacted and the new specialised institutions -- NABU, SAPO, NACP, ARMA -- were set up.³ Finalizing formation of institutional, legal and policy foundations for fighting and preventing corruption is an important accomplishment since the previous monitoring round. Unprecedented transparency achieved in several areas using modern tools is another key aspect of Ukraine's ongoing anti-corruption reforms, which includes electronic asset disclosure, e-procurement and opening up the public registries.

These important changes however are not yet reflected on actual and perceived level of corruption in Ukraine, which remain very high. Anti-corruption enforcement in general and particularly against high-level officials is stalling and meets enormous resistance, and the public trust to the Government has further decreased in recent years. According to civil society, "the new anti-corruption tools face growing resistance from the country's political and business elite."⁴ This raises serious doubts regarding the sincerity of commitments and the political will of the Government to genuinely fight corruption.

Yet, the most pressing challenge now is how to preserve and strengthen the new institutional framework and boost anti-corruption efforts, that are constantly undermined by the governing elite. In the context of turbulence and unrest, even a small achievement does not come easy and is under the constant threat of fall-back and reversal. A small group of dedicated anti-corruption reformers in Ukraine are courageous enough to stay in the public administration, fight back and help reform their country. However, as the pressure is mounting some of them are forced to leave their offices.

Civil society of Ukraine continues to play a significant role in pushing anti-corruption reforms forward.⁵ It is vibrant, competent and proactive, putting pressure on the Government at critical moments when the threat of reversal, blockage or sabotage of the reforms is imminent, and contributing to the implementation of the measures that take right direction. International community has played an important role in promoting anti-corruption reforms through funding conditions and technical assistance, and continue supporting Ukraine in its anti-corruption fight.

¹ Principles of Anti-Corruption Policy of Ukraine (Anti-Corruption Strategy) for 2014-2017, general provisions.

² Package of anti-corruption laws was adopted in October 2014. See details in the OECD/ACN (2015) Third Round Monitoring Report on Ukraine. Also, Anti-Corruption Measures in Ukraine after the Revolution of Dignity: Key Legislative Aspects (2016) Centre for Army, Conversion and Disarmament Studies, Kyiv, 2016.

³ Most of them are adequately resourced, have their own budget and started operation as shown further in the report.

⁴ NGO Coalition Reanimation Package of Reforms (2016) Anti-Corruption Policy of Ukraine: First Success and the Growing Resistance.

⁵ European Commission (2016) Association Implementation Report on Ukraine.

The third round monitoring report (2015) on Ukraine noted that “so far policy, legislative and institutional measures were not supported by strong and practical measures and enforcement”.⁶ Since the previous round, overall Ukraine has made important steps in preventing and fighting corruption as shown further in this report. In June 2017, the European Commission, concluding that all visa liberalisation related benchmarks, including anti-corruption commitments, had been fully achieved, granted visa free regime to Ukraine.

The main anti-corruption reforms carried out since the last monitoring:

- The anti-corruption legislation package and setting up the anti-corruption institutions (NABU, SAPO, NACP, ARMA).
- E-procurement system
- Electronic system of asset declarations with the open access to data, launch of verification
- Opening up public registries and information on public finances; making accessible beneficial ownership information
- Reforms in banking and energy sector
- Constitutional amendments and new legislation on Judiciary
- Civil service law and public administration reform strategy in line with EU standards
- National police reform

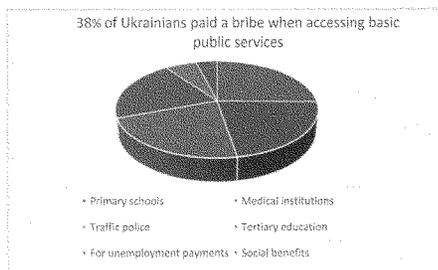
Ukraine has not yet firmly established itself on its path of steady and consistent anti-corruption reforms, but is certainly on a right trail. Resilience, persistency and full determination of the anti-corruption fight of the Ukrainian society at large will be critical in the coming years. Time has long come for Ukraine to take decisive steps to root-out pervasive corruption.

Corruption trends

This section highlights corruption trends in Ukraine based on selected international rankings and national surveys. It shows that corruption is still endemic in Ukraine and extends to all levels of public administration. According to the IMF, corruption remains the most frequently mentioned obstacle in doing business in Ukraine.⁷

The results of the *Global Corruption Barometer, Europe and Central Asia (2016)* put Ukraine among the worst performing countries in the region. The citizens of Ukraine are among the countries particularly critical of the Government’s efforts to fight corruption four out of five giving negative assessment to the Government. 56% of Ukrainians think that corruption is the main problem in the country. 86% consider that anti-corruption activities have no results. Only 58% of the respondents are ready to report corruption, which is a positive increase as compared to 26% in 2013. 16% are certain that a notification on bribery will change nothing, and 14% are afraid of the

Figure 1. Have you paid a bribe to any one of 8 services in the past 12 months?, % “Yes” of those who had contact with the service



Source: Global Corruption Barometer, Transparency

⁶ OECD/ACN (2015) *Third Round Monitoring Report on Ukraine*.

⁷ International Monetary Fund (IMF) *Country Report (No. 17/83) on Ukraine (2017)*.

consequences of reporting. 38% of Ukrainians paid a bribe when accessing the basic public services.⁸ International, 2015/16, <https://goo.gl/Eqd0c9>.

Ukraine shows marginal improvement (by 2 points) in 2016 Transparency International's Corruption Perception Index. Overall improvement compared to 2013 is only 6 points. Ukraine is ranked 131 out of 176 countries with Kazakhstan, Russia, Nepal, and Iran having the same score. The comparative score and ranking of Ukraine among the countries of Eastern Europe and Central Asia is provided below.

Table 2. Corruption Perception Index, Transparency International, Eastern and Central Europe and Central Asia

Global Country Rank 2016	Country	CPI 2016 Score	CPI 2015 Score	CPI 2014 Score	CPI 2013 Score	CPI 2012 Score	CPI 2008 Score**	CPI 2003 Score**
22	Estonia	70	70	69	68	64	66	55
29	Poland	62	62	61	60	58	46	36
31	Slovenia	61↑	60	58	57	61	67	59
38	Lithuania	59↓	61	58	57	54	46	47
44	Georgia	57↑	52	52	49	52	39	18
44	Latvia	57↑	55	55	53	49	50	38
47	Czech Republic	55↓	56↑	51	48	49	52	39
54	Slovakia	51	51	50	47	46	50	37
55	Croatia	49↓	51	48	48	46	44	37
57	Hungary	48↓	51	54	54	55	51	48
57	Romania	48↑	46	43	43	44	38	28
64	Montenegro	45↑	44	42	44	41	34	23
72	Serbia	42↑	40	41	42	39	34	23
75	Bulgaria	41	41	43	41	41	36	39
75	Turkey	41↓	42	45	50	49	46	31
79	Belarus	40↑	32	31	29	31	20	42
83	Albania	39↑	36	33	31	33	34	25
83	Bosnia and Herzegovina	39↑	38	39	42	42	32	33
87	Mongolia	38↓	39	39	38	36	30	-
90	FYR Macedonia	37↓	42	45	44	43	36	23
95	Kosovo	36↑	33	33	33	34	-	-
113	Armenia	33↓	35	37	36	34	29	30
123	Azerbaijan	30↑	29	29	28	27	19	18
123	Moldova	30↓	33	35	35	36	29	24
131	Kazakhstan	29↑	28	29	26	28	22	24
131	Russia	29	29	27	28	28	21	27
131	Ukraine	29↑	27	26	25	26	25	23
136	Kyrgyzstan	28	28	27	24	24	18	21
151	Tajikistan	25↓	26	23	22	22	20	18
154	Turkmenistan	22↑	18	17	17	17	18	-

⁸ Global Corruption Barometer, Europe and Central Asia (2016) Fieldworks carried out in February-May 2016.

156	Uzbekistan	21↑	19	18	17	17	18	24
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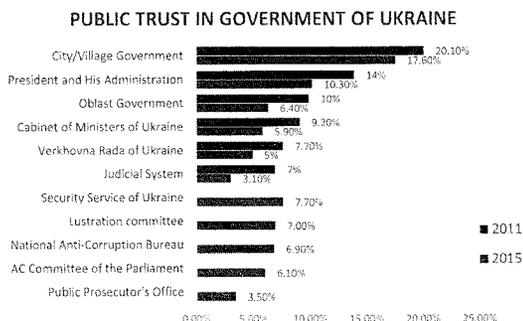
Notes: A higher score means 'less corrupt'. Until 2013, the CPI score was calculated differently (on 0-10 scale); to enable comparison, the CPI 2003 and 2008 scores were converted to 0-100 scale.

Source: Transparency International, CPI, <http://goo.gl/1Ag4HZ>

A national survey (2015) data show decrease in public trust across all levels of the Government compared to 2011 and increase of the perception of corruption. Only 14% believe that the authorities are willing to fight corruption. 94% of Ukrainians consider corruption a serious problem, after the military action in Ukraine and the high cost of living.⁹

According to another national survey (2016), respondents considered corruption as the number one internal threat for the national security.¹⁰

Figure 2 Public Trust in Government



Source: [national corruption survey](#) conducted by the Kiev International Institute of Sociology (2015).

Figure 3 Perception of Corruption in Public Institutions of Ukraine, Comparative Data 2011-2017



Source: [national corruption survey](#) conducted by the Kiev International Institute of Sociology (2015)

⁹ [National corruption survey](#) conducted by the Kiev International Institute of Sociology (2015) with the support of the USAID provides comparative data (2007, 2009, 2011, 2015).

¹⁰ [National survey by Razumkov Centre.](#)

1.2. Impact of anti-corruption policy implementation

Recommendation 1.1-1.2 from the Third Monitoring Round report on Ukraine:

- Develop and adopt without delay an action plan for the 2014 Anti-Corruption Strategy with effective measures and measurable performance indicators.
- Allocate proper budget for the Anti-Corruption Strategy and its action plan implementation.

Recommendation 1.3 from the Third Monitoring Round report on Ukraine:

- Conduct regular corruption surveys to provide analytical basis for the monitoring of implementation of the Anti-Corruption Strategy and its future updates.
- Such surveys should be commissioned by the government, through an open and competitive tender.
- Use surveys conducted by non-governmental organisations for the monitoring of the Anti-Corruption Strategy implementation and adjustment of the anti-corruption policy.

Recommendation 1.4-1.5 from the Third Monitoring Round report on Ukraine:

- Ensure that there is a functioning institutional mechanism for civil society participation in the designing and monitoring of the Anti-Corruption Strategy and Action Plan implementation.

Anti-corruption policy documents

The previous monitoring report positively assessed the quality of the Anti-Corruption Strategy of Ukraine for 2014-2017 (the Strategy) and its adoption by the Parliament as a law.¹¹ Its scope was considered sufficient for anti-corruption reforms in Ukraine at that time, even though the Strategy lacked the analytical basis, research and evaluation of the corruption situation in the country. The report recommended to a) develop and adopt the corresponding action plan with effective measures and measurable performance indicators and b) allocate proper budget for its implementation.

In April 2015, the Government approved the State Programme (2015-2017)¹² for the implementation of the Anti-Corruption Strategy (the State Programme).¹³ According to the NGOs: “for the first time in the history of independent Ukraine, the Anti-Corruption Strategy for 2014-2017 and the State Program for Its Implementation are distinguished by outstanding textual quality and the capacity to create conditions for implementation of real anti-corruption policy.”¹⁴ Several weaknesses are also pointed out: the lack of a

¹¹ The Strategy was adopted in in the form of the law in 2014 and enacted 2015. [Principles of Anti-Corruption Policy of Ukraine](#), (Anti-Corruption Strategy) for 2014-2017.

¹² [State Programme on Implementation of Anti-Corruption Strategy](#), approved by the Cabinet of Ministers Resolution No. 265 of 29 April 2015.

¹³ The development of a comprehensive implementation plan was a part of the EU-Ukraine association agenda as well. See [Association Implementation Report on Ukraine Joint Staff Working Document](#).

¹⁴ Shadow Report (2017) “[Evaluating the Effectiveness of State Anti-Corruption Policy Implementation](#)”.

baseline assessment as well as the need to link these policy documents with the broader reform processes, for example, in healthcare, decentralization, and administrative services.¹⁵

The State Programme is built around four components: the development and implementation of state anti-corruption policy; prevention of corruption; punishment for corruption and awareness raising. The prevention block includes measures for legislature and representative authorities, public service, executive branches and state-owned enterprises and the following issue are covered: public procurement, judiciary and criminal justice bodies, private sector and access to information.

The depth of these components varies, however. For example, the anti-corruption policy and prevention of corruption that are under the NACP competence (see below) are spelled out in detail, whereas the section on enforcement is more general and superficial. In many instances, the development of new, sectoral strategies/action plans is foreseen (for judiciary, prosecution etc.) instead of concrete measures for these institutions. Also, not all the areas covered by the Strategy are included in the Programme.¹⁶ The NACP explained at the on-site that for the current State Programme, the priority was launching the NACP and its proper functioning. As regards the law enforcement and the judiciary, separate anti-corruption programmes were envisaged for them not to interfere in their functioning. The monitoring team agrees on the importance of prioritizing measures for the inclusion in State Programme but also sees the need to fully implement the Strategy and include in new policy documents the measures that were left out or not fulfilled.

The State Programme has a list of expected results under each section, projecting where the government wants to be in two years-time. This can serve as a good basis for assessment of implementation. The Programme also has an annexed log-frame with the objectives, expected results and indicators under each goal that can be a good tool for monitoring. There is an attempt to introduce quantitative impact *indicators* in some parts, but there is no baseline value provided.¹⁷ For example, indicators for the year 2017 in the awareness raising section are: increase of the percentage of people a) who trust anti-corruption bodies, b) are aware of corruption consequences, c) do not resort to corruption as a way of settling their businesses and d) have never had corruption experience. While these are good impact indicators, it is not clear what is the baseline to compare to or what are the targets to aim for (% of increase) and how the government is planning to use the indicator to assess the implementation (what would be the source of data).

As regards the *budget* for implementation of the State Programme, the Government reported that the activities are carried out within the budgetary allocations of the responsible agencies and with the donor support. The NACP, one of the main implementers of the programme, indeed has a separate substantial budget (see below section 1.6).¹⁸ However, NGOs note that one of the obstacles to better implementation was the lack of proper funding.¹⁹ The monitoring team was not provided with the budget execution reports or other information that would enable assessing the spending and sufficiency of budgetary resources for the anti-corruption programme. In addition, in the absence of the national annual report by the NACP (see below),²⁰ it is difficult to speculate, which part of the programme was not implemented and why. Nevertheless, the previous round recommendation regarding a separate budget remains unaddressed.

¹⁵ Reanimation Package of Reforms (2016) Anti-Corruption Policy of Ukraine: First Success and the Growing Resistance.

¹⁶ Anti-Corruption Research and Education Centre of the Kyiv-Mohyla Academy University and the NGO Anti-Corruption Headquarters (2017) "The Assessment of the Anti-Corruption Strategy Implementation: Successes and Challenges" at pg. 16.

¹⁷ See Annex 3 to the programme at pg. 49-57.

¹⁸ In 2017, UAH 773 million was allocated for the National Anti-Corruption Bureau; UAH 119 million for the Specialised Anti-Corruption Prosecution Office; UAH 640 million for the State Bureau of Investigations and UAH 40 million for the National Agency on detection, tracing and management of assets received from corruption or other crimes.

¹⁹ Anti-Corruption Research and Education Centre of the Kyiv-Mohyla Academy University and the NGO Anti-Corruption Headquarters (2017) "The Assessment of the Anti-Corruption Strategy Implementation: Successes and Challenges" at pg. 23.

²⁰ This report was due on 1 April 2017. The monitoring team has not been informed about its finalization.

Despite these deficiencies, overall, the State Programme is a sound document with clear measures and timelines that can guide the responsible agencies in implementation. The policy chapter of the State Programme foresees measures that will further improve the strategic planning quality (developing tools for collecting reliable quantitative and qualitative data and methodologies for assessing the level of corruption) and the Public Administration Reform Strategy of Ukraine provides for a substantial enhancement of strategic planning capacities in the public administration. The implementation of these measures is indeed encouraged.

The Strategy and the State Programme expire in 2017. New strategic documents should be developed based on the evaluation of the implementation of the current policy documents, meaningful CSO participation, and broad public consultations. The development of a new state programme is listed as one of the priority tasks by the NACP for 2017.²¹ At the time of the on-site visit, the NACP representatives shared preliminary ideas about the future programme, pointing out that it should focus on eliminating factors hampering economic development, should be less complex, more concrete and set priority measures in the areas, where the best results can be achieved. After the on-site visit, the NACP reported that an interdepartmental working group was created, the analysis of corruption situation together with the report on implementation of the policy documents was ready and the first draft strategy would be sent to the Cabinet of Ministers by 1 October 2017 for comments. According to the Government, the public consultations will continue after this date before the draft is finalized and submitted to the Parliament in December.

The monitoring team was concerned to learn about three other governmental anti-corruption action plans, all adopted in 2016, not linked to the Strategy and the State Programme.²² One of them the Government Resolution 803, was mentioned by several interlocutors at the on-site as an example of a good coordination involving CSOs, providing for anti-corruption measures for individual state bodies and requiring them to report on progress to the Cabinet of Ministers. However, this process does not involve the NACP and is not coordinated with the State Programme and its monitoring requirements. The monitoring team did not have a possibility to review these documents to assess the purpose and the added value of these action plans. Nevertheless, the monitoring team believes that a clear anti-corruption reform agenda and coordination should be achieved for a joint and successful action against corruption in Ukraine. Several distinct anti-corruption policy documents developed without clear coordination may create uncertainties and complicate implementation, undermining the NACP's coordination efforts. In addition, this arrangement raises issues as to the efficiency of spending the state resources. In the future, Ukraine is encouraged to take a whole-of-government approach, consolidate its anti-corruption measures and coordination efforts under a single national anti-corruption policy framework, complemented by sectoral plans or plans for individual public agencies. In the short term, it would be useful to include all these anti-corruption policy documents and analysis of their implementation in the national annual anti-corruption report.

After the entry into force of the CPL in 2015, all public agencies of Ukraine are obliged to develop *risk-based anti-corruption programmes* to be endorsed by the NACP (Art. 19 of the CPL). To support this work, the NACP approved the methodology for corruption risk assessment and recommendations for developing these programmes.²³ In addition, a sample anti-corruption programme was approved for legal persons.²⁴ Several public bodies have good anti-corruption programmes, among them the Ministry of Justice; National Police of Ukraine; Customs, and Judiciary, as highlighted at the on-site visit. These efforts are commendable. However, it seems that risk assessment is not yet consistently used throughout

²¹ Annual activity report of the NACP (2016).

²² These three documents are: (1) the Government Action Program adopted on April 14, 2016 and (2) the Plan of Government's Priority Actions for 2016 adopted on May 27, 2016 cited in the Shadow Report "[Evaluating the Effectiveness of State Anti-Corruption Policy Implementation](#)" at pt. 8. Para 4 and 5 of the [executive summary, as well as \(3\) "Some issues of prevention of corruption in ministries and other central bodies"](#), adopted on 5 October, 2016 by Cabinet of Ministers Resolution 803.

²³ [Methodology for assessing corruption risks in state authorities](#), approved by NACP decision No. 126 of 22 December, 2016.

²⁴ Adopted by NACP Decision #75, 2 March, 2017.

the public agencies and the guidance and follow up by the NACP are limited. The representative of the authorized unit of the MOJ explained that the interaction is basically confined with sending quarterly reports on implementation to the NACP.

The special session with businesses showed that the mandatory anti-corruption programmes by SOEs and companies who take part in public tenders (Art. 61 of the CPL)²⁵ is a formal box-ticking exercise since the NACP only checks that such programmes are in place and does not assess their quality or implementation. However, some companies are using this tool and developing good anti-corruption programmes based on this requirement.

After the on-site visit, the monitoring team was informed that as of the beginning of 2017, 98 anti-corruption programmes were in place, among them in 17 ministries, 40 other central executive bodies, 24 regional and city administrations and 17 other bodies. Out of these 98, the NACP provided its recommendations for 58 before approval. The NACP is planning to strengthen the coordination and the methodological assistance for corruption risk identification, support the development and oversee the implementation of anti-corruption programs at the agency level in line with its mandate. The NACP is currently working on the procedure for monitoring preparation and implementation of these programmes. These measures are encouraged. Overall, it is important to develop the practice further, increase the risk assessment capacities in the agencies, overcome coordination challenges discussed below and establish an active interaction with the agencies to support their work at the individual agency level.

Involvement of civil society

The previous monitoring report stresses the key role NGOs played in developing anti-corruption policy and advocating for critical reforms in today's Ukraine. However, since CSO involvement in anti-corruption policymaking did not have a structured form, it recommended to ensuring a functioning institutional mechanism for civil society participation in designing and monitoring anti-corruption policy implementation.

After the previous round, the vibrant civil society of Ukraine continued to significantly contribute to the implementation of the anti-corruption reforms. It stays informed, competent and proactive to exert targeted pressure on the decision-makers to push forward important anti-corruption measures and expose corruption, as shown throughout this report. The coalition of leading anti-corruption NGOs *Reanimation Package of Reforms* (RPR)²⁶ continued its wide-ranging work, providing the roadmap for reforms and following up on the implementation on a daily basis, developing draft laws and proposals, advocating legislation and making alarming statements when needed. The individual work of the NGOs such as TI Ukraine, Anti-Corruption Action Centre (AntAC), NGO Lustration Committee, has also been instrumental in digging deep and understanding the problems behind the Government's dubious initiatives. Investigative journalists and media continued to actively expose corruption. It should be noted, that in the absence of the full and updated information from the Government these open sources have been useful to the monitoring team to fill in information gaps.

According to the Government, civil society plays an important role in developing anti-corruption policy in Ukraine. CSOs met during the on-site, confirmed that they have influenced elaboration of the current

²⁵ According to Art. 61 of the CPL, anti-corruption program is obligatory for approval by the heads of: 1) state, municipal enterprises, business partnerships, the state or municipal share of which exceeds 50 percent, average number of employees for the accounting (fiscal) year exceeds fifty, and gross revenue from sale of goods (works, services) during this period is more than seventy million hryvnias; 2) legal entities that are participants of pre-qualification, participants of the procurement procedure in accordance with the Law of Ukraine "On Public Procurement", if the cost of procurement of goods and services is equal to or exceeds 20 million UAH.

²⁶ The RPR functions as a coordination center for 73 non-governmental organizations and 23 expert groups which develop, promote, and control implementation of the reforms. It was established in March 2014 after the Maidan events, and since then experts of the RPR organizations-members have been taking part in development, advocacy and implementation of more than 120 reformist laws.

policy documents, with some of their recommendations taken on board by the Government (on e-procurement, transfer of medicine procurement to international organisations, opening up the registry of beneficiary owners of companies) and some rejected (the right to wiretapping of the NABU, special fund for recovered assets, independent selection of judges of anti-corruption courts). However, they expressed concerns on the lack of opportunities to systematically work with the NACP. According to the recent shadow report the lack of cooperation between civil society and the NACP, particularly in monitoring of the state anti-corruption policy implementation is one of the critical weaknesses.²⁷ CSOs also feared that they would not be meaningfully included in developing the new policy documents, since the Public Council of the NACP was not yet set up, and no other format of cooperation was proposed to them.

By the time of the on-site visit the NACP had already initiated the process of creation of its civil society oversight body – the Public Council to include the NGOs working in the anti-corruption area selected based on the competition.²⁸ Soon after the visit the Public Council composition was approved.²⁹ Reportedly, it is already operational and held several meetings, however, several key NGOs declined participation (see section 1.4 below).

Nevertheless, sincerity of the Government's intention to work with CSOs is seriously questioned considering the recent practices aimed at restricting NGO activities. The monitoring team is troubled to learn that the CSOs have been subject to an increasing pressure, *inter alia*, with the new amendments to the asset declarations regime (see below section 2.1), attempting to discredit them, initiating criminal prosecution and even requesting to shut down some of the most active ones.³⁰ A criminal investigation was initiated by the tax police against one of the leading anti-corruption NGOs Anti-Corruption Action Centre (AntAC). The NGO believes, that the criminal proceedings constitutes a continued pressure and an attempt to block its functioning.³¹ Another criminal case is ongoing against a well-known anti-corruption activist Mr. Vitaliy Shabunin.³² TI Ukraine recently made a statement demanding the government to stop pressure on the anti-corruption NGOs. According to the TI Ukraine executive director: "Taking into account the negative trends in public prosecution against anti-corruption activists, TI Ukraine considers actions of the law enforcement agencies against AntAC as a tool of political pressure. We urge the authorities to stop using controlling functions and harassment against civil activists."³³ Some recent news headlines, however, inform that the war against anti-corruption activists intensified and that it acquired systematic nature extending to the local and regional level and even mounting to the physical pressure.³⁴ According to the NGOs, they are viewed as "dangerous opponents" rather than partners now.³⁵

These worrying signals leave the monitoring team with the impression of a targeted action by the Government to suppress the anti-corruption activism that not long ago instigated the Revolution of Dignity in Ukraine. The monitoring team urges the Government to stop the practices that have chilling effect on anti-corruption activism in Ukraine and create enabling environment for civil society participation in developing and implementing anti-corruption policy.

²⁷ Anti-Corruption Research and Education Centre of the Kyiv-Mohyla Academy University and the NGO Anti-Corruption Headquarters (2017) "The Assessment of the Anti-Corruption Strategy Implementation: Successes and Challenges".

²⁸ Pre-requisite for taking part in the competition is two years of experience in anti-corruption (see below).

²⁹ Decision of the Cabinet of Ministers of Ukraine No.231-p of 5 April, 2017.

³⁰ AntAC (2017) Who and why discredits Shabunin and his associates and Mr. Pynzenyk requested to shut down AntAC as a non-profit organization.

³¹ Tax Police Started a Criminal Proceedings against the Anti-Corruption Action Centre.

³² TI Ukraine: The public crackdown on anti-corruption is gaining momentum. TI Ukraine calls for information on such cases.

³³ TI Ukraine Demands to Stop Pressure on Anti-Corruption NGOs.

³⁴ How the NGOs are persecuted in Ukraine: Rivne Security Service of Ukraine demands investigative journalists a report on grants (updated). The latest example of pressure are physical injuries of Dmytro Bulakh, the Head of Board of NGO "Kharkiv Anti-corruption Centre", prominent regional anti-corruption CSO.

³⁵ Shadow Report (2017) "Evaluating the Effectiveness of State Anti-Corruption Policy Implementation" pg.11.

Monitoring of implementation

The monitoring of implementation of the anti-corruption policy is the function of the NACP, which in turn is reporting to the Cabinet of Ministers *quarterly*, on the progress of implementation of the State Programme based on the information received from the agencies, and *annually*, by submitting the national report on implementation of the anti-corruption strategy (national annual report), which is subsequently presented to the Parliament of Ukraine, discussed, adopted and published.

The CPL (Art. 20) explicitly details the information that should form the part of the national annual report. It includes statistical indicators ranging from criminal enforcement to anti-corruption expertise of legal acts, and to the information about cooperation with CSOs and media and performance of anti-corruption units/officials in the state bodies. The CPL also prescribes that the assessment should be based on surveys and should also include information on the implementation of Ukraine's international anti-corruption obligations. This comprehensive report is submitted to the Cabinet of Ministers annually by 1 April with the proposals and recommendations for updating the national anti-corruption policy.

However, from these statutory requirements of monitoring, the NACP has implemented only a few: it has been receiving the implementation reports from the public agencies and recently developed the national anti-corruption report (finalized in May) and the report on implementation of the State Programme (finalized in August). At the on-site, the agencies confirmed that they submit quarterly implementation reports to the NACP (on 15 February, 15 April, 15 July and 15 October). However, no follow up has taken place so far i.e. discussion at the quarterly meetings by the NACP or submitting them to the Cabinet of Ministers. The NGOs also noted that the monitoring of the State Programme has not taken place since its adoption.

During the on-site visit, the NACP was in the process of finalizing the national annual report based on the submissions from the state bodies, sociological data and risk assessment. After the visit, the monitoring team was informed that the report, was approved by the Cabinet of Ministers and presented to the Parliament in May 2017. However, its full text was never published according to civil society and thus its quality cannot be assessed. The conclusions of the report were provided to the monitoring team: the assessment and recommendations covering 14 main areas, including ratification of several international agreements, finalization of the reforms in prosecution service, intensifying the cooperation with the public, enhanced legislative framework for whistle-blower protection, unimpeded exercise of the full verification of asset declarations by the NACP, shift of the focus from punitive to preventive measures in fiscal and custom authorities.

Whereas the Government has not yet set up a monitoring mechanism to involve civil society, the NGOs have closely followed the Government efforts of implementing its anti-corruption commitments, within the framework and beyond the State Programme. An independent monitoring report with recommendations was prepared jointly by the Anti-Corruption Research and Education Centre of the Kyiv-Mohyla Academy University and the NGO Anti-Corruption Headquarters in May 2017 "[The Assessment of the Anti-Corruption Strategy Implementation: Successes and Challenges](#)", using information collected from the responsible agencies and the expert polls. Another shadow report "[Evaluating the Effectiveness of State Anti-Corruption Policy Implementation](#)" was prepared by the Centre of Policy and Legal Reform in collaboration with the TI Ukraine, RPR and independent experts. The independent evaluation assesses the effectiveness of the state programme and proposes the recommendations. The public discussion of the draft shadow report "The state anti-corruption policy: is it effective?" was held in a form of a roundtable and the results were reflected in the report. AntAC launched the web-site [map of anti-corruption conditionalities](#) to monitoring implementation of Government's international anti-corruption obligations.³⁶

Corruption surveys

The third round monitoring report recommended to commission regular corruption surveys and use the surveys conducted by non-governmental organisations as analytical basis for the monitoring of

³⁶ <https://map.antac.org.ua/> the website only includes the anti-corruption conditionalities by international partners.

implementation of the anti-corruption strategy and its revisions. In addition, the CPL provides that sociological data should be used in developing the national annual anti-corruption report and gives the mandate to the NACP to conduct research and analysis of the corruption situation in the country.

To comply with these requirements, the NACP, in cooperation with the national and international experts and with the support of the OSCE, using the relevant UN standards, elaborated the standard corruption survey methodology. As indicated during the on-site visit, the survey captures dynamics and prevalence of corruption, experience and perception of corruption, as well as public assessment of effectiveness of anti-corruption activities. This survey of households and businesses will be annually commissioned by the NACP and conducted by a non-governmental polling/research institution. The results will be published on the NACP's website and disseminated through other available information channels.

By the time of the on-site visit, the pilot survey was carried out. After the on-site visit, the monitoring team learned that the survey was completed and the report with the recommendations was to be finalized soon. The results would be used for elaborating a new anti-corruption strategy. Furthermore, the Government informed that the NACP performance monitoring toolkit was developed with the support of the Council of Europe and another survey for assessing the effectiveness of the NACP and the impact of its work on the level of corruption would be carried out annually as well.

There are various national surveys conducted in Ukraine on a regular basis. Among them local surveys cited in section 1.1 of the report providing for comparative data for several years.³⁷ The Government noted however, that they cannot be used for evaluating impact as they do not follow uniform methodology and do not provide consistent data. After the on-site visit the Government reported that various latest surveys have been used in developing the national report on implementation of anti-corruption strategy that will form the basis for the new strategic documents. These include:

- Corruption as the Biggest Threat to National Security by the Razumkov Centre;
- Nationwide Municipal Survey in Ukraine by the Center for Insights in Survey Research;
- The State of Corruption in Ukraine: A Comparative Analysis of Nationwide Research Conducted in 2007, 2009, 2011, and 2015 by Kiev International Institute of Sociology;
- 12 Steps to Peace: Section 4. Corruption, Lustration and Reform of Police by TNS Ukraine;
- Ukrainian Mass Media Corruption Perception Index by Democratic Initiative Fund.

The monitoring team welcomes the new survey methodology, initiatives to conduct the regular surveys and using other available surveys in the strategic planning. It encourages Ukraine to fully realize its plans in connection with the corruption surveys: conduct them regularly and use the results in developing the future policy documents.

Accordingly, Ukraine is **largely compliant** with the recommendation 1.3.

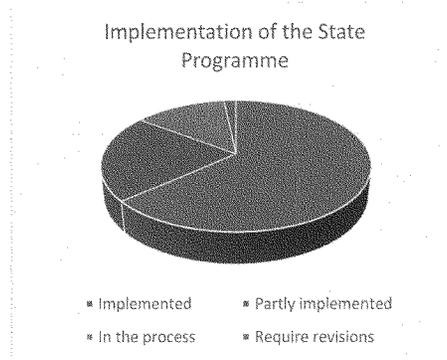
Implementation and impact

During the on-site visit, the NACP shared its preliminary findings on the implementation and impact of anticorruption policy, as no written reports were ready at that time. Regarding the level of implementation, the NACP informed that the two thirds of the State Programme have been implemented. The lack of implementation was primarily due to the late launch of the NACP (see below, section 1.6) and mainly concerned the awareness-raising block of the State Programme. However, no significant measures have been left unimplemented.

³⁷ See section 1.1. on corruption trends above.

The report on implementation of the State Programme was finalized on 1 August 2017.³⁸ The NACP provided numbers from this report, showing that 63.6% of the measures have been implemented, confirming the above estimate.

Figure 4. Level of Implementation of the Anti-Corruption Programme as of 1 August 2017



Source: The data from the report on implementation of the State Programme, 1 August 2017 provided as an additional information provided by Ukraine after the on-site.

Overall, the shadow reports positively evaluate the implementation noting that whereas the measures related to the legislation were almost fully achieved, those aimed at practical implementation are lagging behind. Weak political will is underscored as one of the biggest challenges. It is noted that numerous attempts are being made to block the implementation of the reforms and to exert political pressure on new institutions to reduce their efficiency. The report further notes, that the EU visa liberalisation and IMF requirements have evidently pushed the performance forward.³⁹

Ukraine is encouraged to implement the outstanding measures in the remaining period and transfer the rest of the measures into the new policy documents respectively.

As regards the main outcomes and impact of implementation, although the monitoring team could not study the national anti-corruption report or the report on implementation of the State Programme, the main milestones in implementation can still be identified. These are finalizing formation of the anti-corruption institutional and legislative framework, launching various innovative preventive initiatives (discussed in the section 1.1. above), and some increase in enforcement statistics. Nevertheless, these results are still not reflected on the actual level of corruption, perception of corruption or the public trust in institutions. Corruption in Ukraine is still widespread as shown in section 1.1 of this report. Thus, continuous, persistent and vigorous implementation of the reforms is needed in order to achieve the desired results reflected in the Strategy and the State Anti-Corruption Programme. The Government must take decisive steps and communicate the results to the public.

Conclusion

Since the last monitoring, Ukraine adopted the State Programme for implementation of the anti-corruption strategy with CSO participation. It contains important anti-corruption measures on policy, prevention, law enforcement and awareness raising. The State Programme overall is a quality policy document with clear measures, timelines and indicators and represents a good tool for implementation of the most parts of the

³⁸ Available in Ukrainian on the NACP website [here](#).

³⁹ Anti-Corruption Research and Education Centre of the Kyiv-Mohyla Academy University and the NGO Anti-Corruption Headquarters (2017) "[The Assessment of the Anti-Corruption Strategy Implementation: Successes and Challenges](#)" at pg. 16.

Strategy. Ukraine did not address the recommendation on a separate budget for the State Programme, however, the anti-corruption institutions have been granted substantial budgetary allocations that should have allowed a good level of implementation. In addition, donor assistance has been used to implement some measures.

While the implementation of the State Programme has evolved during the last years, the progress has not been systematically tracked, and consequently, the Government and the Parliament have not been involved in overseeing the implementation. Neither has the State Programme been modified to take into account new developments and needs. The Public Council of the NACP was recently set up, however, the its operation and efficiency as a functional institutional mechanism for civil society participation in designing and monitoring the anti-corruption policy implementation in practice has yet to be tested. Nevertheless, several NGOs have monitored implementation of anti-corruption policy documents. The Government is encouraged to use the NGO expertise and systematically involve them in the monitoring procedure in the future.

The report on implementation of the State Programme was finalized after the on-site visit together with the national report for the implementation of the Strategy. The NACP informed that the two thirds of the measures of the State Programme have been implemented and that not implemented one third concern the awareness raising function of the NACP. This assessment was largely confirmed by the NGO shadow reports. When assessing the remaining implementation challenges, the NACP leadership noted that they are now in a survival mode and the main priority and the pressing challenge is retaining the newly created anti-corruption infrastructure. Ukraine is encouraged to finalize the implementation of the anti-corruption measures that are still pending in the current State Programme or transfer them later in the new policy document.

The Strategy and the State Programme expire in 2017. Ukraine is recommended to develop a new anti-corruption strategy using the wealth of the available evidence -- the analysis of implementation of the previous policy documents, available surveys and assessments of the corruption situation in the country and with the broad and meaningful participation of stakeholders. The NACP developed a corruption research methodology for evaluating impact of anti-corruption reforms on a regular basis. The first survey was carried out, the results should be available soon and form the basis for the policy documents.

Parallel documents and coordination mechanisms for anti-corruption policy are bad practice and should be avoided in the future. Whereas the corruption risk assessments and sectoral anti-corruption programmes in the state agencies are good practice that should be further developed and stimulated by the NACP.

In sum, the monitoring team believes that the implementation of the measures that did not have political connotation has been mostly sufficient. However, the implementation has been challenging each time when it came to the interests of the President and the governing elite. This is evident on the example of the asset declaration system starting from its launch, continued to the enforcement of the NACP mandate over the influential part of the modern Ukrainian government (see sections 2.1. and 2.2 of the report). Civil society and international partners had to get involved each time to the rescue of progressive anti-corruption initiatives. The implementation was also stimulated by the international obligations of Ukraine, particularly EU visa liberalisation and IMF conditions.

In conclusion, major output of the anti-corruption reforms in Ukraine since the last monitoring has been finalizing complete restructuring of the anti-corruption infrastructure and laying down the legislative, policy and institutional foundations for fighting and preventing corruption. The challenge however now is how to ensure that these results and processes are irreversible and that the newly established institutions form into independent and resilient actors. Genuine political support and resistance to undue influence is key to make change.

The recent developments aimed at discouraging the anti-corruption activism in Ukraine are alarming and must be stopped urgently. The monitoring team calls on Ukraine to provide enabling environment for open and full participation of civil society in anti-corruption policy development and monitoring.

Ukraine is **partially compliant** with the recommendations 1.1.-1.2; **partially compliant** with the recommendation 1.3 and **not compliant** with the bullet point one of the recommendation 1.4.-1.5 of the previous monitoring round.

New recommendation 1: Anti-corruption policy

1. Ensure full implementation of the Anti-Corruption Strategy and the State Programme regardless of the political sensitivity of the measures involved.
2. Ensure that the anti-corruption policy documents are evidence-based, developed with the meaningful participation of stakeholders and in coordination with the relevant state bodies. Ensure that the anti-corruption policy covers the regions. Provide resources necessary for policy implementation.
3. Conduct corruption surveys regularly. Evaluate results and impact and update policy documents accordingly. Publish the survey results in open data format.
4. Increase capacity and promote corruption risk assessment by public agencies. Support development and implementation of quality anti-corruption action plans across all public agencies.
5. Regularly monitor the progress and evaluate impact of anti-corruption policy implementation, including at the sector, individual agencies and regional level, involving civil society. Ensure operational mechanism of monitoring of anti-corruption programmes. Regularly publish the results of the monitoring.
6. Ensure that civil society conducts its anti-corruption activities free from interference.

1.3. Public awareness and education in anti-corruption

Recommendation 1.4-1.5 from the Third Monitoring Round report on Ukraine:

- Include systemic awareness-raising and anti-corruption public education in the Government anti-corruption measures.
- Engage civil society in the development and delivery of education and awareness raising activities.

Public awareness

The previous monitoring report pointed out the formalistic approach to the anti-corruption awareness before the Euromaidan and recommended Ukraine a) to include awareness raising and anti-corruption education in the policy and b) engage civil society in development and implementation of these measures.

The first part of the recommendation has been addressed by Ukraine, the State Programme extensively covers the anti-corruption awareness raising, diverse measures are included in the State Programme.^{40A}

⁴⁰ Various awareness raising activities are foreseen in relation to the concrete reforms to gain public support for these reforms, such as: election and political party financing (responsible agency: Ministry of Justice); conflict of interest (specific target groups: MPs and City Councils. Responsible agencies: NACP, Parliament and the Ministry of

dedicated section IV focuses on forming negative attitudes towards corruption and includes various results and indicators.

Expected Results	Indicators of assessment (baseline year 2015)
<ul style="list-style-type: none"> The citizens' attitudes to corruption and actions in situations of corruption risks have changed; The level of trust to anti-corruption state bodies has increased; The share of citizens who voluntarily report about corruption has increased; The share of persons who have corruption experience has decreased. 	<ul style="list-style-type: none"> Share of those who recognize corruption as a way to settle a problem; Trust to anti-corruption state bodies Share of those aware of corruption and its consequences; Voluntarily report about corruption offence; Have never had corruption experience.

Under the current setup, the NACP is responsible for anti-corruption awareness and education. However, this is the area in which the NACP has underperformed the most according to the leadership of the agency and the stakeholders. The one third of the measures of the State Programme that have not been implemented yet are related to this component. At the same time, the NACP worked on awareness raising on specific reform areas, such as conflict of interests, asset declarations and political party funding as shown below. It also organized trainings on certain aspects of anti-corruption legislation for public sector employees covering 1700 persons overall. The NACP also developed its draft communication strategy and presented it for public discussion. The communication strategy was adopted on 23 August, 2017. In addition, the Ministry of Education developed a 17-hour long training course for 10-11 grades "Prevention of Corruption through the Eyes of Pupils". However, according to civil society, this course is not obligatory for schools and exists only on paper. In this connection, important to highlight is that in 2016, the UNDP and the educational project "EdEra" developed "Anti-corruption Lesson", which according to the CSOs covered some schools and was successful.

According to the NGO shadow report, the objectives of the State Programme with regard to the awareness raising have not been reached. The NACP should swiftly start implementation of the communication strategy, allocate budget for awareness and use innovative tools and modern technologies to achieve the results.⁴¹

As regards the second part of the recommendation on involving the NGOs, Ukraine has not taken measures in this regard. However, NGOs have been active. TI Ukraine highlighted the following anti-corruption campaigns: Corruption must be spotted; "De-Corruption Communication" Platform; Corruption kills; They would not keep silent. According to the TI Ukraine's Annual Report for 2016, 800 billboards have been put in 15 regions to raise awareness of corruption, 700 people received lectures on how to contribute to the fight against corruption.⁴²

Conclusion

Ukraine included systemic awareness-raising and anti-corruption public education in the anti-corruption policy documents. However, the implementation has been lacking mainly due to the delays in starting up

Justice); increasing transparency of the Parliament and City Councils (Responsible agency: Ministry of Justice); asset declarations (NACP And State Committee on Television and Radio Broadcasting); whistleblowing (NACP, NABU, State Committee on Television and Radio Broadcasting); new law on prevention of corruption (target group Businesses. Responsible agency: NACP and Business ombudsman).

⁴¹ Shadow Report (2017) "Evaluating the Effectiveness of State Anti-Corruption Policy Implementation", pg. 19.

⁴² TI Ukraine (2016) Annual Report.

the NACP. Ukraine has not engaged with civil society in the development and delivery of the education and awareness raising activities either. The NACP communication strategy was adopted recently. Ukraine must proceed swiftly with the implementation of the measures included in the State Programme and the communication strategy, target awareness raising activities to the sectors most vulnerable to corruption, allocate sufficient resources to awareness raising, measure the results and plan the next cycle of activities accordingly.

Ukraine is **partially compliant** with the recommendations 1.4.-1.5 of the previous monitoring round.

New recommendation 2: Anti-Corruption awareness and education

- 1. Implement awareness raising activities envisaged by the anti-corruption policy documents and the NACP communication strategy.**
- 2. Allocate sufficient resources for implementation of the awareness raising measures.**
- 3. Measure the results of awareness raising activities to plan the next cycle accordingly.**
- 4. Target awareness raising activities to the sectors most prone to corruption, use diverse methods and carry out activities adapted to each target group.**

1.4. Corruption prevention and coordination institutions

Recommendation 1.6 from the Third Monitoring Round report on Ukraine:

- Ensure effective operation of the new National Council on Anti-Corruption Policy; consider assigning the function of its secretariat to the National Agency for Corruption Prevention.
- Establish without delay and ensure effective and independent functioning of the National Agency for Corruption Prevention.
- Ensure that the budget of the National Agency for Corruption Prevention provides for the necessary resources and operational autonomy.
- Subordinate anti-corruption units/officers in executive bodies to the National Agency for Corruption Prevention.
- Provide necessary training and other capacity building support to the staff of the National Agency for Corruption Prevention.
- Develop effective mechanism of coordination between the National Agency for Corruption Prevention, National Anti-Corruption Bureau, and other executive, legislative and judiciary authorities.
- Ensure in practice functioning of an effective mechanism for NGO participation in the work of the National Agency for Corruption Prevention.

The main accomplishment under the corruption prevention and policy coordination institutions pillar after the third monitoring round is the establishment and resourcing of the *National Agency on Prevention of Corruption (NACP)* – the key institution with the potential of playing an instrumental role in the anti-

corruption infrastructure of Ukraine,⁴³ however, facing serious challenges now as described further in this report. A high-level supervisory body, the *National Council for Anti-Corruption Policy (the Council)* was also launched and held several meetings. However, it lacks secretariat support and remains passive. With the adoption of the Law on Prevention of Corruption (CPL), the Parliament of Ukraine has acquired the central role in anti-corruption policy⁴⁴ and its *Committee on Corruption Prevention and Counteraction of the Verkhovna Rada of Ukraine* (Anti-corruption Committee) has reportedly been active.⁴⁵

This section focuses on the operation of the institutions responsible for the anti-corruption policy coordination and prevention of corruption. The specialized anti-corruption law enforcement bodies (NABU, SAPO and others) are discussed in Chapter 3. It must be noted, that the monitoring team did not have a possibility to interview the Council or the Anti-Corruption Committee representatives. Information on their activities in the answers to the questionnaire was also limited, thus the sections are mostly based on the complementary sources.

National Agency on Corruption Prevention

Mandate, composition, independence, participation of non-governmental stakeholders

The third monitoring round report assessed the laws establishing the National Agency on Prevention of Corruption (NACP) and the National Anti-Corruption Bureau (NABU) as "the major break-through in the anti-corruption institutional reform in Ukraine." However, concerns were expressed regarding the apparent delay of launching the NACP and the recommendations were put forward on its swift creation and independent functioning.

The NACP is an independent central executive body with the special status established under the CPL. Its mandate is broad, ranging from the anti-corruption policy development and implementation, to the prevention of corruption, including the issues of conflict of interests and ethical standards, management and verification of asset declarations, protection of whistle-blowers and political party financing.⁴⁶ The NACP also manages two electronic registers: the electronic declarations and the register of persons having committed corruption or related offences. Its anti-corruption policy function extends to the research and analysis, developing, coordinating and monitoring of implementation and endorsement of anti-corruption programmes in all public agencies, coordinating the anti-corruption units in state bodies, providing methodological guidance and consultations, public awareness raising and international cooperation.⁴⁷ (Art 11 of the CPL).

The NACP is composed of five members (Commissioners) selected with the open competition conducted by a special selection commission. The work of this collegial body is supported by a structured administration. The Commissioners are appointed by the Cabinet of Ministers for 4 years with the

⁴³ In its fourth evaluation round report on Ukraine (2017) published recently GRECO noted: "GET wishes to underscore the significance of the establishment of the NACP and the potential this institution has to further contribute to anticorruption efforts in the country. The creation of the NACP has not been an easy path: legislation setting up the NACP dates back to 2014, but the body began operations only in 2016. Thus, the NACP is a very new body, which needs to acquire capacity, experience and confidence as it operates. The GET was made aware of certain shortcomings in the so far limited record of the NACP: these points, which will be described below in detail, rather than questioning the pivotal role that the NACP is to play in the anticorruption field, call for further readjustments and fine tuning of the system." The NACP took over the anti-corruption policy function from the Ministry of Justice.

⁴⁴ It adopts the anti-corruption strategy and approves the annual report on its implementation through its hearing together with the revisions of the strategy as needed (Art. 18 of the CPL).

⁴⁵ Andrii Marusov, Head of the Board, Transparency International Ukraine (2016) Anti-Corruption Policy of Ukraine: First Success and the Growing Resistance.

⁴⁶ Conflict of interests management, asset declarations and whistle-blower protection are discussed in Chapter 2 of this report.

⁴⁷ The NACP took over the anti-corruption policy function from the Ministry of Justice of Ukraine. According to the State Programme, NACP is the key institution to oversee state anti-corruption policy: monitoring and coordination of the programme are among its tasks. As a result, the anti-corruption policy department of the Ministry of Justice was abolished.

possibility of renewal for another term. The law provides for independence guarantees to the NACP members as reflected, *inter alia*, in the procedures for selection, appointment and dismissal, funding and remuneration levels. Nevertheless, these statutory guarantees have been recently questioned considering the challenges surrounding the operation of the NACP as discussed below. The NACP is accountable to the Parliament but it also reports to the Cabinet of Ministers on implementation of anti-corruption policy quarterly and annually. The body is competent to take decisions when at least half of its composition, i.e. 3 commissioners, is appointed.

The NACP was formally established on 18 March 2015,⁴⁸ but it did not start operation until 15 August 2016. Substantial time was devoted to selection of members, drafting secondary legislation and recruiting the staff of the agency. When commenting on the reasons for delay, TI Ukraine stated that the Government was deliberately and unjustifiably postponing competitions to select the NACP members and that there were numerous attempts to influence the selection process to appoint politically favourable candidates. According to the TI Ukraine, even after the selection was finalized, the Government did not provide the NACP with the necessary premises, equipment and funding on time to hinder its operation. Then “civil society and international partners became involved, using all instruments at their disposal - from official statements to street protests.”⁴⁹

Speaking about the deficiencies of the selection and launching process, the NGO coalition RPR, furthermore, stated that the Government failed to secure independent and effective composition of the NACP despite the statutory guarantees.⁵⁰ The selection panel was manipulated and the decisions were made with the violation of the procedure. As a result, at least two appointed members are loyal to the Government selected in the situation of the conflict of interest and nepotism that marked the selection process.⁵¹ It was also maintained, that while civil society managed to secure open, objective and fair competitions for NABU and SAPO leadership, as an example, it failed to keep an eye on and do so for the NACP.

At the time of the on-site visit, four out of five members (commissioners) of the NACP had been appointed and one position remained vacant. Following the on-site visit, the monitoring team learned about the resignation of another commissioner leaving the NACP with 3 members that is just enough for it to be operational (see below). The reason behind the resignation has not been announced, however, the Commissioner noted that the NACP urgently needs the reset. In August 2017, another NACP commissioner resigned. On 15 August 2017, a new commissioner was appointed and currently the NACP functions with the three commissioners. Soon after the appointment of a new commissioner, it was reported that he voted in violation of the conflict of interest rules, which is a ground for a disciplinary or an administrative action. However, the NACP declined the existence of conflict of interests and no action followed.⁵²

The NACP found itself in a major crisis due to the electronic asset declaration system overload just before the deadline of submission of declarations by the second wave declarants. During the on-site visit, the monitoring team could witness the protests by declarants gathered at the entrance of the premises of the NACP, fearing the consequences of non-submission of declarations and demanding the answers to their questions (see details below in section 2.1). As a result, the Prime Minister called on the commissioners to resign, however, no resignations followed. Verkhovna Rada called the NACP Chair to report in the Parliament. The Minister of Justice made a statement that the NACP represents an institutional error that must be corrected. “The collegial body is a collegial irresponsibility, we are doing all the work for the

⁴⁸ Resolution of the Cabinet of Ministers of Ukraine No 118 of 18 March 2015.

⁴⁹ Andrii Marusov, Head of the Board, Transparency International Ukraine (2016) [Anti-Corruption Policy of Ukraine: First Success and the Growing Resistance](#).

⁵⁰ For more details on the mandate and independence guarantees of the NACP, see the [CPL and the OECD/ACN \(2015\) Third Round Monitoring Report on Ukraine](#).

⁵¹ RPR: [The Government of Ukraine failed to secure independent and effective composition of the NACP](#)

⁵² [The member of the NACP is accused of conflict of interest already.](#)

NACP now, as soon as the second wave declarations will be submitted, we will propose the bill to reform the agency”, stated the Minister.⁵³

During the on-site visit, held at the premises of the NACP in March 2017, the monitoring team had an opportunity to meet the leadership of the NACP and interview several of its Commissioners and the staff members. Based on what it has observed, in terms of the resources, staff capacity and competences of the NACP, the monitoring team believes that substantial work has been carried out in a very short period of time to find premises, to staff and to resource the NACP, put in place voluminous secondary legislation necessary for realisation of its broad mandate and make it operational in most of its functions. This is a significant achievement that should not be underestimated, especially considering the turbulent context of Ukraine.

Having said that, it is also evident, that the operation of the NACP is seriously hampered at least with the following factors: a) outside interference; b) decision-making procedure and the need for some of its decisions to be approved by the MOJ c) coordination weaknesses, challenges related to its image and authority in the current administration of Ukraine and d) the capacity needs of its new staff.

The high-level representatives of the NACP and the Parliament repeatedly stressed outside pressure on the NACP and unlawful interference in its functioning as a pressing challenge the NACP is facing now. This has been a major point of criticism in relation to the performance of the NACP by civil society as well corroborated with the specific examples (see the section 2.1 below).

As to the decision-making procedure, the criticism mainly related to the collegial decisions of the NACP which often resulted in ties in view of its actual composition of 4 commissioners. Ironically though, with 3 commissioners now this seemingly does not represent a challenge, as more decisions have been approved by the NACP lately (see section 2.1 on verification of asset declarations). Another weakness is that some of the important decisions (such as secondary legislation) of the NACP do not have a binding force unless approved by the MOJ. This has created problems in practice, for example, in relation to the verification of asset declarations, when the MOJ refused to register the NACP’s decree several times and reportedly, developed its own version of the procedure, which was eventually adopted.⁵⁴ This arrangement limits the independence of the NACP.⁵⁵

The challenges in coordination and authority of the NACP were evident to the monitoring team during the on-site which was not attended by several important agencies (see below). Thus, whereas the staff and competences of the NACP are growing and do not represent that big of a challenge for its efficient functioning, the outside interference certainly does. Accordingly, the independent and effective functioning of the NACP, recommended by previous monitoring round, has yet to be secured.

The debate around the reform of the NACP continues in Ukraine. There are several bills in the Parliament providing for dismissal and selection of the NACP members anew. One of these drafts, reportedly, envisages changes in the selection of NACP commissioners and the decision-making procedure of the NACP and is aimed at strengthening it, whereas other two aim at taking away the independence of the NACP and placing it under the control of the Government.

The monitoring team calls on Ukraine to end the upheaval and chaos around the NACP and ensure its independent functioning, including by taking legislative measures if necessary, to free it from outside interference and allow it to build the capacity, experience and authority and establish itself as a strong corruption prevention agency of Ukraine. The monitoring team concurs with GRECO that: “the actual independence of the NACP, both on paper and in practice and its means and resources are to be fully secured as a matter of priority”.⁵⁶

⁵³ The statement of the Minister of Justice P. Petrenko Regarding the NACP.

⁵⁴ Change of the full verification order is urgently needed, otherwise NACP will legalize the assets of corrupt officials instead of holding them accountable.

⁵⁵ GRECO (2017) fourth evaluation round report on Ukraine, para 29.

⁵⁶ GRECO (2017) fourth evaluation round report on Ukraine, para. 2.

As regards CSO participation, at the time of the on-site visit, the NACP was in the process of setting up a Public Council which is a public oversight body composed of 15 representatives of NGOs selected on the basis of a competition. The procedure for conducting the competition to form the Public Council was approved⁵⁷ at that time and the main NGOs working on anti-corruption have agreed to participate in the selection process (TI Ukraine, Reanimation Package of Reforms, Anti-Corruption Headquarters) and another resolution of the Cabinet of Ministers approved the action plan for conducting the competitions. As noted above, the selection of the NACP Public Council members took place after the on-site visit, the composition was approved in April and the Public Council started operation. Reportedly, only several experts of RPR participated as candidates for the Public Council. The NGO Anti-Corruption Headquarters helped to organize transparent selection process. Many prominent experts and NGOs however, (e.g. TI Ukraine, AntAC) refused to participate in the selection process because of the low trust to the NACP leadership and ineffectiveness of the Agency. As discussed above the Public Council was recently set up but its operation and efficiency is yet to be tested.

Resources and funding

The previous monitoring report recommended Ukraine to ensure that the NACP is provided with the necessary resources that support its operational autonomy and building its staff capacity. The NACP is funded from the state budget. Its operational funds of the NACP in 2016, excluding funding that goes to the political parties, were about 3.1 million EUR (95.4 million UAH).⁵⁸ Reportedly, the NACP spent only 69.5% of the allocated amount, apparently due to its late launch. In 2017, the funding of the NACP increased by about 71% reaching about 5.3 million EUR (163 million UAH). According to the NACP, its budget is still insufficient for the development of the NACP capacity and full implementation of its functions. As an example, no funding is provided for establishment of territorial units/regional offices of the NACP.

The total staff capacity of the NACP is 311.⁵⁹ By the time of the on-site visit in March 2017, the chief of staff and its deputy were already appointed and 211 persons recruited, among them 92 based on the merit-based competitions and the rest by transferring them from the equivalent positions of the civil service (Art. 41.2 of the CSL). The NACP was already registered as a legal person and had its premises. The agency had also approved numerous regulations necessary for its functioning, this has been critical, since, firstly the number of regulations is very high, every small procedure is approved by a separate act and secondly, the Minister of Justice has to register a normative act before it enters into force and, as mentioned above, it has refused to do so several times.

⁵⁷ Resolution of the Cabinet of Ministers of Ukraine No. 140 dated 25 March 2015.

⁵⁸ Please note that the total budget of NACP was 486.4 million UAH. (about 18 million EUR) of which 391 million UAH. (about 14.5 million EUR) goes to the political parties.

⁵⁹ As determined by the Cabinet of Ministers (Cabinet of Ministers of Ukraine resolution № 244 from 30 March 2016).

The NACP is divided into thirteen departments, five of them are substantive, related to its mandate (anti-corruption policy; prevention and detection of corruption; conflict of interests; financial control and lifestyle monitoring and department of prevention of political corruption) and eight are performing support functions. Supervision of the substantive departments are split among the Commissioners. The staff are civil servants with the dominant age category between 30-40 years.

During the on-site visit, it was mentioned that the salaries at the NACP are higher than similar salaries in other state bodies and that many people apply for the NACP's vacancies (average 9 candidates per vacancy). According to the NGOs, however, the high salaries are not accompanied with the high performance.⁶⁰ The recent decision of the head of the NACP to prescribe the bonus for herself "for work" in the midst of the asset declaration system crisis faced major criticism.⁶¹

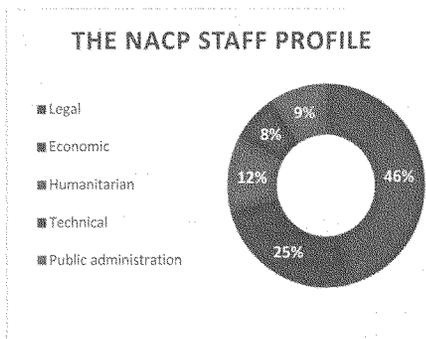
The monitoring team had a good impression of the NACP staff it met, their competencies, determination and dedication to work. The NACP staff are undergoing continuous training and have participated in several study visits (Georgia, Romania, Poland, Latvia, Estonia). Only in 2016, 22 trainings have been organised with the support of the international and national partners. The NACP has approved the training plan for its staff. Capacity building is also provided in the priorities approved by the NACP in December 2016 and the NACP Development Strategy 2017-2020 and its implementation plan prepared by the NACP staff with the assistance of the EU Anti-Corruption Initiative and adopted by the NACP in June 2017.

Resourcing the NACP and recruiting its staff has been one of the major achievements after the previous monitoring round, as mentioned above. Although current level of staffing and budget are fairly adequate and commendable, Ukraine is encouraged to fully resource the agency, provide necessary budget for its territorial units and staff capacity building.

Coordination at the central and municipal level

The NACP is responsible for coordinating the anti-corruption policy implementation and is interacting with the state bodies at the local and municipal level in exercise of its mandate. It also works with the designated anti-corruption officers in SOEs and private companies (see section 2.6). The previous report recommended developing effective mechanism of coordination between the NACP, NABU and other executive, legislative and judicial authorities and subordinating the anti-corruption units/officers in the state bodies to the NACP.

Figure 5 the NACP Staff Profile



Source: additional information provided by the Government of Ukraine

⁶⁰ About high salaries and underperformance of the NACP commissioners Change of the full verification order is urgently needed, otherwise NACP will legalize the assets of corrupt officials instead of holding them accountable.

⁶¹ 5 April 2017, the head of NACP granted herself a bonus "for work".

The Government reported that the NACP signed MoUs with and the Ministry of Justice, the State Service for Financial Monitoring, the State Fiscal Service, the State Audit Office, the Council of business Ombudsman and the NABU to ensure better coordination and exchange of information. Yet, the NACP has access to only 11 out of 23 relevant databases now. The NACP started referring cases to the law enforcement agencies. However, the coordination weaknesses and difficulties are still evident. Firstly, it is telling that the NABU was not granted the access to the electronic asset declarations until May 2017 and reportedly the lack of direct access to the database is still an issue (see the section on asset declarations in chapter 2). Secondly, during the on-site visit, the level of participation in the sessions as well as poor preparation for the monitoring exercise were clear indicators of the coordination challenges the NACP is facing within the administration of Ukraine. As a national coordinator of the OECD/ACN, the NACP was responsible for coordinating the monitoring exercise. However, the representatives of the most of the institutions met during the on-site stated that they have not been consulted when preparing the answers to the monitoring questionnaire and the key institutions responsible for anti-corruption did not show up at the sessions at all (Presidential Administration, Cabinet of Ministers, Ministry of Justice, E-Government agency and others.)

One of the statutory functions of the NACP is to coordinate, provide methodological support and analyse the efficiency of the performance of the units/officers authorized for prevention and detection of corruption (anti-corruption units/officers) that should be appointed by each public agency (Art. 11. 11 of the CPL). The functions of these units are further defined by the Cabinet of Ministers Resolution and include support and monitoring of implementation of measures to prevent corruption, methodological and advisory assistance, research, international cooperation, detecting and reporting violations and training.⁶² Notably, even after the establishment of the NACP anti-corruption units/officers are still subordinated and coordinated by the Secretariat of the Cabinet of Ministers, which retains the functions related to the coordination and methodological assistance of the authorized units/officers.⁶³ The NACP is only consulted before their dismissal.⁶⁴ Notably, the draft CPL included the requirement for the network of the authorized units and further functions of the NACP in this regard, however, the relevant provisions were removed by the Parliament before the adoption of the law.

To guide the work of the authorized units/persons, the NACP approved the methodological recommendations and gave 96 consultations to the authorized units in 2016. It also carried out the assessment of their work in 84 state bodies,⁶⁵ 64 of which had authorized units/officers, one did not have it at all and in 19 bodies, these functions were combined with legal, human resources or internal audit functions. Several anti-corruption officers confirmed at the on-site that they submit the implementation reports to the NACP regularly. Other than this, it was evident that little has been done by the NACP in practice in order to coordinate and work with these units/officers. Thus, further measures are needed firstly to comply with the recommendation of the previous monitoring round and secondly to strengthen these units, their role and ensure effective coordination, assistance and methodological guidance by the NACP.

The NACP has the authority to request to Government to create regional commissions if necessary to enhance the coordination at the regional level, according to the CSO shadow report the process was launched in 2016,⁶⁶ however no regional commissions have been established as of now, as noted by the Government the funding was not sufficient to establish them in 2017.

The Parliament and its Anti-Corruption Committee

⁶² Cabinet of Ministers Resolution No 706, 4 September 2013 on [the issues of prevention and detection of corruption](#).

⁶³ Ibid, sections 3.2 and 12.

⁶⁴ The Procedure for Granting Consent by the National Agency for Dismissal of a Person Responsible for Implementation of the Anti-Corruption Program was adopted (decision No. 74 dated 7 October 2016 registered with the Ministry of Justice of Ukraine on 28 November 2016 under the number 1542/29672).

⁶⁵ Reportedly there are more than 500 such units/persons.

⁶⁶ Shadow Report (2017) "[Evaluating the Effectiveness of State Anti-Corruption Policy Implementation](#)" pg. 21

The Parliament acquired an important role in developing and monitoring implementation of anti-corruption policy with the adoption of the CPL. It is responsible for adoption of the anti-corruption strategy and monitoring implementation through the hearing and approval of the annual national anti-corruption reports. (has not taken place so far). Limited information was provided regarding the anti-corruption activities of the Parliament. At the on-site, the monitoring team met the representatives of the administration of the Committee that informed only about the anti-corruption expertise of legal acts by the Committee, which is discussed in the section 2.4.

The NGO shadow report noted that “in 2014-2016, the Parliament has distinguished itself as a highly productive body in the anti-corruption policy area, since all the basic anti-corruption laws and the absolute majority of those anti-corruption laws that were submitted for its consideration have been adopted [...] At present, this “policy” is chaotic (especially when it comes to the Parliament members’ initiatives), situational (for example, as happened with implementation of the Visa Liberalization Action Plan), and occasionally even intuitive.” It recommended “creating conditions for adequate expert support to the Committee’s Secretariat, in view of its excessive overload with the draft laws subject to anti-corruption expert evaluation”⁶⁷

National Council for Anti-Corruption Policy

The National Council for Anti-Corruption Policy was established in 2014 as a high-level coordination advisory body under the President of Ukraine, but its composition was not approved by the time of the previous monitoring.⁶⁸ The third round report assessed its creation as a step to the right direction and recommended Ukraine to ensure its effective operation.

The Council is tasked with supporting the development of anti-corruption policy, its implementation and coordination and the implementation of the recommendations of international organisations (OECD/ACN; GRECO and others). It is composed of the executive, legislative and judicial branches, representatives of NGOs, experts and academia, local self-government, businesses, and the Business Ombudsman of Ukraine.⁶⁹ The decisions of the Council are binding only if adopted as normative acts by the Government or the Parliament.

According to the Government, the organizational and analytical support to the Council is provided by the Presidential Administration of Ukraine in cooperation with the Ministry of Justice. However, at the time of the on-site visit, the relevant staff was not appointed. The monitoring team was informed that the functions of the Secretariat are now carried out by one person - the head of the Department on Law Enforcement Bodies and Combating Corruption, who performs a number of other duties. In addition, the monitoring team did not have an opportunity to meet the relevant representatives of the Council to discuss the current work or the future plans.

The previous recommendation required Ukraine to consider that the NACP performs the functions of the Secretariat for the Council. The NACP informed that they intended to include this issue in the agenda of the Council for December, 2016 session. However, the session was cancelled and the Council has not been convened since then. Thus, assigning the functions of the secretariat for the Council has not been considered.

During the past two years, the Council held only four meetings and discussed the issues ranging from the general corruption situation, to challenges related to establishing the institutions such as the SAPO and the NABU, EU visa liberalisation conditions and the judicial reform. According to the Government responses, the activities of the Council positively influenced the formation and organization of the new anti-corruption bodies. Two instances were mentioned at the on-site visit by the NACP representatives, when

⁶⁷ Ibid.

⁶⁸ Decree of the President of Ukraine from October 14, 2014 № 808 approved the Regulations on the National Council.

⁶⁹ Approved by the Decree of the President of Ukraine from September 26, 2015 No. 563 and revised in November 2016 (Presidential Decree No 482).

the Council was instrumental to carry the anti-corruption agenda forward: the first was the competition of the NACP members and the second, e-declarations. The NACP explained that this platform is important, since it unites all key anti-corruption institutions and state agencies as well as civil society and academia and it is attended by the President personally. According to the NACP, there is no other comparable platform, thus, maintaining and activating the Council is an important priority. The shadow report underscores the importance of using the full potential of this body as well.⁷⁰ However, according to some NGOs, the role of this body is nominal as it is not operational due to the rare meetings. It is not involved in active decision making process on anti-corruption reforms, "its voice is not present in public domain during the discussions of anti-corruption policies" and although the NGOs participate in its work, they are selected by the President and the process is not transparent.

The monitoring team shares the opinion regarding the need of such an overarching political body in the context of Ukraine. It believes that the Council can be a useful platform to attract political attention to the implementation of the anti-corruption agenda and pushing the stalled initiatives forward. The Council's meetings would help develop a whole-of-government approach to anti-corruption work in Ukraine and facilitate its coordination, supporting the work of the NACP. Thus, the monitoring team encourages Ukraine to ensure active and efficient operation of the Council. Furthermore, the mandate of the Council *vis-a-vis* the NACP should be clarified and the capacity of the secretariat of the Council strengthened.

Conclusion

Since the last monitoring round, Ukraine has made substantial efforts for launching its anti-corruption policy coordination and prevention body, the National Agency on Corruption Prevention (NACP). The establishment and independent operation of the NACP faced numerous hurdles, from the attempts to manipulate selection of its Commissioners, to delaying its launch by rejecting the secondary legislation it needed for operation, to political interference in its enforcement mandate. Nevertheless, after less than eight months since its launch, during the time of the on-site visit in March 2017, the NACP was already sufficiently resourced and equipped to exercise its mandate almost in full. Substantial work had been carried out in a very short period of time to staff and resource the agency, put in place voluminous secondary legislation necessary for realisation of its broad mandate and make it operational in most of its functions. This is a significant achievement in the turbulent context of anti-corruption reforms in Ukraine.

The NACP has started the operation and while it is struggling to establish itself as a strong and functional body, its efforts are undermined by outside political interference and even the attempts to take away its independence altogether. As one of the interlocutors noted at the on-site visit, establishing the NACP is a big step forward, it is a good institution and the laws are good, but it is facing many challenges and unfortunately, the oligarchs' influence is still very high. The NACP leadership further noted that they are now in a survival mode and the key priority is maintaining the existing infrastructure.

Currently, there are several bills in the Parliament providing for dismissal and selection of the NACP members anew. One of these draft, reportedly, envisages changes in the selection procedure of the NACP commissioners and the decision-making of the NACP and is aimed at strengthening it. Whereas other two aim at taking away independence of the NACP and placing it under the control of the Government. For the credibility of the anti-corruption reforms, it is critical that the recently established NACP is preserved, and that the continuity of its work and its independence are ensured in practice. Thus, Ukraine is urged to secure independent functioning of the NACP as a matter of priority, including by taking legislative measures if necessary, to free it from outside interference, allow it to build the capacity, experience and authority and establish itself as a strong corruption prevention agency of Ukraine.

It is now important to ensure that the vacant positions of the NACP are filled in through an open, transparent, credible and objective competition and are merit-based, the work on the remaining secondary legislation is finalized swiftly and the NACP is provided with the necessary resources to perform its

⁷⁰ Shadow Report (2017) "Evaluating the Effectiveness of State Anti-Corruption Policy Implementation" pg. 18.

functions, including at the regional level. Furthermore, the NACP must be provided with the access to all databases held by public agencies that are necessary for its functioning.

The coordination role of the NACP needs to be substantially enhanced as well. The NACP must increase its visibility and establish itself as a trusted authority to be able to fully discharge its coordination functions. Further measures are needed to strengthen the anti-corruption units/officers, their role and ensure their effective coordination, assistance and methodological guidance by the NACP.

In order to finalize the institutional reform, the role of the Secretariat of the Cabinet of Ministers should be clarified *vis-à-vis* anti-corruption units/officers. The NACP should be granted the authority to fully exercise its functions related to the guidance support and coordination of the anti-corruption units/officers.

The National Anti-Corruption Council as a high level body overseeing and supporting anti-corruption policy development and implementation must also be enhanced, *inter alia*, to support the NACP functioning. The mandate of the Council *vis-a-vis* the NACP should be clarified and coordination and closer interaction established in practice.

The new institutional framework for corruption prevention and anti-corruption policy in Ukraine is still very young to be able to fully deliver the results. To acquire necessary experience, capacity and confidence to carry the reforms, it must be strengthened and nurtured, and not undermined and confronted, but this is more often than not against the interests of powerful oligarchs and the well-rooted corrupt high-officials in the public administration of Ukraine.

Ukraine is **partially compliant** with the recommendations 1.6 of the previous monitoring round.

New recommendation 3: Corruption prevention and coordination institutions

1. Ensure without delay that the vacant positions of the NACP commissioners are filled by experienced and highly professional candidates with good reputation recruited through an open, transparent and objective competition.
2. Ensure unimpeded and full exercise of its mandate by the NACP independently, free from outside interference.
3. Finalize adoption of the secondary legislation and provide necessary resources to the NACP to perform its functions, including at the regional level. Establish and make operational the regional branches of the NACP. Ensure continuous training of the NACP staff to build their skills and capacity.
4. Ensure systematic and efficient functioning of the Public Council of the NACP to provide effective mechanism for civil society participation.
5. Substantially enhance the coordination role of the NACP, its authority and leadership among the public agencies. Clarify and enhance the powers of the NACP in relation to anti-corruption units/officers in public agencies and ensure that the NACP provides guidance to support realization of their functions.
6. Ensure that the NACP has the direct access to all databases and information held by public agencies necessary for its full-fledged operation.
7. Ensure systematic and efficient functioning of the National Council on Anti-Corruption Policy.

CHAPTER II: PREVENTION OF CORRUPTION

2.1. Integrity in the civil service

Recommendation 3.2 from the Third Monitoring Round report on Ukraine:

- Legal framework for integrity in civil service
 - Reform the legislation on Civil Service in order to introduce clear delineation of political and professional civil servants, principles of legality and impartiality, of merit based competitive appointment and promotion and other framework requirements applicable to all civil servants, in line with good European and international practice.
 - Review and reform rules for recruitment, promotion, discipline and dismissal of civil servants and develop clear guidelines and criteria for these processes, in order to limit discretion and arbitrary decisions of managers, to ensure professionalism of civil service and protect it from politisation.
 - Review and reform remuneration schemes in order to ensure that flexible share of the salary does not represent a dominant part and is provided in transparent and objective manner based on clearly established criteria.
 - Ensure decent salaries.
 - Establish a clear and well balanced set of rights and duties for civil servants.
- Once the new law is adopted and enacted: Implement the regulations on recruitment and selection of civil servants, including the senior civil servants, based on merit, equal opportunity and open competition to ensure professionalism and avoid direct or indirect political influence on civil service as foreseen in the Law on Civil Service.
- Implement and ensure effective functioning of the regulations on conflict of interest, asset declarations, code of ethics and whistle-blower protection as foreseen in the Law on Prevention of Corruption.
- Consider adopting a stand-alone whistle-blower protection law to cover both public and private sector.

Since the third monitoring round, Ukraine has made a major step forward towards the civil service reform in line with the European standards: the new Civil Service Law (CSL) was adopted in December, 2015 and entered into force on 1 May, 2016.⁷¹ The law is aimed at ensuring professional, depoliticized and efficient civil service in Ukraine, *inter alia*, through the merit-based recruitment and promotion, reformed remuneration system and increased oversight by the National Agency of Ukraine on Civil Service (NACS). According to the NACS the secondary legislation has been adopted (41 bylaws) within a short period of time and all the bylaws necessary for the implementation of the CSL are now in place (revisions are however needed with regard to the bonuses and so-called “priority promotion” as discussed below).⁷² The Government also adopted the comprehensive public administration reform (PAR) strategy 2016-2020 and

⁷¹ Law of Ukraine on Civil Service, 10 December, 2015, No 889, available in English [here](#).

⁷² See the brief information about the [first results of the civil service legislation implementation](#) presented at the conference in Ukraine. See also, the [Resolution 2145\(2017\) of the Parliamentary Assembly of the Council of Europe \(PACE\) on the Functioning of Democratic Institutions in Ukraine](#).

its implementation plan structured around the Principles of Public Administration by the OECD/SIGMA.⁷³ The EU is supporting Ukraine's public administration reform with a comprehensive programme.⁷⁴

Main aspects of the CSL related to the IAP monitoring have already been assessed during the third monitoring round. However, since the CSL was still a draft at that time, the recommendation on civil service integrity still focused on its adoption and subsequent implementation of the relevant rules. This chapter welcomes the adoption of the legal basis for the civil service reform in Ukraine and looks into the practical implementation of the elements of civil service integrity and integrity of public political officials to assess the compliance with the previous recommendations and provide new findings within the scope of the fourth monitoring round.

Civil service integrity policy and its impact

The State Anti-Corruption Programme 2014-2017 contains a section on reforming civil service, however it only includes the adoption of necessary laws and action plans. In addition, Ukraine has a dedicated strategy and action plan on reforming the civil service and the service in local government.⁷⁵ The documents are short and concise and aim at addressing the most acute challenges in civil service to achieve merit-based, well-paid, politically neutral and transparent civil service, using modern technologies in HRM, increasing prestige of civil service and public trust towards civil servants. The measures focus, *inter alia*, on adoption of the new CSL and the necessary bylaws and methodological guidelines, uniform standards of HRM, increasing qualification of civil servants through trainings and increasing awareness and knowledge of the new provisions of the law. However, the NACS representatives met during the on-site informed that this action plan is not used in practice and the capacity and resources needed for its implementation were underestimated when it was drafted. Instead, they referred to the PAR Strategy (2016-2020) and the action plan that follow the structure of the OECD/SIGMA Public Administration Principles and serve as instruments for PAR reform at large in Ukraine. They focus on: public policy development and coordination (strategic planning of government policies, quality of regulations and public policies, evidence-based policy making and public participation); modernization of public service and human resources management; ensuring accountability of public administration (transparency of work, free access to public information, transparent organization of public administration with clear lines of accountability, possibility of judicial review); service delivery (standards and safeguards of administrative procedures, quality of administrative services, e-government); and public financial management (administration of taxes, preparation of state budget, execution of state budget, public procurement system, internal audit, accounting and reporting, and external audit).⁷⁶

The adoption of strategic documents is commendable, nevertheless it remains problematic that they are not evidence-based, their implementation is not ensured (in case of civil service policy documents) and the impact is not evaluated. According to the Government, no regular studies are conducted to analyse integrity risks in civil service and design responses. Moreover, even basic statistical data is not available on civil service as the information management system is lacking. No statistics has been provided by the Government in the answers to the monitoring questionnaire referring to the lack of a unified registry. The monitoring team was informed that the annual report on the results of the first year of implementation of the reform was being prepared for the submission to the Parliament that would contain some statistics, however, it was not provided to the monitoring team either. Accordingly, the data in the subsequent chapters are largely based on open sources.

Currently, the civil service statistics management is in the process of reform. The function was previously held by the national statistics services and later transferred to the NACS. The monitoring team was informed that the human resources management information system (HRMIS) is currently in the

⁷³ OECD/SIGMA Principles of Public Administration.

⁷⁴ https://eeas.europa.eu/sites/eeas/files/ukraine_v2_0.pdf

⁷⁵ Approved by the Ordinance of the Cabinet of Ministers dated 18 March, 2015, No.227-p.

⁷⁶ Order of the Cabinet of Ministers of Ukraine dated 24 June, 2016, No.474.

development with the support of international partners (the concept was approved and the TOR for the system is currently being developed, a tender should be conducted to procure services) and is expected to be functional as of second quarter of 2018 according to the NACS. The EU and the World Bank joint programme, supporting its design and implementation was signed on 30 June 2017 in Kiev.⁷⁷ The HRMIS would be a unified system integrating all the central and territorial units of the civil service management system, including HR functions of each institution and creating a nationwide database for the civil service. The NACS representatives informed that subject to available funding, they would like to fully automatize the system, including the salaries, planning the budget for remuneration and merit-based recruitment, to exclude a human factor from these automated processes as much as possible. The plans for linking the system to the portal on vacancies have not been disclosed, however, would be encouraged. The monitoring team welcomes this timely initiative. As discussed further in this report, such a system would be a tool for maintaining up-to-date statistics on civil service. Publication of these date would be further encouraged.

The human resource management information system would be one of the important tools to facilitate the implementation of the ongoing civil service reform. The monitoring team thus encourages Ukraine to introduce the HRMIS as a matter of priority. However, since the development of this grand project is only at an early stage, the monitoring team stresses that, before the system is in place, the interim solution should be found for maintaining and using up-to-date civil service statistics, since at present the lack of even basic civil service data makes it impossible not only to assess impact, but also to plan for launch and management of any new initiatives (for example, the number of the subjects of the asset declarations was not known and estimated at the time of its launch).

Conclusion

Quality strategic documents and implementation plans for civil service and public administration reform are in place. Nevertheless, they are not evidence-based. No regular studies are carried out to plan risk-based integrity policies or assess the impact of implementation for future planning. Civil service statistics system is in the process of reform and even basic data on civil service is lacking at this point. The HRMIS is being developed with the support of international partners.

The adequate information system is key for carrying out any comprehensive reform. Therefore, Ukraine is recommended to ensure evidence-based policy development and implementation. A human resource management information system to support policy making, management and monitoring of civil service reform by the NACS and other responsible authorities, including accurate and complete data at the level of the entire civil service, administrative bodies and individual civil servants, as a matter of priority. Before its introduction an interim solution must be found to maintain relevant statistics. Ukraine is also encouraged to conduct studies for evidence and risk based civil service policy.

New recommendation 4: Evidence-based civil service policy

- 1. Ensure that the civil service reform policy is evidence-based and implementation strategies are supported by relevant data, risk and impact assessment.**
- 2. Proceed with the introduction of the HRMIS as a matter of priority.**
- 3. Ensure that the disaggregated statistical data on civil service is produced and made public.**

⁷⁷ [Ukraine to Increase Transparency, Efficiency in Public Resource Management, with European Union and World Bank Support.](#)

Institutional framework

The adoption of the CSL reshuffled the institutional framework for civil service management in Ukraine that now includes: the Cabinet of Ministers; the National Agency of Ukraine on Civil Service (NACS); Commission on Senior Civil Service and corresponding competition commissions; heads of civil service; and HR functions (Article 12 of the CSL).

The NACS is a central executive body responsible for development and implementation of civil service policy and ensuring functional management of civil service in the state bodies. Its oversight functions include conducting inspections and internal investigations on compliance with the requirement of the CSL; providing methodological guidance to the HRM units in government agencies, identifying training needs and managing education for civil servants (Article 13 of the CSL). The head of the NACS is appointed and dismissed by the Cabinet of Ministers upon the proposal of the Prime Minister for 5 years of term of service with the right for reappointment for another term. The procedure is the same as for category A civil service positions.⁷⁸ With the adoption of the new CSL the oversight functions of the NACP and its workload have been expanded.

The Commission on Senior Civil Service is a permanent collegial body operating on a voluntary basis, with the recruitment, dismissal and other related powers in relation to the category A civil servants: it approves standard requirements for recruitment, carries out competitions, gives consent for early dismissals and conducts disciplinary proceedings.⁷⁹ The Commission is composed of the representatives of all three branches of power, NACP, professional association and CSOs, research and academic institutions acting *pro bono*.⁸⁰ The composition is approved by the Cabinet of Ministers for the period of 4 years. The administrative and organisational support to its work is provided by the NACS. The CSL and the Statute of the Commission provide detailed regulations on organisation, administration and transparency of its work.⁸¹ The Commission composed of 10 members is currently up and running. It has already carried out recruitment of State Secretaries and other category A civil servants (see below).

Head of Civil Service in a government agency, among other functions, is mandated to organize competitions for categories B and C of civil service and reporting to citizens. The role of the heads of civil service in ensuring discipline, leading by example and creating the spirit of high integrity are defined by the CSL as well (Art. 61). Each government agency shall have Human Resources Management (**HRM function**), directly subordinated to the head of civil service. The standard regulation of HRM function is approved by the NACS. In addition, NACS is providing methodological guidance to these units. According to the NACS, the HR functions have been introduced in the state bodies already.⁸²

Currently, the capacity of the NACS, based on the information provided during the on-site visit, is 133 in the central agency and 85 in 10 territorial bodies (each covering 2-4 regions). In 2016, the NACS had a slight increase in the staff capacity in both central agency and the regions. The monitoring team did not have an opportunity to meet with the head of NACS or other high level management of the agency to discuss the its capacity to lead, support, monitor the implementation and measure the impact of the civil service reform. Representatives from the middle-management of the NACS interviewed during the on-site, however, saw a clear need for enhanced capacity to provide awareness-raising, consultations, guidance and

⁷⁸ Under article of the Civil Service Law of Ukraine the civils service is divided into three categories: Category "A"; "B" and "C" for the definition see Article 6.

⁷⁹ Requirements are prepared by the NACS and after the adoption by the Commission submitted to the Cabinet of Ministers for endorsement; See Standard Requirements for professional competency for category A for a respective position approved by the Resolution of the Cabinet of Ministers of Ukraine of 22 July 2016, No.448.

⁸⁰ Article 14 of the CSL.

⁸¹ Regulation of the Commission on Senior Civil Service, approved by the Resolution of the Cabinet of Ministers of Ukraine dated 25 March 2016 No. 243; and the Composition of the Commission approved by the Ordinance of the Cabinet of Ministers of Ukraine dated July 13, 2016, No. 490.

⁸² See the brief information about the first results of the civil service legislation implementation presented at the conference in Ukraine.

training on how to implement the new civil service primary and secondary legislation. It was also stressed that the expanded oversight functions of the NACS was currently underperformed as the caseload was much bigger now. The NACS representatives noted during the on-site visit that considerable resources were put into developing the significant volume of the secondary legislation in a short period of time, after the adoption of the CSL. They also focused on awareness raising to convey ideas and principles of the new CSL across the board in civil service and train their staff. Institutional strengthening of the NACS is foreseen as one of the objectives is provided for in the civil service reform and the public administration reform strategies mentioned above.

One important instrument to support the NACS in fulfilling its mandate of overseeing the human resource management practices across the civil service in Ukraine is a human resources management information system (HRMIS) which is missing. The functioning HRMIS would also enable the central management unit to provide the government and the parliament as well as the citizens of Ukraine the accurate information on the civil service on a regular basis. The work has been started on designing it with the support of international partners as mentioned above.

Conclusion

The CSL introduced a new enhanced institutional set-up for civil service management in Ukraine. The role and oversight functions of the NACS have expanded considerably and significant resources are needed to oversee and manage the implementation of the ongoing large-scale civil service reform throughout the whole country, provide guidance, increase awareness and carry out trainings for civil servants. The Commission on Senior Civil Service comprising all branches of power and non-governmental sector was set up with the broad mandate in relation to the category A civil servants. Its primary function, merit-based recruitment is already carried out, albeit with some deficiencies: perceived political interference and lack of skills for conducting evaluation of candidates. According to the NACS, the HRM functions have been set up in civil service as required by the CSL. It is important to introduce these units in all public agencies and ensure their proper functioning and coordination by the NACS.

New recommendation 5: Institutional framework for civil service reform

1. Assess the capacity of the NACS, its central and regional units, and increase it, if necessary, in view of the ongoing comprehensive civil service reform implementation and oversight needs.
2. Ensure that the competition commissions include persons with necessary skills to assess the candidates for civil service. Take measures for unimpeded and professional functioning of the Commission on Senior Civil Service and competition commissions, free from political interference.
3. Ensure introduction and proper operation of HRM functions in state agencies across the board of the entire civil service, provide coordination and adequate methodological guidance by the NACS.

Professionalism in civil service

The new CSL established *clear delineation between political and professional* positions in the civil service of Ukraine. The position of a civil servant of the highest rank – the head of civil service was introduced. These are the state secretaries in the Cabinet of Ministers/line ministries and heads of institutions in other government agencies (Art. 17). In more detail, the CSL determines the horizontal and vertical scope of civil service, providing for definitions of civil service, a civil servant and head of civil service (Articles 1

and 2.3), the list of positions within and outside the scope of the law, including those belonging to the "political advisory office" falling under the labour legislation⁸³(Art. 3 and 92.).

The principles of civil service: the rule of law, legality, political neutrality, integrity, professionalism, patriotism, efficiency, equal access, transparency and stability are prescribed by the CSL (Art. 4). A separate article is devoted to political impartiality of a civil servant (Art. 10). Civil servants are not obliged to execute instructions of a political advisory office (Art. 9). Stability of the civil service is guaranteed by prescribing that the appointment to a civil service position is indefinite, except the cases determined by legislation (Art. 34)⁸⁴ and that the change of managers in civil service may not be ground for termination of civil service (Art. 83.2). Clear and detailed rights and obligations of a civil servant is provided for in Articles 7 and 8. In case of violation of his/her rights, a civil servant may file a complaint with the head of civil service. Procedure of consideration of complaints is provide as well (Art. 11).

Thus, by introducing above-described regulations, Ukraine complied with the parts of the previous recommendation on delineation of political and civil service positions and establishing clear and well-balanced rights and duties of a civil servant.

One of the main elements of the civil service reform and the major achievements for politically neutral civil service in Ukraine is the introduction of the position of state secretaries and their recruitment. State secretaries belong to category A civil servants⁸⁵ and as other civil servants, are subject to merit-based recruitment by the Commission on Senior Civil Service. They are appointed for 5 years with the possibility of renewal of the office. They, as other heads of civil service agencies, are in charge of managing the civil service functions in their agency, among them publication of vacancies, competitive selection, appointment, career planning, promotion and training, discipline and the complaints of civil servants (Art. 17 of the CSL).⁸⁶ In order to attract the best candidates, salary of a state secretary was set to 30 000 UAH (1000 EUR), which is significantly higher than the average rate in the civil service sector.⁸⁷ The competitions for state secretary positions were launched in November, 2016. State secretaries have been recruited in all line ministries except for the Ministry of Energy and Coal Industry and the Ministry of Health of Ukraine. RPR's public administration experts monitored selection of state secretaries within the framework of the project "DobroChesno" informed the public about the applicants' profiles, and ensure greater transparency "to avoid the appointment of dubious individuals to high-level positions within the ministries."⁸⁸

Civil service experts in Ukraine positively assess the recruitment process overall, however point to several shortcomings. RPR, which has been monitoring the process of recruitment issued a statement citing the introduction and appointment of state secretaries is a major step but urging the Government to address the existing shortcomings of the competition procedure (see the subsection on merit-based recruitment).⁸⁹

The civil service positions in Ukraine are split among three categories: category A – the senior civil service – comprising of state secretaries, heads and deputy heads of central executive bodies and local state administrations is a newly defined group of professional civil servants in Ukraine. Category B includes middle level managers and category C -- the rest of civil servants. (Art. 6 of the CSL). While all these

⁸³ These include: advisor, assistant, press-secretary of the President; First Deputy Chair and Deputy Chair of Verkhovna Rada etc, these positions fall under the Labour regulations. On the issues of integrity of political officials see the section 2.2. below.

⁸⁴ Exceptions when the fixed term appointments are made: the appointment to the position of civil service of the category "A" – for five years unless otherwise is prescribed by the law, with the right to be reappointed or be transferred to equivalent or lower position in another state body on the proposal of the Commission of senior civil service; substitute the position of civil service for the period of the absence of a civil servant, which under the Law keep the position of civil service.

⁸⁵ Under article of the Civil Service Law of Ukraine the civils service is divided into three categories: Category "A"; "B" and "C" for the definition see Article 6.

⁸⁶ For the functions of the state secretaries of line ministries see Art. 10 of the Law on Central Executive Authorities.

⁸⁷ Reanimation Package of Reforms (RPR) Newsletter September 2016-January 2017.

⁸⁸ RPR Newsletter September 2016-January 2017.

⁸⁹ RPR Calls on Authorities to Improve the Procedure of Competition to Fill the Civil Service Offices.

categories are within the scope of merit-based civil service and all main principles extend to them, different regulations of recruitment, remuneration and discipline apply to different categories as described below.

Table 2 Number of Civil Servants according to the Categories A, B and C, as of 30 June 2017

Category	A	B	C	Total
Number	733	62777	174509	238019

Source: additional information provided by Ukraine after the on-site visit

Another issue to be highlighted is the efficiency of the civil service in view of its size. The size of the civil service of Ukraine is considered high, however, its efficiency is assessed as low. Ukraine ranks 119 on the indicator of public sector performance according to the WEF Global Competitiveness Report.⁹⁰ One of the objectives of the civil service reform has been its optimization. By the time of the on-site visit, the annual report on civil service reform implementation for the year 2016 was not available. However, the NACS confirmed that the number of civil servants, in comparison to the previous years before starting the reform, has decreased by 12% to 238 019 civil servants in total.

Merit-based civil service

The new CSL introduced the merit-based civil service in Ukraine for all categories of civil servants. The civil service offices can only be filled by open, transparent and competitive selection procedure now.⁹¹ General and special requirements for the candidates are prescribed by the CSL (Articles 19, 20) and the secondary legislation.⁹² Among them is the knowledge of anti-corruption legislation. The requirements of transparency, possibility of audio-video recording, random selection of test questions and automatic scoring are among the novelties of the detailed recruitment procedure developed with the support of the OECD/SIGMA and adopted in 2016.⁹³ The vacancies are advertised on the website of the NACS together with the eligibility criteria and procedure for recruitment.⁹⁴ The stages of competition include the screening of documents, tests, case-based tasks and interviews. Each Commission Member evaluates candidate's case-based tasks and interviews individually. Final score is calculated by the NACS supporting administration of the procedure. The information about the winners and the second-best candidates are made public. The recruitment for category A is under the mandate of the Commission of Senior Civil Service described above and is fully automated. With these regulations, Ukraine complied with the relevant part of the recommendation of the third monitoring round calling for introduction of a merit-based recruitment in civil service.

As regards the implementation of merit-based recruitment provisions in practice, according to the data provided by the NACS representatives during the on-site visit, there were no exceptions to filling the positions by open competitions. Among all open competitions, more than 182 competitions to category A positions took place with total of above 1374 candidates. For categories B and C, 26 375 competitions were held with the average of 3.5 candidates for each position. This practice is commendable and must be continued. At the same time, challenges such as insufficient level of competences of the members of the commissions, political influence, inconsistent and subjective assessments of candidate's competences,

⁹⁰ World Economic Forum, *The Global Competitiveness Report 2015-2016, Public Sector Performance*.

⁹¹ A few exceptions are provided in the CSL itself. See the Art.22.4. Special modality for closed competition to civil service positions related to issues of state secret, mobilization readiness, defence and national security are provided in the recruitment regulation.

⁹² Standard Requirements for professional competency for category A for a respective position approved by the Resolution of the Cabinet of Ministers of Ukraine of 22 July 2016, No.448. Requirements for categories B and C prescribed by the *Order of the NACS of 6 April, 2016, No. 72*.

⁹³ Cabinet of Ministers Resolution of *March 25, 2016 No.246*

⁹⁴ <http://nads.gov.ua/page/vakansiyi>

remain, as described by the NACS Chairman in his presentation of the results of implementation of new recruitment.⁹⁵

Civil society expressed similar concerns albeit more acutely during the special session of the on-site visit. They showed the appreciation of the introduction of the merit-based recruitment in practice, and more so for the senior civil service positions, but also pointed out main shortcomings that need to be addressed in relation to the composition of the competition commissions and the professional skills of the members to ensure that the selection process is based on merit and equal opportunities. Furthermore, the alleged manipulations of the existing procedure have been noted with the instances when the qualified candidates could not get civil service positions, among them due to the shortcomings in regulations. Another challenge has been insufficient advertising of vacancies for category A positions which may have precluded attracting highly qualified candidates. It appears that Ukrainian administration has already started to address these challenges with the renewed commissions that would be set up with the help of an international company.⁹⁶

According to RPR, the recruitment regulation should be amended to ensure greater transparency, objectivity of assessment, specifically of the case-based tasks and the observance of anonymity in the process of assessment by commission members.⁹⁷ Likewise, the alternative report on implementation of the anti-corruption programme, recommends drafting a new procedure for competitions taking into account the experience of the competitions conducted so far.⁹⁸

The examination of the recruitment regulation and its annexes indeed suggests that there may be a need for more guidance on how the competences and requirements should be assessed and what are the criteria for assessment within the range of available scores (0-3) by commission members, particularly in the process of assessing the case-based tasks or interviews. The monitoring team believes that further measures are required to address the concern raised since, the mere fact that the process is seen as biased, subjective and lacking transparency, undermines the whole spirit of a merit-based civil service.

Conclusion

Ukraine has set forth the legal framework for merit-based recruitment in line with European standards and started its application in practice. All appointments to civil service positions are now made through open competitions. A substantial number of civil servants have already been recruited. Introduction of the highest position in civil service, head of civil service, and their merit-based recruitment is commendable. Senior appointments to the civil service are now based on open competitions as well in contrast with the past deficient practice. Examples of senior appointment through open competition include the appointment of the heads and senior officials of various anti-corruption bodies, such as NABU, SAPO, NACP and others.

Nevertheless, the challenges such as low qualification of commission members, political interference and difficulties in assessing various competencies/tests have been identified by the NACS and civil society. The question also remains, as to whether this process has allowed to recruit and maintain the best candidates in the civil service of Ukraine.

It is now critical that the merit-based recruitment of civil servants to all vacant positions are consistently implemented. Of particular importance is that recruitments to the category A/senior civil service positions are clearly based on merit, equal opportunities and open competition. Ukraine must ensure that the competition commissions include persons with necessary skills to assess the candidates, and they function free from political interference. Ukraine is encouraged to take all necessary measures, including legislative

⁹⁵ See the brief information about the [first results of the civil service legislation implementation](#) presented at the conference in Ukraine.

⁹⁶ [State secretaries in line ministries what will the European reform of the civil service will change in the country.](#)

⁹⁷ [RPR Calls on Authorities to Improve the Procedure of Competition to Fill the Civil Service Offices.](#)

⁹⁸ Shadow Report (2017) "[Evaluating the Effectiveness of State Anti-Corruption Policy Implementation](#)" pg. 25.

steps, if necessary, in cooperation with civil society, to address the challenges and valid concerns of CSOs and ensure that the recruitment in civil service is and is perceived to be open, transparent, free from political interference, based on merit and allows employing best candidates in the civil service positions.

New recommendation 6: Merit-based civil service

- 1. Take all necessary measures in cooperation with civil society, to address the existing challenges of the recruitment both in legislation and in practice, including the lack of relevant competences of the competition commission members and the lack of transparency.**
- 2. Continue consistent implementation of open, transparent merit-based recruitment to ensure that the civil service is in fact based on merit, is perceived as such and allows selecting the best candidates, free from political interference guarantying equal opportunities and professionalism.**
- 3. Ensure that the civil service vacancies are adequately and broadly advertised to provide for equal access and attract highly qualified candidates.**

Performance appraisal

Under the new CSL, civil servant's performance is subject to an annual appraisal. The bonuses can be allocated, career plan defined and training needs identified based on the outcomes of the evaluation. Evaluation involves the manager of a civil servant, HRM unit and NACS. Performance is assessed against the pre-determined indicators, the compliance with the anti-corruption legislation and ethical behaviour are one of them. Evaluation grades range between: "negative", "positive" and "excellent". In case of "negative" grade, the evaluation is repeated after three months. Civil servant may appeal the results of an evaluation. Two consecutive negative assessments result in dismissal of a civil servant. The "excellent" grade is the ground for bonuses and a priority promotion. Promotion is one of the rights of a civil servant and is based on competition (Art. 40). No further guidance is provided in the legislation how the priority promotion is granted in view of the requirement of a competitive promotion.

A standard performance appraisal procedure mentioned above (Article 44.1 of the CSL) was only approved on 23 August, 2017 by the Cabinet of Ministers of Ukraine.⁹⁹ Thus, the performance evaluations have not started in practice yet. The representatives of the NACS explained during the on-site visit that the first version of the regulation was too complex, cumbersome and would be difficult to implement in practice if adopted. The second version was developed with the broad participation of stakeholders. It describes the process of setting the targets and assessing the compliance, rights and responsibilities of the evaluators and the civil servants to be evaluated, details and the consequences of the assessment. While the document seems to offer appropriate guidance for annual performance evaluation, it is not clear how the evaluation is linked with bonuses and incentives or priority promotion as provided by the CSL and the secondary legislation. Specifically, according to the standard regulation on bonuses, monthly/quarterly bonuses are allocated at the discretion of the head of an institution outside the scope of the performance appraisal system. Similarly, the incentives are paid based on the criteria established by the Cabinet of Minister's Resolution on the issues of remuneration.¹⁰⁰ As to the promotion, the CSL (Art. 40) provides that the promotion is based on competition, whereas Art. 44.9 mentions priority promotion in case of excellent grade with no further details provided.

⁹⁹ Model procedure for assessing the performance of a civil servant.

¹⁰⁰ Please note, that the incentives as a part of the remuneration is not provided under the CSL. However, these will continue to be paid to the civil servants before the regulations on bonuses will enter into force on 1 January, 2019 (for details see subsection on remuneration below).

The NACS representatives explained during the on-site visit that these regulations on bonuses and incentives would be applicable temporarily until the CSL regulations on bonuses would enter into force (however this is not specified in the regulations themselves). Yet, in this case additional rules would be needed to prescribe the procedure for allocation of monthly/quarterly bonuses and granting priority promotion and linking those to the performance evaluation. Ukraine is encouraged to adopt and start implementing in practice the standard regulation for performance evaluation and link the promotion, increase in salary and bonuses to the results of the evaluation, in order to close the regulatory gap for merit-based civil service.

Conclusion

The legal foundation for performance appraisal of a civil servant that supports career development, awards and incentivises better performance has been laid down by the CSL. Performance appraisal, according to the recently adopted Model Procedure for Assessing the Performance of a Civil Servant, involves setting the targets and evaluation of their accomplishment on an annual basis with the participation of a civil servant in question. Outcomes of the evaluation can be used to define a professional development plan, allocate bonuses and grant priority promotion. However, the regulatory gap remains. Specifically, the regulations are needed to a) link the performance appraisal with the monthly/quarterly bonuses that represent the principle part of total bonuses (up to 30% of the annual salary Art. 50.3.2 of the CSL) and b) provide guidance on how the annual assessment results in priority promotion.

Thus, Ukraine is encouraged start implementing in practice the newly adopted performance appraisal regulation and link the promotion, increase in salary and bonuses to the results of evaluation, in order to close the regulatory gap for merit-based civil service.

New recommendation 7: Performance appraisal

- 1. Ensure implementation of performance appraisal in practice.**
- 2. Adopt and put in practice the regulation to link the monthly/annual bonuses and priority promotion to the performance appraisal.**

Discipline and dismissals

The grounds and procedure for disciplinary action with due process guarantees are provided in the CSL (Chapter 2, Section VIII). The CSL regulates dismissals of civil servants in detail as well (Chapter IX). A disciplinary action can be initiated and the sanctions imposed by the appointing agency in consultation with the Commission on Senior Civil Servants (for category A civil servants) or a disciplinary committee of an appointing agency (for categories B and C civil servants). Reprimand can be imposed as a sanction by the appointing agency itself without further consultations with the Commission or the committees.

Notably, the disciplinary proceedings and dismissals of A category civil servants fall under the remit of the Commission on Senior Civil Servants. Disciplinary Committee comprising 5 members is created by the Commission for this purpose.¹⁰¹ According to the Rules of Procedure of the Commission on Senior Civil Servants,¹⁰² the Disciplinary Committee previews the information received from the appointing agency regarding the alleged disciplinary violation by A category civil servant and presents the information to the Commission on Senior Civil Service for the decision on opening the case. If the decision is positive, Disciplinary Committee proceeds with the case and prepares the proposals to the appointing agency regarding the existence or the lack of grounds for disciplinary responsibility, imposing responsibility or closing the case. The same Committee prepares proposals for dismissals of the A category civil servants on

¹⁰¹ Section 29 of the Regulation of the Commission on Senior Civil Service, approved by the Resolution of the Cabinet of Ministers of Ukraine dated 25 March 2016 No. 243;

¹⁰² Rules of Procedure of the Commission on Senior Civil Servants adopted by the Commission on Senior Civil Servants on July 28, 2016.

the initiative of the appointing agency and presents them to the Commission for the decision. The right to appeal of the decision is provided by CSL (Art. 7.10)

The head of civil service has the power of the disciplinary action in relation to the categories B and C in cooperation with the disciplinary committee set up in the agency. Furthermore, the head bears the responsibility in case of a failure to take disciplinary action or bring the case of the alleged commission of the corruption offences or administrative violations to the attention of the relevant bodies (Art. 63.4).

Most of the grounds for disciplinary action are specific and clear (such as absence or appearance in the office under the influence of alcohol or other intoxication; failure to notify about the conflict of interest), on the other hand some grounds are vague and subject to interpretation (such as the breach of the Oath of a civil servant or actions affecting the authority of the civil service). More worrying is the fact that breach of the Oath, is among the category of grounds that can result in dismissal of a civil servant. The Government informed about 7 cases initiated in the first half of 2017 on this ground.

The government has not provided statistics of disciplinary actions and their consequences. The following data is based on the presentation of the results of the implementation of the CSL by the Chairman of the NACS.

Table 3 Disciplinary proceedings in state bodies in 2016

Disciplinary violation confirmed	Possibility of disciplinary enforcement excluded	Disciplinary violation not confirmed	Proceedings are ongoing
33% (1163)	5% (188)	52% (1804)	10% (336)

Source: The Presentation of Results of the Civil Service Reform by the Chairman of NACP obtained by the ACN Secretariat.

Another issue that needs to be mentioned in connection with the dismissals in civil service is the Law on Cleansing the Government (Lustration Law) adopted in 2014.¹⁰³ The law stipulates that those involved in corruption, treason or the violation of human rights, especially against the Maidan protesters, as well as persons holding high-level posts in the former President Yanukovich administration will be dismissed or disqualified from competing for public service posts for 10 years. This Law was a response to the acute political situation, and forced many notoriously corrupt officials out of office.¹⁰⁴ Though, the previous monitoring round report noted that the negative by-effect of elimination from public life of most politicians and civil servants of the older generation and accelerating the process of generational change, is a disruption of the administration as a result of a large-scale dismissals and resignations of experienced personnel, who cannot be replaced in a short time.

According to the Venice Commission opinion, the purposes of the law are legitimate. Lustration strengthens public trust in the new government and enables the society to have a new, fresh start. However, "Lustration must never replace structural reforms aimed at strengthening the rule of law and combating corruption, but may complement them as an extraordinary measure of a democracy defending itself, to the extent that it respects European human rights and European rule of law standards."¹⁰⁵

¹⁰³ Entered into force on 16 October 2014 amended in 2015.

¹⁰⁴ OECD (2016) *Anti-Corruption Reforms in Eastern Europe and Central Asia, Progress and Challenges, 2013-2016*, pg. 166.

¹⁰⁵ Venice Commission (2015) *Opinion on the Law of Government Cleansing (Lustration Law) of Ukraine*.

The administration of Ukraine estimated that the law would affect up to one million persons holding civil service posts.¹⁰⁶ In 2015, the news article informed that 700 officials have been lustrated in Ukraine.¹⁰⁷ The Government informed that according to the Ministry of Justice, which is maintaining the relevant registry, 929 persons were dismissed from the office based on this law. The NACS does not hold this information due to the fact that the law defines the lustration as a process falling under the remit of the Ministry of Justice. However, the NACS did provide overall number of civil servants dismissed – it was 11 349 in total or almost 5% of the whole civil service.

New Recommendation 8: Dismissals and discipline

1. Clarify the grounds for disciplinary proceedings and ensure that they are objective.
2. Ensure that the dismissals are based on the legal grounds and are not politically motivated.

Fair and transparent remuneration

At the time of the previous monitoring round the fixed salary constituted only 20-30% of a total pay; managerial discretion in allocating bonuses, additional payments/supplements or other benefits and thus the risk of nepotism, loyalty to the manager and arbitrariness was high; there was no upper limit on bonuses or detailed guidelines for their payment. Some of these issues have been partially resolved with the new remuneration framework as analysed below.

One of the key aspects of civil service reform in Ukraine is streamlining the remuneration system: decreasing arbitrariness in allocating bonuses, additional payments and benefits and increasing competitiveness of the civil service with higher and fair remuneration, performance appraisals and corresponding rewards.¹⁰⁸ The system of remuneration was reformed with the new CSL (Articles 50, 51, 52, 53) and subsequent secondary legislation.¹⁰⁹ Under the CSL, the state is obliged to provide an adequate remuneration to a civil servant and the reduction of budget cannot serve as basis for reduction of salary or its supplements. CSL provides for balanced and proportionate payment for 9 different wage groups.¹¹⁰ Salary rates are determined each year by the Cabinet of Ministers as part of the draft law on State Budget for the next year. The civil servants may also be provided with social benefits, the rent of the house or additional financial aid to resolve social and household issues.

According to the CSL, salary of a civil servant consists of fixed official salary; long-service premium/supplement; rank-related premium/supplement; bonuses. Bonuses are given based on the results of an annual performance evaluation¹¹¹ or on a monthly/quarterly basis for personal contribution to the performance of a state body. The latter, however, is not a part of the performance appraisal system and is allocated at the discretion of the head of each state body within the budget for salaries of that agency on the

¹⁰⁶ Yatsenyuk: Ukraine lustration will cover 1 million officials, Kyivpost, 17 September, 2014.

¹⁰⁷ <https://www.unian.info/society/1157911-week-in-numbers.html>

¹⁰⁸ On performance appraisal see above.

¹⁰⁹ A set of bylaws have been adopted on the issue of remuneration system in 2016 (including: *Issues of Remuneration of Civil Servants*, Resolution of the Cabinet of Ministers of Ukraine No. 292, dated 6 April 2016 and *Rules of the Application of Incentive Payments to Civil servants*, Resolution of the Cabinet of Ministers of Ukraine No. 289, dated April 9, 2016.), later abolished by the Cabinet of Minister's Resolution No. 15 of 18 January, 2017. Standard bonus policy approved by the Order of the Ministry of Social Policy of Ukraine, 13 June, 2016, No.646 remains in force.

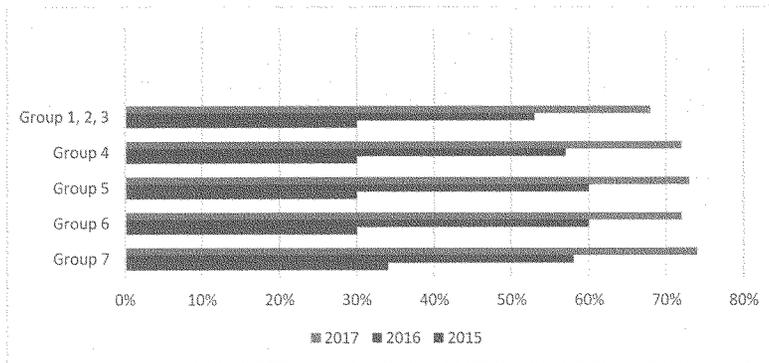
¹¹⁰ Minimal salary rate within group 1 in government agencies with jurisdiction extending onto the entire territory of Ukraine may not exceed 7 minimal salary rates within group 9 of government agencies with jurisdiction extending onto the territory of one or several districts, cities of regional significance.

¹¹¹ If the evaluation grade is "excellent."

basis of the criteria provided in the secondary legislation on bonuses (initiative at work, urgency of tasks, additional tasks and quality of the work performed).¹¹²

Maximum share of bonuses paid on a monthly/quarterly basis can represent up to 30% of the fixed annual salary (Art. 50.3.4 of the CSL). Close reading of Art. 50 of the CSL suggests that there is no upper limit for the annual bonuses. The bonus fund of each governmental body cannot exceed 20% of total salary budget each year, plus the amount of savings of unpaid salaries due to the vacancies.¹¹³ The new regulations on bonuses will only enter into force starting 1 January, 2019. Till that time, the heads of civil service have a discretion to grant additional *incentives payments*¹¹⁴ to civil servants within the limit of the agency's salary funds. The issue is regulated by yet another piece of the secondary legislation -- the Cabinet of Minister's Resolution No. 15 on the issues of remuneration of the state body employees (Resolution No. 15),¹¹⁵ establishing criteria related to intensive and highly important work for providing incentives, that are largely similar but slightly elaborated as the criteria provided by the regulation on bonuses mentioned above. The upper limit of incentives is not specified. For category A civil servants *minimum* of the bonus is established at 50% of an annual salary. A separate part of the Resolution is devoted to the bonuses to the A category of civil servants. According to the NACP representatives met during the on-site this regulation is of a temporary nature for the transition period and is effective only till the entry into force of the provisions on bonuses in 2019. The logic of this approach may be to buy some time until the administration of Ukraine will be able to increase the salary to the competitive minimum to retain qualified civil servants. At the same time, compensating low salaries with the discretionary, arbitrary and sometimes discriminatory bonuses is not in line with the European standards. Therefore, Ukraine is encouraged to fully enact the reform of the remuneration system, set upper limits for annual bonuses and start the application of new provisions in practice. Despite regulatory loopholes, practice seems to be improving and the share of the basic salary in the total remuneration is increasing. See the chart below.

Figure 6 Basic Salary Percentage in Total Pay based on the Wage Groups (2015-2017)



Source: Data provided by the Government as a part of the additional comments.

Another important aspect of remuneration in civil service is its competitiveness. Adequate remuneration should be offered to civil servants to attract and retain highly qualified professionals in civil service. The

¹¹² Regulations on the payment of bonuses have to be approved by the heads of each institution in accordance with the Standard bonus policy approved by the Order of the Ministry of Social Policy of Ukraine, 13 June, 2016, No.646.

¹¹³ in OECD countries the bonuses are usually limited to 20% of the base salary and total budget of bonuses constitutes 5% of total annual salary budget.

¹¹⁴ The CSL does not envisage such a concept.

¹¹⁵ Provisions on the application of incentives payments to civil servants is a part of the Cabinet of Minister's Resolution No.15 of 18 January, 2017.

previous monitoring report criticised low and non-competitive salaries in the civil service of Ukraine and issued a recommendation to provide *decent salaries*.

The Resolution No.15 brought about several important changes: it established the minimum salary in civil service at UAH 2000 (67 EUR) and increased the salaries of civil servants by 5-27%. The civil service positions have been split between various wage groups and salary schemes defined for each of them. Rank-related supplement and social and housing benefits to civil servants have also been regulated.

One new initiative within the framework of the comprehensive public administration reform programme that raises questions with regard to the objective and equal pay is the gradual introduction of so-called “reform staff” positions that are outside the general salary system, with much higher salaries. The initiative is aimed at introducing the policy analysis and strategic planning functions in the line ministries to carry out efficient reforms in the priority areas. The reform staff are special category of civil servants recruited through a merit-based competition, with additional requirements and special procedure for recruitment and substantially higher remuneration compared to other civil servants (from 30 thousand - for an expert, up to 60 thousand UAH - for the director of the directorate).¹¹⁶

The first practical steps towards introduction of this concept were made just recently when the Cabinet of Ministers approved a series of changes in the secondary legislation to pilot the initiative in 10 line ministries, Government Secretariat, State Agency on E-Governance and the NACS (around 1000 positions for the pilot stage up to 3000 positions by the end of 2020). According to the NACS management, this initiative is aimed at breaking the soviet style public administration in Ukraine, by attracting highly qualified professionals and introducing the strong strategic policy analysis to carry out real reforms. 300 million UAH was allocated in the 2017 state budget for the implementation of this concept. The new positions such as director general of the directorate, head of expert group, national expert were added to the salary scheme and the bonuses were specified. The competitions will be launched soon and the first staff members are expected to be appointed late October. Since the relevant amendments were adopted in August,¹¹⁷ just before the adoption of this report, the monitoring team did not have an opportunity to study them and provide its assessment of the changes.

According to the NACS representatives met during the on-site visit, the salaries are gradually increasing and civil service is becoming more competitive and attractive, as shown by the increased number of applicants for the vacancies in the civil service positions. However, according to the NACS, the challenges in transforming the remuneration system of civil servants to enable reasonable conditions for recruiting, motivating and retaining civil servants with required education level and professional skills, remain to be solved.

¹¹⁶ Interview with the Head of Civil Service Agency of Ukraine.

¹¹⁷ Decree of the Cabinet of Ministers No. 647, Some issues of the Implementation of a Comprehensive Reform of Public Administration.

Table 4 Salary Trend in Civil Service of Ukraine (2015-2017) UAH

Name of position of government service	Salary group	Ministries and Central Executive Authorities (without territorial bodies) Average payment amount for 1 person per month in UAH		
		2015	2016	2017
Head of a state body, first deputy, deputy	1, 2, 3	11 600	21 600	35 500
Head of an independent structural division	4	10 700	15 900	18 400
Deputy head of independent structural unit	5	10 000	15 300	17 000
Chief of unit in independent unit	6	7 800	12 100	14 500
Chief specialist	7	4 900	7 700	11 100
Leading specialist	8	3 300	5 200	8 600
Specialist	9	2 000	2 500	4 700

Source: additional information provided by Ukraine after the on-site visit

Conclusion

The new CSL clearly represents a step forward to a transparent and fair remuneration system in Ukraine. Gradual increase of salaries in civil service is also a positive development that should be continued. However, the monitoring team is concerned that the important part of the new provisions on bonuses will only enter into force in 2019. Furthermore, it is worrying that the allocation of a large part of bonuses (monthly/quarterly bonuses constituting up to 30% of an annual salary) is not linked to the performance appraisal process and is left at the discretion of heads of state bodies based on some vague and somewhat discriminatory criteria, since most of the civil servants may not typically perform high intensity or particularly important work. Such criteria would not represent a problem if applied as an exception to the existing practice, as a measure to award the extraordinary performance of a civil servant and a large part of the bonuses would still be allocated according to the performance evaluation results. The issue of performance-based monthly/quarterly bonuses would remain after the full entry into force of the provisions of the CSL as well, since it is not yet resolved by the CSL or any secondary legislation.

Accordingly, the concerns regarding the remuneration policy in the civil service of Ukraine remain. To achieve the goal of streamlining the remuneration system, decreasing arbitrariness in allocating bonuses and increasing competitiveness of civil service, the civil service salary system providing fair and reasonable conditions for recruiting, motivating and retaining professional civil servants needs still to be enforced and implemented.

New Recommendation 9: Remuneration

1. Finalize the adoption of the necessary regulatory framework and ensure in practice fair, transparent and competitive remuneration in civil service.
2. Ensure that there is an upper limit to the bonuses granted based on an annual performance evaluation not exceeding 30% limit provided by CSL.

Conflict of interests

The conflict of interest legislation was adopted in October, 2014 and entered into force in April, 2015. The rules are part of the CPL. The previous monitoring report concluded that the newly adopted legislation was largely in line with international standards.¹¹⁸ Ukraine was found to be fully compliant with the recommendations on ensuring an effective institutional mechanism for management and control of implementation of conflict of interest regulations. The ACN Summary Report considered the creation of the enforcement mechanism is a major achievement for Ukraine.¹¹⁹

Enforcement of the conflict of interest regulations is one of the statutory functions of the NACP. It monitors implementation across the entire public service, including local self-government. NACP provides guidance, consultations, trainings to state bodies and is also responsible for awareness raising. If the conflict of interest is identified, NACP requires the agency in question to eliminate the violation, conduct internal investigation and take disciplinary action against the perpetrator. These instructions are binding. The state institution in question has to report back on the measures carried out in accordance with the instructions. In addition, the NACP has the power to initiate administrative action and refer the case to the court for administrative sanctions.

Since the last monitoring, the NACP approved the methodological recommendations on prevention and settlement of conflicts of interest in the activities of persons authorized to perform the functions of the state or local self-government.¹²⁰ The recommendations are based on the existing legislation, local and international best practices and propose basic practical tools to enhance the effectiveness of detection, prevention and settlement of conflicts of interest. In particular, notions of potential and real conflicts of interests are explained with practical examples; the test for identifying conflict of interest situation and suggested subsequent actions of an employee and the manager are spelled out. In addition, the methodological recommendations on transferring enterprise and/or corporate rights control were approved.¹²¹ With these measures the methodological guidance needed for efficient enforcement has been set forth.

To raise awareness and facilitate the practical application, the NACP carried out an awareness-raising campaign in cooperation with the UNDP under the name "Conflict of interests: need to know!" 13 trainings

¹¹⁸ Only the element of "apparent conflict of interest" is missing which exists "where it appears that a public official's private interests could improperly influence the performance of the duties but this is not in fact the case.

¹¹⁹ OECD (2016) *Anti-Corruption Reforms in Eastern Europe and Central Asia, Progress and Challenges, 2013-2016*, pg. 177. ; These regulations have not been changed since the last monitoring. Detailed description of the legislation including definition of conflict of interests, managing and sanctioning conflict of interests as well as enforcement procedure are described in detail in the [previous monitoring round report](#) and the ACN summary report.

¹²⁰ Decision No. 2, dated July 14, 2016.

¹²¹ Decision No. 10, dated August 11, 2016.

for the central executive bodies, regional and district administrations, deputies and employees of local self-governments have been conducted covering more than 1200 people.¹²²

As to the enforcement statistics, the government reported that the NACP received 860 reports on corruption related offences in 2016, 264 inspections were completed and 249 are ongoing. The NACP provided 922 clarifications about the presence/absence of a real conflict of interests and the plan of actions for settlement of conflict of interest. 27 requests to eliminate violations were sent to public agencies, 23 of these requests are fulfilled. 61 protocols on administrative offences related to corruption were drawn up and submitted to courts. The court imposed administrative liability in 2 cases in 2017. As regards the National Police statistics for 2017, 1760 administrative protocols were drawn up on conflict of interest-based corruption-related offences. The court imposed administrative liability on 858 persons, among them 20 civil servants, 607 deputies of local councils, and 235 officials of local self-governments.

Nevertheless, proactive approach has been expected from the NACP in exercise of its enforcement powers, especially in relation to the high-level officials whose disputable wealth have been recently uncovered. As shown in the below section, NACP has started verifying the asset declarations, albeit with the actions that leave the impression of “going after small fish”, followed by frustration and deeper scepticism from the public as to the ability to enforce the rules in practice (see more details on asset declarations).

Conclusion

The progress achieved in the area of conflict of interest management by Ukraine is undisputable, particularly in view of the short track-record of the NACP and should not be underestimated. Since the previous monitoring round and after its establishment in 2016, the NACP issued various methodological guidance on conflict of interest, carried out information campaign and training of staff, started inspections and implementation of the rules in practice. This is commendable and must be continued.

Nevertheless, the implementation of the conflict of interest rules cannot be seen in isolation and must be looked at in the light of the overall picture of NACP's operation and performance as described elsewhere in the report. More specifically, the questions as to the independent functioning of the NACP free from political interference and bias, persist and must be addressed in order the implementation of CoI rules, as well as other parts of its mandate, to be assessed as efficient and seen as politically neutral.

New Recommendation 10: Conflict of interests

1. **Ensure full and unbiased enforcement of conflict of interest rules in practice by the NACP free from political influence.**
2. **Further raise awareness and continue training to fully introduce the new regulations and ease their practical implementation.**

Ethical rules

The CPL regulates the rules of ethical conduct (articles 37-44) in general terms. It provides regulations on priority of interests, political neutrality, impartiality competences and efficiency, refraining from execution of illegal orders and others. Monitoring and control over implementation, clarification and guidance over the rules of ethical conduct are entrusted to the NACP under Art. 12 of the CPL, whereas the NACS approves the ethical rules for civil servants under CSL (Art. 37). The CPL further provides that the state bodies may adopt specific ethics codes, if necessary. The training of civil servants in general is under the mandate of the NACS, however, it is not entirely clear who is responsible for ethics training of civil servants in view of the NACP's function of enforcement and guidance on ethical standards, also extending to the civil servants.

¹²² The following cities were covered: Vinnytsia, Ivano-Frankivsk, Lutsk, Kyiv, Odesa, Mykolaiv, Kramatorsk, Lviv, Kharkiv, Poltava, Cherkasy, Dnipro and Zaporizhia.

The NACS approved the ethical rules for civil servants and local self-government in 2016.¹²³ However, these rules are somewhat different from those provided in the CPL and are split into four blocks: general duties of a civil servant; use of state resources; use of official position; exchange of information and obligation to provide access to public information. Civil servants are made aware of these rules once appointed. Assessment of compliance with these rules is part of the annual performance evaluation. Furthermore, CSL provides that the general rules of ethical conduct should be part of the internal regulations of each agency (Art.47.6). The heads of state bodies are obligated to monitor enforcement of these rules in their individual agencies and take disciplinary action or if there are signs of criminal or administrative offenses, refer the case to the relevant authorities. Taking into account some discrepancies between the CPL regulations and the NACS order on ethical rules, it is advisable to align them and provide methodological guidance on application of ethical rules in practice. Information about approval by specific ethics codes by state agencies, trainings or enforcement has not been provided. However, the monitoring team is aware that as an example the NABU has its own code of conduct.

New Recommendation 11: Ethics

- 1. Clarify the mandate of agencies responsible for awareness raising and training on ethical standards**
- 2. Carry out systematic awareness raising and training throughout the public service.**
- 3. Analyse the needs and consider adoption of the specific ethics codes for individual agencies/categories.**

Asset declarations

At the time of the previous monitoring round, the reformed primary legislation for e-declarations was already adopted and the preparations were ongoing to design and launch the electronic system upon the entry into force of the CPL in April 2015. Ukraine was hence found fully compliant with the recommendation on legal framework, including in relation to focusing on the high-level officials and high risk areas, the list of information included in the asset declarations, the requirements for publication, verification and sanctions. Only one element of the recommendation on exchange of information with law enforcement was found partially implemented. The new legal and institutional framework introduced by the CPL have been extensively analysed by the previous monitoring report as well as the ACN key publication.¹²⁴ The following sections, therefore, only provides a brief overview of the system and focuses on the developments since the previous round with the emphasis on impact of implementation.

Launching the system

One of the crucial accomplishments of Ukraine in the area of prevention of corruption since the last monitoring round is the launch of the electronic asset declarations system with the unprecedented coverage of declarants and granting online access to these declaration (excluding some personal data). Over 1 210 000 declarations are already accessible online in an open format. Also, some steps have been made for preparing grounds for verification of declarations and using the system not only as a tool of public scrutiny, but as an instrument for the law enforcement to hold those liable for corruption offences accountable.

Introduction of the electronic system was widely welcomed by the international community.¹²⁵ At the local level, it was named as a "truly revolutionary step towards eradicating corruption" and a joint achievement

¹²³ The Order of the National agency on Civil Service N 158 (5 September 2016) on [Approval of the General Rules of Ethical Behavior of Civil Servants and Local Self-Government Officials](#)

¹²⁴ OECD (2016) *Anti-Corruption Reforms in Eastern Europe and Central Asia, Progress and Challenges, 2013-2016, at page 63.*

¹²⁵ EU, NATO, COE and others made welcoming statements encouraging Ukraine's fight against corruption.

of civil society, international partners and reformists in all branches of power.¹²⁶ President Poroshenko called it: “A truly historic event of openness and transparency [...] Corruption must be eradicated, but it is even better to prevent it. Prevention is the best cure. For this, we need an effective control over income and expenditures of all officials, judges, prosecutors, and law enforcement officers. People have long been waiting for the estate, cars and money owned by public servants to come to light. The tool for such control exists” – stated the President.¹²⁷

Yet, the launch of the new system faced fierce resistance and confrontation in Ukraine. Reportedly, several attempts were made by the old regime proponents to block and sabotage its introduction at various stages and to obstruct its implementation after it was put in place. First, the development of the system and the necessary bylaws was delayed and it was argued that the system was not technically ready for the launch, then the secondary legislation for verification could not be adopted, later granting access to the full database to NABU became problematic, further the constitutionality of the new regulations have been challenged in the Constitutional Court by the Members of Parliament (the court decision has not been adopted yet). The war against the system continued with the publication of a false declaration of one of the NACP members to imply that the system is fragile and can easily be manipulated. Shortly thereafter several MPs announced the breakdown of the system, but the statement was confronted by NACP defending the system: that the system was under control and the publication of this declaration was a “test”, carried out by “Ukrainian Special Systems” the state-owned enterprise, that is administering the e-declarations.¹²⁸

Moreover, as the administration could not precisely define the number of public servants subject to the asset declaration in the absence of HRMIS, the capacity of the system was underestimated, it encountered technical obstacles several times and temporarily crashed just before the deadline for the submission of declarations by the second wave declarants. This crisis witnessed by the monitoring team at the time of the on-site visit, probably caused by the system overload as the deadline of the submission of the asset declarations for the second wave of the declarants approached on 1 April 2017. As a result, for several days the system did not allow entering the data causing civil servants’ anxiety and protests as they feared potential sanctions for late submission of declarations. Some NGOs alleged that the security service forces unlawfully interfered in the operation of the system to cause its crash.¹²⁹ The situation escalated to the extent that the Cabinet of Ministers meeting was quickly convened to decide on the next steps in view of the system overload. Eventually, the deadline of submitting the declarations was postponed for one month. However, the Prime Minister called for taking the responsibility by NACP and resignation of the NACP leadership which has not followed.¹³⁰

To respond to this upheaval concerning the functioning of the system, NACP initiated the discussion about conducting an external evaluation (audit) to check if it was fully functional and protected from outside manipulations, and identify the causes of experienced technical issues. CSOs widely believed that such an audit was necessary to assess the integrity of the system and its ability to integrate upgraded modules for interoperability with the databases needed for verification of declarations. However, this initiative was followed with the confrontation within the NACP leadership in particular, between the Head and one member of the NACP.¹³¹ According to the latter, the audit as proposed by NACP was doomed for subjective and superficial assessment. As a result, the NACP could not come up with the joint decision and the audit of the system was postponed. After the on-site visit, the monitoring team was informed that an independent external review of the system was launched with the support of the EU ACI. In addition, the NACP adopted the action plan to modernize the electronic declarations system.

¹²⁶ RPR statement (2016)

¹²⁷ <http://www.president.gov.ua/news/komentar-prezidenta-povnocinne-elektromne-deklaruvannya-akti-37847>

¹²⁸ <http://www.eurointegration.com.ua/news/2016/08/19/7053590/>

¹²⁹ [Will the \(in\) dependent NACP’s leadership vote for an independent expert review of the e-declaration system?](#)

¹³⁰ One of the Commissioners resigned later, but for the reasons reportedly not connected with the asset declaration system (see above chapter 1).

¹³¹ Deputy Head of the NSCC Ruslan Radetsky: [How a positive idea can be turned into evil](#)

Implementation of the external audit stalled after the “Ukrainian Special Systems” enterprise refused to provide the NACP with the copy of the assets declaration software for the testing purposes referring to possible security risks. The lack of proper follow-up may cause repetition of the technical problems with the system for the next wave of declarations.

While NACP provided some reasoning behind all the above-mentioned hurdles, perception of civil society met during the on-site was radically different. They harshly criticized the NACP for the failure to act, believing that it was deliberately hindering the process for most of the time. According to the CSOs, “It was evident that the NACP was under the political pressure to postpone the launch of asset e-declarations.”¹³² Even after the web-portal was ultimately launched, NACP was delaying the adoption of secondary legislation to verify declarations, according to them (see below).

After the on-site visit, the monitoring team was informed that the public access to electronic declarations of specific categories of public employees: the staff of the Security Service of Ukraine and the military prosecutors has been recently closed. Reportedly, the Security Service of Ukraine, citing the threat to the national security, created its own parallel system of asset declarations for its staff, including the top management, which is not public. The Chief military prosecutor of Ukraine in turn issued a Decree in April 2017 obliging the NACP to close public access to more than 100 declarations of military prosecutors. According to the CSOs both actions contradict the CSL. AntAC has filed lawsuits to challenge both decisions.¹³³

The monitoring team urges Ukraine to ensure unimpeded functioning of the asset declarations system in line with the CSL and take all necessary measure to prevent its obstruction any further, including unduly limiting the public access to declarations.

Brief overview of regulations

Under the CPL, all declarations are submitted in an electronic form via the NACP’s web-site and published automatically, except for certain confidential data, such as tax numbers, dates of birth, places of residence, or the specific locations of real estate (the city/village and region where the property is located, is published). The scope of disclosure was extended to include: cash not kept in financial institutions; valuable movable property (e.g. jewellery, antiques, art) worth more than the equivalent of about EUR 4,500 per object; intangible assets (e.g. intellectual property rights); beneficial ownership of legal persons or any assets; unfinished construction of real estate; membership in civic unions, etc.

The asset declarations are submitted by the candidates to civil service and civil servants during the office and after termination of the office.¹³⁴ In addition, the NACP should be informed about the opening of a foreign account or the significant change in the material status of the declarant (i.e. within 10 days after they received an income or made a purchase in the amount exceeding about EUR 2,300) (Art. 52 of the CPL). These notifications are also submitted electronically and available on-line on the NACP web-site for public scrutiny. According to the legislation (Art. 17.3 of the NABU Law), the NABU has direct access to the databases held by public authorities. According to the NACP, the data protection requirements also apply in this regard. Art. 17.3 of the NABU Law provides that the NABU is bound of the data protection requirements of the legislation.

Sanctions

¹³² RPR report (December, 2016) at pg. 4.

¹³³ [AntAC went to court to verify legal grounds for hiding e-declarations of military prosecutors.: AntAC Sues Security Service of Ukraine for E-declarations.](#)

¹³⁴ The following special subjects are included pending a special procedure approved by NACP: the persons referred to in article 52-1 of the Law - the person mentioned in paragraph 1, subparagraph a of paragraph 2 of article 3 of the Law, the personnel of intelligence bodies of Ukraine and/or hold positions involving state secret, in particular, at military units and operational-detective, counterintelligence and intelligence authorities, as well as persons nominated for the above listed positions.

Sanctions for either failing to submit or late submission of declarations and deliberate submission of false information, can cause criminal, administrative or disciplinary liability. The criminal liability arises for false statement in the declaration with regard to assets with value in excess of about EUR 12,000, while false information of value between about EUR 4,750 and EUR 12,000 will be sanctioned as an administrative offence. Violations below the EUR 4,750 threshold may be punished as a disciplinary offence. In addition to the original criminal sanction of imprisonment of up to two years, additional sanctions of a fine and correctional work were introduced. The asset declaration will also be an obvious source of evidence for the public prosecution in proceedings related to illicit enrichment, which is established as an offence in the Criminal Code of Ukraine in accordance with the UNCAC.¹³⁵

Verification

The NACP is responsible for monitoring and verifying declarations as well as monitoring the lifestyle of persons covered by the law. The declarations of high-level officials and persons holding positions associated with a high-risk of corruption are subject to mandatory full verification. *Control and verification* of asset declarations is entrusted to the NACP, which checks timely submission, completeness and accuracy of declarations as well as conducts full verification and monitoring of the lifestyle of declarants (Articles 48-51 of the CPL).¹³⁶ The persons with high status and responsibility and high level of corruption risks are subject to mandatory full examination. The list of positions with high corruption risk was approved by the NACP in 2016.¹³⁷ The NACP has also gained access to the database of National Commission on Securities and other databases (MOJ databases, taxes etc) which is essential for verifying asset declarations.¹³⁸ The monitoring team however learned that the NACP does not have access to a number of other databases and “secret information” which is also necessary for fulfilling its verification mandate. It also learned that the existing access to external databases does not allow automatic interaction with the electronic declarations system.

Despite these regulations the NACP could not start implementing its monitoring functions until recently since the procedure for full verification was only approved on 10 February, 2017.¹³⁹ The procedure for lifestyle monitoring is still a draft. The NACP informed the monitoring team that the Ministry of Justice, twice refused to register these documents.¹⁴⁰ Civil society however believes that NACP and the Ministry of Justice deliberately delayed the process in order to avoid initiating the verification.¹⁴¹ RPR wrote about threats of sabotaging the system: “the National Agency on Corruption Prevention should immediately set the deadlines for complete checks of e-declaration and lifestyle monitoring, as well as automate the process of checking declarations against other state registers and request for access to the relevant registers”¹⁴² The local experts and CSOs believe that the sabotage of the system continues now with the adoption of an

¹³⁵ OECD (2016) Anti-Corruption Reforms in Eastern Europe and Central Asia, Progress and Challenges, 2013-2016, at pg.63

¹³⁶ Full verification of the declaration consists of: clarification of the authenticity of the declared information; Clarification of the accuracy of the declared assets; Checking for conflict of interests; Checking for signs of illegal enrichment.

¹³⁷ List of positions with the high corrupting risks subject to mandatory full examination of declarations approved by NACP Decision in 2016.

¹³⁸ News article (2016).

¹³⁹ NACP Decision No. 56 of 10 February, 2017 On Approval of the Procedure for Controlling and Full Verification of the Declaration of the Person Authorized to Perform the Functions of the State or Local Self-Government.

¹⁴⁰ On 11 November 2016 the NACP adopted the Decisions No. 114 “On approval of *the procedure for control and full verification of the declaration of persons authorized to perform the functions of State or local self-government*” and No. 112 “On approval of *the procedure for the monitoring of the lifestyle of persons authorized to perform the functions of State or local self-governments*”. These decisions were overturned on 28 December 2016 due to refusal of the Ministry of Justice with regard to State registration.

¹⁴¹ Change of the full verification order is urgently needed, otherwise NACP will legalize the assets of corrupt officials instead of holding them accountable.

¹⁴² RPR statement (2016) It is unacceptable to sabotage introduction of a complete check of e-declarations or monitoring of public officials lifestyle.

inadequate verification procedure not allowing for transparent and objective verification and instead is legalizing illegal income of the public officials.¹⁴³

The new procedure details the rules for *control* and *full verification* of asset declarations (Art. 48 and 50 of the CPL). *Control* of declarations includes: a) checking timely submission and b) completeness of the declaration and c) arithmetical and logical check. The violation of the submission deadline or failure to submit can only be monitored with the notifications from relevant agencies, civil society or the information obtained from the NACP in open sources, since Ukraine does not have HRMIS to compare against e-declaration system data. Completeness is assessed automatically by analysing whether all the fields of the asset declaration have been filled in. As regards the final and more important component, the logical and arithmetical monitoring of the declarations, it can only be launched once the secondary legislation and the additional software is in place.¹⁴⁴ *Full verification* of declarations is aimed at revealing the conflict of interests, or signs of illicit enrichment, accuracy of information and the evaluation of assets. Full verification of declarations can be mandatory (for the list of high risk positions; in case the arithmetical logical check showed high risks; declarant has chosen not to indicate the information about the family members) or based on the substantiated decision of the NACP. The request for full verification of a declaration can be submitted by citizens of Ukraine, or initiated by the NACP on its own if the results of the full verification have shown the signs for conflict of interest or illicit enrichment or other illegal activity.

Arithmetical and logical check as an element of monitoring is crucial since its outcomes are linked to the decision on full verification. In this light, it is paradoxical and troubling that before adoption of the required secondary legislation and setting up the relevant software module, *all declarations are considered to have successfully passed the arithmetical and logical verification test*. Further deficiencies of the procedure have been analysed by civil society in detail, reporting about various ways of manipulation, the regulation allows to avoid the full verification of declarations of high officials.¹⁴⁵ Among them is that NACP is obligated to issue conclusions of verification in the absence of sufficient information even if the relevant state body did not cooperate and did not provide the data (which happened in the case of the declaration of the Minister of Justice).¹⁴⁶ Reportedly, the NACP leadership recognizes existence of some of these deficiencies. One of the Commissioners to that effect requested the NGOs to provide their comments on the current procedure.

New development: extending the scope of asset declarations to anti-corruption activists

A worrying development the monitoring team became aware of during the on-site visit was the latest amendments to the CPL, subjecting the anti-corruption activists to full asset disclosure. The Parliament adopted the amendments in March this year extending the scope of the declarants to include a large number of subjects from civil society, independent experts, those members of various panels for merit-based recruitment or other platforms, academia, individuals who receive funds for anti-corruption programmes. Even those who have *participated in trainings* funded by anti-corruption projects are subject to the full regime according to the NACP legal opinion.¹⁴⁷ The NACP obviously has no way to identify these subjects in advance to notify about the need to submit the declaration, thus the declarants may end up being sanctioned, not knowing that they are required to declare. These new categories of declarants will have to file their first declarations in 2018.

¹⁴³ The full verification procedure allows officials to escape responsibility.

¹⁴⁴ Arithmetical and logical verification implies: a) verifying various sections of the declaration against each other to check conformity (done by NACP based on the procedure yet to be adopted); b) checking the data for compatibility with other relevant databases (to be performed automatically by the software once the necessary regulations are developed and the system is put in place)

¹⁴⁵ The full verification procedure allows officials to escape responsibility.

¹⁴⁶ Conclusions of the full verification by NACP are provided here.

¹⁴⁷ The NACP legal opinion is available in Ukrainian.

It goes without saying that the provisions of CPL on asset declarations were aimed at public officials who receive remuneration from public funds, operate with public money, influence public policy and can abuse their public position for personal gain. No such rationale can be found with regard to civil society, anti-corruption watchdog organisations and activists. The amendments cover members of the competition commissions too that take part in the recruitment of civil servants, this will discourage independent experts from taking part in this process in the future, thus reducing transparency and integrity of the merit-based recruitment of civil servants.

The monitoring team is extremely disturbed with these amendments that deviate from the intention and purpose of the CPL and rather seem to be aimed at discouraging anti-corruption activism in the country.¹⁴⁸ It shares the concerns widely expressed by the international community regarding the intimidating effect and discriminatory nature of the provisions and urges Ukraine to abolish them as a matter of priority.

After the on-site visit, the monitoring team learned that as a result of the heavy criticism and substantial pressure, the President initiated the bill aimed at abolishing the e-declarations for anti-corruption activists, however Ukrainian Rada did not include it in the agenda for some time now. NGOs believe the bill needs to be further revised, since they may put undue pressure on NGOs from the State Fiscal Service.

Implementation

the *Unified State Register of Declarations of Persons authorized to perform functions of the state, or local self-governments* – electronic asset declarations was launched on 1 September, 2016.¹⁴⁹ The system contains all the declarations received by NACP in an open format except for some data that is left confidential as mentioned above. The launching of the system was split in two stages.¹⁵⁰ The first wave of declarations (from 1 September to 30 October, 2016) included only the "persons holding responsible and especially responsible positions" (art. 50 of the CPL)¹⁵¹ for 2015 for persons in office and those leaving the public service as well as the notifications on substantial changes in assets. The second wave (from 1 January, 2017) included all other employees. For the first wave, NACP estimated that approximately 50 thousand officials would submit the declarations, however, it turned out that the local self-government officials, diplomats, judges, investigators, prosecutors, were not taken into account. Additionally, as there is no registry of civil servants, the exact calculation of the number of public officials subject to asset declarations has never been made.

The system was developed with the support of the UNDP.¹⁵² Its current technical capabilities do not include automatic verification as it is not yet connected to other registries and databases. However, it is planned to add the relevant modules in the future (66 million 200 thousand UAH allocated from the State budget for this purpose). NGOs are advocating that "the NACP should also make technical improvements to the system, as it still fails to meet a number of effective legislative regulations in an electronic form or ensure user-friendliness and continuous performance. In particular, it is necessary to lift unlawful restrictions on access to information. [...] In addition, there should be enough capacities to analyse declarations in automated manner in bulk, while the declarants shall receive electronic digital signatures."¹⁵³ According to the initial idea, automated verification was supposed to be the first stage of the

¹⁴⁸ For CSO participation, anti-corruption activism and the developments restricting them see Chapter 1.

¹⁴⁹ Relevant regulations are provided in the NACP Decision № 3, dated June 10, 2016 registered at the Ministry of Justice of Ukraine on 15 July 2016 No. 959/29089, "On the functioning of the Unified State Register of Declarations of Persons authorized to perform functions of the state, or local self-governments"

¹⁵⁰ In line with the Decision of the NACP No. 2 dated June 10, 2016 "On the launch of the system for submission and disclosure of declarations by public officials who are to function on behalf of the state or local self-governments", registered in the Ministry of Justice of Ukraine on 15 July 2016 under the No. 958/29088.

¹⁵¹ List of positions with the high corrupting risks subject to mandatory full examination of declarations approved by NACP Decision in 2016.

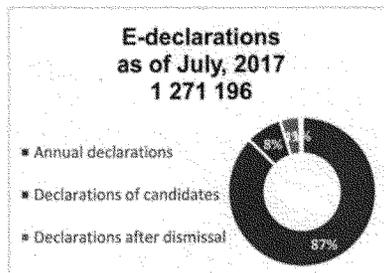
¹⁵² UNDP Ukraine E-Declaration for public servants' assets: public scrutiny to curb corruption?

¹⁵³ RPR statement (2016) It is unacceptable to sabotage introduction of a complete check of e-declarations or monitoring of public officials lifestyle.

full verification process that could filter small amount of declarations with higher corruption risks out of more than 100 000 declarations for full verification. Only the filtered declarations would be verified manually at later stages of the verification process. This approach would make it feasible to conduct full verification, but only in the case if the software of automatic verification is launched.

According to the recent statistics the NACP is conducting full verification of 313 declarations of 244 declarants. 39 checks have already been completed.¹⁵⁴ 4 cases were submitted to the NABU and 4 to the SAPO. Since the beginning of 2017, the NACP received 23 293 notifications on failure to submit declarations (19 229) and late submissions (4064) and more than 6296 declarations have been reviewed.¹⁵⁵ 29 protocols on administrative violations were sent to courts, 4 of them in relation to the late submission of a notice of significant changes in property status and 21 on late submission of declarations.

Figure 7 Asset Declarations



Source: NACP web-site: <https://goo.gl/ojU1sp>

In addition, within the period of eight months of 2017, the National Police of Ukraine have drawn up and sent to the court administrative protocols for: delayed submission of e-declarations – 542; failure to report about substantial change in assets – 158; submission of false information – 8. As a result, the court imposed administrative liability on 290 persons including civil servants, judges and officials of local self-government.

On 28 July 2017, the NACP approved the results of monitoring of declarations of 11 top officials including the Prime Minister, and the cabinet members.¹⁵⁶ According to the decision, no inaccuracies have been found in the declarations of the Prime Minister and the Minister of Agrarian Policy and Food. For the rest, some incomplete information has been identified, however, signs of corruption, illicit enrichment or conflict of interests have not been established. Also, the decision was made to start full verification of 4 declarations (prosecutors, former customs officer) out of 23 requests to conduct full verification by civil society, citizens or the law enforcement.

NGOs created a coalition to monitor declarations called “Declarations under Control”. Civil society organization Lustration Committee maintains a portal allowing citizens to report any irregularities seen in the declarations. According to CSOs, the NACP instead of monitoring public officials “legalized” their illegal income by using the deficient procedure of verifications. The NGOs are strongly advocating for changing the verification procedure as soon as possible.¹⁵⁷

As regards the use of asset declaration system for criminal investigations, the Government informed that as of 1 September 2017, 1133 criminal proceedings were opened on failure to submit e-declarations or false declarations (Art. 366 of the CC), 81 cases were sent to the court. As of the end of June 2017, the NABU detectives were investigating 61 criminal proceedings opened as a result of the analysis of e-declarations

¹⁵⁴ Statistics on e-declarations as of 28 July, 2017 available on the website of NACP [here](#).

¹⁵⁵ The state agencies are obligated to notify NACP about failure to submit asset declarations or late submissions The decision of the NACP No. 19, dated September 06, 2016, registered at the Ministry of Justice of Ukraine on 15 November 2016 by the No. 1479/29609, approved the procedure for verifying the fact of submission of declaration by the subjects of declarations, according to the Law of Ukraine “On prevention of corruption” and “Notification of the NACP about cases of failure or untimely submission of such declarations

¹⁵⁶ 28 July 2017 the NACP approves the results of monitoring of declarations of high officials.

¹⁵⁷ Change of the full verification order is urgently needed, otherwise NACP will legalize the assets of corrupt officials instead of holding them accountable.

on alleged false declarations (Art. 366 of the CC) and illicit enrichment (Art. 368 of the CC), among them 17 Judges¹⁵⁸ 18 MPs, 12 – heads of central executive authorities. The first case where the suspect was recently identified based on the false data in declaration, is of a retired judge, the case is at the pre-trial stage pending decision on the remand measure to be applied.¹⁵⁹ NABU has acquired full access to e-declaration system only in May 2017, after the signature of the MoU with the NACP. As of September 2017, SAPO is supervising 90 related criminal cases. One of the cases that was submitted to the court concerns an alleged illicit enrichment of a high-ranking official in the GPO involving about 2.8 mln UAH illegal assets. Other cases involve high level officials of tax authorities and local government.

Enforcing the asset declarations verification mandate in relation to the high-ranking officials and the submitted cases to NABU is a part of the IMF conditions for Ukraine. The authorities committed to “enforce the filing of comprehensive asset declarations by all high-level officials including managers of SOEs and evaluate the effectiveness of the asset declaration requirements to ensure that they remain appropriately focused on high-level officials and consider amending the categories of officials that will be required to submit asset declarations.”¹⁶⁰

Conclusion

Electronic declaration system is the fundamental anti-corruption measure implemented by Ukraine in recent years. Over 1 271,000 declarations can now be openly accessed, disclosing enormous wealth of the high level public officials. The law enforcement are using the system and have started criminal proceedings based on its data. Since its introduction, civil society, international community and public at large have been mobilised to defend the system from multiple interferences. The turmoil around the e-declarations on the one hand shows how important the system is for the anti-corruption action of the Ukrainian society. On the other hand, it demonstrates the magnitude of opposition and barriers any initiative aimed at revealing the extent of corruption and genuinely fighting it, faces in Ukraine. At the same time, these processes revealed the complete powerlessness of the NACP and inability to efficiently carry out its mandate when it comes to the interference by outside forces.

Now, as the system is operational and is showing its first results in practice, it is important to ensure that it is used for the purposes it was designed for: to hold responsible public officials to account and prevent the illegal practices in the future. For this, it is critical to ensure full and uninterrupted functioning of the system; adopt bylaws that serve the purpose of implementing the primary legislation fully, launch automated verification software, connect the system with the relevant databases to perform this function and allow the NACP to exercise its verification mandate fully and independently.¹⁶¹

Considering the chaos around the massive number of e-declarations and malfunctioning of the system, largely caused by huge number of declarations, it is evident to the monitoring team that the number of the declarants is unreasonably high complicating management of the system by the NACP. It thus recommends Ukraine to focus its verification efforts on the high-level officials that are most exposed to corruption and related violation. Nevertheless, this does by no means suggests decreasing the its public sector transparency standards that Ukraine has set high.

The monitoring team cannot stress enough the importance it attaches to the full enactment and integral application of the system, especially unimpeded and full functioning of its verification component to yield the outcomes for which the system was designed as promised by the Government and long awaited by the Ukrainian society.

¹⁵⁸ [Statistics of the NABU cases](#) based on e-declarations as of 30 June 2017.

¹⁵⁹ First suspect after analysing e-declarations by NABU: news article available [here](#).

¹⁶⁰ International Monetary Fund (IMF) [Country Report \(No. 17/83\) on Ukraine \(2017\)](#), Attachment I. Memorandum of Economic and Financial Policies.

¹⁶¹ EU Delegation statement (2016) (including through a private API).

The latest amendments to the CPL that extended the scope of the declarants to anti-corruption activists are worrying as they depart from the purpose of the asset declaration system and can serve as a tool to discourage and intimidate anti-corruption activism in Ukraine. These amendments should be ultimately abolished.

New Recommendation 12: Asset Declarations

1. **Ensure integrity, full and unimpeded functioning of the electronic asset declaration system allowing timely submission of asset declarations, disclosure of asset declarations, including in open data format. Ensure that any exceptions for disclosure are directly envisaged by the CPL.**
2. **Amend verification procedure to address its shortcomings, adopt the lifestyle monitoring regulation, ensure automated verifications of asset declarations by the NACP and implement data exchange between the asset declarations system and state databases to support automated verification.**
3. **Ensure that the actions are taken proactively on the alleged violations disclosed through the e-declaration system and that cases with the signs of criminal activity are dully referred to the law enforcement for the follow up.**
4. **Ensure that verification is carried out systematically and without improper outside interference with the focus on high-level officials.**
5. **Abolish amendments subjecting a broad range of persons that are not public sector employees (i.e. members of NGOs, activists, experts) to asset disclosure requirements.**
6. **Ensure that the NABU has direct access to the asset declaration database in line with the Article 17 of the Law on NABU and is able to use it for the effective execution of its functions.**

Reporting and whistleblowing

The legal basis for corruption reporting and whistleblower protection is provided by CPL Art. 53. Having analysed applicable legal framework, the previous report concluded that while Ukraine has a proper legal framework for whistleblower protection, no training and guidance is available for its implementation in practice.¹⁶² It was recommended to enforce the existing rules and consider adoption of a stand-alone law to cover both public and private sector whistleblowing.

According to the data of 2016 Global Corruption Barometer, in Ukraine, only 58% of the respondents are ready to report corruption, which however is a positive increase as compared to 26% in 2013. 16% are certain that a notification on bribery will change nothing, and 14% are afraid of the consequences of reporting.¹⁶³

The CPL (Art. 53) provides for reporting the violations stipulated in [this] law or information related to prevention and fighting corruption to the NACP. The protection of these persons falls under the mandate of

¹⁶² Article 53 of the CPL; Article 11 of the Law of Ukraine on Access to Public Information. See [OECD/ACN Third Round of Monitoring Report on Ukraine](#), pages 113–114.

¹⁶³ [Global Corruption Barometer](#), Europe and Central Asia (2016).

the NACP, which can intervene in administrative or civil proceedings to represent a whistleblower.¹⁶⁴ Furthermore, the NACP is responsible for raising awareness to promote whistleblowing.

To start implementing these regulations in practice, the NACP drafted the relevant rules of procedure, however, they are not adopted yet.¹⁶⁵ In addition, the NACP introduced a special phone-line and an electronic notification form on its web-site. Online notification about corruption can be submitted by filling in several pre-determined fields and providing additional information or attachments.¹⁶⁶ The NACP has also conducted trainings for its staff and plans further activities with the donor support to increase capacity of the employees working in this area.¹⁶⁷ As a result of the first steps in implementation, in 2016-2017, the NACP received 860 reports on corruption-related offences, among them 292 were anonymous. Among these reports, 316 have been found ungrounded, 106 reports have been verified but the information was found inaccurate. 195 reports were sent to the National Police of Ukraine for the mere reason that the NACP has had no its territory divisions yet; 35 reports resulted in 70 Protocols on Administrative Offence filed that were brought to court and, eventually, UAH 34 000 (approximately EUR 1 300) was charged as penalty; and currently 208 reports are being processed by the NACP.

TI Ukraine actively supports the work of incentivizing reporting, increasing capacity of NACP and is receiving reports from whistleblowers, similarly to TI national chapters in other countries. A campaign: "It Is Not Shameful to Whistleblow" covering 400 000 people¹⁶⁸ and a training of NACP staff on how to protect whistleblowers has been carried out in 2016. The reports on corruption (168 in total) have been submitted to the relevant authorities for further action.

However, several CSOs consider the progress of the NACP in relation to whistle-blower protection insufficient. During the on-site visit, NGOs raised concerns regarding the inefficiency of the NACP in implementing its mandate, referring to the concrete cases when NACP, despite having the power to interfere in court proceedings, refused to do so. Furthermore, CSOs strongly advocate for reinforcing legislative protection of whistle blowers, since according to them the existing provisions are declaratory and detailed procedural rules are needed to enforce them in practice. Analysing international practice of reward system for whistle-blowers and implementing it in Ukraine to incentivise whistleblowing are also recommended.¹⁶⁹

In 2016, a group of eight lawyers together with the twenty-three MPs prepared a comprehensive stand-alone whistle-blower protection draft law and submitted it to the Parliament.¹⁷⁰ The draft is now in the Parliament for consideration in various committees. During the on-site NACP representatives informed that the agency is not supporting the adoption of a new, stand-alone law since, in its view, firstly, the provisions in force are sufficient for implementation and secondly, reopening the issue for discussion and consideration may do more harm than good to the legal system of whistle-blower protection in Ukraine. The monitoring team was also informed that NACP provided its negative conclusion on the draft mainly due to the declarative nature of its provisions and expansion of the powers of the Ombudsman in relation to the whistleblowers.

¹⁶⁴ For the detailed description of the functions of the NACP see Chapter 1 of this report.

¹⁶⁵ Rules for Processing Signals on Corruption and Methodical Recommendations for Organization of Processing of Signals about Facts of Corruption Offences Disclosed by Whistleblowers.

¹⁶⁶ [Electronic whistleblowing form](#) is available on the NACP website.

¹⁶⁷ The Joint Action plan of Agriteam Canada Consulting Ltd. and the NACP approved by the Decision of the NACP No. 168 on 22 December 2016 includes supporting training on and other measures for enhanced whistleblower protection. See the [news article](#) on the NACP website.

¹⁶⁸ Transparency International Ukraine, [2016 Annual Report](#).

¹⁶⁹ Shadow Report (2017) "[Evaluating the Effectiveness of State Anti-Corruption Policy Implementation](#)", pages 16, 18 and 27.

¹⁷⁰ See Oksana Nesterenko, Olena Shostko (ed.), (2016) [Whistleblower Protection](#), Kharkiv, Human Rights Publisher. The publication contains the draft law in English on pages 17-45.

The monitoring team welcomes the development of a stand-alone draft law as recommended by the previous report. The draft is ambitious and fairly comprehensive, generally in line with the relevant international standards and good practices. It covers public and private sectors (public authorities, state-owned enterprises and legal entities corresponding defined criteria), provides for various reporting channels and defines what can be reported, extending the scope beyond the corruption offences. The detailed procedure for reviewing whistleblower reports is also envisaged. The significant part is dedicated to the protection, including some of the new measures, right to compensation and financial awards.

Nevertheless, the monitoring team believes, that when discussing the draft in the Parliament, it is important to consider whether sufficient regulations have been included to secure the enforcement in practice. For instance, how restoration of violated rights and immediate reinstatement (draft Art. 12) will be provided or how the compensation of the caused damage (draft Art. 14) will be ensured and what is the role of the executive *vis-à-vis* the courts in this process. It is also important to ensure a working mechanism of establishing a causal link between the whistleblowing and the action taken against the whistleblower. Furthermore, the implementation of this law will require significant financial resources. Thus, noting these and other potential implementation challenges, the monitoring team encourages Ukraine to further analyse and discuss the draft law together with its authors and competent authorities and invites Ukraine to take into account in this process the [Council of Europe CM/Rec\(2014\)7 recommendation “Protection of Whistleblowers”](#) and the growing good practices of stand-alone whistleblower protection laws.¹⁷¹

Conclusion

The CPL provides regulations for protecting whistle-blowers disclosing corruption. The number of reports received so far represents a good start showing the willingness of the public to cooperate with the NACP. Introducing clear reporting channels and online anonymous reporting by the NACP is a welcome development. However, challenges have been noted in ensuring protection in practice (some instances of not intervening in court proceeding and not providing protection were noted by NGOs). Nevertheless, given the short track record since its establishment, it is difficult to judge the NACP’s performance in this respect. The practice is not ripe yet to give grounds for definite conclusions. The trends in whistleblower reports in the coming years and criminal/administrative cases based on these reports would be good indicators to assess the efficiency of the work done in this area in the future.

While introducing stronger regulations reflecting international standards and good practices is encouraged (to cover both private and public sector, provide for financial reward, etc.),¹⁷² practical measures to increase awareness and incentivize reporting, provide efficient reporting channels and protection for whistle-blowers that are subject to retaliation are no less necessary.

The monitoring team recommends Ukraine set fourth clear procedures for receiving and reviewing whistleblower reports and protecting whistle-blower in case of retaliation for reporting. Further, it encourages the NACP to promptly investigate the reports, follow up on the information received from whistle-blowers and provide needed protection to promote reporting. Also, negative stereotypes around whistleblowing need to be tackled further with the information campaigns. More importantly, in order for the whistleblowing to increase, the NACP should be seen as an objective and reliable ally to provide information to and receive protection from.

New Recommendation 13: Reporting and Whistleblowing

1. **Ensure clear procedures for submitting, reviewing and following up on whistleblower reports and providing protection. Further train the responsible staff.**
2. **Raise public awareness on whistleblowing channels and protection mechanism to**

¹⁷¹ Over the last four years such laws were adopted in Belgium, Ireland, Slovakia, Netherlands, France and Sweden, and was approved by the Cabinet of Ministers and is in the Parliament in Latvia.

¹⁷² OECD (2016) [Committing to Effective Whistleblower Protection](#).

incentivize reporting.

- 3. Consider adoption of a stand-alone law on whistleblower protection in line with international standards and good practices.**

Ukraine is **partially compliant** with the recommendation 3.2 of the previous monitoring round.

2.2. Integrity of political public officials

Public trust to the political public officials in Ukraine is minimal. There is a wide belief that the officials are obstructing and undermining the implementation of progressive reforms to protect their businesses and personal interests, and continue corrupt practices in peace.¹⁷³ Among the most often cited instances are the launch of the asset declaration system and the recent attacks on the anti-corruption activists as described in the previous chapters.

A former investigative journalist and the current MP calls the Ukrainian Parliament “the largest business club in Europe” where it is “considered normal” to combine the parliament membership and businesses and that this is openly discussed by MPs in the premises of the Parliament.¹⁷⁴ According to the national survey results (2015), perceived corruption in the government has increased compared to 2011. Corruption is perceived to be highest in Verkhovna Rada (60.6%); Cabinet of Ministers (54.8%); the President and his administration (46.4%).¹⁷⁵

Recently published asset declarations of political officials brought to the surface immense wealth and enormous assets of the governing elite, giving reasonable grounds to allege integrity violations.¹⁷⁶ Civil society closely followed and aggressively exposed the alleged violations referring them to the NACP. Against this background, the enforcement of the regulations and the follow up on the allegations has been inadequate. The following section describes the integrity rules applicable to the public political officials and challenges related to their enforcement in the current context of Ukraine.

The information received by the monitoring team in relation to this section both in the form of the answers to the questionnaire and the on-site visit was limited. The monitoring team did not have an opportunity to meet the representatives who would provide responses to its questions to fill in information gaps either. Thus, the section is based on the analysis of legislation and information obtained through the research in open sources.

Applicable integrity rules

There is no statutory definition of a political official or the list of political officials as such in the legislation of Ukraine.¹⁷⁷ Yet, Art. 3.3 the CSL lists the persons to whom the law does not apply, including political officials and article 3 of the CPL lists the positions to whom it applies, among them, the political officials.¹⁷⁸ Art. 50 of the CPL prescribing special full verification procedure of declarations, includes the list of “responsible and especially responsible” persons, among them political officials of all levels. Thus, the integrity rules provided by the CPL extend to the political officials, including members of parliament and local authorities. These rules comprise, as described above, conflict of interest prevention, gifts, declarations of interests, restrictions and ethical conduct (Art. 37–44). State authorities and local self-government may develop their own codes of conduct according to the CPL (Art. 37), for more specific

¹⁷³ See, *inter alia*, Sergii Leshchenko (2017) *Corruption Inc.*; GRECO (2017) fourth evaluation round report on Ukraine.

¹⁷⁴ Sergii Leshchenko (2017) *Corruption Inc.*

¹⁷⁵ See Kyiv International Institution of Sociology (2015) Corruption in Ukraine, Comparative Analysis of National Surveys: 2007, 2009, 2011, and 2015.

¹⁷⁶ Kleptocracy Initiative (2016) Luxuries and Loopholes: Ukraine’s New Asset Declaration Law.

¹⁷⁷ Art. 9.5 of the Law on Central Executive Authorities defines first deputy minister and deputy ministers as “political positions” similarly to Art. 6.3 of the Law on Cabinet of Ministers of Ukraine for Government members.

¹⁷⁸ Article 3 lists the subjects of the law including: the President of Ukraine, the Chairman of the Verkhovna Rada of Ukraine, his First Deputy and Deputy, Prime Minister of Ukraine, First Deputy Prime Minister of Ukraine, Vice Prime Minister of Ukraine, ministers, the Head of the Security Service of Ukraine, the Prosecutor General of Ukraine, the Head of the National Bank of Ukraine, the Head and other members of the Accounting Chamber of Ukraine, Verkhovna Rada’s Commissioner for Human Rights, Chairman of the Verkhovna Rada of the Autonomous Republic of Crimea, the President of the Council of Ministers ARC and others.

integrity regulations. No such code of conduct has been yet adopted in relation to the MPs or other political officials.

European Parliament Needs Assessment to the Verkhovna Rada of Ukraine recommended to develop a code of conduct for the members of parliament as a matter of priority through an inclusive and transparent process. OSCE/ODIHR has been supporting the work on parliamentary ethics and public integrity since 2013 together with the USAID/RADA Programme.¹⁷⁹ A group of Ukrainian MPs announced their intent to set up a working group that will draft a Code of Ethics for the Verkhovna Rada.¹⁸⁰ In the view of the monitoring team, the development and implementation of a separate code of conduct for MPs is especially important in the Ukrainian context in view of the low level of trust and high level of perceived corruption in Verkhovna Rada of Ukraine.

The Law on the Status of People's Deputy of Ukraine provides some integrity rules and its implementation is entrusted to the Parliamentary Rules and Procedures Committee. However, no information was provided as to its actual implementation. Based on the information collected by the monitoring team, there seems to be no meaningful follow up to the violations of these provisions.

Enforcement of integrity rules

The supervision and enforcement of the integrity rules for the entire public service and among them political officials are entrusted to the NACP.¹⁸¹ This includes the enforcement of conflict of interest regulations, providing guidance and consultations, as well as control and verification of asset declarations.

While the asset disclosure rules are the same for political officials as for all other declarants, special rules of verification apply for "responsible and particularly responsible positions" (as listed in the note of Art. 50 of the CPL) and the positions associated with a high level of corruption risk (list was approved by NACP in 2016¹⁸²). The asset declarations of these persons are subject to mandatory full verification (Art. 50 of the CPL).¹⁸³ The list of responsible positions is extensive covering highest positions in the state among them the President, Prime Minister, ministers, and deputy ministers and all high political positions.¹⁸⁴

During the onsite visit the NACP confirmed the scope of the political public officials, however it could not provide the exact numbers for this category. The representatives informed that there have not been any specific trainings or consultations on conflict of interest and ethics to the public political officials specifically. Neither there have been any official surveys conducted as regards the trust to the political officials. NACP emphasized that all political public officials should comply with the ethical behaviour as provided in Chapter 6 of the CPL, and NACP remains available for organising trainings and providing guidance (Art. 28 the CPL) as needs emerge.

The monitoring team, however, considers that the oversight and enforcement of the conflict of interests and integrity rules as they stand now are currently unsatisfactory both by the NACP and by respective parliamentary committee mentioned above. The NACP has not paid a particular attention to providing training, guidance or consultations to public political officials, even though this group is especially vulnerable to corruption and the impact of violations committed by them on the public good is significant. Whereas the mandate and the tools in the hands of the NACP in terms of conflict of interest and ethical

¹⁷⁹ See OSCE/ODIHR event in Kyiv stresses importance of adopting code of conduct for Ukraine parliamentarians.

¹⁸⁰ See International Conference on Parliamentary Ethics: Ukrainian MPs to Develop Own Code of Conduct (2016)

¹⁸¹ The mandate of the NACP is spelled out in Chapter 1 and section 2.1 of the report.

¹⁸² List of positions with the high corrupting risks subject to mandatory full examination of declarations approved by the NACP Decision in 2016.

¹⁸³ Notion of control and verification of asset declarations are explained in section 2.1. of the report.

¹⁸⁴ As to the civil service positions the note prescribes that all positions belonging to A and B category are also covered.

rules enforcement over the political officials may still be insufficient, there is at least one tool, which could be successfully used for identifying and following up on integrity violations by political officials. This is the electronic asset declarations system with the special procedure for full verification of declarations of political public officials.

The authorities explained that despite difficulties to launch the asset declaration systems and adopt the relevant regulations to verify them, the NACP is already actively engaged in supervising implementation of these rules, *inter alia*, by investigating potential violations by MPs and high officials, on the basis of the information received from NGOs, but they could not provide the details of the results of such investigations.

However, CSOs met during the on-site widely believe that the NACP is failing to enforce its mandate over the high level officials in Ukraine and that it is selective and biased in its investigations of integrity violations in the absence of the objective asset declaration verification procedure. One NGO, for example, informed about 20 notifications of alleged serious violations and potentially criminal offences by public officials they have sent to the NACP, that the agency failed to check. By contrast, NACP started investigation of the alleged misconduct of an MP as he received 9000 UAH (300 EUR) from the NGO Anti-Corruption Centre (AntAC) for developing anti-corruption course for students of Kyiv-Mohyla academy.¹⁸⁵ According to the information available in the open sources, Ukrainian Prosecutor General's Office have processed e-declarations and also sent materials concerning 53 MPs to the National Agency on Corruption Prevention (NACP) for further action.¹⁸⁶

On 28 July 2017, the NACP approved the results of monitoring of declarations of 11 top officials including the Prime Minister, and the cabinet members.¹⁸⁷ According to the decision, no inaccuracies have been found in the declarations of the Prime Minister and the Minister of Agrarian Policy and Food. For the rest, some incomplete information has been identified, however, signs of corruption, illicit enrichment or conflict of interests have not been established. The NACP made decision to carry out 181 full verifications of declarations and refused to do so in case of 156 requests to conduct full verification by civil society, citizens or the law enforcement. According to CSOs, with the new verification procedure, however, the NACP instead of monitoring public officials "legalized" their illegal income (for more details see the section on asset declaration above).¹⁸⁸ It was also noted that some agencies do not cooperate and provide information necessary for full verification. These data, in conjunction with the recently approved deficient verification procedure raise serious doubts as to the impartial and unbiased application of its mandate by NACP with regard to the political officials.

The NABU is currently investigating cases in relation to 18 MPs on alleged false declarations (Art. 366 of the CC) and illicit enrichment (Art. 368 of the CC), as a result of the analysis of e-declarations. The recent "amber mafia" case shows how MPs use their legislative powers for private gain. A foreign company allegedly provided the advantage in the amount more than 300 thousand USD to the persons closely related to the Members of Parliament¹⁸⁹ to prepare draft laws and unlawfully influence officials of the State Service of Ukraine for Geodesy, Cartography and Cadastre, the State Forestry Agency, the State Service of Geology and Mineral Resources of Ukraine, local self-government bodies, the courts and the Prosecutor's offices to take decisions favourable to this company. Out of 7 detained, 6 are closely affiliated with the MPs and 2 MPs have allegedly participated. More than 100 kg of amber, firearms, ammunition, computer equipment, drafts and copies of documents containing information about the crime were seized. The case is

¹⁸⁵ National Agency on Corruption Prevention is looking for illegal secondary employment in teaching activities of Serhiv Leshchenko.

¹⁸⁶ Ukrainian GPO sends materials on 53 MPs' e-declarations to NACP

¹⁸⁷ The NACP approves results of inspections.

¹⁸⁸ Change of the full verification order is urgently needed, otherwise NACP will legalize the assets of corrupt officials instead of holding them accountable.

¹⁸⁹ NABU and SAPO detained and gave notices of suspicion to accomplices of the so-called "amber mafia". Two MPs allegedly affiliated.

now on the pre-trial stage. SAPO requested the lifting of immunities of 2 MPs which was partially granted by Verkhovna Rada. The Parliament approved the filing of charges but not the arrest of the MPs. The Rules of Procedure Committee of the Parliament did not support most of the requests for lifting immunity and was heavily criticized for this by the CSOs. Reportedly, the acting chair of the committee was later seen having lunch with one of the MPs whose immunity the committee refused to lift, shortly after the decision was taken.

Conclusion

Integrity of MPs and other political officials is a concern in Ukraine. There is a wide and strong public perception of high level of corruption among the politicians. The CPL applies to political officials including high level and local government. Supervision and control is entrusted to the NACP, but there is a wide distrust to this agency as to the impartiality and unbiased implementation of its mandate. While measures still are pending to render the system of verification of asset declarations and lifestyle monitoring operational, it is clear, that so far NACP has been after “a small fish” leaving corrupt politicians and public officials untouched. NACP has not taken adequate measures in response to the recently disclosed millions of cash and significant assets of high officials, that left public in shock.¹⁹⁰

While some integrity rules are provided in the CPL, a separate ethics code for parliamentarians is needed with the necessary training and guidance for its application. It is also important to clarify the oversight mandate of the NACP vis-a-vis the Parliamentary Committee of Rules and Procedure and how the awareness, training consultations and guidance are provided to the MPs. Moreover, it is crucial that the NACP starts exercising its powers related to monitoring the enforcement of the conflict of interest rules and verification of asset declarations fully and objectively in relation to this category.

New Recommendation 14: Integrity of Political Officials

- 1. Provide training, awareness raising and guidance on applicable integrity rules to the political officials.**
- 2. Proceed with the development and adoption of the parliamentary ethics code. Provide trainings, consultations and guidance for its application in practice, once adopted.**
- 3. Clarify responsibilities and mandates for enforcement of integrity rules by parliamentarians, including in relation to the conflict of interest, ethical conduct and consequences of their violation. Ensure independent and objective monitoring and enforcement.**
- 4. Provide for systematic objective scrutiny of declarations of political officials and the subsequent follow up as provided by law.**

¹⁹⁰ See, inter alia: [Assets On Parade: Ukraine Officials Made To Declare Their Bling](#).

2.3. Integrity in the judiciary and public prosecution service

Judiciary

Recommendation 3.8. from the Third Monitoring Round report on Ukraine:

- Adopt, without further delay, a constitutional reform to bring provisions on the judiciary in line with European standards and recommendations of the Venice Commission, in particular with regard to appointment and dismissal of judges, their life tenure, composition of the High Council of Justice.
- Introduce comprehensive changes in the legislation on the judiciary and status of judges, procedural legislation in particular to revise provisions on the system of judicial self-governance, disciplinary proceedings, dismissal and recusal of judges to guarantee their impartiality and protection of judicial independence.
- Ensure sufficient and transparent funding of the judiciary and remuneration of judges that is commensurate to their role and reduces corruption risks.
- Make public on Internet all court decisions, including interim ones.
- Review system of automated distribution of cases among judges to remove loopholes that allow manipulating the system and ensure that results of automated distribution are public and included in the case-file. Introduce ICT tools in the judicial procedures and court functioning (e.g. electronic filing of lawsuits and other legal documents).

Since the adoption of the 3rd round IAP monitoring report many developments took place in the area of judicial reform in Ukraine.

In May 2015 the Strategy on Reform of the Judiciary, Justice and other Related Legal Institutes for 2015-2020 (the Strategy) was adopted by the Presidential Decree # 276/2015. The strategy was envisioned in two stages: first stage would introduce general legislative changes and the second stage would commence with adoption of the constitutional changes and will proceed to setting up of the institutional framework in line with the new legal framework. According to the Ukrainian authorities, Ukraine is currently at the second stage of the Strategy implementation.

On 2 June 2016, Ukraine's parliament approved a package of constitutional amendments reforming the justice system¹⁹¹ and the Law on the judiciary and the status of judges¹⁹², which came into force on 30 September 2016. In addition the Law on the High Council of Justice¹⁹³ was adopted on 21 December 2016 and entered into force on 5 January 2017. Effectively the entire legislative framework of the judiciary was revised and will need to be put into practice.

New legislation simplified the court system, transforming it from the four into the three-level system. It now consists of local courts, appellate courts, and the Supreme Court, which in effect shortened the court time for the hearings. However, in order for these to be properly implemented draft law 6232, introducing amendments into the Civil Procedure Code, Commercial Procedure Code, Code of Administrative justice, changes into the Criminal Procedure Code, would need to be adopted.

¹⁹¹ Law On Amendments to the Constitution of Ukraine (provisions on justice) # 1401-VIII

¹⁹² Law On Judiciary and Judges Status # 1402-VIII

¹⁹³ Even though amendments into Constitution use the new term which is the closest in translation to "High Council of Judiciary" the monitoring report uses the term "High Council of Justice" to keep the same name as GRECO is using in its latest report.

These legislative changes addressed many elements of the Recommendation 3.8 adopted for Ukraine in the 3rd round of IAP monitoring. The reform brought forward various other positive changes that have not been directly recommended but were discussed in the previous report. In particular, the authority of the Prosecutor General's Office was reduced and access to the Constitutional Court of Ukraine was significantly expanded to include all individuals and companies.

This being said, the implementation of these laws will be the actual test of the introduced changes, and this is the most challenging task ahead of Ukraine.

And finally despite these good developments there are still some issues remaining and emerging from the latest legislative changes. Some of them are discussed in this section of the report.

Adopt, without further delay, a constitutional reform to bring provisions on the judiciary in line with European standards and recommendations of the Venice Commission, in particular with regard to appointment and dismissal of judges, their life tenure, and composition of the High Council of Justice.

This part of the recommendation was pending from the 2nd round of monitoring and was reiterated in the 3rd. Ukraine was prompted by various international organisations to take this step. Therefore, Ukraine is commenced on finally moving forward with the constitutional reform.

Constitutional amendments changed the judicial appointment procedure: all judges are now appointed by the President upon a binding submission of the High Council of Justice following a competitive selection.¹⁹⁴ In addition, various procedural steps, including eligibility assessment, special verification procedure and qualification assessment are regulated in detail in the legislation. Professional ethics and integrity, along with the candidate's competence, are now among decisive criteria in selection process.

Decisions on judicial dismissal have also to be approved by the High Council of Justice.

The time limit on judicial tenure has been abolished. All judges are now to be appointed for life with no probationary appointment. However in practice judges that have been on their 5 years' probation term at the time of the adoption of the law get their mandates terminated when that period lapses and have to be appointed following the procedure described in the Transitional Provisions of the Constitution of Ukraine.

During the on-site visit, the monitoring team has learnt that many judges are finding themselves in the position when they are still in office with their "re-appointment" pending, rendering their judicial posts and their decisions ineffective. Representatives of the judiciary met at the on-site visit estimated that there are approximately 781 judges whose probation term expired by the time of the law entering into force. As of 28 August 2017 the decisions in regards to their "re-appointment" were taken only in regards to 137 judges with many of these files being postponed for a long time. The monitoring team was further informed that 13 courts have become ineffective because the probation term of the judges ran out. Member of the judiciary met at the on-site visit shared serious concerns over this situation; the monitoring team is also highly concerned, and believes that this should be rectified without further delay.

Composition of the High Council of Justice has been changed to 21 members, the majority of which will now be judges elected by their peers, which is in line with European standards. The President and the Parliament still take part in the forming of the composition of the High Council of Justice (appointing two members each). Two members will also be appointed by each - the Congress of Advocates of Ukraine, the Congress of Prosecutors and the Congress of representatives of the legal higher education and scientific institutions. Congress of judges of Ukraine will appoint ten members, who must be serving or former judges and the only ex-officio member of the High Council of Justice will be the President of the Supreme Court, both the Minister of Justice and the Prosecutor General will no longer be part of this body. The members will be appointed for the four year term and cannot serve consecutive terms. The High Council of Justice will become operational with the minimum of 15 members, the majority of which should be judges. However, Civil Society representatives are critical of this approach. Taking into account the situation in

¹⁹⁴ For detailed description of the selection procedure see Fourth Evaluation Round Report on Ukraine, adopted by GRECO at its 76th Plenary Meeting on 23 June 2017 (pp. 38-40)

Ukraine, selection procedure for High Council of Justice and High Qualifications Commission should include safeguards to ensure high level of qualification and integrity of candidates for these positions.

In addition to legislative deficiencies that translated into the Recommendation 3.8, the 3rd round of monitoring discussed practical challenges that related to the impact of the Law on Restoration of Trust. The law terminated the offices of all members of the High Council of Justice and previous members were no longer allowed to take up these positions. This rendered the High Council of Justice inactive: by the time of the adoption of the report only 7 members out of 20 were in the High Council of Justice. High Qualifications Commission, in addition to its very high workload, was also ineffective for almost the whole of 2014. Such situation was found to be unacceptable.

Since then, before adoption of the judicial reform new composition of the High Council of Justice was appointed in April-May 2015. On 4 June 2015 it became effective with 17 members in the office. This High Council of Justice continues to operate now. According to the Constitutional amendments, the serving members of the High Council of Justice can hold their posts until 30 April 2019, by which point appointment of the new composition has to take place.

The 3rd round of monitoring recommendation 3.8 referred specifically to the need of aligning the changes to the recommendations of the Venice Commission. At the time of the report the latest opinion dated back to 2014. Since then the Venice Commission produced another assessment relevant to this issue¹⁹⁵. The only new Venice Commission recommendation, which relates directly to this part of Recommendation 3.8, and which was not followed, regards the election of two members of the High Council of Justice by the Parliament and prescribes that it should be done by qualified majority.

In its latest Report on Ukraine¹⁹⁶ GRECO confirms that the 2016 constitutional reform benefited from the expertise of the Venice Commission to a large extent. It also underlines that the adopted Law on the Judiciary and the status of judges has not been reviewed by any Council of Europe body yet. PACE also calls Ukraine on seeking the opinion of the Venice Commission on the Law on the High Council of Justice with the view to implement its recommendations.¹⁹⁷ The monitoring team strongly believes that this should be done.

All of these positive legislative changes can only be definitively assessed once they are tried out in practice. However, in terms of the requirements under this part of the Recommendation they are considered to be largely implemented.

Introduce comprehensive changes in the legislation on the judiciary and status of judges, procedural legislation in particular to revise provisions on the system of judicial self-governance, disciplinary proceedings, dismissal and recusal of judges to guarantee their impartiality and protection of judicial independence.

Similarly, this part of the Recommendation 3.8 mostly reiterates an even earlier recommendation given to Ukraine in the 2nd round of IAP monitoring. Therefore, comprehensive changes into the legislation on the judiciary and status of judges which indisputably took place in Ukraine, with adoption of the Law on the judiciary and the status of judges, as well as the Law on the High Council of Justice are welcomed.

System of judicial self-governance

¹⁹⁵ Secretariat Memorandum on the compatibility of the Draft Law of Ukraine on amending the Constitution of Ukraine as to Justice as submitted by the President to the Verkhovna Rada on 25 November 2015 (CDL-REF(2015)047) with the Venice Commission's Opinion on the proposed amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015 (CDL-AD(2015)027), Opinion no. 803/2015 available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)043-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)043-e)

¹⁹⁶ Fourth Evaluation Round Report on Ukraine, adopted by GRECO at its 76th Plenary Meeting on 23 June 2017.

¹⁹⁷ Resolution 2145(2017) of the Parliamentary Assembly of the Council of Europe (PACE) and its Explanatory memorandum.

With regards to the issue of judicial self-governance, the system now has the following structure:

- The Congress of Judges is the supreme body of the judicial self-governance.
- The Council of Judges is responsible for ensuring that the decisions of the Congress of Judges are implemented.
- The High Council of Justice is responsible for appointment and dismissal of judges, supervision of the incompatibility requirements on judges and for all disciplinary proceedings. It also gives consent on detention and taking in custody of the judges and decides on the transfer of judges to other courts.
- The High Qualifications Commission of Judges has tasks relevant to the appointment procedure and the qualifications examination of judges. It is still responsible for completing disciplinary procedures which were launched before the adoption of this law.
- The State Court Administration is a state body accountable to the High Council of Justice. It provides organisational and financial support to the judiciary.

The role of the judicial self-governance bodies has been strengthened, as well as the procedures in which they are being established and function.

In particular, decisions of the Congress of Judges are now binding on other bodies of the judicial self-governance and on all judges. Delegates of all courts are elected at the meetings of judges and compose this body. It elects justices of the Constitutional Court, as well as members of all other bodies of judicial self-governance.

The Council of Judges has representation of judges of different court levels.

The improvements into the composition of the High Council of Justice have been already discussed above. Additionally, the members of the High Council of Justice now work on the permanent basis (apart from the President of the Supreme Court) and just like the members of the High Qualifications Commission of Judges, are subject to strict rules on incompatibilities. This change addresses one of the deficiencies highlighted in the previous round of monitoring and pointed out in the opinion of the Venice Commission and the ECtHR judgement. The High Council of Justice is now endowed with broad powers for most matters concerning the status of judges as well as the organisation and the functioning of judicial institutions.

The functions of the High Qualifications Commission of Judges in regards to the disciplinary proceedings have been transferred to the High Council of Justice. This is a positive step in line with the recommendation of the Venice Commission, which in 2013 opined that there is no need for two bodies such as the High Council of Justice and the High Qualifications Commission of Judges. However more is needed in this regard. Due to the continued existence of these two bodies the institutional set-up even for the judicial appointment remains to be over-complicated and the monitoring team agrees with the opinion of the Venice Commission that was also reiterated by GRECO that “ideally, in order to ensure a coherent approach to judicial careers, the High Qualifications Commission should become part of the High Council of Justice, possibly as a chamber in charge of the selection of candidates for judicial positions.”¹⁹⁸

Disciplinary proceedings

Various concerns in regards to the disciplining of judges have been raised in the 3rd round of IAP monitoring. They called for:

- clear and established in the law grounds for liability that would be in line with legal certainty requirements and proportionate sanctions;
- disciplinary proceedings complying with fair trial guarantees by (a) separation of functions of initiating disciplinary proceedings and conducting investigation and taking decision on the case and (b) giving judges means to appeal (this concerned in particular the judges of the Supreme Court and higher specialised courts).

¹⁹⁸ Opinion of the Venice Commission CDL-AD(2015)026 and its Opinion CDLAD(2013)034.

In respect to the first point, the adopted Law on the judiciary and the status of judges contains the full list of disciplinary misconduct that results in disciplinary liability.¹⁹⁹ However, as pointed out in the latest GRECO report “references to some imprecise concepts such as “conduct which disgraces the status of judge or undermines the authority of justice” and “compliance with other norms of judicial ethics and standards of conduct which ensure public trust in court” have still been maintained. Venice Commission continuously criticised Ukraine for such approach²⁰⁰, and the 3rd round IAP monitoring report highlighted this issue when providing grounds for Recommendation 3.8. This important issue therefore remains pending for Ukraine.

On the positive side, with the judicial reform of 2016 the appropriate scale of sanctions can be selected with respect for the principle of proportionality. Dismissal of the judge can be made in the clearly defined cases (if the judge violated the duty to prove the legality of the sources of his/her assets, or if s/he committed a substantial disciplinary offence, gross or systematic neglect of duties which is incompatible with the status of the judge or which has revealed his/her incompatibility with the office)²⁰¹. The use of the “breach of oath” as ground for dismissal has been done away with.

In regards to the second point, the rules on disciplinary proceedings have been fully revamped by the judicial reform of 2016. Most of the deficiencies pointed out in the 3rd round of IAP monitoring have been addressed, at least to some extent.

Namely, the disciplining functions have been all transferred to the High Council of Justice, where disciplinary chambers are being established. These chambers are composed of at least four members of the High Council of Justice, the majority of which should be serving or retired judges.

Disciplinary proceedings are conducted according to the procedure defined in the Law On the Judiciary and the Status of Judges. They include preliminary review of the complaint by the member of the High Council of Justice (*rappporteur*), opening of the disciplinary case by the disciplinary chamber, the hearing of the complaint and adoption of the decision. The decisions are adopted by simple majority; decisions on dismissal of a judge are taken in full session of the High Council of Justice upon recommendation from the disciplinary chamber.

Disciplinary decision may be challenged by the judge to the High Council of Justice. However, the complainant can only do so if the disciplinary chamber grants him/her permission for that, this appears to be restrictive considering that no further details are provided on such situations. The members of the relevant disciplinary chamber do not participate in the consideration of the appeal. The decisions on the appeal can be appealed to court (but only on certain procedural grounds).

Statistics on the disciplinary liability of judges in 2015 and 2016 was not made available. It was only communicated that complaints against 3 judges were made to the High Qualifications Commission of Judges. According to the answer to the questionnaire provided by Ukraine, information about sanctions applied to judges for violations of all forms is being published on the official websites of the High Qualifications Commission of Judges and High Council of Justice from January 2017. From the look at the website of the High Council of Justice, it appears that as of 11 August there were 47 entries made. Ukraine is commended on such steps towards transparency, however, since the information on the website is not generalized and is in the Ukrainian language the monitoring team could not properly analyse it in more depth.

¹⁹⁹ Article 106.

²⁰⁰ Opinion of the Venice Commission CDL-AD(2015)007.

²⁰¹ Article 126 of the Constitution of Ukraine, Article 109 of the Law on the judiciary and the status of judges.

Ukraine is commended on addressing two more issues that were covered in the 3rd round report. Namely, the information on disciplining of judges is now being published on the website of the court where the judge is working, in addition to the website of the High Council of Justice. And statute of limitation for disciplinary liability of judges was introduced; it constitutes 3 years. These are welcome steps.

Again, it will be important now to see how all of the introduced changes work in practice and what elements would require adjustment.

Dismissal of judges

Different procedure is followed for the decisions on the dismissal of the judge. These decisions are within the preview of the High Council of Justice and can be appealed directly to court. The grounds for the dismissal now include failure to exercise his/her powers for health reasons; violation of the incompatibility regulations; commission of a substantial disciplinary offence, gross or systematic neglect of duties which is incompatible with the status of judge or which has revealed his/her incompatibility with the office; resignation or voluntary termination of service; refusal to be transferred to another court in case of dissolution or reorganisation of a court; breach of the obligation to prove the legality of the sources of his/her assets.²⁰²

The following information was provided by Ukraine in regards to the number of judges dismissed and in regards to the grounds for such dismissals for 2015 – 2016.

	Grounds for dismissal	2015	2016
1	Expiry of the term of chairing an office of a judge	2	10
2	Reaching the age of 65 years	14	8
3	Due to inability to exercise judiciary functions caused by poor health conditions	8	5
4	Personal desire	79	47
5	Submitting resignation (letter of resignation)	362	1449
6	Due to conviction court decision entering into force	6	1
7	Recommendation made by the HQCJ as a result of judge's having broken his or her oath of office	282	22
8	Conclusions made by the Temporary Special Commission on Auditing Judges of General Jurisdiction (the TSC)	20	9
9	Statements of claim given by the TSC	0	2
10	Violation of provisions of legislation on incompatibility	1	10
11	Breaking the oath of office by judges of the Supreme Court of Ukraine and judges of High Specialized Courts (as a result of disciplinary proceedings)	1	2
Total number of judges dismissed		775	1565

²⁰² Article 131 of the Constitution of Ukraine.

The number of judicial resignations is alarming, especially with the dramatic increase in 2016. The answers to the questionnaire also state that the High Council of Justice has discharged 246 judges based on their resignation letters in 2016. It is unclear whether this number is to be added to the one already cited in the table for 2016. Regardless, situation with so many resignations requires a more in-depth look and close monitoring in the future.

GRECO also raises concerns in this regard. In its latest report it stated that “Already at the time of the visit, in some 20 courts there were no more judges and many others were critically understaffed: about 1 500 judges resigned in 2016. Several interlocutors asserted that many of those judges wanted to avoid the qualification assessment – as well as the electronic and public declaration of their assets which was launched in September 2016. However, the authorities stress that the reasons for those’ resignations in 2016 have not been analysed and that one reason evoked by many of the judges concerned was that they did not want to lose their lifelong maintenance allowance which the state periodically considered abolishing.” At present, there are 8 418 judge posts but only approximately 7 000 acting judges.²⁰³

Information provided by Ukrainian authorities to the monitoring team is even bleaker – see table below for the numbers as of August 2017.

Table 5 Number of sitting judges vs vacant positions in the court system of Ukraine.

	Court	Number of judges	Total number of vacant positions of judges
1	local general courts	4855	1374
2	local commercial courts	754	187
3	local administrative courts	676	105
4	appellate courts	1706	951
5	appellate economic courts	302	115
6	appellate administrative courts	380	141
7	High Specialized Court of Ukraine for Civil and Criminal Time	120	60
8	High Economic Court of Ukraine	90	34
9	High Administrative Court	97	57
10	Supreme Court	48	30
	Total	9028	3054

This in addition to the issues discussed earlier in the context of the appointment and “re-appointment” of judges creates a serious gap in the capacity of the judiciary to carry out its functions.

Recusal of judges

Conditions for recusal of judges are stipulated in the Criminal Procedure Code, Civil Procedure Code, Commercial Procedure Code and Code of Administrative Procedure. If those conditions are present the judge must withdraw from the case, or his participation may be challenged by parties to the case.

Issues that were identified by GRECO in this regard in their 4th evaluation round are of concern to this monitoring team as well.

²⁰³ Fourth Evaluation Round Report on Ukraine, adopted by GRECO at its 76th Plenary Meeting on 23 June 2017.

In particular, possibility of and or participation of the judge, whose case for recusal is being reviewed, in the decision making process on this case is of serious concern. Moreover, GRECO report refers to the examples of the judges deciding on motions for their own recusals unilaterally.²⁰⁴

This should be rectified and appropriate appeal process which is currently absent in Ukraine should be introduced.

Again, considering the nature of this part of the Recommendation 3.8, which called for legislative changes –the changes introduced by the judicial reform of 2016 addressed most of its elements to a large degree.

Ensure sufficient and transparent funding of the judiciary and remuneration of judges that is commensurate to their role and reduces corruption risks.

The same as at the time of the 3rd round IAP monitoring, judiciary can be only funded by the state. Money collected from the judicial fees goes to fund judiciary. This fee has been increased since 2015 and provides higher inflows.

It was not possible to fully assess the actual state of affairs in regards to the state funding of the judiciary. Provided data on state financing of the courts for 2015, 2016, or 2017 did not include estimated budget needs (or amounts of funds which have been forecasted and requested) and did not allow for comparisons and conclusions.

Table 6 Allocated funding to the Judiciary.

	Organization	allocated funds UAH 2015	allocated funds UAH 2016	allocated funds UAH 2017
1	State court administration of Ukraine	2 856 778,9	3 577 914,1	6 632 128, 1
2	Supreme Court	88 456,5	95 751,5	986 901,8
3	High Specialized Court of Ukraine for Civil and Criminal Matters	87 452,6	94 885,5	95 055,4
4	High Economic Court of Ukraine	86 951,4	93 909,9	94 102,3
5	High Administrative Court	76 576,8	82 426,4	82 629,1
6	Constitutional court	59 029,7	99 851,6	173 192,3
7	High Council of justice			283 292,7
8	Council of Judges	4 607,6	6 576,4	8 922,5

Interlocutors met at the on-site visit informed the monitoring team that in 2016 54% of the requested budget for the judiciary was allocated. In 2017 the judiciary has been financed at 74%, the highest percentage in the recent history of the country. The number of court facilities was growing, along with their conditions.

Financial independence of judges is regulated by the Law On the Judicial System and Status of Judges.²⁰⁵ The judge is to be remunerated starting from the first day of his/her appointment. Judicial remuneration consists of a base salary and additional payments for length of service, for holding an administrative position in court (e.g. president of the court), scientific degree and work that involves access to State secrets; regional and size of the administrative community where the judge is practicing are also taken into consideration.

The base salary rates for a judge of:

²⁰⁴ Fourth Evaluation Round Report on Ukraine, adopted by GRECO at its 76th Plenary Meeting on 23 June 2017.

²⁰⁵ Article 135

- 1) the local court is set at 30 minimal salaries²⁰⁶;
- 2) the appeal court and high specialised court is set at 50 minimal salaries;
- 3) the Supreme Court is set at 75 minimal salaries.

According to the information cited by GRECO in their latest report “gross monthly base salary thus ranges from approximately 1 766 € for local court judges to approximately 4 416 € for Supreme Court justices. Judges are entitled to social insurance and, in case of need, service housing at the location of the court”.²⁰⁷

Judges are remunerated monthly with bonuses paid for the years of service (for over 3 years’ working experience the bonus is 15 per cent; for over 5 years – 20 per cent; for over 10 years – 30 per cent; for over 15 years – 40 per cent; for over 20 years – 50 per cent; for over 25 years – 60 per cent; for over 30 years – 70 per cent; and for over 35 years – 80 per cent of the monthly salary rate of a judge of the corresponding court).

And finally, the monitoring team was informed at the on-site visit that after “qualification evaluation” the legislator will be raising judicial salaries 2 or 3-fold.

These represent significant increases from the time of the 3rd round of IAP monitoring, when monthly remuneration of the local court judge was supposed to be raised from 6 to 15 minimum salaries over four years but then was revoked. The salary rate was then set at 10 salary minimums but in the mid 2014 suffered further cuts to 1/3 of that amount. Ukraine is commended on such substantial increases introduced into the system of judicial remuneration. This should certainly contribute to building a professional and more stable judiciary which is less prone to corruption risks.

Representatives of the judiciary met at the on-site visit were fairly satisfied with the level of salaries, which they thought commensurate to their role.

It appears that at the least one element of this part of the recommendation was implemented.

Make public on Internet all court decisions, including interim ones.

The Law On Access to Court Decisions²⁰⁸ requires that all court decisions are open and are subject to electronic publication no later than on the next day following completion and sign-off.

Access to decisions of courts of general jurisdiction is secured through the Unified State Registry. It is a computerized system on collection, storage, protection, records, search, and presentation of electronic copies of court decisions. Court decisions registered with the system are open for free round-the-clock access at the official website of the judiciary of Ukraine (<http://reyestr.court.gov.ua>).

The Law of Ukraine On Ensuring the Right for Fair Trial²⁰⁹ significantly changed legislative prescriptions on filling into the Unified State Registry of court decisions by setting requirements on inclusion of all decisions of courts of general jurisdictions (including interim ones) into the Registry, as well as dissenting opinions of the judges executed in writing.

Multiple interlocutors confirmed at the on-site visit that the Unified State Registry is efficient and is being widely used by all parties to the court proceedings, civil society, media, etc.

This part of the Recommendation 3.8 was fully implemented.

In addition, legislation envisages other guarantees for participants of the court proceedings. In particular,

²⁰⁶ Minimal salary in 2016 amounted to 1 600 UAH (approximately 58.88 EUR). This number has been already changed from 2 May 2017 to 1 684 UAH, and from 1 December 2017 it will be set at 1 762 UAH.

²⁰⁷ Fourth Evaluation Round Report on Ukraine, adopted by GRECO at its 76th Plenary Meeting on 23 June 2017 (p. 43)

²⁰⁸

²⁰⁹ Law of Ukraine On Ensuring the Right for Fair Trial №192-VIII, adopted on February 12, 2015.

information about a court hearing the case, the parties to the dispute and the essence of the claim, the date of receipt of the statement of claim, or a statement of appeal, cassation complaint, application for review of court decision, the current status of the proceedings, venue, date and time of the court session are open and subject to immediate publication at the official website of the judiciary in Ukraine (except in cases stipulated by law). It also grants the right for any person to be present at and to take photo/video recording during a court session.²¹⁰

Such steps are welcomed and they will likely help ensure transparency of the court proceedings and ultimately will have effect on building up of the positive image of the judiciary in Ukraine.

Review system of automated distribution of cases among judges to remove loopholes that allow manipulating the system and ensure that results of automated distribution are public and included in the case-file. Introduce ICT tools in the judicial procedures and court functioning (e.g. electronic filing of lawsuits and other legal documents).

Automated distribution of cases

It is not clear whether the system of automated distribution of cases among judges was reviewed with the view to remove loopholes that were allowing manipulating the system. However, changes into the system have been introduced and as suggested in the 3rd round of monitoring report the case allocation is now regulated in detail directly in the law. Law On the Judicial System and Status of Judges²¹¹ provides for assignment of a judge or judges to consider a specific case through the automated case-management system in the manner prescribed in the procedural law.

The cases are distributed taking into account specialization of judges, the caseload of each judge, restrictions on participation in the review of the decision imposed on the judges who rendered the court decision in question, leave, absence on the ground of temporary disability, business trips, and other cases provided by the law that prevent a judge from exercising justice or participating in a trial.

When a case is heard with participation of the jury, the panel of jury is assigned with the System.

The system is not utilized only in cases if there were objective circumstances that rendered the use of system impossible for the duration of 5 days. In such cases old procedure under the 2010 Regulations is applied.

Information on the results of distribution is saved in the System and must be protected against unauthorized access and interference. Unlawful interference with the system entails criminal liability under Article 376-1 of the Criminal Code.

²¹⁰ Ukraine IAP 3rd round of monitoring Progress Update, October 2015

²¹¹ Article 15

Statistics on committed criminal offences stipulated by the Article 376¹ of the Criminal Code of Ukraine in 2015-2016, January-July 2017 and consequences of their investigations

Period	Registered	Cases dismissed	including	Taken into account	Submitted to the court**	including
			Dismissed pursuant to part 1 paragraphs 1,2,4,6 of the Article 284 of CC of Ukraine			bill of indictment
2015	27	9	9	18	0	0
2016	61	24	24	37	2	2
January - July 2017	43	3	3	40	2	2

According to the information that the State Judicial Administration of Ukraine released on its website (<http://court.gov.ua>), daily automatic publication of reports on computerized allocation of court cases has been launched as of September 1, 2015 at the 'Information on Consideration Stages of Court Cases' section of the website of State Judicial Administration of Ukraine.

Complete detailed information on results of computerized allocation of court cases is attached to the court case file. After such information is recorded, making adjustments to it in the computerized system is impossible, since access for editing respective protocol and report gets blocked by the computerized system. This according to the Ukrainian authorities makes it impossible to manipulate the system.

Introduced innovations allow making the information about results on computerized allocation of court cases open and available to parties of court proceedings.

And finally, Ukrainian authorities report that the procedure for automated case allocation within the system of the Supreme Court of Ukraine was adopted in June 2015.²¹²

ICT tools in judicial procedures and court functioning

With respect to introduction of informational and communicational technologies into court proceedings and work of judges, Ukrainian authorities state that 'electronic justice' has already been partially introduced and has been successfully operating in courts of Ukraine. The court fees can be paid via payment terminals, final court decisions can be shared via email, summons and messages can be transmitted via use of sms-messaging.²¹³

These practices should be continued and further expended.

It is hard to make a definitive judgement in regards to whether the system is being manipulated and/or to what extent and the monitoring team could not find enough information to substantiate such conclusions. However, it would be fair to say that the system is now better protected from manipulation, as compared to the times of the 3rd round of monitoring report. Moreover, the results of the case allocation are made public

²¹² Council of Judges of the Supreme Court of Ukraine Decision #10, from 15.06.2015 On the Fundamentals of Performance of Computerized Documents Control System of the Supreme Court of Ukraine.

²¹³ Ukraine IAP 3rd round of monitoring Progress Update, October 2015.

and are attached to the case-file. Other ICT tools have also been introduced in Ukraine since March 2015. Therefore, this part of the recommendation can be considered implemented.

This being said, Ukraine is strongly encouraged to continue monitoring functioning of the system to ensure that it is being properly applied. Any manipulations should be looked into with the view to eliminate circumstances that enabled such manipulations. This issue should be further followed up on in the progress updates and in the next round of monitoring.

Other issues

Despite positive legal changes the judiciary continues to be perceived as a weak branch, often lacking independence and suffering from corruption. This is the case both according to the international reports, reports and studies of the civil society. Many interlocutors met during the on-site visit by the monitoring team confirmed this perception, including representatives of the judiciary themselves.

There are various factors that contribute to this situation in Ukraine, including serious indicators of entrenched corruption within the system. However, there are also other considerations raised in this report. These considerations deal with various factors that undermine judicial independence, making judges vulnerable to various types of outside improper pressure, especially given the volatile situation in Ukraine.

“Cleaning up” of the judiciary

In addition to the overhaul of the legal system several steps have been proposed in Ukraine with the view to clean up the judiciary. One such proposal was to dismiss all sitting judges and make them reapply for their positions. Such measure on one hand raised controversy in regards to the international standards on judicial independence and rule of law. On the other hand the need for such drastic measures was heavily advocated by various political forces, as well as much welcomed by the civil society and the general public.

In the end a compromise solution was reached. Namely, starting from February 2016 all sitting judges are being submitted to the qualification assessment (with vetting) before they are being granted life tenure.

This is being done in addition to the vetting procedures under the Law on the Restoration of trust in the judiciary in Ukraine and the Law on Lustration. The 3rd round of monitoring report already covered this topic extensively. While such measure should be reviewed in the Ukraine’s context of the “Revolution of Dignity” and the expectations of the society that followed, they do raise serious concerns in addition to non-compliance with the international standards.

As it was already mentioned in this report, in 2016 1 449 judges resigned in addition to 47 who left on their own accord, which constitutes almost one fifth of the judicial posts. Unwillingness to undergo this assessment is prominently featured among the reasons cited for such high numbers of judges leaving their offices.

The new Supreme Court competition is being finalised with 120 judges shortlisted by the HQCJ. However, according to the Public Integrity Council 30 candidates recommended by the HQCJ do not meet the integrity requirements.

Allegations of prosecutorial pressure

The report already mentions positive changes that the judicial reform brought in regards to reducing potentials for prosecutors to exert pressure on judges, including their exclusion from the High Council of Justice and abolishment of the prosecutorial supervision function.

However, representatives of the judiciary met at the on-site visit expressed concerns that prosecutorial pressure continues. One issue, in particular, was raised by the judges. It concerned the use of the Article 375 of the Criminal Code “on delivery of the knowingly unfair sentence, judgement, ruling or order by a judge” by the prosecutors to put pressure on judges.

Representatives of the judiciary met at the onsite visit informed the monitoring team that in 2015 – 388 proceedings have been initiated under this Article; in 2016 – 285. According to the statistical data provided by Ukraine in 2015-2016 6 criminal cases have been opened against judges under this Article.

This issue is a concern and, similarly, to the Recommendation issued for Ukraine in GRECO report, it is believed that the criminal offence of “delivery of a knowingly unfair sentence, judgement, ruling or order by a judge” should either be abolished or at least changed to clarify that it criminalizing only deliberate miscarriages of justice to prevent any misuses by the prosecutors. The civil society would prefer the second option.

Safety of judges

Another issue that was raised by the representatives of the judiciary during the on-site visit and that is of high concern is the safety of judges in Ukraine; this includes their physical security, security of their families and property.

The judges shared that they do not feel safe in the courtrooms. Security measures that were in place in the courtrooms before are no longer provided. National police protection was removed due to the lack of funds in the budget. In their opinion, this approach sends a particular message by the state.

They have provided examples of many instances of attack on judges or their property, citing 3 cases of damages done to the property of judges, several hundred attacks on the judges with only 2 having gone to court, 1 case of the murder of the judge.

This is further corroborated by the information from the survey of Judges conducted in May 2016.²¹⁴ When asked about security in court premises 88% of the surveyed judges responded that they do not feel safe, with unsubstantial differences between jurisdictions and court instances.

Judiciary in Ukraine is already in a very fragile position; ensuring safety of judges is the basic prerequisite to their resistance to external pressure or corruption and should be dealt with as a matter of priority.

Several other issues that directly relate to the judiciary and to the matters covered in this section are covered in other sections of the report which should be read in conjunction, such as the issue of the anti-corruption courts (see Section 3.4). And finally one more such issue touches upon asset declarations and also might have some relevance in the context of safety of judges. The judges, similarly to civil servants, political appointees and the prosecutors, have to submit their annual asset declarations to the NACP.²¹⁵ These are also being entered into the Unified State Register held by NACP, which provides open access to the submitted information. Another declaration that the judges need to submit is “declaration on family relations” and “declaration of judicial integrity”. These are being published on the website of the High Qualifications Commission. While these are no doubt contributing to the increase in transparency of the judiciary, they need to be tested in practice to see if they remain to be of declarative nature only and whether in any way they can have impact on the safety of individual judges. In particular, the monitoring team was alerted during the monitoring visit by the representatives of the judiciary that information disclosed by judges as part of their asset declarations was used to target their homes for attacks and burglaries; this pertained especially to small communities where even though address and other personal details of the judge are not revealed in the declaration they are known to the community. For more information regarding the issue of asset declarations, please see Section. 2.1.

Conclusion

In conclusion, judicial reform of 2016 helped address most of the legislative elements of the Recommendation 3.8, including appointment and dismissal of judges on recommendation of the High Council of Justice instead of the Parliament, abolishment of the five-year probation period for junior judges, changes into the composition of the High Council of Justice to include the majority of judges. It introduced changes into the system of judicial self-governance and disciplining of judges. Other elements of the recommendation that have been of a more practical nature have also been largely addressed.

²¹⁴ National survey of judges of Ukraine regarding the judicial reform in Ukraine, February-March 2016, USAID FAIR Justice Project.

²¹⁵ Article 56 of the Law on the Judiciary and the Status of Judges.

Ukraine is **largely compliant** with the recommendations 3.8 of the previous monitoring round.

New Recommendation 15

1. Ensure that introduced by the judicial reform changes are effectively implemented and that their practical application is analysed with the view to identify deficiencies and address them.
2. Continue to reform with the view to address the remaining deficiencies in the system of judicial self-governance, appointment, disciplinary proceedings, dismissal and recusal of judges to bring them in line with European standards and recommendations of the Venice Commission.
3. Analyse the reasons for the big number of judicial resignations and take necessary measures to ensure that judicial posts are being filled, including resolving the situation with pending ‘re-appointment’ of the judges whose 5 years’ probation term lapsed after the adoption of the judicial reform.
4. Closely monitor the functioning of the automated distribution of cases system to ensure that it is being properly applied. Look into instances of manipulations and take necessary measures to eliminate circumstances that enabled such manipulations.
5. Consider abolishing Article 375 of the Criminal Code of Ukraine or at the least ensure in other ways that only deliberate miscarriages of justice are criminalised to eliminate potential for abuse or exerting of pressure on judges.
6. Take all necessary measures to ensure the safety of judges; these measures should involve protection of the courts and of the judges.

Public prosecution service

Previous monitoring reports did not examine prosecution service integrity to the same extent as outlined in the 4th Round Monitoring methodology. As a result, no recommendations on this issue have been made in the 3rd Round.

The prosecution service plays a crucial role in sustaining the rule of law. Corruption within the prosecution office undermines the justice system of the country and fosters impunity. Effective anti-corruption efforts are impossible in the system where prosecutorial bodies lack integrity and are vulnerable to undue influence, and a “clean” prosecution service requires robust safeguards of independence, integrity and accountability.

The Ukrainian prosecution service has been undergoing major reforms; the current Law on the Prosecutor’s Office was adopted on 14 October 2014 and since then has been amended 14 times, with the latest amendments adopted in December 2016. Just like the judiciary, the prosecution service was also affected by the constitutional amendments of 2016.

Reforms included abolishment of the general supervision function of the prosecution service, for which Ukraine has been criticised by many international organisations for years. Now functions of the prosecution service are limited to: public prosecution; organisation and procedural supervision of the pre-trial investigations, supervision of investigative and search activities of the law enforcement agencies and

decisions in regard to other matters in criminal proceedings; representation of the interests of the state in exceptional cases.²¹⁶

New legislation also provides for guarantees of the independence of the prosecutors, identifies more specific criteria and procedures for appointment and disciplining of prosecutors, and establishes the system of self-governance of the prosecution service. All of these are positive developments and should be continued, and any attempts at rollback, as described in the latest GRECO report,²¹⁷ should be circumvented.

The Prosecution service of Ukraine is composed of the General Prosecutor's Office (GPO), regional prosecution offices, local prosecution offices, as well as the military prosecution office and the Specialised Anti-Corruption Prosecutor's Office (SAPO) generally mirroring the court system of Ukraine. Consistent with recommendations of experts for many years, the number of prosecutors has in recent years been reduced almost in half. According to the GPO, the number of prosecutors was reduced from 18 500 to 11 300²¹⁸ (of them 770 investigators, 672 military investigators and prosecutors, and 38 SAPO prosecutors), which according to GRECO still represents one of the highest prosecutors per citizen ratios in the Council of Europe member states.²¹⁹

Despite the above mentioned changes and considerable reduction of the number of prosecutors, the prosecution service continues to be a powerful body with direct links to the President of Ukraine and headed by a political appointee, who is a close political ally of the President. The current PG was the head of the Petro Poroshenko's Bloc (President's political faction) in the Parliament at the time of his appointment. The monitoring team notes that the IMF has noted political interference in the efforts of prosecutors to fight corruption.²²⁰ The prosecution service of Ukraine, along with courts, continues to be one of the least-trusted public administration institutions, with only 8% (in 2015) and 11% (in 2016) of the population of Ukraine having trust in it according to the survey conducted by the USAID Fair Justice Project in 2016.²²¹

Institutional, operational and financial independence, appointment and dismissal of Chief Prosecutor

Prosecutorial independence should ensure that the prosecutor's activities are free of external pressure as well as from undue or illegal internal pressures from within the prosecution system.²²² The complete independence of the public prosecution from intervention on the level of individual cases by any branch of government is essential.²²³ External independence of prosecutors can be ensured through a variety of methods and should include sufficient and non-arbitrary budgetary funding.²²⁴ And finally in order to

²¹⁶ Article 131.1 of the Constitution of Ukraine.

²¹⁷ Fourth Evaluation Round Report on Ukraine, adopted by GRECO at its 76th Plenary Meeting on 23 June 2017

²¹⁸ According to part 1, Art 14 of the Law on the Prosecution office – there should be only 10 000 of them remaining by 1 January 2018.

²¹⁹ Fourth Evaluation Round Report on Ukraine, adopted by GRECO at its 76th Plenary Meeting on 23 June 2017

²²⁰ Ukraine : Second Review Under the Extended Fund Facility and Requests for Waivers of Non-Observance of Performance Criteria, Rephasing of Access and Financing Assurances Review-Press Release; Staff Report; and Statement by the Executive Director for Ukraine, IMF 3 October 2016. See at <https://www.imf.org/en/Publications/CR/Issues/2016/12/31/Ukraine-Second-Review-Under-the-Extended-Fund-Facility-and-Requests-for-Waivers-of-Non-44318>

²²¹ National Public Opinion Survey Regarding Democratic Development, Judicial Reform and the Process of Purification of Government, USAID Fair Justice Project, 2016 at: http://www.fair.org.ua/content/library_doc/fair_gfk_eng.pdf

²²² Study No. 494/2008, Venice Commission, December 2010.

²²³ PACE Recommendation 1604 (2003).

²²⁴ The Council of Europe CM Recommendation 19 (2000).

ensure proper functioning of the prosecution service the Chief Prosecutor has to be appointed and dismissed in the transparent manner, strictly according to the law and through an objective and merit based process.

Institutional, operational and financial independence are provided for in the Law on the Prosecutor's Office: Article 3 includes independence of prosecutors in the principles of operation of the prosecution office and Article 16 lists the safeguards, including special procedure for appointment, dismissal and disciplining of prosecutors, the functioning of the bodies of the prosecutorial self-governance, etc.

The prosecutors "shall be independent and independently make decisions on the procedure of exercising their powers in compliance with laws".²²⁵ However, higher level prosecutors have the right to give instructions to lower level prosecutors, to approve their decision making and to exercise other actions directly connected to the implementation of the prosecution functions within the limits and in line with procedure prescribed by the law. The Prosecutor General (PG) has the right to give instructions to any prosecutor.

To try to minimize against improper interference in how cases are handled, orders and instructions concerning administrative matters are binding upon the prosecutor only if they are received in the written form. The prosecutor can report to the Council of Prosecutor's a threat to his/her independence due to an order of instruction issued by higher prosecutor. Nevertheless, GRECO in its report alerts to the frequent practice of oral instructions still being given, especially by the PG himself, and states that "instructions by the PG in individual cases could be problematic in the country-specific context where the PG is a political appointee and where according to a number of interlocutors the reputation of that office is damaged by public perceptions of undue political influence."²²⁶ The monitoring team is aligned with the opinion of the GRECO that the matter of whether the PG's right to issue instructions in individual cases should be abolished in Ukraine requires serious consideration. In addition, GRECO states that giving instructions to prosecutors of lower subordination does not contradict the standards of the Council of Europe.

Funding of the prosecutor's office is provided for in the Chapter X of the Law on the Prosecutor's Office, and the funding necessary for proper functioning of the prosecutorial system should be accordingly fully ensured by the State Budget. However, in 2016 fulfilment of these provisions were made dependent on the CoM decision subject to the availability of the funds in the state and local budgets.²²⁷ And in 2017 Art 81 of Law on the Prosecutor's Office, which defines the size of the base salary started to have direct application. However the PG did not provide for its enforcement and the prosecutors continue to receive salaries that are smaller than what is defined in the law. As discussed below, this situation is seriously undermining proper exercise of the prosecution function in the state. Specifically, inadequate salaries and funds for other expenses create serious corruption risks.

According to the information provided by the Ukrainian authorities during the bilateral meetings, one of the steps for improving the situation was taken with adoption of the Decree by the Cabinet of Ministers of Ukraine on 30 August 2017 No. 657, that regulates payment package for prosecutors and investigators. According to this decrec the salaries of the prosecutors at the local level will rise on average by 40 %, at the regional level by 40% and for the prosecutors of the GPO by 30%.

While the reform of the prosecution service was intended to subject the exercise of power within the GPO to more democratic and lower level control on many issues involving hiring, advancement and discipline, there is abundant evidence that the highest levels of the GPO, if not the PG himself still exercise inordinate power over such decisions. The PG represents prosecution service in relations with state authorities and

²²⁵ Article 17 of the Law on the Prosecutor's Office.

²²⁶ See the Fourth Evaluation Round Report on Ukraine, adopted by GRECO at its 76th Plenary Meeting on 23 June 2017 (p. 63).

²²⁷ Law of Ukraine on State Budget of Ukraine for 2016 # 928-VIII, adopted on 25 December 2015.

other bodies, organises the operation of the prosecution offices, and subject to some new limits in the text of the law appoints and dismisses prosecutors, and decides on disciplinary sanctions among other duties.

The PG is appointed by the President of Ukraine with the consent of the Parliament for a 6 year non-renewable term. The PG appoints his/her deputies on the recommendation of the Council of Prosecutors. He can be dismissed from his/her position by the President of Ukraine with the consent of the Parliament on the basis of and in accordance with the scope of the dismissal motion of the Qualification Disciplinary Commission or the High Council of Justice. The PG can also be voted out of the office by the Parliament through the vote of non-confidence.

In the recent years, the position of the PG has been highly volatile (since 2014 – 5 PGs have held that office, namely, Pshonka, Mahnitskiy, Yarema, Shokin, Lutsenko), and surrounded by much controversy and public discontent. The GPO was believed to be engaged directly in and permitting rampant corruption to go on unabated. Holding anyone accountable for serious corruption offenses was the exception not the norm. If major corruption allegations were pursued and charged, the cases appeared to be serving political objectives rather than even handed enforcement of the law. The PG who served under President Yanukovich has been linked to major corruption scandals sometimes involving his son a member of parliament, and has fled to Russia. The fourth of the 5 PG's since the Revolution of Dignity was dismissed under tremendous public and international pressure and was considered to be instrumental in blocking reforms of the PGO as well as the anti-corruption enforcement priorities.

The current PG was appointed to the office on 12 May 2016, shortly after the Law was changed to eliminate the requirement that the PG hold a law degree, which the incumbent does not have. In addition to the political context in which it was introduced, the absence of this requirement does not set a good tone for the rule of law in the overall prosecution system. In Ukraine, the Chief prosecutor in order to carry out his/her functions does not need the same basic qualifications as all other prosecutors in the country since all other prosecutors of Ukraine are required to hold law degrees. Furthermore it does not contribute to building up of public trust that the office of the PG is independent of the political bodies who changed these basic rules to be able to appoint their candidate.

The procedure for selection of the appointees for PG is also highly discretionary. Current legislation does not require seeking of any expert advice on professional qualifications of the candidate from the relevant bodies by the President or the Parliament. This should be introduced to ensure a transparent process. As recommended by GRECO, due consideration should be given “to reviewing the procedures for the appointment and dismissal of the PG in order to make this process less prone to undue political influence and more oriented towards objective criteria on the merits of the candidate”.²²⁸

Merit-based recruitment and promotion of prosecutors²²⁹, grounds for dismissal and statistics

The prosecutors are appointed for life by the head of the relevant prosecution office on the recommendation of the Qualification Disciplinary Commission and can be dismissed only on the grounds and in the manner prescribed in the law.²³⁰

First time appointed prosecutors at the local office level are to be selected on a competitive basis. Candidates have to undergo a proficiency test, the results of which are published by the Qualification Disciplinary Commission together with the ranking list of the candidates. After this vetting procedure, the Qualification Disciplinary Commission may decide to exclude the candidate from further stages of the procedure. This decision can be appealed to court. Successful candidates undergo 12 months training at the National Academy of Prosecutors. Once positions become available, the Qualification Disciplinary

²²⁸ See Recommendation xxiv in the Fourth Evaluation Round Report on Ukraine, adopted by GRECO at its 76th Plenary Meeting on 23 June 2017.

²²⁹ Unfortunately the military prosecutors are not covered by the rules described in this section.

²³⁰ Articles 16 and 28 of the Law on Prosecutor's Office.

Commission conducts a further contest and rates the candidates and submits its recommendations to the head of the prosecution office which has vacancies. The heads of local and regional offices are appointed for 5 year term and dismissed by the PG on the recommendation from the Council of Prosecutors. On the basis of these recommendations the heads of the concerned offices take the appointment decision. These are welcome developments in the context of open and competitive selection procedure. However, representatives of the expert community in Ukraine alert that in practice this procedure is indeed closed and not competitive.

Prosecutors may be transferred to another office only on their consent. Promotion to a higher level within the prosecution service is done based on the results of a competition organized by the Qualification Disciplinary Commission. The law specifies no details about the criteria to be used but it is the only specified way in which prosecutors are supposed to be promoted. The absence of specific rules or criteria for prosecutor's promotion is a concern. As it was pointed out by GRECO in its latest report "regulating in more detail the promotion/career advancement of prosecutors so as to provide for uniform, transparent procedures based on precise, objective criteria, notably merit, and ensuring that any decisions on promotion/career advancement are reasoned and subject to appeal"²³¹ is imperative. However, on 7 June 2017 Qualification Disciplinary Commission has adopted procedure for competition to fill vacant position through transfer of prosecutors. The monitoring team did not have the opportunity to review it in-depth and it is yet to be seen how it will be applied in practice.

The powers of each prosecutor are terminated when s/he reaches the age of 65, in the event of death or absence, if the Qualification Disciplinary Commission decides that it is impossible for him/her to maintain position. Such decision may also be taken by the Qualification Disciplinary Commission if the prosecutor committed grave disciplinary offence or disciplinary offence while under disciplinary measures. Performance evaluations appear only to be done, if necessary, during disciplinary proceedings opened against the prosecutor if s/he failed to perform his/her official duties properly. No regular performance evaluations are held. This should be rectified: performance of prosecutors should be done on a regular basis against clearly written criteria. And prosecutors should have the opportunity to provide their own statement regarding their performance in the period under examination to be considered by the reviewers. It is noted that Ukraine is already working towards this end: representatives of the GPO met at the on-site visit informed the monitoring team of the creation of the working group that was working on the development of performance indicators. This group with the support from the CoF and EU Advisory Mission experts is currently analysing work load, job descriptions, organizational structure and other issues related to the duties of the local prosecutors with the view to develop criteria for evaluation of their work.

Grounds for dismissal of the prosecutor besides the commission of the disciplinary offence include violation of the incompatibility regulations, entry into force of the judgement on administrative liability for corruption offence, entry into force of the court judgement of guilt against the prosecutor, etc. Prosecutors in Ukraine do not enjoy immunity and can be investigated by the NABU (deputy PG and SAPO prosecutors fall under the jurisdiction of the National Bureau of Investigations, which does not yet exist). Improper conduct can also be reprimanded by the head of the prosecution office via imposing of the warning.

Statistics on dismissal of prosecutors was found in the latest GRECO report: it appears that 32 prosecutors have been notified that they are suspected of committing corruption offences in 2016, in 2015 – there were 20 such cases and in 2014 – 8. Two of these prosecutors were held criminally liable. These numbers are extremely low if compared to the huge numbers of prosecutors and the fact that a large number were hired before even the new competitive hiring procedures were in place. These new hiring procedures were intended to make it possible for new types of candidates to become prosecutors who may not have political connections and to eliminate the incentive for candidates to offer and for candidates to be extorted for bribes as a condition for hiring.

However, in practical terms, there has been very little turnover in the personnel of the GPO in many years

²³¹ See the Fourth Evaluation Round Report on Ukraine, adopted by GRECO at its 76th Plenary Meeting on 23 June 2017 (pp. 60-61).

except at the lowest level. In 2016, 559 prosecutors were appointed to the local prosecution offices and 462 of them have never worked in the prosecution offices before. The same steps have not yet followed at other levels, with the exception of the deputy prosecutor generals. The non-governmental interlocutors met at the on-site level shared with the monitoring team that prosecutors at the higher levels have been mostly unchanged and were simply re-appointed to the same positions of the management positions at the local prosecutors offices. GPO representatives maintain that management positions were changed. This is regrettable and needs to be addressed by Ukraine as a matter of priority in the opinion of the monitoring team.

System of prosecutorial self-governance

With regards to the issue of prosecutorial self-governance, the system has the following structure:

- The All Ukrainian Conference of Prosecutors (AUCP) is the supreme body of the prosecutorial self-governance. Its decisions are binding on all prosecutors and the Council of Prosecutors. It appoints members of the HCJ, the Council of Prosecutors, and the Qualifications and Disciplinary Commission. Its delegates are elected at the meetings of the prosecutors from different levels of prosecution offices. In particular, 2 prosecutors represent each of the 155 local prosecution offices, 3 represent each of the 26 regional offices and 6 represent the GPO. Its Presidium is elected by secret ballot and decisions are adopted by majority of all delegates. The first Conference of the AUCP under the new legislative provisions that entered into force on 15 April 2017 was held on 26-28 April 2017. The monitoring team was alerted by the Civil society that the military prosecutors took part in this conference, even though the bodies of self-governance of the prosecutors do not encompass them. According to the Articles 15, 43-50 of the Law 'On Prosecutors Service' military prosecutors undergo the same disciplinary procedures applied to all other prosecutors by the bodies of prosecutorial self-governance and there are currently 672 of them in total. This was allegedly used by the leadership of the prosecution office to influence the outcomes of the conference.
- The Council of Prosecutors is responsible for making recommendations on the appointment and dismissal of prosecutors from the administrative positions (i.e.: head and deputy head of the prosecution office); overseeing measures to ensure independence of prosecutors, etc. It consists of 13 members, which serve 5 year non-renewable term (11 prosecutors from various levels of the prosecution offices and 2 representatives of academia appointed by the Congress of law schools and scientific institutions). The members elect their Chair and Vice Chair. Eleven prosecutorial members were elected by the AUCP on 26-28 April 2017.
- The Qualifications and Disciplinary Commission (QDC) is the collegial body responsible for setting the level of professional requirements for candidate prosecutors, deciding on disciplinary responsibility, transfer and dismissal of prosecutors. It is composed of 11 members who serve a non-renewable three year term. Five of the members are to be prosecutors appointed by the AUCP, 2 are to be representatives of academia appointed by the Congress of law schools and scientific institutions, 1 is to be a defence lawyer appointed by the Congress of defence lawyers and 3 members are to be appointed by the Parliament Commissioner for Human Rights. They elect their chair by secret ballot and adopt their decisions by the majority. The 5 members representing the prosecutors also were elected at the AUCP meeting on 26 April 2017. In May QDC became operational and according to the information provided at the bilater meetings, as of 1 September 2017 it received 351 complaints and began consideration of 196 of them. Furthermore 146 disciplinary proceedings have been opened and 36 of them relate to integrity. As a result, 8 prosecutors were held disciplinary liable and 4 have been dismissed. It also announced competition for 300 positions at the local prosecution offices and 2 positions of the higher level.

These are all positive steps towards ensuring independence of the prosecution service from undue political influence, especially from the executive level of the GPO. With the exception of the QDC, all bodies of the prosecutorial self-governance have the membership and functions that correspond to international standards and best practice. The issue of QDC membership needs to be further reviewed to ensure that the majority of its members are prosecutors. This was also reflected in the GRECO recommendation xxiii, with which this monitoring team fully agrees.

However, it is even more important that the bodies of the prosecutorial self-government which are being established under the new legislation do represent the interests of all of the prosecutors and do so to ensure that in the opinion of the prosecutors and the public that the “old prosecutorial cadre” does not gain control over these bodies rendering them purposeless in terms of any future reforms of the prosecutorial system.

Once the bodies are fully and properly formed it would also be of outmost importance to ensure their functions are independently and proactively implemented and Ukraine is strongly recommended to pay close attention to this issue.

Ethics rules (code of conduct) – special rules, enforcement mechanism, statistics

Prosecutors are bound by ethical rules in accordance with Article 19 of the Law on the Prosecutor’s Office. Regular (two or more times a year) or one gross violation of prosecutorial ethics results in disciplinary liability.²³²

On April 27 2017, the AUCP has adopted the Code of Professional Ethics and Rules of Professional Conduct for the Prosecution Office, which is the improved version of the Code of 2012. It now contains provisions on prevention of corruption, clearer guidance on the Conflicts of Interests to be avoided, and calls for respect of judicial independence. Nevertheless, the Code remains to be fairly general in nature and requires supplementary guidance in order to be put it in practice. Interlocutors met at the on-site visit informed the monitoring team that such work was being done by the prosecution office. This would be a welcome development once it is finalized, made public and properly circulated to the prosecutors for their wide use.

In addition, disciplinary liability is the result of any actions which discredit the prosecutor and may raise doubts about his/her objectivity, impartiality and independences, and about the integrity and incorruptibility of prosecution office.²³³ This definition appears to be too vague and would benefit from further clarifications.

The breach of prosecutor’s oath also results in liability. This also raises concerns. GRECO in its latest report draws attention to the fact that such vaguely defined actions may result in criminal or disciplinary liability and recommends defining disciplinary offences in relations to prosecutorial breach of ethical norms more precisely in its recommendation xxix.²³⁴

The following information on how ethics rules are being applied in practice was made available to the monitoring team: in the answers to the questionnaire the authorities stated that statistical data is not collected in respect to violations of ethical rules, however, according to the available records in 2015 – such liability was applied to 50 prosecutors, out of whom 42 were dismissed; and in 2016 – such liability was applied to 44 prosecutors, of which 33 were dismissed. Again, the numbers appear to be extremely limited if compared to the overall prosecutorial corpus of 11,300, and represent 0,4% and 0,3% of prosecutors to whom such liability was applied and who were subsequently dismissed in 2016.

Conflict of interests - special rules, enforcement mechanism, sanctions, statistics

The Law on Prevention of Corruption covers the prosecutors and provisions on the prevention of corruption, including the Conflicts of Interest that are applicable to them under the general rules of the Chapter V of the Law. This issue is discussed in more depth under Section 2.1 of this report.

In terms of issues specific to prosecutors, rules on conflict of interest are included in the CPC in the provisions on the disqualification of the prosecutor.

No information was provided to the monitoring team about how these rules are being applied in practice.

Other restrictions (gifts, incompatibility, post-employment, etc.)

Under the Law on Prevention of Corruption prosecutors are prohibited from demanding, asking, or receiving gifts for themselves or close persons from legal entities or individuals in connection with their activity as a prosecutor or from subordinate persons. Allowed hospitality sets the value at approximately

²³² Article 3 of the Law on Prosecutor’s Office.

²³³ Article 43 of the Law on Prosecutor’s Office.

²³⁴ Fourth Evaluation Round Report on Ukraine, adopted by GRECO at its 76th Plenary Meeting on 23 June 2017

the equivalent of EUR 52 from an individual and aggregate value of approximately EUR 97 from a group of persons over the prosecutor's entire career.

The prosecutor may not hold office at any state authority, other state body, local government authority or be in a publicly elected position. The prosecutor may not be a member of the political party or take part in any political actions. The prosecutors cannot be involved in any part-time or other paid activity other than teaching, research, creative activity, medical practice or sports.

Post-employment restrictions include a one year cooling-off period in certain cases, such as entering into employment agreements/performing business transactions with persons over whom the prosecutor exercised control, supervision or decision making powers.

Asset and interests disclosure - special rules, enforcement mechanism, sanctions, statistics

Prosecutors are obliged to submit their annual asset declarations to the NACP and these declarations are entered into the Unified State Register, as described earlier in the Section 2.1 of this report. Violation of the legal procedures on submission of asset declarations results in disciplinary liability. Administrative and criminal liability is also foreseen as describe in the Section 2.1 of this report.

Uniquely to the prosecutors, they additionally submit to investigations focused on identifying lapses in integrity, the results of which are to be published on the Website of the GPO. This is done annually. These applications on integrity are used for integrity testing by the IG unit of the GPO.

All of the anti-corruption provisions described above which are covered by the Law on Prevention of Corruption fall under the competence of the NACP which supervises their compliance and is described in the Section 2.1 of this report.

In addition, an Inspector General unit of the GPO which became operational in January 2017 is staffed with 87 employees according to the information available in the GRECO report. They are responsible for carrying out of annual integrity tests. They are also supposed to investigate misconduct by employees of the prosecution services. Information on the results of the work of this unit is very limited and it was therefore not possible to draw conclusions on the effectiveness of this unit. The previous office of inspector general unit appeared to be aggressively fulfilling its mandate. Within months, as a result of the competition the leadership and staff was almost completely replaced and the investigations and prosecutions it undertook involving serious misconduct appear to have been abandoned without any principled reason.

Table 7 Statistics regarding the number of initiated and completed criminal proceedings by the General Inspectorate of the General Prosecutor's Office of Ukraine for 7 months of 2017

Number of initiated criminal proceedings in the reporting period		183
Number of completed criminal proceedings (together with recompleted ones)		26
Among them	Submitted to the court with the bill of indictment	8
	Completed criminal proceedings	18

Availability of training, advice and guidance on request, written guidelines

All prosecutors are required to undergo regular trainings at the National Academy of Prosecutors which include courses on rules of the prosecutorial ethics. Interlocutors met at the on-site visit confirmed that they have in fact benefited from such training in practice as part of their regular training curriculum at the Academy.

Representatives of the National Academy of Prosecutors also shared their plans to conduct regional trainings on the issues related to the asset declarations to raise awareness on the requirements for prosecutors under the Law on Prevention of Corruption.

In terms of advice and guidance, the prosecutors can turn to NACP. They also can seek advice from the higher-level prosecutor or from one of the inspector generals within the GPO IG unit whenever they have questions on ethical conduct.

Fair and transparent remuneration

Remuneration of the prosecutors is defined in the law²³⁵ and consists of a base salary, bonuses and additional payments for length of service, for holding an administrative position in the prosecution offices (e.g. head of the prosecution office) and other payments established by law.

As of January 2017 the base salary rate for the prosecutor from the local prosecution office is set at 12 minimal salaries²³⁶ and the other levels are counted based on the coefficient defined in the law.

According to the information cited by GRECO in their latest report gross monthly base salary thus ranges from approximately EUR 707 for local prosecutor to approximately EUR 1,380 for GPO prosecutors at the headquarters. However, as mentioned earlier these are also not being honoured due to the CoM decision regarding the availability of the funds in the state and local budgets.²³⁷

Based on this information it is clear that remuneration of the prosecutors (apart from SAPO prosecutors) is considerably lower than that of judges or detectives of NABU and SAPO, at least three times smaller. This cannot positively contribute to prosecutors carrying out their functions properly in the criminal justice system of Ukraine and requires actions from its authorities.

In addition, the monitoring team learned at the on-site visit, that the critically low base salaries, are widely supplemented by additional bonuses. However, this is being done at the discretion of the heads of the prosecution offices. This discretionary bonus system presents a serious potential for improper external influence on the prosecutors and needs to be addressed by Ukraine, along with the general level of remuneration of the prosecutors and funding made available to the prosecution offices of Ukraine.

Complaints against prosecutors, disciplinary proceedings

On 15 April 2017 new provisions on disciplinary proceedings for prosecutors entered into force.²³⁸ Disciplinary proceedings may now be conducted by the QDC based on the complaints from citizens, as long as they are not anonymous. The QDC adopts its decisions in disciplinary proceedings by the majority of the vote of its members. Information on disciplining of the prosecutor is published on the website of the QDC. In the case of the PG, the QDC and the HCJ can submit a motion for his/her dismissal to the President of Ukraine.

Grounds for disciplinary liability include:

- failure to perform or improper performance by the prosecutor of his official duties;
- unreasonable delay in consideration of an application;
- disclosure of secrets protected by law; violation of the legal procedures for the submission of asset declarations (including the submission of incorrect or incomplete information);
- actions which discredit the prosecutor and may raise doubts on his/her objectivity, impartiality and independence and on integrity and incorruptibility of prosecution offices;
- a regular or one-off gross violation of prosecutorial ethics; violation of internal service regulations; and
- intervention or other influence in cases in a manner other than that established by the law.

Disciplinary sanctions include reprimand, ban for up to one year on a transfer to a higher prosecution office or on appointment to a higher position, and dismissal from the office.

Disciplinary liability has a statute of limitation of one year from the time the offense is committed regardless of vacation or temporary disability of the prosecutor. This statute of limitation is very short for the disclosure of the misconduct in all cases, and it should be addressed by Ukraine.

²³⁵ Article 81 of the Law on Prosecutor's Office.

²³⁶ Minimal salary in 2016 amounted to 1 600 UAH (approximately 58.88 EUR). This number has been already changed from 2 May 2017 to 1 684 UAH, and from 1 December 2017 it will be set at 1 762 UAH.

²³⁷ Law of Ukraine on State Budget of Ukraine for 2016 # 928-VIII, adopted on 25 December 2015.

²³⁸ Article 44 of the Law on the Prosecutor's Office.

*Other issues**Case allocation*

The head of the relevant prosecution office after the start of the preliminary investigation assigns the case to the prosecutor taking into consideration the complexity and publicity of the case, workload and professional skills and experience of the prosecutors.²³⁹

The prosecutor is then usually responsible for the case from the start until the end of the proceedings. However, the head of the relevant prosecution office may re-assign the case to another prosecutor in particular circumstances (due to disqualification, serious disease, dismissal, or as an exception due to ineffective supervision over the pre-trial investigation).

This approach is not in line with good practices and international standards, and the monitoring team agrees with the conclusion of the GRECO and would like to echo its recommendation xxvi to introduce “a system of random allocation of cases to individual prosecutors, based on strict and objective pre-established criteria including specialisation, and experience coupled with adequate safeguards – including stringent controls – against any possible manipulation of the system”.²⁴⁰

New Recommendation 16

- 1. Ensure implementation of the reform and continue with the view to address the remaining deficiencies to bring them fully in line with European standards. In particular:**
 - a) review the procedures for the appointment and dismissal of the PG in order to make this process more insulated from undue political influence and more oriented towards objective criteria on the merits of the candidate;**
 - b) reform further the system of prosecutorial self-governance, including the statutory composition of the QDC, and ensure that the self-governance bodies function independently and proactively, represent the interests of all of the prosecutors, and do so in the opinion of these prosecutors and the public;**
 - c) improve disciplining proceedings by (i) clearly defining grounds for disciplinary liability, (ii) extending the statute of limitation, and (iii) ensuring robust enforcement with complaints diligently investigated and the violators held responsible. Consider whether the right to legal representation is allowed at some stages in selected cases. Relatedly, conduct a review of the operation of the general inspector office to determine if it is properly addressing the most serious allegations of prosecutorial misconduct and/or is making appropriate referrals to the NABU and other appropriate bodies;**
 - d) regulate in more detail career advancement, including by (i) establishing uniform and transparent procedures, and (ii) introducing regular performance evaluations.**
- 2. Ensure sufficient and transparent funding of the prosecution service and remuneration of prosecutors that is commensurate to their role and reduces corruption risks.**
- 3. Further strengthen procedural independence of the prosecutors. In particular, introduce**

²³⁹ Order of the Prosecutor General # 4 On the Organisation of the Prosecutor’s Activities in Criminal Proceedings, adopted on 19 December 2012.

²⁴⁰ Fourth Evaluation Round Report on Ukraine, adopted by GRECO at its 76th Plenary Meeting on 23 June 2017

random allocation of cases to individual prosecutors based on strict and objective criteria with safeguards against possible manipulations.

2.4. Accountability and transparency in the public sector

Recommendation 3.3. from the Second Monitoring Round of Ukraine valid in the Third round:

- Develop and adopt Code of Administrative Procedures without delay, based on best international practice.
- Take further steps in ensuring transparency and discretion in public administration, for example, by encouraging participation of the public and implementing screening of legislation also in the course of drafting legislation in the parliament.
- Step up efforts to improve transparency and discretion in risk areas, including tax and customs, and other sectors.

Recommendation 3.6. from the Third Monitoring Round report on Ukraine:

- Set up or designate an independent authority to supervise enforcement of the access to public information regulations by receiving appeals, conducting administrative investigations and issuing binding decisions, monitoring the enforcement and collecting relevant statistics and reports. Provide such authority with necessary powers and resources for effective functioning.
- Reach compliance with the EITI Standards and cover in the EITI reports all material oil, gas and mining industries. Adopt legislation on transparency of extractive industries.
- Implement the law on openness of public funds, including provisions on on-line access to information on Treasury transactions.
- Ensure in practice unhindered public access to urban planning documentation.
- Adopt the law on publication of information in machine-readable open formats (open data) and ensure publication in such format of information of public interest (in particular, on public procurement, budgetary expenditures, asset declarations of public officials, state company register, normative legal acts).

Limited information was provided by the Ukrainian authorities on most of the issues covered by this section both in the form of the answers to the questionnaire and the on-site visit. The representatives of the key agencies, Ministry of Justice, E-government Agency, the Secretariat of the Cabinet of Ministers and others have been invited but did not take part. Only the representatives of the Ombudsman of Ukraine and the State Committee for Television and Radio-Broadcasting were present at the meeting. Thus, the findings of this section may be limited, and may not reflect the current situation.

The highlights of this part are the launch of the open data portal, opening up the beneficial ownership information and the information held in the public registries. It should be noted, that the level of transparency achieved by Ukraine, since the previous monitoring round as reflected, *inter alia*, in this section, is unprecedented, commendable and encouraged further.

Code of Administrative Procedures

The previous monitoring report found that by drafting the Law on Administrative Procedures (LAP), which in general integrates European standards on good governance and administration, although not yet adopting it, Ukraine was partially compliant with the sub-recommendation of 3.3 As of the fourth monitoring round, the LAP is still pending. According to CSOs, this law has been pending for almost 19 years and in order to move forward, a new working group should be created under the MOJ, which would finalize the draft LAP (version of 2015). This process should include various stakeholders, among them local self-governing bodies.²⁴¹ In addition, an implementation plan should be designed to include the commentaries, trainings, awareness raising and other accompanying measures for efficient implementation. NGOs continue to use various platforms to advocate for the adoption of this law.²⁴²

Accordingly, Ukraine **is not compliant** with the first part of the recommendation 3.3 of the previous monitoring round.

Transparency and discretion in public administration, public participation

The previous report highlights the efforts of the Ministry of Revenue and Taxes to prevent and detect corruption as well as the use of risk-based approach to anti-corruption policies in public agencies. The latter issue is discussed in section 1.2 of this report and no information has been provided regarding the former.

The Government reported that the MOJ is preparing the draft Law of Ukraine "On public consultation." The purpose of the draft law is to define the procedure for public consultations in the process of preparation of the draft legal acts and public policy documents (concepts, strategies, programs and action plans, etc.), introduce modern standards of drafting and an efficient mechanism of interaction with the public. While such an initiative would be encouraged, the provided information is not sufficient to conclude compliance with the recommendation of the previous monitoring round report. Thus, Ukraine is **not compliant** with the second part of the recommendation 3.3 of the previous round.

Anti-corruption screening of legal acts

Ukraine was recommended to encourage public participation in anti-corruption screening of laws, including for the draft legislation initiated by the Parliament. The answers to the questionnaire do not provide information regarding the implementation of this recommendation and only describe the statutory duties of the MOJ and the Anti-Corruption Committee of the Parliament of Ukraine related to the mandatory screening of legislation and the NACP's right to conduct such an examination at its own initiative.

The previous monitoring report describes the anti-corruption screening by the Anti-Corruption Committee of the Parliament as inefficient and not meaningful, referring *inter alia* to the NGO feedback. According to the report, the volume of the legal acts for the anti-corruption screening is so big that the Anti-Corruption Committee is not in a position to perform the expertise efficiently. The NGOs developed the methodology of unofficial screening, envisaged by the legislation and conducted the selective screening of draft laws, however, their opinions have been discarded by the Parliament and did not affect the final results, according to the report.²⁴³

At the on-site, the representative of the Secretariat of the Anti-Corruption Committee confirmed that the draft laws subject to screening are numerous and the workload compared to the staff capacity is excessive reaffirming that the findings of the previous monitoring report are still valid. After the on-site, the Government provided the additional information regarding the exercise of its mandate of mandatory anti-corruption screening by Verkhovna Rada of Ukraine, which during the last four years has analyzed 5982 out of 8445 drafts received, provided conclusions on compliance with anti-corruption legislation and rejected those that contained provisions with the corruption risks. In addition, the Committee established the Council of Public Expertise in 2015 to support its work. The Council includes nine independent experts

²⁴¹ Shadow Report (2017) "Evaluating the Effectiveness of State Anti-Corruption Policy Implementation".

²⁴² Reanimation Package of Reforms (2016), Roadmap for Reforms of Ukraine. Available [here](#). See page 11-12.

²⁴³ OECD/ACN (2015) *Third Round of Monitoring Report on Ukraine*; page 119.

selected through an open competition. In its support functions, the Council involves a wide range of stakeholders, including the specialized NGOs.

The NGO shadow report praises the work of the Anti-Corruption Committee of the Parliament, criticizing the MOJ which has been passive in its role and the NACP which has not started to carry out the anti-corruption expertise yet. The report states that the Committee members showed willingness to use this tool, including in cooperation with the NGOs and confirms the information provided by the Government. According to the report 90.5% of 8 445 legislative drafts received by the Committee in four years' time were analysed and corruption factors identified in 5.9%.²⁴⁴ These the draft laws were subsequently rejected. The NGOs encourage the MOJ and the NACP to efficiently work on this direction of their mandate. In the long run, they recommend amendments to the legislation transferring the anti-corruption expertise functions from the MOJ to the NACP and streamlining its procedure as well as ensuring the efficient use of the tool.²⁴⁵ The monitoring team learned after the on-site that currently, the EU Anti-Corruption Initiative is helping the parliament to streamline this function.

Reportedly, the NACP approved the procedure²⁴⁶ and in cooperation with the UNDP, national and international experts developed the Methodology for conducting anti-corruption expertise and conducted anti-corruption expertise of 97 legal acts.

Thus, although the efficiency and impact of this work can still not determined, clearly, the steps have been made to include the public in the anti-corruption expertise and there are plans to improve the anti-corruption expertise further.

Transparency and discretion in risk areas, including tax and customs, and other sectors

Answers to the questionnaire refer to the obligation by state agencies to prepare anti-corruption plans based on the risk assessment. This issue is discussed in Chapter I of the report. The previous report commends Ukraine on initiating sector specific approach in the Ministry of Revenues and Taxes and State Fiscal Services.

The monitoring team is not in a position to assess compliance with this part of the recommendation due to the lack of information in the answers to the questionnaire and no opportunity to meet the representatives of the relevant agencies at the on-site.

Access to information

The access to information legislation of Ukraine is well-advanced, incorporating important rights and guarantees, including presumption of openness of information held or produced by public bodies and the requirement to apply the public interest (harm) test when deciding on granting or rejecting requests of information with so-called "limited access" (confidential, secret and official).²⁴⁷ Thus, no information held by public authorities can be closed *per se* and each time the determination should be made using the test. Moreover, the law lists the information that cannot be withheld, provides for the obligation to appoint freedom of information officers (FOI Officers) in public bodies and for proactive mandatory publication of some information. The Law does not provide for an independent oversight mechanism, but it assigns some monitoring functions (Art 17 of the Law on Access to Public Information) to the Secretariat of the Ukrainian Parliament Commissioner for Human Rights (Ombudsman's Office). The Global Right to Information rating (RTI) of Ukraine is high (23rd place and 108 points out of 150).²⁴⁸

²⁴⁴ A slightly higher percentage than indicated by the government.

²⁴⁵ Shadow Report (2017) "[Evaluating the Effectiveness of State Anti-Corruption Policy Implementation](#)".

²⁴⁶ The procedure of anti-corruption expertise approved by NACP's decision on July 28, 2016 №1 and registered in the Ministry of Justice on 25 August, 2016 for No 1184/29314.

²⁴⁷ See the detailed analysis in the [OECD/ACN Third Round of Monitoring Report on Ukraine](#).

²⁴⁸ The rating assesses the quality of access to information laws against the pre-determined indicators. See Centre for Law and Democracy, [Global Right to Information Rating](#).

Whereas the quality of the laws is good, the enforcement is marked with the evident challenges, similar to those described in the previous monitoring round as well. Most of these challenges, as highlighted by the authorities at the on-site and confirmed by civil society, are related to the lack of knowledge of the legal requirements and how to interpret them in practice by public servants providing answers to the requests. In addition, according to the NGO analysis of implementation, often the responses are of poor quality, incomplete and provided with the delay. Additionally, the fees of administrative proceedings have been increased recently and are unreasonably high, therefore not used by citizens regularly when their requests are denied, and the cost for the information requiring copying documents (that are more than 10 pages) is mentioned to represent a problem.²⁴⁹

During the on-site visit, the authorities further explained the difficulties related to the interpretation of the public interest test by freedom of information officers (FOI officers). Since there is no designated body to provide guidance and consultations, the practice has been inconsistent resulting in ungrounded refusals. Likewise, the recent joint submission of the NGOs to the Universal Periodic Review (UPR) highlights that: "Despite improvements in access to information legislation, implementation remains problematic. Civil servants, even at higher levels, lack knowledge about requirements on disclosure of information and understanding of how to process requests, resulting in too many public interest requests being denied [...] There are at least nine cases pending before the European Court of Human Rights regarding denied access to information cases."²⁵⁰ According to the joint submission, one of the weakest points in enforcement has been the judiciary: the courts disregarding the requests for information on budgets and salaries of judicial personnel.²⁵¹

After the on-site visit, in addition, the Government informed about the following challenges of implementation: the use of departmental lists of information "for official use" as a ground for refusal of the access to information; non-disclosure of information that is open under the law and the failure to answer email requests electronically. According to the Government, the main problems that lead to systematic violations are the lack of the culture of openness and the knowledge of the requirements of the law as well as controversial judicial practice of resolving the disputes concerning the application of the law in similar cases.

Some commentaries for the interpretation and application of the provisions of access to information is provided in the decision of the Supreme Administrative Court Plenum.²⁵² Whereas the Ombudsman's Office representative mentioned their joint activities with CSOs to monitor implementation of access to information legislation and provide recommendations to the officials on the best practices, it is evident that the public agencies do not receive any guidance or clarifications on a systematic basis.²⁵³ Clearly, guidance, trainings and awareness raising have been insufficient since the introduction of the law. The Government has not reported any trainings or awareness campaigns for the staff of the public agencies or the general public since the previous monitoring round.

Oversight body

The previous monitoring round recommended to set up or designate an independent authority for supervising enforcement of the access to public information regulations by receiving appeals, conducting administrative investigations and issuing binding decisions, monitoring the enforcement and collecting

²⁴⁹ <https://helsinki.org.ua/en/right-to-public-information/>

²⁵⁰ Joint submission of Ukrainian NGOs to the Universal Periodic Review (2017) Ukraine by ARTICLE 19, Centre for Democracy and Rule of Law, Anti-corruption Research and Education Centre, Human Rights Information Centre, Human Rights Platform, and Regional Press Development Institute

²⁵¹ *Ibid.*, para 40.

²⁵² Decree (September, 2016) on practice of administrative courts' application of legislation on access to public information.

²⁵³ Further, Ombudsman's webpage contains information about FOI, legislation and clarifications/information on various cases and judicial practice but it is not up-to-date.

relevant statistics and to provide such an authority with the necessary powers and resources for effective functioning.

The Ombudsman's Office has the powers for oversight of implementation of access to information legislation. However, necessary resources have not been provided as confirmed by the head of the unit responsible for access to information issues in the Ombudsman's Office during the on-site. This unit comprises 13 staff members, which is clearly insufficient in the context of the relatively new legislation and the currently developing practice. The monitoring team was informed about the joint initiatives of the Ombudsman's Office and CSOs aimed at enhancing the monitoring. A new methodology was developed in 2017 with the support of the UNDP and Denmark together with the leading non-governmental organizations in the field of access to information (Eidos Center for Political Studies and Analysts, Institute for the Development of Regional Press, and as well as the Center for Democracy and Rule of Law), which was planned to be tested soon. This initiative would be implemented under the Ombudsman Plus platform in 2017.

The NGOs actively follow the progress and issues on FOI.²⁵⁴ **Ombudsman Plus** already monitored implementation of the law in all regions of Ukraine during the 6 months. This seems to be a good source to analyse the problems and provide guidance for uniform practice to support the work of the FOI officer.²⁵⁵

Nevertheless, representatives of the both agencies present at the on-site visit session on the access to public information, Ombudsman's Office and State Committee for Television and Radio-Broadcasting, concurred with the view that an oversight body is necessary. The previous report already included the information about the initiative of the Ombudsman's Office to create an independent information commissioner with the right to issue binding decisions. The creation of an independent oversight institution, which would require changes in the Constitution, is currently debated by the Parliament. The draft law was already available during the previous monitoring.

As regards the enforcement statistics and analysis, the situation has not changed in this regard either. The Government did not provide data on the number or requests, the percentage of satisfied requests against rejected or the use of sanctions for violations of access to information provisions.

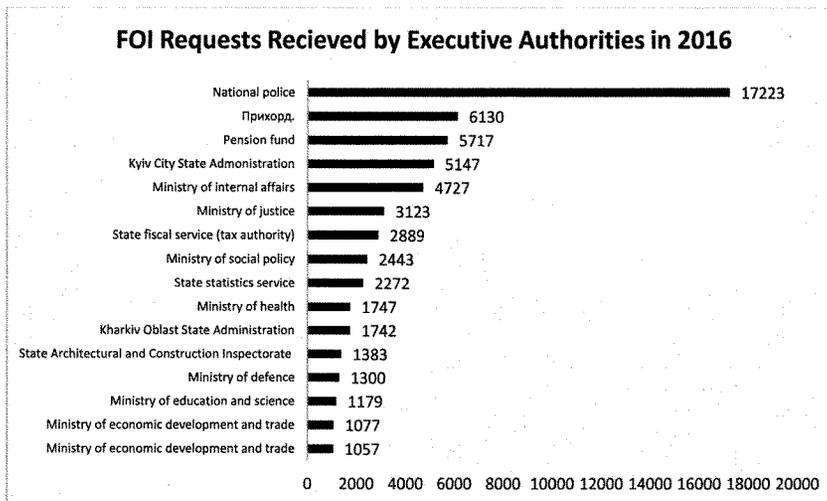
The Department of Information and Communications of the Government Secretariat continues to collect statistics on FOI requests providing some basic data with analytics on its web-page (data for 2012-2016 also quoted in the previous report) at its own initiative, including the number of requests received, the content of requests, the form of requests, appeals and the decision on appeals. However, no data is available on the questions such as what are the main challenges in access to information; the ratio of granted requests; rate of rejections and the grounds for refusal. Analysis of the consistency of application of public interest test, which represents a challenge has not been conducted. It is not clear either what is the follow up of the analysis of this information.²⁵⁶

Some of the available statistics has been quoted below as an illustration, however, they are not informative enough for the findings on the application of the right to access to information in practice.

²⁵⁴ M. Petrov (2016), Right to Public Information, Ukrainian Helsinki Human Rights Union.

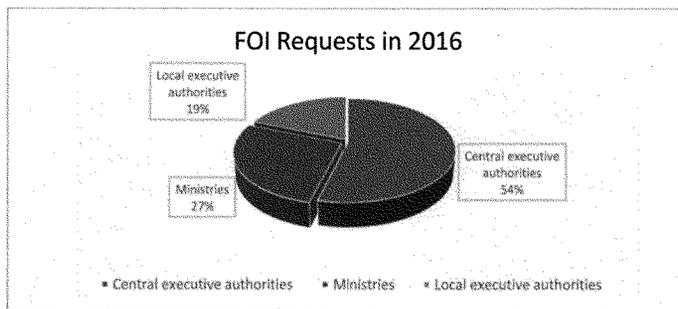
²⁵⁵ Results and Recommendations, Developed as a Part of the Project "Ombudsman Plus" (2016).

²⁵⁶ http://www.kmu.gov.ua/control/uk/publish/article?art_id=250178316&cat_id=244316991



Source: the [web-site](#) of the Government of Ukraine.

The State Committee for Television and Radio-Broadcasting of Ukraine monitors the web-pages of the line ministries and assesses the level of publication of information based on four main indicators²⁵⁷ and compiles the transparency rating of the state agencies. The latest monitoring was conducted in April-June 2017 and included 18 ministries, 43 other executive authorities (61 web-sites in total).²⁵⁸ The overall conclusion is that the transparency and the quality of information has been improved, information became more systematized and up-to-date. The next monitoring is scheduled in October-December 2017.



Source: the [web-site](#) of the Government of Ukraine.

In conclusion, situation under this component has remained largely unchanged and Ukraine is **not compliant** with the first part of the recommendation 3.6. of the previous monitoring round.

²⁵⁷ These are: availability of information; quality of information (how complete and up-to-date is the information, how is the search function working); transparency index (is calculated based on the first 2 indicators) and progress (how much the website evolved in a given period)

²⁵⁸ The website of the [State Committee for Television and Radio-Broadcasting of Ukraine](#)

Open data

The Law of Ukraine on Access to Information (Art. 10¹) requires all governmental bodies to present their datasets in an open data (machine-readable) format. Datasets should be published and regularly updated on the web-portal. In October 2015, the Cabinet of Ministers Resolution was approved, opening up 331 datasets²⁵⁹ and Ukraine launched the open data portal data.gov.ua with the support of the UNDP. The initiative significantly evolved since then and the web-page contains 19 992 datasets now organised under 15 themes.²⁶⁰ Information about the beneficial ownership is publicly available in Ukraine through the Unified State Registers of Legal Entities and Individual Entrepreneurs (USR), as well as through e-declarations (if a public official of his/her family member are beneficial owners of companies). This is a big step forward in Ukraine's efforts for transparency and fight against corruption and also represents the best practice.²⁶¹ However, no information was provided regarding the verification mechanisms (e.g. by the National Bank with regard to banks, National Agency on Prevention of Corruption with regard to asset disclosure of public officials, National Broadcasting Council concerning disclosure of ownership structure of broadcasting companies).

According to the Government the following registers are open: state register of rights and immovable property, land cadastre, register of permits and licences, auctions, unified register of state property, car register, in total 105 registries. ProZorro initiative, and implementation of Open Contracting Data Standard are other successful examples of transparency initiatives. In addition, Ukraine became the first country to integrate its national central register of beneficial ownership with the OpenOwnership Register – a global register of ultimate beneficiaries – where its beneficial ownership data will be automatically available.²⁶² According to the RPR: "A real breakthrough was achieved in the sphere of transparency and access to information and to governmental decision-making: all key governmental registries and databases were made accessible online free of charge or for a small fee [...] In addition, Ukraine is one of a few countries in the world that obliged all legal entities to disclose their final beneficiaries in the governmental business registry."²⁶³

Ukraine is ranked 31st in the Global Open Data Index 2017 with the 48% of the information open, this is a significant leap compare to 2015 (54th place with the 34% of information open). Among 100% open are the datasets on the Government budget, national laws and company register. 80-85% is the openness rate for national statistics, draft legislation and procurement. Among the datasets included in the index, these are not open in Ukraine: government spending, water quality, locations, national maps and air quality.²⁶⁴

In February 2016, the government approved the roadmap on open data, based on the open data readiness assessment of Ukraine conducted by the State Agency for Electronic Governance in Ukraine with the support of the UNDP.²⁶⁵ Ukraine committed to achieving 41 tasks in five key areas for open data development: improving open data availability and quality, training public authorities to publish open data,

²⁵⁹ The Cabinet of Ministers No. 835 of October 21, 2015, Resolution on approval of the Provisions on data sets to be made public in the form of open data. See also, a news article Ukraine's Government Opens over 300 Datasets for its Citizens.

²⁶⁰ <http://data.gov.ua/> last visited on 10 August, 2017.

²⁶¹ OECD (2016) Anti-Corruption Reforms in Eastern Europe and Central Asia, Progress and Challenges, 2013-2016 pg. 236.

²⁶² TI Ukraine (2017) Information about beneficial owners will be listed in a public register.

²⁶³ Andrii Marusov, Head of the Board, Transparency International Ukraine (2016) Anti-Corruption Policy of Ukraine: First Success and the Growing Resistance.

²⁶⁴ Open Knowledge International's first State of Open Government Data report.

²⁶⁵ Open Data Readiness Assessment of Ukraine

strengthening the role of open data in implementing state policy, providing regulatory support, and developing citizens' capabilities to deal with open data.²⁶⁶

Monitoring team would like to congratulate Ukraine on its progress on these transparency initiatives and encourage to continue opening up further, as envisaged by its plans.

Public access to urban planning documentation

The previous report noted that the construction and land allocation are one of the most corruption-prone areas in Ukraine. Public access to urban planning documents was included as one of the Open Government Partnership (OGP) commitments. The previous report recommended ensuring unhindered access to such documents. The government informed that although the legislation requires publishing the general and local plans of the inhabited localities and detailed area plans on the website of local government authority, including in open data format, in practice, its implementation turned out to be impossible as these documents contained information with the restricted access. The Ministry of Regional Development drafted the law to remove these obstacles but it was rejected by the Parliament in October, 2016. The Ministry planned to submit the revised draft again in spring 2017.²⁶⁷ According to the Open Government Partnership Independent Reporting Mechanism (OGP IRM) (2016), OGP commitment on access to urban planning documentation remains unimplemented.

Transparency of budgetary information

The previous report commends Ukraine on the adoption of the law on transparency of public funds in 2015, which provides for mandatory publication of detailed data on budgetary transaction in real time, budget expenses and revenues in open data format. RPR calls the adoption of the law a revolutionary step requiring all governmental and local self-government bodies as well as municipal and state-owned companies to disclose their budgets and transactions on the online portal spending.gov.ua. In 2016, only half of the governmental bodies and one fifth of companies published their information. In order to secure full compliance, legislative amendments were prepared and advocated by CSO coalition. The Government did not provide any information regarding the progress. Monitoring team could attest that the web-site is functional, but could not verify the level of publication of information to assess the trend. Ukraine's score in open budget index worsened in 2015 to 46 (from 54 in 2012). The opportunities for the public to engage in budget planning are assessed as weak by the index.²⁶⁸

EITI

In 2013, Ukraine received the status of a candidate country to EITI. The Ministry of Energy and Coal-Mining industry manages a multilateral group of stakeholders for implementation of EITI in Ukraine.²⁶⁹ On 8 September 2015, the government adopted a plan of action to implement the EITI in Ukraine in 2015. In January 2017, Ukraine published its EITI report covering 2014-2015 which includes oil, gas and mining industries.²⁷⁰ Ukraine's Validation against the EITI Standard were scheduled to begin on 1 July 2017. The Measures foreseen by the State Programme include: draft law on transparency of extraction industry in line with the EITI standards, ensuring Ukraine's participation in EITI: developing and publishing an annual report on payments of companies and governmental revenue from the extractive industries in line with the EITI standards. The Government reported that in addition to preparation of the report, the activities under the project include mechanisms to prevent corruption in the extractive industries; EITI improving regulatory support for the Extractive Industries Transparency; automation of the collection of information on payments to the budget; creation of an open information portal according to the extractive industries to

²⁶⁶ Ukraine's [roadmap for promoting open data development](#) in the country.

²⁶⁷ http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=61676

²⁶⁸ [International Open Budget Index](#).

²⁶⁹ <http://eiti.org.ua/>

²⁷⁰ EITI, the [National Report of Ukraine](#) (2014-2015).

optimize reporting preparation; conducting of specialized seminars and training for reporting entities to explain the peculiarities of reporting under EITI.

OGP

Ukraine joined the Open Government Partnership (OGP) in 2011 and is now in the process of implementation of its third action plan on open government for 2016-2018.²⁷¹ Already the first Action Plan was listed among the top 10 Action Plans. Ukraine has a national OGP Coordination Council which was recently restructured, its composition reduced and the co-chairs from the Government and civil society introduced.²⁷² The competitive selection of the representatives of civil society is planned. The Secretariat of the Council is placed under the Cabinet of Ministers. Six thematic working groups have been established co-chaired by the Government and civil society. The OGP IRM recommended to reform the OGP coordination mechanism by ensuring better operational management of the initiative and sharing responsibility for the initiative's management with civil society actors, ensure ownership from the implementing agencies through a formal process for coordination. The monitoring team has not been informed about the steps made to comply with this recommendation.

According to the TI Ukraine (2015): 14 out of 32 (44%) commitments of the Action Plan (2014-2015) has been fulfilled, 14 (44%) are in progress – 14 (44%), have yet to be launched – 2 (6%) and removed – 2 (6%). The overall success rate of the Initiative is 88%. More than twenty civil society organizations are engaged in the implementation of the Action Plan.²⁷³ Ukraine is further encouraged to use the platform offered by the Open Government Partnership to advance its transparency and public participation initiatives.

CoST

In Ukraine, the CoST Initiative²⁷⁴ was established in November 2013, when Ukravtodor²⁷⁵ became its member and started work in summer 2015 with the support of the World Bank and the Ministry of Infrastructure. CoST Pilot Initiative project in the road sector was established in November 2015 after the signing of the Memorandum on cooperation between the CoST International Secretariat, Ministry of Infrastructure of Ukraine, Ukravtodor and Transparency International Ukraine. TI Ukraine ensures operation of the National Secretariat and a multi-stakeholder group. In December 2016, the first verification report indicating the problems and giving recommendations for reform was presented. The Minister of Infrastructure and President recognized the success of the initiative and expressed commitment for implementation. Moreover, Ukrenergo²⁷⁶ recently joined CoST Ukraine. The State Programme include the following on this issue: Implementing projects under CoST, submitting proposals for extending Ukraine's participating in CoST to the Cabinet of Ministers. The monitoring team did not have an opportunity to receive more information or meet with the responsible officials to discuss the issue in more detail.

Streamlining the public service delivery

Answers to the questionnaire do not provide information on this issue and no one from the responsible authorities was present at the on-site visit to respond to the questions of the monitoring team. This subsection is therefore not addressed in the report.

Conclusions

The main accomplishment of Ukraine under this section since the previous monitoring round is related to the open data and transparency initiatives. The amendments of the law on access to public information of

²⁷¹ <https://www.opengovpartnership.org/country/ukraine>

²⁷² TI Ukraine, *The OGP Introduced a New Mechanism for Good Governance and Responsible Partnership*.

²⁷³ TI Ukraine (2016) *Open Government and Ukraine: is Ukraine able to properly Fulfill its Commitments?*

²⁷⁴ <http://www.constructiontransparency.org/ukraine>

²⁷⁵ *Ukravtodor*, SOE for automobile roads in Ukraine.

²⁷⁶ *Ukrenergo*, SOE, national power company.

2015 introduced the obligation of state agencies to publishing data in open, machine-readable format. Ukraine launched the open data portal which contains around 20 000 datasets. Furthermore, the information on beneficial ownership and various public registries became public. With these initiatives as well as launching the public procurement portal and electronic asset declarations, Ukraine achieved an unprecedented level of transparency, which is commendable and encouraged further.

Some progress could be observed in relation to the anti-corruption screening of legislation from the side of the NACP, which has approved the procedure and developed the methodology for anti-corruption expertise with the support of the UNDP and national experts and the Anti-Corruption Committee, which made some steps towards streamlining this function and included civil society in this work through the public council.

No tangible progress could be noted however in relation to the recommendations on the Law on Administrative Procedure and access to information. Other parts of the recommendations 3.3 and 3.6 could not be evaluated due to the insufficient information received from the Government.

Ukraine is **partially compliant** with the recommendation 3.3 and **partially compliant** with the recommendation 3.6 (based on the assessment of the recommendation on the open data) The previous round recommendations 3.3 and 3.6 remain valid (Under the new number 17).

Previous round recommendations that remain valid under number 17.

Recommendation 3.3. from the Second Monitoring Round of Ukraine valid in the Third round:

- Develop and adopt Code of Administrative Procedures without delay, based on best international practice.
- Take further steps in ensuring transparency and discretion in public administration, for example, by encouraging participation of the public and implementing screening of legislation also in the course of drafting legislation in the parliament.
- Step up efforts to improve transparency and discretion in risk areas, including tax and customs, and other sectors.

Recommendation 3.6. from the Third Monitoring Round report on Ukraine:

- Set up or designate an independent authority to supervise enforcement of the access to public information regulations by receiving appeals, conducting administrative investigations and issuing binding decisions, monitoring the enforcement and collecting relevant statistics and reports. Provide such authority with necessary powers and resources for effective functioning.
- Reach compliance with the EITI Standards and cover in the EITI reports all material oil, gas and mining industries. Adopt legislation on transparency of extractive industries.
- Implement the law on openness of public funds, including provisions on on-line access to information on Treasury transactions.
- Ensure in practice unhindered public access to urban planning documentation.
- Adopt the law on publication of information in machine-readable open formats (open data) and ensure publication in such format of information of public interest (in particular, on public procurement, budgetary expenditures, asset declarations of public officials, state company register,

normative legal acts).

New Recommendation 18

1. Carry out awareness raising and training of relevant public servants on access to public information laws and their application in practice.
2. Gradually increase the datasets and diversify areas on the open data portal.

2.5. Integrity in public procurement**Recommendation 3.5. from the Third Monitoring Round report on Ukraine:**

- Continue reforming the public procurement system, based on regular assessment of application of the new Law on Public Procurement, in particular with a view to maximise the coverage of the Public Procurement Law, minimise application of non-competitive procedures. At the same time ensure that any changes to the Public Procurement Law are subject to public consultations.
- Establish e-procurement system covering all procurement procedures envisaged by the Public Procurement Law.
- Ensure that entities participating in the public procurement process are required to implement internal anti-corruption programmes. Introduce mandatory anti-corruption statements in tender submissions.
- Ensure that the debarment system is fully operational, in particular that legal entities or their officials who have been held liable for corruption offences or bid rigging are barred from participation in the public procurement.
- Arrange regular trainings for private sector participants and procuring entities on integrity in public procurement at central and local level, and for law enforcement and state control organisations – on public procurement procedures and prevention of corruption.
- Increase transparency of public procurement by ensuring publication and free access to information on specific procurements on Internet, including procurement contracts and results of procurement by publicly owned companies.

This section of the report was drafted mostly based on the research made by the monitoring team and information available from open sources. At the on-site visit the monitoring team was informed by the participants of the panel on public procurement that the answers to the questionnaire provided to the monitoring team did not reflect the current state of affairs. To rectify this situation the Ukrainian participants of the panel agreed to provide correct information following the on-site visit. Subsequently, the questionnaire was re-sent to the Ukrainian participants by the Secretariat, but regrettably no information was provided in response.

Public procurement continues to represent a large part of economic activity in Ukraine. In 2014, the aggregate value of government procurements amounted to UAH 113.8 billion. In 2015 the figure grew to

UAH 152.59 billion, while during the first 6 months of 2016 it already reached UAH 120.52 billion (more than the total for 2014).²⁷⁷

Major developments took place in Ukraine since the 3rd round of the IAP monitoring report was adopted in March 2015. There has been a significant revision of the legislative framework: following the adoption of the new framework procurement legislation in December 2015, further regulations have followed. An electronic procurement system for the purchase of goods, works and services by government bodies was first piloted in May 2015 and then became full-scale operational by mid-2016. And finally, Ukraine acceded to the World Trade Organisation (WTO) Government Procurement Agreement (GPA). This allowed companies from GPA member countries (including all EU member countries) to bid for Ukrainian public contracts and provided Ukrainian businesses access to public procurement markets in GPA member states. It is evident that these are all significant achievements.

However, the public procurement system in Ukraine continues to carry high risks of corruption. Companies indicate that bribes are still very common in public procurement procedures.²⁷⁸ They further report that the diversion of public funds due to corruption and favouritism in decisions of government officials are very common.²⁷⁹ In the latest report on its activities, the National Anti-Corruption Bureau of Ukraine (NABU) identified corruption in the State-Owned Enterprises (SOEs) sector as one of the main priorities for NABU's work. Out of NABU's 400 criminal proceedings, approximately 100 dealt with SOEs. The analysis of these cases identifies corruption in public procurement as the number one crime typology for this sector.²⁸⁰ To name a few: NABU's high-profile case linked to SOE "Ukrzaliznitsya"; the cases linked to Administration of sea ports, including SOE "Pivdennyi"; the case linked to SOE "Energoatom". All of these examples represent recent cases of corruption in public procurement.

Continue reforming the public procurement system, based on regular assessment of application of the new Law on Public Procurement, in particular with a view to maximise the coverage of the Public Procurement Law, minimise application of non-competitive procedures. At the same time ensure that any changes to the Public Procurement Law are subject to public consultations.

At the time of the 3rd round of IAP monitoring, Ukraine adopted the new Law on Public Procurement #1197 (PPL 1197), which entered into force in April 2014. Recommendation 3.5 in this part refers to that PPL 1197. In addition, the 2014 Law on Prevention of Corruption introduced a number of changes which related directly to public procurement. In September 2015, Ukraine adopted the Law "On amendments of certain laws of Ukraine in the field of public procurement to bring them into compliance with international standards and to take steps to eliminate corruption" No. 679-VIII. The provisions of this Law are aimed at preventing corruption. The Law amended the Laws of Ukraine "On Public Procurement", "On prevention of Corruption", "On specifics of procurement in individual areas of economic activity", "On open use of public funds". This allowed Ukraine to accede to the WTO GPA, as mentioned above.

The situation concerning public procurement has significantly improved after these reforms. The PPL #1197 has introduced a number of simplifications and has introduced provisions that facilitate more transparent public procurement processes. Despite these generally positive developments, a number of

²⁷⁷ Data source for 2014-2016: Report of the Accounting Chamber of Ukraine on results of the analysis of the public procurement in Ukraine in 2015-2016, adopted on 31 January 2017.

²⁷⁸ Global Competitiveness Report 2015-2016, World Economic Forum, at http://www3.weforum.org/docs/gcr/2015-2016/Global_Competitiveness_Report_2015-2016.pdf

²⁷⁹ Global Competitiveness Report 2016-2017, World Economic Forum, at http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017_FINAL.pdf

²⁸⁰ NABU report for 1st part of 2017, can be further consulted at: <https://nabu.gov.ua/report/zvit-pershe-pivrichhya-2017-roku>

exemptions concerning the application of the PPL have remained in place. In addition, there were eight areas where procurement is regulated by special laws.²⁸¹

In May 2015, two pilot projects were launched: one on the use of e-procurement by the Ministry of Economic Development and Trade (MEDT)²⁸² and another pilot was launched in the Ministry of Defence on the testing of the use of e-procurement for procurement through the negotiation procedure.²⁸³ Both of these were utilising the then newly developed e-procurement system “Prozorro”. The results of these pilots were used in order to develop draft legislation on the use of e-procurement, which resulted in the Law on Public Procurement #922 (hereinafter PPL), adopted on 25 December 2015. Legislation was drafted and adopted in consultations with EU technical assistance project “Harmonisation of Public Procurement System in Ukraine with EU Standards”.

The new PPL entered into force in 2016, requiring that all procurement of a value exceeding UAH 200,000 (goods) or UAH 1.5 million (works and services) has to be conducted via the new e-procurement system. Contracts that are below these amounts can be procured through Prozorro on a voluntary basis.

In the case of the procurement of goods, works and services without the use of an electronic procurement system, provided that the value of the object of purchase is equal to or exceeds UAH 50,000 and is less than the value set in the Art 2 of the PPL, procuring entities must file a report on the agreements in the system of electronic procurement in accordance with article 10 of the PPL.

Based on the information provided to the monitoring team, the coverage of the PPL has not been significantly extended, despite numerous improvements in the areas where the PPL does apply. Consequently, this part of the Recommendation has not been implemented.

The new PPL (enacted in 2016) provided for the optional establishment of centralised procurement bodies. The Government or local self-government authorities can designate such bodies to conduct procurement on behalf of public entities, including through established framework contracts.

Statistics regarding the use of competitive vs non-competitive procedures provided by the Ukrainian authorities in the answers to the questionnaire are as follows:

In 2015, 103,865 public sector procurement processes were undertaken, out of which 55,790 were conducted using competitive procedures (53.71%) and 48,075 using non-competitive procedures (46.29%).

In 2016, procurement data available on the old platform of the Ministry of Economic Development and Trade (tender.me.gov.ua) provided the following information:

From a total of 79,407 total procurement procedures that were conducted (these were not registered within the new e-procurement system Prozorro), 49,091 (61.82%) followed competitive procedures, and 30,316 (38.18%) were done under non-tendering procedures (negotiated procurement procedure).

The data made available to the monitoring team indicates that a significant volume of public sector procurement, i.e. more than a third of all public sector procurement, is still conducted by using non-competitive procedures. Hence, this part of the recommendation cannot be considered met.

Establish e-procurement system covering all procurement procedures envisaged by the Public Procurement Law.

In 2014-2015, Ukraine introduced an innovative system of electronic procurement. The new eProcurement reform in Ukraine was driven by civil society activists and Transparency International Ukraine. In September 2014, a group of volunteers, providers of e-platforms, the regulator and experts signed a memorandum on the creation of a new system and thus launched the Prozorro Project. As the legislative

²⁸¹ Anti-Corruption Reforms in Eastern Europe and Central Asia, Progress and Challenges, 2013-2016. OECD 2016.

²⁸² It was approved by the CMU Order #501 from 20.05.2015.

²⁸³ This was also enacted by the CMU Order#416 from 31.3.2015.

system at the time did not provide for the use of such system, in February 2015 Prozorro was launched for the voluntary use by contracting authorities for micro value procurements (contracts of less than EUR 5,000).

The pilot initially involved three contracting authorities, three commercial platform operators and offered one electronic bidding procedure: open tendering with post-qualification and a mandatory electronic reverse auction. In March 2015, two Prozorro project volunteers were appointed to key regulatory positions in charge of the public procurement reform: one in the MEDT, which had become the leader of the reform, and one in the National Reforms Council under the President that supported the process.

According to the promoters of e-procurement in Ukraine, the new system had “a strong business background and allowed to benefit from existing electronic procurement capacity in private sector in Ukraine (that is, big number of commercial electronic systems with significant number of registered suppliers and strong sector, with one of the best programming communities in the world) while avoiding shortcomings of other multi models where using electronic procurement did not achieve transparency objectives with complicated data collection for monitoring and market analysis.”

The Ukrainian model includes a single central database unit to which all commercial platforms are connected through a standard application programming interface (API). The process stakeholders (procuring entities, suppliers and contractors) can access the system through these platforms. Full information about any public tender announced on any commercial platform is immediately recorded in the central database and is shared with all other platforms connected to the central unit. Stakeholders can use any commercial platform connected to the central database unit for asking questions and bidding. To achieve this effective exchange and access to information, all data formats, tender procedures, rules, etc. are strictly standardised and made uniform for all commercial platform operators.

To maximise the impact of the eProcurement reforms in the market, a decision was made to fully open the central database code by using the most flexible open-source Apache 2.0 license (it can be freely downloaded from <https://github.com/openprocurement>). “The opening of the source code facilitated joint improvement of the system by the community of Ukrainian programmers and the development of additional applications, as well as created an opportunity for exporting the model to any country wishing to implement a similar system. In addition, the decision to use the Open Contract Data Standard (<http://standard.open-contracting.org/>) from the very beginning will make it possible in the future to link the Ukrainian system with other electronic systems, as well as to perform a general cross-country analysis of public procurement data.”²⁸⁴

A business intelligence module for the monitoring of the Prozorro procedures was developed and launched (based on the donation of Qlik (www.qlik.com). Anyone, including civil society and the general public, can check the analytical data at <http://bi.prozorro.org/> in the real time mode.

The reform implementation cost very little. The first donation of USD 35,000 was received by Transparency International Ukraine from the first seven commercial platform operators who joined the Prozorro project in 2014. This funded the development of the single database software. Afterwards, international donors contributed USD 230,000 towards IT services necessary for the development of the single database unit, help desk and project office. The European Bank for Reconstruction and Development (EBRD) funded the eProcurement experts and a European Union (EU)-funded project contributed with advice of EU consultants and legal support on EU policies. In addition, there were private donations (qlik.com) and volunteers from Ukrainian IT companies, business schools, and individuals who worked and continue working *pro bono* for the ProZorro Project. Other donors have also contributed. Since 2016, the ongoing Transparency and Accountability in Public Administration and Services (TAPAS) activity, funded by the USAID and the UK-AID and implemented by Eurasia Foundation, provided financial, legal and technical support to the Prozorro project. As of today, over \$188,000 has been spent towards this goal, and over \$500,000 is obligated for improving Prozorro's system in coming years.

²⁸⁴ Open Contracting Partnership (2015), Tato Urjumelashvili and David Marghania, «Open Contracting in Ukraine: a collaborative effort for procurement reform», <http://goo.gl/BxRuZ0>.

The piloting exercise proved that the “hybrid” concept was operational. The promoters of Prozorro report that the system produced first savings and business community engagement far beyond the initial expectations. It is further reported that, by November 2015, the Prozorro pilot project had carried out more than 15,000 procurement procedures with a budget of more than USD 150 million, involving 1,500 procuring entities and with savings of more than USD 20 million.

As mentioned earlier, in December 2015 the PPL made the use of Prozorro system mandatory for purchases above a certain threshold by government entities. The connection to the system was implemented in two stages: central executive bodies and large state-owned enterprises were integrated starting 1 April 2016, with all remaining public procurement entities starting 1 August 2016.

To be used for all PPL operations, Prozorro is being upgraded to cover additional procurement methods, including open tender, negotiated procedures without publication, competitive dialogue and online framework agreements with e-catalogues compliant with the GPA/EU standards. Upgrades of Prozorro now include new modules for submitting complaints (e-review), procurement planning (e-planning), electronic payment and integration with the State Treasury. To achieve this, the old notice publication system is upgraded to Open Contracting Data Standard, new web-portal (design, layout, search), integration with e-government registers for qualification of suppliers and contractors as well as building a risk management system and a comprehensive security system.²⁸⁵

From the data available, it is difficult to estimate the ratio of contracts that are below and above the threshold determined for obligatory procurement through Prozorro. However, according to the data provided on the MEDT website, the contracts that exceeded the threshold amounted to UAH 192 billion in 2015.

The data provided by the Prozorro system suggest that in the period since August 2016, when the system became mandatory for all government buyers, it features bids for the total declared value of UAH 278 billion. Contracts worth UAH 78 billion were declared unsuccessful, which suggests that qualified suppliers or contractors could not be identified for these contracts. At the same time, the number of trade organisations (legal entities) registered in the system that completed at least one procurement procedure as of the end of January 2017 exceeded 22,000 (as of 30 August 2017 28,160).

As a comprehensive e-procurement system was established during the reporting period, this part of the Recommendation can be considered implemented.

Practical application and further improvements

When Prozorro was launched, it enjoyed very wide media coverage quoting it as a model of successful reforms in Ukraine.

However, in December 2016, experts of Deloitte Ukraine presented the results of their study of corruption in the field of infrastructure, which was based on anonymous interviews with members of the business community of the transportation market. The most common complaints of the businessmen were divided into 18 sections. Four referred specifically to the operation of Prozorro. These include: corrupt schemes in the selection of suppliers; manipulations with contract conditions; problems in the monitoring of tender implementation; and conspiracy of the bidders.

Whilst the introduction of Prozorro has vastly improved the transparency of procurement processes, it is only one of the tools in the fight of corruption in procurement. One needs to be aware of the fact that there are still a number of loopholes that an electronic procurement system cannot easily close in order to prevent corruption in a procurement process, e.g. procurement opportunities are not detectable due to misspellings of the object to be procured or supplier biased specifications or evaluation criteria are used. Most importantly, an e-procurement system cannot prevent corruption on the level of contract implementation.

²⁸⁵ EBRD (2015), «Are you ready for eProcurement? Guide to Electronic Procurement Reform», pages 77-84, <https://goo.gl/ufRCqR>.

Another problem that has been identified is the quality of the tender committees. There are approximately 25,000 tender committees in Ukraine, employing up to 200,000 people. In large SOEs, professionals deal with the tender processes. In contrast, tender committees in smaller public entities might include members who are not experts in the relevant field. These members often lack the professional expertise to draft technically adequate and supplier neutral specifications for a product they seek to purchase. Apparently, unscrupulous suppliers take advantage of this situation and provide goods of poor quality. Public procurement reformers speak openly about these problems and to address this, the Prozorro team has set up a library of standard specifications for the most popular products. This is constantly updated.²⁸⁶ This problem is being addressed at the moment by the MEDT and is explained in detail below.

Consequently, public control of procurement processes and contract implementation and the development of a competitive environment are of major importance. Therefore, stakeholders have the opportunity to challenge procurement processes on the grounds of allegations of corruption. In Ukraine, the authority to appeal procurement procedures remains to be the Antimonopoly Committee (AMC).

In order to engage a large number of citizens in controlling public procurement processes, the www.dozorro.org website (Dozorro) was created. The portal provides detailed information on submitting appeals and complaints to various law enforcement and regulatory authorities, as well as appeal templates. It is also possible for a user to refer to a notification of a tender with possible violations, which will be reviewed by lawyers who work for Transparency International

As of the beginning of February 2017, 429 suspicious tenders with a value exceeding UAH 4 billion have been reported through Dozorro. The procurement processes monitored through the portal include infamous examples, such as the purchase of Mitsubishi electric cars for the National Police and the tender to supply GPS systems for electric transport in Lutsk. Dozorro is a very useful tool and should be further supported.

In addition, the following loopholes in the current PPL relevant to the application to e-procurement have been identified in Ukraine's answers to the questionnaire:

- the lack of criminal responsibility in case of non-application of public procurement legislation by the procuring entities;
- the need to reduce the grounds for applying non-competitive procurement procedures;

Ukraine is commended for launching Prozorro and, moreover, for making it fully operational. Whilst the system would benefit from further improvements (particularly the inclusion of all relevant procurement methods), this is a notable and important step in the fight against corruption in Ukraine, which can also serve as an example for other countries in the region and beyond. It is of utmost importance that this achievement will not be reversed and the progress made is maintained. However, as mentioned further above, an electronic procurement system is only one tool in providing transparency and fairness in a procurement process and for reducing opportunities for corruption. It has to be complementary to other measures that prevent corruption.

Ensure that entities participating in the public procurement process are required to implement internal anti-corruption programmes. Introduce mandatory anti-corruption statements in tender submissions.

The 2014 Law on Prevention of Corruption introduced mandatory anti-corruption programmes for the participants in public procurement processes. It also provides for the introduction of compliance (anti-corruption) officers in all organisations participating in public procurement processes, which enhances internal control measures. The Public Procurement Law was also amended to prohibit public entities from undertaking public procurement processes, if they fail to implement these requirements. As relevant information was not provided to the monitoring team, it could not be assessed to what degree these requirements have been implemented in practice.

²⁸⁶ Press Reader 15.02.2017 at: <https://www.pressreader.com/ukraine/the-ukrainian-week/20170215/281552290611283>

The 3rd round of IAP monitoring was concerned that the mandatory introduction of anti-corruption programmes may potentially be a deterrent for small businesses to participate in public procurement processes. However this has been addressed through the introduction of the threshold of UAH 20 million. Tenderers for contracts below this threshold are not required to submit such statements.

The requirement to introduce mandatory anti-corruption statements in tender submissions was introduced in Article 17 by the CPL.

With reference to this part of the recommendation, it has been implemented.

Ensure that the debarment system is fully operational, in particular that legal entities or their officials who have been held liable for corruption offences or bid rigging are barred from participation in the public procurement.

The new PPL established a new system of debarment. The procuring PPL entity is obliged to reject a bid in the following cases:

- it has irrefutable evidence that the tenderer offers, gives or agrees to give, directly or indirectly, a reward to any official of the contracting authority, of another public authority in any form (proposal of employment, valuables, a service, etc.) with the view to influence the decision on selecting the successful tenderer or on choosing a certain procurement procedure by the contracting authority;
- confirmation that a tenderer is included in the Unified State Register of Perpetrators of Corruption or Corruption-related Offences;
- an officer (official) of a tenderer authorized by the tenderer to represent its interests during a procurement procedure, or an individual who is a tenderer was held liable for the commitment of a corruption offence in the field of procurement;
- an economic operator (tenderer), during the last three years, was held liable for an infringement in the form of anti-competitive concerted actions related to bid rigging;
- an individual tenderer, or an officer (official) of a tenderer who signed the tender was convicted of a crime committed with mercenary motives, for which the conviction has not been lifted or cancelled;
- a tender is submitted by a tenderer that is a related person to other tenderers and/or to a member(s) of the tender committee or authorized person(s) of the contracting authority;
- a tenderer has been declared bankrupt;
- the Unified State Register of Legal Entities and Sole Entrepreneurs contains no information on the ultimate beneficial owner (controller) of the tenderer;
- a legal entity that is a tenderer has no anti-corruption programme or no authorized officer is in charge of the implementation of the anti-corruption programme, if the value of the procurement contract equals to or exceeds UAH 20 million.

Information on how and to what extent these provisions of the PPL are being applied and monitored in practice was not made available to the monitoring team. Therefore it could not make conclusions in regards to the operational status of the new debarment system or its effectiveness.

Arrange regular trainings for private sector participants and procuring entities on integrity in public procurement at central and local level, and for law enforcement and state controlled organisations – on public procurement procedures and prevention of corruption.

Trainings through Prometeus online course have been organized and covered 13000 persons. The course provided basic and enhanced level of education on a free of charge basis. 2724 of these persons received certification, most of them were from tendering commissions.

In addition according to MEDT information in 2016:

- Trainings for Trainers program was launched (mostly for regional needs). 36 regional trainers conducted 165 seminars for 9000 participants from tendering commissions in the first three months of 2017.

- More than 20 out-of-office seminars were organized and carried out by METD (for NABU, State Audit Service etc).
- 10 regional seminars were organized and carried out by METD with the support of the EU technical assistance project “Harmonisation of Public Procurement System in Ukraine with EU Standards” (975 participants, 496 out of which represented purchasing entities).
- Comprehensive informational resource was launched on METD web-site (www.me.gov.ua).
- Methodological assistance is being provided through resource of Prozorro web-site (<http://infobox.prozorro.org>).

This part of the Recommendation therefore was implemented.

Increase transparency of public procurement by ensuring publication and free access to information on specific procurements on Internet, including procurement contracts and results of procurement by publicly owned companies.

The new PPL requires on-line publication of all main information about procurement, including tender announcements and detailed information on the procurement results (see the box below).

Tender procedures cannot be carried out before or without publication of the announcement about the procurement procedure on the central web-portal. Procurement announcements should also be published in English on the web-portal if the procurement exceeds the thresholds mentioned above. Information on procurement is published on the central web-portal free of charge via authorised electronic platforms. Public access to the web-portal is provided for free without any limits. Information on the web-portal is also published in a machine-readable format (as open data).

Table 8. Procurement information published on-line in Ukraine

According to the recent Public Procurement Law of Ukraine (enacted on 1 April 2016), the following information is to be published by the procuring entity on the central procurement web-portal:

- procurement announcement and tender documentation (not later than 15 days before the opening of tender proposals, if the procurement cost is below EUR 133,000 for goods/services or EUR 5,150,000 for works; not later than 30 days if the procurement cost exceeds the above thresholds);
- amendment of the tender documentation and any explanation attached to them (within one day after making such changes/issuing explanations);
- announcement about concluded framework agreement (within seven days after concluding the agreement);
- protocol of tender proposals consideration (within one day after its adoption);
- notice about intent to conclude a procurement agreement (within one day after making the decision on the procurement procedure winner);
- information about rejection of a participant’s tender proposal (within one day after the relevant decision);
- procurement agreement (within two days after it was concluded);
- notice about amendments in the agreement (within three days after the amendments were made);
- report about implementation of the agreement (within three days after the agreement’s term expiration, fulfilment of the agreement or its dissolution);
- report about concluded agreements (within one day after the agreement conclusion).

Source: OECD/ACN secretariat research.²⁸⁷

²⁸⁷ Anti-Corruption Reforms in Eastern Europe and Central Asia, Progress and Challenges, 2013-2016, OECD.

Technically, Prozorro is a centralised database connected to electronic trading platforms. Businesses that intend to bid for tenders can register with any of the authorised e-procurement services. By now, authorisation agreements have been entered into with 18 such platforms. Any information provided by these platforms on tenders, procurement procedures and contracts awarded is also recorded and stored in Prozorro. This allows any interested party to access the information free of charge and without authorisation. The design of the system did not incur any direct costs for the Ukrainian authorities as web hosting and IT development were financed by international donors.

Taking into account the above findings, it appears that the part of the Recommendation that deals with increasing transparency of public procurement by ensuring publication and free access to information on specific procurements on Internet has been implemented. Information in regards to contracts procured by SOEs was not available to the monitoring team and therefore it is difficult to assess what information is being published and to what extent procurement by SOEs is not undertaken through the Prozorro system.

Other issues raised in the 3rd round:

Review of complaints

Since 2010, the Anti-Monopoly Committee (AMC) has continued to be the body which reviews procurement related complaints. The AMC is a body primarily responsible for competition issues. It is referred to in the Constitution, has a special legal status and is not subordinated to the Government. The Head of the AMC is appointed and dismissed by the President of Ukraine upon agreement by the Parliament. To review procurement complaints, the AMC has set up a permanent administrative panel comprising of three state antimonopoly agents (staff members of the AMC). No prior appeal to the procuring entity is required. Decisions of the administrative panel are binding and can be appealed in court.

Under the new PPL, enacted in 2016, a complaint has to be submitted in an electronic form via the e-procurement system. A complaint, once filed, is published on the procurement web-portal. The Law sets different deadlines for the submission of complaints depending on the procurement process stage. Once a contract has been concluded, a complaint can only be reviewed by court. Within three days after submission of a complaint, the review body decides on the start of the proceedings. A complaint should be reviewed within 15 days after it was filed (during which the tender is suspended). The complainant and the procuring entity have the right to participate in the consideration of the complaint, including via telecommunication in real time. The consideration of the complaint is open to the public and the decision is announced publicly. The review decision can be appealed in court within 30 days after its publication in the e-procurement system.

The PPL introduced the notion of “related persons” and established some restrictions to avoid possible conflicts of interests of said persons. Members of the AMC’s administrative panel (a review body) are not permitted to participate in the consideration of a complaint if he/she is “related” to the complainant or the procuring entity. The Ukrainian Law uses the concept of “related persons” also to prevent bid rigging by prohibiting participation in the procurement of an entity that is “related” to another bidder (or the procuring organisation). The definition of “related party” is sufficiently broad to cover most cases of possible conflicts of interests. Ukraine has also introduced a stronger general system of conflict-of-interests resolution under the 2014 Corruption Prevention Law (see above chapter on integrity of public service) and disclosure of beneficial owners of all legal persons (see below chapter on access to information). However, the 3rd round IAP report noted that none of the above mentioned laws seem to identify a conflict of interest, which may occur in a procurement process with respect to affiliated (related) persons, who were involved in the early phases of the procurement cycle, such as feasibility or design stages. There is no formal requirement to present a conflict of interest and/or affiliation declaration/statement, as a part of tender submissions.²⁸⁸

²⁸⁸ OECD/ACN (2015), Third Monitoring Round report on Ukraine, page 134.

Conclusions

Ukraine is commended for many of the steps taken towards the reform of the procurement system. The introduction of the e-procurement system is certainly expected to have a positive effect on enhancing the level of transparency in public procurement and thus making it less susceptible to corruption. The large amount of relevant information related to procurement that is published in Ukraine is impressive. This creates the possibility for public scrutiny of the Government's spending through procurement. Anti-corruption measures introduced under the anti-corruption legislation of 2014 have also helped build mechanisms to prevent corruption. These steps have contributed to Ukraine progressing in many parts of the 3rd round Recommendation. As described above, there are still some actions, tools, policies and practices missing or unsatisfactory, which should be further addressed by Ukraine.

Ukraine is **largely compliant** with the previous recommendation 3.5

New Recommendation 19

1. Continue reforming the public procurement system, based on regular assessments of the application of the new Law on Public Procurement, in particular with a view to maximise the coverage of the Public Procurement Law and to minimise the application of non-competitive procedures.
2. Ensure that state owned enterprises (SOEs) use competitive and transparent procurement rules as required by law.
3. Extend electronic procurement systems to cover all public procurement at all levels and stages.
4. Provide sufficient resources to properly implement procurement legislation by procuring entities, including adequate training for members of tender evaluation committees.
5. Ensure that internal anti-corruption programmes are effectively introduced within entities that conduct public procurement processes.
6. Ensure that the debarment system is fully operational, in particular that legal entities or their officials who have been held liable for corruption offences or bid rigging are barred from participation in public procurement.
7. Arrange regular training for private sector participants and procuring entities on integrity in public procurement at central and local level. Provide training for law enforcement and state controlled organisations on public procurement procedures and prevention of corruption.

2.6. Business integrity

Recommendation 3.9. from the Third Monitoring Round:

- Rigorously implement provisions of section 6 of the 2014 Anti-Corruption Strategy on the prevention of corruption in the private sector.
- Ensure business participation in the development of the Action Plan for the Anti-Corruption Strategy and its implementation and monitoring.
- Pursue further simplification of business regulations to reduce opportunities for corruption and eliminate corruption schemes affecting business.
- Consider introducing regulations for lobbying, in particular clear regulations for business participation in the development and adoption of laws and regulatory acts.
- Ensure that the business has a possibility to report corruption cases without fear of prosecution or other unfavourable consequences.

Information received by the monitoring team in relation to business integrity in the answers to the questionnaire was limited. Therefore, this chapter is primarily based on the analysis of information available from public sources, available pieces of legislation as well as information obtained in the various discussions and meetings during the on-site visit.

According to the World Bank's Doing Business, Ukraine has slightly improved its performance regarding the protection of minority investors and enforcement of contracts, however overall it remains one of the worst performers regarding business climate among the Istanbul Action Plan countries²⁸⁹. See below more details on Ukraine's standing in several main business-related ratings.

Table 9. Ukraine in global governance and doing business ratings

Index	Armenia	Azerbaijan	Georgia	Kazakhstan	Kyrgyzstan	Mongolia	Tajikistan	Ukraine	Uzbekistan
"Doing Business", 190 countries. Rank in 2017 (in 2013)	38 (32)	65 (67)	16 (9)	35 (49)	75 (70)	64 (76)	128 (14)	80 (137)	87 (157)
Economic Freedom Index, 186 countries. Rank in 2017 (in 2015, 178 countries)	33 (52)	68 (85)	13 (22)	42 (69)	89 (82)	129 (96)	109 (140)	166 (162)	148 (160)
Global Competitiveness Index, 144 countries.	82 (82)	40 (46)	66 (77)	42 (51)	102 (127)	104 (93)	80 (100)	79 (73)	-

²⁸⁹ World Bank (2017), Doing Business, <http://www.doingbusiness.org/data/exploreeconomies/ukraine#starting-a-business>

Rank in 2015-2016 ranking (in 2012-2013 ranking)									
<i>-Burden of government regulation</i>	56 (41)	31 (29)	7 (9)	46 (52)	68 (92)	92 (102)	17 (22)	87 (135)	-
<i>-Property rights</i>	94 (64)	99 (87)	78 (131)	66 (77)	121 (142)	112 (118)	64 (94)	131 (134)	-
<i>-Transparency of government policy making</i>	51 (16)	55 (49)	31 (36)	30 (32)	95 (87)	69 (102)	65 (68)	98 (123)	-
<i>-Irregular payments and bribes</i>	73 (82)	87 (110)	23 (26)	64 (64)	130 (137)	77 (114)	69 (101)	122 (133)	-
<i>-Judicial independence</i>	106 (110)	101 (86)	56 (95)	72 (94)	109 (140)	102 (112)	58 (64)	132 (124)	-
<i>-Favouritism in decisions of government officials</i>	71 (75)	58 (43)	48 (51)	50 (91)	101 (136)	129 (130)	41 (40)	99 (119)	-
<i>-Burden of customs procedures</i>	105 (127)	122 (107)	9 (13)	55 (77)	97 (136)	86 (117)	73 (91)	113 (138)	-
<i>-Ethical behaviour of firms</i>	96 (91)	60 (69)	51 (55)	43 (70)	110 (141)	97 (121)	46 (78)	76 (124)	-

Source: Doing Business, World Bank (2017); Economic Freedom Index, Heritage Foundation; Global Competitiveness Index, World Economic Forum (2015-2016).

Recommendation 3.9. from the Third Monitoring Round:

- Rigorously implement provisions of section 6 of the 2014 Anti-Corruption Strategy on the prevention of corruption in the private sector; Ensure business participation in the development of the Action Plan for the Anti-Corruption Strategy and its implementation and monitoring.

Prevention of corruption in the private sector was included as one of the sections – section 6 - of the National Anti-Corruption Strategy for 2014-2017. While representatives of the Ukrainian government admitted that no risk analysis was conducted regarding corruption involving the business sector, the Strategy identifies the main general problems such as the "merger of business and government", illicit lobbying of business interests, complicated procedures for business regulations, corruption in control authorities and in the judicial system. It is worth noting that many non-governmental groups study corruption risks in the business environment that can be used for the development and monitoring of policy documents, e.g. TI Ukraine has recently studied compliance practices in the private sector.

According to the Ukrainian government, the section was developed in consultations with the private sector. However, no clear information was provided on how representatives of business community were involved into this process. Furthermore, the business sector is not involved in the monitoring of the implementation of the Strategy (for more information on the monitoring of the Strategy please refer to the relevant section of the report), which indicates the low level of interest of the business community in this policy document. During the on-site visit the NACP informed the monitoring team that they would involve business in the development of the next Anti-Corruption Strategy, however this process has not started yet. It is important

to note that there are many active companies and business associations working on business integrity issues in Ukraine that can contribute to such work, e.g. AmCham Compliance club and others.

Regarding the implementation of section 6, the main achievement to date was the development and adoption in 2017 of the model anti-corruption programme for state-owned enterprises (SOEs) and for companies that would like to take part in the public procurement. This model programme was developed by the NACP in consultations with several state and private companies, and with the technical assistance from the UNDP. The SOEs and some companies participating in public tenders are obliged to have adopted their own anti-corruption programmes based on this model.²⁹⁰ However, no information was provided by the Government about the application of the model programme in practice. As discussed in the section 1.2. of this report, during the on-site visit the representatives of businesses informed that in most of the cases this is just a box-ticking exercise. The NACP is not involved in developing or monitoring these programmes in any ways. On the other hand, one company informed that they made a good use of this regulation and developed a quality anti-corruption programme.

Recommendation 3.9. from the Third Monitoring Round:

- Pursue further simplification of business regulations to reduce opportunities for corruption and eliminate corruption schemes affecting business.

While the Anti-corruption Strategy provided only a limited contribution to promoting business integrity, as described above, several important measures in this area were taken by various parts of the Government including the Ministry of Economy, Ministry of Justice and other state bodies. These included simplification of business regulations, promoting e-governance solutions including e-procurement and improving transparency and disclosure of information.

In 2015, Ukraine introduced legislative changes which simplified procedures for starting and conducting business. Among the main achievements was the creation of “one-stop shop” for corporate registration, allowing registration at the local level, allowing submission of electronic documents and simplification of liquidation and restructuring procedures.

At the end of 2014, the Parliament adopted legislation limiting the rights of the controlling bodies to inspect companies. Additionally the moratorium on business entities inspection has been established.²⁹¹

In 2016, the Cabinet of Ministries approved Resolution No. 926-p, which effectively accepted all the measures that were proposed by the World Bank its Doing Business Roadmap for Ukraine.²⁹² The Roadmap includes many practical measures that reduce red tape and various bureaucratic obstacles (e.g. cancelling the mandatory use of seals on company documents) as well as fundamental measures liberalising the economy (e.g. removal of price controls on food products). While the Resolution provides key important measures for deregulation, its implementation in practice suffers from considerable delays. According to the 2016 report of the National Reform Council, these delays are due to slow pace of approval of drafted legislation by Parliament.

²⁹⁰ According to Art. 61 of the CPL, anti-corruption program is obligatory for approval by the heads of: 1) state, municipal enterprises, business partnerships, the state or municipal share of which exceeds 50 percent, average number of employees for the accounting (fiscal) year exceeds fifty, and gross revenue from sale of goods (works, services) during this period is more than seventy million hryvnias; 2) legal entities that are participants of pre-qualification, participants of the procurement procedure in accordance with the Law of Ukraine “On Public Procurement”, if the cost of procurement of goods and services is equal to or exceeds 20 million UAH.

²⁹¹ The Law No. 76-VIII of Ukraine “On Amendments to Some Legislative Acts of Ukraine” of December 28, 2014

²⁹² <http://www.kmu.gov.ua/control/uk/cardnpd?docid=249579596>

More recently, in 2017, Ukraine abolished a number of mandatory licensing and permits for some industry sectors and introduced the principle of "silent consent" whereby companies wishing to engage in a certain activity need only to make a declaration to the state, instead of requesting a permit.

In 2017 the Government launching an automatic system of VAT reimbursement – one of the notorious corruption risks for companies. The Ministry of Finance has initiated reform of the State Fiscal Service (SFS) in order to reduce corruption in this area as well.

The introduction of the e-procurement system ProZorro in 2016 became a mini revolution in Ukraine. It has radically improved transparency in public procurement and allowed identifying and stopping many corruption cases. For more information about ProZorro please refer to the section on public procurement.

Ukraine has achieved significant improvements in the area of transparency and disclosure of information related to business integrity. On the one hand, the Ministry of Justice has opened for public access all state registered, including for example the State Registry on real estate. On the other hand, since 2014, Ukrainian companies are obliged to disclose their ultimate beneficiaries in the course of the incorporation and then regularly update this information. This information is publicly available in the Unified State Register of Legal Entities and Individual Entrepreneurs (USR) and the data also could be obtained from the public Application Programming Interface (API). These measures brought about unprecedented transparency in the business world of Ukraine, where information about owners of key companies and their possible links to oligarchs and politicians became open. Anti-Corruption and law-enforcement institutions now could use this information during their investigations. In May 2017 the Ministry of Justice together with TI Ukraine and global initiative Open Ownership signed a memorandum on transferring data on beneficial owners of the Ukrainian businesses to the global register of ultimate beneficiaries.²⁹³

Recommendation 3.9. from the Third Monitoring Round:

- Consider introducing regulations for lobbying, in particular clear regulations for business participation in the development and adoption of laws and regulatory acts.

In 2015 the Parliament Committee on Prevention and Fight against Corruption created a working group for preparing the draft law "On Lobbying". The working group consists of MPs, representatives from the CSOs, academics, and private sector lawyers (Paragraph 11 of the Protocol of the Meeting dated on 3 June 2015 #26). However, at the time of the on-site visit, the draft of the law was not developed yet.

Recommendation 3.9. from the Third Monitoring Round:

- Ensure that the business has a possibility to report corruption cases without fear of prosecution or other unfavourable consequences.

Ukrainian companies have several possibilities to report about corruption. As in the past, they can report to the police or prosecution services, however, experience showed that they did not have trust that these bodies would effectively protect them. They can also complain to the NACP hot line launched in 2016, however it does not appear popular among companies. With the establishment of NABU, citizens of Ukraine have witnessed for the first time that powerful individuals were punished for corruption, which gave them hope, that rule of law can be rebuilt.

Establishment of the Business Ombudsman Council in this context provided a powerful tool for companies to report corruption and to seek protection of their legitimate rights.

²⁹³ <https://minjust.gov.ua/news/ministry/minyust-pidpisav-memorandum-pro-peredachu-do-globalnoi-bazi-vlasnikov-biznesu-informatsii-pro-kintsevih-benefitsiariv-ukrainskih-kompanii-23642>

The Business Ombudsman Council (BOC) was established on November 26, 2014, based on the Decree of the Government No. 691 dated 26.11.2014²⁹⁴ as implementation of Memorandum of Understanding for the Ukrainian Anti-Corruption Initiative dated May 12, 2014²⁹⁵, concluded among the Government of Ukraine, EBRD, OECD, and five largest Ukrainian business associations. The BOC is a public-private non-profit entity with high degree of independence and professional staff.

BOC has two main functions - investigation of individual complaints by companies concerning alleged acts of corruption or other violations of their legitimate interests by the state, and proposing systemic solutions to the most common problems. Regarding the investigations, BOC reviews the complaints submitted by companies, conducts preliminary analysis, and in cases where complains are substantiated, BOC goes to the state bodies that infringed company's rights and seeks resolution of specific problems. During 2015-2017 BOC received around 2000 complains and closed over 600 investigations. BOC's actions helped companies to recover around 10 billion UAH.²⁹⁶

In addition to this main function, BOC prepared systematic reports on the most common problems faced by companies. During 2015-2016 BOC issued 9 systemic reports 297 in the area of tax administration, abuse of power on the part of law enforcement agencies, competition policy, natural monopoly, etc. The systemic reports include recommendations for individual state bodies. BOC also prepares reports for the Cabinet of Ministers with the proposals of legislative amendments. According to the latest BOC's activity report respective governmental institution implemented 87% of all recommendations issued by the BOC.²⁹⁸

The BOC earned the high level of trust and acknowledgement among small and medium business as well as business associations, proving to be instrumental in fighting corruption as the first point of contact for businesses seeking redress against unfair treatment and as an institution that provides for greater transparency of business practices in Ukraine.

In order to strengthen its status, the BOC has prepared a draft law "On Business Ombudsman Institution", which was approved by the Parliament in the first reading on May 31, 2016.²⁹⁹ In addition to providing a legal basis for the BOC, the Draft Law seeks to build BOC's powers, such as the duty of state bodies to consider BOC's commendations, administrative liability for state bodies for the failure to disclose information on BOC's request. Currently the Draft Law is still awaiting final approval in the second reading.

In January 2017, back-to-back with the regional expert seminar "Business Integrity in Eastern Europe and Central Asia", BOC together with the OECD, UNDP, and EBRD organised a round table "Business Integrity in Ukraine" to discuss practical ways for promoting business integrity in the country. At that meeting BOC proposed a new initiative to the Ukrainian companies - the Ukrainian Network of Integrity and Compliance (UNIC).

The proposal was enthusiastically supported by the participants of the round table, which stressed that it became possible for companies in Ukraine to do business in full compliance with the law. Doing clean business often requires more effort, time and investment, but companies realised that clean business was a good long-term investment. While the number of such clean companies is growing, they are still a minority in the Ukrainian market, they agreed therefore to gather together to promote clean business and to make it

²⁹⁴ <http://zakon5.rada.gov.ua/laws/show/691-2014-rr>

²⁹⁵ Memorandum of Understanding for the Ukrainian Anti-Corruption Initiative. – May 12, 2014 –

<http://www.ebrd.com/downloads/news/mou-ukraine-aci.pdf>

²⁹⁶ <https://boi.org.ua/publications/reports>

²⁹⁷ <https://boi.org.ua/en/publications/reports?page=1>

²⁹⁸ Ibid

²⁹⁹ http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=58980

'fashionable' in Ukraine. BOC with the assistance of international partners took the lead in establishing the UNIC.

Further consultations with Ukrainian business and international partners indicated that there is a sufficient willingness among many companies operating in Ukraine to engage in active promotion of business integrity. On 19 May 2017, 46 companies signed a pledge of integrity and established UNIC Initiative Group. Companies who joined the network committed to support a good business reputation and improve the standards of integrity. They also agreed that UNIC in order to maintain the high standard of integrity for UNIC members, they will undergo a verification of their integrity systems. In addition to this verification procedure, UNIC will also provide assistance to companies regarding integrity issues, will promote good practices, and will also engage in various promotional activities to make the notation of business integrity well known and popular. At present, UNIC is a private sector initiative, but in the future UNIC may also engage in a dialogue with the government.

The official launch of the UNIC is planned for October 2017, where new members will be invited to join this collective action.

Conclusions

The State Programme provided only a limited contribution to the promotion of business integrity. The development of the model compliance programme for SOEs and companies participating in the public procurement is a good initiative, but it has to be further promoted in order to produce a visible impact on business practices. In this regard, the focus on business integrity of SOEs should become the priority of the government.

Ukraine implemented several important measures to simplify business regulations; most recent measures to simplify licencing and permits are positive developments. However, most of the actions provided by the Doing Business Roadmap were delayed and remain unimplemented. Moreover, the fundamental challenge of freeing the Ukrainian economy from the control of oligarchs is still to be tackled.

E-governance solutions provide an important contribution to the improvement of business climate and prevention of corruption. In this regard ProZorro e-procurement system is a key achievement. However, this system addresses only one part of the procurement process – the transparency of the bidding process – and further work is needed to clean up public procurement from corruption.

Ukraine has improved transparency and disclosure of information related to business, publication of information beneficiary owners of companies is a good example. Further efforts are needed to improve disclosure requirements for companies.

Ukraine has taken limited steps to develop a law on lobbying, such as the creation of a working group in the Parliament to develop a draft law; however, no tangible results are produced yet.

Creation of the Business Ombudsman Council provided the business with a powerful tool to report corruption cases without fear of prosecution or other unfavourable consequences, to receive protection of legitimate rights, as well as possibility to tackle most common problems in a systematic manner. Independence and professionalism of BOC allowed this institution to gain trust of companies in the rule of law, which, in its turn inspired them to launch the collective action for compliance and integrity, the UNIC. It is crucial for Ukraine to build on this excellent progress and to take further steps. Strengthening the BOC and supporting UNIC should be among these steps. Greater involvement of other state bodies, such as the Ministry of Economy and Trade and National Agency for Corruption Prevention, in the business integrity would be important for the sustainability of this work.

Ukraine is **largely compliant** with the previous recommendation 3.9.

New Recommendation 20

1. Ensure further implementation of the following provisions from the 2014 Anti-Corruption Strategy on the prevention of corruption in the private sector:
 - a) Simplification of business regulations and promoting free market competition;
 - b) Debarment of companies involved in corruption offences from the use of public resource such as public procurement, state loans, subsidies, and tax benefits;
 - c) Establishing obligations for external and internal auditors to report corruption offenses;
 - d) Raising awareness of companies about the law on liability of legal entities for corruption offences and enforcing this law in practice;
 - e) Consider introducing regulations for lobbying, in particular clear regulations for business participation in the development and adoption of laws and regulatory acts.
2. Develop business integrity section of the new National Anticorruption Strategy on the basis of a risk analysis and in consultation with companies and business associations, ensure active participation of business in the monitoring of the Strategy.
3. Promote integrity of state owned enterprises through their systemic reform and by introducing effective compliance or anti-corruption programmes, increasing their transparency and disclosure.
4. Strengthen the Business Ombudsman Council by creating a legal basis for this institution in the law and by providing it with necessary powers for effective work.
5. Support the Ukrainian Network of Integrity and Compliance.

CHAPTER III: ENFORCEMENT OF CRIMINAL RESPONSIBILITY FOR CORRUPTION

This report comes in a very volatile time for Ukraine, which still has a long way to go in terms of establishing functioning democratic anti-corruption institutions and actions and there are serious signs that it is in danger of backsliding into the kleptocracy that it was despite many substantial positive steps since the dignity revolution. This section attempts to do both: point out the achievements and areas of potential risk of regress.

3.1. Criminal law against corruption

Recommendation 2.1.-2.2. from the Third Monitoring Round report on Ukraine:

- Expand the statute of limitations for all corruption offences to at least 5 years and provide for suspension of the statute of limitations during the period an official enjoyed immunity from criminal prosecution.
- Provide adequate training and resources to prosecutors and investigators to ensure the effective enforcement of new criminal law provisions, in particular with regard to such offences as illicit enrichment, trafficking in influence, offer and promise of unlawful benefit, definition of unlawful benefit including intangible and non-pecuniary benefits, criminal measures to legal persons, new definition of money laundering.
- Analyse practice of application of the new provisions on corporate liability for corruption and, based on results of such analysis, introduce amendments to address deficiencies detected. Ensure autonomous nature of the corporate liability.

By the time of the 3rd round of IAP monitoring Ukraine had introduced into its national law most of the international requirements on criminalization of corruption. New recommendations pointed out as outstanding only two issues that related to the statute of limitations and shortcomings in the legislation on corporate liability.

In addition, a new recommendation was made in the 3rd round to take steps focused on increasing the enforcement of the offences that have been introduced into Ukrainian legislation through adequate training and resources to the investigators and prosecutors.

Expand the statute of limitations for all corruption offences to at least 5 years and provide for suspension of the statute of limitations during the period an official enjoyed immunity from criminal prosecution.

At the time of the 3rd round, under Ukrainian law the statute of limitation for such basic offences as Active bribery of employee of state enterprise, institution or organisation (Criminal Code (CC) Art 354, para 1), Passive bribery of employee of state enterprise, institution or organisation (CC Art 354, para 3), Illicit enrichment (CC Art 368(2), para 1), Active bribery in private law legal persons (CC Art 368(3), para 1),

Active bribery of persons providing public services (CC Art 368(4), para 1), and Active trafficking in influence (CC Art 369(2), para 1) was set at 3 years.

This was deemed problematic for effective investigation and prosecution of such cases in light of the complexity of most cases in this area and the concealment efforts which are usually involved. It was also pointed out that the absence of the suspension of the statute of limitation for the time when a person enjoys immunity from prosecution represents another problem.

Therefore, the 3rd round IAP report recommended expanding the statute of limitations for all corruption offences to at least 5 years, and providing for suspension of the statute of limitations during the period an official enjoyed immunity from criminal prosecution.

No relevant information was provided by authorities on these issues in the answer to the questionnaire. Specifically, the request for statistics on the number of corruption cases that were abandoned because of the expiry of limitation period which would be helpful in assessing the issue was not provided on the request of the monitoring team.

Interlocutors met during the on-site visit told the monitoring team that there were corruption cases that have been closed due to running out of the statute of limitation; 2 cases in 2016 have been mentioned in particular. However, most of the law enforcement officials, met at the on-site visit, were more concerned with tight timelines of the pre-trial investigations. The monitoring team followed up on this issue and requested statistical data to support these concerns; the information provided indicated no cases that have been closed due to running out of the pre-trial investigation term in 2015 or 2016.

After review of the texts of the relevant articles of the CC, no changes that relate to sanctions have been made since March 2015, and therefore the statute of limitation of 3 years continues to apply.

No changes have been also made into CC Art 49, which regulates release from criminal responsibility in cases when the statute of limitation runs out since the 3rd round of monitoring.

This part of the recommendation is not implemented.

Provide adequate training and resources to prosecutors and investigators to ensure the effective enforcement of new criminal law provisions, in particular with regard to such offences as illicit enrichment, trafficking in influence, offer and promise of unlawful benefit, definition of unlawful benefit including intangible and non-pecuniary benefits, criminal measures to legal persons, new definition of money laundering.

Trainings and resources

In the answers to the questionnaire Ukrainian authorities provided very little information regarding trainings and resources on such offences as illicit enrichment, trafficking in influence, offer and promise of unlawful benefit, definition of unlawful benefit including intangible and non-pecuniary benefits, criminal measures to legal persons, and the new definition of money laundering. No relevant information on this issue was provided to the monitoring team at the on-site visit.

It was communicated that due to the very recent establishment of the Specialised Anti-Corruption Prosecutor's Office (SAPO) they didn't have time to undergo many trainings. Only examples of conferences in which the prosecutors of SAPO took part were provided. Information regarding trainings of investigators which would focus on these offences was not made available. The GPO has jurisdiction to enforce these same statutes for lower ranking officials. No information was provided as to their training on these issues either. While it would seem the topics should at least be addressed in the curriculum for students at Academy of Prosecutors, if not in continuing legal education, no such information was provided. Therefore, on the information provided, such efforts cannot be considered as adequate training

that would ensure effective enforcement of the abovementioned offences which are critical to an effective anti-corruption program.

Similarly, no guidelines or methodological recommendations for the investigators or prosecutors in this regard have been mentioned to the monitoring team. Also it appears that no policy priorities have been set to focus on these types of crimes.

Nevertheless, it is understandable that the newly created anti-corruption agencies – National Anti-Corruption Bureau of Ukraine (NABU) and SAPO – have only recently started their operations: NABU hired its first detectives in August 2015 and SAPO was being staffed in December 2015. They have just started providing more in-depth training to their staff. Initial trainings for NABU detectives have commenced in September 2015; SAPO prosecutors have also undergone training. Newly recruited detectives of NABU (and their analysts), as well as SAPO prosecutors dove right into the practical work and have shown some impressive results to date. However, it would be important as these institutions' training capacities develop to ensure that the training programs that they devise focus on these offences and provide adequate guidance to ensure effective enforcement.

And finally, in terms of resources to ensure effective enforcement of these offences, they have been allocated in Ukraine: through the establishment and appropriate staffing of the NABU and SAPO. Both agencies are very well resourced and fare well compared to other state bodies in the criminal justice system of Ukraine. In addition, investigative capacity has been successfully supported by analytical capacities (NABU retains analytics in addition to detectives). All of this contributed to the good results of these institutions to date in terms of actual enforcement. (See Section 3.4. for more details in regards to resources of these institutions.)

It is noted that there are adequate salaries for NABU employees which seems to have helped to attract talented applicants, salaries of prosecutors within the SAPO are also at the same or above level as NABU's and this is stipulated in the law.

As discussed in other sections, no information was provided about the resources of the PGO outside of SAPO to investigate and prosecute corruption which is important because it has the jurisdiction to investigate and prosecute high level corruption from the previous presidential administration as well as all corruption at levels lower than the SAPO and NABU. Judging by the results reported, adequacy of resources and/or lack of priority for addressing these offenses might be an issue.

Enforcement

Enforcement efforts of NABU and SAPO to date have been successful (this subject is delved into more depth in the Section 3.3 of this report). Moreover, there is actual enforcement of some of the offences mentioned in the Recommendation 2.1-2.2. In particular:

- With regard to illicit enrichment, in 2015 NABU registered two criminal proceedings on the fact of committing a crime under CC Article 368-2. In 2016 there were already 11 criminal proceedings. In 2016 1 case was submitted with charges to court and the trial on this case is ongoing.
- With regard to trafficking in influence, in 2015 NABU registered one criminal proceeding on the offence under CC Article 369-2. In 2016 there were already 5 criminal proceedings. In 2016 3 cases were submitted with charges to court, with the trials on-going.
- With regards to money laundering, in 2015 NABU registered 3 criminal proceedings under the CC Article 209. In 2016 there were 9 criminal proceedings. However, none of them had been submitted with charges to court. As of 7 September 2017, 2 criminal proceedings were filed with the court by SAPO.

Ukrainian authorities provided information in regards to enforcement by other investigative bodies, as follows:

- With regard to illicit enrichment, in 2015 there were 31 criminal proceedings. In 2016 there were 14 criminal proceedings and 38 in 2017. As of end August 2017 one of them has been submitted to court, with 1 conviction.
- With regard to trafficking in influence, 208 criminal proceedings were registered in 2015, 254 in 2016, and 192 in 2017. As of end August 2017 171 of them have been submitted to court, with 164 convicted persons.
- With regard to money laundering, in 2015 there were 220 criminal proceedings; in 2016 there were 144 criminal proceedings and 147 in 2017. As of end August 2017 76 of them have been submitted to court.

No information was provided regarding investigations or charges in cases on offer and promise of unlawful benefit, or that involve the definition of unlawful benefit including intangible and non-pecuniary benefits.

Finally, no information in regards to the obstacles that the investigators and prosecutors are facing in these cases was provided. However, as discussed in Section 3.4 of this report, in the onsite visit the monitoring team heard about concerns that NABU has no wiretap authority and is required to work with other agencies that have such authority. This can undermine the independence of NABU and the confidentiality of their investigations.

To conclude information made available to the monitoring team refers only to some of the offences mentioned in the recommendation and therefore it was only partially implemented.

Analyse practice of application of the new provisions on corporate liability for corruption and, based on results of such analysis, introduce amendments to address deficiencies detected. Ensure autonomous nature of the corporate liability.

Quasi-criminal corporate liability for corruption offences was introduced in Ukraine at the time of the 3rd round of IAP monitoring. Some of the deficiencies in the initial legislation have been addressed by the amendments of May 2014 and are covered in detail in the 3rd round report.

While it was not directly stated in the introduced provisions of the Ukrainian CC, it is clear from them that corporate liability is linked to that of the “authorised person” who committed the offence. The very model used (“measures of criminal nature”) presumes that such measures are secondary to individual liability; it requires “commission of the crime” by the authorised person on behalf and in the interests of the legal entity; according to Article 96(10) CC when applying such measures to a legal entity court takes into account, *inter alia*, gravity of the crime committed, degree of criminal intent of the perpetrator; according to Article 214, para. 8, of the Criminal Procedure Code (CPC) proceedings with regard to the legal entity are carried out simultaneously with the proceedings concerning natural person; under Article 284 CPC, para. 3, proceedings with regard to the legal entity should be closed in case criminal proceedings against the natural person were closed or the relevant person was acquitted.³⁰⁰

As a result, in the 3rd round of monitoring Ukraine was recommended to ensure the autonomous nature of the corporate liability. Ukraine was also called to analyse the practice of application of the new provisions and address any challenges, etc. And finally it was recommended that with the assistance of qualified international organizations where possible, Ukraine should plan, create and provide trainings and written

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guidelines and other advice on the law, and how to employ it in specific cases, for at least prosecutors and judges.

No changes were introduced into the legislation since the 3rd round of IAP monitoring and no information in regards to analysis of the application of these provisions conducted by Ukrainian authorities was made available. The actual practice of application, according to the information provided by Ukrainian authorities, at the moment appeared to be one criminal proceeding, which was initiated by NABU and concerned a private university (as legal entity) attempting to bribe a Deputy Minister of Education and Science. This case was submitted with charges to court.

When this issue was discussed with various interlocutors at the on-site visit, including detectives, prosecutors and judges, they all agreed that the cases were not forthcoming because the legislation was too new and “foreign”. They also said the practice needs to be formed before any guidelines or even analysis can be carried out. The judges expressed most active interest in taking up such cases, while prosecutors expressed more skepticism. The novelty of this legal concept is understandable, however, in order for the practice to form there needs to be a concerted push for pursuing of such liability. Perhaps it could be done both in terms of policy messages and in practical terms of providing training specifically focused on liability of legal persons for corruption offences.

Interestingly, at the on-site visit the monitoring team was also provided with the copy of the court decision of the Mariupol court, in which it applied measures of criminal nature to a legal person implicated in the case under CC Art 369 (active bribery) in the form of the fine amounting to UAH 19840. This decision was appealed to the Donetsk oblast court which upheld the decision of the 1st instance court.

This case is interesting in several aspects. Firstly, taking into account that this case was never reported in the framework of the statistics provided for the monitoring, it may mean that there could be more cases of this nature. Secondly, the case has been tried outside of the capital where courts were traditionally viewed as less receptive to new concepts. Thus, this seems to be in line with opinions expressed by the representatives of the judiciary met at the on-site visit that they are ready and open to trying such cases. Thirdly, the circumstances of the case support the position taken in the 3rd IAP monitoring round in regards to the lack of autonomous liability. The legal person in this case was fined when the natural person was found guilty and criminal measures applied to the legal person were indeed secondary to individual liability. And finally, it is without a doubt a positive development that the decision of the first instance court was further upheld.

For the reasons stated, this part of the recommendation was not implemented.

Conclusions

Very little was done by Ukraine towards implementation of this recommendation, especially in legislative terms. The statute of limitation has not been changed, and legislation on liability of legal persons for corruption offences has not been analysed or further improved.

Focused training on offences introduced at the time of the 3rd round of monitoring was not offered to the investigators or prosecutors on an in-depth and systematic basis. In terms of training of NABU and SAPO, this is objectively explained by the recent establishment of the new anti-corruption criminal justice institutions, but this explanation is not applicable to the PGO which has and continues to have responsibilities for these offenses for certain offenders.

However, it is undisputable that proper resources have been allocated to tackle these crimes at the very least at the top level of crimes falling under jurisdiction of NABU and SAPO. And newly established agencies already managed to demonstrate some results of actual enforcement of the offences covered by the Recommendation 2.1.-2.2; which is a positive sign. Further enforcement practice as it develops will be a real test of the capacity of these agencies to apply these particular norms. For the PGO which continues

to have responsibility to enforce these offenses, no information was provided in the questionnaire or in the onsite visit about resources or results in this area.

Ukraine **is partially compliant** with the previous recommendation 2.2 – 2.2, and the previous recommendation remains valid and is reinstated with some additional elements in the 4th round.

New Recommendation 21

1. **Expand the statute of limitations for all corruption offences to at least 5 years and provide for suspension of the statute of limitations during the period an official enjoyed immunity from criminal prosecution.**
2. **Provide adequate training and resources to prosecutors and investigators to ensure the effective enforcement of new criminal law provisions, in particular with regard to such offences as illicit enrichment, trafficking in influence, offer and promise of unlawful benefit, definition of unlawful benefit including intangible and non-pecuniary benefits, criminal measures to legal persons, new definition of money laundering. Training programmes of the specialised anti-corruption agencies should contain modules or focus in other ways on these issues in their regular training curriculum.**
3. **Analyse practice of application of the new provisions on corporate liability for corruption and, based on results of such analysis, introduce amendments to address deficiencies detected. Ensure autonomous nature of the corporate liability.**
4. **Take measures at the policy level (for example, set as priorities by the management of the anti-corruption specialised bodies) to encourage investigation and prosecution of corruption committed by legal persons.**

Confiscation

Recommendation 2.5. from the Third Monitoring Round report on Ukraine:

- Ensure that confiscation of assets obtained as a result of crime, their proceeds, or their equivalent in value is applied to all corruption and related crimes in line with international standards; collect and analyse statistics on the application of special confiscation measures (both under criminal and criminal procedure codes).
- Implement an efficient procedure for identification and seizure of proceeds from corruption; consider setting up a special unit responsible for tracing and seizing property that may be subject to confiscation.
- Introduce extended (civil or criminal) confiscation of assets of perpetrators of corruption crimes in line with international standards and best practice.

Overall, Ukraine has made considerable progress since the 3rd round of monitoring in enacting legislation and establishing necessary institutions to implement an effective confiscation program to deprive criminals of access to the profits of crime and to recover assets of Ukraine that have been misappropriated.

This appears to be due in large part to the work of the “Interagency Working Group on Coordination of the Recovery of the Assets Illegally Obtained by High-level Officials of Ukraine” (Interagency Working Group) which was established in March 2015 and included civil society experts in this area (RPR and AnTac). The Interagency Working Group was chaired by a knowledgeable now-former Deputy Prosecutor General, Vitaliy Kasko. In particular, this Interagency Working Group has developed draft legislation which was reviewed favorably by the Council of Europe. Challenges presented in the legislative process

were ultimately overcome in large part and resulted in adoption of the Law of Ukraine 772-VII on 10 November 2015³⁰¹; it was subsequently amended several times, including by Law of Ukraine 1019-VIII on 18 February 2016³⁰², and is still mostly compliant with international standards. In addition, the CMU authorized establishment of the Unified Registry of Assets in April 2017, the creation of the Registry is pending.

Many observers credit the requirement imposed by the terms of the EU Liberalization Action Plan for Ukraine and by the EU Macro-Financial Assistance agreements with support from western embassies as a principal motivation for the government to take these steps as is the case with many other anticorruption reforms undertaken since the “Revolution of Dignity” in 2014.

In connection with this monitoring, however, Ukraine provided little statistical or anecdotal evidence of effective implementation of the confiscation authorities. Open source information indicates that confiscation has been sought in a number of cases brought by the NABU and the SAPO, especially through search and seizure warrants but courts have inconsistently granted meaningful pre-trial restraints of assets and, overall, corruption cases are not proceeding to trials which might result in convictions and final confiscation judgments.

There is little open source information about confiscation actions brought by the Prosecutor General’s Office (GPO) in corruption cases it is handling with the exception of one reported matter in which a recovery of approximately \$1.5 billion in assets misappropriated that are linked to a scheme led by Yanukovitch. If true, this major seizure could be a very good development. However, the relevant court decision was not made available to the public. In the future the newly created Asset Recovery Agency should be involved in such cases. According to the information provided by the government the Unified State Registry of Assets will be created only in 2018 or after.

Specifically, three recommendations were made in the 3rd round of monitoring concerning confiscation. First, it was recommended that Ukraine ensure that confiscation of assets obtained as a result of crime, their proceeds, or their equivalent in value is applied to all corruption and related crimes in line with international standards. Relatedly, Ukraine was recommended to collect statistics of the application of confiscation measures under both criminal and criminal procedure laws. Second, Ukraine was recommended to implement an efficient procedure for identification and seizure of proceeds from corruption and consider setting up a special unit responsible for tracing and seizing property subject to confiscation. Third, Ukraine was recommended to introduce extended confiscation of assets of perpetrators of corruption crimes in line with international standards and best practices.

Ensure that confiscation of assets obtained as a result of crime, their proceeds, or their equivalent in value is applied to all corruption and related crimes in line with international standards; collect and analyse statistics on the application of special confiscation measures (both under criminal and criminal procedure codes).

No information regarding changes in application of confiscation to all corruption and related crimes was provided by Ukrainian authorities in the answers to the questionnaire.

However, from a review of legislation enacted in 2016, the Criminal Code of Ukraine (CC) provides for two types of confiscation:

³⁰¹ Law on National Agency of Ukraine on Detecting, Tracing and Management of Assets deprived from Corruption and other Crimes.

³⁰² Law On Amending the Criminal and Criminal Procedure Codes of Ukraine in line with recommendations of the European Commission’s 6th report of the state of implementation by Ukraine of the EU visa liberalization plan, in regards to improvement of the procedures on arrest of assets and special confiscation.

1. Confiscation under Art. 59 of CC, also called extended confiscation, which means confiscation of all or part of property directly belonging to the convicted person (no matter of the origin of assets);
2. Special confiscation under Art.96-2 of CC, which resembles ordinary confiscation in European countries which means confiscation of proceeds and means of crime.

Special confiscation under Art.96-2 of CC applies to all corruption crimes. Extended confiscation under Art. 59 of CC applies to embezzlement committed on an especially large scale or by the organized groups, and abuse of authority by public officials, if it resulted in severe consequences, including certain types of bribery, and illicit enrichment.

Thus, all corruption crimes appear to be covered under the special confiscation law but not all by extended confiscation of convicted persons.

Furthermore, it appears that extended confiscation provides for a form of value based confiscation but special confiscation may be more limited to the specific proceeds and means of crime.

It is also not clear that confiscation of transformed/merged assets has been envisaged. Ukrainian legislation does not appear to provide for confiscation of assets which have been transferred to a third party, without an exception for transfers to someone knowledgeable of the involvement of the asset in the scheme or for less than fair market value. Thus, it may still be possible to defeat confiscation by transferring property to family members or nominees. It is recommended that if these gaps still exist in the legislation, that necessary amendments should be introduced to have an effective confiscation process.

As it was mentioned before, no statistical data on the application of special confiscation measures (both under Criminal and Criminal Procedure Codes) was provided by the Ukrainian authorities in the answers to the questionnaire and some limited data was provided following the on-site visit. Interlocutors met at the on-site visit told the monitoring team that statistics were not being collected in regards to special confiscation. They also said that while confiscation powers are being used and some examples were shared with the monitoring team, there was no policy document emphasizing that confiscation is a priority and the law enforcement representatives were hoping that perhaps ARMA would become the driver of the extended confiscation. Some, however, have expressed doubts whether that could happen soon, if at all. They provided some examples when it was applied. This leads to conclusion that this part of the recommendation has not been addressed by Ukraine.

Implement an efficient procedure for identification and seizure of proceeds from corruption: consider setting up a special unit responsible for tracing and seizing property that may be subject to confiscation.

Ukraine has made progress in establishing a procedure for identification and seizure of proceeds from corruption and a special office responsible for maintaining a unified record of seized and confiscated assets, as well as responsibility to manage and preserve the value of seized assets and maximum recoveries for confiscated assets. As stated above, through the work of the Interagency Working Group, legislation was developed which was positively reviewed by the Council of Europe to accomplish this goal.

The Law of Ukraine "On the National Agency of Ukraine for the identification, investigation and management of assets derived from corruption and other crimes," came into force on November 26, 2015. The law stipulated that the newly created body would be responsible for the identification, tracing, evaluation of assets on appeal of investigator, detective, prosecutor, and court (the investigating judge). It was also to be responsible for the evaluation, keeping of records and asset management. It was required to establish and maintain the Unified State Register of assets seized in criminal proceedings, replacing the prior patchwork of agency responsibility and transparency. It would be able to cooperate with similar bodies (offices for tracing and asset management) of foreign countries, other competent bodies, relevant international organizations. It would also be authorized to be involved on behalf of Ukraine in obtaining evidence in cases relating to the return of assets derived from crime to Ukraine that is in foreign jurisdictions.

The actual agency – the Asset Recovery and Management Agency of Ukraine (ARMA), which is entrusted with the functions of identification, investigation, evaluation, management and confiscation of criminal assets, was established by the Resolution of the Cabinet of Ministers of Ukraine on February 24, 2016 № 104.

Decree of the Cabinet of Ministers of Ukraine from March 30, 2016 № 244 approved the composition of the selection board for the selection of the candidate for the post of Chairman of the ARMA. The selection procedure was conducted and the first Chairman of ARMA was appointed on December 7, 2016. This appointment was followed by establishment of the inter-departmental working group to support the set-up of the ARMA.

The monitoring team was advised that through a competitive process, people with financial investigations skills have been hired by the ARMA. Presently ARMA employs 45 people, who are properly equipped. Additionally, it is understood that these “investigators” are to have access to all relevant databases about property ownership and income which exist in Ukraine to conduct their investigations. Currently ARMA was already granted access to 5 state registries and two more are pending. It would be important to ensure that they are also granted remote access through secure channels to the databases of the Unified Register of Pre-Trial investigations and have access to data bases of bodies of the local self-governance and others. In the area of international cooperation ARMA has already joined various international networks, including CARIN, StAR and is about to join Interpol Global Focal points for Asset recovery and other regional asset recovery networks. Establishing bi-lateral contacts and cooperation with foreign authorities will be important.

However, it is unclear when the agency is allowed to or will be involved in the process of confiscating assets or in identifying assets which could be confiscated. For example, are they responsible for and do they work with the investigative teams to conduct financial tracing of the proceeds of crime for use as substantive evidence and for special confiscation purposes? Will ARMA be principally responsible to identify assets to be confiscated from convicted persons in extended confiscation proceedings where the assets need not be tied to specific criminal activity? Additionally, it will be important to monitor the level of awareness of various law enforcement authorities responsible for investigations and prosecutions of the available resources that ARMA can provide to increase effective confiscation.

As noted above, by law, the ARMA is to maintain a central database of all seized, restrained and confiscated assets. This is an important requirement to limit corruption in the seizure and misappropriation of seized and confiscated assets. To date, no statistics have been provided about restrained and forfeited assets by whether the bodies previously responsible for such action or ARMA. ARMA is obligated to maintain custody to preserve the value of restrained and confiscated assets but according to open source materials there appear to be assets which are restrained by prosecutors through court orders but are not yet within the oversight of the ARMA. While the process of restraining assets in place rather than liquidating them or transferring custody of them to the control of ARMA before a final order of confiscation is entered may be appropriate to maintain the value of assets subject to confiscation in some instances, it is nevertheless important to maintain a central registry and it is too soon to determine whether these alternative custody arrangements are being implemented successfully.

It appears that until ARMA is properly staffed and operational, there will be no comprehensive database and analysis of the statistics regarding confiscation proceedings in criminal cases and the implementation of an efficient procedure for identification and seizure of corruption proceeds is therefore in progress.

Therefore further progress on both of these recommendations is currently pending.

Introduce extended (civil or criminal) confiscation of assets of perpetrators of corruption crimes in line with international standards and best practice.

As discussed, the 3rd round monitoring report recommendation that Ukraine introduce extended confiscation of assets of perpetrators of corruption crimes in line with international standards and best practice appears to have been met in 2016.

An amendment to Criminal Procedure Code, Article 100.9, provides that when a court rules on the criminal case it should also order confiscation of assets (money and other assets, including proceeds from them) belonging to a person convicted of a corruption offence or money laundering or to a legal entity related to such a convicted person, if the legal grounds for acquiring such assets have not been established in the court. Similarly, the Civil Procedure Code was supplemented with new Chapter 9, Section III, on proceedings to recognize assets as acquired with unexplained legitimate wealth and forfeit them. According to these new provisions, a prosecutor may file a lawsuit with a civil court after the criminal conviction of a public official for corruption or money laundering. The court will recognize assets as unjustified and forfeited if, based on the evidence submitted, it cannot establish that the assets or the money used to acquire the assets was obtained on a legal basis.³⁰³

Like other significant legislative reforms in this area, it will be important to see examples of the use of this authority especially in corruption crimes.

Finally, Financial Action Task Force (FATF) Recommendations include a recommendation that countries should adopt a form of non-conviction based confiscation. Extended confiscation as adopted by Ukraine provides some though not all of the same benefits. At the time that Ukraine considered and adopted laws allowing for trials in absentia in the wake of the allegations of grand corruption by former government officials who fled Ukraine in February 2014, the decision was apparently made that the process of trial in absentia was preferable to non-conviction based confiscation given the problems in Ukraine with fair and equitable courts. It should be noted however, that the monitoring team was provided no evidence that this trial in absentia process is being used to confiscate assets upon conviction from persons who have fled the jurisdiction. Accordingly, there seems to be no effective means to recover assets from corrupt officials who have fled Ukraine.

Conclusions

Based on the analysis above, implementation of the first two parts of this Recommendation are still pending. However, Ukraine's steps taken towards their implementation are recognised, especially the new confiscation legislation and the establishment of ARMA. This is the result of cooperative and effective work together by government and civil society experts taking advantage of international expertise. Such an approach to other legal and practical issues is encouraged. The third part of this recommendation has been formally implemented and will require a close follow-up on the actual implementation of the new legislation.

Ukraine is **partially compliant** with the previous recommendation 2.5.

New Recommendation 22

1. **Ensure that ARMA has adequate resources to meet its legislative objectives, including collecting and maintaining statistical evidence about confiscation actions. Ensure that its role and available resources are communicated to the law enforcement and prosecutorial bodies.**
2. **Step up efforts to confiscate corruption proceeds to family members, friends or nominees.**

³⁰³ OECD/ACN (2015), Foreign Bribery Offence and Its Enforcement in Eastern Europe and Central Asia, pages 40-41, <http://goo.gl/IXbRru>

3. Continue to make progress in the effective use of the newly enacted confiscation authorities.

Immunities

Recommendation 2.6. from the Third Monitoring Round report on Ukraine:

- Review legislation to ensure that the procedures for lifting immunities of MPs and judges are transparent, efficient, based on objective criteria and not subject to misuse.
- Limit immunity of judges and parliamentarians to a certain extent, e.g. by introducing functional immunity and allowing arrest in cases of *in flagrante delicto*.
- Revoke additional restrictions on the investigative measures with regard to MPs, which are not provided for in the Constitution of Ukraine.

The IAP monitoring consistently has been raising the issue of extensive immunities in Ukraine. Initially in the 2nd round report and then in the 3rd round monitoring report Ukraine was urged to review the effectiveness of legislation and regulation on immunities of judges and parliamentarians in order to ensure that the procedures for lifting of immunities are transparent, efficient, based on objective criteria and not subject to misuse and to limit immunity for judges and parliamentarians to a certain extent, e.g. by introducing functional immunity and allowing arrest in cases of *in flagrante delicto*.

At the time of the 3rd round monitoring report the law provided that a judge or a parliamentarian, unlike all other persons, may not be apprehended at the time when he/she committed a crime or attempted to do it, immediately after commission of a crime or during pursuit of a person suspected of a crime. Specifically, during the 3rd round monitoring the law provided that a judge may not be apprehended or detained – before his conviction by a court - without the consent of the parliament. A member of parliament of Ukraine may not have been “brought to criminal liability” (a stage in the criminal proceedings when a notice of suspicion is delivered to a person), apprehended or subjected to a measure of restraint in the form of detention or house arrest without consent of the parliament.

Limitations of these immunities required amendment of the Constitution of Ukraine. Such amendments with regard to judges were adopted in June 2016 (enacted in September 2016), however they did not address the MPs. Specifically, on 2 June 2016, Ukraine’s parliament approved a package of constitutional amendments reforming the justice system³⁰⁴ and the Law on the judiciary and the status of judges³⁰⁵, which came into force on 30 September 2016. In addition the Law on the High Council of Justice was adopted on 21 December 2016 and entered into force on 5 January 2017. The constitutional and broader judicial reform has had as one of its outcomes the substitution of an absolute immunity of judges with a functional one. Judges may now be remanded in custody in case of commission of grave and especially grave crimes and if apprehended in *flagrante delicto*. In all other cases the approval by the High Justice Council must be obtained. This is undeniably a positive development, however practice will be the ultimate test of these changes.

This being said, civil society representatives note that there are two difficulties with this provision already. In particular, in January 2017 High Council of Justice adopted Public Appeal, which has to clarify corresponding article of the Constitution³⁰⁶ and in their opinion contradicts the initial idea of the

³⁰⁴ Law On Amendments to the Constitution of Ukraine (provisions on justice) # 1401-VIII

³⁰⁵ Law On Judiciary and Judges Status # 1402-VIII

³⁰⁶ <http://www.vru.gov.ua/news/1956>

Constitutional amendments³⁰⁷, and there is no clear understanding as to what is being covered by "detention during the crime or just after the crime". This uncertainty leads to different understanding of this clause by the High Council of Justice and law enforcement bodies.³⁰⁸ As a result the ability of the law enforcement agencies to conduct investigations against judges can be hampered.

At the same time the Criminal Procedure Code of Ukraine, as well as the Law on the Status of People's Deputies of Ukraine, continued to provide additional immunities which were broader than the Constitution: a personal search of a member of parliament of Ukraine, inspection of his personal belongings and luggage, personal transport, residence or work place, as well as breach of privacy of letters, telephone conversations, and other correspondence, and imposing other measures, including covert investigative actions, which, according to the law, restricted the rights and freedoms of an MP, may be applied only if the parliament has given its consent to bringing the MP to criminal liability and if it is not possible to obtain information by other means. The 3rd Monitoring Round report urged Ukraine to revoke these provisions, as they presented additional serious obstacles for effective investigation of corruption and were not required by the Constitution of Ukraine. Unfortunately the situation has not changed since then.

Very limited information has been provided by Ukrainian authorities in regards to the application of the procedure of lifting of immunities. In the answers to the questionnaire, they state that requests for lifting of immunities in regards to 3 MPs have been approved by the Parliament in 2017. No information was provided on the refusal to lift immunities or whether the delays which permitted MPS or judges to flee or conceal or destroy assets and evidence while the requests were pending. Open source information and interlocutors met at the on-site visit suggest that the delays have thwarted law enforcement efforts on occasion involving MPS and judges.

Statistical data in regards to the judges was provided following the on-site visit and two judges have had their immunities lifted in 2016 according to the provided information. This information presents a striking contrast to that provided by Ukrainian authorities to GRECO, which in its latest report states: "The authorities indicate that in 2015 i.e. under the previous legislation, judges' immunity was lifted in 31 cases (in 2014: in 17 cases); in 11 cases, Parliament refused to lift judges' immunity."³⁰⁹

In any case, whatever the judges-related figures have been before the recent Constitutional changes, new practice will have to indicate whether the procedures for lifting immunities of judges has become transparent, efficient, based on objective criteria and not subject to misuse, and whether functional immunity of judges is sufficient for effective law enforcement measure on corruption cases.

Conclusions

Only the second part of the Recommendation was partly implemented and only in the part that relates to judges. The first part of the Recommendation was also to some degree addressed in respect of judges, but not for MPs. The third part of the Recommendation remained not implemented.

Practical application of these Constitutional amendments should be closely followed with the possibility to take further steps.

Ukraine is **partially compliant** with the previous recommendation 2.5. and outstanding elements of it are being transferred into the new Recommendation.

³⁰⁷ See explanatory note to the draft law at: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=57209

³⁰⁸ See for example the case of the judge from Lugansk region, investigated by NABU at: <https://www.facebook.com/highcouncilofjustice/posts/1336761393136832>.

³⁰⁹

New Recommendation 23

1. Review legislation to ensure that the procedures for lifting immunities of MPs are transparent, efficient, based on objective criteria and not subject to misuse.
2. Limit immunity of parliamentarians to a certain extent, e.g. by introducing functional immunity and allowing arrest in cases of in flagrante delicto.
3. Analyse practical application of the judicial reform to take appropriate legal measures to ensure that the procedures for lifting immunities of judges are transparent, efficient, based on objective criteria and not subject to misuse and that the functional immunity contributes to effective law enforcement.
4. Revoke additional restrictions on the investigative measures with regard to MPs, which are not provided for in the Constitution of Ukraine.

3.2. Procedures for investigation and prosecution of corruption offences

Effective/proactive detection: sources of information, use of FIU reports

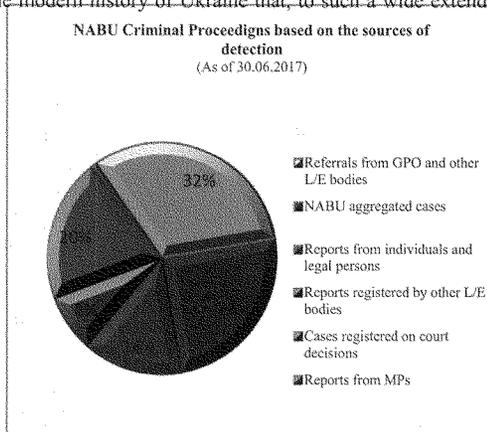
The issue of detection of corruption has not been the focus of the previous rounds of monitoring but is being looked at in this round, as it is key for effectiveness of enforcement of the criminal liability for corruption.

No information was provided by the Ukrainian authorities in responses to the questionnaire on this topic. However, the monitoring team was able to collect some information in this regard through its own research in the open sources of information and during the on-site visit.

Sources of detection

NABU is the first law enforcement agency in the modern history of Ukraine that, to such a wide extent, began taking proactive measures in detecting corruption cases. There are abundant examples where such detection methods have been effective. Because many of the investigative techniques require court approval obtained by the SAPO, SAPO also is credited for these achievements.

The number of detected cases by NABU is impressive, especially if compared to limited enforcement efforts on high-profile corruption cases before their establishment. As of end of June 2017 detectives of NABU were working under procedural supervision of the SAPO prosecutors on 370 proceedings with 220 persons in the status of suspects.³¹⁰



³¹⁰ National Anti-Corruption Bureau's report for the 1st half of 2017.

The scale of these cases is also a novelty in Ukraine's enforcement efforts: the cases involve top level officials, many of whom were or remain in the office; use elaborate schemes and structures; and deal with big amounts of funds. (See more information on this in Section 3.3).

As can be seen from the data, the second biggest source of detection constitutes information that NABU itself gathered. Indeed, 25 per cent of cases have been detected by NABU itself as of 30 June 2017.

There are several factors contributing to this. Firstly, NABU is staffed with detectives, which is a new "procedural position" in Ukraine; it combines the functions of the intelligence officers (operatives) and investigators. This position ensures that the primary job of detectives is to detect. Secondly, along with detectives, NABU has been staffed with analytical officers (analytics) working within NABU's Department on analytics and information processing. (More information on NABU's structure can be found in Section 3.4). Both detectives and analysts have access to and use in their work the main registries and databases. They undergo numerous trainings on detection and investigative methods that are being applied world-wide in complex corruption cases. NABU has also made effective use of mentoring by foreign law enforcement officers and analysts who are experts in this area. And finally, its leadership seems to be setting the tone from the top, encouraging its staff to be proactive. These results go hand in hand with proper resourcing and would not be possible without the independence that the detectives have been enjoying so far.

There are other new possibilities that opened to law enforcement in terms of detection since the previous monitoring. Among them access to open source databases of information, such as the Unified Court Registry, and registry of legal entities, as well as databases that contain closed information, such as the asset declarations database to which detectives have access too. These should open new possibilities and it is encouraging to see that they have already being utilized in Ukraine for the purposes of detection and investigation of corruption.

To this end in January 2017 a Memorandum of Cooperation was signed between NABU and NACP. The initial difficulties³¹¹ with access to the Unified Registry of Asset Declarations were overcome and within several months the detectives were able to obtain access to this database. Interlocutors met at the on-site visit opined that organisation of such access is not ideal at the moment: the detectives receive electronic access keys but can use them only in the physical premises of the NACP. This being said, it appears that NACP has set up necessary premises for such access and it was being utilized at the time of the on-site visit and plans to have remote access through the protected channels was discussed and might have happened since then. As of 30 June 2017 NABU was working on 66 proceedings launched based on the analysis of the asset declarations submitted by the public officials.³¹²

It would be good to continue scanning media reports and using them as the source of detection, as good practices in other countries suggest. Civil society representatives provided an example when this has been done by NABU and this practice should be continued.³¹³

In 2015, investigative units of law enforcement bodies other than NABU initiated 7032 criminal proceedings involving corruption offences, of them 2441 were sent to court, with 875 convictions. In 2016, investigative units of law enforcement bodies other than NABU initiated 7069 criminal proceedings involving corruption offences, of them 2130 were sent to court, with 597 convictions. And in 2017,

³¹¹ Please see Chapter 2.1, section on the asset declarations for more information.

³¹² National Anti-Corruption Bureau's report for the 1st half of 2017.

³¹³ Provided example relates to the case of Pavlo Demchyna, the first deputy of the Head of State Security Service. Journalist Yevheniya Motorevska ("Slidstvo.info") prepared an investigation about his alleged illegal enrichment. On the basis of this report NABU started criminal proceeding. More information can be found here: <https://nabu.gov.ua/novyny/nabu-pochalo-rozsliduvannya-za-faktamy-nezakonnogo-zbagachennya-posadovcya-sbu>.

investigative units of law enforcement bodies other than NABU initiated 6992 criminal proceedings involving corruption offences, of them 2008 were sent to court, with 475 convictions.

Use of FIU reports

Efforts undertaken by the FIU in order to facilitate detection of corruption cases and support these types of investigations were also impressive. At the on-site visit FIU representatives informed the monitoring team that they received over 2000 requests from various law enforcement bodies in the last year alone, and this number is growing. The information that FIU sends to the law enforcement agency can be used only for the purpose of intelligence and cannot be part of the overt investigative measures.

Recently, the FIU has been working closely with the newly established anti-corruption law enforcement bodies and participated in joint trainings (both being trained and in the capacity of trainers). They also have expressed readiness to work with ARMA staff once it becomes operational, and to the knowledge of the monitoring team participated in the training of the first ARMA recruits in July 2017. And finally FIU developed a typology on corruption cases. All of these are positive developments and should be continued.

The monitoring team was not provided with information about whether the FIU has been using its own authority to suspend transactions temporarily while referrals are made by the appropriate law enforcement or prosecutorial bodies and whether or not this temporary freeze authority can be or is being used to facilitate timely asset restraints through the courts. Such coordination, if possible, could greatly enhance effective confiscation.

Conclusions

Ukraine should be commended on becoming proactive in detection of the high profile corruption occurring since the last presidential administration, at the very least. These efforts should be maintained and further improved.

Additional steps in this regard can be considered, such as information gathering from open sources outside of Ukraine (considering that most of the money illegally derived from corruption goes outside), including informal networks of practitioners which can provide a wide range of evidence and information without formal MLA requests if no compulsion power is required to obtain it. Use of formal MLA requests should also be maximized to aid in corruption detection. And finally, tax disclosures and asset declarations should become a widely used source of information and evidence in corruption investigations and prosecutions purposes.

New Recommendation 24

1. Ensure that proactive efforts are continued with rigour by NABU, and other law enforcement bodies, to facilitate maximum detection and swift investigation of corruption in Ukraine. These efforts should include:
 - a) Use of all possible sources of information and tools, including the asset declarations.
 - b) Cooperation between law enforcement and other non-law enforcement bodies, such as FIU, ARMA, tax, customs, etc. to ensure detection and swift investigation of corruption in Ukraine.
 - c) Use of information obtained through international cooperation, as well as data collected from the open sources outside of Ukraine.
 - d) Joint trainings for law enforcement with representatives of the non-law enforcement bodies, especially FIU and ARMA.
2. Establish a centralised register of bank accounts of legal and natural persons, including information about beneficial owners of accounts, making it accessible for authorised bodies, including NABU, NACP and ARMA, without court order to swiftly identify bank accounts in the course of financial investigations and verification.

Access to bank, financial, commercial records – procedure, burden of proof, timeframe, obstacles; central register of bank accounts

Recommendation 2.8 from the Third Monitoring Round report on Ukraine (Part 1):

- Consider establishing a centralised register of bank accounts, including information about beneficial ownership that should be accessible for investigative agencies without court order in order to swiftly identify bank accounts in the course of financial investigations.
- Ensure direct access of investigative agencies dealing with financial investigations to tax and customs databases with due protection of personal data.
- Step up law enforcement efforts in prosecution of corruption offences with the focus on high-level public officials and corruption schemes affecting whole sectors of economy.
- Ensure free access via Internet to regularly updated detailed statistic data on criminal and other corruption offences, in particular on the number of reports of such offences, number of registered cases, the outcomes of their investigation, criminal prosecution and court proceedings (with data on sanctions imposed and categories of the accused depending on their position and place of work). Statistical data should be accompanied with analysis of trends in corruption offences.

Consider establishing a centralised register of bank accounts, including information about beneficial ownership that should be accessible for investigative agencies without court order in order to swiftly identify bank accounts in the course of financial investigations.

Ensure direct access of investigative agencies dealing with financial investigations to tax and customs databases with due protection of personal data.

The 3rd round monitoring report identified several obstacles to conducting effective criminal investigations concerning financial crimes in Ukraine. These included locating accounts of the suspect/accused in specific banks or other financial institutions. In order to obtain such information, if not already known from the case file, a law enforcement agency needed to send out requests to all banks based on court order (only tax authorities may request information about existence of accounts in banks directly).

Since establishing whether a person owns an account is the first step in the possible further freezing and seizing of the relevant assets as well as tracing illicit funds to establish the elements of offenses for financial and corruption crimes, Ukraine was therefore recommended to simplify the procedure and provide law enforcement agencies with the possibility of establishing the list of accounts a person owns (without accessing further details). One method is to create a centralized register of bank accounts.

Another obstacle which needed addressing according to the 3rd monitoring report was the need for access of law enforcement agencies to the databases of the customs and tax bodies.

Little information has been provided by Ukrainian authorities regarding the implementation of this recommendation in the answers to the questionnaire. Authorities confirmed that no centralized register of bank accounts was created in Ukraine. In subsequent meetings with some of the representatives of law enforcement, there was little interest in such a registry. However, the questionnaire does describe the existence of an agreement between the National Anti-Corruption Bureau (NABU) and the State Fiscal Service (SFS) allowing for an exchange of information, including on taxpayers' bank accounts. In particular, according to the agreement NABU has access to SFS's information resources, including information regarding open and closed accounts of taxpayers at banks and other financial institutions and the register of legal entities and individuals - entrepreneurs.

Also from NABU activity reports, available online, the monitoring team has learned about similar agreements on exchange of information and cooperation which were signed between NABU and Border Guards Service of Ukraine, giving NABU direct access to their databases. Additionally, NABU reported it has entered into a Memorandum with the Ministry of Justice (MoJ) granting detectives with access to 23 databases and registries of MoJ.

Conclusions

These are necessary and promising developments. It may be too soon to tell at this time, but in the absence of more information about how the agreements are being implemented, we must conclude that the recommendation is pending. Also they appear to be only covering NABU detectives. The situation with other law enforcement bodies that could be involved in detection, investigation and prosecution of corruption is not clear. However, when appropriate, they should become part of the same arrangements.

Review of Ukraine's efforts under this recommendation is continued in the Section 3.3: it also includes the final rating and the text of the New Recommendation.

*International cooperation***Recommendation 2.7 from the Third Monitoring Round report on Ukraine:**

- Step up efforts in obtaining mutual legal assistance in corruption cases, in particular with a view to recover assets allegedly stolen by the officials of Yanukovich regime.
- Review procedures on assets recovery to ensure that they are effective and allow swift repatriation of stolen assets.
- Raise capacity of the Prosecutor's General Office and other agencies (notably, the newly established National Anti-Corruption Bureau) on mutual legal assistance and asset recovery issues.
- Establish national mechanism for independent and transparent administration of stolen assets recovered from abroad.

The 3rd round report stated that the EU and other jurisdictions froze bank accounts and other assets belonging to the high government officials - alleged perpetrators of crimes in 2010-2013. The Ukrainian FIU reported in April 2014 that it estimated the overall amount of money laundered at more than UAH 77 billion, that it sent requests to 136 FIUs worldwide to trace stolen assets and freeze them, and that the US and the UK assisted in the work on recovery of stolen assets. To address these issues, the Ministry of Justice (MOJ) and the GPO established separate units on asset recovery. Despite these and other efforts not much progress was achieved in repatriating illegal proceeds of the Yanukovich regime's officials to Ukraine. It concluded that this was mainly due to ineffective national investigations into relevant cases, but could also have been due to ineffective procedures for asset recovery, lack of expertise and capacity.

These specific issues were flagged in the 3rd round monitoring report in regards to international cooperation, and included the need to (a) step up MLA efforts in corruption cases to recover assets allegedly stolen by Yanukovich regime officials; (b) review of asset recovery procedures; (c) raise capacity of existing central authorities and newly created NABU on MLA; and (d) set up mechanism for management of recovered assets, resulted into the recommendation.

As explained below, it appears that effective exchanges of information by Ukrainian authorities with foreign counterparts are up, even if assets recovered have not significantly increased so far. While there is little evidence that progress was made in actually recovering significant assets misappropriated during the Yanukovich era, open source information suggests some more effective action is being taken against certain former officials and their assets, and many more criminal investigations and prosecutions are being undertaken to address high level corruption occurring since the Yanukovich administration ended by NABU and SAPO.

Step up efforts in obtaining mutual legal assistance in corruption cases, in particular with a view to recover assets allegedly stolen by the officials of Yanukovich regime.

Raise capacity of the Prosecutor's General Office and other agencies (notably, the newly established National Anti-Corruption Bureau) on mutual legal assistance and asset recovery issues.

Since the last round of IAP monitoring, the GPO and MoJ continue their functions in the capacity of the Central authorities, and NABU has acted to transmit its own MLA. The 3rd round report noted that the exercise of this function merits follow up in the 4th round.

Taking into account the need for confidentiality and the ability to ensure that MLA are transmitted in the form needed for cases under the competence of the NABU and in order to ensure autonomous execution of functions given to it by the law, the legislation provides that NABU is responsible for international

cooperation within its competence and according to national legislation and international treaties (Art 16, p.9 of the Law of Ukraine On National Anti-Corruption Bureau). While the GPO will remain the Central authority under international treaties, the complimentary role of NABU in MLA is enhancing effectiveness of international investigations.

The Criminal Procedure Code was also amended giving the newly created anti-corruption body the mandate for international cooperation, in particular CPC Art 545 part 1. According to these amendments the GPO requests for international legal assistance in criminal proceedings during pre-trial investigation and considers relevant requests of competent foreign authorities, except pre-trial investigation of corruption offences that are under the competence of the NABU which performs functions of central body in such cases.

Anecdotal evidence from countries where MLA requests have been made by NABU indicates that in most cases, the MLA requests are clearly written and ask for evidence which appears logically related to the investigation described. The requests fall appropriately within the scope of the treaties under which the requests are made.

No information was provided by Ukrainian authorities in regards to what is being done by the GPO in this area, or what is done to raise the capacity of its staff in the answers to the questionnaire. Some information on NABU in this context has been provided. However, more details were found in the Progress report from September 2016. In particular, in 2016, Ukrainian authorities reported that during 2014 - 2016 law-enforcement authorities of Ukraine sent 167 requests for international assistance in criminal proceedings against Ukrainian former high-level officials to the competent authorities of foreign states, 64 had been executed.

Additionally, in the beginning of August 2016, efforts were apparently being made to address deficiencies in MLAs. Forty requests for international legal assistance in 17 criminal proceedings against Ukrainian former high-level officials were discussed with the representatives of the Basel Institute of Governance (Swiss Confederation). Under their MOU with the PGO, Basel Institute experts devoted significant resources to working with investigators to prepare effective requests and increase capacity in the process.

Likewise, from its inception through February 2017, NABU reports that it sent 118 requests for international legal assistance in investigation of 29 criminal proceedings to 42 foreign states, including Latvia, Switzerland, Cyprus, Austria and the United Kingdom. As of February 2017, 45 requests had been fully executed. None of the data provided includes a specific comparison to periods before NABU was established, but it seems apparent that an unprecedented increase in investigative activity involving foreign evidence is being undertaken on corruption matters by Ukrainian law enforcement, particularly by NABU and SAPO.

Additionally anecdotal evidence suggests that under the current Prosecutor General, the International Division of the PGO has been given greater authority to pursue certain international criminal investigations into official corruption and recovery of associated criminal proceeds. According to some official statements by the PGO, significant progress is being made in some cases, but the data the monitoring team had so far is not complete to form any firm conclusions.

Review procedures on assets recovery to ensure that they are effective and allow swift repatriation of stolen assets.

Establish national mechanism for independent and transparent administration of stolen assets recovered from abroad.

As discussed above in connection with Recommendation 2.5, the National Agency of Ukraine for detection, investigation and management of assets derived from corruption and other crimes (ARMA) was established by the Resolution of the Cabinet of Ministers № 104, dated February 24, 2016 and is authorized to detect, investigate, assess, manage and seize proceeds of crime, as well as to keep the Unified State Register of Assets arrested as a result of criminal proceedings. It is also can directly cooperate with the relevant authorities of foreign states (offices for investigation and managing the assets) other competent authorities of foreign states and related international organizations and participate in representing the rights

and interests of Ukraine in foreign authorities with jurisdiction for the matters related to the return of assets derived from corruption and other crimes back to Ukraine etc. The Director of ARMA has been appointed and staff are being hired. Open source material indicates the staff are also being trained by civil society and international experts in this field.

Conclusions

The latest figures provided in regards to the mutual legal assistance date back to September 2016 and seem to be credible and are not put into doubt. They still fail to corroborate a conclusion that the authorities' efforts in this area have been stepped up, as is required by the Recommendation 2.7.

With no additional data from the government, the monitoring team observed that there is a recognition that the PGO's International Department seems to have more license to take actions on certain cases to obtain information and evidence and to try to recover assets, and the leadership seems to understand the imperative to show results to a sceptical public. The monitoring team further notes the unverified reports of a major recovery of approximately \$1.3 billion in misappropriated assets which could be a significant result, but the confirming facts are not available.

Additionally, there is still some concern expressed by some civil society representatives regarding the lack of effectiveness in the international activity of the Prosecutor General's Office in relation to the huge levels of suspected corruption to be addressed, and some concerns about who is given the responsibility to conduct certain investigations. Questions in particular were raised about the increasing involvement of the Military prosecutors Office in investigations which appear to have no connection to the corruption subject matter.

At the same time, positive trends have been identified in the work of the SAPO and of the NABU (whose commitment has been proven *inter alia* through the successful freezing of property abroad). At the time of the drafting of this report, criminal charges have been brought in an estimated seventy cases involving corruption since the Yanukovich administration ended, and assets are sought to be restrained in about half.

The authorities are therefore urged to reinforce their action along the lines of the recommendation so that concrete and measurable results in terms of asset recovery could be shown. The ACN understands that any further progress in this area also depends in part on the effective functioning of the newly established ARMA, which is as yet to become operational.

Ukraine is **partially compliant** with the previous recommendation 2.7.

New Recommendation 25

- 1. Show concrete and measurable results in terms of asset recovery. In particular:**
 - a) Proactively take all available measures to obtaining mutual legal assistance in corruption cases;**
 - b) Continue to raise capacity of the General Prosecutor's Office, NABU and ARMA in international cooperation and asset recovery.**
 - c) Ensure that procedures on assets recovery allow swift repatriation of stolen assets;**
 - d) Ensure effective functioning of ARMA in its tasks on asset tracing, recovery and management of stolen assets.**
- 2. Ensure that NABU can independently transmit and respond to MLA requests.**

3.3. Enforcement of corruption offences

Recommendation 2.8. from the Third Monitoring Round report on Ukraine (Part 2):

- Consider establishing a centralised register of bank accounts, including information about beneficial ownership that should be accessible for investigative agencies without court order in order to swiftly identify bank accounts in the course of financial investigations.
- Ensure direct access of investigative agencies dealing with financial investigations to tax and customs databases with due protection of personal data.
- Step up law enforcement efforts in prosecution of corruption offences with the focus on high-level public officials and corruption schemes affecting whole sectors of economy.
- Ensure free access via Internet to regularly updated detailed statistic data on criminal and other corruption offences, in particular on the number of reports of such offences, number of registered cases, the outcomes of their investigation, criminal prosecution and court proceedings (with data on sanctions imposed and categories of the accused depending on their position and place of work). Statistical data should be accompanied with analysis of trends in corruption offences.

Step up law enforcement efforts in prosecution of corruption offences with the focus on high-level public officials and corruption schemes affecting whole sectors of economy.

Another issue identified in the 3rd round report was a strong perception that there was a lack of political will of the Ukrainian authorities to prosecute corruption, and that most cases focused on low to mid-level officials and with leniency of sanctions for convicted corrupt officials. This resulted in recommending that Ukraine step up its enforcement efforts.

While no information towards this end has been provided in the answers to the questionnaire, according to open source information and findings of the on-site visit, considerable progress is being made in addressing high level corruption occurring after the Yanukovich administration. As it was mentioned earlier this progress for the most part can be attributed to the newly established anti-corruption bodies, NABU and SAPO.

In particular, as of 30 June 2017 detectives of NABU under the procedural guidance of SAPO prosecutors have investigated over 370 cases. In total 218 high level officials and CEOs of the SOEs have been accused in these proceedings, including the Head of the Fiscal Service of Ukraine, head of the Accounting Chamber of Ukraine, Head of the Central Election Commission, and others. In these cases the Prosecutor General was asked and filed motions for lifting of immunities with regard to 3 MPs (only two of these were granted and only in the part permitting to charge them without consent to their apprehension or arrest). Some of these cases, in line with Recommendation 2.8, target corruption schemes effecting whole sectors of the economy with a special focus on SOEs. The operations of the major SOEs³¹⁴ that have been investigated in NABU/SAPO cases include the following: “EnergoAtom”, “Yuzhno-Ukrainsky Nuclear Station”, “CherkassyOblenergo”, “Ukrzaliznitsia” to name a few. The “Onyshchenko Gas case” is another high profile case involving a scheme with a large impact on the economy. The MP Onyshchenko has been charged along with 8 others so far and it is being closely monitored by the public.³¹⁵

³¹⁴ All of them are listed in the top 100 SOEs by the MEDT.

³¹⁵ Detailed information in regards to these cases can be found in NABU reports at <https://nabu.gov.ua/reports> and <https://nabu.gov.ua/en/tags/oleksandr-onyshchenko>

As of 30 June 2017, the NABU and SAPO report they have filed charges in approximately 78 cases involving high level corruption. This includes a proactive undercover investigation into corruption involving the sale of amber in which the NABU and SAPO worked with the U.S.'s Federal Bureau of Investigation to complete the investigation. Taking into account that the NABU has initiated its first proceedings in December 2015 and the SAPO was not fully operational until February 2016, and charges could not be filed in NABU cases except by the SAPO, based on the numbers of cases, the seriousness of the charges and the high level of the officials involved, this appears to represent robust action by the two offices.

The monitoring team was advised that several of the cases have been resolved through plea agreements, but ARMRA does not seem to have information about the assets recovered, and as discussed in Section 3.4 of this report, many are stalled in the courts. The inability to routinely try and resolve cases filed in courts undermines public confidence in the new institutions which were created in clear recognition that the old prosecution system was ineffective in addressing grand corruption. When criminals are not ultimately held responsible, it also serves to undermine deterrence of corrupt conduct and prevents significant asset recovery.

In the legislation establishing the NABU and reforming the PGO, the law provided that the Ministry of Interior and PGO's authority to investigate and prosecute cases involving high level corruption as described in the statute would be transferred to the NABU and the SAPO when these bodies were created and became functional, but not later than 3 years since entering into force of the Law on NABU. The PGO and Ministry of Interior (MOI)/State Bureau of Investigations (SBU) would be responsible for corruption cases that do not fall under the remit of NABU/SAPO, including lower levels of corruption.

In July 2015, CPC Art 216, which regulates jurisdiction, was amended providing that the investigations that have been already launched will not be transferred to NABU. This was reportedly done because of concerns that it would undermine NABU's mission if it took on responsibility for all the investigation and prosecutions of the prior administration. The Ministry of Interior and PGO which had been responsible for these matters continued with them and were to be held accountable for their work or lack of progress. It is the understanding of the monitoring team that responsibility along the lines outlined is in fact in place. However, it is unclear if each agency is abiding by the division of labor or that each group is addressing the offenses for which they are now responsible.

In contrast to the NABU and SAPO relatively little is known about actions involving corruption occurring by high level former administration officials which should be addressed by the PGO and MOI/SBU since those investigations and cases were under their responsibility for years prior to July 2015. As noted there are some reports of a significant asset recovery case involving tax evasion and the former head of the State Fiscal Service but few details are public and the ARMA apparently has no information or assets under its control. There are also public reports of charges pending against the former Minister of Justice for charges involving budget fraud and there are signs that some procurement fraud and kickback investigations are underway, especially involving state-owned companies.

However, some high level corruption investigations and prosecutions which were ongoing seem to be stalled. This includes the investigation and prosecution of the so-called "Diamond prosecutors" accused of bribery and extortion which was viewed as a very positive sign that the PGO was policing its own corruption. Media reports were widely read of staggering levels of unexplained wealth of the subjects that were uncovered in searches. Now the personnel of the unit that conducted the investigation and brought the charges appears to be mostly new. This case that was submitted to the court in January 2016 and this very serious matter does not appear to be progressing. The slow progress on a very serious case involving corruption by senior prosecutors and the renewed focus on critics of the PGO feeds the low level of public confidence in the PGO to carry out its responsibilities and demands for accountability.

In general, there is little information to confirm that effective work is being done and progress is being made now almost three years after the former high ranking officials left office amid reports of billions of dollars in embezzlement, misappropriation, abuse of office and bribery. The signs of opulent wealth which could not be explained by published salaries or identifiable prior private sector employment are staggering. This includes information provided by Ukraine in response to the questionnaire and open source material. Resources for combatting high level corruption cases prior to SAPO are scarce. There is also noted that recently under the new Prosecutor General, the office of the military prosecutor is assigned to conduct high level corruption investigations which don't appear to be within its mandate. This raises concerns in regards to the fact that violation of the jurisdiction renders results of the investigation conducted by the improper agency legally void: according to the CPC evidence collected by the incorrect investigative body cannot be used in court. There are already examples when persons have been acquitted because the incorrect body investigated the case.³¹⁶ There are also examples of indictments being sent back to the prosecutors.³¹⁷

Ensure free access via Internet to regularly updated detailed statistic data on criminal and other corruption offences, in particular on the number of reports of such offences, number of registered cases, the outcomes of their investigation, criminal prosecution and court proceedings (with data on sanctions imposed and categories of the accused depending on their position and place of work). Statistical data should be accompanied with analysis of trends in corruption offences.

As part of addressing the issues of public discontent with the work of the law enforcement and prosecutorial bodies, the 3rd round monitoring report recommended that Ukraine ensures free access via Internet to regularly updated detailed statistic data on criminal and other corruption offences, in particular on the number of reports of such offences, number of registered cases, the outcomes of their investigation, criminal prosecution and court proceedings (with data on sanctions imposed and categories of the accused depending on their position and place of work). Moreover, it called for the statistical data to be accompanied with analysis of trends in corruption offences.

Ukrainian authorities provided no relevant information in regards to statistics in the answers to the questionnaire. Moreover, most of the requested statistics was simply not provided throughout the whole section of the questionnaire on criminalisation and enforcement of corruption, which puts into question its ready availability.

There does appear to be some piecemeal reporting on each website of the offices of prosecutors and investigators responsible for anti-corruption work. The cases that are being detected, investigated and prosecuted by the NABU and the SAPO are very much in the public domain. For example, information both in the form of statistics and analysis of trends can be found in activity reports of NABU published on their site in Ukrainian and English. With regard to individual cases that NABU and SAPO is working on – it appears that when they reach a public stage, information can be found at the newly created register of cases which contains information in the easily digestible aggregated form. This register allows tracking progress on cases, and if its maintenance is continued and properly updated, would be an interesting information resource for the society at large, as well as various civil society organisations and experts. This is a welcome development, if all legal requirements on confidentiality of investigations are preserved.

Similar information in regards to other offices and cases, including statistics and trends could also be found at the Website of the GPO.

While there are some limits to the significance of statistics in complex investigations and prosecutions, the aggregated data about open and closed cases and prosecutions and sentences and asset recovery is still

³¹⁶ See Alternative Report on Assessment of the effectiveness of the Anti-Corruption Policy implementation, prepared by RPR, Renaissance Foundation and TI-Ukraine in 2017 (pp. 315-316).

³¹⁷ In the case of bribe-taking by the deputy Minister of Health Care - Vasylyshynets, jurisdiction over which should be with NABU but in fact investigation was conducted by PGO - trial court decided to send back indictment to prosecutors. More details can be found here: <http://www.pravda.com.ua/news/2017/05/29/7145332/>

important as a measure of the degree to which the corruption problem is being addressed. It contributes to a full picture which can help the society and policy makers assess progress, needs, threats, etc.

Conclusion

Since the 3rd round of IAP monitoring, there has been significant work performed by some of the responsible law enforcement and prosecutorial bodies to address high level corruption. For example, the publicly filed cases by SAPO working with NABU appear to reflect aggressive and effective investigations and prosecution decisions.

Presumably this progress has been aided in part by the improvements in access to information by the investigators as outlined above. But significant progress does not seem to be true across all of the responsible bodies.

Although there appears to be more commitment by the current Prosecutor General in some areas, we note the apparent abandonment of very serious cases brought by the former office of the general inspectorate against senior and experienced prosecutors. Of major concern, investigative and prosecutorial resources also seem to be trained on the critics of the PGO and others.

Table 10 Statistics on number of initiated and completed criminal proceedings by the General Inspectorate of the General Prosecutor's Office of Ukraine for 7 months of 2017

Number of initiated criminal proceedings in the reporting period		183
Number of completed criminal proceedings (together with recompleted ones)		26
Among them	Submitted to the court with the bill of indictment	8
	Completed criminal proceedings	18

Of paramount concern is the absence of fair and effective courts to set conditions of release and detention and to resolve the charges which have been brought. This threatens to undermine all of the progress made and continues to limit Ukraine's future.

Progress has been made in creating new institutions and in their growing effectiveness, but it is not possible to conclude that Ukraine has met the recommendation to step up its focus on investigating and prosecuting high level corruption. The absence of a fair and effective judiciary is a prime impediment.

Based on the cumulative conclusions in regards to the first part of the Recommendation 2.8, presented earlier and the conclusions above, Ukraine **is partially compliant** with the previous recommendation 2.8.

(Please see New Recommendation after Section 3.4)

3.4. Anti-corruption criminal justice bodies

Since many of the issues connected to this Section have already been covered earlier in this report, in addition to reviewing the status of the implementation of the relevant 3rd round IAP Recommendation, it will only look at the outstanding matters that specifically relate to the anti-corruption criminal justice bodies in Ukraine and have not been previously covered. This section should be read in conjunction with the section 3.1, 3.2 and 3.3.

Recommendation 2.9 from the Third Monitoring Round report on Ukraine:

- Ensure swift establishment and genuine independence of the National Anti-Corruption Bureau, in particular by excluding political bodies from the process of the Bureau's head selection, ensuring his job security, providing it with necessary resources, including the salaries for the Bureau's staff as established by the law.
- Consider introducing amendments in the Constitution of Ukraine to provide legal basis for functioning of independent anti-corruption agencies (law enforcement and preventive).
- Ensure operational and institutional autonomy of the specialized anti-corruption prosecutor's office dealing with cases in jurisdiction of the National Anti-Corruption Bureau.
- Consider introducing specialized anti-corruption courts or judges.

Ensure swift establishment and genuine independence of the National Anti-Corruption Bureau, in particular by excluding political bodies from the process of the Bureau's head selection, ensuring his job security, providing it with necessary resources, including the salaries for the Bureau's staff as established by the law.

At the time of the IAP 3rd round, the Law on NABU has been just adopted and the procedure for the selection and appointment of the first director of the Agency was launched. The report expressed concerns in regards to the procedure being tempered via legislative changes (from the Selection commission making a final decision on the candidate to it proposing three candidates one of which is to be picked and appointed by the President). Ukraine was urged to reconsider this change, however, this was not done and the selection procedure went ahead in accordance with the changed procedure.

Nevertheless, IAP 3rd round report positively evaluated composition of the selection commission. Selection procedure went ahead as prescribed by the law with all of the transparency checks put in place and the first Director of NABU was selected and appointed in April 2015.

The staffing of the NABU has followed shortly. All of the staff of the NABU, with the exception of the Director and Deputy Director, has been selected based on the open competition over the summer of 2015. Currently NABU has 572 staff (700 staff is the ceiling set in the law).

At the end of 2015 NABU was provided with premises. Salaries of the NABU staff have been provided as established by the law, in line with the Recommendation 2.9 of the 3rd IAP round of monitoring. They are at a very competitive level which resulted in a fierce competition for the vacancies announced within the NABU. In the opinion of the NABU representatives met by the monitoring team – the Bureau is well resourced. It also enjoys strong support from the international community, both in political terms and in terms of resources and training.

This part of the recommendation appears to be implemented to the large degree.

Additional issue: NABU audit

Another potential for concern in regards to the independence of NABU that was raised in the 3rd round report dealt with the audit commission members that would evaluate NABU's effectiveness, and its operational and institutional independence.³¹⁸ If Commission concludes that NABU's operations have been ineffective or Director did not execute his duties properly, the Director can be dismissed by the President or by the Parliament upon request from 150 MPs or more.

3rd round report expressed concerns regarding risks of political influence on the audit via appointing members of this commission by the political bodies and final decision making by the President or Parliament. This concern was especially valid at the time of the drafting of this report.

The External control commission will be composed of 3 members with the President, the Parliament, and the government each selecting 1 member, so the concerns of the 3rd LAP round were not addressed.

In addition, some of the developments in this regard are alarming. Firstly, the issue of NABU's annual audit was raised only at the end of 2016, almost two years since establishment of NABU (law on NABU adopted in October 2014, Director appointed in April 2015, NABU was staffed with detectives over summer 2015). This seems to coincide with the Bureau's launch of first big investigations linked to various political forces (November 2016 – Naftogaz and Odessa port plant cases; December 2016 - "Party of Regions accounting books case", January 2017 - "Onishenko case", and finally arrest of Mr Nasirov, the Head of Fiscal Service of Ukraine in March 2017). Some of these have been already discussed earlier.

The process of selection and appointment of auditors was marked with several scandals. Mr Nigel Brown (British private lawyer, who worked from 1979-92 in New Scotland yard) was put forward by two biggest Parliament factions (Petro Poroshenko's Bloc and People's Front). His candidacy raised a wave of discontent from the Civil Society, international community and the public in general due to obscure circumstances of his nomination appearing outside of the Anti-Corruption Committee's nomination process, his presence in the Parliament when appointment of auditors was discussed and his "weak" qualifications if compared to other candidates discussed by the Committee. As a result his candidacy was rejected and a-c Committee announced open competition which closed in May 2017. Later on the Government held consultations with the Civil Society, solicited nominations and appointed Mr Buromensky, whose qualifications appear not to be fully in line with requirements of the Law on NABU (he does not have direct experience of working in either foreign law enforcement agencies or international organisations). The President has not yet appointed his auditor.

These developments raise serious concerns and it is of utmost importance that such Commission be formed in a proper a transparent manner and in full compliance with the requirements of the law. If auditors of the Commission are not impartial, their findings can be manipulated and used to discredit NABU and dismiss its Director.

If the Director of NABU is dismissed through undue process or for political motives this will send a strong message to the detectives working in the Bureau regarding the independence of their agency, and most importantly their own independence. Currently they are taking unprecedentedly independent decisions in their investigations. Hierarchical independence is further reinforced by the aggressive position of their leadership, setting the tone for proactive actions. The work of the Bureau will also be disrupted for the period until new Director is appointed. Even in procedural terms, for example, the detectives of NABU will no longer be able to request operative and intelligence cases, as well as criminal proceedings that relate to their cases from other law enforcement bodies; this requires a decision of the Director and his approval of such decision with Special a/c prosecutor.³¹⁹ Finally, even if the new Director is properly selected, this might have a chilling effect on him, and also on other agencies tasked with fighting corruption and further feed disillusionment of the public with new a-c instruments.

³¹⁸ Article 26 of the Law on National Anti-Corruption Bureau of Ukraine.

³¹⁹ Article 216 of the Criminal Procedure Code of Ukraine and Article 17 of the Law on NABU.

The issue of NABU's audit requires close monitoring and urgent steps need to be taken to ensure that such audit is conducted free of abuse and political interference.

Capacity of NABU to conduct wire-tapes

At the time of the on-site visit, the monitoring team was alerted to the following weakness in the institutional set up of NABU. The interlocutors met at the on-site visit stated that NABU did not have capacity (legally and technically) to conduct its own wire-tapping. For such measures they had to rely on the operative officers of other agencies, in particular the SBU. Draft law to address this issue has been registered with Parliament in autumn 2016 and is still pending.

In addition to practical challenges it also presents other potential drawbacks – more specifically dangers of compromising the sensitive investigations of NABU. Such investigations may involve among others – the SBU officials as potential suspects. The monitoring team was also provided anecdotal evidence of leaks occurring.

It would therefore be most effective to ensure that NABU has such capacities within its own institution and can limit the scope of persons involved in the sensitive investigations.

Consider introducing amendments in the Constitution of Ukraine to provide legal basis for functioning of independent anti-corruption agencies (law enforcement and preventive).

No steps towards implementation of this recommendation have been taken and this part of the Recommendation remains unimplemented.

Ensure operational and institutional autonomy of the specialized anti-corruption prosecutor's office dealing with cases in jurisdiction of the National Anti-Corruption Bureau.

Since the adoption of this report, the Head of the SAPO – the Special Anti-Corruption Prosecutor, who also has the position of the Deputy Prosecutor General - has been selected and appointed in accordance with the requirements of the Law. The selection process, similarly to that of NABU's Director, was held in an open competition by the Selection Board and resulted in the appointment on 30 November 2015. Deputies of the Specialised Anti-Corruption prosecutor have been appointed in December 2015.

The staffing of the SAPO has followed shortly. SAPO prosecutors have been selected based on open competition over January-February 2016. Currently SAPO has 51 staff (of whom 12 are administrative) and its organisational structure includes the following departments: department of procedural guidance, support of state accusation and representation in the courts, as well as division on analytics and information and division on documentation.

The SAPO was allocated premises and was provided with other necessary technical and material support. Salaries of the SAPO staff have been provided as established by the law and are also at a very competitive level which is far higher than that of regular prosecutors. In fact, the monitoring team was informed at the time of the on-site that the base salary of the similar rank prosecutor amounted on average to one tenths of that of SAPO prosecutor or NABU detective. Regulation on SAPO was adopted in April 2016.

As described earlier SAPO has become fully operational in early 2016 and since then has demonstrated its ability to carry out its functions professionally and independently. Enforcement results have been earlier discussed in the section 3.3.

This part of the recommendation appears to be implemented.

Additional issue: General "Reception Office" of the GPO and Administrative Support Services

At the on-site visit, the monitoring team identified one technical/organisational issue which could be addressed and help eliminate potential impediments to operational independence of SAPO, as well as make its work more efficient and confidential.

Currently all of the administrative support of SAPO, in terms of HR, communications, filing, archiving, etc., is provided by the “General Reception office” and other administrative support services of the GPO. All correspondence and filing also goes through the PGO. This seemingly small function can have greater implications, especially in light of jurisdictional disputes/disambiguates that have been already discussed in section 3.3. and taking into consideration sensitivity of the SAPO cases.

For example, when documents addressed to the SAPO arrive they go through the General Reception Office of the GPO. There they are registered, entered into the system and are being forwarded to the recipient. At this point prosecutors of the GPO and other staff of the GPO, have access to any of these documents. This firstly can present issues in regards to confidentiality of the transmitted information.

Moreover, at this point PG can be alerted of the opportunity to decide to reassign cases, share files with other relevant in his view prosecutors, etc. This provides other prosecutors of the GPO with an easy entry point into cases that fall under the jurisdiction of the SAPO and NABU. And since the PG is vested with powers to resolve jurisdictional disputes according to the CPC Art 216 – this lends itself to potential for channelling of cases away from the newly created specialised bodies.

As it was mentioned earlier, the monitoring team was made aware of a number of cases which were assigned to other units within GPO, including the Military Prosecutor’s Office. Whether misuse of this set up happens in practice is beyond the point of this report. However, even a potential for such misuse should be eliminated. Plus, giving SAPO its own reception service, as well as perhaps other support services, would simply make its work more efficient.

Consider introducing specialized anti-corruption courts or judges.

Formally to implement this part of the 3rd round recommendation, Ukraine needed to take steps demonstrating that it considered establishing anti-corruption courts. Consideration of this topic has been achieved through recent heated debates over the merits of their establishment. Finally, with adoption of the judicial reform of 2016 – Ukraine’s President and parliament made a clear policy decision that such courts should be established. However, the manner in which they will be established is still a matter of serious controversy and, in any case, is not moving forward sufficiently to address the problem. The new system of courts foresees establishment of specialised courts, including the court responsible to handle anti-corruption cases.

The debate and passage of legislation would bring Ukraine in compliance with this part of the current recommendation. However, the monitoring team believes that this issue requires more in-depth consideration about whether this proposal adequately addresses the problem of the immediate need for fair and impartial courts to begin hearing these matters without further delay.

One of the most serious issues is the shocking fact that the courts currently assigned high level corruption cases are simply not bringing the cases to trials. Clearly, something must be done in regards to the large number of stalled cases brought by SAPO and NABU.

As it was mentioned earlier, approximately 78 cases have been sent to courts by SAPO/NABU. According to the CPC Art 31, p.3 adjudication of cases under SAPO and NABU jurisdiction has to be performed by the panel of 3 judges that should have at least 5 years of judicial experience. However, due to mass resignation of the judges and pending “re-appointment” of judges whose 5 years’ probation term has lapsed with judicial reform - this issue was discussed at length in Section 2.3 – there are simply not enough judges in the individual courts to form panels for trial of these cases. Plus, the monitoring team was informed by some of the interlocutors met at the on-site visit, that many judges in order to avoid trials of these politically sensitive, as well as publicly exposed cases – take extensive sick leaves, recuse themselves, arrange their schedules in such ways that the three are never present. There are also examples when judges send cases to appeal courts arguing that the cases do not fall within their jurisdiction.

Due to these reasons, trials of cases brought by SAPO/NABU are often delayed, or are allowed to be continued for a long time despite the CPC requirement of timely set and continuous trials. As a result, according to the data provided by NABU – as of 30 June 2017 – one third of the 78 cases are awaiting trial. Only 15 cases have been adjudicated so far, most of them deal with secondary participants of the big cases.

This situation is unacceptable and something needs to be done urgently to ensure prompt and proper adjudication of these cases. In addition, the issues that have been raised in the Section 2.3 of this report in regards to selection of the HCJ members should be addressed in this context.

Other issues

There is growing evidence that the practice of using the criminal justice system to silence critics is rising again. Requirements such as the registry of all allegations of crimes and the narrow discretion of law enforcement authorities to refuse to take action when the system is being abused appear to contribute to the problem. In other countries juries of peers and fair and effective judges provide some safeguards against abuse of the system. The control of abuse of this power is also dependent in large measure on the ethics and integrity of the prosecutors and law enforcement officials. But there are some procedural safeguards that could be considered and implemented, including requirements that allegations of crimes be subject to penalties if knowingly false allegations are made.

Conclusions

Fundamental changes took place in the institutional landscape of criminal justice bodies in the area of anti-corruption in Ukraine since the time of the 3rd round IAP monitoring. Some of them have already been in the making, others in design and yet others have been only recommended in the 3rd round of monitoring report adopted for Ukraine in March 2015.

Establishment of the NABU was finalized and it became fully operational and managed to meet the expectations of delivering real high-profile investigations. The SAPO has also since then was established and became fully operational. Again, just like the NABU is has delivered procedural guidance on NABU cases and submitted high-profile cases to courts. Unfortunately, further progress on these cases stopped there. Nevertheless, these two new institutions (the NABU and the SAPO) demonstrated that high level officials and grand corruption are no longer beyond the remit of the law enforcement in the country. They also sent some unsettling messages to the powerful oligarchs and the well-rooted corrupt high-officials in the public administration of Ukraine.

The debate on the establishment of the anti-corruption courts was initiated and found its reflection in the judicial reform, which now provides for establishment of the anti-corruption courts. However, the plans seem vague, are viewed as ineffective by many in civil society, and are not being implemented swiftly enough to address this critical failure in the justice system. It is extremely important to ensure that the cases which were investigated and brought to court by the NABU and SAPO are properly adjudicated by the judges with high integrity and independence. The failure to take this on immediately and in a way that the society believes will be fair and just may well spell the end of the anti-corruption reforms Ukraine has undertaken. Ukraine's freedom and economic prosperity depend on it getting this right.

To some extent the rigor of the new law enforcement anti-corruption bodies in attempts to curb high-profile corruption and their attempts at keeping independence caused a backlash. They are being attacked in various forms from media and legislative initiatives, to investigation and prosecution of the leadership and staff, as well as to various other methods applied to prevent them from doing their job. Measures need to be taken to ensure that their independence is preserved and that the cases that they have accumulated are finally resolved.

Ukraine is largely compliant with the previous recommendation 2.9.

New Recommendation 25

(This is a joint recommendation addressing issues covered in Sections 3.3 and 3.4)

1. Establish without delay specialized anti-corruption courts insulated from corrupt and political influences which can fairly and effectively hear and resolve high level corruption charges. Select the judges through transparent, independent and highly trusted selection process which will guarantee integrity and professionalism.
2. Ensure strict compliance with exclusive jurisdiction of NABU and SAPO.
3. Provide NABU with capacity (legally and technically) to conduct wire-tapping autonomously.
4. Step up the level of investigations and prosecutions of corruption throughout all responsible government bodies.
5. Ensure that independence of the National Anti-Corruption Bureau is maintained without undue interference into its activities, including by providing for independent and un-biased audit of its activities and safeguard against abuse of criminal process.
6. Consider introducing amendments in the Constitution of Ukraine to strengthen the legal basis for functioning of independent anti-corruption agencies (law enforcement and preventive).
7. Ensure that operational and institutional autonomy of the Specialized Anti-Corruption Prosecutor's Office is maintained and further expanded by, among other things, granting it its own administrative support services and the "Reception office", as well as its own capacity for maintaining of classified information.
8. Enact regulations and procedures that in fact reduce the risk that the criminal justice system is used to silence uncomfortable speech from critics of the government.

ANNEX. FOURTH MONITORING ROUND RECOMMENDATIONS TO UKRAINE

CHAPTER 1: ANTI-CORRUPTION POLICY

New recommendation 1: Anti-corruption policy

1. Ensure full implementation of the Anti-Corruption Strategy and the State Programme regardless of the political sensitivity of the measures involved.
2. Ensure that the anti-corruption policy documents are evidence-based, developed with the meaningful participation of stakeholders and in coordination with the relevant state bodies. Ensure that the anti-corruption policy covers the regions. Provide resources necessary for policy implementation.
3. Conduct corruption surveys regularly. Evaluate results and impact and update policy documents accordingly. Publish the survey results in open data format.
4. Increase capacity and promote corruption risk assessment by public agencies. Support development and implementation of quality anti-corruption action plans across all public agencies.
5. Regularly monitor the progress and evaluate impact of anti-corruption policy implementation, including at the sector, individual agencies and regional level, involving civil society. Ensure operational mechanism of monitoring of anti-corruption programmes. Regularly publish the results of the monitoring.
6. Ensure that civil society conducts its anti-corruption activities free from interference.

New recommendation 2: Anti-Corruption awareness and education

1. Implement awareness raising activities envisaged by the anti-corruption policy documents and the NACP communication strategy.
2. Allocate sufficient resources for implementation of the awareness raising measures.
3. Measure the results of awareness raising activities to plan the next cycle accordingly.
4. Target awareness raising activities to the sectors most prone to corruption, use diverse methods and carry out activities adapted to each target group.

New recommendation 3: Corruption prevention and coordination institutions

1. Ensure without delay that the vacant positions of the NACP commissioners are filled by experienced and highly professional candidates with good reputation recruited through an open, transparent and objective competition.
2. Ensure unimpeded and full exercise of its mandate by the NACP independently, free from

outside interference.

3. Finalize adoption of the secondary legislation and provide necessary resources to the NACP to perform its functions, including at the regional level. Establish and make operational the regional branches of the NACP. Ensure continuous training of the NACP staff to build their skills and capacity.
4. Ensure systematic and efficient functioning of the Public Council of the NACP to provide effective mechanism for civil society participation.
5. Substantially enhance the coordination role of the NACP, its authority and leadership among the public agencies. Clarify and enhance the powers of the NACP in relation to anti-corruption units/officers in public agencies and ensure that the NACP provides guidance to support realization of their functions.
6. Ensure that the NACP has the direct access to all databases and information held by public agencies necessary for its full-fledged operation.
7. Ensure systematic and efficient functioning of the National Council on Anti-Corruption Policy.

CHAPTER 2: PREVENTION OF CORRUPTION

New recommendation 4: Evidence-based civil service policy

1. Ensure that the civil service reform policy is evidence-based and implementation strategies are supported by relevant data, risk and impact assessment.
2. Proceed with the introduction of the HRMIS as a matter of priority.
3. Ensure that the disaggregated statistical data on civil service is produced and made public.

New recommendation 5: Institutional framework for civil service reform

1. Assess the capacity of the NACS, its central and regional units, and increase it, if necessary, in view of the ongoing comprehensive civil service reform implementation and oversight needs.
2. Ensure that the competition commissions include persons with necessary skills to assess the candidates for civil service. Take measures for unimpeded and professional functioning of the Commission on Senior Civil Service and competition commissions, free from political interference.
3. Ensure introduction and proper operation of HRM functions in state agencies across the board of the entire civil service, provide coordination and adequate methodological guidance by the NACS.

New recommendation 6: Merit-based civil service

1. Take all necessary measures in cooperation with civil society, to address the existing challenges of the recruitment both in legislation and in practice, including the lack of relevant competences of the competition commission members and the lack of transparency.

2. Continue consistent implementation of open, transparent merit-based recruitment to ensure that the civil service is in fact based on merit, is perceived as such and allows selecting the best candidates, free from political interference guarantying equal opportunities and professionalism.
3. Ensure that the civil service vacancies are adequately and broadly advertised to provide for equal access and attract highly qualified candidates.

New recommendation 7: Performance appraisal

1. Ensure implementation of performance appraisal in practice.
2. Adopt and put in practice the regulation to link the monthly/annual bonuses and priority promotion to the performance appraisal.

New Recommendation 8: Dismissals and discipline

1. Clarify the grounds for disciplinary proceedings and ensure that they are objective.
2. Ensure that the dismissals are based on the legal grounds and are not politically motivated.

New Recommendation 9: Remuneration

1. Finalize the adoption of the necessary regulatory framework and ensure in practice fair, transparent and competitive remuneration in civil service.
2. Ensure that there is an upper limit to the bonuses granted based on an annual performance evaluation not exceeding 30% limit provided by CSL.

New Recommendation 10: Conflict of interests

1. Ensure full and unbiased enforcement of conflict of interest rules in practice by the NACP free from political influence.
2. Further raise awareness and continue training to fully introduce the new regulations and ease their practical implementation.

New Recommendation 11: Ethics

1. Clarify the mandate of agencies responsible for awareness raising and training on ethical standards
2. Carry out systematic awareness raising and training throughout the public service.
3. Analyse the needs and consider adoption of the specific ethics codes for individual agencies/categories.

New Recommendation 12: Asset Declarations

1. Ensure integrity, full and unimpeded functioning of the electronic asset declaration system allowing timely submission of asset declarations, disclosure of asset

declarations, including in open data format. Ensure that any exceptions for disclosure are directly envisaged by the CPL.

2. Amend verification procedure to address its shortcomings, adopt the lifestyle monitoring regulation, ensure automated verifications of asset declarations by the NACP and implement data exchange between the asset declarations system and state databases to support automated verification.
3. Ensure that the actions are taken proactively on the alleged violations disclosed through the e-declaration system and that cases with the signs of criminal activity are duly referred to the law enforcement for the follow up.
4. Ensure that verification is carried out systematically and without improper outside interference with the focus on high-level officials.
5. Abolish amendments subjecting a broad range of persons that are not public sector employees (i.e. members of NGOs, activists, experts) to asset disclosure requirements.
6. Ensure that the NABU has direct access to the asset declaration database in line with the Article 17 of the Law on NABU and is able to use it for the effective execution of its functions.

New Recommendation 13: Reporting and Whistleblowing

1. Ensure clear procedures for submitting, reviewing and following up on whistleblower reports and providing protection. Further train the responsible staff.
2. Raise public awareness on whistleblowing channels and protection mechanism to incentivize reporting.
3. Consider adoption of a stand-alone law on whistleblower protection in line with international standards and good practices.

New Recommendation 14: Integrity of Political Officials

1. Provide training, awareness raising and guidance on applicable integrity rules to the political officials.
2. Proceed with the development and adoption of the parliamentary ethics code. Provide trainings, consultations and guidance for its application in practice, once adopted.
3. Clarify responsibilities and mandates for enforcement of integrity rules by parliamentarians, including in relation to the conflict of interest, ethical conduct and consequences of their violation. Ensure independent and objective monitoring and enforcement.
4. Provide for systematic objective scrutiny of declarations of political officials and the subsequent follow up as provided by law.

New Recommendation 15

1. Ensure that introduced by the judicial reform changes are effectively implemented and that their practical application is analysed with the view to identify deficiencies and address them.
2. Continue to reform with the view to address the remaining deficiencies in the system of judicial self-governance, appointment, disciplinary proceedings, dismissal and recusal

of judges to bring them in line with European standards and recommendations of the Venice Commission.

3. Analyse the reasons for the big number of judicial resignations and take necessary measures to ensure that judicial posts are being filled, including resolving the situation with pending 're-appointment' of the judges whose 5 years' probation term lapsed after the adoption of the judicial reform.
4. Closely monitor the functioning of the automated distribution of cases system to ensure that it is being properly applied. Look into instances of manipulations and take necessary measures to eliminate circumstances that enabled such manipulations.
5. Consider abolishing Article 375 of the Criminal Code of Ukraine or at the least ensure in other ways that only deliberate miscarriages of justice are criminalised to eliminate potential for abuse or exerting of pressure on judges.
6. Take all necessary measures to ensure the safety of judges; these measures should involve protection of the courts and of the judges.

New Recommendation 16

1. Ensure implementation of the reform and continue with the view to address the remaining deficiencies to bring them fully in line with European standards. In particular:
 - a) review the procedures for the appointment and dismissal of the PG in order to make this process more insulated from undue political influence and more oriented towards objective criteria on the merits of the candidate;
 - b) reform further the system of prosecutorial self-governance, including the statutory composition of the QDC, and ensure that the self-governance bodies function independently and proactively, represent the interests of all of the prosecutors, and do so in the opinion of these prosecutors and the public;
 - c) improve disciplining proceedings by (i) clearly defining grounds for disciplinary liability, (ii) extending the statute of limitation, and (iii) ensuring robust enforcement with complaints diligently investigated and the violators held responsible. Consider whether the right to legal representation is allowed at some stages in selected cases. Relatedly, conduct a review of the operation of the general inspector office to determine if it is properly addressing the most serious allegations of prosecutorial misconduct and/or is making appropriate referrals to the NABU and other appropriate bodies;
 - d) regulate in more detail career advancement, including by (i) establishing uniform and transparent procedures, and (ii) introducing regular performance evaluations.
2. Ensure sufficient and transparent funding of the prosecution service and remuneration of prosecutors that is commensurate to their role and reduces corruption risks.
3. Further strengthen procedural independence of the prosecutors. In particular, introduce random allocation of cases to individual prosecutors based on strict and objective criteria with safeguards against possible manipulations.

Previous round recommendations that remain valid under number 17:

Recommendation 3.3. from the Second Monitoring Round of Ukraine valid in the Third round:

- Develop and adopt Code of Administrative Procedures without delay, based on best international practice.
- Take further steps in ensuring transparency and discretion in public administration, for

example, by encouraging participation of the public and implementing screening of legislation also in the course of drafting legislation in the parliament.

- Step up efforts to improve transparency and discretion in risk areas, including tax and customs, and other sectors.

Recommendation 3.6. from the Third Monitoring Round report on Ukraine:

- Set up or designate an independent authority to supervise enforcement of the access to public information regulations by receiving appeals, conducting administrative investigations and issuing binding decisions, monitoring the enforcement and collecting relevant statistics and reports. Provide such authority with necessary powers and resources for effective functioning.
- Reach compliance with the EITI Standards and cover in the EITI reports all material oil, gas and mining industries. Adopt legislation on transparency of extractive industries.
- Implement the law on openness of public funds, including provisions on on-line access to information on Treasury transactions.
- Ensure in practice unhindered public access to urban planning documentation.
- Adopt the law on publication of information in machine-readable open formats (open data) and ensure publication in such format of information of public interest (in particular, on public procurement, budgetary expenditures, asset declarations of public officials, state company register, normative legal acts).

New Recommendation 18

1. Carry out awareness raising and training of relevant public servants on access to public information laws and their application in practice.
2. Gradually increase the datasets and diversify areas on the open data portal.

New Recommendation 19

1. Continue reforming the public procurement system, based on regular assessments of the application of the new Law on Public Procurement, in particular with a view to maximise the coverage of the Public Procurement Law and to minimise the application of non-competitive procedures.
2. Ensure that state owned enterprises (SOEs) use competitive and transparent procurement rules as required by law.
3. Extend electronic procurement systems to cover all public procurement at all levels and stages.
4. Provide sufficient resources to properly implement procurement legislation by procuring entities, including adequate training for members of tender evaluation committees.
5. Ensure that internal anti-corruption programmes are effectively introduced within entities that conduct public procurement processes.
6. Ensure that the debarment system is fully operational, in particular that legal entities or their officials who have been held liable for corruption offences or bid rigging are barred from participation in public procurement.
7. Arrange regular training for private sector participants and procuring entities on integrity in public procurement at central and local level. Provide training for law enforcement and state controlled organisations on public procurement procedures and prevention of corruption.

New Recommendation 20

1. Ensure further implementation of the following provisions from the 2014 Anti-Corruption Strategy on the prevention of corruption in the private sector:
 - a) Simplification of business regulations and promoting free market competition;
 - b) Debarment of companies involved in corruption offences from the use of public resource such as public procurement, state loans, subsidies, and tax benefits;
 - c) Establishing obligations for external and internal auditors to report corruption offenses;
 - d) Raising awareness of companies about the law on liability of legal entities for corruption offences and enforcing this law in practice;
 - e) Consider introducing regulations for lobbying, in particular clear regulations for business participation in the development and adoption of laws and regulatory acts.
2. Develop business integrity section of the new National Anticorruption Strategy on the basis of a risk analysis and in consultation with companies and business associations, ensure active participation of business in the monitoring of the Strategy.
3. Promote integrity of state owned enterprises through their systemic reform and by introducing effective compliance or anti-corruption programmes, increasing their transparency and disclosure.
4. Strengthen the Business Ombudsman Council by creating a legal basis for this institution in the law and by providing it with necessary powers for effective work.
5. Support the Ukrainian Network of Integrity and Compliance.

CHAPTER 3: ENFORCEMENT OF CRIMINAL RESPONSIBILITY FOR CORRUPTION**New Recommendation 21**

1. Expand the statute of limitations for all corruption offences to at least 5 years and provide for suspension of the statute of limitations during the period an official enjoyed immunity from criminal prosecution.
2. Provide adequate training and resources to prosecutors and investigators to ensure the effective enforcement of new criminal law provisions, in particular with regard to such offences as illicit enrichment, trafficking in influence, offer and promise of unlawful benefit, definition of unlawful benefit including intangible and non-pecuniary benefits, criminal measures to legal persons, new definition of money laundering. Training programmes of the specialised anti-corruption agencies should contain modules or focus in other ways on these issues in their regular training curriculum.
3. Analyse practice of application of the new provisions on corporate liability for corruption and, based on results of such analysis, introduce amendments to address deficiencies detected. Ensure autonomous nature of the corporate liability.
4. Take measures at the policy level (for example, set as priorities by the management of the anti-corruption specialised bodies) to encourage investigation and prosecution of corruption committed by legal persons.

New Recommendation 22

1. Ensure that ARMA has adequate resources to meet its legislative objectives, including collecting and maintaining statistical evidence about confiscation actions. Ensure that its role and available resources are communicated to the law enforcement and prosecutorial bodies.
2. Step up efforts to confiscate corruption proceeds to family members, friends or nominees.
3. Continue to make progress in the effective use of the newly enacted confiscation authorities.

New Recommendation 23

1. Review legislation to ensure that the procedures for lifting immunities of MPs are transparent, efficient, based on objective criteria and not subject to misuse.
2. Limit immunity of parliamentarians to a certain extent, e.g. by introducing functional immunity and allowing arrest in cases of in flagrante delicto.
3. Analyse practical application of the judicial reform to take appropriate legal measures to ensure that the procedures for lifting immunities of judges are transparent, efficient, based on objective criteria and not subject to misuse and that the functional immunity contributes to effective law enforcement.
4. Revoke additional restrictions on the investigative measures with regard to MPs, which are not provided for in the Constitution of Ukraine.

New Recommendation 24

1. Ensure that proactive efforts are continued with rigour by NABU, and other law enforcement bodies, to facilitate maximum detection and swift investigation of corruption in Ukraine. These efforts should include:
 - a) Use of all possible sources of information and tools, including the asset declarations.
 - b) Cooperation between law enforcement and other non-law enforcement bodies, such as FIU, ARMA, tax, customs, etc. to ensure detection and swift investigation of corruption in Ukraine.
 - c) Use of information obtained through international cooperation, as well as data collected from the open sources outside of Ukraine.
 - d) Joint trainings for law enforcement with representatives of the non-law enforcement bodies, especially FIU and ARMA.
2. Establish a centralised register of bank accounts of legal and natural persons, including information about beneficial owners of accounts, making it accessible for authorised bodies, including NABU, NACP and ARMA, without court order to swiftly identify bank accounts in the course of financial investigations and verification.

New Recommendation 25

1. Show concrete and measurable results in terms of asset recovery. In particular:
 - a) Proactively take all available measures to obtaining mutual legal assistance in corruption cases;
 - b) Continue to raise capacity of the General Prosecutor's Office, NABU and ARMA in international cooperation and asset recovery.
 - c) Ensure that procedures on assets recovery allow swift repatriation of stolen assets;
 - d) Ensure effective functioning of ARMA in its tasks on asset tracing, recovery and management of stolen assets.
2. Ensure that NABU can independently transmit and respond to MLA requests.

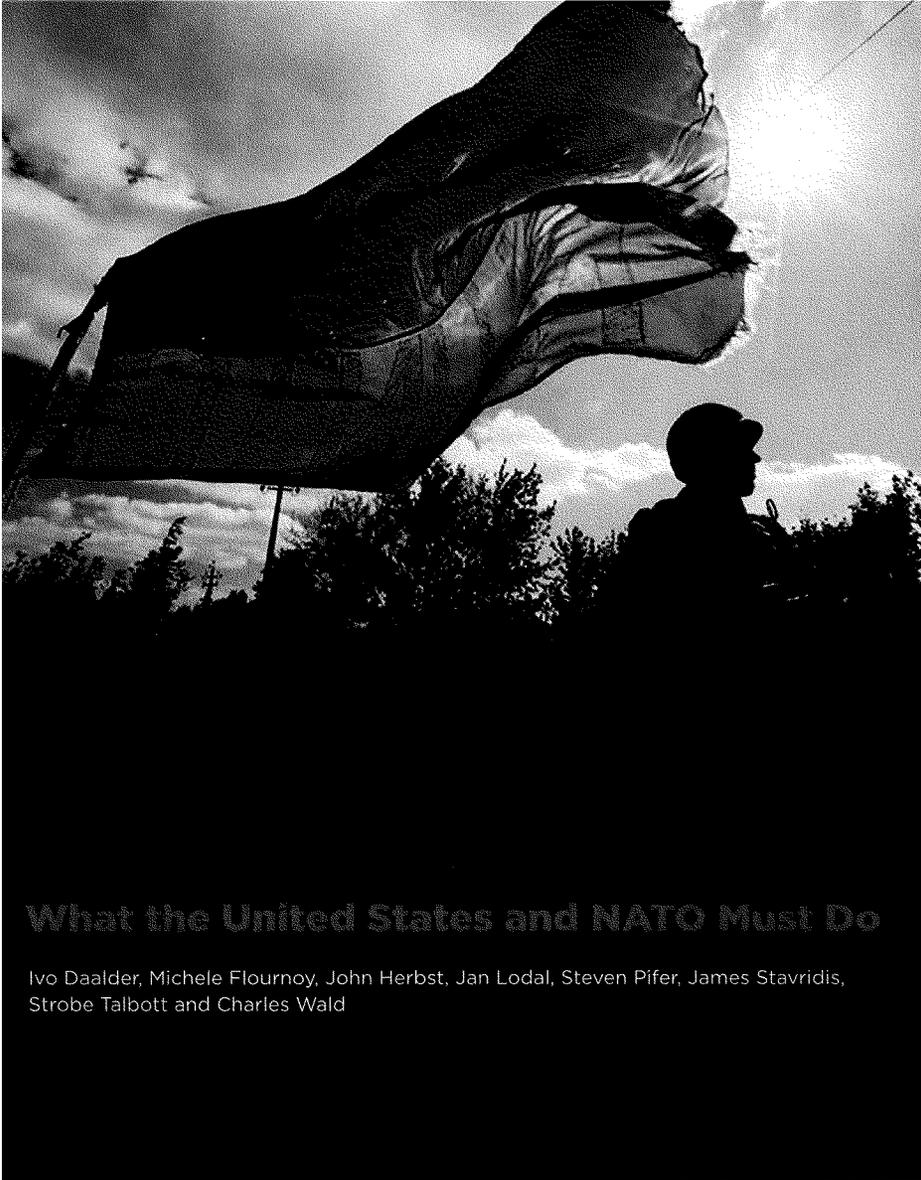
New Recommendation 25

(This is a joint recommendation addressing issues covered in Sections 3.3 and 3.4)

1. Establish without delay specialized anti-corruption courts insulated from corrupt and political influences which can fairly and effectively hear and resolve high level corruption charges. Select the judges through transparent, independent and highly trusted selection process which will guarantee integrity and professionalism.
2. Ensure strict compliance with exclusive jurisdiction of NABU and SAPO.
3. Provide NABU with capacity (legally and technically) to conduct wire-tapping autonomously.
4. Step up the level of investigations and prosecutions of corruption throughout all responsible government bodies.
5. Ensure that independence of the National Anti-Corruption Bureau is maintained without undue interference into its activities, including by providing for independent and unbiased audit of its activities and safeguard against abuse of criminal process.
6. Consider introducing amendments in the Constitution of Ukraine to strengthen the legal basis for functioning of independent anti-corruption agencies (law enforcement and preventive).
7. Ensure that operational and institutional autonomy of the Specialized Anti-Corruption Prosecutor's Office is maintained and further expanded by, among other things, granting it its own administrative support services and the "Reception office", as well as its own capacity for maintaining of classified information.
8. Enact regulations and procedures that in fact reduce the risk that the criminal justice system is used to silence uncomfortable speech from critics of the government.

www.oecd.org/corruption/acn/





What the United States and NATO Must Do

Ivo Daalder, Michele Flournoy, John Herbst, Jan Lodal, Steven Pifer, James Stavridis,
Strobe Talbott and Charles Wald

 Atlantic Council

BROOKINGS

 THE CHICAGO COUNCIL
ON GLOBAL AFFAIRS

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February 2015

PREFACE

This report is the result of collaboration among scholars and former practitioners from the Atlantic Council, the Brookings Institution, the Center for a New American Security, and the Chicago Council on Global Affairs. It is informed by and reflects mid-January discussions with senior NATO and U.S. officials in Brussels and senior Ukrainian civilian and military officials in Kyiv and at the Ukrainian "anti-terror operation" headquarters in Kramatorsk.

The report outlines the background to the crisis over Ukraine, describes why the United States and NATO need to engage more actively and urgently, summarizes what the authors heard in discussions at NATO and in Ukraine, and offers specific recommendations for steps that Washington and NATO should take to strengthen Ukraine's defenses and thereby enhance its ability to deter further Russian aggression.

Such action would contribute to helping Ukraine restore control over its border and territory in

the Donbas provinces of Donetsk and Luhansk. A stronger Ukrainian military, with enhanced defensive capabilities, will increase the prospects for negotiation of a peaceful settlement. When combined with continued robust Western economic sanctions, significant military assistance to bolster Ukraine's defensive capabilities will make clear that the West will not accept the use of force to change borders in Europe. President Putin may hope to achieve glory through restoring, through intimidation and force, Russian dominion over its neighbors. But a peaceful world requires opposing this through decisive action.

We fully endorse the analysis and recommendations contained in the report and urge the Obama Administration and NATO governments, with support from the U.S. Congress and Allied parliaments, to move rapidly to implement the recommendations.

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EXECUTIVE SUMMARY

We face a critical juncture in Ukraine. There is no real ceasefire; indeed, there was a significant increase in fighting along the line of contact in eastern Ukraine in mid-January, with Russian/separatist forces launching attacks on the Donetsk airport and other areas. Instead of a political settlement, Moscow currently seeks to create a frozen conflict in eastern Ukraine as a means to pressure and destabilize the Ukrainian government. Russians continue to be present in the Donetsk and Luhansk oblasts in substantial numbers and have introduced significant amounts of heavy weapons. This could be preparation for another major Russian/separatist offensive.

Russian success would fatally undermine Ukraine's stability and embolden the Kremlin to further challenge the security order in Europe. It might tempt President Putin to use his doctrine of protecting ethnic Russians and Russian speakers in seeking territorial changes elsewhere in the neighborhood, including in the Baltic States, provoking a direct challenge to NATO. Maintaining Western sanctions are critical but not by themselves sufficient. The West needs to bolster deterrence in Ukraine by raising the risks and costs to Russia of any renewed major offensive.

That requires providing direct military assistance—in far larger amounts than provided to date and including lethal defensive arms—so that Ukraine is better able to defend itself. The U.S. government should provide Ukraine \$1 billion in military assistance as soon as

possible in 2015, followed by additional tranches of \$1 billion in FY 2016 and FY 2017.

Additional non-lethal assistance should include: counter-battery radars, unmanned aerial vehicles (UAVs), electronic counter-measures for use against opposing UAVs, secure communications capabilities, armored Humvees and medical support equipment.

Lethal defensive military assistance should include light anti-armor missiles, given the large numbers of armored vehicles that the Russians have deployed in Donetsk and Luhansk and the abysmal condition of the Ukrainian military's light anti-armor weapons.

Other NATO members should provide military assistance as well. Of particular use to the Ukrainian military would be equipment and weapons from NATO members who operate former Soviet equipment compatible with the arms currently in the Ukrainian inventory.

Assisting Ukraine to deter attack and defend itself is not inconsistent with the search for a peaceful, political solution—it is essential to achieving it. Only if the Kremlin knows that the risks and costs of further military action are high will it seek to find an acceptable political solution. Russia's actions in and against Ukraine pose the gravest threat to European security in more than 30 years. The West has the capacity to stop Russia. The question is whether it has the will.

Background: A Putin-Manufactured Conflict

Ukrainian President Yanukovich's November 2013 decision, apparently under great pressure from Putin, not to sign an association agreement with the European Union triggered massive demonstrations and an intense political crisis within Ukraine. The Ukrainian crisis became a major Ukraine-Russia conflict in late February 2014, when Yanukovich abandoned his position and Russian military forces seized Crimea. Just weeks after Russia's annexation of Crimea, armed separatists—with support, funding and leadership from Moscow—seized government buildings in the eastern Ukrainian oblasts of Donetsk and Luhansk. By May, the Russian-supported separatists had occupied a significant portion of the Donbas.

Once a Ukrainian counteroffensive started to make progress in June, Russia began supplying the separatists with heavy weapons, such as tanks, armored personnel carriers, artillery and advanced anti-aircraft systems, apparently including the BUK (NATO designator SA-11/17) surface-to-air missile system that shot down Malaysia Air flight 17 in July. Russia also sent in large numbers of “volunteers.” When Ukrainian forces continued to make progress in August, regular Russian army units entered the Donbas, and attacked and inflicted heavy casualties on the Ukrainian military and Ukrainian volunteer battalions. The Ukrainian military reportedly lost well over half of its deployed armor.

A ceasefire was reached in Minsk on September 5, which significantly reduced the number of deaths from the fighting (see Appendix 1 for the twelve points of the ceasefire). But the ceasefire never fully took hold. In some areas, including around the Donetsk airport, fighting continued almost unabated. There was a significant improvement in compliance with the ceasefire beginning on December 8, but shellings across the line of contact between Ukrainian and separatist/Russian forces in the Donbas increased markedly around January 11, and the situation again deteriorated. Since the ceasefire, the Russian-backed separatists have seized an additional 500 square kilometers of territory.

The United States, European Union and other countries imposed increasingly severe economic sanctions on Russia over the course of 2014. They began with sanctions targeted at individuals but in July and September applied much broader and more robust sanctions targeting a range of Russian entities in the financial, energy and defense sectors. Sanctions appear to be having a significant impact on the Russian

economy—particularly as oil prices have dropped substantially, sharply reducing export earnings. But they have not yet achieved their principal political goal: effecting a change in Russian policy toward Ukraine. Western leaders have stated that sanctions will remain in place until the Kremlin's policy changes in a significant way.

Although there have been numerous diplomatic exchanges since the September 5 ceasefire agreement, little real progress has been made toward a broader settlement. The Russians have done little to implement the ceasefire terms. They have not withdrawn their forces and equipment; indeed, NATO and Ukrainian sources report a significant influx of Russian heavy equipment in December and January. By all appearances, as of mid-January, the Russian government does not seek a genuine settlement in eastern Ukraine but intends to create a frozen conflict as a means to pressure and destabilize the Ukrainian government.

Russian and separatist forces currently operating in eastern Ukraine enjoy significant advantages over the Ukrainian armed forces in air superiority, intelligence, electronic warfare, command and control, artillery and rockets, supply and logistics, and sanctuary in Russia (see Appendix 2 for more detail). These advantages have significantly contributed to losses suffered by Ukrainian forces since the September 5 ceasefire. These capabilities most likely render Ukrainian forces unable to prevent, and unlikely to halt on favorable terms, a major offensive by Russian and separatist forces to take additional territory in the Donetsk and Luhansk oblasts or to create a land bridge through Mariupol to Crimea.

The Case for Increased U.S. Military Assistance Now

The situation in eastern Ukraine is urgent and deteriorating. In recent weeks, the flow of heavy weapons has grown markedly, and Moscow is no longer taking steps to hide this support from overhead imagery. Fighting along the line of contact increased significantly during the week of January 19. Aleksandr Zakharchenko, leader of the self-proclaimed “Donetsk People's Republic,” indicated on January 23 that the separatists would seek to take all of the Donetsk oblast. Large numbers of Russian forces remain deployed along the border, ready to enter Ukraine on very short notice.

Russian and separatist forces clearly have the capacity for further offensive military action—whether to gain control of the entire Donbas region or, worse, to

establish a land bridge between Russia and the Crimea through effective control of southeastern Ukraine. Any such offensive move would set back the prospect for a peaceful settlement and further destabilize Ukraine. The costs to the West of maintaining an independent Ukraine would then only grow, and Moscow might be emboldened to take further actions. While these actions may not seem likely, they certainly are not unthinkable. Few analysts at the end of 2013 would have considered a Russian military seizure of Crimea or invasion of the Donbas "thinkable."

The post-World War II effort to create a safer Europe is under serious threat. The 1975 Conference on Security and Cooperation in Europe Final Act, in which Russia agreed to respect the "inviolability of borders" in Europe, has been blatantly violated. The United States, moreover, is a signatory to the 1994 Budapest Memorandum on Security Assurances for Ukraine. In that document, the United States, Britain and Russia committed to respect Ukraine's sovereignty, independence and territorial integrity, and not to use or threaten to use force against Ukraine. Russia has grossly violated those commitments, which were key to Kyiv's decision to eliminate its nuclear weapons. The United States and Britain should, in response, do more to robustly support Ukraine and penalize Russia.

This is not just a question of honoring U.S. commitments under international agreements. It is important for preserving the credibility of security assurances for the future, when they might play a role in resolving other nuclear proliferation cases, such as Iran and North Korea.

Above and beyond Ukraine—and more important in strategic terms for the United States and NATO—is the need to respond to the challenge to European and Eurasian security posed by the Kremlin's aggressive policies. Russia has broken the cardinal rule of post-war European security, i.e., states must not use military force to change international borders. Putin and the Kremlin have proclaimed a unique and legally dubious right to "protect" ethnic Russians and Russian speakers, wherever they are located and whatever their citizenship. This was the justification that Putin belatedly offered for Russia's illegal annexation of Crimea, despite the fact that there was no credible threat to ethnic Russians in Crimea.

If not constrained, such Russian policies represent a clear danger to European security, the North Atlantic community, as well as to Russia's neighbors in Eurasia. Given the many other world challenges confronting the United States, especially problems in the broader Middle

East and the strategic challenge posed by the rise of China, Washington and other capitals have not devoted sufficient attention to the threat posed by Russia and its implications for Western security. This must change.

If the United States and NATO do not adequately support Ukraine, Moscow may well conclude that the kinds of tactics it has employed over the past year can be applied elsewhere. Of particular concern would be Russian actions to destabilize Estonia or Latvia, each of which has a significant ethnic Russian minority and both of which are NATO members to whom the United States and allies have an Article 5 commitment. The Kremlin has already demonstrated aggressive intent in the Baltics by kidnapping an Estonian security official the day the NATO Wales summit ended.

To be sure, there are issues on which the interests of the United States and the West, on the one hand, and Russia, on the other, coincide. These include preventing Iran from acquiring nuclear arms, avoiding a return of the Taliban or chaos in Afghanistan, the broader counter-terrorism struggle, and controlling nuclear weapons and materials. But these interests should not outweigh the West's interest in blocking Russian aggression that poses a threat not just to Ukraine, but also to the security of broader Europe and the transatlantic community.

The world has faced this kind of challenge before. History makes clear that the only way to stop such aggression from precipitating a regional or even world-wide conflagration is to deter and defend against it as early as possible and not to be fooled by protestations of innocent motives or lack of further ambitions.

Providing Military Support to Deter Further Aggression

The Ukrainian military appears capable of limited military operations, such as the January 19 counter-attack on the Donetsk airport (the airport reportedly has since been lost). Given the experience of August, however, Kyiv is most unlikely to launch a major military effort to try to regain control of Donetsk and Luhansk; President Poroshenko has said there can be no military solution and has sought a negotiated settlement.

There remains, however, the question of Kyiv's ability to defend itself against further Russian attacks. Even with enormous support from the West, the Ukrainian army will not be able to defeat a determined attack by the Russian military. This point is well understood in

Kyiv. The more appropriate goal of Western military assistance should be to give the Ukrainian military additional defense capabilities that would allow it to inflict significant costs on the Russian military, should the Russians launch new offensive operations, sufficient enough that Moscow will be deterred from further aggression.

The United States and NATO should seek to create a situation in which the Kremlin considers the option of further military action in or against Ukraine too costly to pursue. The combination of closing off that option plus the cumulative impact of Western economic sanctions could produce conditions in which Moscow decides to negotiate a genuine settlement that allows Ukraine to reestablish full sovereignty over Donetsk and Luhansk. (The West cannot lose sight of the status of Crimea, though Kyiv has said that that is an issue for the longer term; it correctly attaches priority to the Donbas situation.)

Putin's aggression in Ukraine and self-proclaimed right to protect ethnic Russians and Russian speakers wherever they are pose the gravest security threat to the transatlantic community and Eurasia since the end of the Cold War. The United States and NATO must recognize this danger and adjust policies and allocate resources accordingly. A firm Western response can bolster Kyiv's ability to deter further Russian attacks. Moreover, if confronted by a strong Western response in support of Ukraine, the Kremlin will be far less tempted to challenge the security or territorial integrity of other states, including NATO members Estonia and Latvia.

Recommendations for Specific Military Assistance

Bolstering Ukraine's defense capabilities will require a commitment of serious resources. The U.S. government in 2014 pledged \$120 million in non-lethal military assistance, of which about half has been delivered. The Ukraine Freedom Support Act of 2014 authorized—but did not appropriate—\$350 million in military assistance (non-lethal and lethal) over three years (see Appendix 3 for key provisions of the Act).

This is a beginning. But a much more substantial effort is required. The administration should request, and Congress should immediately authorize and appropriate, \$1 billion in assistance to bolster Kyiv's defense and deterrence capabilities as rapidly as possible in 2015, with additional tranches of \$1 billion to be provided in FY 2016 and FY 2017. Congressional staff should coordinate with the Departments of Defense and State

to ensure that Congressional authorizations are written in a way that allows the government to make quick and efficient use of the assistance.

Some of us traveled January 12-16 to Brussels for discussions with senior NATO leaders, to Kyiv for discussions with senior Ukrainian civilian and military leaders, and to Kramatorsk to meet with the commanding general of the "anti-terror operation" and his staff.¹ According to both NATO and Ukrainian officials, Russian military personnel are in the Donbas, and there has been a significant influx of additional Russian heavy equipment in December and January. The Ukrainians reported that the Russians make heavy use of unmanned aerial vehicles (UAVs) for surveillance and reconnaissance and combine those with long-range artillery and rocket strikes with devastating effect. (See Appendices 4 and 5 for details on discussions in Brussels and Ukraine.)

The following recommendations, based on what we heard in Brussels, Kyiv and Kramatorsk, constitute a minimum immediate response. Washington should urgently consult with Kyiv on provision of the following types of military assistance, with a view to rapid procurement—or provision from existing U.S. defense stocks—and delivery:

- Counter-battery radars that can detect and locate the origin of multiple launch rocket system (MLRS) launches and artillery firings out to a range of 30-40 kilometers. These will enable the Ukrainian military to identify ceasefire violations and potentially to target the Russian/separatist weapons that have thus far caused the greatest number of Ukrainian casualties. (Approximately 70 percent of Ukrainian casualties are from rocket and artillery fire.)
- Medium altitude/medium range UAVs. These will assist the Ukrainian military to increase its tactical situational awareness, identify opposing troop deployments, and locate opposing MLRS and artillery.
- Electronic counter-measures for use against opposing UAVs. This will give the Ukrainian military capabilities to disrupt opposition UAVs conducting missions against Ukrainian forces.
- Secure communications capabilities. Much Ukrainian tactical communication currently is conducted over non-secure radios or cell phones and thus is extremely vulnerable to interception by Russian intelligence-gathering systems.

¹ Daalder, Herbst, Lodal, Pifer and Wald traveled to Brussels and Ukraine.

- **Armored Humvees.** With Russian UAVs patrolling the skies and the persistent threat of Russian precision rocket and artillery fire, Ukrainian forces require all-weather mobility, speed, reliability and a measure of protection as they move between positions on the battlefield.
- **Medical support equipment.** Ukrainian casualties are greater because of their relatively underdeveloped and severely under resourced military medical system. The provision of field hospitals would greatly improve their soldiers' survival rate.
- **In addition to the above non-lethal items, the U.S. government should immediately change its policy from prohibiting lethal assistance to allowing provision of defensive military assistance, which may include lethal assistance, most importantly, light anti-armor missiles.** Ukrainian light anti-armor capabilities are severely lacking at a time when the Russians have moved large numbers of tanks and armored personnel carriers into the Donbas (70 percent of their existing stocks of light anti-armor weapons reportedly do not work). Any major Russian/separatist advance beyond the line of contact would presumably make heavy use of tanks and armored personnel carriers. Anti-armor missiles would give the Ukrainian army the capability to impose heavier costs and support the disruption of such attacks. Raising the risks and costs will help deter further Russian offensive operations.

Given the urgency of the situation—some fear that a new offensive could be launched once the spring arrives in April/May—consideration should be given to drawing equipment from U.S. stocks and using assistance funds to replenish U.S. inventories.

Bolstering Ukraine's defenses should not be a U.S.-only responsibility. NATO members should also increase their military assistance to Ukraine, with a view to meeting the priority needs identified above. NATO allies who have former Soviet/Warsaw Pact equipment and weapons systems similar to or compatible with those now operated by the Ukrainian military should consider contributing those to Kyiv's defense capabilities.

Ukraine has a significant need for improved air defenses. While Russian resort to large-scale air strikes would remove any veneer from Moscow's claim that its military is not engaged in operations in/against Ukraine, such action cannot be excluded. Procuring advanced U.S. air defense weapons would be expensive, and integrating them into the existing Ukrainian air defense system would take time. A quicker solution would be for NATO members who operate similar former Soviet air defenses

to provide equipment and weapons from their stocks to Ukraine. For the longer term, U.S. military experts should consult with the Ukrainian military on steps to build a stronger national air defense. As part of this discussion, the United States should not rule out the possibility of helping provide advanced air defense systems.

The U.S. government should approach Poland, the Baltic States, Canada and Britain regarding their readiness to provide lethal military assistance. Such assistance should be coordinated to avoid duplication of efforts. Poland, in particular, as a former Warsaw Pact member, should be able to help with consumables and spare parts, as well as compatible equipment, since the bulk of Ukraine's equipment is Soviet in origin.

Some in the West are concerned that provision of military assistance, particularly of lethal arms, would cause Russia to escalate the crisis. We vehemently disagree. Russia has already continuously escalated: seizing and annexing Crimea, encouraging and aiding separatists in eastern Ukraine, providing the separatists with heavy arms, and ultimately invading the Donbas with regular Russian army units. Although NATO and Ukraine differ over whether Russian regular units have been withdrawn, there is no dispute that a significant number of Russian officers and a large amount of Russian military equipment remain in the Donbas. Enhanced military assistance would increase Kyiv's capability to deter further Russian escalation.

Supporting Recommendations

There exists a clear gap between NATO and Ukrainian intelligence estimates with regard to the number and organization of Russian military personnel in eastern Ukraine. NATO and Ukrainian intelligence analysts should consult with a view to developing a common picture of the Russian presence. It appears that there are significant gaps in U.S. and NATO intelligence on Russian activities in and near eastern Ukraine. Given the grave nature of the danger posed by the Kremlin's aggression in Ukraine, the United States and NATO should increase intelligence coverage of the relatively small Ukrainian area of operations. Closing this intelligence gap requires an immediate shift of more intelligence assets to the Ukraine/Russia theater.

U.S. military equipment should be provided to the Ukrainian army only, not to the Ukrainian volunteer battalions. The U.S. Defense Attaché Office in Kyiv should be tasked to monitor the equipment's employment in order to ensure its effective and appropriate use.

As a condition of this assistance, the U.S. government should require the Ukrainian government to develop and implement a plan to integrate the volunteer battalions into—and place them under command of—regular army units and the National Guard as rapidly as possible. That would enhance the effectiveness of Ukrainian military operations.

In providing military equipment, the United States and its NATO partners should steer clear of equipment that is of such technological sophistication that it would require U.S. or NATO personnel to operate or maintain. Ukraine's defense and deterrence posture can be bolstered without a direct U.S. or NATO presence on the ground, and we would not support such a presence under current circumstances.

Conclusion

The West should work with Ukraine to create a successful and prosperous democratic state that is capable of choosing its own foreign policy course. The Ukrainian government has stated that it will institute economic and political reforms, as well as institute anti-corruption measures. Ukraine will need more financial support from international financial institutions, such as the International Monetary Fund, and the West. Others have made recommendations for such additional support, provided that Ukraine does indeed move forward on reform. Success in deterring

and, if necessary, defending against further aggression will strengthen Ukraine's sovereignty, but that may matter little unless the Ukrainian government moves forward with serious reforms.

The robust political and economic sanctions currently imposed on Russia with the full support of our European allies, and with the strong leadership of German Chancellor Merkel, are having an impact on the Russian economy and appear to have taken the Russian leadership by surprise. If Kyiv can deter further Russian military aggression while the sanctions have further impact on the Russian economy, there is a chance that Moscow will alter its course and seek a peaceful settlement in eastern Ukraine. In the meantime, however, Ukraine finds itself in a perilous state, and the Kremlin's aggression presents the transatlantic community with its most serious security threat in more than 30 years.

The United States and NATO must respond, both to support Ukraine and to push back against Russia's unacceptable challenge to the post-war European security order. This will require more military assistance, some of it lethal but none of it offensive. Should we delay action, the price will only grow. Should we not act more robustly, we can expect to face further Russian incursions, possibly including attempts to redraw borders elsewhere, and efforts to intimidate former Soviet states into accepting Russian dominance.

APPENDIX 1: September 5 Minsk Ceasefire Protocol

Following is an informal translation of the Russian language text of the ceasefire protocol signed on September 5, 2014:

Protocol on the results of the consultations of the trilateral contact group regarding joint steps towards implementation of the peace plan of President of Ukraine Petro Poroshenko and the initiatives of President of Russia Vladimir Putin

As a result of consideration and discussion of the proposals by members of the consultations in Minsk on September 1, 2014, the trilateral contact group composed of representatives from Ukraine, the Russian Federation and the Organization for Security and Cooperation in Europe, an understanding was reached regarding the need to take the following steps:

1. Provide for an immediate and bilateral ceasefire.
2. Provide OSCE monitoring and verification of the ceasefire.
3. Conduct decentralization of power, including through approval of the law of Ukraine "On the temporary order of local self-government in certain districts of the Donetsk and Luhansk oblasts" (the law on special status).
4. Provide permanent monitoring at the Ukrainian-Russian state border, and verification by OSCE, with creation of a safety zone in the areas adjacent to the border in Ukraine and the Russian Federation.
5. Immediately free all hostages and persons being held illegally.
6. Approve a law to prevent the persecution and punishment of persons in regard to events that took place in certain districts of the Donetsk and Luhansk regions of Ukraine.
7. Continue an inclusive national dialogue.
8. Take measures to improve the humanitarian situation in Donbas.
9. Conduct early local elections in accordance with the law of Ukraine "On the temporary order of local self-government in certain districts of the Donetsk and Luhansk oblasts" (law on special status).

10. Remove illegal military formations, military equipment, and militants and mercenaries from the territory of Ukraine.
11. Approve a program for economic development of the Donbas and renew the vital functions of the region.
12. Give guarantees of personal security for participants in the consultations.

Members of the trilateral contact group:

Ambassador Heidi Tagliavini (Signed)

Second President of Ukraine L. D. Kuchma (Signed)

Ambassador of Russian Federation to Ukraine M. Yu. Zurabov (Signed)

A. V. Zakharchenko (Signed)

I. V. Plotnitskiy (Signed)

APPENDIX 2: Russian/Separatist Military Advantages

Russian and separatist forces enjoy significant military advantages over the Ukrainian armed forces, including the following:

- **Air superiority:** Russian/separatist forces have denied Ukrainian forces the ability to attack, collect intelligence, maneuver and resupply their forces in Ukraine's sovereign airspace. Ukrainian forces have halted all flight operations in eastern Ukraine due to effective Russian/separatist employment of shoulder-fired man-portable air defense systems (MANPADS), which have downed numerous Ukrainian fixed and rotary-wing aircraft, and advanced radar-guided surface-to-air missiles, such as the BUK (NATO designator SA-11/17) which is widely believed to have downed Malaysia Air 17 in July 2014.
- **Intelligence, surveillance and reconnaissance:** Russian/separatist forces employ unmanned aerial vehicles, including the Aesop 100 and 4-post, to overfly Ukrainian forces, often coinciding with artillery and rocket attacks, likely collecting video/imagery intelligence to aid targeting and to assess attack effectiveness as well as collecting signals intelligence to monitor the mostly unencrypted Ukrainian communications.
- **Command and control (C2):** Russian/separatist forces use secure/encrypted communications systems and their own cell phone network, while Ukrainian forces lack signals intelligence collection or jamming systems to collect or disrupt these capabilities.
- **Electronic warfare:** Russian/separatist forces employ advanced systems to jam communications and GPS signals, disrupting Ukrainian C2, maneuver of forces, air operations and targeting.
- **Artillery and rockets:** Russian/separatist forces employ long-range artillery and multiple launch rocket systems such as the GRAD, with capacity to put large amounts of munitions into a target area at ranges up to 30-40 kilometers.
- **Supply and logistics:** Russian/separatist forces receive supplies from Russia into the Donetsk and Luhansk oblasts through the unsecured Ukraine-Russia border.
- **Sanctuary:** Russia provides advisors, training, weapons, equipment and safe haven for separatists and their Russian partners bound for operations inside Ukraine. Ukrainian forces are prohibited from attacking targets in Russia.

APPENDIX 3:

Key Elements of the Ukraine Freedom Support Act of 2014

Statement of Policy (Section 3):

"It is the policy of the United States to further assist the Government of Ukraine in restoring its sovereignty and territorial integrity to deter the Government of the Russian Federation from further destabilizing and invading Ukraine and other independent countries."

Increased Military Assistance for the Government of Ukraine (Section 6):

"The President is authorized to provide defense articles, defense services, and training to the Government of Ukraine for the purpose of countering offensive weapons and reestablishing the sovereignty and territorial integrity of Ukraine, including anti-tank and anti-armor weapons, crew weapons and ammunition, counter-artillery radars to identify and target artillery batteries, fire control, range finder, and optical and guidance and control equipment, tactical troop-operated surveillance drones, and secure command and communications equipment."

Presidential Report to Congress Required February 18, 2015:

"Not later than 60 days after the date of the enactment of this Act, the President shall submit a report detailing the anticipated defense articles, defense services, and training to be provided pursuant to this section and a timeline for the provision of such defense articles, defense services, and training."

\$350 million authorized (but not appropriated) for fiscal years 2015-2017:

"There are authorized to be appropriated to the Secretary of State \$100,000,000 for fiscal year 2015, \$125,000,000 for fiscal year 2016, and \$125,000,000 for fiscal year 2017."

APPENDIX 4: Discussions in Brussels, January 12, 2015

List of Individuals Met in Brussels and Mons

- Robert Bell, Defense Advisor, U.S. Mission to NATO
- General Sir Adrian Bradshaw, Deputy Supreme Allied Commander Europe, NATO
- General Philip Breedlove, Supreme Allied Commander Europe, NATO
- Catherine Dale, Senior Advisor to Supreme Allied Commander Europe, NATO
- Kurt Donnelly, Political Advisor, U.S. Mission to NATO
- Ambassador Martin Erdmann, Permanent Representative of the Federal Republic of Germany to NATO
- Rear Admiral Collin Green, Executive Officer, Supreme Allied Commander Europe
- Alice Guittou, Deputy Permanent Representative of France to NATO
- Major General Randy "Church" Kee, Director of Strategy and Policy, U.S. European Command
- Lee Litzenger, Deputy Chief of Mission, U.S. Mission to NATO
- Ambassador Douglas Lute, U.S. Permanent Representative to NATO
- Håkan Malmqvist, Deputy Chief of Mission of Sweden to NATO
- Ambassador Jacek Najder, Permanent Representative of the Republic of Poland to NATO
- Ambassador Pia Rantala-Engberg, Head of Mission of Finland to NATO
- Jens Stoltenberg, Secretary General, NATO
- Ambassador Alexander Vershbow, Deputy Secretary General, NATO
- Lieutenant General Michel Yakovleff, Vice Chief of Staff, Supreme Headquarters Allied Powers Europe

NATO believes that a large number of Russian military intelligence (GRU) and military officers—estimates ranged from 250 to 1000—are in eastern Ukraine as of about January 12. These officers serve as advisors and trainers to the separatists, as well as to the “volunteers”

and others from Russia. They also operate the more sophisticated equipment that Russia has deployed into the Donbas. In recent weeks, NATO has observed a large influx of Russian equipment into eastern Ukraine, including tanks, armored personnel carriers, artillery, and air defense systems, with less effort than before to conceal those movements.

NATO's position is that organized Russian army units were not present as of about January 12 and that the Russian military personnel there were not operating in viable military units. They noted that the Russian army had eight to nine battalion tactical groups and 50,000 troops deployed close to the Ukraine-Russia border on the Russian side. (A significant difference existed between the NATO and Ukrainian assessments on the questions of numbers of Russian troops and presence of organized Russian army units in Donetsk and Luhansk.)

NATO believes that Russian officers are providing training on the use of the equipment that Russia has moved into the Donbas and that Moscow has strengthened command and control (C2) over the separatist units. This combination of influx of equipment, Russian leadership, greater training and improved C2 means that the Russians/separatists have a capability for offensive operations, though NATO believes these units as of about January 12 did not have sufficient logistics for significant operations beyond the current line of contact with Ukrainian forces in Donetsk and Luhansk.

From the January 12 discussions, it was clear that some NATO members did not fully appreciate the threat posed by Russia's more aggressive policies of the past year. Conversely, interest remains strong among some in attaining a settlement that would allow for an end to sanctions.

Some NATO member states—the Baltic States, Poland, Canada, and perhaps Britain—might be prepared to provide lethal military assistance to Ukraine if the United States were to do so. These states are reluctant to go first and run the risk of political exposure, however, when U.S. policy remains one of providing nonlethal assistance only.

APPENDIX 5: Discussions in Ukraine, January 13-16, 2015

List of Individuals Met in Kyiv and Kramatorsk

- Michael Bociurkiw, Spokesperson, OSCE Special Monitoring Mission to Ukraine
- Boris Boyko, Chairman of the Supervisory Board, Charitable Fund for War Veterans and Participants of the Antiterrorist Operation
- Valeriy Chaliy, Deputy Head, Administration of the President of Ukraine
- Bohdan Chomiak, Board Director, Charitable Fund for War Veterans and Participants of the Antiterrorist Operation
- Colonel Joseph Hickox, Defense Attaché, U.S. Embassy, Kyiv
- General Leonid Holopatiuk, Deputy Chief of Staff, Armed Forces of Ukraine
- Oleksiy Honcharenko, Member of Parliament (Bloc of Petro Poroshenko)
- Volodymyr Horbulin, Head, National Institute of Strategic Studies and Advisor to the President of Ukraine
- Pavlo Klimkin, Minister of Foreign Affairs of Ukraine
- Ivanna Klympush-Tsintsadze, Member of Parliament (Bloc of Petro Poroshenko)
- Igor Lepsha, Board Director, Charitable Fund for War Veterans and Participants of the Antiterrorist Operation
- Petro Mekhed, Deputy Minister of Defense of Ukraine
- Sergey Mikhaylenko, Chairman, Charitable Fund for War Veterans and Participants of the Antiterrorist Operation
- Valentyn Nalyvaichenko, Head, Security Service of Ukraine
- Colonel Nozdrachov, Head, Civil-Military Cooperation (CIMIC), Armed Forces of Ukraine
- Major Jason Parker, Air Attaché, U.S. Embassy, Kyiv
- Serhiy Pashynskiy, Member of Parliament and Head, Parliamentary Committee on National Security and Defense
- Anatoliy Pinchuk, Chairman, Civic Assembly of Ukraine
- Vadym Prystaiko, Deputy Minister of Foreign Affairs of Ukraine
- Ambassador Geoffrey Pyatt, U.S. Ambassador to Ukraine
- Oleksiy Ryabchyn, Member of Parliament (Batkivshchyna)
- Ostap Semeriak, Member of Parliament (People's Front)
- Major General Oleksandr Sirskiy, Commander, "Anti-Terror Operation," Armed Forces of Ukraine
- Colonel General Ihor Smeshko, Head, Joint Intelligence Committee and Advisor to the President of Ukraine
- Serhiy Sobolev, Member of Parliament (Batkivshchyna)
- Wolfgang Sporrer, Political Analyst, OSCE Special Monitoring Mission to Ukraine
- Borys Tarasyuk, Member of Parliament (Batkivshchyna) and former Foreign Minister of Ukraine
- Oleksandr Turchynov, Secretary, National Security and Defense Council of Ukraine
- Ivan Vinnyk, Member of Parliament and Secretary, Parliamentary Committee on National Security and Defense

Ukrainian interlocutors were understandably concerned regarding Russian actions in eastern Ukraine and possible future intentions. They noted that the Russians/separatists have steadily expanded the territory under their control since the September 5 ceasefire and currently occupy about 500 square kilometers more territory than four months ago. There is some concern that Moscow might aim to take all of the Donetsk and Luhansk oblasts. There seemed to be less concern about a Russian drive to take Mariupol and continue on to seize a land bridge to Crimea. Some interlocutors noted preparations for partisan warfare in the event that Russia occupied further Ukrainian territory. One cited the experience learned from Afghan fighters in the 1980s.

Ukrainian sources said that the total number of Russian troops and separatist fighters in the Donbas came to 36,000, as opposed to 34,000 Ukrainian troops along the line of contact. They believed that Russian forces made up 8500 to 10,000 of the 36,000 and included eight to ten airborne and mechanized battalion tactical groups, with each battalion tactical group comprising 600 to 800 officers and soldiers. One unofficial interlocutor put the number of Russian troops at 5000 to 6000. (The number of Russian troops and the presence/absence of organized Russian army units in the Donbas was the biggest difference between the NATO and Ukrainian briefings.)

When one subtracts the number of Russian soldiers from the 36,000 figure, Ukrainian sources believe that the majority of the rest are Ukrainian citizens. The others include Chechen and Cossack fighters from Russia. One interlocutor said that approximately 2000 of the 36,000 are operating in "rogue" units that are not under Russian, "Donetsk People's Republic" or "Luhansk People's Republic" command.

Like NATO, the Ukrainians reported a significant recent influx from Russia into Ukraine of armor (T-64 and T-72 tanks as well as armored personnel carriers), artillery, multiple launch rocket systems (MLRS) such as the Grad, and sophisticated air defense systems. One Ukrainian estimate put the armor numbers at 250 tanks and 800 armored personnel carriers; other estimates were higher.

Ukrainians reported significant Russian use of unmanned aerial vehicles (UAVs) for surveillance and targeting purposes. The Russians combined this capability with MLRS and artillery with devastating effect; one Ukrainian officer stated that 70 percent of Ukrainian casualties were from MLRS and artillery strikes. Ukrainian military officers said that they have no capabilities to jam or down Russian UAVs.

Ukrainian military officials praised the counter-mortar radars provided by the United States and now in use along the line of contact, but they observed that those radars have a range of only six to seven kilometers. They expressed very strong interest in acquiring longer range counter-battery systems that could detect MLRS launches and artillery firing out to a range of 30-40 kilometers and enable the Ukrainian military to target those systems with its own MLRS and artillery. (The Grad MLRS, which the Russians/separatists have used to great effect, has a range of 20 kilometers.)

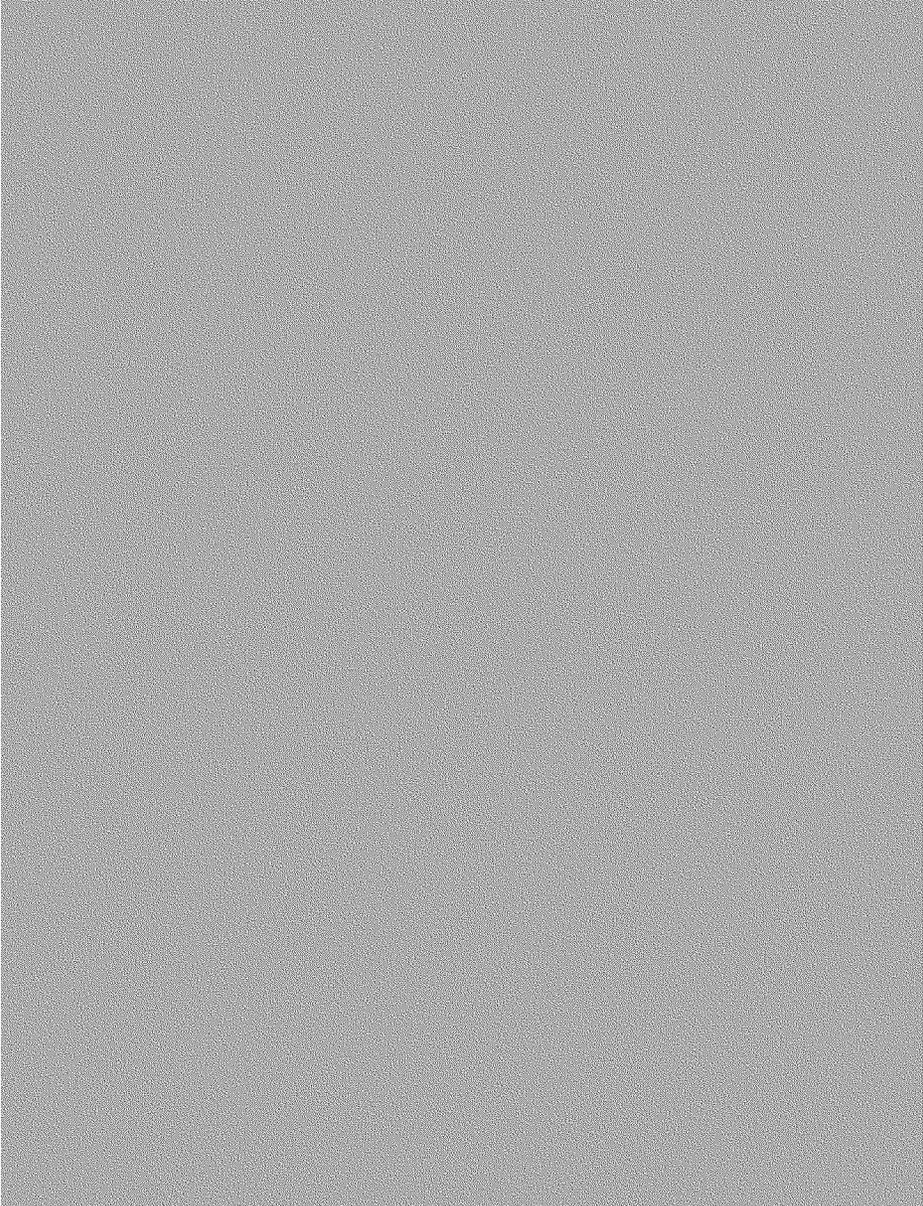
Other gaps reported by Ukrainian military officers largely fell into the non-lethal category: secure communications, counter-jamming equipment, electronic counter-measures for use against UAVs, UAVs for the Ukrainian military with ranges of 50-80 kilometers, armored Humvees and medical support equipment. They had two primary requests for lethal military assistance: sniper weapons and precision anti-armor weapons, specifically the Javelin anti-tank missile. The current stocks of Ukrainian anti-tank/anti-armor weapons are at least 20 years old and reportedly have a 70 percent out of commission rate.

One knowledgeable Ukrainian interlocutor noted Ukraine's "strategic" need for modern air defense systems, given the overwhelming Russian advantage in airpower, which he believed would be employed in any major force-on-force operation by the Russian military, e.g., an effort to seize a land bridge to Crimea. He contrasted this with the "tactical" need for anti-armor weapons.

Ukrainian officials maintained that they could quickly learn to operate new equipment and cited their experience in getting U.S.-provided counter-mortar radars into action.

While there is some coordination between the regular army and volunteer battalions, it varies with the battalion, ranging from barely satisfactory to poor. Military officials suggested that coordination is better with those battalions that are working with the Ministry of the Interior.

The OSCE Special Monitoring Mission to Ukraine (which is separate from the OSCE mission that monitors two crossing points on the Ukraine/Russia border) reported a difficult situation in the Donbas. The mission believed that some 5.2 million people have been affected (the majority, but not all, on the separatist side of the line of contact) and that, in addition, more than one million people had been displaced, with slightly more than half of those relocated in Ukraine while most of the rest had gone to Russia. The mission noted that 70 percent of the Russian/separatist-controlled area in Luhansk oblast was not under control of the "Luhansk People's Republic" but was controlled by rogue groups.



**STATE SECRETS: HOW AN AVALANCHE OF
MEDIA LEAKS IS HARMING NATIONAL
SECURITY**

**A Majority Staff Report of the
Committee on Homeland Security and Governmental Affairs
United States Senate
Senator Ron Johnson, Chairman**



July 6, 2017

EXECUTIVE SUMMARY

Federal law prohibits the unauthorized release of certain information that could damage our national security. The protection of our nation's secrets is essential to protecting intelligence activities, sources and methods, preserving the ability of the President to effectively achieve foreign policy objectives, and ultimately to safeguard our country. In short, the unauthorized disclosure of certain information can cost American lives, and our laws protecting this information provide for harsh punishments when violated. Since President Trump assumed office, our nation has faced an unprecedented wave of potentially damaging leaks of information protected by these important laws.

Under President Trump's predecessors, leaks of national security information were relatively rare, even with America's vibrant free press. Under President Trump, leaks are flowing at the rate of one a day, an examination of open-source material by the majority staff of the Committee on Homeland Security and Governmental Affairs shows. Articles published by a range of national news organizations between January 20 and May 25, 2017 included at least 125 stories with leaked information potentially damaging to national security. Even a narrow search revealed leaks of comparable information during the Trump administration that were about seven times higher than the same period during the two previous administrations.

From the morning of President Trump's inauguration, when major newspapers published information about highly sensitive intelligence intercepts, news organizations have reported on an avalanche of leaks from officials across the U.S. government. Many disclosures have concerned the investigations of alleged Russian interference in the 2016 election, with the world learning details of whose communications U.S. intelligence agencies are monitoring, what channels are being monitored, and the results of those intercepts. All such revelations are potential violations of federal law, punishable by jail time.

But the leak frenzy has gone far beyond the Kremlin and has extended to other sensitive information that could harm national security. President Trump's private conversations with other foreign leaders have shown up in the press, while secret operations targeting America's most deadly adversaries were exposed in detail.

As *The New York Times* wrote in a candid self-assessment: "Journalism in the Trump era has featured a staggering number of leaks from sources across the federal government."¹ No less an authority than President Obama's CIA director called the deluge of state secrets "appalling."² These leaks do not occur in a vacuum. They can, and do, have real world consequences for national security. To ensure the security of our country's most sensitive information, federal law enforcement officials ought to thoroughly investigate leaks of potentially sensitive information flowing at an alarming rate.

¹ Michael Grynbaum & John Koblin, *After Reality Winner's Arrest, Media Asks: Did 'Intercept' Expose a Source?*, N.Y. TIMES (June 6, 2017).

² Brian Naylor, *Former CIA Director Tells Lawmakers About 'Very Aggressive' Russian Election Meddling*, NPR (May 23, 2017).

FINDINGS

Under the direction of Senator Ron Johnson, Chairman of the Senate Committee on Homeland Security and Governmental Affairs, majority committee staff examined media leaks between January 20, 2017, and May 25, 2017—President Trump’s first 126 days in office. The examination consisted entirely of publicly available news articles; no classified information was accessed or reviewed. The inquiry found:

- The Trump administration faced 125 leaked stories—one leak a day—containing information that is potentially damaging to national security under the standards laid out in a 2009 Executive Order signed by President Barack Obama.
- Leaks with the capacity to damage national security flowed about seven times faster under President Trump than during President Obama’s and President George W. Bush’s first 126 days.
- The majority of leaks during the Trump administration, 78, concerned the Russia probes, with many revealing closely-held information such as intelligence community intercepts, FBI interviews and intelligence, grand jury subpoenas, and even the workings of a secret surveillance court.
- Other leaks disclosed potentially sensitive intelligence on U.S. adversaries or possible military plans against them. One leak, about the investigation of a terrorist attack, caused a diplomatic incident between the United States and a close ally.
- Leaked stories appeared in 18 news outlets, sourced to virtually every possible permutation of anonymous current and former U.S. officials, some clearly from the intelligence community. One story cited more than two dozen anonymous sources.
- Almost all of the stories leaked during President Trump’s first 126 days were about the President or his administration. In contrast, only half of the stories leaked during the comparable period of the Obama administration were about President Obama or his administration; the other half concerned President Bush and his anti-terrorism tactics.

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OVERVIEW OF LAWS ON NATIONAL SECURITY INFORMATION

The Committee on Homeland Security and Governmental Affairs, in addition to its role as the chief oversight committee in the Senate, is specifically entrusted with two important responsibilities—to oversee our nation’s federal records and to examine “the effectiveness of present national security methods, staffing, and procedures as tested against the requirements imposed by the rapidly mounting complexity of national security problems.”³ Nothing is more important to America’s national security than protecting its secrets. While the First Amendment must be respected and a free press is vital to an accountable democracy, the federal government’s foremost mission must be to keep Americans safe from harm. As Deputy Attorney General Rod J. Rosenstein put it: “Releasing classified material without authorization threatens our nation’s security and undermines public faith in government.”⁴

While no single law governs unauthorized disclosures of national security information, a patchwork of statutes and presidential directives address the release of information that the executive branch deems potentially classified. The Espionage Act, a World War I-era law, remains “one of the U.S. government’s primary statutory vehicles for addressing the disclosure” of sensitive national security information.⁵ The Act’s broadest prohibition is 18 U.S.C. § 793, which criminalizes the dissemination of various types of national defense information.⁶ With so many recent Russia-related leaks disclosing intelligence activities and information, one security studies expert, Angelo M. Codevilla,⁷ decried the “patently obvious felonies that U.S. intelligence officials have committed each and every time they have informed reporters of *The Washington Post* and *New York Times* about the targets, functions and results of U.S. communications intelligence.”⁸

Violations of the Espionage Act are punishable by up to 10 years imprisonment, as are violations of a separate statute, 18 U.S.C. § 1030(a)(1), which prohibits the communication of classified information retrieved from a computer if the information “could be used to the injury of the United States.”⁹

The Obama administration laid out a zero-tolerance policy for leaks and the harm they cause. President Obama’s Director of National Intelligence, James R. Clapper, wrote in a blunt 2012 Intelligence Community Directive: “National intelligence and intelligence sources, methods and activities shall be protected. The integration of [counterintelligence] and security activities throughout the [intelligence community] is the primary method for neutralizing threats

³ S. Rule XXV(k); S. Res. 62, 115th Cong. (2017).

⁴ Press Release, U.S. Dep’t of Justice, Federal Government Contractor in Georgia Charged With Removing and Mailing Classified Materials to a News Outlet (June 5, 2017), <https://www.justice.gov/opa/pr/federal-government-contractor-georgia-charged-removing-and-mailing-classified-materials-news>.

⁵ Stephen P. Mulligan & Jennifer K. Elsea, *Criminal Prohibitions on Leaks and Other Disclosures of Classified Defense Information*, Cong. Research Serv. (March 7, 2017).

⁶ 18 U.S.C. § 793 (2012).

⁷ See The Claremont Inst., <http://www.claremont.org/crb/contributor-list/116/> (last visited June 20, 2017).

⁸ Angelo Codevilla, *Punishing The Real Russia Crime: Leaking*, AMERICAN GREATNESS (June 4, 2017), <https://amgreatness.com/2017/06/04/punishing-real-russia-crime-leaking/>.

⁹ 18 U.S.C. § 1030 (2012).

by foreign powers, organizations, or persons, or their agents, or international terrorist organizations or activities.”¹⁰ President Obama also issued Executive Order 13526 in 2009 governing classified national security information. Section 1.4 specifies the categories of information subject to classification because “unauthorized disclosure could reasonably be expected to cause identifiable or discernible damage to the national security.”¹¹ The categories include “intelligence activities”; “foreign relations or foreign activities of the United States”; “military plans, weapons systems, or operations”; and “scientific, technological or economic matters relating to the national security.”¹²

Prosecuting leakers is complicated and subject to case-specific factors, including criminal intent. This report is not meant to suggest that the unauthorized disclosure of sensitive information will always lead to criminal prosecutions. It is the responsibility of federal prosecutors and law enforcement officials to decide if cases should be brought.

What is clear, however, is that the cascade of leaks may be unprecedented and is causing real harm. Susan Hennessey, a Brookings Institution scholar and former National Security Agency lawyer, said that recent disclosures of telephone intercepts are beyond anything in her experience. “This information is really, really sensitive,” she told *The Washington Post*.¹³ Among those calling for a crackdown on leaks is former CIA director John Brennan. After criticizing President Trump’s reported decision to share sensitive information with Russian officials,¹⁴ Brennan recently told House members that his bigger concern was subsequent leaks disclosing that the information had been provided by a U.S. intelligence partner.¹⁵ “What I was very concerned about, though, is the subsequent release of what appears to be classified information purporting to point to the originator of the information, liaison partners,” Brennan testified before the House Permanent Select Committee on Intelligence. “These continue to be very, very damaging leaks, and I find them appalling, and they need to be tracked down. So, that is where the damage came from.”¹⁶

It is also apparent that the arguments often used to justify leaks that are at odds with the Trump administration—that leakers are bringing to light potential illegality, unwise policies, or concerns about the President’s temperament—have no legal basis. According to the non-partisan

¹⁰ U.S. OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, INTELLIGENCE COMMUNITY DIRECTIVE 700 (June 7, 2012), https://www.dni.gov/files/documents/ICD/ICD_700.pdf.

¹¹ Exec. Order No. 13526, 75 Fed. Reg. 2, 707 (January 5, 2010).

¹² *Id.*

¹³ Margaret Sullivan, *Of Course Washington is Plagued by Leaks. That’s a Good Thing*, WASH. POST (June 4, 2017), https://www.washingtonpost.com/lifestyle/style/of-course-washington-is-plagued-by-leaks-thats-a-good-thing/2017/06/02/f6a8245c-46e7-11e7-98cd-af64b4fe2dfc_story.html?utm_term=.99d84e9c36df.

¹⁴ Greg Miller & Greg Jaffe, *Trump Revealed Highly Classified Information to Russian Foreign Minister and Ambassador*, WASH. POST (May 15, 2017), https://www.washingtonpost.com/world/national-security/trump-revealed-highly-classified-information-to-russian-foreign-minister-and-ambassador/2017/05/15/530c172a-3960-11e7-9e48-c4f199710b69_story.html?utm_term=.dd6c1b5b4560.

¹⁵ Adam Goldman, Eric Schmitt & Peter Baker, *Israel Said to Be Source of Secret Intelligence Trump Gave to Russians*, N.Y. TIMES (May 16, 2017), <https://www.nytimes.com/2017/05/16/world/middleeast/israel-trump-classified-intelligence-russia.html>.

¹⁶ Video: *Brennan: IC Leaks To Press Are Appalling And Need to Be Tracked Down*, YOUTUBE (May 23, 2017), https://www.youtube.com/watch?v=lfguLYzP_U.

Congressional Research Service (CRS), no accused leaker “has ever been acquitted based on a finding that the public interest in the released information was so great that it justified an otherwise unlawful disclosure.”¹⁷ Instead, “courts have regarded such disclosures by government employees to be conduct that enjoys no First Amendment protection, regardless of the motives of the divulger or the value the release of such information might impart to public discourse.”¹⁸

METHODOLOGY

This examination of media leaks during the Trump administration consists entirely of publicly available news reporting. No classified information was accessed or reviewed for any purpose during this examination. As such, the report takes no position on the accuracy of the information as reported in the media.

President Obama’s Executive Order 13526 served as the basis for this examination. The inquiry began with searches of Google and commercial databases for stories that ran in publications and/or were posted online between January 20, 2017 and May 25, 2017—President Trump’s first 126 days in office. Staff members used 36 search terms designed to identify phrases typically used in anonymously-sourced stories, such as “Trump and U.S. officials,” and “Trump and people familiar with.” Articles were tagged if they: (a) had no named sources; (b) reflected the news outlet’s original sources;¹⁹ and (c) fell under a category in Executive Order 13526 as reasonably expected to cause damage to national security, such as “intelligence activities” or “foreign relations or foreign activities of the United States.” This search resulted in 125 stories that matched these criteria.²⁰

To approximate the amount of national security leaks during the Trump administration relative to President Trump’s predecessors, searches were conducted using the Lexis database of news articles for the same time period of the Trump, Obama and Bush administrations.²¹ The same 36 search terms were used for each of these searches.

By necessity, these searches were not comprehensive, and this report required some judgement calls on which leaks could reasonably be expected to cause damage to national security. This analysis does not include a number of stories during the Trump administration that

¹⁷ Stephen P. Mulligan & Jennifer K. Elsea, *supra* note 5.

¹⁸ *Id* (citing argument based upon *U.S. v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972); *Snepp v. U.S.*, 444 U.S. 507 (1980)).

¹⁹ “Original sources” means that the article contained a unique leak of the damaging information. The *Washington Post*, for example, broke a story in April 2017 that the FBI had obtained a secret order from the secret Foreign Intelligence Surveillance Court to monitor the communications of a Trump advisor. See Ellen Nakashima, Devlin Barrett & Adam Entous, *FBI Obtained FISA Warrant to Monitor Trump Adviser Carter Page*, WASH. POST (April 11, 2017). Stories were only tagged from publications that confirmed the *Post* reporting with their own sources. Stories were not included if they ran: “The *Washington Post* reported that”

²⁰ These articles are included in the Appendix.

²¹ Since a comprehensive Lexis search for President Trump’s first 126 days produced more than 10,000 hits, the Lexis inquiries for Trump and his two predecessors were limited to The Associated Press and five major newspapers: *The New York Times*; *The Washington Post*; *The Los Angeles Times*; *The Boston Globe* and *The Houston Chronicle*. Even those narrower searches—of The Associated Press and five major newspapers—produced nearly 3,000 articles. Staff members pulled out those that met the same criteria listed above.

could meet the criteria outlined in President Obama's executive order but were considered borderline. The analysis also does not include examples of what could be called "palace intrigue" stories, such as a *CNN* report that President Trump was furious and lashing out at White House staff over the Russia investigation.²² Thus, this analysis represents a conservative estimate of the volume of leaks of information potentially damaging to national security during the Trump administration.

²² Jake Tapper ET AL., *Trump Angry and Frustrated at Staff Over Sessions Fallout*, CNN (Mar. 6, 2017, 6:08 AM), <http://www.cnn.com/2017/03/04/politics/donald-trump-jeff-sessions-reince-priebus/index.html>.

LEAKS OF SENSITIVE NATIONAL SECURITY INFORMATION DURING THE TRUMP ADMINISTRATION

The broad search of Trump's first 126 days in office yielded a total of 125 leaked stories that met the criteria for original sourcing and potential national security damage. The second, narrower Lexis searches of The Associated Press and five major newspapers found 62 such stories—about seven times more than the comparable numbers of stories under President Obama or President Bush. Of the 125 total stories, half were broken by *The Washington Post* or *The New York Times*. But leaks also flowed to 16 other news organizations, ranging from mainstream newspapers such as *The Wall Street Journal* and wire services such as *Reuters*, to major television network websites, venerable magazines such as *Foreign Policy*, and relatively newer outlets like *The Daily Beast*.

Many stories presented President Trump in a negative and often harsh light, with some seemingly designed to embarrass the administration. For example, a *Mother Jones* article detailed a memo telling intelligence analysts to keep President Trump's daily briefings short and to avoid nuance;²³ a *Reuters* piece reported on how the National Security Council frequently puts his name in briefings so he will keep reading;²⁴ and *The Washington Post* wrote a story on how the President “badgered, bragged and abruptly ended” a phone call with the Australian Prime Minister.²⁵ This *Post* story was one of several that quoted directly from President Trump's private calls with foreign leaders, a rare occurrence under previous presidents.

More than 70 leaked stories were attributed to “officials” in virtually every form the word can be used, including “U.S. officials”; “former U.S. officials”; “current and former U.S. officials”; “senior U.S. officials”; “former government officials”; “administration officials”; “intelligence officials”; “national security officials”; “Justice Department officials”; “law enforcement officials”; and “defense officials.” Other stories cited people “familiar with” or briefed on closely-held information such as classified intelligence; contents of wiretapped communications; national security forms, and internal administration deliberations. The sheer volume and scope of the sources indicates that they are coming from across the government, with some clearly from within the intelligence community, given the large number of stories reporting on secret intelligence and how publications cite their sources.

The stories about reported Russia-related intelligence are especially troublesome given the potential for disclosure of national security information. In recent months, the world has learned, reportedly, that U.S. intelligence agencies are routinely monitoring Russian officials,

²³ Ashley Dejean, *Exclusive: Classified Memo Tells Intelligence Analysts to Keep Trump's Daily Brief Short*, MOTHER JONES (Feb. 16, 2017, 1:58 PM), <http://www.motherjones.com/politics/2017/02/classified-memo-tells-intelligence-analysts-keep-trumps-daily-brief-short/>.

²⁴ Steve Holland & Jeff Mason, *National Security Officials Put Trump's Name in Their Briefings As Much As Possible So He Will Keep Reading*, REUTERS (May 17, 2017, 9:33 AM), <http://www.businessinsider.com/r-embroiled-in-controversies-trump-seeks-boost-on-foreign-trip-2017-5>.

²⁵ Greg Miller & Phillip Rucker, *'This Was the Worst Call by Far': Trump Badgered, Bragged and Abruptly Ended Phone Call With Australian Leader*, WASH. POST (Feb. 2, 2017), https://www.washingtonpost.com/world/national-security/no-gday-mate-on-call-with-australian-pm-trump-badgers-and-brags/2017/02/01/88a3bfb0-e8bf-11e6-80c2-30e57e57e05d_story.html?utm_term=.91af5709181e.

including “within the Kremlin”,²⁶ the communications channels being monitored; whose conversations have been picked up on telephone wiretaps; the contents of some of these communications; and, in at least one case, which agency is doing the monitoring.²⁷ In one egregious example, current and former officials apparently gave *Reuters* the exact number of calls and electronic messages exchanged in a specific time period between Trump advisors and Russian officials.²⁸ These stories plainly could damage national security under the definition laid out in President Obama’s 2009 Executive Order.

Equally clear is the potential damage from numerous leaks unrelated to Russia. A *Bloomberg* story in May 2017, for example, unveiled an intelligence community assessment about the U.S. resources that would be required to “stop the advance of the Taliban” in Afghanistan and “save the government in Kabul.”²⁹ That leak alone appeared to violate three parts of the 2009 Executive Order: the prohibition on unauthorized disclosure of intelligence activities, another on revealing U.S. “military plans, weapons systems or operations,” and a third on disclosing information about “foreign relations or foreign activities of the United States.” A number of recent stories about alleged terrorist plots or possible military action against a terrorist group could help undermine anti-terror activities, while another disclosing details of a secret cyber operation targeting a terrorist group constitutes potential harm under a provision of the 2009 Executive Order prohibiting disclosure of “technological . . . matters relating to the national security.”³⁰ Even a relatively short *Washington Post* piece in March 2017 that reported about Administration data that allegedly undercuts President Trump’s visa restrictions could fall under the Executive Order.³¹ By disclosing internal reports, including one reportedly drawn from closely-held FBI data, the article risks revealing “vulnerabilities . . . of systems, installations, infrastructures, projects, plans . . . relating to the national security”—because the administration argues the ban is necessary for maintaining that security.³²

Many of the most publicized leaks in recent weeks stemmed from President Trump’s removal of FBI Director James Comey and the documents Director Comey allegedly wrote detailing his communications with the President. In testimony before the Senate, Director Comey

²⁶ Matthew Rosenberg, Adam Goldman & Michael S. Schmidt, *Obama Administration Rushed to Preserve Intelligence of Russian Election Hacking*, N.Y. TIMES (Mar. 1, 2017), <https://www.nytimes.com/2017/03/01/us/politics/obama-trump-russia-election-hacking.html>.

²⁷ Michael S. Schmidt, Matthew Rosenberg, Adam Goldman & Matt Apuzzo, *Intercepting Russian Communications Part of Inquiry Into Trump Associates*, N.Y. TIMES (Jan. 19, 2017), <https://www.nytimes.com/2017/01/19/us/politics/trump-russia-associates-investigation.html>.

²⁸ Ned Parker, Jonathan Landay & Warren Strobel, *Exclusive: Trump Campaign Had At Least 18 Undisclosed Contacts with Russians: Sources*, REUTERS (May 18, 2017, 1:07 PM), <http://www.reuters.com/article/us-usa-trump-russia-contacts-idUSKCN18E106>.

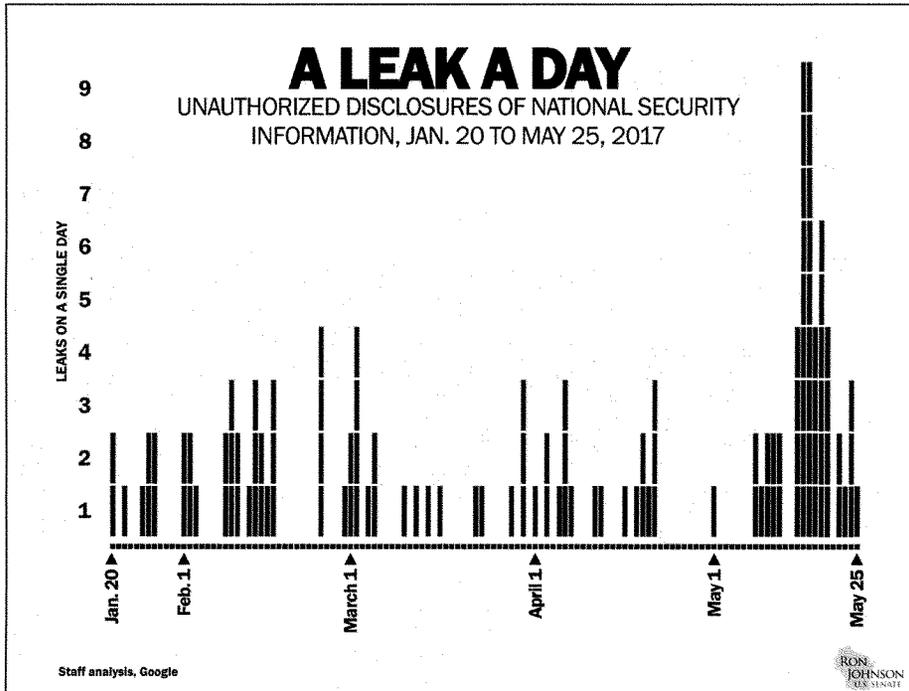
²⁹ Eli Lake, *Trump Has to Decide: 50,000 Troops to Afghanistan?*, BLOOMBERG (May 17, 2017, 5:00 AM), <https://www.bloomberg.com/view/articles/2017-05-17/trump-has-to-decide-50-000-troops-to-afghanistan>.

³⁰ Ellen Nakashima, *Cyber Operation Targeting ISIS Divided Obama Officials*, WASH. POST (May. 12, 2017), <https://www.pressreader.com/usa/the-washington-post/20170512/281724089472008>.

³¹ Devlin Barrett, Abigail Hauslohner & David Nakamura, *Internal Trump Administration Data Undercuts Travel Ban*, WASH. POST (Mar. 16, 2017), https://www.washingtonpost.com/world/national-security/internal-trump-administration-data-undercuts-travel-ban/2017/03/16/9a2dc6b4-098e-11e7-93dc-00f9bdd74ed1_story.html?utm_term=.e83c36a0261a.

³² Nat’l Archives Information Sec. Oversight Office, *The President Executive Order 13526*, <https://www.archives.gov/isoo/policy-documents/cnsi-eo.html> (last visited June 20, 2017).

said he deliberately wrote the memos in unclassified form and that he helped leak them to the media in hopes of getting a special counsel appointed.³³ This report is not meant to question the motives of Director Comey. The release of these documents, however, could potentially harm national security under the 2009 presidential Executive Order if they concern foreign relations or counter-intelligence efforts. Constitutional law expert Jonathan Turley, for one, said the former director is still subject to laws “governing the disclosure of classified and non-classified information.” Professor Turley, who opined the memos should have been classified “even on the confidential level,” concluded that leaking them “is problematic given the overall controversy involving leakers undermining the Administration.”³⁴ For these reasons, this report includes articles relating to leaks surrounding Director Comey’s conversations with the President.



³³ Devlin Barret, Ellen Nakashima & Ed O’Keefe, *Comey: White House Lied About Me, FBI*, WASH. POST (June 8, 2017), https://www.washingtonpost.com/world/national-security/comey-testimony-trump-senate-hearing/2017/06/07/afadf87c-4bd0-11e7-bc1b-fddb8359dee_story.html?hpid=hp_hp-banner-main_comey-845a-head%3Ahomepage%2Fstory&utm_term=.23c811a98c4b.

³⁴ Jonathan Turley, *Did Comey Violate Laws in Leaking the Trump Memo?*, JONATHAN TURLEY: RES IPSA LOQUITUR (June 8, 2017), <https://jonathanturley.org/2017/06/08/did-comey-violate-laws-in-leaking-memo/>.

LEAKS OF SENSITIVE NATIONAL SECURITY INFORMATION DURING THE OBAMA AND BUSH ADMINISTRATIONS

Compared to news reports containing potentially damaging national security information occurring during the Trump administration, there were a fraction of similar reports during the Obama and Bush administrations. The Lexis search of President Obama's first 126 days in office produced 18 stories that met the criteria of anonymously sourced accounts reflecting original sourcing that could reasonably be expected to cause damage to national security. A closer look, however, revealed that national security reporting in the early Obama administration was often focused on President Obama's Republican predecessor.

Soon after President Obama took office in January 2009, debate raged anew in Washington about years-old Bush administration tactics for fighting terrorism. Much of the media storm was fueled by President Obama's authorized release in April 2009 of so-called "torture memos"—Justice Department documents authorizing enhanced interrogations of terror suspects after the September 11, 2001 attacks. The Obama administration's decision to make these documents public meant that 10 of the 18 stories identified in this analysis were actually mostly negative pieces about the Bush administration, with headlines such as "A grim look at a key CIA method; Memos show sleep deprivation is harsher and more controversial than most realize" and "Debate over interrogation methods sharply divided the Bush White House."³⁵

Because these 10 stories were plainly not about the Obama administration, they were excluded from the analysis. That left a total of eight stories containing leaks of information potentially damaging to national security during the Obama administration, compared to 62 stories found in the comparable Lexis search for President Trump. Those remaining eight Obama administration stories reported on topics such as the new White House's increasing reliance on foreign intelligence to detain terror suspects,³⁶ a new missile test-fired by Iran,³⁷ and a hacking of the U.S. electric grid that exposed key vulnerabilities.³⁸ While the leaks in all of these stories could be harmful to national security and are thus prohibited by law, none depicted President Obama in a negative light.

The results from the search of stories in President Obama's first 126 days in office mirrored the search of President Bush's first 126 days in office. A total of nine anonymously sourced stories met the criteria, including potential damage to national security. The topics reported by these stories included an intelligence estimate on Iraq rebuilding weapons factories, a confidential Pentagon review calling for new arms to counter China, and details about possible

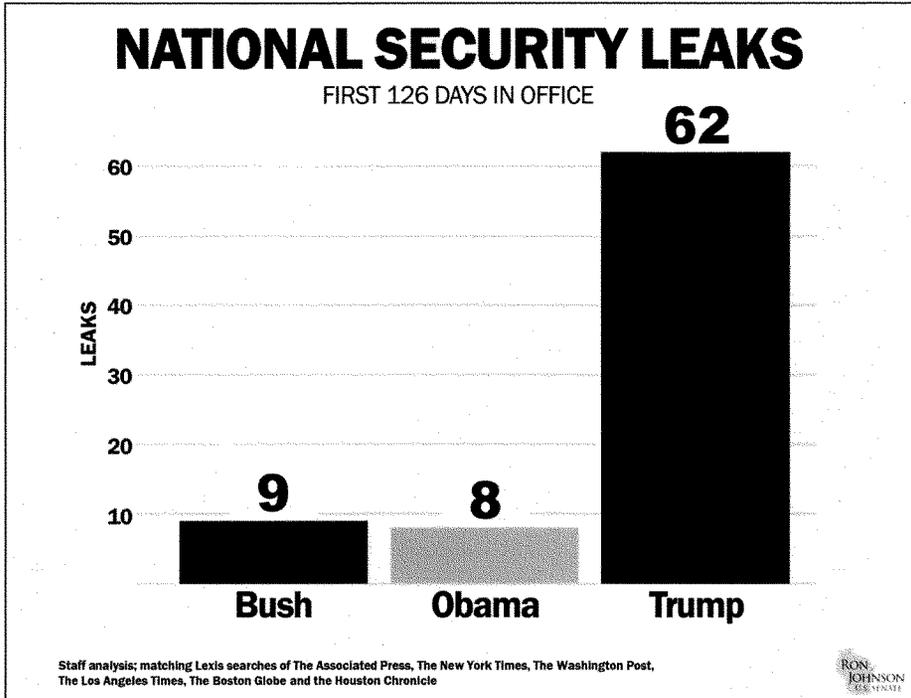
³⁵ Mark Mazzetti & Scott Shane, *Debate Over Interrogation Methods Sharply Divided the Bush White House*, N.Y. TIMES (May 3, 2009), <http://www.nytimes.com/2009/05/04/us/politics/04detain.html>.

³⁶ Eric Schmitt & Mark Mazzetti, *U.S. Relies More on Aid of Allies in Terror Cases*, N.Y. TIMES (May 23, 2009), <http://www.nytimes.com/2009/05/24/world/24intel.html>.

³⁷ Pamela Hess & Pauline Jelinek, *S Officials: Iran Missile May be More Advanced*, ASSOCIATED PRESS, May 20, 2009, Washington Dateline.

³⁸ Jordan Robertson & Eileen Sullivan, *AP Source: Spies Comprised US Electric Grid*, ASSOCIATED PRESS, April 9, 2009, Domestic News.

arms sales to Taiwan. Even with the nation still healing from the divisive presidential election in 2000, none of the stories targeted President Bush specifically or cast him in a negative light.



CONCLUSION

The American institutions of a free press and honest, open government are among our most sacred traditions. Every citizen has an interest in the free flow of information so the American public can stay informed about public policy, make wise decisions, and hold its leaders accountable. Yet, it is critical to maintain a balance between these democratic imperatives and the government's most vital role: keeping our country safe.

With the recent surge of harmful leaks of information potentially damaging to national security during the Trump administration, that balance is now under threat. It must be restored, as people on different sides of the debate are beginning to realize. Mark S. Zaid, a Washington lawyer known for representing national security whistleblowers, points out that “as a matter of law, no one who leaks classified information to the media (instead of to an appropriate governmental authority) is a whistleblower entitled to legal protection The law appropriately protects only those who follow it.”³⁹ While reaffirming the need for whistleblowers to ensure accountability in government, Zaid adds: “It is a fact that the Trump administration has been besieged by leaks . . . at a level that far exceeds that of previous presidencies within the first 130 days.”

This report confirms Zaid's statement. President Trump and his administration have faced apparent leaks on nearly a daily basis, potentially imperiling national security at a time of growing threats at home and abroad. The commander-in-chief needs to be able to effectively manage U.S. security, intelligence operations and foreign relations without worrying that his most private meetings, calls and deliberations will be outed for the entire world to see. As Zaid concludes:

“One day history will judge the consequences of these actions.”

³⁹ Mark S. Zaid, *Reality Winner Isn't a Whistleblower – or a Victim of Trump's War on Leaks*, WASH. POST (June 8, 2017), https://www.washingtonpost.com/posteverything/wp/2017/06/08/reality-winner-isnt-a-whistleblower-or-a-victim-of-trumps-war-on-leaks/?utm_term=.17d12882e932.

APPENDIX

I. Trump Administration

Date of publication	Headline	Publication	Byline
5/25/17	Jared Kushner now a focus in Russia investigation	The Washington Post	Matt Zapotosky, Sari Horwitz, Devlin Barrett and Adam Entous
5/24/17	How a dubious Russian document influenced the FBI's handling of the Clinton probe	The Washington Post	Karoun Demirjian and Devlin Barrett
5/24/17	Found at the Scene in Manchester: Shrapnel, a Backpack and a Battery	The New York Times	C.J. Chivers
5/24/17	Top Russian Officials Discussed How to Influence Trump Aides Last Summer	The New York Times	Matthew Rosenberg, Adam Goldman, and Matt Apuzzo
5/23/17	Trump asked DNI, NSA to deny evidence of Russia collusion	CNN	Jim Sciutto, Stephen Collinson, and Eli Watkins
5/22/17	Mueller briefed on secret Comey memos, source says	CNN	Pamela Brown and Shimon Prokupez
5/22/17	Trump asked intelligence chiefs to push back against FBI collusion probe after Comey revealed its existence	The Washington Post	Adam Entous and Ellen Nakashima
5/20/17	As Trump prepared for Riyadh visit, Saudis blocked U.S. on terrorist sanctions	The Washington Post	Joby Warrick
5/20/17	Killing C.I.A. Informants, China Crippled U.S. Spying Operations	The New York Times	Mark Mazzetti, Adam Goldman, Michael S. Schmidt and Matt Apuzzo
5/20/17	Russia Probe Looking at Official in Trump White House	NBC News	Andrew Rafferty, Pete Williams and Ken Dilanian
5/20/17	Comey now believes Trump was trying to influence him, source says	CNN	Pamela Brown, Gloria Borger and Eric Lichtblau
5/19/17	Russia probe reaches current White House official, people familiar with the case say	The Washington Post	Devlin Barrett and Matt Zapotosky
5/19/17	White House looking at ethics rule to weaken special investigation: sources	Reuters	Julia Edwards Ainsley

Date of publication	Headline	Publication	Byline
5/19/17	Trump Told Russians That Firing 'Nut Job' Comey Eased Pressure from Investigation	The New York Times	Matt Apuzzo, Maggie Haberman and Matthew Rosenberg
5/19/17	Russian officials bragged they could use Flynn to influence Trump, sources say	CNN	Gloria Borger, Pamela Brown, Jim Sciutto, Marshall Cohen and Eric Lichtblau
5/19/17	Israeli Intelligence Furious Over Trump's Loose Lips	Foreign Policy	Kavitha Surana, Dan De Luce, Robbie Gramer
5/19/17	Sources: White House lawyers research impeachment	CNN	Evan Perez
5/18/17	Trump Team Planning Possible Retaliation for Classified Leak Allegations	Foreign Policy	Jenna McLaughlin
5/18/17	Trump campaign had at least 18 undisclosed contacts with Russians: sources	Reuters	Ned Parker, Jonathan Landay and Warren Strobel
5/18/17	Comey, Unsettled by Trump, Is Said to Have Wanted Him Kept at a Distance	The New York Times	Michael S. Schmidt
5/18/17	Trump Transition Said to Know Of Flynn Inquiry before Hiring	The New York Times	Matthew Rosenberg and Mark Mazzetti
5/17/17	Comey Wrote Memo Saying Trump Urged Him to Drop Flynn Investigation: Sources	NBC News	Ken Dilanian, Dafna Linzer, Alex Johnson and Peter Alexander
5/17/17	Besieged White House denies, defends as new bombshells hit	Associated Press	Eric Tucker, Catherine Lucey, and Julie Pace
5/17/17	NSA feared its hacking tool would get out. Then it did.	The Washington Post	Ellen Nakashima and Craig Timberg
5/17/17	National security officials put Trump's name in their briefings as much as possible so he will keep reading	Reuters	Steve Holland and Jeff Mason
5/17/17	House majority leader to colleagues in 2016: 'I think Putin pays' Trump	The Washington Post	Adam Entous
5/17/17	Trump Has to Decide: 50,000 Troops to Afghanistan?	Bloomberg	Eli Lake
5/17/17	Trump Team Knew Flynn Was Under Investigation Before He Came to White House	The New York Times	Matthew Rosenberg and Mark Mazzetti
5/17/17	Memo: Trump asked Comey to end Flynn investigation	CNN	Pamela Brown, Jake Tapper, and Stephen Collinson
5/17/17	Flynn never spoke to Trump about ending investigations, sources close to former adviser say	Fox News	Catherine Herridge
5/16/17	Sources: Trump shared classified info with Russians	CNN	Dan Merica, Jake Tapper, and Jim Sciutto

Date of publication	Headline	Publication	Byline
5/16/17	Trump's disclosure endangered spy placed inside ISIS by Israel, officials say	ABC News	Brian Ross, James Gordon Meek, and Randy Kreider
5/16/17	Trump Officials on Comey Memo: 'Don't See How Trump Isn't Completely F*cked'	The Daily Beast	Lachlan Markay, Asawin Suebsaeng, and Jana Winter
5/16/17	Intelligence Trump shared with Russians came from Israel	CBS News	N/A
5/16/17	U.S. officials 'warned Israel' not to share sensitive intel with Trump administration	Newsweek	Jack Moore
5/16/17	Notes made by FBI Director Comey say Trump pressured him to end Flynn probe	The Washington Post	Devlin Barrett, Ellen Nakashima, and Matt Zapotosky
5/16/17	Comey Memo Says Trump Asked Him to End Flynn Investigation	The New York Times	Michael S. Schmidt
5/16/17	Israel Was Source of Intelligence Trump Shared With Russia: Sources	NBC News	Dafna Linzer and Ken Dilanian
5/16/17	Israel Said to Be Source of Secret Intelligence Trump Gave to Russians	The New York Times	Adam Goldman, Eric Schmitt, and Peter Baker
5/15/17	Trump Revealed Highly Classified Information To Russians During White House Visit	Buzzfeed News	Jim Dalrymple II and Jason Leopold
5/15/17	Top US officials warn Trump against moving US embassy to Jerusalem	CNN	Jeremy Diamond and Elise Labott
5/15/17	Trump Revealed Highly Classified Intelligence to Russia, in Break With Ally, Officials Say	The New York Times	Matthew Rosenberg and Eric Schmitt
5/15/17	Trump revealed highly classified information to Russian foreign minister and ambassador	The Washington Post	Greg Miller and Greg Jaffe
5/12/17	Former Trump Adviser Paul Manafort's Bank Records Sought in Probe	The Wall Street Journal	Michael Rothfeld, Mark Maremont and Rebecca Davis O'Brien
5/12/17	Cyber operation targeting ISIS divided Obama officials	The Washington Post	Ellen Nakashima
5/11/17	In a Private Dinner, Trump Demanded Loyalty. Comey Demurred.	The New York Times	Michael S. Schmidt
5/11/17	Before the ax, Comey was pushing Trump-Russia probe harder	The Associated Press	Julie Pace
5/10/17	Michael Flynn targeted by grand jury subpoenas, sources confirm	CBS News	N/A
5/10/17	Grand jury subpoenas issued in FBI's Russia investigation	CNN	Evan Perez, Shimon Prokupez and Pamela Brown

Date of publication	Headline	Publication	Byline
5/9/17	Trump Advisers Call for More Troops to Break Deadlock in Afghan War	The New York Times	Michael R. Gordon
5/8/17	U.S. poised to expand military effort against Taliban in Afghanistan	The Washington Post	Missy Ryan and Greg Jaffe
5/8/17	Obama Warned Trump Against Hiring Mike Flynn, say Officials	NBC News	Kristen Welker, Peter Alexander, Dafna Linzer and Ken Dilanian
5/1/17	Making Afghanistan Great Again	Bloomberg	Eli Lake
4/21/17	Putin-linked think tank drew up plan to sway 2016 US election	Reuters	Ned Parker, Jonathan Landay and John Walcott
4/21/17	Justice Dept. is Weighing Prosecution of Assange	The New York Times	Adam Goldman
4/21/17	Russia tried to use Trump advisers to infiltrate campaign	CNN	Pamela Brown, Shimon Prokupecz, Jim Sciutto and Marshall Cohen
4/20/17	Justice Dept. debating charges against WikiLeaks members in revelations of diplomatic, CIA materials	The Washington Post	Matt Zapposky and Ellen Nakashima
4/19/17	Exxon Seeks U.S. Waiver to Resume Russia Oil Venture	The Wall Street Journal	Jay Solomon and Bradley Olson
4/19/17	Trump Adviser's Visit to Moscow Got the F.B.I.'s Attention	The New York Times	Scott Shane, Mark Mazzetti and Adam Goldman
4/18/17	FBI used dossier allegations to bolster Trump-Russia investigation	CNN	Evan Perez, Shimon Prokupecz and Manu Raju
4/16/17	Trump Is Willing to Consider a Sudden Strike on North Korea	Bloomberg	Jennifer Jacobs and Michelle Jamrisko
4/12/17	Court Approved Wiretap on Trump Campaign Aide over Russia Ties	The New York Times	Matthew Rosenberg and Matt Apuzzo
4/11/17	FBI obtained FISA warrant to monitor Trump adviser Carter Page	The Washington Post	Ellen Nakashima, Devlin Barrett and Adam Entous
4/7/17	C.I.A. Tracked Russian Prying in the Summer	The New York Times	Eric Lichtblau
4/6/17	Trump considering military action in Syria in retaliation for chemical attack	CNN	N/A
4/6/17	Trump considering military strike on Syria in response to poison gas attack	Los Angeles Times	W.J. Hennigan
4/6/17	Kushner Omitted Meeting With Russians on Security Clearance Forms	The New York Times	Jo Becker and Matthew Rosenberg

Date of publication	Headline	Publication	Byline
4/5/17	Trump Giving Military New Freedom. But With That Comes Danger.	The New York Times	Helene Cooper
4/3/17	Top Obama Adviser Sought Names of Trump Associates in Intel	Bloomberg	Eli Lake
4/3/17	Susan Rice requested to unmask names of Trump transition officials, sources say	Fox News	Adam Housley
4/1/17	U.S. increasingly sees Iran's hand in the arming of Bahraini militants	The Washington Post	Souad Mekhennet and Joby Warrick
3/30/17	2 White House Officials Helped Give Nunes Intelligence Reports	The New York Times	Matthew Rosenberg, Maggie Haberman and Adam Goldman
3/30/17	Mike Flynn Offers to Testify in Exchange for Immunity	The Wall Street Journal	Shane Harris, Carol E. Lee and Julian E. Barnes
3/30/17	Three White House officials tied to files shared with House intelligence chairman	The Washington Post	Greg Miller and Karen DeYoung
3/28/17	Trump administration sought to block Sally Yates from testifying to Congress on Russia	The Washington Post	Devlin Barrett and Adam Entous
3/23/17	U.S. Officials: Info suggests Trump associates may have coordinated with Russians	CNN	Pamela Brown, Evan Perez, Shimon Prokupez, and Jim Sciutto
3/22/17	Before Trump job, Manafort worked to aid Putin	The Associated Press	Jeff Horwitz and Chad Day
3/16/17	Internal Trump administration data undercuts travel ban	The Washington Post	Devlin Barrett, Abigail Hauslohner and David Nakamura
3/14/17	Trump wants to relax rules governing drone strikes	The Washington Post	Greg Jaffe and Karen DeYoung
3/12/17	Trump Administration Is Said to Be Working to Loosen Counterterrorism Rules	The New York Times	Charlie Savage and Eric Schmitt
3/10/17	FBI investigation continues into 'odd' computer link between Russian bank and Trump organization	CNN	Pamela Brown and Jose Pagliery
3/5/17	Comey Asks Justice Dept. to Reject Trump's Wiretapping Claim	The New York Times	Michael S. Schmidt and Michael D. Shear
3/5/17	FBI director asks Justice Department to publicly reject Trump's wiretap claim	Los Angeles Times	Laura King and Del Quentin Wilber
3/4/17	More Trump advisers disclose meetings with Russia's ambassador	CNN	Sara Murray, Jim Acosta and Theodore Schleifer

Date of publication	Headline	Publication	Byline
3/2/17	White House staff told to preserve Russia-related materials	The Associated Press	Julie Pace and Vivian Salama
3/2/17	Chaotic Yemen raid still reverberates for president	The Washington Post	Missy Ryan and Thomas Gibbons-Neff
3/2/17	Investigators Probed Jeff Sessions' Contacts with Russian Officials	The Wall Street Journal	Carol E. Lee, Christopher S. Stewart, Rob Barry and Shane Harris
3/2/17	Top Trump Advisers Are Split on Paris Agreement on Climate Change	The New York Times	Coral Davenport
3/1/17	Sessions met with Russian envoy twice last year, encounters he later did not disclose	The Washington Post	Adam Entous, Ellen Nakashima and Greg Miller
3/1/17	Obama Administration Rushed to Preserve Intelligence of Russian Election Hacking	The New York Times	Matthew Rosenberg, Adam Goldman and Michael S. Schmidt
2/28/17	FBI once planned to pay former British spy who authored controversial Trump dossier	The Washington Post	Tom Hamburger and Rosalind S. Helderman
2/24/17	DHS report casts doubt on need for Trump travel ban	The Washington Post	Matt Zapotosky
2/24/17	State Department writes anti-leak memo, which promptly leaks	The Washington Post	Josh Rogin
2/24/17	Trump administration sought to enlist intelligence officials, key lawmakers to counter Russia stories	The Washington Post	Greg Miller and Adam Entous
2/24/17	FBI refused White House request to knock down recent Trump-Russia stories	CNN	Jim Sciutto, Evan Perez, Shimon Prokupecz, Manu Raju, and Pamela Brown
2/16/17	Flynn in FBI interview denied discussing sanctions with Russian ambassador	The Washington Post	Sari Horwitz and Adam Entous
2/16/17	Spies Keep Intelligence from Donald Trump on Leak Concerns	The Wall Street Journal	Shane Harris and Carol E. Lee
2/16/17	Classified Memo Tells Intelligence Analysts to Keep Trump's Daily Brief Short	Mother Jones	Ashley Dejean
2/15/17	Trump aides were in constant touch with senior Russian officials during campaign	CNN	Pamela Brown, Jim Sciutto and Evan Perez
2/14/17	Trump Campaign Aides Had Repeated Contacts with Russian Intelligence	The New York Times	Michael S. Schmidt and Matt Apuzzo

Date of publication	Headline	Publication	Byline
2/14/17	Flynn's Downfall Sprang From 'Eroding Level of Trust'	The New York Times	Peter Baker, Glenn Thrush, Maggie Haberman, Adam Goldman and Julie Hirschfeld Davis
2/13/17	Michael Flynn Resigns as National Security Adviser	The New York Times	Maggie Haberman, Matthew Rosenberg, Matt Apuzzo and Glenn Thrush
2/13/17	Justice Dept. warned Trump team about Flynn's contacts with Russia	The Associated Press	N/A
2/13/17	Justice Department warned White House that Flynn could be vulnerable to Russian blackmail, officials say	The Washington Post	Adam Entous, Ellen Nakashima and Philip Rucker
2/12/17	Turmoil at the National Security Council, From the Top Down	The New York Times	David E. Sanger, Eric Schmitt and Peter Baker
2/10/17	US investigators corroborate some aspects of the Russia dossier	CNN	Jim Sciutto and Evan Perez
2/10/17	Flynn Said to Talk of Sanctions to Russians in 2016	The New York Times	Matthew Rosenberg and Matt Apuzzo
2/9/17	National security adviser Flynn discussed sanctions with Russian ambassador, despite denials, officials say	The Washington Post	Greg Miller, Adam Entous, and Ellen Nakashima
2/9/17	Caution urged on terror label for Iranian entity	The Washington Post	Karen DeYoung
2/9/17	In call with Putin, Trump denounced Obama-era nuclear arms treaty	Reuters	Jonathan Landay and David Rohde
2/8/17	Trump's faux-pas diplomacy	Politico	Tara Palmeri, Kenneth P. Vogel, Josh Dawsey and Nahal Toosi
2/8/17	U.S. Weighs Terror Label on Iran Revolutionary Guard, Muslim Brotherhood	The Wall Street Journal	Felicia Schwartz and Jay Solomon
2/3/17	Trump team ditches Obama's plan to take Raqqa	The Washington Post	Adam Entous, Greg Jaffe, and Missy Ryan
2/2/17	'This was the worst call by far': Trump badgered, bragged and abruptly ended phone call with Australian leader	The Washington Post	Greg Miller and Philip Rucker
2/2/17	Trump had heated exchange with Australian PM, talked 'tough hombres' with Mexican leader	CNN	Jake Tapper, Eli Watkins, Jim Acosta and Euan McKirdy
2/2/17	Trump to Mexico: take care of 'bad hombres' or US might	The Associated Press	Vivian Salama

Date of publication	Headline	Publication	Byline
2/1/17	More immigration measures weighed	The Washington Post	Abigail Hauslohner, Janell Ross
1/27/17	How Civilian Prosecution Gave the U.S. a Key Informant	The New York Times	Adam Goldman and Benjamin Weiser
1/27/17	President Is Said to Seek Plan for U.S. to Strike ISIS Harder	The New York Times	Michael R. Gordon, Helene Cooper and Eric Schmitt
1/26/17	Trump signals changes to US interrogation, detention policy	The Associated Press	Desmond Butler and Deb Riechmann
1/25/17	White House draft order calls for review on use of CIA 'black site' prisons overseas	The Washington Post	Greg Miller
1/25/17	Leaked Draft of Executive Order Could Revive C.I.A. Prisons	The New York Times	Mark Mazzetti and Charlie Savage
1/22/17	U.S. Eyes Michael Flynn's Links to Russia	The Wall Street Journal	Carol E. Lee, Devlin Barrett and Shane Harris
1/20/17	U.S. counterintelligence officials are examining possible ties between Russia and Trump associates	The Washington Post	Ellen Nakashima and Greg Miller
1/20/17	Wiretapped Data Used in Inquiry of Trump Aides	The New York Times	Michael S. Schmidt, Matthew Rosenberg, Adam Goldman and Matt Apuzzo

II. Obama Administration

Date of publication	Headline	Publication	Byline
5/24/09	U.S. Relies More on Aid of Allies in Terror Cases	The New York Times	Eric Schmitt and Mark Mazzetti
5/20/09	US officials: Iran missile may be more advanced	The Associated Press	Pamela Hess and Pauline Jelinek
5/19/09	Amid Queries, CIA Worries About Future; Intelligence Officials Privately Warn That New Rules May Hinder Their Interrogations	The Washington Post	Walter Pincus
5/10/09	A grim look at a key CIA method; Memos show sleep deprivation is harsher and more controversial than most realize. And it could be used again.	Los Angeles Times	Greg Miller

Date of publication	Headline	Publication	Byline
5/6/09	Charges unlikely for interrogation memos; A Justice draft report finds problematic conduct by two Bush administration lawyers	Los Angeles Times	Josh Meyer and Julian E. Barnes
5/6/09	Torture Memos: Inquiry Suggests No Prosecutions	The New York Times	David Johnston and Scott Shane
5/4/09	Debate Over Interrogation Methods Sharply Divided the Bush White House	The New York Times	Mark Mazzetti and Scott Shane
5/4/09	Pakistan Strife Raises U.S. Doubt on Nuclear Arms	The New York Times	David E. Sanger
4/22/09	Banned Techniques Yielded 'High Value Information,' Memo Says	The New York Times	Peter Baker
4/17/09	CIA objections slowed torture memos release	The Associated Press	Pamela Hess
4/17/09	Role of Bush NSA Plan Under Review; Obama Administration Faces Privacy, Security Challenges in Defending Cyberspace	The Washington Post	Ellen Nakashima
4/14/09	U.S. May Drop Key Condition for Iran Talks	The New York Times	David E. Sanger
4/9/09	AP source: Spies compromised US electric grid	The Associated Press	Jordan Robertson and Eileen Sullivan
4/3/09	Intel chief wants new spy satellite program	The Associated Press	Pamela Hess
3/29/09	Detainee's Harsh Treatment Foiled No Plots; Waterboarding, Rough Interrogation of Abu Zubaida Produced False Leads, Officials Say	The Washington Post	Peter Finn and Joby Warrick
3/11/09	Officials: Taliban ops chief once held at Gitmo	The Associated Press	Pamela Hess
3/3/09	CIA Destroyed 92 Interrogation Tapes, Probe Says	The Washington Post	Carrie Johnson and Joby Warrick
1/25/09	Guantanamo Case Files in Disarray; Situation Complicates Prison's Closure	The Washington Post	Karen DeYoung and Peter Finn

III. Bush Administration

Date of publication	Headline	Publication	Byline
5/17/01	Pentagon Review Puts Emphasis On Long-Range Arms in Pacific	The New York Times	Michael R. Gordon
5/13/01	What Happened to the McVeigh Evidence?	The New York Times	Neil A. Lewis and David Johnston

Date of publication	Headline	Publication	Byline
4/23/01	U.S. Says CIA Crew Urged Against Attack on Plane	The Washington Post	Alan Sipress and Karen DeYoung
4/17/01	U.S. May Withhold Main Radar Item om Taiwan's List	The New York Times	David E. Sanger and Eric Schmitt
4/13/01	Returning Crew Tells of Collision; Debriefings Reveal A Nearly Fatal Dive	The Washington Post	William Claiborne and Thomas E. Ricks
3/11/01	Border Arrest Stirs Fear of Terrorist Cells in U.S.	Los Angeles Times	Josh Meyer
3/4/01	Dispute Over Russian Testing Divides U.S. Nuclear Experts	The New York Times	William J. Broad with Patrick E. Tyler
2/23/01	U.S. Had Evidence of Espionage, But F.B.I. Failed to Inspect Itself	The New York Times	David Johnston and James Risen
1/22/01	Iraq Rebuilt Weapon Factories, U.S. Officials Say	The New York Times	Steven Lee Myers and Eric Schmitt

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The President's Cabinet: Evolution, Alternatives, and Proposals for Change

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The President's Cabinet: Evolution, Alternatives, and Proposals for Change

Summary

The President's Cabinet is an institution whose existence rests upon custom rather than law. President George Washington found the Cabinet concept, a meeting of departmental secretaries, to be useful, and all subsequent Presidents have followed this precedent. Presidents have differed in their opinions as to the utility of the Cabinet, but all have found some political and administrative strengths in its continuance.

This report discusses how membership in the Cabinet has changed over the decades. The selection and removal processes are examined as well as commentary on the Cabinet by persons who have been participants.

In this century, a whole host of sub-Cabinet groups have been created as substitutes for full Cabinet sessions. The authority and configuration of these sub-Cabinet groups (*e.g.*, Council on Economic Policy) vary from administration to administration and few institutions and sets of relationships have acquired permanent status. A number of sub-Cabinet groups have staffs (*e.g.*, National Security Council), and it is these staffs that help provide some measure of institutional depth to the presidency.

Despite two centuries of criticism, the Cabinet remains a fixture in the President's political world. This report reviews criticisms directed at the Cabinet, and the "reforms" offered to correct alleged deficiencies, and provides an assessment of the utility of the Cabinet to successive Presidents. The Cabinet is retained because it provides to the President: (1) political and managerial advice; (2) a forum for interdepartmental conflict resolution; (3) a location where he can address most of the executive branch and thereby enhance administrative coherence; and (4) a source of political support for his programs and policies.

This report concludes with several observations on the nature of the Cabinet. The Cabinet is not now, and is not likely to become, a body with collective responsibility. Presidents cannot appropriately share their legal authority or responsibilities with the Cabinet. Thus, there are inherent limitations to the Cabinet that no reforms can alter or overcome. The Cabinet, its members, and its sub-groups provide the President with an adaptive resource with which to manage the executive branch of government.

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The President's Cabinet: Evolution, Alternatives, and Proposals for Change

Origin and Evolution

The President's Cabinet is an institution whose existence rests upon custom rather than law.¹ While the wording of Article II, Section 2 of the Constitution, that the President may require "... the Opinion, in writing, of the principal Officer in each of the executive Departments," clearly indicates the intention of the Framers that the President was expected to seek the advice of his department heads, there was no constitutional requirement that he meet with them either individually or collectively.

The Cabinet came into being because President George Washington found it useful. He began meeting with his three departmental secretaries and the attorney general in 1791, although it was not until 1793, during a crisis with France, that this group acquired the popular name of "Cabinet."²

While all subsequent Presidents have considered it necessary to meet with the Cabinet, their attitudes toward the institution and its members have varied greatly. Some Presidents have convened their Cabinet only for the most formal and routine matters while others have relied heavily upon it for advice and support. Richard Fenno has noted the absolute dependence of the Cabinet upon the President: "The President's power to use or not use it is complete and final. The Cabinet is his to use when and if he wishes, and he cannot be forced into either alternative. He has the power of life or death over it at this point."³

The composition of the Cabinet from the beginning has reflected two critical concepts promoted by the ascendent Federalist leadership. First, to meet the problems facing the new republic, energy, they argued, must be the hallmark of the

¹ The first time the Cabinet was recognized in statute law was on February 26, 1907, when Congress provided for an increase in the salaries of heads of executive departments, who were designated as "members of the President's Cabinet." 34 Stat. 935, 993.

² Henry Barrett Learned, *The President's Cabinet: Studies in the Origin, Formation and Structure of an American Institution* (New Haven: Yale University Press, 1912), Chapter 5. Mary L. Hinsdale, *A History of the President's Cabinet* (Ann Arbor, Michigan: Wahr, 1911).

³ Richard Fenno, *The President's Cabinet* (New York: Random House, 1959), p. 29.

executive branch and such energy, leavened by law and shared powers, must be centered in an institutionally strong President.⁴ In *Federalist 70*, Hamilton asserts:

Energy in the Executive is a leading character ... of good government A feeble executive implies a feeble execution of government. A feeble execution is but another phrase for a bad execution ... all men of sense will agree in the necessity of an energetic Executive.

President Washington was not in any doubt that the heads of departments were his agents when he wrote to the Comte de Moustier in May 1789: “The impossibility that one man should be able to perform all the great business of the State, I take to have been the reason for instituting the great Departments, and appointing officers therein, to assist the Supreme Magistrate in discharging the duties of his trust.”⁵ The issue took the form of a challenge to the President by Congress that he could not dismiss anyone confirmed by the Senate from Office without first obtaining Senate approval. In what has come down to us as the “Decision of 1789,”⁶ Congress, under Madison’s leadership, retreated from this position and indicated to the President that from the outset he could dismiss any officer, thus cementing the position of the President as chief of an integrated executive branch.⁷

Second, the Cabinet reflects the Framers’ belief in the superiority of single executives to manage departments over a plural executive arrangement. The Framers turned away from grand theory and reflected instead upon their own experience in waging the Revolutionary War against a global power and in attempting to run the nation under the Articles of Confederation after the close of hostilities in 1781.⁸

⁴ For a general account of the intentions of the Framers with respect to the institutions of the new republic, consult: Martin Diamond, *The Founding of the Democratic Republic* (Itasca, IL: F.E. Peacock Publishers, 1981).

⁵ George Washington, *The Writings of George Washington*, ed., John C. Fitzpatrick, vol. 30 (Washington: GPO, 1939), p. 334.

⁶ For a discussion of the “Decision of 1789,” consult, Leonard D. White, *The Federalists* (New York: Macmillan, 1948), pp. 20-25, also: (name redacted), *Constitutional Conflicts Between Congress and the President*, 4th rev. ed. (Lawrence, KS: University Press of Kansas, 1997), chapter 3.

⁷ With respect to fundamental authorities and lines of accountability, the executive branch has never been a pristine unity. From the decision of the first Congress to give the comptroller in the Treasury department a substantial degree of legal autonomy within the department, (1 *Annals of Congress*, (1789), p. 164), down to the present day “independent prosecutors” functioning in an uneasy relationship with the executive branch, not all officers have been directly accountable to the President. Katy J. Harriger, “Separation of Powers and the Politics of Independent Counsels,” *Political Science Quarterly*, vol. 109, summer 1994: 261-86. (name redacted), “The Independent Counsel Statute,” in Mark Rozell and Clyde Wilcox, eds., *The Clinton Scandal and the Future of American Government* (Washington: Georgetown University Press, 2000), pp. 60-80. These exceptions notwithstanding, the prevailing organizational norm has historically been toward an executive branch and its officers accountable to the President.

⁸ “[T]he advantages of single-headed control [of departments] had been so conclusively (continued...)

Their personal experiences became the crucible for political thought. This was particularly true for Alexander Hamilton, who found his administrative experiences with plural executives during the Confederation period to have been extremely frustrating. In 1780 Hamilton stated:

A single man, in each department of the administration would be greatly preferable. It would give us a chance for more knowledge, more activity, more responsibility and, of course, more zeal and attention. Boards partake of a part of the inconveniences of larger assemblies. Their decisions are slower, their energy less, their responsibility more diffused. They will not have the same abilities and knowledge as an administration of a single man.⁹

One of the first orders of business for the new Congress in 1789 was the establishment of executive departments. Three “organic” statutes were passed creating three “great” departments: Treasury, State, and War.¹⁰ A fourth department, a Department of Home Affairs, was considered and abandoned; the functions likely to have resided in that department were assigned to the other three departments. All the particular functions of the newly created executive branch, save that of prosecuting the laws and delivering the mails, were assigned these departments.¹¹

As noted above, President Washington assembled his department secretaries for advice and counsel and, in 1793, this informal group became popularly referred to as the Cabinet. In addition to the three secretaries (after 1798 there was a fourth secretary representing the new Department of the Navy), the President received legal advice from an Attorney General. The Attorney General was a private lawyer on retainer (\$1,500 annually) to the federal government. The Attorney General subsequently became a full-time officer of the United States and finally the head of the newly created Department of Justice in 1870.¹²

As for the Postmaster General, he was the head of the Post Office, although not a member of the Cabinet until 1829. The Post Office became an executive department

⁸ (...continued)

demonstrated that when the first Congress under the new Constitution began consideration of administrative organization in 1789, serious objections were raised against the establishment of single-headed administrative departments in only one instance; namely in connection with a finance department.” Lloyd M. Short, *The Development of National Administration in the United States* (Baltimore: The Johns Hopkins Press, 1923), chapter 9.

⁹ Alexander Hamilton, *The Works of Alexander Hamilton*, ed., J.C. Hamilton, 7vols. (New York: John F. Throw, 1850-1851), vol. I, pp. 154-55.

¹⁰ Discussion of the acts creating the three “great departments” may be found in James Hart, *The American Presidency in Action, 1789: A Study in Constitutional History* (New York: Macmillan Company, 1948), chapter 7.

¹¹ For a discussion of the administrative philosophy and practices that guided the early development of the United States government, consult: White, *The Federalists*. See also: Lynton K. Caldwell, *The Administrative Theories of Hamilton and Jefferson*, 2nd ed. (New York: Holmes and Meier, 1988).

¹² John A. Fairlie, *The National Administration of the United States* (New York: Macmillan Co., 1905), chapter 9.

in 1872 (17 Stat. 283), a status it held until 1971, when it was redesignated by Congress as “an independent establishment of the executive branch.”¹³ The position of Postmaster General was consequently removed from the Cabinet. The first major addition to the list of executive departments was the Department of the Interior in 1849.¹⁴

The point to be recognized, however, is that as functions were assumed by the federal government, they were assigned to new or existing departments, thereby retaining the essential unitary basis for the executive branch. Prior to 1860, only four permanent “detached agencies” were created: the Library of Congress, the Smithsonian Institution, the Botanic Garden, and the Government Printing Office.¹⁵ For the first century of the republic, therefore, the executive branch, with few exceptions, consisted of departments headed by single administrators under the authority of the President.

There are presently (2000) some 14 departments in the executive branch, the most recent department to be established being the Department of Veterans Affairs (1988). The departments represented on the Cabinet with their date of establishment are:

- (1) Department of Agriculture (1889)
- (2) Department of Commerce (1903, 1913)¹⁶
- (3) Department of Defense (1789,1949)¹⁷
- (4) Department of Education (1979)
- (5) Department of Energy (1977)
- (6) Department of Health and Human Services (1953,1980)¹⁸
- (7) Department of Housing and Urban Development (1965)
- (8) Department of the Interior (1849)
- (9) Department of Justice (1870)
- (10) Department of Labor (1903, 1913)¹⁹
- (11) Department of State (1789)

¹³ Gerald Cullinan, *The United States Postal Service* (New York: Praeger, 1973).

¹⁴ Short, *National Administrative Organization*, chapter 9.

¹⁵ U.S. Congress, Committee on Governmental Affairs, *The Federal Executive Establishment: Evolution and Trends*, by (name redacted), Committee print, 96th Cong., 2nd sess. (Washington: GPO, 1980), p. 3.

¹⁶ A Department of Commerce and Labor was established in 1903. After 10 years, and the election of Woodrow Wilson, Congress approved the separation of this joint department into two separate departments; one for commerce and the other for labor. Short, *National Administrative Organization*, chapter 29.

¹⁷ The War department, established in 1789, was reorganized in 1947 into the National Military Establishment which, in turn, was redesignated the Department of Defense by Congress in 1949.

¹⁸ The Department of Health, Education and Welfare was established in 1953. The department was renamed as the Department of Health and Human Services in 1979.

¹⁹ See footnote 8.

- (12) Department of Transportation (1966)
- (13) Department of the Treasury (1789)
- (14) Department of Veterans Affairs (1988)

The Cabinet today is alternately viewed with despair and hope. Self-described “realists” say that the Cabinet, both collectively and as a shorthand way of referring to the 14 departmental secretaries individually, is an institution of limited utility and not likely to change. Self-described “reformers,” on the other hand, still seek a formula that will elevate the Cabinet, both collectively and individually, to a primary role as advisor to the President. The debate over the proper role for the Cabinet is now more than two centuries old and shows no signs of being resolved. For most Presidents at least, it is more a problem to be lived with than solved.

Membership on the Cabinet

Traditionally, membership on the Cabinet has consisted of the secretaries of the several executive departments, the present number being 14. From the beginning, however, Presidents have accorded to others the privilege of attending and participating in Cabinet meetings. Although Vice Presidents were from time to time invited to attend, it was not until President Warren Harding invited Vice President Calvin Coolidge in 1921 to be a regular attendee and to preside in his absence that the Vice President has been recognized as a member of the Cabinet.²⁰

President Dwight D. Eisenhower initiated the practice of designating certain positions as having “Cabinet rank.” This special status is not recognized in law and is purely a presidential distinction that can be given and later withdrawn. The number of positions assigned Cabinet rank has varied over time but has included, among others, the Ambassador of the United States to the United Nations, the Director of the Office of Management and Budget (OMB), and the Special Trade Representative. In the case of the Director of OMB and the Special Trade Representative, both have been given the rank for pay purposes of Executive Level I, the rank assigned department secretaries.²¹

Cabinet rank may be assigned to individuals as well as to positions. Thus, recent Presidents, beginning with Richard Nixon, have designated individuals as “counselor to the President,” (*e.g.*, Daniel P. Moynihan by Nixon and Hedley Johnson by Jimmy Carter). For the most part, such designations are given to individuals the President desires to have nearby for advice, although they only occasionally have a portfolio of

²⁰ George Haynes, *The Senate of the United States: Its History and Practice*, 2v. (Boston: Houghton-Mifflin Co., 1938), vol. 1, p. 225.

²¹ President Bill Clinton designated a number of positions as having “honorary Cabinet status,” although the positions may not be assigned Executive Level I compensation. In addition to the three positions noted in the text, the following positions were designated in 2000: (1) White House Chief of Staff; (2) Director, Central Intelligence Agency; Administrator, Environmental Protection Agency; (4) Administrator, Federal Emergency Management Agency; (5) Chairman, Council of Economic Advisers; (6) Director, Office of Drug Control Policy; and (7) Administrator, Small Business Administration.

responsibilities. The title of “counselor” may also serve as a consolation prize by which a President can, as a face-saving gesture, ease a person out of some other position. In 2000, President Clinton had one person designated as counselor, Ann F. Lewis.

Historically, staff aides to the President, including the chief of staff, have not been members of the Cabinet and have not sat at the Cabinet table. Rather, staff members may have been invited to the meeting but occupied chairs located at the side of the Cabinet room. The President may invite others from time to time (*e.g.*, Under Secretary of the Treasury for Monetary Affairs), if the subject to be discussed warrants their inclusion. The Cabinet remains, however, ultimately what it has always been, a creation of the President’s will and style.

While Presidents enjoy a degree of deference in the appointment process for departmental secretaries, it has become increasingly difficult for nominees to be confirmed without controversy. The Federal Bureau of Investigation conducts rigorous character and security checks prior to the submission of names. Standards and expectations for public officials are higher than in the past, and large numbers of would-be appointees never make it through the White House Personnel Office to the nominee stage.²² If they successfully navigate the White House political and security minefields, they are then subject to confirmation by the Senate, which has its own capabilities to generate additional information and perspective on appointees.²³

Notwithstanding these recent developments, only 19 Cabinet nominations have failed to be confirmed since 1789. Nine were rejected on the floor of the Senate, seven withdrawn by the President, and three died in committee. In addition, two Cabinet nominations were announced but never submitted to the Senate. Of the Cabinet nominations rejected on the floor of the Senate, one nominee, Caleb Cushing was rejected three times in 1843 to be Secretary of the Treasury while a second nominee, Charles Warren, was rejected twice in 1925 to be Attorney General.²⁴ In one instance, a nominee, former Vice President Henry Wallace, was rejected by a committee to be Secretary of Commerce but later confirmed by a vote of the full Senate.

At least seven Cabinet nominations have been withdrawn by Presidents, the most recent occurrence being in October 1997. President Clinton withdrew the name of his nominee, Herschel Gober, to be Secretary of Veterans Affairs, an action previously taken in 1993 with respect to his nominee, Zoë Baird, to be Attorney

²² For a discussion of the pre-nomination processes, consult: Calvin Mackenzie, *The Politics of Presidential Appointments* (New York: The Free Press, 1981). Thomas Weko, *The Politicizing Presidency: The White House Personnel Office, 1948-1994* (Lawrence, KS: University Press of Kansas, 1995).

²³ For a somewhat dated but still useful overview of the Senate’s confirmation process, consult: Joseph P. Harris, *The Advice and Consent of the Senate: A Study of the Confirmation of Appointments by the United States Senate* (Berkeley: University of California Press, 1953).

²⁴ The Cushing and Warren rejections are discussed in Louis C. James, “Senatorial Rejections of Presidential Nominations to the Cabinet: A Study in Constitutional Custom,” *Arizona Law Review*, vol. 3, winter 1961: 232-261.

General. Three Cabinet nominations died in committee, the most recent being the 1996 nomination of Michael Kantor to be Secretary of Commerce. The Senate committee simply declined to hold hearings. In addition, two Cabinet nominees had their nomination withheld by the President prior to formal submission to the Senate. In one instance, disclosure of the name of Kimba Wood to be Attorney General, generated media controversy sufficient to induce the President to issue a statement withdrawing Wood's name from consideration.²⁵ Similarly, the President had announced his intention in 1993 to nominate Bobby R. Inman to be Secretary of Defense, replacing Les Aspin. The adverse political reaction was such that the President determined that submitting his name formally was a futile gesture. Traditionally, when a President wanted to maximize the likelihood that a nominee would be confirmed, he would select a Member of Congress. Even this strategy is no longer a sure route to success, however, as the 1989 rejection of former Senator John Tower to be Secretary of Defense attests.²⁶

Members of the Cabinet, like most other presidential appointees, serve at the pleasure of the President. Presidents can (and have) "fired" Cabinet secretaries, the most striking recent instance being in 1979 when President Carter required that all 12 Cabinet secretaries, plus 21 other officials, submit their resignations. He accepted the resignations of secretaries Joseph Califano (Health, Education and Welfare), Michael Blumenthal (Treasury), and Brock Adams (Transportation), all generally viewed as effective administrators, but all also viewed by the White House staff as failing to be "team players."²⁷

Historically, membership in the Cabinet has been diverse within the cultural context of the period. The single most constant factor in the selection process over the years has been partisan affiliation.²⁸ Presidents generally confine their list of potential Cabinet members to persons affiliated with their own party. A Republican President will occasionally select a Democrat to head an executive department, but this is an exceptional event, and the situation is the same with Democratic Presidents. The most recent instance of a President reaching to the opposing party for a departmental secretary occurred in January 1997 when President Clinton nominated former Republican Senator William Cohen of Maine to be his Secretary of Defense.

The political considerations present in selecting members of the Cabinet tend to reflect the two basic approaches to the Cabinet as an institution. First, there are factors that influence a President when viewing the Cabinet collectively. Presidents

²⁵ Shortly after the name of Kimba Wood was leaked to the press as the President's nominee for Attorney General, the President issued a statement that Wood had withdrawn as a candidate. "Statement of Withdrawal of Kimba Wood as a Candidate for Attorney General," Weekly Compilation of Presidential Documents, vol. 29, no. 5, Feb. 8, 1993, p. 154.

²⁶ "Tower Nomination Spurned by Senate," 1989 CQ Almanac (Washington: CQ Press, 1990), pp. 403-13.

²⁷ Dom Bonafede, "Carter Moves Boldly to Save His Presidency," National Journal, July 28, 1979: 1236-1240.

²⁸ Jeffrey Cohen, *The Politics of the U.S. Cabinet: Representation in the Executive Branch, 1789-1984* (Pittsburgh, PA: University of Pittsburgh Press, 1988), chapter 4.

seek a “representative” Cabinet in the sense that it represents to the public where their priorities lie. The factors playing a role in the selection process include, but are not limited to, partisan affiliation, ideology, gender, geography, friendship, ethnicity, interest group support, and professional reputation. The managerial competency factor appears to play a relatively minor role.

When the Cabinet is not viewed as simply a collectivity tied to the President’s political interests, however, but as the sum total of individual department secretaries who have as part of their job descriptions periodic meetings in the White House, the factors influencing the selection process differ in emphasis, if not in kind. Experience and managerial competence will often be considered as a factor in the selection process if the discussion centers on the needs of the department and its programs, rather than on the aggregate political fortunes of the President. The more prestigious the department, the more likely that some measure of demonstrated competence will be expected. Thus, the Secretary of State is generally expected to be a person with considerable international experience. As with all generalizations, however, there have been notable exceptions, as when Woodrow Wilson selected William Jennings Bryan to be his Secretary of State in 1913.²⁹

While Presidents have generally been involved in the selection process for Cabinet officers, President Clinton stood apart by his very public pledge to commit his time and prestige to the process. The goal in this instance was to appoint a Cabinet that reflected his definition of ethnic and gender “diversity.”³⁰ The process and the nominations submitted were not without their problems and political risks, however, as evidenced by the withdrawal of two nominees for Attorney General. President Clinton found, as had most of his predecessors, that they personally knew relatively few persons fully capable of performing the responsibilities of department secretaries and whose past could withstand close public scrutiny. Cabinet appointments, in short, rarely add substantively to a President’s political capital and may inflict considerable harm.

The first set of Cabinet appointments in a new administration tends to favor interests that were instrumental in the candidate’s electoral success. Often these appointments are disappointments to the President, particularly if they appear to be more responsive to the interests from whence they came than to the President. Also, initial appointments are more likely to become ambassadors to the President from the departments rather, than the reverse. All in all, experience suggests that as an administration ages, Presidents weigh personal and party loyalty more heavily in their

²⁹ President Wilson found his first Secretary of State, William Jennings Bryan, to be “incompetent” and his second, Robert Lansing, to be “inept,” thereby reinforcing Wilson’s reliance on Colonel Edward M. House as his intimate advisor on international affairs. Arthur S. Link, *The Higher Realism of Woodrow Wilson*, (Nashville, TN: Vanderbilt University Press, 1971), pp. 83-85.

³⁰ Gwen Ifill, “Clinton Completes Cabinet and Points to Its Diversity,” *New York Times*, Dec. 24, 1992, p. A-1. Shirley Anne Warshaw, *Powersharing: White House - Cabinet Relations in the Modern Presidency* (Albany, NY: State University of New York Press, 1996), chapter 8.

selections than initially.³¹ Moreover as an Administration's tenure draws to a close, Presidents occasionally will promote career executives or relatively unknown, but competent and politically safe, administrators to serve as Cabinet members until the Administration completes its term.

The Cabinet Meeting

The very name "Cabinet" suggests a collective concept. This title, however, is misleading. The Cabinet in the United States is simply a gathering of individuals, selected by the President to perform specified responsibilities, who exhibit no collective responsibility and little collective consciousness.³² The Cabinet never resigns *en masse* simply because Congress has rejected one of the President's proposals, nor do they feel an obligation to come to the aid of one of their number when that individual may be political trouble. The single common thread to the members of the Cabinet is their loyalty to the President who appointed them.

Since the Cabinet is not a statutory body, its use has varied greatly over time, depending upon the practices and philosophy of the particular President. We know that President Washington placed great reliance upon his Cabinet members both individually and collectively.³³ In the 19th century, a number of Presidents, in the absence of a White House staff, came to rely upon individual executive department secretaries for policy advice, administrative assistance, and political support. Some Presidents went outside their official Cabinet and formed "kitchen cabinets" as sources of advice and support.

In the 20th century, the Cabinet has experienced a not-so-gradual decline in its political and administrative relevance to the President. This decline has not been a straight line, however, as several Presidents (*e.g.*, Jimmy Carter) have attempted to resurrect the Cabinet, and particularly the Cabinet meeting, as a forum for serious policy discussion.³⁴ Regardless of good intentions, however, the institutional Cabinet

³¹ James D. King and James W. Riddlesperger, "Presidential Cabinet Appointments: The Partisan Factor," *Presidential Studies Quarterly*, vol. 14, spring 1984: 231-237.

³² Louis Brownlow had this to say about the collective consciousness of the Cabinet. "Each [member] feels his responsibility—as indeed it is—personally to the President and not to the President in Council nor to the President and his Cabinet, and above all not to his Cabinet colleagues." (Emphasis in the original) *The President and the Presidency* (Chicago: Public Administration Service, 1949), p. 100.

³³ Learned, *The President's Cabinet*, pp. 47, 119.

³⁴ President Jimmy Carter was influenced early on by the recommendations by Stephen Hess made in person and in his book that he create a "cabinet government." *Organizing the Presidency*. (Washington: The Brookings Institution, 1976), chapter 11. Carter did try to follow Hess's recommendations, but soon retreated. Hess himself later backed away from his advocacy of "cabinet government." See: *Organizing the Presidency*, 2nd ed. (Washington, The Brookings Institution, 1988).

As for Cabinet meetings, in a symbolic gesture against alleged "secrecy in government,"
(continued...)

has simply not responded to most efforts to “reform” its character. The truth is that matters of high government policy are rarely raised at Cabinet meetings by the President or any of those present. Even with respect to questions of high politics to which, presumably, the collective wisdom of the Cabinet might be properly directed, Presidents rarely avail themselves of this opportunity. President Franklin Roosevelt, for instance, never raised the issue of the soundness and political viability of his “court-packing bill” with the Cabinet, although such a body might have given him useful advice. Nor were issues connected with World War I discussed at Wilson Cabinet meetings.

The Cabinet meeting belongs to the President. The President sets the agenda for the meeting. Individual Cabinet members may be asked to present reports of general interest (and not so general interest) concerning their respective fields of responsibility. Members tend to be reluctant to raise problems concerning their own departments for general discussion. According to memoirs of some attendees at these meetings, all too often the meetings become fora for the weakest members to expound their views.³⁵ What usually happens is that the Cabinet meeting is a prelude to a line-up of individual department secretaries who want to see the President alone. Jesse Jones, one of the more colorful Cabinet members of the Roosevelt years, said: “My principal reason for not having a great deal to say at Cabinet meetings was that there was no one at the table who could be of help to me except the President, and when I needed to consult him, I did not choose a Cabinet meeting to do so.”³⁶

President Dwight Eisenhower determined upon taking office to bring some structure to Cabinet meetings and White House staff work generally. Cabinet meetings were regularly scheduled on a weekly basis with a pre-distributed agenda, minutes, and follow-up action report. A small Cabinet secretariat was created, not only to provide institutional support for meetings but also to serve an activist troubleshooting role. The Cabinet secretary was expected to seek out problems that

³⁴ (...continued)

Carter announced he was considering “opening the Cabinet meetings” to press coverage, a proposal that met with skepticism and scorn by some, even in his own administration. Edward Walsh, “Carter Might Open Meetings of Cabinet to Press Coverage,” *Washington Post*, Feb. 1, 1977, p. A-2. The proposal was withdrawn within days, as was his idea to make the Cabinet minutes public. Edward Walsh, “Coverage of Cabinet Meetings Barred,” *Washington Post*, Feb. 13, 1977, p. A-20. “Minutes of Cabinet Won’t Be Disclosed,” *Washington Post*, April 6, 1977, p. A-18.

Carter’s loss of confidence in the Cabinet is reflected in the declining frequency of their occurrence as the administration aged. During the first year Carter met with his Cabinet every week, every other week during his second year, once a month during his third year, and sporadically during his final year. George C. Edwards III and Stephen J. Wayne, *Presidential Leadership: Politics and Policy Making*, 4th ed. (New York: St. Martin’s Press, 1997), p. 205.

³⁵ Harold Ickes, *The Secret Diary of Harold L. Ickes* (New York: Simon and Schuster, 1953-4), vol. III, p. 190.

³⁶ Jesse Jones and Edward Angly, *Fifty Billion Dollars* (New York: DaCapo Press, [1951] 1971), p. 303.

were ripe for resolution at the Cabinet level.³⁷ This attempt to institutionalize certain Cabinet related functions was both praised and criticized. To supporters, it was merely common sense to have organized meetings, record-taking, and systematic follow-up actions. To critics, however, it was unproductive procedure amounting to tidiness for its own sake. After Eisenhower's 1958 heart attack and the departure of Maxwell Rabb, the first Cabinet secretary, there was some movement away from the highly structured Cabinet meetings.

Eisenhower's successors, Presidents Kennedy and Johnson, lost little time in dismantling the institutionalized Cabinet, even eliminating the position of Cabinet secretary. President Kennedy reputedly commented: "Cabinet meetings are simply useless. Why should the Postmaster General sit there and listen to a discussion of the problems of Laos?"³⁸ Not surprisingly, Kennedy held Cabinet meetings as seldom as possible. He was openly critical of his predecessor's structured approach to decisionmaking preferring instead to rely on individuals—staff and otherwise—whom he trusted most, irrespective of their responsibilities or position. Under Kennedy, the White House staff began to grow, with individual staff members increasingly becoming political personalities and powers in their own right. President Johnson tended to use Cabinet meetings as opportunities for one-way conversations and to promote the appearance of political consensus within his administration. President Richard Nixon was marginally more concerned with building structured decisionmaking than Kennedy and Johnson, but his views on the value of Cabinet meetings still remained closer to his immediate predecessors than to Eisenhower.

President Gerald Ford, however, discerned value in providing some structure to his management decisionmaking and reinstated the Cabinet secretariat, which has remained in operation, in some form, since that time. Ford also determined that at least part of the cause for the Watergate debacle lay with Nixon's over-reliance upon personal staff whose only formal responsibility was to serve the President's political interests. This narrow focus tended to distort the type of advice given the President and was easily corrupted. The departmental secretaries, meeting individually with the President or in Cabinet, provided a useful antidote to any arrogant attitudes that might be assumed by White House staffers.

Presidents work today within rigid time constraints on complex subjects that need to be translated into relatively simple political terms. Such problems do not lend themselves to long discussions by generalists in a Cabinet setting. Additionally, Cabinet meetings involve a relatively large number of people so that the ability to control leaks to the press is limited. The White House staff, on the other hand, is in close physical proximity to the Oval Office and tends to share the presidential perspective, which rarely goes beyond the next congressional or presidential election. The meeting of the Cabinet, no matter how it is "reformed" by a particular President,

³⁷ For a detailed description of the efforts by President Eisenhower to institutionalize some of the Cabinet functions, see: Fenno, *The President's Cabinet*, chapters 3 and 4; Bradley H. Patterson, Jr., *The President's Cabinet: Issues and Questions* (Washington: American Society for Public Administration, 1976); and Fred I. Greenstein, *The Hidden-Hand Presidency* (New York: Basic Books, 1982).

³⁸ Arthur M. Schlesinger Jr., *A Thousand Days* (Boston: Houghton-Mifflin, 1965), p. 688.

remains only one among many options available to a President in seeking advice, in providing administrative direction to the executive branch, and in developing political support for policy initiatives.

Cabinet Alternatives

Informal and Formal Subgroups

Presidents, recognizing the limitations inherent in the institutionalized Cabinet, have long sought alternative ways to provide themselves with advice and political support. Before Presidents had substantial White House Office staffs, they frequently turned to informal groups for advice. The first and most famous informal cabinet was Andrew Jackson's "kitchen cabinet," a group of friends and newspapermen with whom he felt comfortable.³⁹ Jackson reportedly met with his Cabinet only 16 times in eight years.⁴⁰ Later Presidents had their informal advisers given names such as Grover Cleveland's "fishing cabinet," Herbert Hoover's "medicine ball cabinet," and Franklin Roosevelt's "brain trust." With the development of White House staffs, however, and the growing complexity of issues, the appeal of "kitchen cabinets" has declined.⁴¹

In the post-World War II period, Presidents have experimented with sub-Cabinet groups as a substitute for full Cabinet sessions.⁴² The best known sub-Cabinet group is the National Security Council (NSC), established by law in 1947.⁴³ Formally, the NSC consists of the President, Vice President, and the Secretaries of State and

³⁹ Richard P. Longaker, "Was Jackson's Kitchen Cabinet a Cabinet?" *Mississippi Valley Historical Review*, vol. 44, June 1957: 94-108.

⁴⁰ Gordon Hoxie, "The Cabinet in the American Presidency," *Presidential Studies Quarterly*, vol. 14, spring 1984, p. 217.

⁴¹ Just as "kitchen cabinets" have lost their appeal, so have close individual non-official advisors to Presidents. It is unlikely that there will be in the future another relationship between a President and a private citizen to rival that of President Woodrow Wilson and Colonel Edward Mandell House. The reasons for the retreat from informal advisors and advisory groups appear two-fold. First, the complexity, intensity, and rapidity of events today simply makes it unlikely that outsiders can gain ascendancy over the nuances of issues to the degree possible by "insiders." Second, the media are more probing than in the past and look with suspicion upon the acquisition of influence by outsiders of any sort.

⁴² For an overview of the varieties of sub-Cabinet-level groups created during the post-War decades, consult: Patterson, *The President's Cabinet: Issues*, pp. 87-98. Colin Campbell, *Managing the Presidency: Carter, Reagan, and the Search for Executive Harmony* (Pittsburgh, PA: University of Pittsburgh Press, 1986), chapters 2, 5.

⁴³ 50 U.S.C. 402. U.S. Library of Congress, Congressional Research Service, (name redacted), and Mark M. Lowenthal, *The National Security Council: An Organizational Assessment*, CRS report, 93-517F (Washington: May 12, 1993). Kevin V. Mulcahy and Cecil V. Crabbe, "Presidential Management of National Security Policy-Making, 1947-1987," in *The Managerial Presidency*, James P. Pfiffner, ed. (Pacific Grove, CA: Brooks-Cole, 1991), pp. 250-64.

Defense, with the director of the Central Intelligence Agency and the chairman of the Joint Chiefs of Staff as advisers. It is intended to be highest-level advisory body to the President on military and international affairs. Once again, the formal NSC itself does not make collective decisions. It meets at the President's request, but the real contribution of the NSC is found in the work of its staff. The staff is a unit with foreign policy expertise and has been influential when the President has appointed a national security adviser to whom he is particularly close (*e.g.*, Henry Kissinger with President Nixon).

President Nixon, appreciative of the strengths of the NSC, wanted a similar type organization for the domestic side of presidential responsibilities. In April 1969, the President established the President's Advisory Council on Executive Organization (known popularly as the Ash Council, after its chairman, Roy L. Ash), to recommend changes in Executive Office organization and in the organization of the executive branch generally.⁴⁴ During the period when the Ash Council was meeting, in 1969 and 1970, the White House staff emerged as the dominant force within the presidential advisory orbit. Aware of this trend, and in general agreement, the Ash Council recommended to the President that he submit a reorganization plan to Congress that would establish a Domestic Council and reconstitute the Bureau of the Budget, changing its name to the Office of Management and Budget. In his message to Congress accompanying the plan, the President noted that the reorganization plan established a Domestic Council with an institutional staff to coordinate policy formulation in the domestic arena. To a considerable degree, it was intended to be the domestic counterpart to the National Security Council.⁴⁵

Formally, the Domestic Council was composed of the President, the Vice President, the Attorney General and the Secretaries of the Treasury; Interior; Agriculture; Commerce; Labor; Health, Education and Welfare; and Transportation. The President could also designate persons to serve on the council relevant to the issue at hand. The key to the council was its staff, located in the Executive Office and headed by an assistant to the President. The expectation was that ad hoc groups of departmental representatives would meet and formulate policy options for the President, supported by a small, elite staff corps based at the White House. The growth in the staff of the Domestic Council during the years 1970 through 1972

⁴⁴ As a result of the Ash Council recommendations, President Nixon submitted four bills to Congress which would have abolished seven existing departments (*i.e.*, Agriculture; Interior; Commerce; Health, Education and Welfare; Housing and Urban Development; Labor; and Transportation) and created in their place four new departments (*i.e.*, Human Resources; Community Development; Natural Resources; and Economic Development). Additionally, the functions of a number of independent agencies were to be absorbed within the new departments. U.S. Executive Office of the President, Office of Management and Budget, *Papers Relating to the President's Departmental Reorganization Program* (Washington: GPO, 1971). U.S. Congress, House, Committee on Government Operations, *Executive Reorganization: A Summary Analysis*, H. Report 922, 92nd Cong., 2nd sess. (Washington: GPO, 1972).

⁴⁵ U.S. Congress, House, Committee on Government Operations, *Disapproving Reorganization Plan No. 2 of 1970*, H. Report 1066, 91st Cong., 2nd sess. (Washington: GPO, 1970). Larry Berman, "The Office of Management and Budget That Almost Wasn't," *Political Science Quarterly*, vol. 92, summer 1977: 281-304.

reflected the utility of the approach at the time. By the election of 1972, the council had 66 persons on the staff, divided into six substantive policy units, each with an assistant director.

Initially, the Domestic Council staff and subcommittees worked reasonably well. They studied issues and provided background option papers. The dynamics of White House life intruded on the Council and its staff, however: there were fewer and fewer meetings and less longer-term planning. Peri Arnold concluded: “[T]he Domestic Council never quite fulfilled the expectations of the Ash Council. Far from being a mechanism for policy formulation, the Domestic Council became a large staff for Presidential errands, admittedly increasing Presidential reach but often providing little analytic or formulative capacity over policy.”⁴⁶ The President’s short-term political needs simply displaced any efforts to develop an institutionalized policy process within the White House.

In 1974, the Ford transition team concluded that there was a useful role for the Domestic Council and its staff, and Ford named his new Vice President, Nelson Rockefeller, to be the vice chairman of the Domestic Council and to head the staff. This decision, however, quickly drew opposition from the President’s chief of staff, Donald Rumsfeld, because, in effect, there would now be a “two-track” system for political and policy advice for to the President. This arrangement lasted but a short time, with Vice President Rockefeller opting to forego his role as “chief” of the Domestic Council staff.⁴⁷

President Jimmy Carter ended the Domestic Council experiment but maintained the Domestic Council staff, renaming it the Domestic Policy Staff, and having it headed by a single administrator. The staff has undergone several organizational and name changes in subsequent years (President Ronald Reagan changed the title to the Office of Policy Development (OPD); President Bush to the Domestic Policy Council (DPC)), but the unit still retains a separate statutory status and account in the budget.⁴⁸

In 1973, President Nixon made a second attempt to alter the character of the Cabinet. Disappointed that Congress had “rejected” his legislative proposals to reorganize the seven domestic departments into four larger departments, Nixon decided early in his second term to accomplish much the same objective through administratively creating a “super-cabinet” comprised of three departmental secretaries (Agriculture; Health, Education and Welfare; and Housing and Urban Development) who would be designated “counselors” as well as department

⁴⁶ Peri E. Arnold, *Making the Managerial Presidency: Comprehensive Reorganization Planning, 1905-1996*, 2nd ed. (Lawrence, KS: University Press of Kansas, 1998), p. 298.

⁴⁷ (name redacted), “The Domestic Council in Perspective,” *The Bureaucrat*, vol. 5, Oct. 1976: 251-72.

⁴⁸ Margaret Jane Wyszomirski, “A Domestic Policy Office: Presidential Agency in Search of a Role,” *Policy Studies Journal*, vol. 12, June 1984: 705-18. Colin Campbell, “The White House and Presidency Under the ‘Let’s Deal’ President,” in *The Bush Presidency: First Appraisals*, eds., Colin Campbell and Bert A. Rockman (Chatham, NJ: Chatham House Publishers, 1991), pp. 185-222.

secretaries, and who would also have offices in the White House.⁴⁹ These counselors were to be given responsibility for initiating and coordinating broad policy initiatives that cut across departmental lines. Each counselor was to have a small staff under the “oversight” of an assistant to the President.⁵⁰ The other domestic departmental secretaries would definitely be relegated to an “outer cabinet.” This experiment with a “super cabinet” was abandoned almost as soon as it was announced, the first casualty of the Watergate debacle that would soon consume the President and his White House staff.

Presidents Reagan and Bush made little pretense of promoting a Cabinet government. What President Reagan did do, however, at the urging of one of his top aides, Edwin Meese, was to create a set of seven Cabinet councils as working groups. Each council was assigned a specific substantive area to cover; (e.g., economic affairs, agriculture).⁵¹ The idea was to have Cabinet members and their deputies concentrate on those areas of special concern to themselves or to their department. Each council was provided some modest staff assistance. The Cabinet council system worked reasonably well in Reagan’s first term but gradually lost steam. Once Meese left the White House to become Attorney General, the seven councils became two councils (Council on Domestic Policy and Economic Policy Council), with few meetings and relatively little impact on presidential decision-making.

Under President George Bush, the two policy councils remained and were the forum for issues that cut across departmental lines. Both councils, as well as the full Cabinet, were supported by staff from a small Office of Cabinet Affairs, which viewed its task as being that “of an ‘honest broker’ between Cabinet secretaries and between the Cabinet and the White House staff in—other words, to make certain that the President understood without prejudice or bias or distortion what it was the Cabinet was doing, what they were concerned about, what proposals they wanted made.”⁵² The Bush administration experience tended to reinforce the view that the Cabinet itself was ill suited for substantive policy development and, that insofar as Cabinet-level input to the President was useful, it was best provided in the setting of Cabinet sub-groups or councils.⁵³

President Clinton meets with his Cabinet infrequently: just twice in 1998 and five times in 1999. Like his recent predecessors, Clinton relies more on his White House staff than on Cabinet secretaries for both policy advice and political appointee recommendations. With respect to the Cabinet itself, Clinton has delegated to his

⁴⁹ Richard Waterman, *Presidential Influence and the Administrative Presidency* (New York: John Wiley and Sons, 1975), chapter 4.

⁵⁰ Richard Nathan, *The Plot That Failed: Nixon and the Administrative Presidency* (New York: John Wiley and Sons, 1975), chapter 4.

⁵¹ “Cabinet Councils of Government: Effectively Running the Federal Machine,” *Government Executive*, Jan. 1983, pp. 20-30.

⁵² “Two Former Staffers Discuss Bush Cabinet,” *Miller Center Report*, vol. 13, spring 1997, p. 6.

⁵³ The staff support of such councils, and their relationship to White House units such as the Office of Policy Development, has never been institutionalized or viewed as satisfactory.

chief of staff, John Podesta, the chairing of “executive” Cabinet sessions which have been called more frequently, although the number of meetings held in 1999 and 2000 has yet to be disclosed.

Within the White House, three primary sub-Cabinet councils—the National Security Council, the Domestic Policy Council, and the National Economic Policy Council—dominate the process for establishing administration policy. What makes these sub-Cabinet councils different is that the President has ended the practice of viewing the departmental secretaries as superior in status to White House staff. With respect to the Domestic Policy Council, it is officially composed of departmental secretaries, several independent agency directors, and White House staff officials. “Unlike the Reagan and Bush administrations,” reports Shirley Anne Warshaw, “which placed one Cabinet officer in charge of a Cabinet council, the Clinton approach was to place presidential assistants directly in charge. White House-Cabinet interaction for policy development was purposely structured to ensure that the White House staff controlled the process.”⁵⁴ Apparently, it is the belief and practice of President Clinton to view Cabinet secretaries and top White House officers as equal in status and members of a team.

White House Staff

The more serious contemporary alternative to the Cabinet as a source of political and policy assistance to the President is the White House staff. Presidents generally enter office with the view that the White House staff should be tamed in power and reduced in numbers.⁵⁵ They often issue a statement suggesting that the department secretaries will be viewed as superior to White House staff. Thus, President Carter laid down the law early in his administration: “There will never be an instance while I am in office where the members of the White House staff dominate or act in a superior position to the members of the Cabinet.”⁵⁶ This pledge was soon broken.

While Presidents have always had assistance of one sort or another, complaints throughout the 19th century were that it was insufficient.⁵⁷ As late as 1922, the White House staff consisted of a secretary to the President, an executive clerk, and approximately 25 lesser clerks plus some detailees from departments. Herbert Hoover requested and received from Congress additional formal positions clearly at the

⁵⁴ Shirley Anne Warshaw, *Powersharing: White House-Cabinet Relations in the Modern Presidency* (Albany, NY: State University of New York Press, 1996), p. 211.

⁵⁵ Ann Devroy, “Clinton Announces Cut in White House Staff,” *Washington Post*, Feb. 19, 1993, p. A-1. President Clinton announced he was cutting the size of the White House staff, a term later defined as encompassing the entire Executive Office of the President, by 25 percent. The reduction never reached the projected figure, and where downsizing occurred, it was principally in the National Drug Control Policy Office. The number of senior staff positions in the White House proper actually increased.

⁵⁶ Edward D. Feigenbaum, “Staffing, Organization, and Decision-Making in the Ford and Carter White Houses,” *Presidential Studies Quarterly*, vol. 10, summer 1980, p. 371.

⁵⁷ For a discussion of early staff support to the President, see: John Hart, *The Presidential Branch*, 2nd ed. (Chatham, NJ: Chatham House Press, 1995), chapter 4.

executive assistant level, but the situation remained extremely lean for a President bent upon an activist managerial role.

In 1936, in preparation for his second term, President Franklin Roosevelt appointed Louis Brownlow to head a three-member committee to study how he might reorganize the executive branch generally and the White House in particular, to enhance his managerial capacity as President. The Brownlow committee (President's Committee on Administrative Management) submitted its report on January 1, 1937, and proposed, among other things, that some 100 independent agencies, administrations, boards and commissions, and corporations be placed within 12 executive departments. Of these departments, two—Public Works and Social Welfare—would be additions to the Cabinet. The principal thesis of the report was that the executive branch should be reorganized to create an integrated, hierarchical structure with the President as an active manager. In short, it became the foremost contemporary statement favoring departmentalism.⁵⁸

In terms of legislative accomplishment, relatively little was directly forthcoming from the Brownlow committee work. The two most important results were the passage of the Reorganization Act of 1939 (53 Stat. 561) with its provision for the legislative veto of presidential initiatives to effectuate reorganizations⁵⁹ and the establishment, by way of Reorganization Plan No. 1 of 1939, (53 Stat. 1423) of the Executive Office of the President (EOP).⁶⁰ The EOP initially consisted of five presidential agencies; the White House Office, the Bureau of the Budget, the National Resources Planning Board, the Liaison Office for Personnel Management, and the Office of Government Reports.

In the half-century since that time, a number of units have been added and removed from the EOP, with the current number standing at approximately 12. The two key units of the EOP from the perspective of the institutional Cabinet are the White House Office and the Office of Management and Budget (in 1970 the Bureau of the Budget was renamed the Office of Management and Budget (OMB)). The White House Office consists of approximately 400 persons, not including the Office of Administration, Office of Policy Development, National Security Council, and other units frequently associated in the public mind with the White House.⁶¹

The staff of the White House, plus the director of OMB, are competitors to the several department secretaries. They differ, however, in their authorities, perspectives, resources, and objectives. Departmental secretaries, as heads of departments, are

⁵⁸ U.S. President's Committee on Administrative Management, Report with Special Studies (Washington: GPO, 1937). (name redacted), "The Brownlow Report: A Timeless Message," *The Bureaucrat*, vol. 16, fall 1987: 45-48.

⁵⁹ John D. Millett and Lindsay Rogers, "The Legislative Veto and the Reorganization Act of 1939," *Public Administration Review*, vol. 1, winter 1941: 176-89.

⁶⁰ (name redacted), ed., *The Executive Office of the President: A Historical, Biographical, and Bibliographical Guide* (Westport, CT: Greenwood Press, 1997).

⁶¹ U.S. Office of Management and Budget, *Budget of the United States Government, Fiscal Year 1998* (Washington: GPO, 1997), p. A-59.

required by law to perform certain functions. Members of the White House staff are not generally assigned statutory functions. Cabinet secretaries are subject to centrifugal forces working to separate secretaries from the appeals of the President. Staff generally believe that secretaries succumb to these pressures.

From their point of view, White House staffers tend to see department secretaries as inflexible, politically insensitive, and resistant to interagency cooperation or cooperation with the White House Office. Department secretaries, for their part, often view staffers as holding less responsible positions with little to no statutory basis, and thus tend to resent or resist White House staff directives or initiatives. In their view, the departments have the experts, the White House the dilettantes. These conflicting perspectives can be useful or harmful to Presidents, depending upon how well they harness these institutional forces to achieve their political and managerial objectives.⁶²

Many Presidents and their staffs have tended to see in the executive branch a morass of departments, agencies, regulatory commissions, corporations, and other units too complicated and numerous to fathom fully. The sheer complexity of the structure and system acts as an invitation to politically motivated aides near the President to promote reorganization proposals. Many of these proposals, which frequently involve the creation, merger, or elimination of whole executive departments, are highly charged and erode collegiality. Other efforts to reorganize agencies and programs within departments (particularly through the reorganization plan process, an authority allowed to lapse in 1984) have been characterized as flawed in concept and implementation.⁶³

If an early enthusiasm for reorganizing departments wanes in a first term, it may be replaced by a presidential desire to further politicize the departments and agencies through loyalist political appointees and to centralize critical decisionmaking in the White House. These twin objectives—politicization and centralization—are often pursued by Presidents pledged to fulfill the opposite, or at least different, goals. These two trends away from reliance upon career executives and from decentralized policymaking in the departments, while subject to noteworthy exceptions, are often accepted as the norm in the evolving institutionalized presidency.⁶⁴

⁶² For a discussion of these contrasting perspectives by one who served both as a White House Assistant to the President and later as a Cabinet Secretary, see: Joseph A. Califano, *Governing America: An Insider's Report from the White House and the Cabinet* (New York: Simon and Schuster, 1981), chapter 10.

⁶³ U.S. Congress, House, Committee on Government Operations, *Reorganization Act Amendments of 1983*. H. Rept. 93-128, 98th Cong., 1st sess., (Washington: GPO, 1984). (name redacted) and (name redacted), "Presidential Reorganization Authority: Is It Worth the Cost?" *Political Science Quarterly*, vol. 96, summer 1981: 301-18.

⁶⁴ Terry M. Moe, "The Politicized Presidency," in *The New Direction in American Policies*, eds. John E. Chubb and Paul E. Peterson (Washington: The Brookings Institution, 1985): 235-71.

Reinventing Government and the Cabinet

President Clinton has followed a complex pattern of relating to his departmental secretaries and other agency heads. For the most part, Clinton has informally delegated responsibility for management of the executive branch to Vice President Al Gore Jr. The Vice President embarked in 1993 on a widely publicized program, under the heading of National Performance Review (NPR), to “reinvent” the government to more closely resemble a large corporation in the private sector.⁶⁵ “Chief Executive Officers—from the White House to agency heads—,” the Vice President asserted, “must ensure that everyone understands that power will never flow through the old channels again. That’s how GE did it; that’s how we must do it as well.”⁶⁶

The National Performance Review team was created as part of the Vice President’s office on a non-institutionalized basis intentionally separate from the Office of Management and Budget and the Cabinet. In 1994, OMB was reorganized with the “M” side of the agency being integrated into the “B” side and reconstituted into five Resource Management Offices (RMOs). This reorganization of OMB was not without its critics, who argued that critical management issues would always be subordinated to near-term budget priorities.⁶⁷

Two major consequences affecting the Cabinet as an institution have followed in the wake of the executive branch reinvention. First, there has been a general shift away from reliance upon central management agencies, such as the Office of Personnel Management (OPM), to support and hold executive agencies accountable to meet governmentwide standards. The thrust of the NPR approach has been to assign wherever possible management responsibilities to the specific department and agencies and more directly to “front line” personnel because, in their view, that is where accountability properly resides.⁶⁸ Second, there is increasing emphasis on devolving authority within departments and the assignment of functions to third parties, generally private contractors.⁶⁹

⁶⁵ For a full iteration of Vice President Gore’s objectives in “reinventing” the government, consult: U.S. Executive Office of the President, National Performance Review, *From Red Tape to Results: Creating a Government That Works Better and Costs Less* (Washington: GPO, 1993).

⁶⁶ *Ibid.*, p. 68. See also: Vice President Al Gore, National Performance Review, *Businesslike Government: Lessons Learned from America’s Best Companies* (Washington: GPO, 1997).

⁶⁷ Alan Dean, Dwight Ink and Harold Seidman, “OMB’s ‘M’ Fading Away,” *Government Executive*, June 26, 1994, pp. 62-64.

⁶⁸ “Effective, entrepreneurial governments transform their cultures by decentralizing authority. They empower those who work on the front lines to make more of their own decisions and solve more of their own problems. National Performance Review, *From Red Tape to Results*, p.7.

⁶⁹ For a discussion of contemporary third party administration of government programs see: James W. Fesler and Donald F. Kettl, *The Politics of the Administrative Process*, 2nd ed., (Chatham, NJ: Chatham House Publishers, 1996), Chapter 11. U.S. General Accounting Office, *Government Contractors: Are Service Contractors Performing Inherently* (continued...)

“General management laws” is a term of art that refers to those cross-cutting laws regulating the activities, procedures, and administration of all agencies of government, except where exempted either as a class of agency or on an agency specific basis.⁷⁰ Such laws (*e.g.*, Administrative Procedure Act and Title V personnel acts) have historically been viewed as crucial to maintaining the integrity of the executive branch through departmental secretaries to the President and ultimately to Congress. The NPR view of government management, based as it is on the private sector corporate model, moves away from the public law, hierarchical basis for management and, in its place, seeks to reorganize the executive branch into many essentially autonomous government agencies (*e.g.*, Performance Based Organizations) competing both internally with other agencies and with non-governmental entities in the private sector.⁷¹

Second, the NPR and much of the current management philosophy addressed to the governmental sector seeks to decrease the role of the President’s central management agencies (Office of Management and Budget, Office of Personnel Management, and General Services Administration), and also that of departmental secretaries. As devolution of authority within departments to lower levels accelerates and as departments are disaggregated (*e.g.*, Social Security Administration made independent of the Department of Health and Human Services; National Nuclear Security Administration being made “administratively autonomous” of the Department of Energy), the role of Cabinet secretaries is correspondingly diminished. Possibly of greatest import to the current administrative management government-wide, however, is the increasing reliance of departments and agencies upon contracted third parties for the performance of their statutory mission. Whole programs, and even agencies, could find themselves being held accountable for program management and administration, while the actual program resources rest with third parties, often private sector, for-profit corporations.⁷²

⁶⁹ (...continued)

Governmental Functions? GAO/GGD-92-11, (Washington: GAO, 1991).

⁷⁰ U.S. Library of Congress, Congressional Research Service, *General Management Laws: A Selected Compendium*, ed. (name redacted), CRS report RL30267 (Washington: July 28, 1999).

⁷¹ David Osborne and Ted Gaebler, *Reinventing Government* (Reading, MA: Addison-Wesley Publishing Co., 1992). Alasdair Roberts, “Performance-Based Organizations: Assessing the Gore Plan,” *Public Administration Review*, vol. 57, Nov./Dec. 1997: 465-78.

⁷² Donald F. Kettl in his book, *Sharing Power: Public Governance and Private Markets* (Washington: The Brookings Institution, 1993), describes the growing reliance by the federal government upon its private partners. “In its eager pursuit of the competition prescription, government has—for a remarkable variety of reasons—too often surrendered its basic policy-making power to contractors.” p. 13. Writing in 1990, a Senate report concluded: “DOE [Department of Energy] relies on private workforce to perform virtually all basic governmental functions. It relies on contractors in the preparation of most important plans and policies, the development of budgets and budget documents, and the drafting of reports to Congress and Congressional testimony.... DOE top management does not have the basic information it needs to understand the dimensions of its reliance on a contractor workforce.”

(continued...)

The point to recognize is that in recent decades, and especially with the implementation of the NPR proposals after 1993, the basic functions of departments and of departmental secretaries have been altered, in some measure strengthening the department and its secretary, in other cases reducing their authority and leverage over operations. When the latter is the case, it is not unreasonable to assume that the role and importance of the Cabinet has undergone a similar diminution.⁷³

Utility of The Cabinet

Most Presidents have complained about the Cabinet as a political institution. It rarely has met their expectations. Nearly all memoirs written by persons who have served in the Cabinet are equally or more critical in their appraisals and are skeptical of its utility to either the President or to the department secretaries. Outsiders writing of the Cabinet often are cynical concerning its proceedings and contribution to the management of the executive branch. A few of the outsiders (and an occasional insider) have proposed reforms for the Cabinet, but these proposals have generally come to naught.

If there are so many people who find fault with the institutional Cabinet, why has it survived for two centuries, and why are there no serious proposals to abandon the Cabinet? The answer appears to be that, notwithstanding the continuing criticism, the Cabinet has utility to Presidents and to department secretaries in meeting their respective managerial responsibilities. If the Cabinet is expected to provide the President with collective, or even individual, policy advice, the expectations are not likely to be fulfilled. Once the Cabinet is considered as a vehicle for management, however, its utility becomes both substantial and visible.

There are at least four areas where the utility of the institutional Cabinet is evident and worth discussing more fully.

1. Political and managerial advice
2. Interdepartmental conflict resolution
3. Administrative coherence
4. Political assistance

⁷² (...continued)

U.S. Congress, Senate, Committee on Governmental Affairs, Subcommittee on Federal Services, Post Office and Civil Service, Report to the Subcommittee Chairman by Majority Staff, "The Department of Energy's Reliance on Private Contractors to Perform the Work of Government," in *Use of Consultants and Contractors by the Environmental Protection Agency and the Department of Energy*, S. Hrg. 554, 101st Cong., 1st sess. (Washington: GPO, 1990), p. 65.

⁷³ It is interesting to note that, in a comprehensive overview of management reform efforts in the federal government since 1945, the President's Cabinet is not discussed. Paul Light, *The Tides of Reform: Making Government Work, 1945-1995* (New Haven, CT: Yale University Press, 1997).

Political and Managerial Advice

Generally, presidential leadership is defined in terms of persuading the public and elected officials to follow the President's policy preferences; providing initiatives in international affairs; and being a public symbol for worthwhile national causes. But another, less visible, aspect of presidential leadership relates to providing political and managerial leadership for the executive branch. It is in this latter field of leadership where the Cabinet can play a highly useful role.

Information and analytic judgments can flow in both directions at a Cabinet meeting. The President can raise the general question, say, of how best might the federal government encourage greater technology research and development and then let the Cabinet secretaries exchange ideas before him. In so doing, certain themes may develop and need further "fleshing out" by selected secretaries. Here, the ideas are coming from below to the President. Subsequently, the President, considering the advice given, may assign to a particular secretary responsibility for developing options for his consideration, and for developing a consensus on what may become the administration's policy. Cabinet meetings can facilitate the raising of critical issues and the resolution of those issues within an executive branch context. Finally, the Cabinet may serve as the basis for building a political consensus sufficiently strong to put these ideas, such as vocational education and retraining, into practice.

Cabinet meetings can help a President to "get a feel" for the management problems afflicting the federal government. Presidents, generally familiar and experienced in legislative politics, feel comfortable with the process of getting a law passed by Congress. But laws are not self-executing; they must be implemented and implementation is a managerial function.

Recent Presidents have been discouraged by both advisers and scholars from investing time and political capital in executive branch management.⁷⁴ Their argument is that Presidents should concentrate on political leadership, not managerial leadership, the latter being described by some as a mere "clerkship" function.⁷⁵ This attitude has arguably been costly both to Presidents and to departmental secretaries. Today, some government offices and even departments appear to be "hollow,"⁷⁶ that is, they have become dependent (usually because of personnel ceilings) upon a contract workforce. This "government by proxy"⁷⁷ poses a major management challenge to departmental secretaries as they must manage more through negotiations than through command.

⁷⁴ Arnold, *Making the Managerial Presidency*, 2nd ed., chapter 11. (name redacted), "At Risk: The President's Role as Chief Manager," in James P. Pfiffner, ed., *The Managerial Presidency*, 2nd ed. (College Station, TX: Texas A&M University Press, 1999): 265-84.

⁷⁵ Richard E. Neustadt, *Presidential Power: the Politics of Leadership* (New York: John Wiley and Sons, 1960), pp. 5-8.

⁷⁶ Mark Goldstein, *America's Hollow Government* (Homewood, IL: Business One Irwin, 1992).

⁷⁷ Donald F. Kettl, *Government By Proxy* (Washington: CQ Press, 1988).

It is a proper role for the department secretaries in Cabinet meetings to bring to the President's attention managerial problems associated with the current organizational and personnel structures. Policy decisions should be informed by resource availability and public law considerations, both subjects on which department secretaries collectively and individually are conversant. The Cabinet, therefore, has utility in that it provides a forum where most of the executive branch is represented, and where general managerial concerns can be raised and discussed. But the management value of the Cabinet is once again solely at the discretion of the President.

Interdepartmental Conflict Resolution

Our government is a government managed by laws.⁷⁸ For the most part, Congress passes a law establishing a program or directing the writing of regulations, and assigns this responsibility to a departmental secretary. While this system has the virtue of creating clear lines of authority and accountability, it also has limitations. Different laws may assign different department secretaries responsibility for administering what are in effect similar programs, but are intended to achieve conflicting objectives.

The Secretary of Health and Human Services, for instance, through the Administrator of the Food and Drug Administration, is charged with protecting the health of the citizenry-at-large. There is a specific provision in law forbidding the use of any food additive that is deemed to induce cancer in man or animal, but what standards shall apply to this prohibition? If any trace of such an additive is sufficient to ban the product, what impact will this have on farmers/growers who consider traceable doses of this additive to be essential to their productivity and international competitiveness? Clearly, there is the potential in this situation for conflict between the secretaries of Health and Human Services and of Agriculture.

The Cabinet is itself not a useful forum for resolving this conflict, but the fact that two equal-ranked secretaries can meet on neutral territory, possibly with presidential prodding, makes resolution of this problem more likely. Cabinet meetings permit secretaries to meet each other socially, a situation which is conducive to subsequent phone calls and personal meetings. On most issues, two or more secretaries can agree to have their principal deputies meet to work out agreements.

Interdepartmental conflicts are inevitable and even healthy. They are likely to increase simply because the government is concerned with more issues than in the past, and the issues are becoming more complex. Oftentimes, problems between bureaus within different departments resist resolution until they can be considered at the secretarial level. While the Cabinet setting does not guarantee resolution of these conflicts, it is reasonable to assume that it facilitates agreements between parties.

⁷⁸ (name redacted), "The Importance of Public Law: New and Old Paradigms of Government Management," in Phillip J. Cooper and Chester A. Newland, eds., *Handbook of Public Law and Administration* (San Francisco: Jossey-Bass Publishers, 1997): 41-57.

Administrative Coherence

When Presidents meet with their Cabinet, they are able to express their views to the chief executive officers of most, but a decreasing percentage, of the executive branch. The independent agencies (*e.g.*, National Aeronautics and Space Administration; National Archives and Records Administration), the independent regulatory commissions (*e.g.*, Federal Communications Commission), most government corporations (*e.g.*, Federal Deposit Insurance Corporation, Tennessee Valley Authority, Postal Service), and quasi-governmental bodies (*e.g.*, Federal Reserve System and Smithsonian Institution) are not represented when the Cabinet meets. Similarly, a decreasing percentage of the budget remains “discretionary” and represented by the Cabinet officers. These caveats aside, the Cabinet still provides the President an audience where most of his responsibilities as the nation’s chief executive reside.

The Cabinet collectively, in small groups, and individually, is the institution where a President, if so inclined, can give managerial direction in the broadest sense to the executive establishment. When the Cabinet meets there is a visible reminder that each person present is part of a “team” and that this team is supposed to be moving in the same direction, the President’s direction. Presidents differ on how they use this opportunity for leadership. More often than not, the Cabinet meetings are used to send hortatory messages or to invoke across-the-board directives. Typical of the latter is where Presidents instruct all secretaries to submit to the White House staff prior to the next meeting their recommendations for cutting costs within their departments.

Experience suggests that few secretaries are interested in managing their departments in any hands-on manner. Many are selected solely for political reasons and see their role in political terms. In support of this view of their job, secretaries have substantial political staffs and other political appointees upon whom they rely upon for policy advice and administrative loyalty.⁷⁹ Departmental management, as that term is generally understood, usually falls under the purview of the deputy secretary. Deputy secretaries tend to view their subordinate agencies with ambivalence. For those departments that are “holding companies” (*e.g.*, Department of Commerce) for agencies with long-standing missions and independent bases of support, the secretary and deputy secretary may see their internal managerial role as more that of a “mediator” between the agencies rather than that of policy initiator.

Political Assistance

Arguably, the most useful role of the Cabinet to the President is in the political realm. As noted, the highest patronage the President has at his disposal are Cabinet appointments. In return for these appointments, Cabinet members, with some exceptions, are expected make public appearances in favor of the President’s policies and programs. They must be prepared to spend time on the “campaign trail.” They

⁷⁹ Paul C. Light, *Thickening Government: Federal Hierarchy and the Diffusion of Accountability* (Washington: The Brookings Institution, 1995).

must speak to trade associations and private organizations to build up the President's constituency.

Cabinet members are expected to be useful to the President in his relations to Congress. Cabinet members are the heads of departments, and the President and Congress are generally in a conflict over who should supervise what. Even when a departmental secretary may differ with the President on a policy affecting the department, the secretary is expected to defend the President publicly. This can place the secretary in a difficult position, such as in cases when the President is proposing to move an agency out a department (*e.g.*, the Social Security Administration out of the Department of Health and Human Services).

Harold Seidman reminds us of the Cabinet officer's role as far as the President is concerned:

While the White House may not consider a Cabinet member's participation in the development of a legislative proposal essential, the President will hold him to account for assuring its enactment by the Congress. So far as the President is concerned, a Cabinet member's primary responsibility is to mobilize support both within and outside the Congress for Presidential measures and to act as a legislative tactician. Major questions of policy and legislative strategy are reserved, however, for decision by the White House staff.⁸⁰

Finally, Presidents expect that secretaries will keep their subordinate political officers in line. This is not an easy task today because there are so many sub-Cabinet officers testifying before the myriad of congressional committees and subcommittees that the voice of the administration can sound cacophonous.

In sum, Presidents, even those most critical of the institutional Cabinet, find ways in which it can serve their needs, and thus its utility insures its continuance.

“Reforming” The Cabinet

It is evident that the Cabinet has rarely pleased those seeking greater political and managerial effectiveness for the President. It has also been a disappointment for many in philosophical terms. The Cabinet has been viewed by some as symbolic of a fundamental fault in American political theory. In one form or another, the underlying assumption of critics has been that the United States should change from a presidential political system to a variant on the parliamentary political system. The

⁸⁰ Harold Seidman and Robert S. Gilmour, *Politics, Position, and Power: From the Positive to the Regulatory State*, 4th ed. (New York: Oxford University Press, 1986), p. 82.

Cabinet is seen by these “reformers” as a critical element in a successful institutional and philosophical transformation.⁸¹

The young Woodrow Wilson, like so many political and social activists in the post-Civil War period, despaired of the American government with its “spoils system,” and looked longingly across the Atlantic to the emerging parliamentary system in England where “responsible parties” appeared to provide the basis for clear and effective government. Wilson was particularly incensed at Congress and its committee structure, which he believed was corrupt and dominated the presidency. He initially advocated a full-blown parliamentary system.⁸²

In Wilson’s early schema, the Cabinet was to be selected by the President but only from representatives in Congress. Thus, members of the Cabinet would not only hold executive department portfolios, they would also sit in Congress and answer questions regarding their policies and administration.⁸³ Wilson believed that the dominance of Congress, and particularly its committees, over the President and the executive branch was a permanent condition, and, therefore a constitutional amendment was necessary.

Like many reformers, then and now, there was concern that the branches were “too separate,” that they functioned at cross-purposes and indulged themselves in corrosive competition. Furthermore, Congress was seen as the captive of local, parochial interests. What was needed was a Cabinet which served as a bridge between the branches. As the years passed, and Congress changed, the views of the young Wilson changed as well.⁸⁴ He was still opposed to what he called “committee government” but was not as vocal in his support of drawing Cabinet members from the Congress. When Wilson assumed executive positions later on, he began to see hope for leadership in the presidency.⁸⁵

⁸¹ A typical “reform” proposal from those who desire that the American political system more closely resemble a parliamentary system is provided by Herman Finer in his review of the first Hoover Commission Report in 1949. “A full cabinet system with collective responsibility is the crying need of America—of the nation, of the Congress, of the departments, of the civil service, and of the presidency. Only if responsibility is truly shared among fifteen or twenty men, only if the will to govern is put into commission, will it be possible to integrate the Government of the United States, and secure simultaneously that all departments shall be heard, that all departments shall take notice, that all personnel shall respect their chief, that facts and advice shall not run about free, equal, and wild.” “The Hoover Commission Report,” *Political Science Quarterly*, vol. 64, Sept. 1949, p. 417.

⁸² Woodrow Wilson, “Cabinet Government in the United States,” *The International Review*, vol. 7, Aug. 1879: 146-63.

⁸³ The first of the reformers credited with the idea of having “the principal officers of each of the Executive Departments ... occupy seats on the floor of the Senate and House of Representatives” was Senator George H. Pendleton of Civil Service fame. *Congressional Record*, 46th Cong., 1st sess. vol. 9, num. 1, March 26, 1879, p. 72.

⁸⁴ Woodrow Wilson, *Congressional Government* (Boston: Houghton-Mifflin Co., 1885).

⁸⁵ Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia (continued...))

The appeal of bridging the chasm believed to exist between the branches by having the Cabinet sit in Congress (not requiring a constitutional amendment) cut across the political spectrum.⁸⁶ Supporters included such diverse personalities as Henry Stimson, Robert La Follette and William Howard Taft. The latter, in his post-presidential exegesis, *Our Chief Magistrate and His Powers*, noted:

I am strongly in favor of a change in our existing system, by which the importance and influence of Cabinet officers shall be increased. Without any change in the Constitution, Congress might well provide that heads of departments, members of the President's Cabinet, should be given access to the floor of each House to introduce measures, to advocate their passage, to answer questions, and to enter into the debate as if they were members, without of course the right to vote. Without any express constitutional authority, Congress has done this in the case of delegates from the territories. Why may it not do it with respect to the heads of departments?"⁸⁷

In the 1920s, Warren Harding and his Secretary of State, Charles Evans Hughes, were ardent supporters of having the Cabinet sit in Congress and answer questions.⁸⁸ There had been instances in the then-recent past when members of the Cabinet had appeared individually on the floor and the "reformers" saw this as a salutary sign. The underlying assumption behind the varied support for this idea was a tremendous faith in the efficacy of debate to change rational minds for the better, a process leading ultimately to consensus. Of course, both the liberals and conservatives of the period were convinced that discussion and debate would ultimately favor their views.

Where were the opponents of the idea of having the Cabinet sit in the Congress? Given the fact that no action was forthcoming on the various proposals, it is reasonable to assume that the opponents were in the majority; but the opponents, for whatever reason, rarely published their views or had access to the major newspapers or journals. The reformers were never quite able to convince the majority of Members of Congress, or Presidents since Warren Harding, of the wisdom of their proposals. Indeed, proposals to put the Cabinet "in" Congress were increasingly viewed as either utopian, naive, or simply wrongheaded.⁸⁹

⁸⁵ (...continued)
University Press, 1908).

⁸⁶ For a discussion of the historical proposals and debates to assign Cabinet members some role in the Congress and, conversely, to permit Members of Congress to also serve in some executive branch capacity, see: Stephen Horn, *The Cabinet and Congress* (New York: Octagon Books, (1960) 1982).

⁸⁷ William Howard Taft, *Our Chief Magistrate and His Powers* (New York: Columbia University Press, 1916), p. 31.

⁸⁸ For an overview of the "question period" proposal for Cabinet members to appear before either or both Houses of Congress, consult: U.S. Congress, Congressional Research Service, *A Question Period Before Congress; Proposals to Bring Cabinet Officials Before the Legislature*, by Paul Rundquist, CRS archived report 91-305G (Washington: April 3, 1991).

⁸⁹ David B. Truman, *The Governmental Process: Political Interests and Public Opinion* (New York: A.A. Knopf, 1951), p. 530.

This is not to say, however, that reformers have given up the struggle. In addition to the lingering appeal of parliamentary government over presidential government, in recent years the impetus for much reform activity has been the spectre and practice of “divided government,” a term referring to those periods when the White House is occupied by one political party and one or both houses of Congress are dominated by the other.

Today’s reformers still tend to place faith in the related proposals to have Cabinet members “sit” in Congress or to have Members of Congress simultaneously hold executive branch offices, but see these proposals as simply one small part of a major constitutional reorganization of the national political system.⁹⁰ For the most part, reformers, such as James MacGregor Burns,⁹¹ Lloyd Cutler,⁹² and James Sundquist are generally considered to be “liberal” in their political orientation, and believe that the natural majority consensus behind their political views is frustrated by antiquated and anti-majoritarian institutions.⁹³ They generally favor a presidency that is dominant over Congress, and see the Cabinet as an instrument towards this end.

A second set of reformers also has a long history of offering unrealized recommendations on how to make the Cabinet more effective for the President. They want the Cabinet to undergo alteration, but are less comprehensive in their vision. Their proposals stress modification and changes in emphasis to increase the “policy advising role” of the Cabinet. Earlier proposals to alter the Cabinet (*e.g.*, Nixon’s 1973 proposal to create three “super counselors” or “super Cabinet members”) have been discussed in other contexts. Cabinet reorganization proposals tend either to emphasize altered use of existing departmental secretaries or recommend a rather different cast of characters to serve in the Cabinet.

⁹⁰ Committee on the Constitutional System, *A Bicentennial Analysis of the American Political Structure* (Washington: Committee on the Constitutional System, 1987). Donald L. Robinson, *To the Best of My Ability: The Presidency and the Constitution* (New York: Norton, 1987).

Contemporary “reformers” lean towards a comprehensive overhaul of the American political system and do not shy away from proposing many constitutional amendments. James Sundquist provides a “menu” of constitutional and non-constitutional changes that most reformers favor. Included in the list of changes proposed would be: (1) laws discouraging “split-ticket voting;” (2) four-year House terms and eight-year Senate terms; (3) modified procedures for selecting the President (*e.g.*, abolish the electoral college); (4) permitting special elections to reconstitute a “failed” government; (5) removing the prohibition against dual office-holding; (6) limited item veto; (7) restoration of the legislative veto; (8) making the war powers statute into a constitutional provision; and (9) approval of treaties by majority vote of both houses. *Constitutional Reform and Effective Government*, rev. ed. (Washington: The Brookings Institution, 1992), pp. 322-24.

⁹¹ James MacGregor Burns, *The Power to Lead: The Crisis of the American Presidency* (New York: Simon and Schuster, 1984).

⁹² Lloyd N. Cutler, “Some Reflections on Divided Government,” *Presidential Studies Quarterly*, vol. 18, Summer 1988: 485-92.

⁹³ James MacGregor Burns, *Cobblestone Leadership: Majority Rule, Minority Power* (Norman, OK: University of Oklahoma Press, 1990).

A typical proposal is that of Graham Allison in 1980, who called for a Presidential Executive Cabinet (EXCAB). “Presidents need stronger and more responsive performance from key Cabinet departments. Strength and responsiveness are not easy to combine. But making key Cabinet officers the primary substantive counselors to the President, and insuring steady face-to-face relations between them and the President, will tend to induce both. The recognized participation of secretaries in presidential decision-making would also sensitize them to presidential perspectives and to interests other than those of their own departments.”⁹⁴ The EXCAB would consist of “key” secretaries, such as State, Defense, Treasury, and Health and Human Services, plus a rotating mix of other Cabinet officers, agency heads and White House staff. The point would be that those permanent EXCAB members would have offices in the White House and develop a permanent staff. In this way, Allison believes, the President would acquire a collective advisory body with knowledge and political clout. Critics suggest, on the other hand, that a departmental secretary physically removed from his or her department will tend to lose whatever uniqueness of perspective that made the secretary seem valuable in the first place. Spending substantial time in the White House, it is feared, will transform the secretaries into adjuncts of the White House staff.

Among the more recent “reform” proposals for the Cabinet is that offered by three-time Cabinet member, the late Elliot Richardson. Richardson proposed that the Cabinet be radically reconstituted to include those positions with cross-cutting responsibilities, rather than operating responsibilities for departments. He suggested that the Cabinet should consist of the President’s chief of staff, the director of OMB, the National Security advisor, the U.S. trade representative, plus some advisers on economic, domestic policy and science. “This inner circle, augmented by the three department heads whose spheres of responsibility are most inclusive—the secretaries of State, Defense, and Treasury—would constitute a well-balanced policy council.”⁹⁵

There is no reason to believe that the reformers will cease in their quest for the Holy Grail, a Cabinet that wisely advises a receptive President. There is also no reason to believe that Presidents will suddenly find the Cabinet, however it may be organized, to be a useful collective source for policy advice.

Concluding Comments

The President’s Cabinet in the American political context is the source of considerable debate and frustration. Few are satisfied with the Cabinet as an institution. Particularly critical are those who have served in the Cabinet. Presidents seek to find uses for their Cabinet—as a collectivity, in sub-Cabinet groups, and individually—but generally retreat from this quest as experience overshadows hope.

⁹⁴ Graham Allison, “The Advantages of a Presidential Executive Cabinet (EXCAB),” in Vincent Davis, ed., *The Post-Imperial Presidency* (New York: Praeger, 1980), p. 120.

⁹⁵ Elliot L. Richardson and James P. Pfiffner, “Our Cabinet System is a Charade,” *New York Times*, May 28, 1989, p. E-14.

Rather than succumb to the subtle political agenda of “reformers” with their penchant for institutional tinkering, defenders argue that the Cabinet should be appreciated for its flexibility and nuances. They believe that the Cabinet, under the right conditions, can be a source of political and managerial strength to the President, even compensating on occasion for presidential weakness. Under other circumstances, however, it can become a political negative as when Presidents are forced to fire some departmental secretary or find the person a face-saving job. The critical point is, however, that while the Cabinet may be useful to the President, the Cabinet itself never governs. The President remains the critical center of the executive establishment.

Informed persons may debate endlessly respecting the characteristics of a “best” Cabinet and staff system for supporting the President in his decisionmaking capacity. Should Presidents, for instance, appoint a chief of staff to run the White House staff or should they rely on several co-equal assistants to manage their office staff and resources? The truth is that there is no single or accepted theoretical model to which Presidents can repair. Structure and systems are ultimately no substitute for coherent ideas and presentations and for access to the President. Certain secretaries, as well as certain staff aides, will always be “more equal than others.” It is an unavoidable responsibility for Presidents to determine their own personal needs and managerial style and to shape their office, and their Cabinet, accordingly.

A final comment that may help to explain the ambiguous and controversial nature of the Cabinet. The President of the United States is both the head of state and the head of government—two responsibilities almost invariably split between two persons in a parliamentary system. If the President were only the head of government, and if governments could fall without affecting the incumbency of the head of state, the Cabinet might be assigned and fill more collective responsibility. Presidents cannot, however, share their power officially or they place at risk their prestige and authority as chief of state, the symbol of national sovereignty. Thus, proposals to modify, strengthen, or collectivize the Cabinet that neglect to take into consideration the inherent dual nature of the presidency are bound to be deficient.

The experience of recent Presidents illustrates both the potential and limitations of the institutional Cabinet. As a collective body, the Cabinet is but one of the institutional resources available to the President for advice and administrative leadership of the executive establishment. The range of attitudes toward the Cabinet evidenced by recent Presidents suggests that the life of the institutional Cabinet shall continue to be uneven and unpredictable. However, few institutions in the world have a longer uninterrupted history than the American President’s Cabinet, which should suggest to the inquiring observer that there must be some intrinsic and deep-seated value to the Cabinet, and that in its very adaptability and unthreatening nature to succeeding Presidents lies its strength.

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Dear Reader:

Over the course of a decade, the Society of Corporate Secretaries and Governance Professionals has published the *Board Practices Report*. This ninth edition, in collaboration with the Deloitte LLP Center for Corporate Governance, continues to explore a number of areas affecting boardrooms today, including board oversight of strategy, director tenure policies and other mechanisms for board refreshment, use of data analytics, and shareholder engagement.

The 2014 *Board Practices Report: Perspectives from the boardroom* is based on invaluable contributions from 250 public companies represented in the Society's membership. Analysis of the survey results reveals, among other interesting findings, that:

- Strategy topped the list of board focus areas for the coming year, selected by 85 percent of survey respondents. This was followed by risk oversight, which is often viewed in tandem with strategy, and board composition, which continues to garner shareholder attention. To round out the top five, CEO succession planning and cyber security were also noted as board priorities for 2015.
- More than half of the respondents said their boards are discussing strategy at every board meeting. Further, almost all said the board is briefed on strategic alternatives and discusses risks associated with those strategies. A majority noted that the level of information provided to the board on strategic risk has been enhanced over the past year.
- A combined chairman and CEO role exists in 60 percent of large cap boards, and most of those have a lead director, while mid and small cap companies have combined roles 53 percent and 50 percent of the time, respectively.
- Common practices pertaining to board refreshment were also investigated. Approximately 50 percent of respondents said their most recent director joined the board during the past year. Age limits are the most prevalent mechanism triggering board turnover, and they continue to rise; director retirement is another reason for change in board composition at 53 percent of all companies.
- The three most sought-after board skills and backgrounds remain unchanged from the 2012 report: related industry experience, c-level experience, and international business exposure. One-third of small caps selected mergers and acquisitions experience, highlighting a focus area for these companies.
- The number of women on boards appears to be increasing; 18 percent of respondents increased the number of women on their board in the past year. This is particularly true among large and small caps where women comprise 26%–50% of board composition. Similar trends, but on a smaller scale, can be found with respect to minority representation. Very few boards have directors aged 40 or younger.
- One-third of the companies surveyed educate their boards on big data and data analytics, and this is particularly true among the large cap companies (48 percent). Further, 28 percent said they are incorporating advanced analytics into company strategy and 7 percent are considering doing so.
- A slight majority, 55 percent, of the participants noted that their boards have discussed how to prepare for an activist.
- Boards are receiving education on a number of topics; the most common are company policies, fiduciary duties, insider trading, and industry-specific topics. Compared to our 2012 report, topics that have gained in popularity are ethics, company policies, and regulatory issues, with 12, 15, and 17 percent point increases, respectively.

Whether used as a means to stay current, engage in benchmarking, or achieve other goals, our hope is that this report will serve as a resource for boards, management teams, governance professionals, and other interested parties.

Sincerely yours,

Darla C. Stuckey
Executive Vice President & General Counsel
Society of Corporate Secretaries and Governance Professionals

Maureen P. Bujno
Director
Deloitte LLP Center for Corporate Governance

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Participant overview

The responses to the survey's first questions provide detail on the industry and size of respondents, as shown in the charts and tables to follow.

2014 respondents

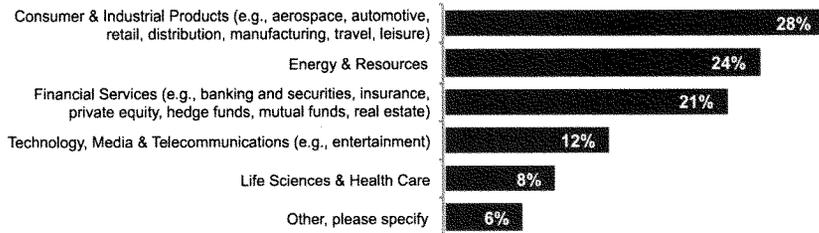
	Large cap	Mid cap	Small cap	Financial services	Nonfinancial services	Total public companies
No. of respondents	114	108	28	53	197	250
Percent of total respondents (by market cap¹ and industry)	46%	43%	11%	21%	79%	100%

¹Company market cap is as of December 31, 2013. Market cap breakdown is as follows:

Large cap: > \$10 billion; Mid cap: ≥ \$700 million to ≤ \$10 billion; and Small cap: <\$700 million.

Industry classification

For analysis purposes, respondents have been grouped into financial services and nonfinancial services companies, representing 21 percent and 79 percent of the sample, respectively.



Survey results

FINDINGS AND TRENDS

Board selection, recruitment, and composition

Board size is nine to 11 members depending on company size

Board size is relatively consistent, with 45 percent of respondents having nine to 11 members. Board size appears to be associated with company size; as market cap increases, the size of the board also rises. Most small caps have seven directors; most mid caps have nine, and large caps have 11. The majority of both financial and nonfinancial services companies have nine to 11 board members. While there is no one-size-fits-all approach to board size, companies should consider this factor with respect to board efficiency and effectiveness. About half of the respondents said that their board size did not change in the past year. The remaining half was split, with 29 percent saying size decreased and 22 percent saying it increased in the past year.

Mixed results on tenure and turnover

Recently, many investors have been expressing concern over director tenure. Some have raised the issue that long-standing directors could compromise independence and objectivity, regardless of the institutional knowledge they have obtained. Some also link long-tenured directors with a lack of opportunity for new and/or diverse board candidates. One large investor now screens companies on director tenure when considering votes for or against directors. One-third of all companies have an average tenure of non-management directors of between five and seven years. Small caps have longer tenures, with 29 percent having an average tenure of 11 or more years. A similar trend is apparent for financial services companies, with 40 percent having an average tenure of 11 or more years. Sixty-one percent of companies noted their longest-tenured director has been on the board for more than 13 years.

DID YOU KNOW?

The proxy advisory firm Institutional Shareholder Services reports average director tenure of 8.6 years.

While some boards have a long-standing member, they are still refreshing their membership regularly; 50 percent of all companies surveyed said their most recent director joined the board within the past year and another 20 percent said

one year ago. Few respondents answered that the most recent board member joined more than three years ago.

Amid increasing age limits, retiring directors drive board refreshment

Retirement in response to age limits continues to be the most prevalent mechanism for board refreshment. Age limits continue to rise; respondents chose ages 72 and 75 (or older) as the most frequent age limit policy. In addition, more boards are increasing the age limit: 30 percent said 75 or older, up from 18 percent in 2012. While more companies appear to be instituting term limits, the number remains very low. Since the 2012 report, there has been a 3 percentage point increase to 6 percent of companies. For the few companies with term limits, the most common term is 11 to 15 years. Ten percent of respondents have "other board tenure conditions/restrictions" in place, up from 4 percent in 2012.

Despite the increase in age limits, director retirement is the main reason for change in board composition at 53 percent of all companies surveyed, particularly among the large caps. This was followed—distantly—by the need for specialized knowledge and director resignation. There has been a significant decline in "need for specialized knowledge," at 19 percent, down from 37 percent in 2012. This may be an indication that board recruitment practices are more focused and strategic in onboarding directors to fill skill gaps. Some respondents, mainly small caps, supplied a response in the "other" category; responses included "loss/change in controlling shareholder" and "CEO and other management transitions."

When it comes to proactively recruiting new board members, responses were varied. A majority of companies turn to their own directors for prospective board member recommendations, with 72 percent of respondents choosing this as their first option. But 56 percent also use a search firm when recruiting. An equal number of companies have a process in place to identify potential board candidates continuously (44 percent) versus those that identify a potential candidate only when there is a clear opening (43 percent). Surprisingly, very few respondents (6 percent) said they keep a recruiting firm on retainer at all times.

Diversity and ethnicity budge, but few Generation Xers make it to the boardroom

Diversity in board composition continues to gain attention, not just from investors but from organizations such as Catalyst, the 30% Coalition, 2020 Women on Boards, and Alliance for Board Diversity, whose missions are to increase women and minority representation on boards. While it is slow, companies appear to be increasing the number of women on their boards. This year, about one-quarter of all companies said women make up 26 percent to 50 percent of the board, up from 18 percent in 2012. Such increases are particularly noticed among large caps, small caps, and financial services companies, with 7, 16, and 12 percentage point increases, respectively. Similar trends, but on a smaller scale, can be found with respect to minority representation. The biggest jump since 2012 is the 9 percentage point increase of financial services companies that have 26 percent to 50 percent minorities on their boards. This is the opposite for small caps, where none have had an increase in minority directors during the past year. Companies would be well advised to seek out business executives and leaders of minority-represented organizations.

DID YOU KNOW?

In 2014, Wal-Mart Stores added 30-year-old Kevin Systrom, former CEO and co-founder of Instagram, to its board of directors. According to a September 29, 2014, Wall Street Journal article, the company was looking for a new director with technology experience. This is the first public company board position for Systrom.

While the needle has moved slightly on gender and ethnicity, it appears to be at a standstill when it comes to adding younger board members. There has been little change since the 2012 report; currently, more than half of the companies report that their youngest director is older than 50. Small caps have the youngest board members, with 15 percent having a director in the age range of 26 to 40. Some predict that more companies will likely take a chance on filling board seats with younger, more

inexperienced directors, who are often viewed as having high technological aptitude and ingenuity.

Wanted: industry, c-suite, and international business experience

The top three desired board skills and experience remain unchanged from the 2012 report: industry (similar to that of the respective company), C-suite experience, and international business exposure. A breakdown by company type shows that one-third of small caps selected mergers and acquisitions experience, highlighting a focus area for these companies. It is interesting to note that in the "other" category, some respondents indicated social and digital media were desired board skills, reflecting our increasingly digital society and a greater focus on cyber security. Some would speculate that this could trigger a rise in younger board members, as many see younger generations as being highly tech savvy and leaders in developing innovative technological ideas.

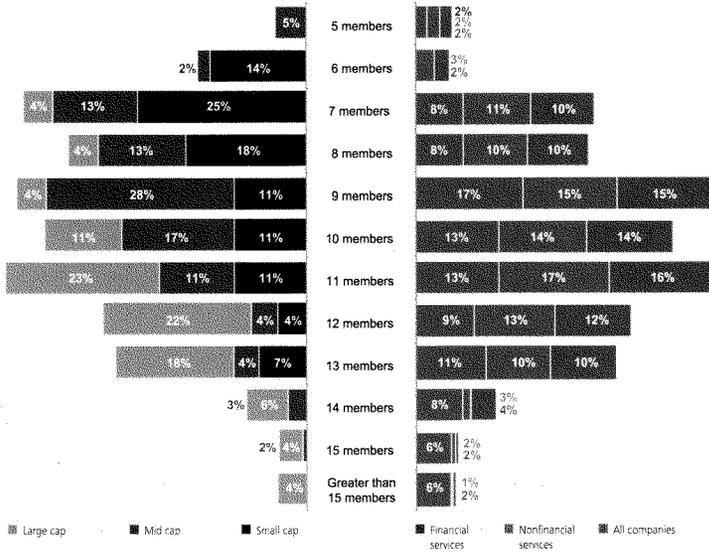
A majority of companies have declassified boards, except at small caps

Across all companies surveyed, there has been no change in board classification; 70 percent have a declassified structure. Any notable changes can be found among the financial services companies, with 75 percent now having a declassified board versus 67 percent in 2012. But this is reversed at small cap companies, where the number of classified boards increased 8 percentage points in 2014. It is possible that this figure represents new public companies that may not yet face the same pressure as larger companies to move to annual director elections. According to a WilmerHale LLP report, there were 178 IPOs in 2013, reflecting a 75 percent increase from the previous year.

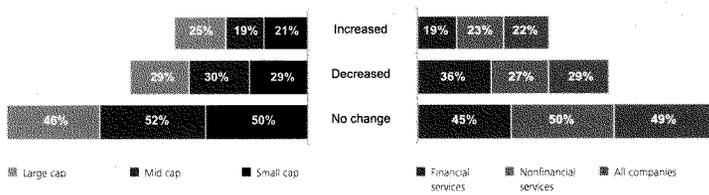
Findings on majority voting vary

Results on majority voting policies present interesting trends. While there is no change among large caps since the 2012 report (86 percent), significantly fewer mid caps implement majority voting for uncontested director elections (49 percent, down from 67 percent in 2012). A similar yet less drastic decline by 12 percentage points is seen among the small caps. As in the case of board classification, a similar conjecture can be made here: companies that recently issued an IPO may not yet have high demand for implementing majority voting.

4. What is your current board size?



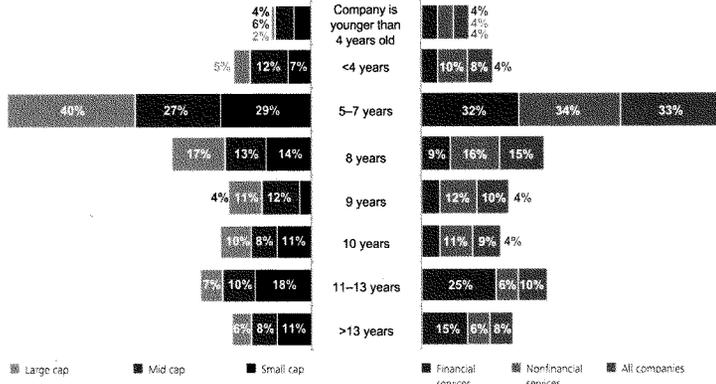
5. How has your board size changed over the past year?



Board selection, recruitment, and composition

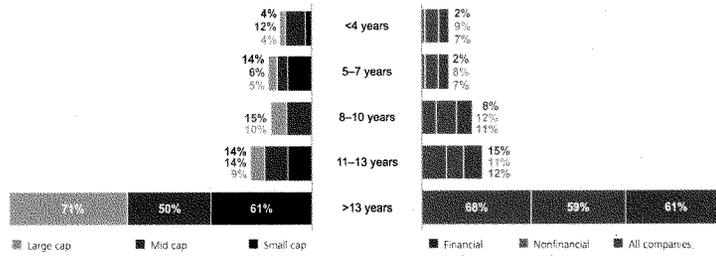
Respondents answering "Don't know/Not applicable" were as follows: 3% large cap, 4% mid cap, 4% small cap, 4% financial services, 3% nonfinancial services, and 3% all companies.

6. What is the average tenure of all non-management members of your board?

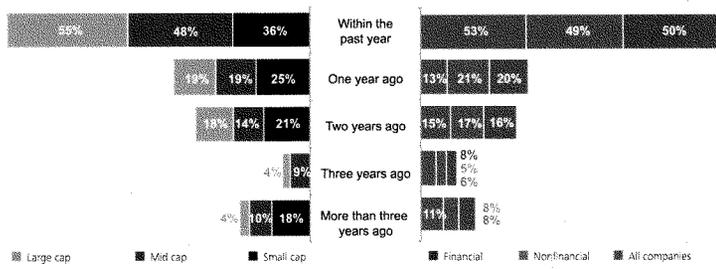


Respondents answering "Don't know/Not applicable" were as follows: 2% large cap, 3% mid cap, 7% small cap, 6% financial services, 2% nonfinancial services, and 3% all companies.

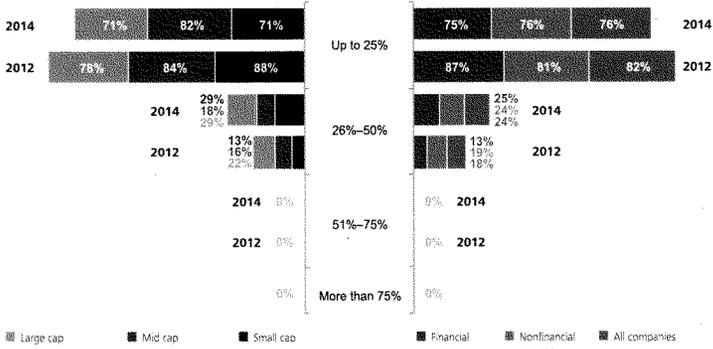
7. How long has your longest non-management director been a member of your board?



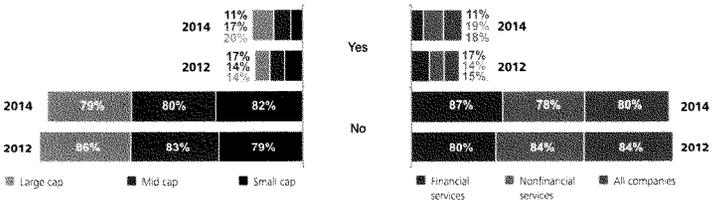
8. When did the most recent director join your board?



9. What percentage of board members are women?



10. Compared to last year, have you had an increase in the number of women directors serving on your board?

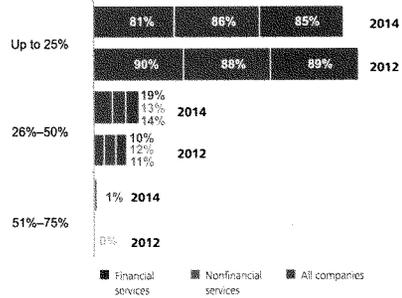
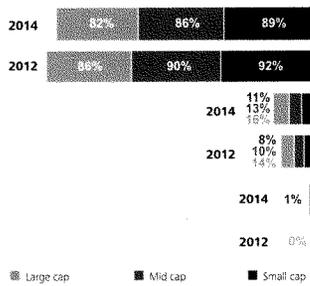


In 2014, respondents answering "Don't know/Not applicable" were as follows: 1% large cap, 4% mid cap, 7% small cap, 2% financial services, 3% nonfinancial services, and 3% all companies. In 2012, respondents answering "Don't know/Not applicable" were as follows: 0% large cap, 3% mid cap, 4% small cap, 3% financial services, 2% nonfinancial services, and 2% all companies.

Board selection, recruitment, and composition

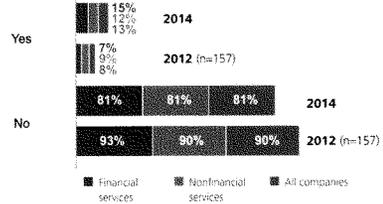
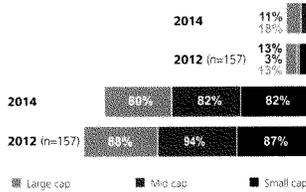
In 2014, respondents answering "Don't know/Not applicable" were as follows: 1% large cap, 1% mid cap, 0% small cap, 0% financial services, 1% nonfinancial services, and 1% all companies. In 2012, no respondents answered "Don't know/Not applicable".

11. What percentage of board members are minorities?

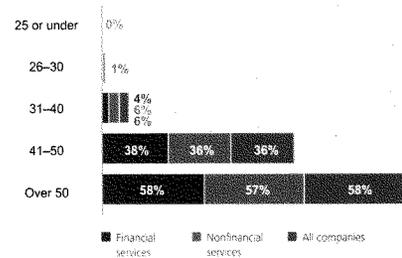
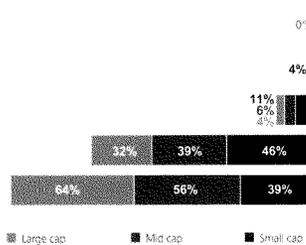


In 2014, respondents answering "Don't know/Not applicable" were as follows: 3% large cap, 6% mid cap, 18% small cap, 4% financial services, 7% nonfinancial services, and 6% all companies. In 2012, respondents answering "Don't know/Not applicable" were as follows: 0% large cap, 3% mid cap, 0% small cap, 0% financial services, 2% nonfinancial services, and 1% all companies.

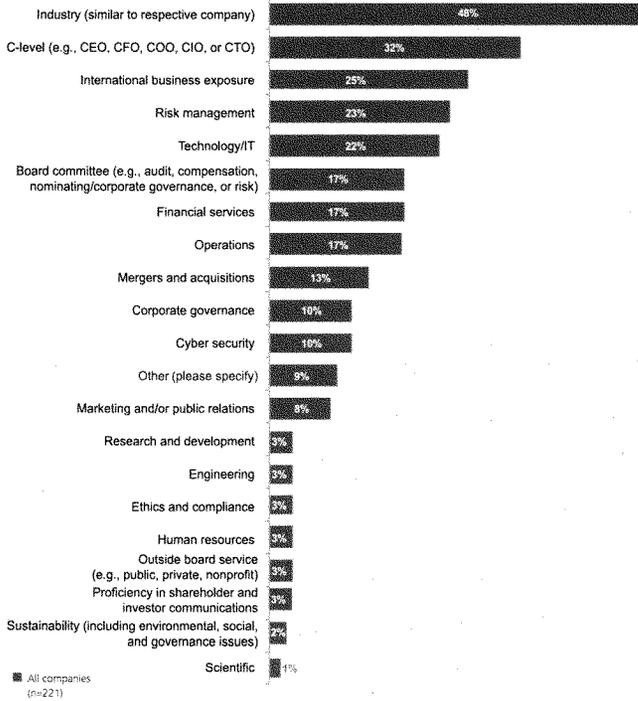
12. Compared to last year, have you had an increase in the number of minority directors serving on your board?



13. What is the age of the youngest director currently serving on your board?



14. What will be the most desired skills and experience needed to contribute to your board's success in the next two years?
 Participants were asked to make three selections.

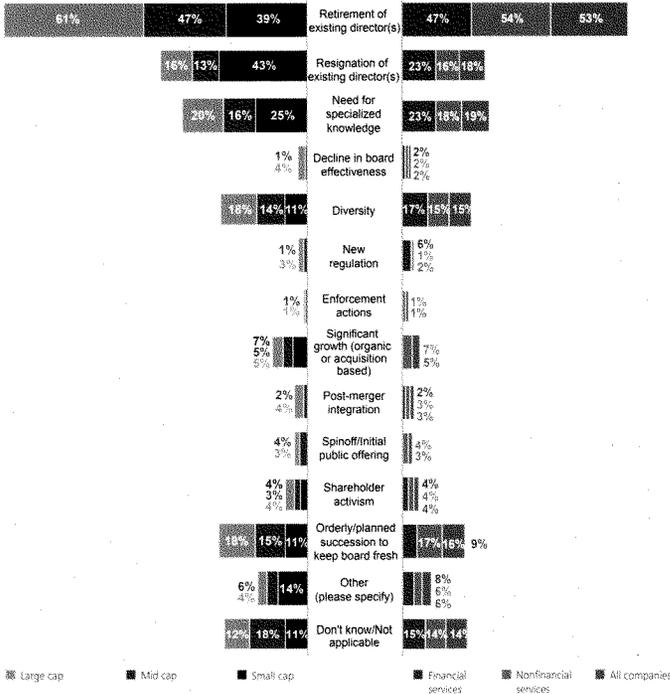


Board selection, recruitment, and composition

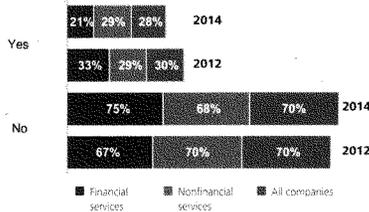
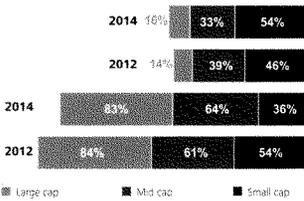
Skills and experience	Small cap (n=25)	Mid cap (n=95)	Large cap (n=101)	Financial services (n=49)	Non-financial services (n=172)	All companies (n=221)
Industry (similar to respective company)	40%	53%	46%	31%	53%	48%
C-level (e.g., CEO, CFO, COO, CIO, or CTO)	28%	26%	39%	22%	35%	32%
International business exposure	4%	26%	30%	4%	31%	25%
Risk management	32%	19%	25%	51%	15%	23%
Technology/IT	4%	21%	27%	29%	20%	22%
Board committee (e.g., audit, compensation, nominating/corporate governance, or risk)	28%	17%	15%	27%	15%	17%
Financial services	24%	20%	13%	45%	9%	17%
Operations	12%	19%	16%	4%	20%	17%
Mergers and acquisitions	36%	16%	4%	12%	13%	13%
Corporate governance	24%	8%	9%	10%	10%	10%
Cyber security	8%	12%	10%	16%	9%	10%
Other (please specify)	20%	4%	10%	10%	8%	9%
Marketing and/or public relations	0%	12%	6%	6%	8%	8%
Research and development	8%	2%	3%	2%	3%	3%
Engineering	4%	2%	3%	0%	3%	3%
Ethics and compliance	0%	5%	1%	2%	3%	3%
Human resources	12%	1%	2%	6%	2%	3%
Outside board service (e.g., public, private, nonprofit)	4%	2%	3%	2%	3%	3%
Proficiency in shareholder and investor communications	8%	2%	2%	2%	3%	3%
Sustainability (including environmental, social, and governance issues)	0%	3%	2%	2%	2%	2%
Scientific	0%	1%	2%	0%	2%	1%

Question 14 allowed respondents to supply specific skills and experience related to their answer selection. With regard to desired C-suite experience, almost all respondents said CEO and CFO experience was important, and a few noted CIO and COO experience. Other choices were compensation committee experience. For outside board service, all respondents specified public company board experience as a requirement. In the "other" category, responses included social media, digital media, e-commerce, and regulatory experience.

15. What triggers drove any recent, or pending, change in your board composition? (Select all that apply)



16. Is your board classified?

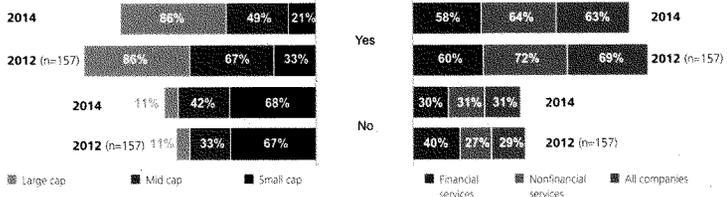


In 2014, respondents answering "Don't know/Not applicable" were as follows: 1% large cap, 3% mid cap, 11% small cap, 4% financial services, and 3% all companies. In 2012, respondents answering "Don't know/Not applicable" were as follows: 2% large cap, 0% mid cap, 0% small cap, 0% financial services, 0% non-financial services, and 1% all companies.

Board selection, recruitment, and composition

In 2014, respondents answering "Don't know/Not applicable" were as follows: 3% large cap, 9% mid cap, 11% small cap, 11% financial services, 5% nonfinancial services, and 6% all companies. In 2012, respondents answering "Don't know/Not applicable" were as follows: 3% large cap, 0% mid cap, 0% small cap, 0% financial services, 1% nonfinancial services, and 1% all companies.

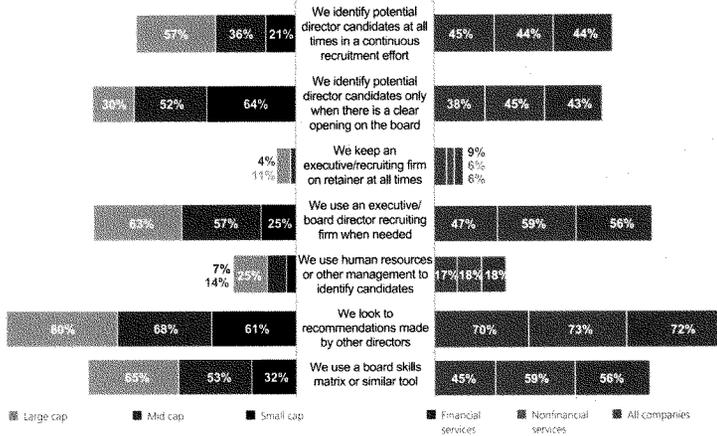
17. For uncontested director elections, has your company implemented majority voting?



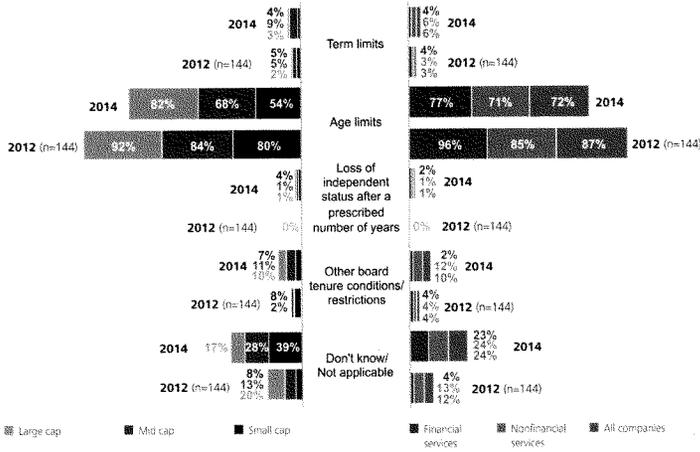
Respondents answering "Other" were as follows: 1% large cap, 0% mid cap, 4% small cap, 0% financial services, 1% nonfinancial services, and 1% all companies.

Respondents answering "Don't know/Not applicable" were as follows: 0% large cap, 4% mid cap, 4% small cap, 2% financial services, 2% nonfinancial services, and 2% all companies.

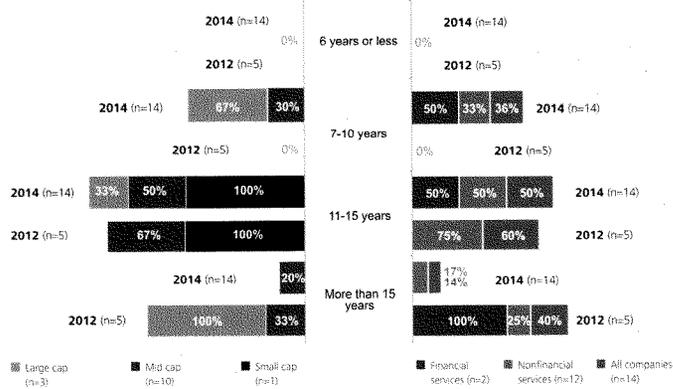
18. Which of the following describes your board's timeline and practices related to director recruitment? (Select all that apply)



19. Does your board have any of the following refreshment policies? (Select all that apply)



19a. Please specify the term:



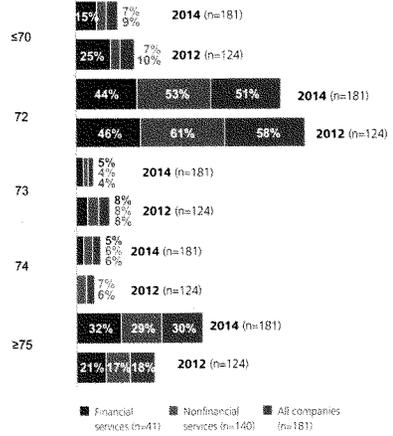
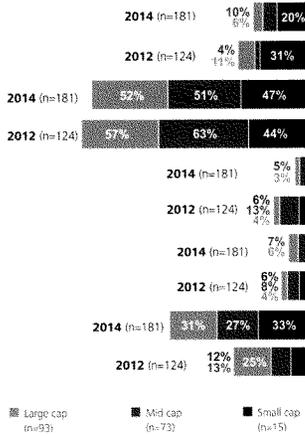
In 2014, less than the full survey population responded to this question; therefore, 'n' values are provided in the chart legend.

Board selection, recruitment, and composition

In 2014, less than the full survey population responded to this question, therefore, 'n' values are provided in the chart legend.

In 2014, respondents answering "71" were as follows: 1% large cap, 0% mid cap, 0% small cap, 0% financial services, 1% nonfinancial services, and 1% all companies. In 2012, no respondents answered "71".

19b. Please specify the required retirement age:



FINDINGS AND TRENDS

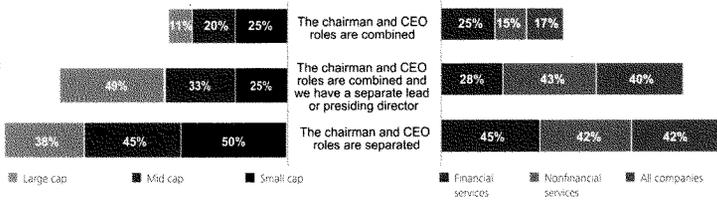
Board leadership

Smaller companies combine chairman and CEO roles

While still an important governance topic, leadership structure remains fluid. When compared to a similar question asked in the 2012 report, there appears to be an increase of small and mid cap companies having a combined leadership structure. Almost half (49 percent) of the large caps have a combined chairman/CEO model with

a lead or presiding director; 38 percent have a separate chairman and CEO; and 11 percent combine the roles without a separate lead or presiding director. Mid caps and small caps have a larger percentage of separate chairman positions (45 percent and 50 percent, respectively). Investors continue to focus on combined models and the robustness of the lead/presiding director role.

20. Which of the following best describes your board leadership structure?



Respondents answering "Other" were as follows: 2% large cap, 1% mid cap, 0% small cap, 2% financial services, 1% nonfinancial services, and 1% all companies.

Board meetings and materials

Most boards hold seven or more board meetings a year

Board meeting frequency has remained relatively constant since the 2012 report. Sixty percent of boards meet seven or more times a year. There were slight decreases in the number of large and mid cap companies meeting 10 or more times a year, which appear to have moved into the range of seven to nine meetings a year. Both financial and nonfinancial services companies show a decrease among those meeting 10 or more times a year. Instead, more of these companies are now meeting seven to nine times a year. The overall decrease in meeting frequency could be a result of boards returning to a sense of normalcy after a tumultuous period during and following the financial crisis.

Most boards are meeting for three to five hours, which is also in line with the 2012 results. The most significant change is among small caps, where more companies (25 percentage point increase) are meeting for three to five hours instead of six to eight hours.

Sixty-nine percent of all companies send board materials six to 10 days in advance of the meeting

Eighty-two percent of large cap respondents (a near 10 percentage point increase) said board meeting information is provided six to 10 days in advance of the board meeting. It was, however, the reverse for other companies. Thirty-

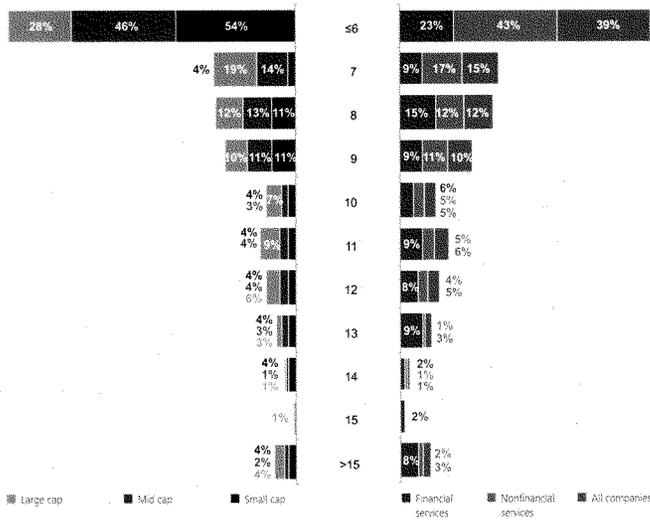
nine percent of small caps (a ten percentage point increase) are sending materials five days in advance of board meetings and 12 percent of mid caps (an 8 percentage point increase) are sending less than five days in advance as compared to 2012.

Use of board portals is now almost ubiquitous. Used by 84 percent of all companies surveyed, they are clearly the primary mechanism for distributing board materials. This represents a 20 percentage point increase at large and mid cap companies when compared to the 2012 report.

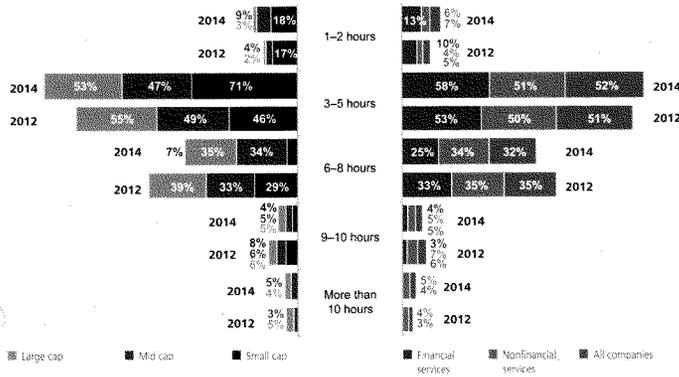
Slight decrease in companies allowing shareholders to call special meetings

Despite the uptick in shareholder proposals, there has been a slight decrease since the 2012 report of large and small cap companies allowing shareholders to call special meetings. Of all companies surveyed, 46 percent permit special meetings by shareholders (but with a minimum ownership threshold) and 39 percent do not permit them at all. Those with a threshold typically chose "10 percent or less;" or "25 percent." In the financial services industry, there was a 6 percent increase (up from zero) in the number of companies permitting shareholders to call special meetings without any restriction; there was virtually no change among the nonfinancial services companies, which are split on permitting this shareholder right.

21. How many times did the board meet, including special meetings, (whether live or via teleconference/videoconference) in the past full fiscal year?

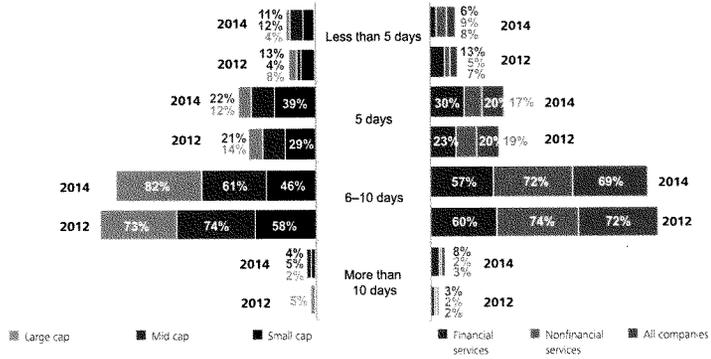


22. How many hours does a typical meeting of the full board last? (Do not count time spent on committee meetings)

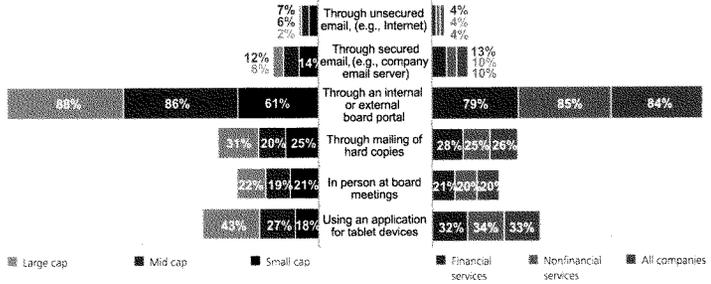


Board meetings and materials

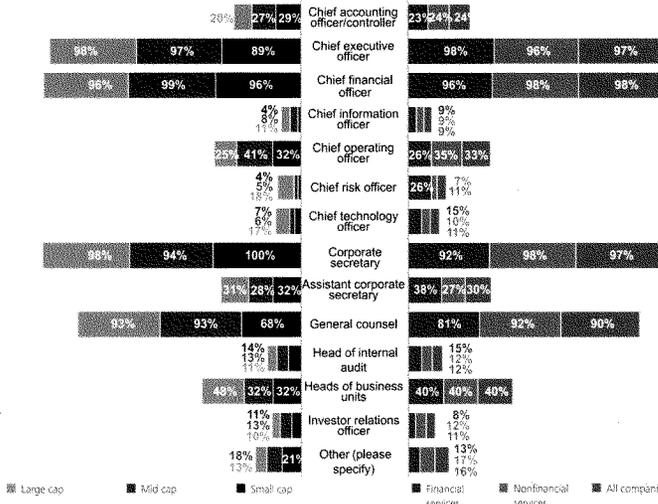
23. How many days in advance are board meeting materials provided to board members?



24. Please specify how your company distributes board materials. (Select all that apply)

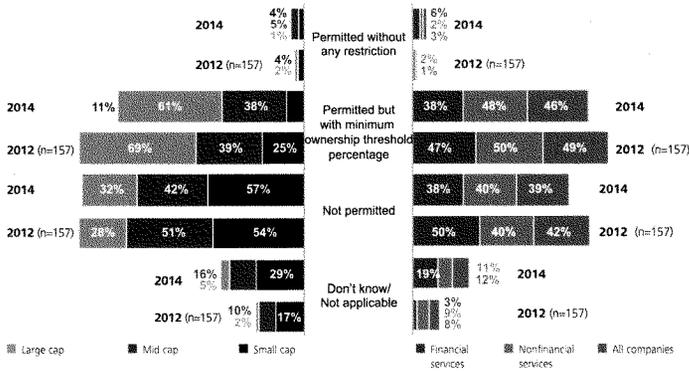


25. The following members of management regularly attend board meetings: (Select all that apply)



A number of respondents supplied an answer of "other (please specify)." Some of the most common responses were all senior vice presidents, the chief human relations officer, and the chief administrative officer.

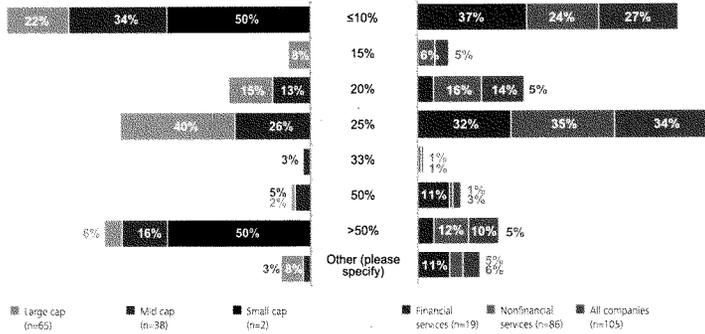
26. Does your company permit shareholders to call special shareholder meetings?



Board meetings and materials

Less than the full survey population responded to this question; therefore, 'n' values are provided in the chart legend.

26a. Specify the threshold percentage:



Trends in minimum ownership threshold required to call special shareholder meetings

Ownership threshold	Large cap			Mid cap			Small cap			Financial services			Nonfinancial services			All companies		
	2014	2012	2011	2014	2012	2011	2014	2012	2011	2014	2012	2011	2014	2012	2011	2014	2012	2011
≤10%	22%	16%	18%	34%	16%	23%	50%	33%	50%	37%	14%	17%	24%	18%	25%	27%	17%	22%
15%	8%	9%	3%	0%	0%	0%	0%	17%	0%	0%	7%	0%	6%	7%	2%	5%	7%	1%
20%	15%	5%	12%	13%	0%	15%	0%	0%	0%	5%	0%	17%	16%	3%	11%	14%	3%	11%
25%	40%	59%	55%	26%	16%	23%	0%	33%	17%	32%	57%	50%	35%	39%	34%	43%	39%	
33%	0%	0%	0%	3%	4%	4%	0%	0%	0%	0%	0%	0%	1%	2%	2%	1%	1%	2%
50%	2%	5%	6%	5%	28%	12%	0%	0%	0%	11%	7%	0%	1%	13%	11%	3%	12%	7%
>50%	6%	2%	0%	16%	32%	19%	50%	17%	33%	5%	14%	17%	12%	13%	9%	10%	13%	11%
Other	8%	5%	6%	3%	4%	4%	0%	0%	0%	11%	0%	0%	5%	5%	6%	6%	4%	6%

Source: Board practices reports issued in 2011, 2012, and 2014 by the Society of Corporate Secretaries and Governance Professionals and Deloitte LLP.

Board committee structures and roles

More risk committees at financial services companies

A board-level risk committee, often tasked with overseeing the risk management infrastructure and risk exposure, assisting with risk appetite and tolerance, and advising

In determining whether to form a risk committee, boards may consider questions like: Which risks will the risk committee oversee and which will be left to other board committees? Which board members have the experience to be on the risk committee, and how can the company attract and cultivate appropriate risk committee members? How will the board keep abreast of changes in regulations and in risk governance and management practices?

Source: Risk Intelligent Governance: Lessons from state-of-the-art board practices, Deloitte

the board on risk strategy, may not be needed at all companies. In comparison to the 2012 report, there was an 11 percentage point increase in the number of companies having standing risk committees, up to 20 percent, and most were financial services companies (where those with such a committee increased by about 30 percentage points). This could be attributable to Dodd-Frank Act mandates applicable to certain large banking organizations. Mid cap, small cap, and non-financial services companies also experienced increases in standing risk committees, at 4, 8, and 4 percentage points, respectively, up to 11 percent, 13 percent, and 8 percent. Among all respondents, there has been an increase in those meeting 10 or more times a year, from 0 percent in 2012 to 18 percent in 2014.

Almost one-half of all companies have a standing finance committee, and it appears to be most common among large caps (60 percent) and nonfinancial services companies (52 percent). Only 4 percent of companies have a standing cyber security and IT committee, but it will be interesting to see whether this changes in coming years as boards increase their oversight of this area.

Committee chairman rotation remains uncommon. Similar to the 2012 results, the majority of respondents continue to indicate that their boards do not have rotation policies for their committee chairmen (79 percent) or committee members (88 percent). For the few that have a policy in place, there is very little disparity in whether the policy calls for rotation annually, every two years, or every three years. A few said rotation policies are reviewed annually or periodically.

Board committee structures and roles

27. Please complete the following table with regard to the specific committee practices of your board.

The tables below present complete results for the large, mid, and small cap companies. For the financial and nonfinancial services companies, results pertaining to the risk committee are provided. Please refer to Appendix B for complete results for this question.

Large cap	Standing committee		Number of members			Meeting frequency (number of meetings annually)				Average length of meetings (hours)		
	Yes	No	1-4	5-9	≥10	1-3	4-6	7-9	≥10	<2	2-3	>3
Audit	69	0	32	37	0	0	16	32	21	26	38	5
	100%	0%	46%	54%	0%	0%	23%	46%	30%	38%	55%	7%
Compensation	113	1	55	57	1	4	74	26	7	42	63	6
	99%	1%	49%	50%	1%	4%	67%	23%	6%	38%	57%	5%
Nom/Corp Gov	112	2	56	54	2	13	85	12	0	81	29	0
	98%	2%	50%	48%	2%	12%	77%	11%	0%	74%	26%	0%
Executive	42	52	16	27	1	26	3	0	3	26	5	0
	45%	55%	36%	61%	2%	81%	9%	0%	9%	84%	16%	0%
Risk	24	62	10	12	2	2	11	6	4	6	11	6
	28%	72%	42%	50%	8%	9%	48%	26%	17%	26%	48%	26%
Finance	56	38	24	31	1	10	29	11	4	30	22	2
	60%	40%	43%	55%	2%	19%	54%	20%	7%	56%	41%	4%
Investment	12	69	4	7	1	4	7	0	0	4	6	0
	15%	85%	33%	58%	8%	36%	64%	0%	0%	40%	60%	0%
Strategy	3	73	0	1	1	0	2	0	0	0	1	0
	4%	96%	0%	50%	50%	0%	100%	0%	0%	0%	100%	0%
Regulatory and Compliance	10	67	5	4	0	0	8	1	0	2	6	1
	13%	87%	56%	44%	0%	0%	89%	11%	0%	22%	67%	11%
Public Policy	15	61	8	7	0	5	10	0	0	13	2	0
	20%	80%	53%	47%	0%	33%	67%	0%	0%	87%	13%	0%
Cyber security and IT	4	72	3	1	0	0	4	0	0	1	3	0
	5%	95%	75%	25%	0%	0%	100%	0%	0%	25%	75%	0%
Sustainability	8	68	3	5	0	3	5	0	0	4	4	0
	11%	89%	38%	63%	0%	38%	63%	0%	0%	50%	50%	0%
Science and Technology	16	64	6	7	1	8	6	0	0	4	6	4
	20%	80%	43%	50%	7%	57%	43%	0%	0%	29%	43%	29%
Safety	11	65	3	9	0	3	8	1	0	4	6	0
	14%	86%	25%	75%	0%	25%	67%	8%	0%	40%	60%	0%

Mid cap	Standing committee		Number of members			Meeting frequency (number of meetings annually)				Average length of meetings (hours)		
	Yes	No	1-4	5-9	≥10	1-3	4-6	7-9	≥10	<2	2-3	>3
Audit	71	1	48	23	0	0	35	30	6	23	46	2
	99%	1%	68%	32%	0%	0%	49%	42%	8%	32%	65%	3%
Compensation	107	1	81	26	0	14	76	16	0	61	40	4
	99%	1%	76%	24%	0%	13%	72%	15%	0%	58%	38%	4%
Nom/Corp Gov	104	2	79	25	0	30	68	4	1	84	17	0
	98%	2%	76%	24%	0%	29%	66%	4%	1%	83%	17%	0%
Executive	35	46	23	12	1	20	1	1	1	23	0	1
	43%	57%	64%	33%	3%	87%	4%	4%	4%	96%	0%	4%
Risk	8	62	7	1	0	2	4	0	2	3	5	0
	11%	89%	88%	13%	0%	25%	50%	0%	25%	38%	63%	0%
Finance	33	52	24	10	0	11	17	4	2	20	10	4
	39%	61%	71%	29%	0%	32%	50%	12%	6%	59%	29%	12%
Investment	9	59	3	4	1	1	4	1	1	6	0	1
	13%	87%	38%	50%	13%	14%	57%	14%	14%	86%	0%	14%
Strategy	3	64	1	2	0	1	2	0	0	1	0	2
	4%	96%	33%	67%	0%	33%	67%	0%	0%	33%	0%	67%
Regulatory and Compliance	3	63	2	1	0	1	0	1	1	3	0	0
	5%	95%	67%	33%	0%	33%	0%	33%	33%	100%	0%	0%
Public Policy	0	66	0	0	0	0	0	0	0	0	0	0
	0%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Cyber security and IT	2	64	0	1	0	0	1	0	0	0	0	1
	3%	97%	0%	100%	0%	0%	100%	0%	0%	0%	0%	100%
Sustainability	4	63	1	1	0	1	1	0	0	2	0	0
	6%	94%	50%	50%	0%	50%	50%	0%	0%	100%	0%	0%
Science and Technology	5	63	3	2	0	1	4	0	0	3	1	1
	7%	93%	60%	40%	0%	20%	80%	0%	0%	60%	20%	20%
Safety	6	64	4	2	0	3	2	1	0	4	2	0
	9%	91%	67%	33%	0%	50%	33%	17%	0%	67%	33%	0%

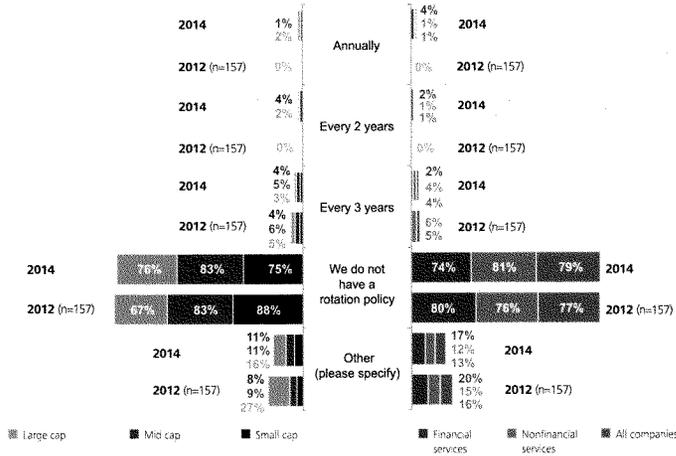
Board committee structures and roles

Small cap	Standing committee		Number of members			Meeting frequency (number of meetings annually)				Average length of meetings (hours)		
	Yes	No	1-4	5-9	≥10	1-3	4-6	7-9	≥10	<2	2-3	>3
Audit	18	1	12	7	0	2	11	6	0	11	8	0
	95%	5%	58%	42%	0%	1%	39%	43%	17%	58%	42%	0%
Compensation	25	1	17	9	0	4	18	3	1	19	7	0
	96%	4%	65%	35%	0%	15%	69%	12%	4%	73%	27%	0%
Nom/Corp Gov	25	1	20	6	0	15	10	1	0	24	2	0
	96%	4%	77%	23%	0%	58%	38%	4%	0%	92%	8%	0%
Executive	11	11	7	5	0	8	2	0	2	11	1	0
	50%	50%	58%	42%	0%	67%	17%	0%	17%	92%	8%	0%
Risk	2	14	1	1	0	0	2	0	0	2	0	0
	13%	88%	50%	50%	0%	0%	100%	0%	0%	100%	0%	0%
Finance	5	13	3	2	0	1	2	1	1	3	2	0
	28%	72%	60%	40%	0%	20%	40%	20%	20%	60%	40%	0%
Investment	4	14	0	4	1	0	4	0	0	3	1	0
	22%	78%	0%	80%	20%	0%	100%	0%	0%	75%	25%	0%
Strategy	3	14	0	2	1	2	1	0	0	2	1	0
	18%	82%	0%	67%	33%	67%	33%	0%	0%	67%	33%	0%
Regulatory and Compliance	3	13	2	1	0	1	2	0	0	3	0	0
	19%	81%	67%	33%	0%	33%	67%	0%	0%	100%	0%	0%
Public Policy	0	16	0	1	0	0	0	0	0	0	0	0
	0%	100%	0%	100%	0%	0%	0%	0%	0%	0%	0%	0%
Cyber security and IT	1	15	1	1	0	0	1	0	0	1	0	0
	6%	94%	50%	50%	0%	0%	100%	0%	0%	100%	0%	0%
Sustainability	0	16	0	1	0	0	0	0	0	0	0	0
	0%	100%	0%	100%	0%	0%	0%	0%	0%	0%	0%	0%
Science and Technology	1	16	1	1	0	0	0	1	0	1	0	0
	6%	94%	50%	50%	0%	0%	0%	100%	0%	100%	0%	0%
Safety	1	15	0	1	0	0	1	0	0	1	0	0
	6%	94%	0%	100%	0%	0%	100%	0%	0%	100%	0%	0%

Financial services	Standing committee		Number of members			Meeting frequency (number of meetings annually)				Average length of meetings (hours)		
	Yes	No	1-4	5-9	≥10	1-3	4-6	7-9	≥10	<2	2-3	>3
Risk	24	17	12	10	2	0	13	5	5	8	9	6
	59%	41%	50%	42%	8%	0%	57%	22%	22%	35%	39%	26%

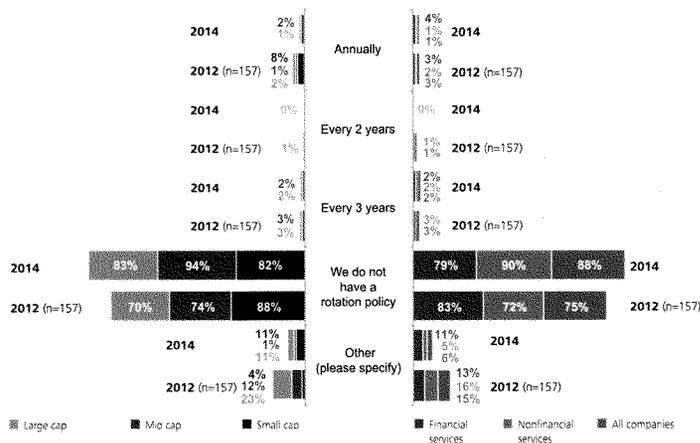
Nonfinancial services	Standing committee		Number of members			Meeting frequency (number of meetings annually)				Average length of meetings (hours)		
	Yes	No	1-4	5-9	≥10	1-3	4-6	7-9	≥10	<2	2-3	>3
Risk	10	121	6	4	0	4	4	1	1	3	7	0
	8%	92%	60%	40%	0%	40%	40%	10%	10%	30%	70%	0%

28. Provide the frequency with which committee chair rotation takes place:



In 2014, respondents answering "Don't know/Not applicable" were as follows: 2% large cap, 0% mid cap, 7% small cap, 2% financial services, 2% nonfinancial services, and 2% all companies. In 2012, respondents answering "Don't know/Not applicable" were as follows: 2% large cap, 3% mid cap, 0% small cap, 0% financial services, and 2% all companies.

29. Provide the frequency with which committee membership rotation takes place:



In 2014, respondents answering "Don't know/Not applicable" were as follows: 4% large cap, 2% mid cap, 7% small cap, 4% financial services, and 3% all companies. In 2012, respondents answering "Don't know/Not applicable" were as follows: 2% large cap, 9% mid cap, 0% small cap, 0% financial services, 6% nonfinancial services, and 4% all companies.

Board orientation and training

More boards receive education on a variety of topics. Survey results show that the majority of boards surveyed are receiving training on a number of different topics, ranging from market risk to ethics and regulatory issues. In 2014, the most common topics for training were reported to be company policies, board fiduciary duties, insider trading, and industry-specific topics, which is not surprising given the increased SEC enforcement focus.

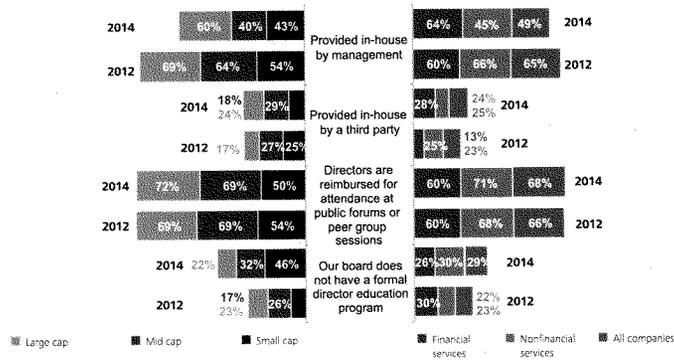
related to the business. This latter trend is the same for mid caps, which have also had notable increases in board education on financial liquidity and risk and on ethics, at 12 and 17 percent point increases, respectively (to 42 percent and 56 percent). A 16 percentage point increase of small caps (46 percent) say they receive board education on ethics, a 9 percentage point increase (18 percent) say they receive education on market risk, but there is a 16 percentage point decrease (32 percent) of those that have training on risk oversight.

Specific to large cap board education topics, 48 percent (a 10 percentage point increase) say they are receiving training on financial liquidity and risk and 67 percent (a near 20 percentage point increase) on regulatory issues

In 2014, respondents answering "Other" were as follows: 3% large cap, 2% mid cap, 4% small cap, 0% financial services, 3% nonfinancial services, and 2% all companies. In 2012, respondents answering "Other" were as follows: 3% large cap, 0% mid cap, 0% small cap, 0% financial services, 3% nonfinancial services, and 1% all companies.

In 2014, respondents answering "Don't know/Not applicable" were as follows: 1% large cap, 1% mid cap, 4% small cap, 4% financial services, 1% nonfinancial services, and 1% all companies. In 2012, respondents answering "Don't know/Not applicable" were as follows: 0% large cap, 3% mid cap, 8% small cap, 0% financial services, 3% nonfinancial services, and 3% all companies.

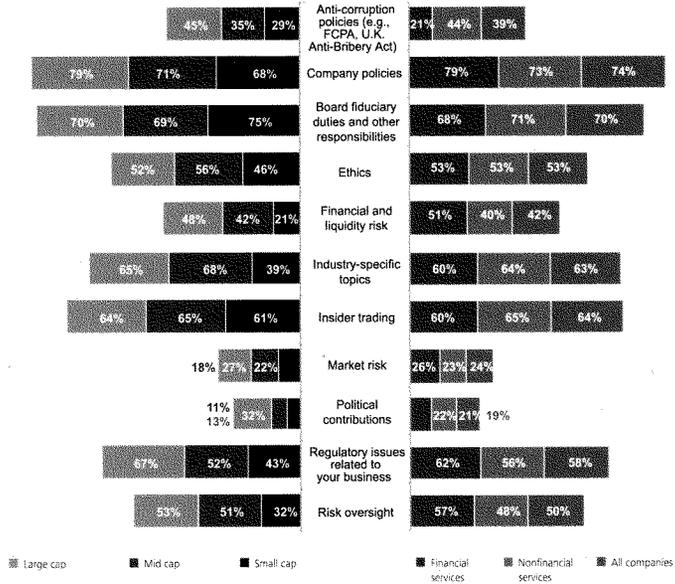
30. Which of the following best describes your board's ongoing director education program? (Select all that apply)



Respondents answering "Other" were as follows: 6% large cap, 1% mid cap, 7% small cap, 6% financial services, 4% nonfinancial services, and 4% all companies.

Respondents answering "Don't know/Not applicable" were as follows: 9% large cap, 12% mid cap, 14% small cap, 8% financial services, 12% nonfinancial services, and 11% all companies.

31. Education for new and existing board directors is provided on these topics: (Select all that apply)



Board evaluations

Fewer small caps with formal director evaluation processes

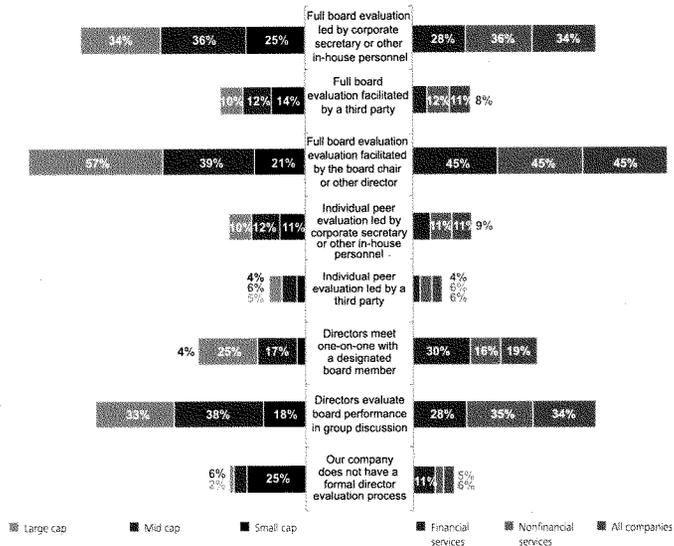
Overall, the most prominent way that boards conduct their evaluations is via facilitation by the board chairman or other director, as noted by 45 percent of the respondents. In 2012, 8 percent of small cap companies said they did not have a formal director evaluation process. In 2014, this increased to 25 percent. There are a number of other ways that survey respondents evaluate directors, such as:

- Directors engage in self-evaluation for committees on which they serve and the board.
- Each committee and board does a self-evaluation, and the chairman meets with each director for peer evaluations and reports results to lead independent director.
- The board and each committee evaluates itself via individually completed brief evaluation forms, which are then reviewed and reported on by the chairmen of those groups.

Respondents answering "Other" were as follows: 5% large cap, 3% mid cap, 14% small cap, 6% financial services, 5% nonfinancial services, and 5% all companies.

Respondents answering "Don't know/Not applicable" were as follows: 0% large cap, 3% mid cap, 0% small cap, 0% financial services, 2% nonfinancial services, and 1% all companies.

32. How are your directors evaluated? (Select all that apply)



FINDINGS AND TRENDS

Strategy and risk

The majority of respondents discuss strategy at every board meeting

Strategy is the first priority area for boards in 2015 (as indicated by the last question of the survey), and results show that 52 percent of respondents say that strategic objectives are discussed at every board meeting. Another 29 percent said they are discussed annually. With regard to discussion of strategic objectives, some respondents selected the "other" answer choice and gave examples such as:

- An annual "deep dive" updated during the year
- Annually plus discussion at other meetings
- Semi-annually and more frequently when needed.

Boards play a critical role in advising management on a strategic plan that considers the organization's mission, shareholder expectations, and a short-, mid-, and long-range focus. This role extends to the active monitoring of strategy execution and related internal and external communications.

While the frequency of offsite strategy retreats may have decreased, strategic discussions have not.

The majority of respondents, 87 percent, said the board is briefed on strategic alternatives, and another 83 percent said the information the board receives on risk associated with the company strategy has been enhanced during the past year. Further, 68 percent say the full board discusses significant risks to the company more frequently than once a year.

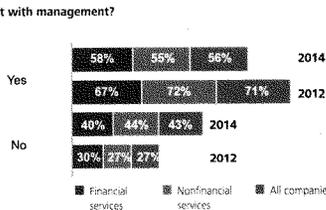
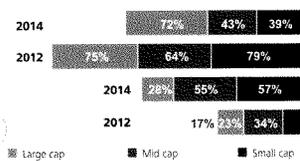
Risk oversight is becoming more formalized

Where and how board-level risk oversight is handled is a frequent question, and our survey shows it is typically handled by either the audit committee or the full board. However, when risk oversight is shared by multiple board committees, the results show that boards take a variety of approaches to coordination. The majority of respondents (66 percent) said the board has a detailed discussion on risk at full board meetings, a 13 percentage point increase since the 2012 report. Forty percent said committee meeting minutes and materials are shared broadly, and another 32 percent said they have cross-membership of committees. More boards are formalizing their processes related to risk oversight.

Boards are considering a number of capital allocation strategies

As part of their strategy oversight, boards play a critical role in helping management consider alternatives and make decisions on capital allocation. Results show that the alternatives being considered are almost evenly spread across dividends, stock buy-backs, acquisitions, and capital expenditures. Most mid and small caps are focused on acquisitions and capital expenditures, whereas the emphasis was more on dividends and capital expenditures for large caps.

33. Does your board participate in an offsite strategy retreat with management?

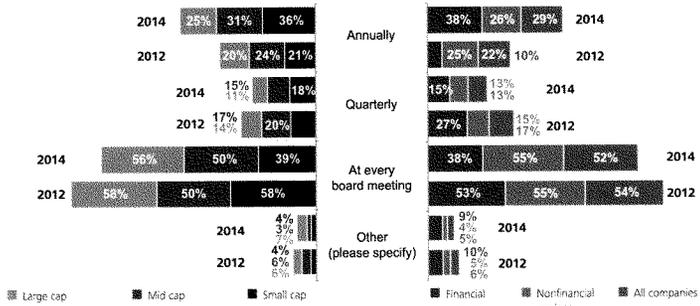


In 2014, respondents answering "Don't know/Not applicable" were as follows: 0% large cap, 3% mid cap, 4% small cap, 2% financial services, and 2% all companies. In 2012, respondents answering "Don't know/Not applicable" were as follows: 2% large cap, 1% mid cap, 4% small cap, 3% financial services, 2% nonfinancial services, and 2% all companies.

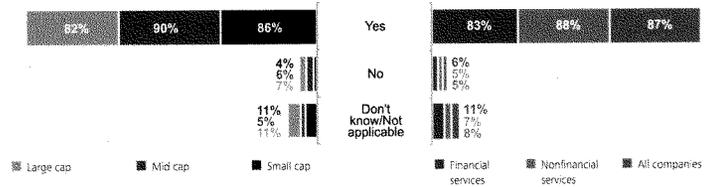
Strategy and risk

In 2014, respondents answering "Don't know/Not applicable" were as follows: 2% large cap, 1% mid cap, 4% small cap, 0% financial services, 2% nonfinancial services, and 2% all companies. In 2012, respondents answering "Don't know/Not applicable" were as follows: 2% large cap, 0% mid cap, 0% small cap, 0% financial services, 1% nonfinancial services, and 1% all companies.

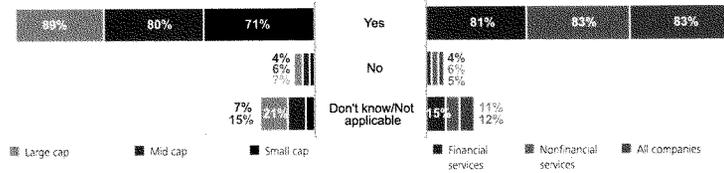
34. How often does the board discuss strategic objectives?



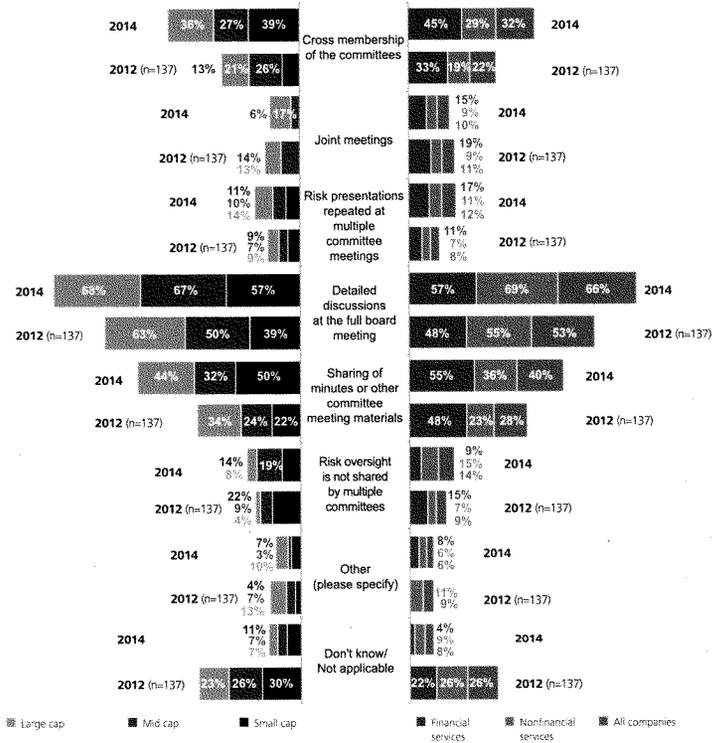
35. Has the board been briefed on strategic alternatives?



36. In the past year, has the board received enhanced information on risks associated with your company's strategy?

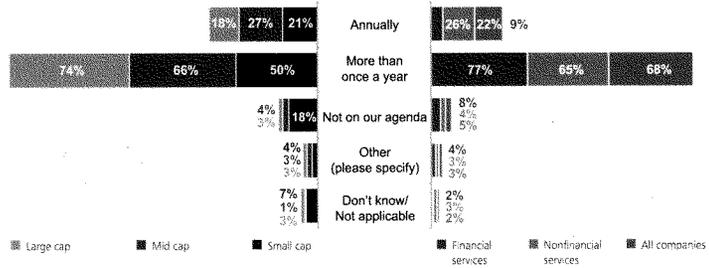


37. If risk oversight is shared by multiple committees, how does the board coordinate these activities? (Select all that apply)



Strategy and Risk

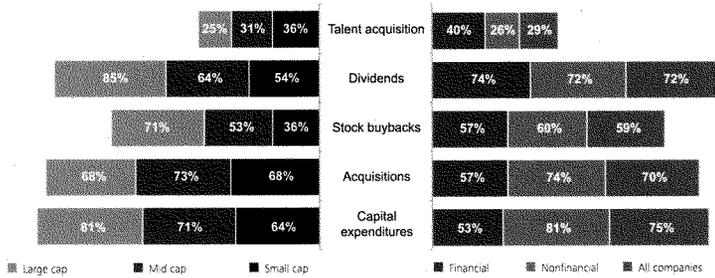
38. How often does the full board discuss the most significant risks to the company?



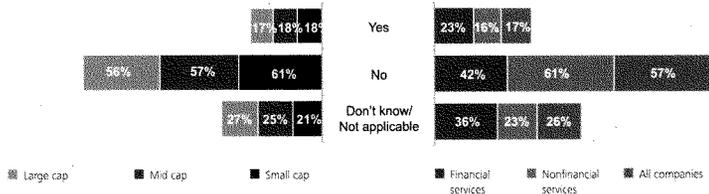
Respondents answering "Other" were as follows: 2% large cap, 3% mid cap, 4% small cap, 3% financial services, 3% nonfinancial services, and 2% all companies.

Respondents answering "Don't know/Not applicable" were as follows: 6% large cap, 5% mid cap, 4% small cap, 8% financial services, 5% nonfinancial services, and 5% all companies.

39. With regard to capital allocation, which of the following strategies has the board considered this year? (Select all that apply)



40. If the board is faced with a potential M&A transaction, does it appoint a special committee of the board?



Audit committee

Audit committees are meeting with more members of management

Similar to what was reported in 2012, almost all audit committees meet with the CFO. Compared to 2012, there is about a 30 percentage point increase of audit committees (58 percent) meeting with their chief compliance officer and about a 20 percentage point increase (34 percent) of those meeting with their chief risk officer. With the recent rise in data breaches and related risks, it is no surprise that more audit committees report meeting with their chief technology/information security officer (CISO). In 2012, only 5 percent were meeting with the CISO, compared to 30 percent in 2014.

With regard to the frequency of face-to-face audit committee meetings, there is little change since the 2012 report.

Increase in the number of internal tips received

There has been little change from the 2012 report with regard to the frequency with which audit committees receive reports on internal tips from the company

hotline; most said frequently (five or more times a year) or sometimes (two to four times a year). However, there has been a rise in the number of tips received, most notably a 15 percentage point increase for nonfinancial services companies and a 14 percentage point increase for both large and mid caps. Small caps reported a 7 percentage point increase; these companies reported no tips in 2012.

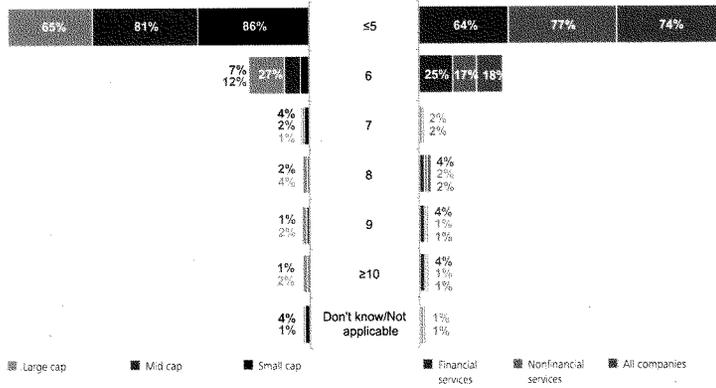
Limits on audit committee service

Similar to 2012, about 60 percent of respondents have limits on audit committee members who also serve on the audit committees of other companies. Of these, very few allow for more than three other audit committees, which is in accordance with the NYSE listing standards and which has become a general rule of thumb. Further, there have been slight increases across all company types limiting service to other audit committees. We note that even though companies may not have a formal policy on audit committee service limits, they may be reviewing each committee member's outside service on a case-by-case basis.

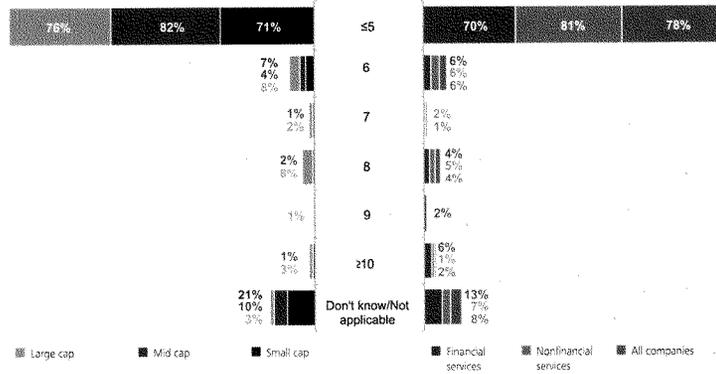
Audit committee

41. How often does the audit committee meet annually via:

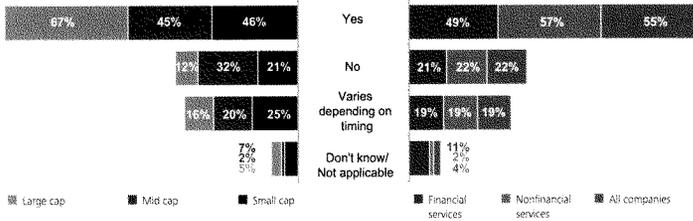
In-person meetings



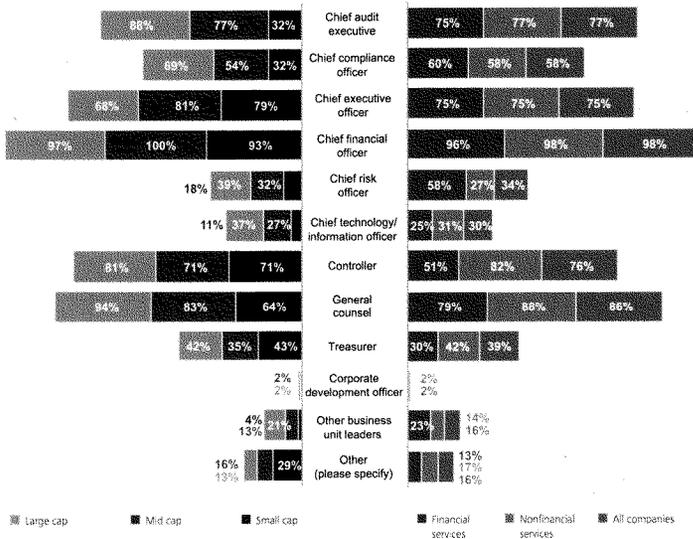
Teleconference/videoconference



42. Does your company's audit committee hold a separate meeting to review the earnings release?



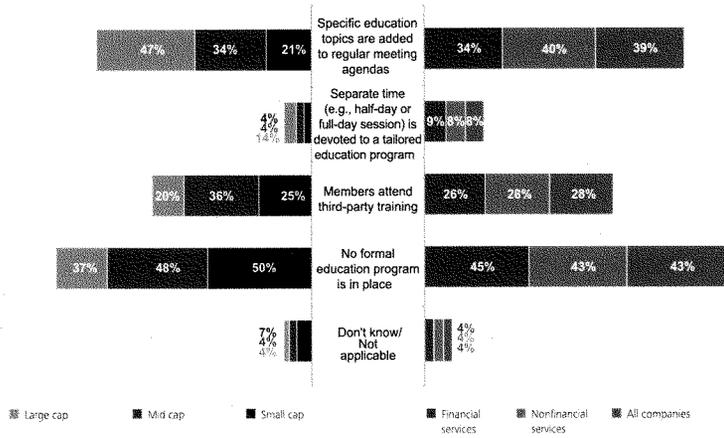
43. Which members of management meet with the audit committee? (Select all that apply)



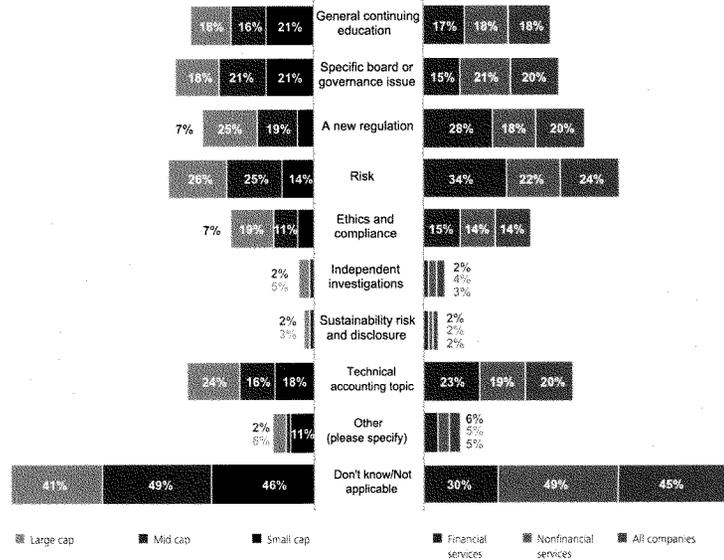
Respondents answering "Don't know/Not applicable" were as follows: 1% large cap, 0% mid cap, 4% small cap, 2% financial services, 1% nonfinancial services, and 1% all companies.

Audit committee

44. Which of the following describes your company's audit committee education program? (Select all that apply)

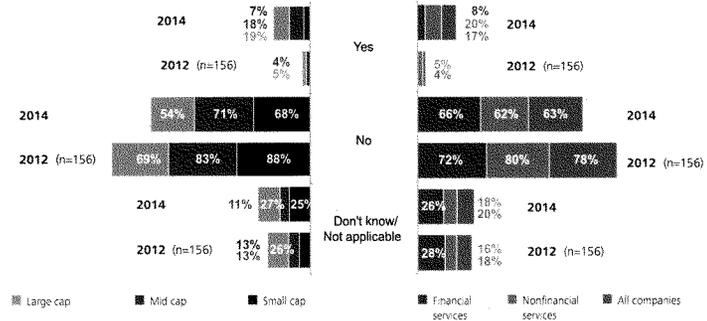


45. Over the past year, has your company's audit committee participated in a board training program on these topics: (Select all that apply)

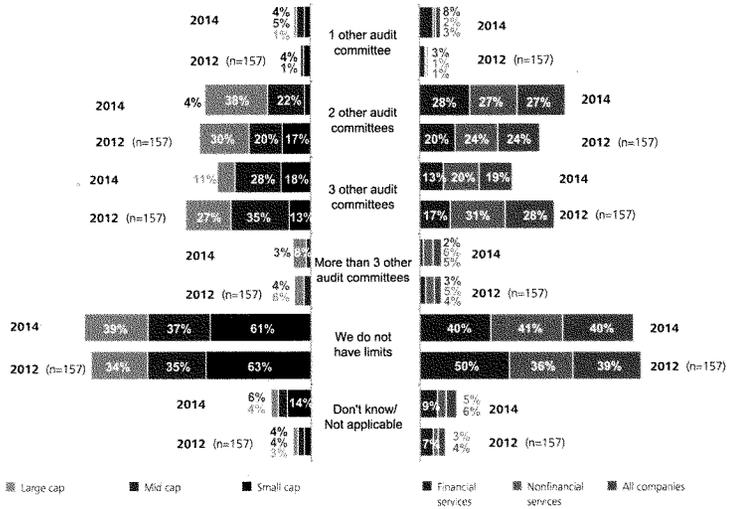


Audit committee

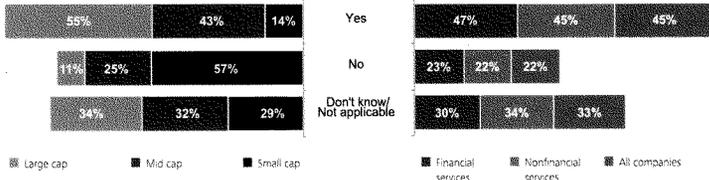
48. In the past year, has your helpline received an increase in tips?



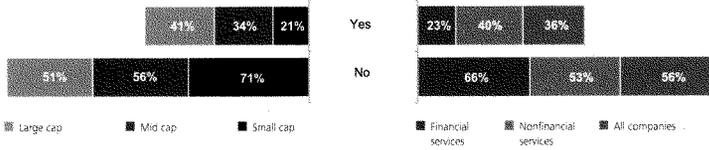
49. Please specify the limit on your board's audit committee members being able to serve on the audit committees of other companies:



50. Has your company done any benchmarking on its internal audit department (e.g., budget, resources)?

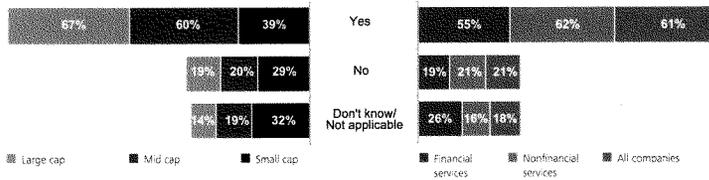


51. Do your audit committee agendas include a discussion on succession of finance talent?



Respondents answering "Don't know/ Not applicable" were as follows: 8% large cap, 9% mid cap, 7% small cap, 11% financial services, 8% nonfinancial services, and 8% all companies.

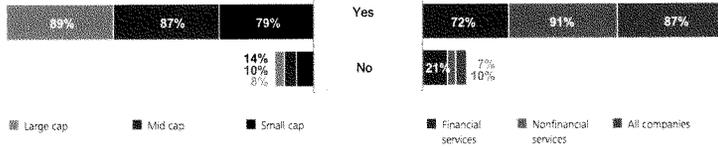
52. If you have more than one financial expert on your audit committee, does your company disclose all names in your proxy?



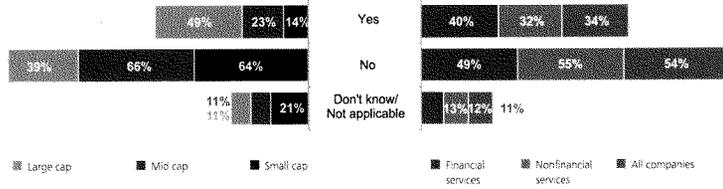
Audit committee

Respondents answering "Don't know/ Not applicable" were as follows: 4% large cap, 3% mid cap, 7% small cap, 8% financial services, 3% nonfinancial services, and 4% all companies.

53. Is your audit committee chair also your financial expert?



54. Have you considered an increased level of disclosure in audit committee reports beyond what is required?



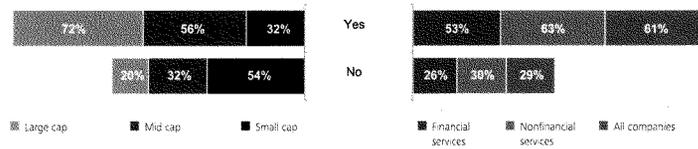
FINDINGS AND TRENDS

Compensation matters

Two-thirds of companies are considering increased compensation disclosure. While clawback policies are not a new topic, they continue to gain interest from shareholders and proxy advisory firms; in addition, the Dodd-Frank Act requires rule-making related to clawbacks, enhanced disclosure on pay for performance, employee and director hedging policies, and the CEO/median worker pay ratio. Thus, 61 percent of

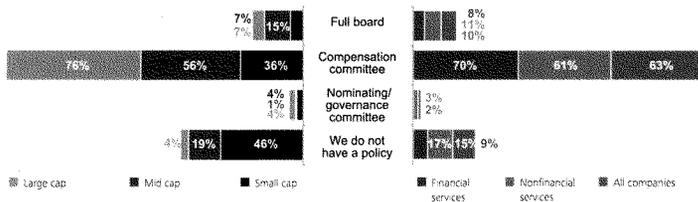
respondents said they are considering supplemental pay-for-performance disclosure in their company proxy statements—this includes 72 percent of large cap, 53 percent of financial services companies, and 63 percent of nonfinancial services companies. Further, when compared to the 2012 report, more companies have an anti-hedging policy that applies to directors, particularly among the large and mid cap companies and nonfinancial services companies.

55. Has your company considered supplemental pay-for-performance disclosure, in addition to the summary compensation table, in its proxy statement?



Respondents answering "Don't know/ Not applicable" were as follows: 8% large cap, 11% mid cap, 14% small cap, 21% financial services, 7% nonfinancial services, and 10% all companies.

56. Which board committee oversees your company's clawback policy?



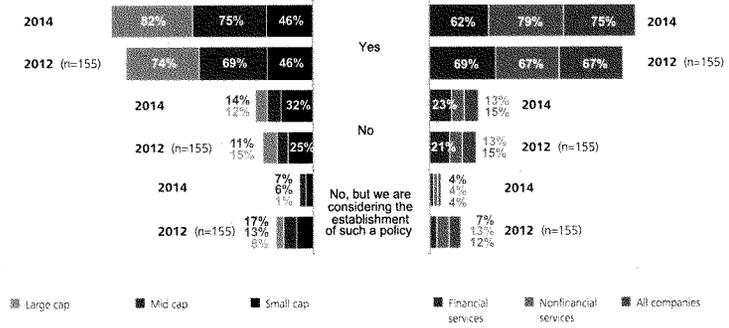
Respondents answering "Other" were as follows: 4% large cap, 1% mid cap, 4% small cap, 2% financial services, 3% nonfinancial services, and 2% all companies.

Respondents answering "Don't know/Not applicable" were as follows: 5% large cap, 8% mid cap, 4% small cap, 11% financial services, 5% nonfinancial services, and 6% all companies.

Compensation matters

In 2014, respondents answering "Don't know/Not applicable" were as follows: 4% large cap, 5% mid cap, 14% small cap, 11% financial services, 4% nonfinancial services, and 6% all companies. In 2012, respondents answering "Don't know/Not applicable" were as follows: 3% large cap, 7% mid cap, 13% small cap, 3% financial services, 7% nonfinancial services, and 6% all companies.

57. Has your company established an anti-hedging policy that applies to directors?



FINDINGS AND TRENDS

Disclosure committee

Disclosure committee practices

Some common practices include:

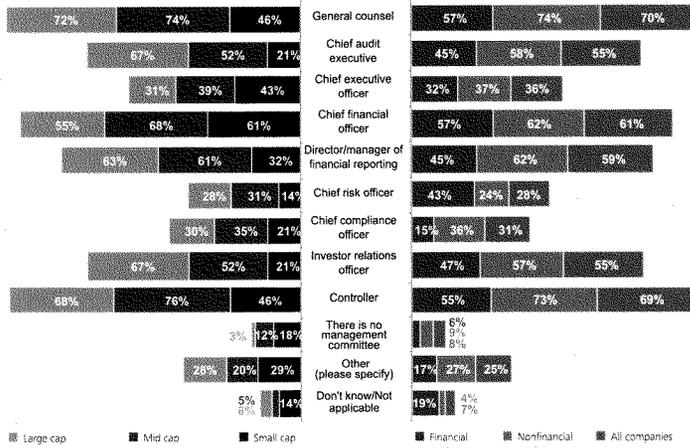
- More than 90 percent of respondents said they have a management disclosure committee.
- The committee appears to have representation across the business with the general counsel, controller, and chief financial officer being the most frequently cited

members of the committee. "Other" members include the corporate secretary and securities counsel.

- The committee is overwhelmingly chaired by the chief financial officer and, according to 89 percent of respondents, meets quarterly.

58. Which of the following individuals are members of your company's management disclosure committee? (Select all that apply)

No respondents answered "Board/board Committee".



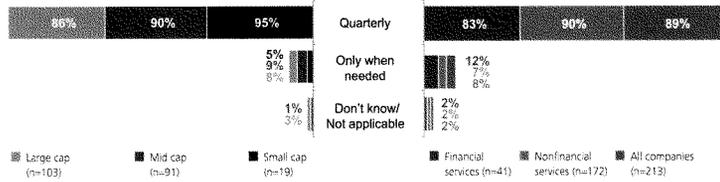
Disclosure committee

Less than the full survey population responded to this question; therefore, 'n' values are provided in the chart legend.

Respondents answering "Annually" were as follows: 1% large cap and 1% nonfinancial services.

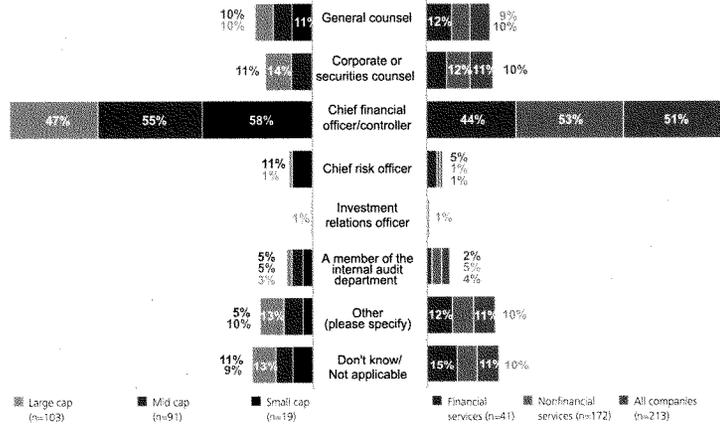
Respondents answering "At each board meeting" were as follows: 2% large cap, 2% financial services, 2% nonfinancial services, and 1% all companies.

58a. How often does your management disclosure committee meet?



Less than the full survey population responded to this question; therefore, 'n' values are provided in the chart legend.

58b. Who chairs your management disclosure committee?



FINDINGS AND TRENDS

CEO succession planning

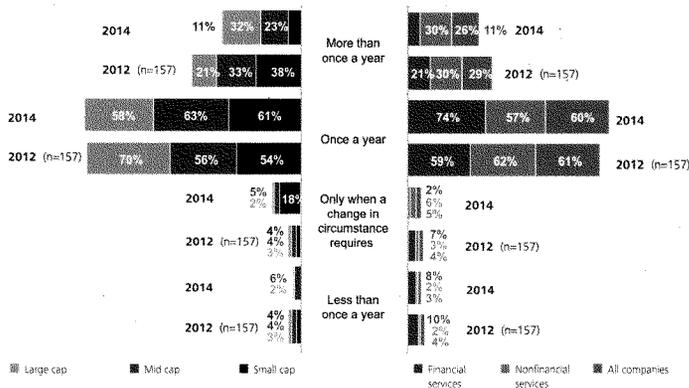
Varied responses on the succession plan process

Responses were spread when it came to who has primary responsibility over the CEO succession planning process. Across all respondent categories, most said the full board bears the responsibility, followed closely by the compensation committee and the nominating/corporate governance committee. Trends related to how often boards review CEO succession plans are mixed. Sixty percent of respondents review the plans annually. Most notable is an 11 percentage point increase in large caps (32 percent) reviewing succession plans more than once a year as compared with the 2012 responses. In 2014, more small caps are reviewing succession either annually or when circumstances warrant.

Slight increases in the level of succession plan disclosure

This year's survey showed that the majority of companies (60 percent) had no change in the level of succession plan process disclosure. A few—11 percent of large cap, 13 percent of mid cap, and 7 percent of small cap companies increased their disclosure.

59. How often does the full board review CEO succession plans?



In 2014, respondents answering "Never" were as follows: 1% large cap, 0% mid cap, 4% small cap, 2% financial services, 1% nonfinancial services, and 1% all companies. In 2012, no respondents answered "Never".

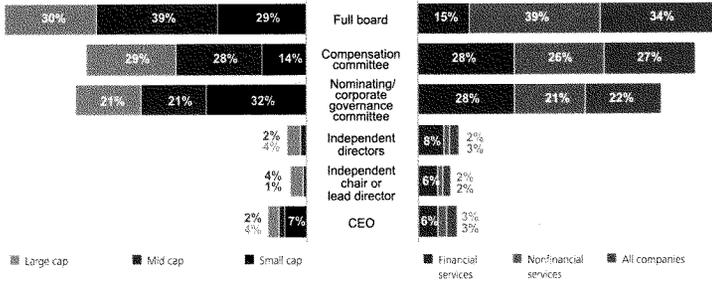
In 2014, respondents answering "Don't know/Not applicable" were as follows: 5% large cap, 4% mid cap, 7% small cap, 4% financial services, 5% nonfinancial services, and 5% all companies. In 2012, respondents answering "Don't know/Not applicable" were as follows: 3% large cap, 3% mid cap, 0% small cap, 3% financial services, 2% nonfinancial services, and 3% all companies.

CEO succession planning

Respondents answering "Other" were as follows: 4% large cap, 3% mid cap, 7% small cap, 4% financial services, 4% nonfinancial services, and 4% all companies.

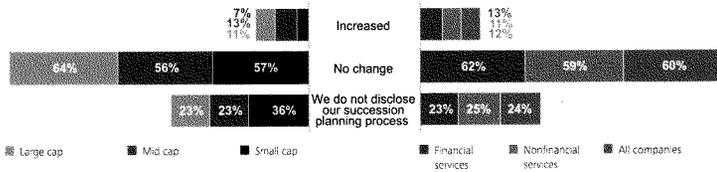
Respondents answering "Don't know/Not applicable" were as follows: 4% large cap, 5% mid cap, 11% small cap, 6% financial services, 5% nonfinancial services, and 5% all companies.

60. Who has the primary responsibility over the CEO succession planning process?



61. In the past year, how has the level of disclosure on your succession plan process changed?

Respondents answering "Don't know/Not applicable" were as follows: 2% large cap, 8% mid cap, 0% small cap, 2% financial services, 5% nonfinancial services, and 4% all companies.



FINDINGS AND TRENDS

Shareholder engagement and activism

Level of shareholder engagement remains consistent

Forty-four percent of respondents noted that their board members had no direct contact with shareholders, which is unchanged from the 2012 report. Another 22 percent said at least one board member had shareholder contact, also similar to 2012. The majority of respondents, 55 percent, said that requests from shareholders to have direct contact with the board have not increased over the past two years. Perhaps this is because more companies are doing proactive shareholder outreach, increasing the dialogue on issues that are important to their investors, and addressing investor requests.

Approximately one-third of all respondents have a policy relating to contact between directors and shareholders (other than the NYSE and Regulation S-K communications disclosure requirements) and two-thirds do not. Of the 34 percent that have a policy, the contours of the policy are varied: some respondents do not allow a director to have contact with shareholders; others only allow the independent chairman or independent lead director to do so.

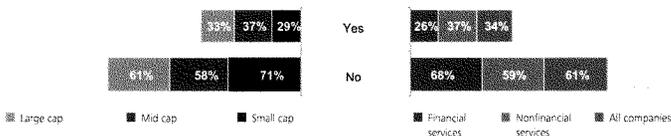
A number of "other" responses included policy provisions such as:

- Allowed at the request of management or the board and with knowledge of management or the board
- Allowed by the CEO and separate chairman
- Encourages directors to route discussions through management but are invited to participate in some shareholder contacts or events
- Allowed by a designated outside director.

Slight decline in shareholder activism

More than half of the companies surveyed have had board-level discussions on how to prepare for an activist in the past year. A number of companies have stepped up their efforts in the past few years to quell shareholder activity through various means, such as getting to know their shareholders better and by maintaining periodic shareholder contact throughout the year. Compared to 2012, there is nearly a 4 percentage point decrease (31 percent) in the number companies that were approached by a shareholder activist in 2014. The only exception is with small cap companies, which saw an 8 percentage point increase (21 percent) in activist approaches.

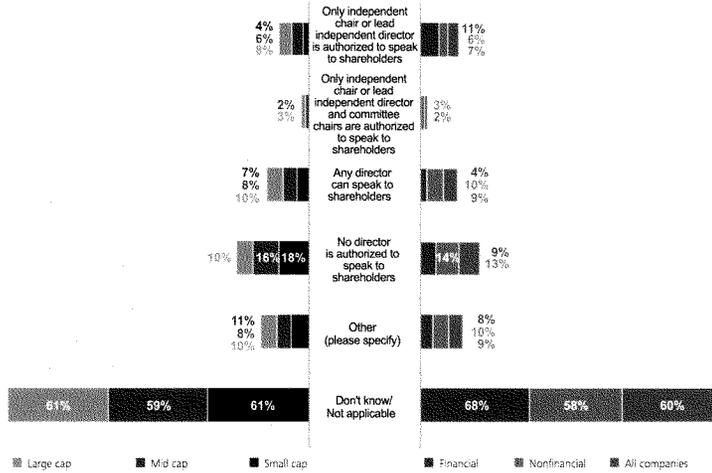
62. Does your company have a policy relating to contact between directors and shareholders (other than the NYSE communications/Reg. S-K communications disclosure requirements)?



In 2014, respondents answering "Don't know/Not applicable" were as follows: 6% large cap, 5% mid cap, 0% small cap, 6% financial services, 5% nonfinancial services, and 5% all companies.

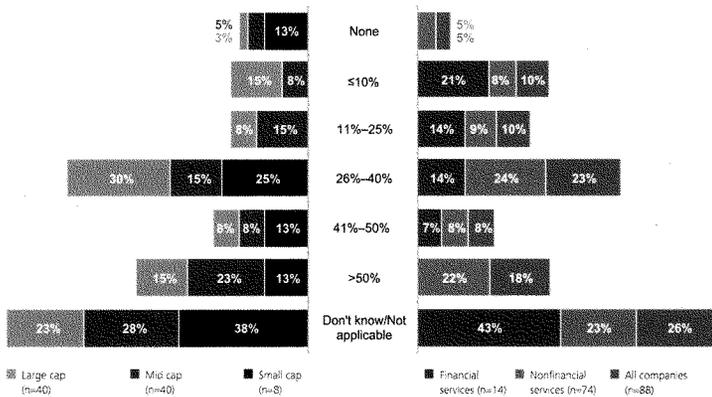
Shareholder engagement and activism

62a. The policy provides for the following:

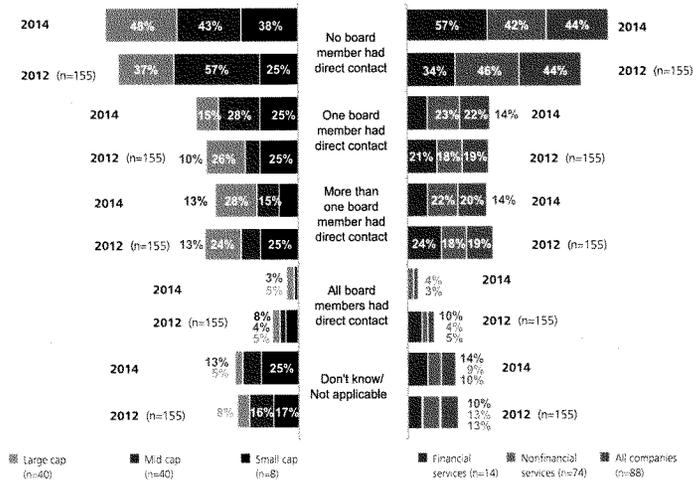


Less than the full survey population responded to this question; therefore, 'n' values are provided in the chart legend.

63. What percentage of your company shareholders did the corporate secretary, the board, or senior management interact with over the past year?

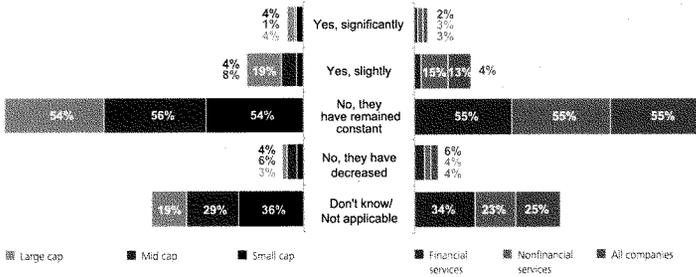


64. Have members of your board had direct contact with shareholder(s) or shareholder groups over the past year?



In 2014, less than the full survey population responded to this question; therefore, 'n' values are provided in the chart legend.

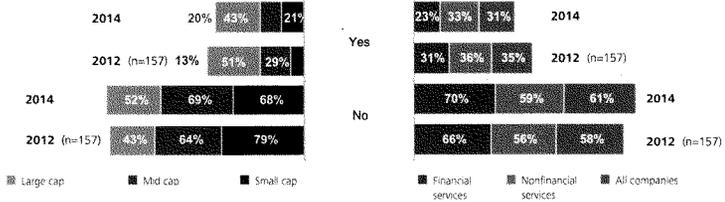
65. Have requests from shareholders to speak directly to board members increased over the past two years?



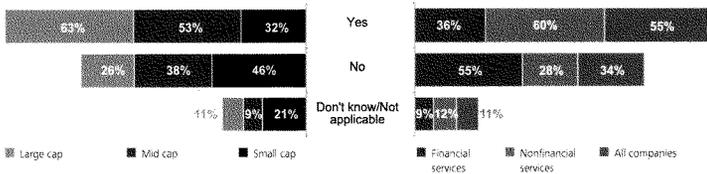
Shareholder engagement and activism

In 2014, respondents answering "Don't know/Not applicable" were as follows: 5% large cap, 10% mid cap, 11% small cap, 8% financial services, 8% nonfinancial services, and 8% all companies. In 2012, respondents answering "Don't know/Not applicable" were as follows: 6% large cap, 7% mid cap, 8% small cap, 3% financial services, 8% nonfinancial services, and 7% all companies.

66. Has your company been approached by a shareholder activist within the past 12 months?

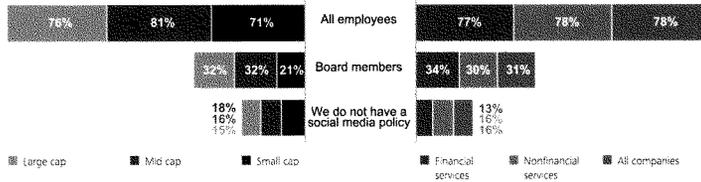


67. Has your board discussed how to prepare for activism in the last year?



Respondents answering "Don't know/Not applicable" were as follows: 9% large cap, 5% mid cap, 11% small cap, 11% financial services, 6% nonfinancial services, and 7% all companies.

68. Your company's social media policy applies to: (Select all that apply)



FINDINGS AND TRENDS

Technology and data analytics

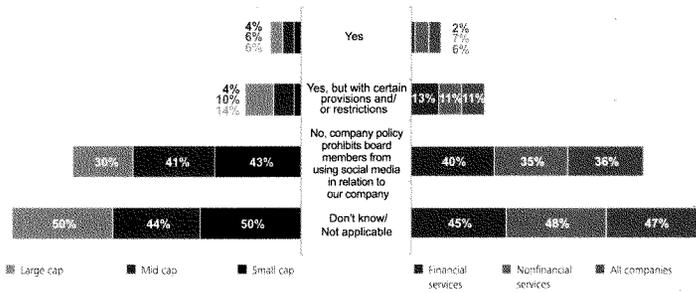
Most have social media policies

With the rise in use of social media for both personal and business reasons and the potential damage to a company if it is misused, it is not surprising that 84 percent of all companies surveyed have a social media policy. Of the companies that have policies, 78 percent said the policy applies to employees and 31 percent said it applies to directors. This is consistent with the fact that less than 20 percent of companies allow board members to comment on the company via social media, and those that do usually have restrictions in place. Half of all companies do not know whether directors are permitted to comment on social media, and about 30 percent have had a report on social media use by either customers, employees, or board members.

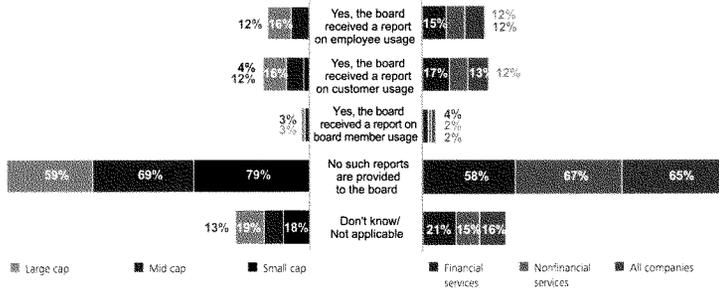
Nearly half of all large caps are educated on "big data"

Big data is structured and unstructured data generated from diverse sources in real time, in volumes too large for traditional technologies to capture, manage, and process in a timely manner. The concept is not new, but in the past few years, boards and their management teams have been paying more attention to it and the value it can add to company strategy and risk assessment. There is just a 15 percentage point difference between companies that educate their boards on big data and data analytics (33 percent) and those that do not (48 percent). Large cap companies in particular are focused on this (48 percent of their boards receive training on big data, compared to 23 percent and 7 percent of mid and small cap companies, respectively). Twenty-eight percent of those surveyed said they are incorporating advanced analytics into company strategy and 7 percent are considering doing so.

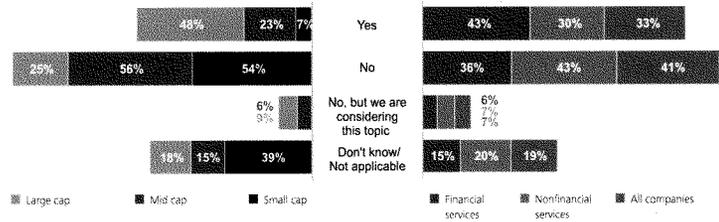
69. Board members are permitted to comment on our company and industry via various social media (e.g., Twitter, Facebook, LinkedIn):



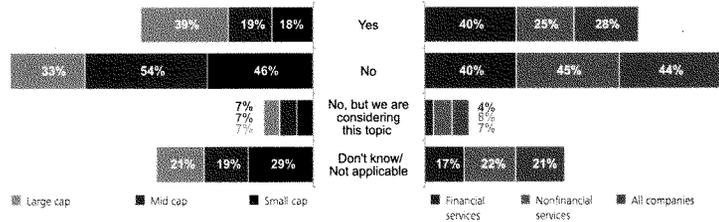
70. In the past year, has your board received a report on, or discussed the usage of, social media by employees, customers, or board members? (Select all that apply)



71. In the past two years, has your board been educated on the evolving use of big data and advanced analytics, and their potential return on investment?



72. Does your board discuss how to incorporate and implement advanced analytics (e.g., data mining, predictive modeling, optimization, segmentation) into company strategy?



FINDINGS AND TRENDS

Cyber security

Small caps lag on cyber security awareness
 Cyber security has quickly become an important topic for companies and boards, particularly in light of recent data breaches; hackers are becoming smarter and the increased amount of data collected by companies increases their risk of attack. According to survey results, the level of board awareness on cyber security is moderate to high across all companies surveyed, with the exception of small cap companies. Only 11 percent of small cap companies indicated their board has a high level of awareness; most said the level is either moderate or low, but directors are becoming more knowledgeable.

About half say the audit committee oversees cyber security
 The survey results show that most often the full board or the audit committee is responsible for the oversight of cyber security matters. Audit committee involvement here is not surprising given that cyber security is often integrated with risk management programs. No respondent said the board has a separate cyber security committee. At the management level, results show that the chief information officer and chief technology officer, at 55 percent and 30 percent, respectively, are responsible for managing cyber security at the organization. They are also the two individuals most likely to provide board education on the topic, according to survey results.

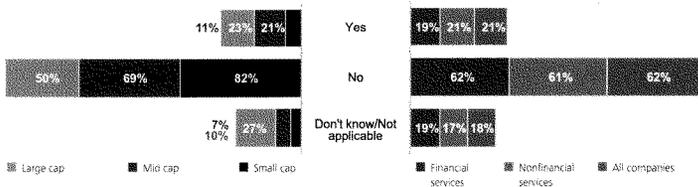
As boards consider cyber security in the context of their organizations, they may consider asking questions such as:

- How do we determine what information is leaving the organization, and how?
- What are the greatest cyber threats our organization faces?
- What are the "crown jewels" we must protect?
- Which other data require strong protection?
- Do we have a plan to respond to cyber incidents?

Is it up to date, and have we truly practiced it?

Source: Mary E. Gilligan, a director in the Security & Privacy practice of Deloitte & Touche LLP following her recent retirement from the Federal Bureau of Investigation

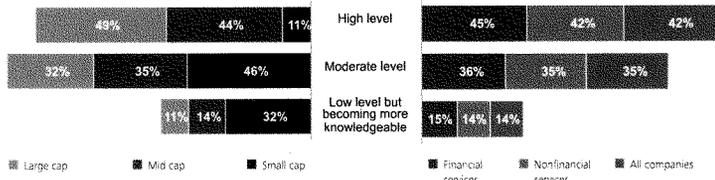
73. Has your company experienced a cyber security breach during the past two years?



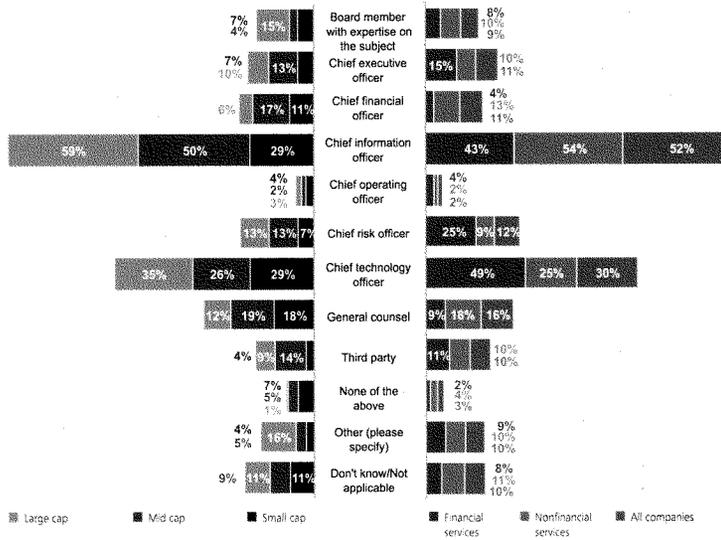
Cyber security

Respondents answering "Don't know/Not applicable" were as follows: 8% large cap, 7% mid cap, 11% small cap, 4% financial services, 9% nonfinancial services, and 8% all companies.

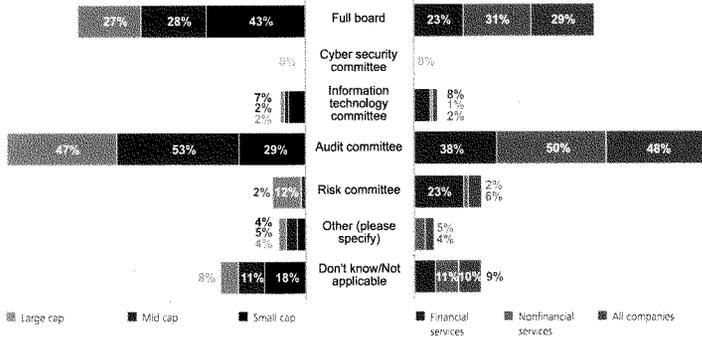
74. What level of awareness does the board have on cyber security?



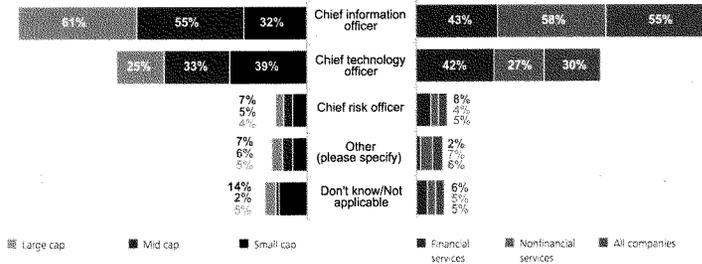
75. Who has educated your board on cyber security? (Select all that apply)



76. Which committee of the board oversees cyber security issues?



77. Who within management is responsible for cyber security?





Little change in sustainability reporting and oversight

In 2014, the most common shareholder proposals on social issues addressed political contributions and lobbying, environmental practices and reporting, human rights, and sustainability reporting. The companies that engage in sustainability reporting are mostly large caps, with 75 percent responding that they have a report available on their website. The reverse is true for small cap companies, 75 percent of which do no sustainability reporting. One-third of mid cap companies provide a report. Despite small decreases at most companies since the 2012 report, about 40 percent of all respondents said their boards are involved in the oversight of corporate social responsibility, sustainability, and related public disclosures. About the same, 36 percent, said their companies have incorporated sustainability initiatives into strategy.

Practices related to conflict minerals

Just 36 percent of those surveyed noted that the SEC's disclosure rule on conflict minerals applies to their companies, and this mostly consisted of large caps, mid caps, and nonfinancial services companies. Of these, about one-half said it is a topic on the audit committee agenda.

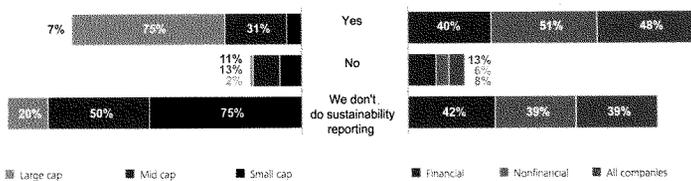
Companies making political contributions remains static, except at small caps

Compared to results from the 2012 report, there is little change among large and mid cap companies that make political contributions, at 71 percent and 37 percent, respectively. However, small cap companies making political contributions decreased by 9 percentage points, to 8 percent. Among large caps, it is common to charge a specific board committee with oversight of such contributions, while small cap companies assign the duty to the full board or a board committee.

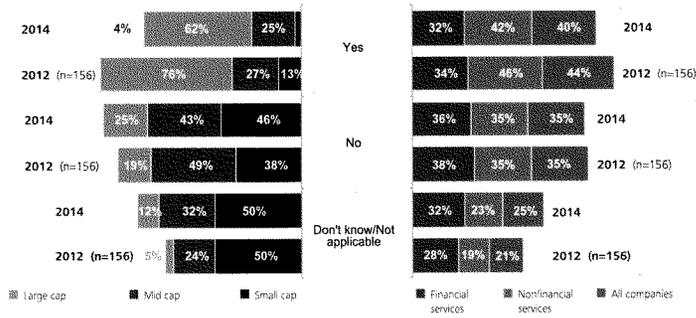
The shareholder proposals related to political issues in 2014 were commonly related to increased disclosure on political spending and/or lobbying costs and, in some cases, called for an advisory vote or prohibition on political spending. Twenty-two percent of respondents said they disclose the amount their company spends on lobbying and another 28 percent said they disclose membership in trade associations that may make political contributions with some limitations.

Respondents answering "Don't know/Not applicable" were as follows: 3% large cap, 6% mid cap, 7% small cap, 6% financial services, 5% nonfinancial services, and 5% all companies.

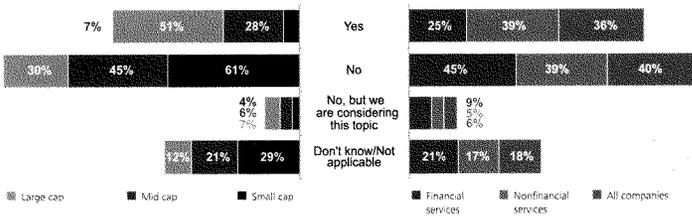
78. Is your company's corporate social responsibility or sustainability report available on its website?



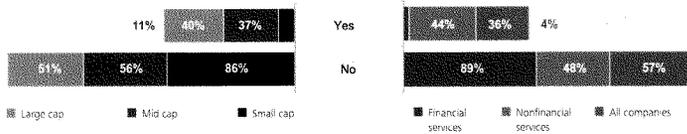
79. Is the board and/or a board committee involved in the oversight of the company's corporate social responsibility or sustainability effort and related public disclosures?



80. In the past year, has your company's strategy incorporated new sustainability initiatives?



81. Does the new SEC conflict minerals disclosure rule apply to you?

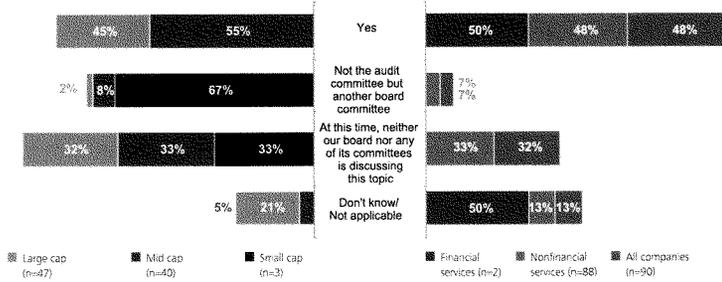


Respondents answering "Don't know/Not applicable" were as follows: 9% large cap, 7% mid cap, 4% small cap, 9% financial services, 8% nonfinancial services, and 8% all companies.

Sustainability

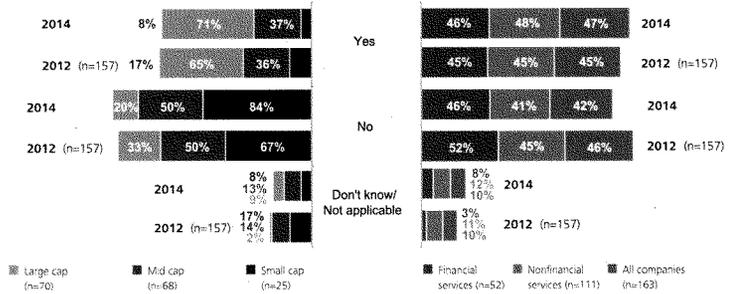
Less than the full survey population responded to this question; therefore, 'n' values are provided in the chart legend.

81a. Is conflict minerals reporting regularly included on the audit committee's agenda?



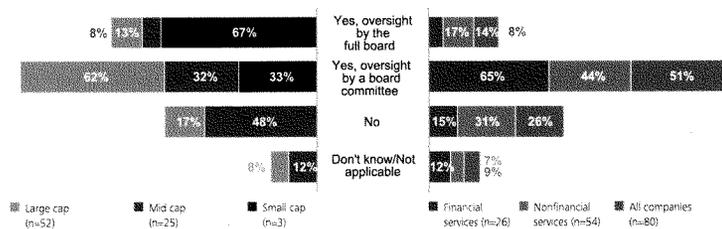
Less than the full survey population responded to this question; therefore, 'n' values are provided in the chart legend.

82. Does your company make political contributions?

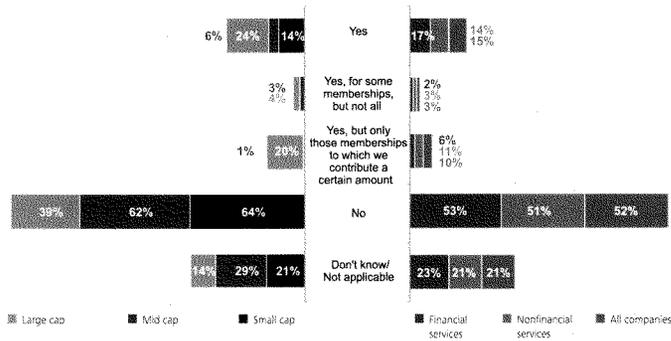


Less than the full survey population responded to this question; therefore, 'n' values are provided in the chart legend.

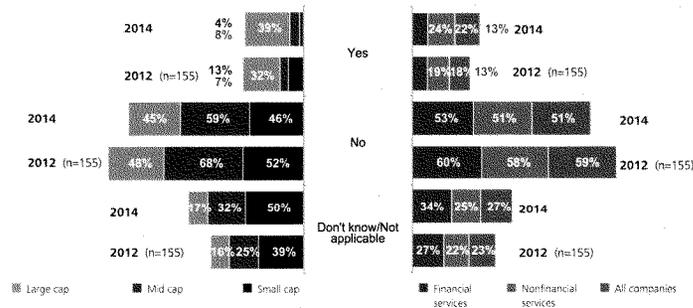
82a. Does your company's board or a board committee oversee such contributions?



83. Does your company disclose membership in trade associations that may make independent political expenditures?



84. Does your company disclose the amount spent on lobbying?



Compliance, culture, and setting the tone at the top

A variety of approaches to setting the tone at the top

Results show that companies are employing a number of tactics to help create a tone at the top and foster a culture that supports professionalism and integrity. In addition to a code of ethics or conduct, more than 50 percent provide other communications, such as newsletters and break room postings, town hall meetings, and trainings. The audit committee is most often tasked with oversight of the company compliance-related activities across all of those surveyed, but a quarter of small cap companies said the full board oversees compliance activities.

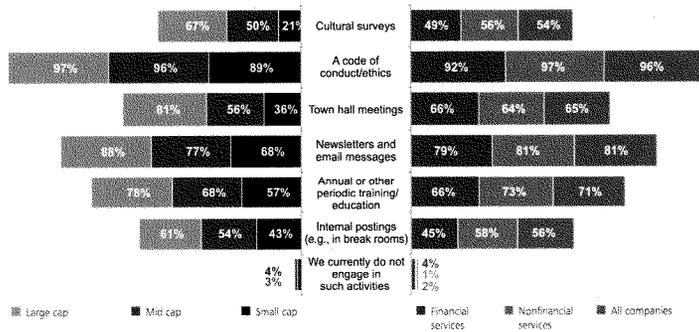
Compliance oversight and education practices

The board should consider maintaining a view of the organization's culture through hands-on observation and consultation with management, as well as regular reporting on a variety of cultural topics. The type of reporting provided to the board was spread across a variety of areas. Reporting on compliance violations, issues tracking and resolution, and compliance program performance were most common topics at the large and mid cap companies. For small cap companies, the most common topics were compliance violations, regulatory compliance, and reports on new regulations.

Respondents answering "Other" were as follows: 4% large cap, 0% mid cap, 4% small cap, 4% financial services, 2% nonfinancial services, and 2% all companies.

Respondents answering "Don't know/Not applicable" were as follows: 1% large cap, 0% mid cap, 4% small cap, 2% financial services, 1% nonfinancial services, and 1% all companies.

85. Which activity does your company engage in to create tone at the top of the company? (Select all that apply)



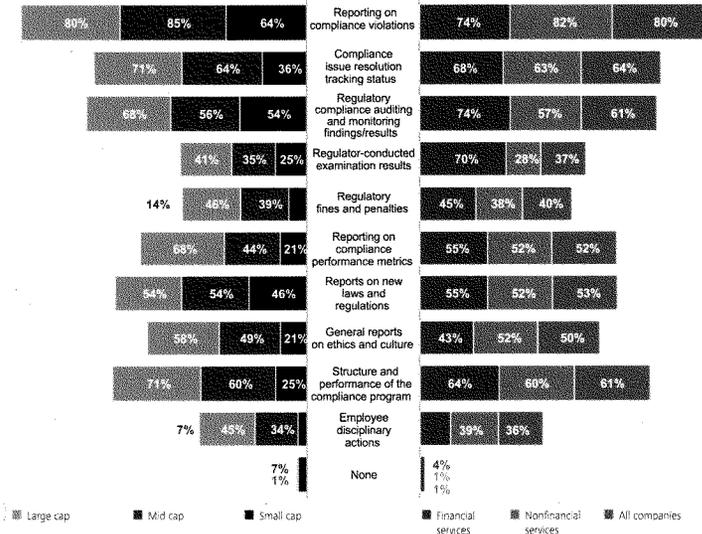
86. Who is primarily responsible for the oversight of the compliance program at the board level?



Respondents answering "Other" were as follows: 5% large cap, 0% mid cap, 4% small cap, 2% financial services, 3% nonfinancial services, and 3% all companies.

Respondents answering "Don't know/Not applicable" were as follows: 1% large cap, 3% mid cap, 7% small cap, 2% financial services, 3% nonfinancial services, and 2% all companies.

87. What type of compliance program reporting does your company (or chief compliance officer) provide to the board and/or executive management? (Select all that apply)



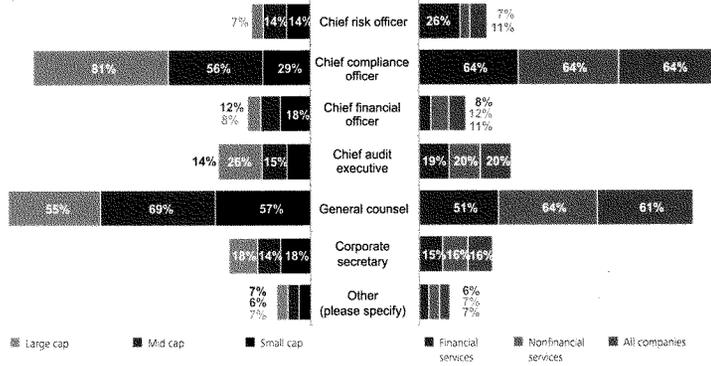
Respondents answering "Other" were as follows: 1% large cap, 3% mid cap, 7% small cap, 2% financial services, 3% nonfinancial services, and 2% all companies.

Respondents answering "Don't know/Not applicable" were as follows: 11% large cap, 5% mid cap, 11% small cap, 9% financial services, 8% nonfinancial services, and 8% all companies.

Compliance, culture, and setting the tone on top

Respondents answering "Don't know/Not applicable" were as follows: 1% large cap, 0% mid cap, 0% small cap, 0% financial services, 1% nonfinancial services, and 0% all companies.

88. Which individual(s) are responsible for reporting ethics and compliance matters to the board? (Select all that apply)



FINDINGS AND TRENDS

Concluding question

Board priorities in 2015: strategy, risk, board composition

These are interesting times for U.S. companies and the board and management teams that lead them. They need to navigate myriad issues and topics, including difficult economic and political environments, international unrest, and an uptick in startups and disruptive technologies, which challenge their competitiveness and opportunities for growth. As they head into 2015, the individuals surveyed said that the top three areas of board focus will be strategy, risk, and board composition, followed by succession planning and cyber security.

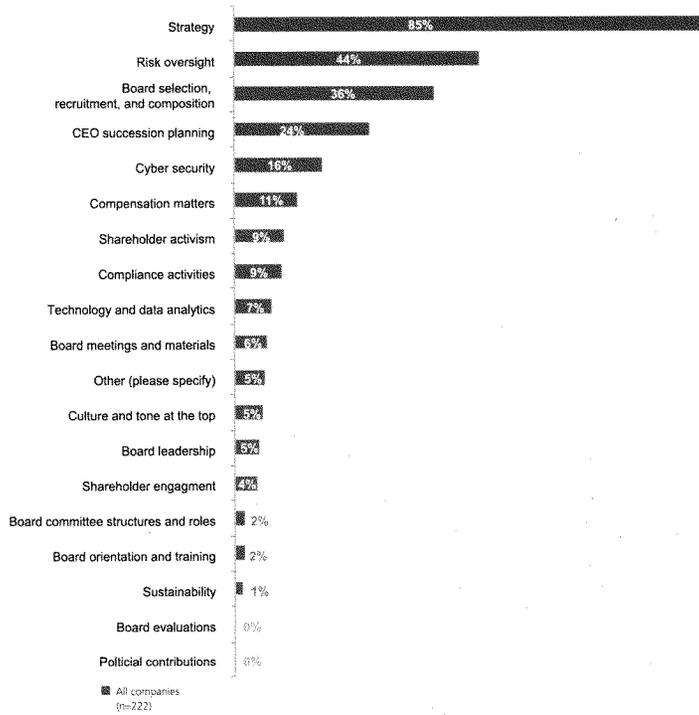
A large majority of respondents (85 percent) chose strategy as the top focus area. The next-highest selection of 44 percent went to risk oversight. The two topics go hand-in-hand as boards remain vigilant and focused on monitoring strategy and related metrics and alternatives, while also overseeing and mitigating risks to the strategy and the business itself (e.g., operational and reputational risks).

Next on the list of board priorities in 2015 is board composition, according to 36 percent of survey respondents. Amid pressure from shareholders, boards should consider placing greater consideration on recruitment efforts, particularly on recruiting diverse board members (e.g., diversity of thought, race, and gender) while also considering director tenure and how it influences overall board composition and independence.

Rounding out the top five focus areas for 2015 were CEO succession planning, noted by 24 percent of respondents, and cyber security, at 16 percent. Formalizing and documenting CEO succession plans is a leading board practice. As we move further into the digital age, the potential for hackers to gain access to confidential customer and employee data and other intellectual property assets increases. Not surprisingly, boards are talking more about cyber security, and it is likely that the CISO (or equivalent) may have a more active role in the boardroom.

Concluding question

89. Considering the topics included in this survey, which will be the top three areas of focus for your board in the next year?
 Participants were asked to make three selections



Selection	Small cap (n=26)	Mid cap (n=98)	Large cap (n=98)	FSI (n=49)	Non-FSI (n=173)	All companies (n=222)
Strategy	77%	84%	88%	76%	87%	85%
Risk oversight	58%	43%	42%	61%	39%	44%
Board selection, recruitment, and composition	35%	32%	41%	37%	36%	36%
CEO succession planning	19%	24%	26%	22%	25%	24%
Cyber security	8%	21%	12%	10%	17%	16%
Compensation matters	8%	12%	11%	4%	13%	11%
Shareholder activism	12%	7%	10%	8%	9%	9%
Compliance activities	4%	10%	8%	16%	6%	9%
Technology and data analytics	12%	5%	7%	8%	6%	7%
Board meetings and materials	12%	2%	8%	8%	5%	6%
Other (please specify)	12%	7%	2%	6%	5%	5%
Culture and tone at the top	4%	4%	6%	4%	5%	5%
Board leadership	4%	6%	3%	2%	5%	5%
Shareholder engagement	12%	2%	4%	10%	2%	4%
Board committee structures and roles	4%	2%	1%	2%	2%	2%
Board orientation and training	0%	0%	4%	0%	2%	2%
Sustainability	0%	2%	1%	0%	2%	1%
Board evaluations	0%	0%	0%	0%	0%	0%
Political contributions	0%	0%	0%	0%	0%	0%

Appendix

Appendix A — Question 27

27. Please complete the following table with regard to the specific committee practices of your board.

Audit Committee		Large cap		Mid cap		Small cap		FSI		Non-FSI		All companies	
		n	%	n	%	n	%	n	%	n	%	n	%
Is this a standing committee?	Yes	69	100%	71	99%	18	95%	35	97%	123	99%	158	99%
	No	0	0%	1	1%	1	5%	1	3%	1	1%	2	1%
Number of members	1-4	32	46%	48	68%	12	58%	21	58%	71	58%	92	58%
	5-9	37	54%	23	32%	7	42%	15	42%	52	42%	67	42%
	≥10	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
Meeting frequency (number of meetings annually)	1-3	0	0%	0	0%	2	1%	2	6%	0	0%	2	1%
	4-6	16	23%	35	49%	11	39%	15	42%	47	38%	62	39%
	7-9	32	46%	30	42%	6	43%	11	31%	57	46%	68	43%
	≥10	21	30%	6	8%	0	17%	8	22%	19	15%	27	17%
Average length of meetings (hours)	<2	26	38%	23	32%	11	58%	12	33%	48	39%	60	38%
	2-3	38	55%	46	65%	8	42%	20	56%	72	59%	92	58%
	>3	5	7%	2	3%	0	0%	4	11%	3	2%	7	4%

Compensation Committee		Large cap		Mid cap		Small cap		FSI		Non-FSI		All companies	
		n	%	n	%	n	%	n	%	n	%	n	%
Is this a standing committee?	Yes	113	99%	107	99%	25	96%	51	98%	194	99%	245	99%
	No	1	1%	1	1%	1	4%	1	2%	2	1%	3	1%
Number of members	1-4	55	49%	81	76%	17	65%	32	62%	121	62%	153	62%
	5-9	57	50%	26	24%	9	35%	19	37%	73	38%	92	37%
	≥10	1	1%	0	0%	0	0%	1	2%	0	0%	1	0%
Meeting frequency (number of meetings annually)	1-3	4	4%	14	13%	4	15%	6	12%	16	8%	22	9%
	4-6	74	67%	76	72%	18	69%	27	54%	141	73%	168	69%
	7-9	26	23%	16	15%	3	12%	12	24%	33	17%	45	19%
	≥10	7	6%	0	0%	1	4%	5	10%	3	2%	8	3%
Average length of meetings (hours)	<2	42	38%	61	58%	19	73%	27	54%	95	49%	122	50%
	2-3	63	57%	40	38%	7	27%	18	36%	92	48%	110	45%
	>3	6	5%	4	4%	0	0%	5	10%	5	3%	10	4%

Complete results for question 27

Nominating/Corporate Governance Committee		Large cap		Mid cap		Small cap		FSI		Non-FSI		All companies	
		n	%	n	%	n	%	n	%	n	%	n	%
Is this a standing committee?	Yes	112	98%	104	98%	25	96%	50	96%	191	98%	241	98%
	No	2	2%	2	2%	1	4%	2	4%	3	2%	5	2%
Number of members	1-4	56	50%	79	76%	20	77%	33	65%	122	64%	155	64%
	5-9	54	48%	25	24%	6	23%	17	33%	68	36%	85	35%
	≥10	2	2%	0	0%	0	0%	1	2%	1	1%	2	1%
Meeting frequency (number of meetings annually)	1-3	13	12%	30	29%	15	58%	16	33%	42	22%	58	24%
	4-6	85	77%	68	66%	10	38%	28	57%	135	71%	163	68%
	7-9	12	11%	4	4%	1	4%	5	10%	12	6%	17	7%
	≥10	0	0%	1	1%	0	0%	0	0%	1	1%	1	0%
Average length of meetings (hours)	<2	81	74%	84	83%	24	92%	41	84%	148	79%	189	80%
	2-3	29	26%	17	17%	2	8%	8	16%	40	21%	48	20%
	>3	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%

Executive Committee		Large cap		Mid cap		Small cap		FSI		Non-FSI		All companies	
		n	%	n	%	n	%	n	%	n	%	n	%
Is this a standing committee?	Yes	42	45%	35	43%	11	50%	32	65%	56	38%	88	45%
	No	52	55%	46	57%	11	50%	17	35%	92	62%	109	55%
Number of members	1-4	16	36%	23	64%	7	58%	14	41%	32	55%	46	50%
	5-9	27	61%	12	33%	5	42%	19	56%	25	43%	44	48%
	≥10	1	2%	1	3%	0	0%	1	3%	1	2%	2	2%
Meeting frequency (number of meetings annually)	1-3	26	81%	20	87%	8	67%	21	72%	33	87%	54	81%
	4-6	3	9%	1	4%	2	17%	3	10%	3	8%	6	9%
	7-9	0	0%	1	4%	0	0%	1	3%	0	0%	1	1%
	≥10	3	9%	1	4%	2	17%	4	14%	2	5%	6	9%
Average length of meetings (hours)	<2	26	84%	23	96%	11	92%	25	86%	35	92%	60	90%
	2-3	5	16%	0	0%	1	8%	3	10%	3	8%	6	9%
	>3	0	0%	1	4%	0	0%	1	3%	0	0%	1	1%

Risk Committee		Large cap		Mid cap		Small cap		FSI		Non-FSI		All companies	
		n	%	n	%	n	%	n	%	n	%	n	%
Is this a standing committee?	Yes	24	28%	8	11%	2	13%	24	59%	10	8%	34	20%
	No	62	72%	62	89%	14	88%	17	41%	121	92%	138	80%
Number of members	1-4	10	42%	7	88%	1	50%	12	50%	6	60%	18	53%
	5-9	12	50%	1	13%	1	50%	10	42%	4	40%	14	41%
	≥10	2	8%	0	0%	0	0%	2	8%	0	0%	2	6%
Meeting frequency (number of meetings annually)	1-3	2	9%	2	25%	0	0%	0	0%	4	40%	4	12%
	4-6	11	48%	4	50%	2	100%	13	57%	4	40%	17	52%
	7-9	6	26%	0	0%	0	0%	5	22%	1	10%	6	18%
	≥10	4	17%	2	25%	0	0%	5	22%	1	10%	6	18%
Average length of meetings (hours)	<2	6	26%	3	38%	2	100%	8	35%	3	30%	11	33%
	2-3	11	48%	5	63%	0	0%	9	39%	7	70%	16	48%
	>3	6	26%	0	0%	0	0%	6	26%	0	0%	6	18%

Finance Committee		Large cap		Mid cap		Small cap		FSI		Non-FSI		All companies	
		n	%	n	%	n	%	n	%	n	%	n	%
Is this a standing committee?	Yes	56	60%	33	39%	5	28%	13	33%	81	52%	94	48%
	No	38	40%	52	61%	13	72%	27	68%	76	48%	103	52%
Number of members	1-4	24	43%	24	71%	3	60%	8	57%	43	53%	51	54%
	5-9	31	55%	10	29%	2	40%	5	36%	38	47%	43	45%
	≥10	1	2%	0	0%	0	0%	1	7%	0	0%	1	1%
Meeting frequency (number of meetings annually)	1-3	10	19%	11	32%	1	20%	2	15%	20	25%	22	24%
	4-6	29	54%	17	50%	2	40%	7	54%	41	51%	48	52%
	7-9	11	20%	4	12%	1	20%	3	23%	13	16%	16	17%
	≥10	4	7%	2	6%	1	20%	1	8%	6	8%	7	8%
Average length of meetings (hours)	<2	30	56%	20	59%	3	60%	9	69%	44	55%	53	57%
	2-3	22	41%	10	29%	2	40%	3	23%	31	39%	34	37%
	>3	2	4%	4	12%	0	0%	1	8%	5	6%	6	6%

Complete results for question 27

Investment Committee		Large cap		Mid cap		Small cap		FSI		Non-FSI		All companies	
		n	%	n	%	n	%	n	%	n	%	n	%
Is this a standing committee?	Yes	12	15%	9	13%	4	22%	15	37%	10	8%	25	15%
	No	69	85%	59	87%	14	78%	26	63%	116	92%	142	85%
Number of members	1-4	4	33%	3	38%	0	0%	5	33%	2	20%	7	28%
	5-9	7	58%	4	50%	4	80%	7	47%	8	80%	15	60%
	≥10	1	8%	1	13%	1	20%	3	20%	0	0%	3	12%
Meeting frequency (number of meetings annually)	1-3	4	36%	1	14%	0	0%	1	8%	4	40%	5	23%
	4-6	7	64%	4	57%	4	100%	9	75%	6	60%	15	68%
	7-9	0	0%	1	14%	0	0%	1	8%	0	0%	1	5%
	≥10	0	0%	1	14%	0	0%	1	8%	0	0%	1	5%
Average length of meetings (hours)	<2	4	40%	6	86%	3	75%	6	46%	7	88%	13	62%
	2-3	6	60%	0	0%	1	25%	6	46%	1	13%	7	33%
	>3	0	0%	1	14%	0	0%	1	8%	0	0%	1	5%

Strategy Committee		Large cap		Mid cap		Small cap		FSI		Non-FSI		All companies	
		n	%	n	%	n	%	n	%	n	%	n	%
Is this a standing committee?	Yes	3	4%	3	4%	3	18%	6	17%	3	2%	9	6%
	No	73	96%	64	96%	14	82%	29	83%	122	98%	151	94%
Number of members	1-4	0	0%	1	33%	0	0%	0	0%	1	33%	1	13%
	5-9	1	50%	2	67%	2	67%	3	60%	2	67%	5	63%
	≥10	1	50%	0	0%	1	33%	2	40%	0	0%	2	25%
Meeting frequency (number of meetings annually)	1-3	0	0%	1	33%	2	67%	2	40%	1	33%	3	38%
	4-6	2	100%	2	67%	1	33%	3	60%	2	67%	5	63%
	7-9	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
	≥10	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
Average length of meetings (hours)	<2	0	0%	1	33%	2	67%	1	25%	2	67%	3	43%
	2-3	1	100%	0	0%	1	33%	2	50%	0	0%	2	29%
	>3	0	0%	2	67%	0	0%	1	25%	1	33%	2	29%

Regulatory and Compliance Committee		Large cap		Mid cap		Small cap		FSI		Non-FSI		All companies	
		n	%	n	%	n	%	n	%	n	%	n	%
Is this a standing committee?	Yes	10	13%	3	5%	3	19%	7	20%	9	7%	16	10%
	No	67	87%	63	95%	13	81%	28	80%	115	93%	143	90%
Number of members	1-4	5	56%	2	67%	2	67%	5	83%	4	44%	9	60%
	5-9	4	44%	1	33%	1	33%	1	17%	5	56%	6	40%
	≥10	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
Meeting frequency (number of meetings annually)	1-3	0	0%	1	33%	1	33%	0	0%	2	22%	2	13%
	4-6	8	89%	0	0%	2	67%	5	83%	5	56%	10	67%
	7-9	1	11%	1	33%	0	0%	0	0%	2	22%	2	13%
	≥10	0	0%	1	0%	0	0%	1	17%	0	0%	1	0%
Average length of meetings (hours)	<2	2	22%	3	100%	3	100%	4	67%	4	44%	8	53%
	2-3	6	67%	0	0%	0	0%	2	33%	4	44%	6	40%
	>3	1	11%	0	0%	0	0%	0	0%	1	11%	1	7%

Public Policy Committee		Large cap		Mid cap		Small cap		FSI		Non-FSI		All companies	
		n	%	n	%	n	%	n	%	n	%	n	%
Is this a standing committee?	Yes	15	20%	0	0%	0	0%	3	9%	12	50%	15	9%
	No	61	80%	66	100%	16	100%	32	91%	111	50%	143	91%
Number of members	1-4	8	53%	0	0%	0	0%	2	50%	6	0%	8	50%
	5-9	7	47%	0	0%	1	100%	2	50%	6	0%	8	50%
	≥10	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
Meeting frequency (number of meetings annually)	1-3	5	33%	0	0%	0	0%	1	33%	4	33%	5	33%
	4-6	10	67%	0	0%	0	0%	2	67%	8	67%	10	67%
	7-9	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
	≥10	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
Average length of meetings (hours)	<2	13	87%	0	0%	0	0%	3	100%	10	83%	13	87%
	2-3	2	13%	0	0%	0	0%	0	0%	2	17%	2	13%
	>3	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%

Complete results for question 27

Cyber security and IT Committee		Large cap		Mid cap		Small cap		FSI		Non-FSI		All companies	
		n	%	n	%	n	%	n	%	n	%	n	%
Is this a standing committee?	Yes	4	5%	2	3%	1	6%	4	11%	3	2%	7	4%
	No	72	95%	64	97%	15	94%	31	89%	120	98%	151	96%
Number of members	1-4	3	75%	0	0%	1	50%	4	80%	2	0%	4	57%
	5-9	1	25%	1	100%	1	50%	1	20%	0	100%	3	43%
	≥10	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
Meeting frequency (number of meetings annually)	1-3	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
	4-6	4	100%	1	100%	1	100%	4	100%	2	100%	6	100%
	7-9	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
	≥10	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
Average length of meetings (hours)	<2	1	25%	0	0%	1	100%	2	50%	0	0%	2	33%
	2-3	3	75%	0	0%	0	0%	2	50%	1	50%	3	50%
	>3	0	0%	1	100%	0	0%	0	0%	1	50%	1	17%

Sustainability Committee		Large cap		Mid cap		Small cap		FSI		Non-FSI		All companies	
		n	%	n	%	n	%	n	%	n	%	n	%
Is this a standing committee?	Yes	8	11%	4	6%	0	0%	3	9%	9	7%	12	8%
	No	68	89%	63	94%	16	100%	31	91%	116	93%	147	92%
Number of members	1-4	3	38%	1	50%	0	0%	0	0%	4	50%	4	36%
	5-9	5	63%	1	50%	1	100%	3	100%	4	50%	7	64%
	≥10	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
Meeting frequency (number of meetings annually)	1-3	3	38%	1	50%	0	0%	1	50%	3	38%	4	40%
	4-6	5	63%	1	50%	0	0%	1	50%	5	63%	6	60%
	7-9	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
	≥10	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
Average length of meetings (hours)	<2	4	50%	2	100%	0	0%	1	50%	5	63%	6	60%
	2-3	4	50%	0	0%	0	0%	1	50%	3	38%	4	40%
	>3	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%

Science and Technology Committee		Large cap		Mid cap		Small cap		FSI		Non-FSI		All companies	
		n	%	n	%	n	%	n	%	n	%	n	%
Is this a standing committee?	Yes	16	20%	5	7%	1	6%	2	6%	20	15%	22	13%
	No	64	80%	63	93%	16	94%	32	94%	111	85%	143	87%
Number of members	1-4	6	43%	3	60%	1	50%	1	50%	9	47%	10	48%
	5-9	7	50%	2	40%	1	50%	1	50%	9	47%	10	48%
	≥10	1	7%	0	0%	0	0%	0	0%	1	5%	1	5%
Meeting frequency (number of meetings annually)	1-3	8	57%	1	20%	0	0%	1	100%	8	42%	9	45%
	4-6	6	43%	4	80%	0	0%	0	0%	10	53%	10	50%
	7-9	0	0%	0	0%	1	100%	0	0%	1	5%	1	5%
	≥10	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
Average length of meetings (hours)	<2	4	29%	3	60%	1	100%	0	0%	8	42%	8	40%
	2-3	6	43%	1	20%	0	0%	1	100%	6	32%	7	35%
	>3	4	29%	1	20%	0	0%	0	0%	5	26%	5	25%

Safety Committee		Large cap		Mid cap		Small cap		FSI		Non-FSI		All companies	
		n	%	n	%	n	%	n	%	n	%	n	%
Is this a standing committee?	Yes	11	14%	6	9%	1	6%	1	3%	17	13%	18	11%
	No	65	86%	64	91%	15	94%	32	97%	112	87%	144	89%
Number of members	1-4	3	25%	4	67%	0	0%	0	0%	7	39%	7	37%
	5-9	9	75%	2	33%	1	100%	1	100%	11	61%	12	63%
	≥10	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
Meeting frequency (number of meetings annually)	1-3	3	25%	3	50%	0	0%	0	0%	6	33%	6	32%
	4-6	8	67%	2	33%	1	100%	1	100%	10	56%	11	58%
	7-9	1	8%	1	17%	0	0%	0	0%	2	11%	2	11%
	≥10	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
Average length of meetings (hours)	<2	4	40%	4	67%	1	100%	1	100%	8	50%	9	53%
	2-3	6	60%	2	33%	0	0%	0	0%	8	50%	8	47%
	>3	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%

Appendix B — 2014 Board practices survey questionnaire

2014 Board Practices Survey

Note: Unless noted otherwise, please choose one answer for each survey question.

Company Profile

1. Please specify your company's industry:

- Consumer & Industrial Products (e.g., soap, automotive, retail, distribution, manufacturing, home, leisure)
- Energy & Resources
- Financial services (e.g., banking and securities, insurance, private equity, hedge funds, mutual funds, real estate)
- Life Sciences & Health Care
- Technology, Media & Telecommunications (e.g., entertainment)
- Other, please specify: _____

2. Please provide your ticker symbol: _____

3. Please indicate your company's market cap as of December 31, 2013:

- Large-cap: > \$10 billion
- Mid-cap: \$100 million to \$10 billion
- Small-cap: < \$100 million

Board Practices

Board Selection, Recruitment, and Composition

Note: For all questions in this section, please do not consider director and executive director in your responses.

4. What is your current board size?

- 3 members
- 4 members
- 5 members
- 6 members
- 7 members
- 8 members
- 9 members
- 10 members
- 11 members
- 12 members
- 13 members
- 14 members
- 15 members
- Greater than 15 members
- Don't know/Not applicable

5. How has your board changed over the past year?

- Increased
- Decreased
- No change
- Don't know/Not applicable

6. What is the average tenure of all non-management members of your board?

- < 4 years
- 5-7 years
- 8 years
- 9 years
- 10 years
- 11 years
- 12 years
- 13 years
- 14 years
- 15 years
- Don't know/Not applicable

7. How long has your longest non-management director been a member of your board?

- < 4 years
- 5-7 years
- 8-10 years
- 11-13 years
- > 13 years
- Don't know/Not applicable

8. When did the most recent director join your board?

- Within the past year
- One year ago
- Two years ago
- Three years ago
- More than three years ago
- Don't know/Not applicable

9. What percentage of board members are women?

- Up to 25%
- 30%-50%
- 51%-75%
- More than 75%
- Don't know/Not applicable

10. Compared to last year, have you had an increase in the number of women directors serving on your board?

- Yes
- No
- Don't know/Not applicable

11. What percentage of board members are minorities?

- Up to 25%
- 30%-50%
- 51%-75%
- More than 75%
- Don't know/Not applicable

12. Compared to last year, have you had an increase in the number of minority directors serving on your board?

- Yes
- No
- Don't know/Not applicable

13. What is the age of the youngest director currently serving on your board?

- 25 or under
- 26-30
- 31-40
- 41-50
- Over 50
- Don't know/Not applicable

14. What will be the most desired skills and experience needed to contribute to your board's success in the next two years? (Select up to three answers)

- Board committee (e.g., audit, compensation, nominating/governance, or risk)
- Financial acuity
- Clearing (e.g., CEO, CFO, COO, CIO, or CTO)
- Please specify: _____
- Corporate governance
- Cybersecurity
- Engineering
- Ethics and standards
- Financial services
- Human resources
- Industry (similar to respective company)
- International business experience
- Marketing and/or public relations
- Mergers and acquisitions
- Operations
- Outside board service (e.g., public, private, nonprofit)
- Please specify: _____
- Proficiency in stakeholder and investor communications
- Insurance and development
- Risk management
- Scientific
- Sustainability (including environmental, social, and governance issues)
- Technology/T
- Other, please specify: _____
- Don't know/Not applicable

15. What triggers drove any recent or pending changes to your board composition? (Select all that apply)

- Retirement of existing director(s)
- Requisition of existing director(s)
- Need for specialized knowledge
- Update in board effectiveness
- Diversity
- New regulation
- Enforcement actions
- Significant growth (organic or acquisition-based)
- Proactive integration
- Sponsor/initial public offering
- Operational activism
- Company/industry decision to keep board fresh
- Other, please specify: _____
- Don't know/Not applicable

16. Is your board classified?

- Yes
- No
- Don't know/Not applicable

17. For unclassified director elections, has your company implemented staggered voting?

- Yes
- No
- Don't know/Not applicable

18. Which of the following describes your board's timeline and practices related to director recruitment? (Select all that apply)

- We identify potential director candidates at all times in a continuous recruitment effort
- We identify potential director candidates only when there is a clear opening on the board
- We keep an open/ongoing director recruiting list on hand at all times
- We use an executive/board director recruiting firm as needed
- We use human resources or other management to identify candidates
- We look to recommendations made by other directors
- We use a board skills matrix or similar tool
- Other, please specify: _____
- Don't know/Not applicable

19. Does your board have any of the following refreshment policies? (Select all that apply)

- Age limit
- Loss of independent status after a prescribed number of years
- Other board tenure conditions/restrictions
- Don't know/Not applicable

20. Please specify the term: _____

- 3 years or less
- 3-5 years
- 6-10 years
- More than 10 years
- Don't know/Not applicable

21. Please specify the required retirement age: _____

- 60
- 71
- 72
- 73
- 74
- 75
- 76
- 77
- 78
- 79
- Don't know/Not applicable

Board Leadership

22. Which of the following best describes your board leadership structure?

- The chairman and CEO roles are combined
- The chairman and CEO roles are combined and we use a separate lead or steering director
- The chairman and CEO roles are separated

Other, please specify: _____
 Don't know/not applicable

24. The chairman is also chairman of these committees:
 (Select all that apply)

- Audit committee
- Nominations/corporate governance committee
- Compensation committee
- Executive committee
- Other, please specify: _____
- Don't know/not applicable

25. Is your chairman independent?

- Yes
- No
- Don't know/not applicable

Board Meetings and Materials

21. How many times did the board meet, including special meetings, (whether live or via teleconference/webconference) in the past full fiscal year?

- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- >15
- Don't know/not applicable

22. How many hours does a typical meeting of the full board last? (Do not count time spent on committee meetings)

- 1-2 hours
- 2-3 hours
- 4-5 hours
- 6-8 hours
- 9-10 hours
- More than 10 hours
- Don't know/not applicable

23. How many days in advance are board meeting materials provided to board members?

- Less than 5 days
- 5 days
- 6-10 days
- More than 10 days
- Don't know/not applicable

24. Please specify how your company distributes board materials.
 (Select all that apply)

- Through internal email, (e.g., internal network)
- Through secured email, (e.g., company email server)
- Through an internal or external board portal
- Through mailing of hard copies
- In person at board meetings
- Using an application for tablet devices
- Don't know/not applicable

25. The following members of management regularly attend board meetings:
 (Select all that apply)

- Chief accounting officer/controller
- Chief executive officer
- Chief financial officer
- Chief information officer
- Chief operating officer
- Chief risk officer
- Chief technology officer
- Corporate secretary
- Assistant corporate secretary
- General counsel
- Head of internal audit
- Head of business units
- Investor relations officer
- Other, please specify: _____
- Don't know/not applicable

26. Does your company permit shareholders to call special shareholder meetings?

- Permitted without any restriction
- Permitted but with minimum ownership threshold percentage
- Not permitted
- Don't know/not applicable

26a. Specify the threshold percentage:

- 10%
- 15%
- 20%
- 25%
- 30%
- 35%
- 40%
- 50%
- >50%
- Other, please specify: _____
- Don't know/not applicable

Board Committee Structures and Roles

27. Please complete the following table with regard to the specific committee practices of your board.

Committee	1. Do a standing committee?	2. Do a standing committee?	3. Number of members	4. Meeting frequency (number of meetings annually)	5. Average length of meeting (hours)
Answer choices:	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> 1-4 <input type="checkbox"/> 5-8 <input type="checkbox"/> 9-10 <input type="checkbox"/> 11-12	<input type="checkbox"/> 1-2 <input type="checkbox"/> 3-4 <input type="checkbox"/> 5-6 <input type="checkbox"/> 7-9 <input type="checkbox"/> 10-12	<input type="checkbox"/> <2 <input type="checkbox"/> 2-3 <input type="checkbox"/> 4-5 <input type="checkbox"/> 6-7 <input type="checkbox"/> 8-10	<input type="checkbox"/> <2 <input type="checkbox"/> 2-3 <input type="checkbox"/> 3-4 <input type="checkbox"/> 4-5 <input type="checkbox"/> 6-7 <input type="checkbox"/> 8-10
Audit					
Compensation					
Nominations/corporate governance					
Executive					
Risk					
Finance					
Investment					
Strategy					
Regulatory and compliance					
Public policy					
Cybersecurity and IT					
Sustainability					
Science and technology					
Safety					

28. Provide the frequency with which committee chair rotation takes place:

- Annually
- Every 2 years
- Every 3 years
- We do not have a rotation policy
- Other, please specify: _____
- Don't know/not applicable

29. Provide the frequency with which committee membership rotation takes place:

- Annually
- Every 2 years
- Every 3 years
- We do not have a rotation policy
- Other, please specify: _____
- Don't know/not applicable

30. Which of the following best describes your board's ongoing director education program? (Select all that apply)

- Provided on-site by management
- Provided in-house by a third party
- Directors are instructed by attendance at public forums or peer group sessions.
- Our board does not have a formal director education program

31. Education for new and existing board directors is provided on these topics:
 (Select all that apply)

- Anticorruption policies (e.g., FCPA, U.K. Anti-Bribery Act)
- Company policies
- Board fiduciary duties and other responsibilities
- Ethics
- Financial and liquidity risk
- Industry-specific topics
- Insider trading
- Market risk
- Every 3 years
- We do not have a rotation policy
- Other, please specify: _____
- Regulatory issues related to your business
- Risk oversight
- Other, please specify: _____
- Don't know/not applicable

32. How are your directors evaluated?
 (Select all that apply)

- Full board evaluation led by corporate secretary
- or other in-house personnel
- Full board evaluation facilitated by a third party

2014 Board practices survey questionnaire

<p> <input type="checkbox"/> Full board evaluation facilitated by the board chair or other director <input type="checkbox"/> Individual peer evaluation led by corporate secretary or other in-house personnel <input type="checkbox"/> Individual peer evaluation led by a third party <input type="checkbox"/> Directors meet one-on-one with a designated board member <input type="checkbox"/> Directors evaluate board performance in group discussion <input type="checkbox"/> Our company does not have a formal director evaluation process <input type="checkbox"/> Other, please specify: _____ <input type="checkbox"/> Don't know/Not applicable </p> <p> Strategy and Risk 33. Does your board participate in an affairs strategy retreat with management? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know/Not applicable </p> <p> 34. How often does the board discuss strategic alternatives? <input type="checkbox"/> Annually <input type="checkbox"/> Quarterly <input type="checkbox"/> At every board meeting <input type="checkbox"/> Other, please specify: _____ <input type="checkbox"/> Don't know/Not applicable </p> <p> 35. Has the board been briefed on strategic alternatives? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know/Not applicable </p> <p> 36. In the past year, has the board received enhanced information on risks associated with your company's strategy? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know/Not applicable </p> <p> 37. Was oversight shared by multiple committees, how does the board coordinate these activities? (Select all that apply) <input type="checkbox"/> Cross membership of the committees <input type="checkbox"/> Joint meetings <input type="checkbox"/> Risk presentations reported at multiple committee meetings <input type="checkbox"/> Detailed discussions at the full board meeting <input type="checkbox"/> Sharing of minutes or other committee meeting materials <input type="checkbox"/> Risk oversight is not shared by multiple committees <input type="checkbox"/> Other, please specify: _____ <input type="checkbox"/> Don't know/Not applicable </p> <p> 38. How often does the full board discuss the most significant risks to the company? <input type="checkbox"/> Annually <input type="checkbox"/> More than once a year <input type="checkbox"/> Not on our agenda <input type="checkbox"/> Other, please specify: _____ <input type="checkbox"/> Don't know/Not applicable </p> <p> 39. With regard to capital allocation, which of the following strategies has the board considered (this year)? (Select all that apply) <input type="checkbox"/> Share repurchase <input type="checkbox"/> Dividends <input type="checkbox"/> Stock buybacks <input type="checkbox"/> Acquisitions <input type="checkbox"/> Capital expenditures <input type="checkbox"/> Other, please specify: _____ <input type="checkbox"/> Don't know/Not applicable </p> <p> 40. If the board is faced with a potential M&A transaction, does it appoint a special committee of the board? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know/Not applicable </p> <p> 41. How often does the audit committee meet annually (in)? <input type="checkbox"/> 5 <input type="checkbox"/> 6 <input type="checkbox"/> 7 <input type="checkbox"/> 8 <input type="checkbox"/> 9 <input type="checkbox"/> 10 <input type="checkbox"/> 11 <input type="checkbox"/> 12 <input type="checkbox"/> Don't know/Not applicable </p> <p> 42. Does your company's audit committee hold a separate meeting to review the earnings release? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Varies depending on timing <input type="checkbox"/> Don't know/Not applicable </p> <p> 43. Which members of management meet with the audit committee? (Select all that apply) <input type="checkbox"/> Chief audit executive <input type="checkbox"/> Chief compliance officer <input type="checkbox"/> Chief risk officer <input type="checkbox"/> Chief financial officer <input type="checkbox"/> Chief tax officer <input type="checkbox"/> Chief technology/information officer <input type="checkbox"/> Controller <input type="checkbox"/> General counsel <input type="checkbox"/> Corporate development officer <input type="checkbox"/> Other business unit leaders <input type="checkbox"/> Other, please specify: _____ </p>	<p> <input type="checkbox"/> Don't know/Not applicable </p> <p> 44. Which of the following describes your company's audit committee education program? (Select all that apply) <input type="checkbox"/> Specific education topics are added to regular board meetings <input type="checkbox"/> Corporate third party, half-day or full-day sessions is devoted to a tailored education program <input type="checkbox"/> Managers attend third party training <input type="checkbox"/> No formal education program is in place <input type="checkbox"/> Don't know/Not applicable </p> <p> 45. Over the past year, has your company's audit committee participated in a board training program on these topics? (Select all that apply) <input type="checkbox"/> General continuing education <input type="checkbox"/> Specific board or governance issue <input type="checkbox"/> A new regulation <input type="checkbox"/> Ethics and compliance <input type="checkbox"/> Independent investigations <input type="checkbox"/> Sustainability risk and disclosure <input type="checkbox"/> Technical accounting topic <input type="checkbox"/> Other, please specify: _____ <input type="checkbox"/> Don't know/Not applicable </p> <p> 46. Does the audit committee conduct performance evaluations of its members? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know/Not applicable </p> <p> 47. How often does the audit committee receive reports on internal loss from a compliance hotline? <input type="checkbox"/> Frequently (five or more times a year) <input type="checkbox"/> Sometimes (one to four times a year) <input type="checkbox"/> Rarely (once a year) <input type="checkbox"/> Never <input type="checkbox"/> Don't know/Not applicable </p> <p> 48. In the past year, has your hotline received an increase in tips? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know/Not applicable </p> <p> 49. Please specify the links on your board's audit committee members being able to access the audit committee of other companies: <input type="checkbox"/> Other audit committees <input type="checkbox"/> 2 other audit committees <input type="checkbox"/> More than 2 other audit committees <input type="checkbox"/> We do not have links <input type="checkbox"/> Don't know/Not applicable </p> <p> 50. Has your company done any benchmarking on its internal audit department (e.g., budget, resources)? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know/Not applicable </p> <p> 51. Do your audit committee agendas include a discussion on succession of finance talent? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know/Not applicable </p> <p> 52. You have more than one financial expert on your audit committee, does your company disclose all names in your proxy? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know/Not applicable </p> <p> 53. Is your audit committee chair also your financial asset? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know/Not applicable </p> <p> 54. Have you considered an increased level of disclosure in audit committee reports beyond what is required? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know/Not applicable </p> <p> 55. Has your company considered supplemental performance disclosure, in addition to the summary compensation table, in its proxy statement? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know/Not applicable </p> <p> 56. Which board committee oversees your company's climate policy? <input type="checkbox"/> Full board <input type="checkbox"/> Compensation committee <input type="checkbox"/> Nominating/governance committee <input type="checkbox"/> We do not have a policy <input type="checkbox"/> Other, please specify: _____ <input type="checkbox"/> Don't know/Not applicable </p> <p> 57. Has your company established an anti-hedging policy that applies to directors? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> No, but we are considering the establishment of such a policy <input type="checkbox"/> Don't know/Not applicable </p> <p> Disclosure Committee 58. Which of the following individuals are members of your company's management disclosure committee? (Select all that apply) <input type="checkbox"/> General counsel <input type="checkbox"/> Chief audit executive <input type="checkbox"/> Chief risk officer <input type="checkbox"/> Chief financial officer <input type="checkbox"/> Director/chief of financial reporting </p>
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<p> <input type="checkbox"/> Chief risk officer <input type="checkbox"/> Chief compliance officer <input type="checkbox"/> Investor relations officer <input type="checkbox"/> Controller <input type="checkbox"/> Board-level committee <input type="checkbox"/> There is no management disclosure committee <input type="checkbox"/> Other, please specify: <input type="checkbox"/> Don't know/Not applicable </p> <p> 36. How often does your management disclosure committee meet? <input type="checkbox"/> Annually <input type="checkbox"/> Quarterly <input type="checkbox"/> At each board meeting <input type="checkbox"/> Only when needed <input type="checkbox"/> Don't know/Not applicable </p> <p> 37. Who chairs your management disclosure committee? <input type="checkbox"/> General counsel <input type="checkbox"/> Corporate or securities counsel <input type="checkbox"/> Chief financial officer/controller <input type="checkbox"/> Chief risk officer <input type="checkbox"/> Investment relations officer <input type="checkbox"/> A member of the internal audit department <input type="checkbox"/> Other, please specify: <input type="checkbox"/> Don't know/Not applicable </p> <p> CEO Succession Planning 38. How often does the full board review CEO succession plans? <input type="checkbox"/> More than once a year <input type="checkbox"/> Once a year <input type="checkbox"/> Less than once a year <input type="checkbox"/> Only when a change in circumstances requires <input type="checkbox"/> Never <input type="checkbox"/> Don't know/Not applicable </p> <p> 39. Who has the primary responsibility over the CEO succession planning process? <input type="checkbox"/> Full board <input type="checkbox"/> Compensation committee <input type="checkbox"/> Nominations/governance committee <input type="checkbox"/> Independent directors <input type="checkbox"/> Independent chair or lead director <input type="checkbox"/> CEO <input type="checkbox"/> Other, please specify: <input type="checkbox"/> Don't know/Not applicable </p> <p> 40. In the past year, how has the level of disclosure on your succession plan process changed? <input type="checkbox"/> Increased <input type="checkbox"/> No change <input type="checkbox"/> We do not disclose our succession planning process <input type="checkbox"/> Don't know/Not applicable </p> <p> Shareholder Engagement and Shareholder Activism 41. Does your company have a policy relating to contact between directors and shareholders </p>	<p> (other than the NYSE communications/Reg. 5-1C communications disclosure requirements?) <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know/Not applicable </p> <p> 42. The policy provides for the following: <input type="checkbox"/> Only independent chair or lead independent director is authorized to speak to shareholders <input type="checkbox"/> Only independent chair or lead independent director and committee chairs are authorized to speak to shareholders <input type="checkbox"/> Any director can speak to shareholders <input type="checkbox"/> No director is authorized to speak to shareholders <input type="checkbox"/> Other, please specify: <input type="checkbox"/> Don't know/Not applicable </p> <p> 43. What percentage of your company shareholders did the corporate secretary, the board, or senior management interact with over the past year? <input type="checkbox"/> None <input type="checkbox"/> 1%-5% <input type="checkbox"/> 6%-10% <input type="checkbox"/> 11%-15% <input type="checkbox"/> 16%-20% <input type="checkbox"/> 20% <input type="checkbox"/> Don't know/Not applicable </p> <p> 44. How many of your board had direct contact with shareholder(s) or shareholder groups over the past year? <input type="checkbox"/> No board member had direct contact <input type="checkbox"/> One board member had direct contact <input type="checkbox"/> More than one board member had direct contact <input type="checkbox"/> All board members had direct contact <input type="checkbox"/> Don't know/Not applicable </p> <p> 45. How requests from shareholders to speak directly to board members increased over the past two years? <input type="checkbox"/> Yes, significantly <input type="checkbox"/> Yes, slightly <input type="checkbox"/> No, they have remained constant <input type="checkbox"/> No, they have increased <input type="checkbox"/> Don't know/Not applicable </p> <p> 46. Has your company been approached by a shareholder activist within the past 12 months? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know/Not applicable </p> <p> 47. Has your board discussed how to prepare for activism in the last year? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know/Not applicable </p> <p> Technology and Data Analytics 48. Your company's social media policy applies to: <input type="checkbox"/> All employees </p>	<p> <input type="checkbox"/> Board members <input type="checkbox"/> We do not have a social media policy <input type="checkbox"/> Don't know/Not applicable </p> <p> 49. Board members are permitted to comment on our company and industry via various social media (i.e., Twitter, Facebook, LinkedIn)? <input type="checkbox"/> Yes <input type="checkbox"/> Yes, but with certain provisions and/or restrictions <input type="checkbox"/> No, company policy prohibits board members from using social media in relation to our company <input type="checkbox"/> Don't know/Not applicable </p> <p> 79. In the past year, has your board received a report on, or discussed the usage of, social media by employees, customers, or board members? <input type="checkbox"/> (Select all that apply) <input type="checkbox"/> Yes, the board received a report on employee usage <input type="checkbox"/> Yes, the board received a report on customer usage <input type="checkbox"/> Yes, the board received a report on board member usage <input type="checkbox"/> No such reports are provided to the board <input type="checkbox"/> Don't know/Not applicable </p> <p> 71. In the past two years, has your board been educated on the evolving use of big data and advanced analytics, and their potential return on investment? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> No, but we are considering this topic <input type="checkbox"/> Don't know/Not applicable </p> <p> 72. Does your board discuss how to incorporate and implement advanced analytics (e.g., data mining, predictive modeling, optimization, regression) into company strategy? <input type="checkbox"/> Yes <input type="checkbox"/> No, but we are considering the topic <input type="checkbox"/> Don't know/Not applicable </p> <p> Cybersecurity 73. Has your company experienced a cybersecurity breach during the past two years? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know/Not applicable </p> <p> 74. What level of awareness does the board have on cybersecurity? <input type="checkbox"/> High level <input type="checkbox"/> Moderate level <input type="checkbox"/> Low level but having more knowledgeable <input type="checkbox"/> Don't know/Not applicable </p> <p> 75. Who has submitted your board on cybersecurity? (Select all that apply) <input type="checkbox"/> Board member who specializes on the subject <input type="checkbox"/> Chief executive officer </p> <p> <input type="checkbox"/> Chief financial officer <input type="checkbox"/> Chief information officer <input type="checkbox"/> Chief operating officer <input type="checkbox"/> Chief risk officer <input type="checkbox"/> Chief technology officer <input type="checkbox"/> General counsel <input type="checkbox"/> Chief legal <input type="checkbox"/> None of the above <input type="checkbox"/> Other, please specify: <input type="checkbox"/> Don't know/Not applicable </p> <p> 76. Which committee of the board oversees cybersecurity issues? <input type="checkbox"/> Full board <input type="checkbox"/> Cybersecurity committee <input type="checkbox"/> Information technology committee <input type="checkbox"/> Audit committee <input type="checkbox"/> Risk committee <input type="checkbox"/> Other, please specify: <input type="checkbox"/> Don't know/Not applicable </p> <p> 77. Who within management is responsible for cybersecurity? <input type="checkbox"/> Chief information officer <input type="checkbox"/> Chief technology officer <input type="checkbox"/> Chief risk officer <input type="checkbox"/> Other, please specify: <input type="checkbox"/> Don't know/Not applicable </p> <p> Sustainability 78. Is your company's corporate social responsibility or sustainability report available on its website? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> We do not use sustainability reporting <input type="checkbox"/> Don't know/Not applicable </p> <p> 79. Is the board and/or a board committee involved in the oversight of the company's corporate social responsibility or sustainability effort and related public disclosures? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know/Not applicable </p> <p> 80. In the past year, has your company's strategy incorporated new sustainability initiatives? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> No, but we are considering this topic <input type="checkbox"/> Don't know/Not applicable </p> <p> 81. Does the new SEC conflict minerals disclosure rule apply to you? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know/Not applicable </p> <p> 81a. Is this topic regularly included on the audit committee's agenda? <input type="checkbox"/> Yes <input type="checkbox"/> Not on audit committee but another board committee </p>
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2014 Board practices survey questionnaire

At the time, neither our board nor any of its committees is discussing the topic
 Don't know/Not applicable

82. Does your company make political contributions?
 Yes
 No
 Don't know/Not applicable

83a. Does your company's board or a board committee oversee such contributions?
 Yes, oversight by the full board
 Yes, oversight by a board committee
 No
 Don't know/Not applicable

83. Does your company provide membership in trade associations that may make independent political expenditures?
 Yes
 Yes for some memberships, but not all
 Yes, but only those memberships to which we contribute a certain amount
 No
 Don't know/Not applicable

84. Does your company disclose the amount spent on lobbying?
 Yes
 No
 Don't know/Not applicable

Compliance, Culture, and Setting the Tone at the Top

85. Which activity does your company engage in to create tone at the top of the company?
 (Select all that apply)
 Cultural program
 A code of conduct/ethics
 New hire methodology
 Leadership and direct messaging
 Annual or other periodic training/education
 Internal postings (e.g., in news rooms)
 We currently do not engage in such activities
 Other, please specify
 Don't know/Not applicable

86. Who is primarily responsible for the oversight of the compliance program at the board level?
 The full board
 Regulatory/compliance committee
 Audit committee
 Risk committee
 Governance committee
 Other, please specify
 Don't know/Not applicable

87. What type of compliance program reporting does your company (or chief compliance officer) provide to the board and/or executive management?
 (Select all that apply)
 Reporting on compliance violations
 Compliance issue resolution meeting status
 Regulatory compliance testing and monitoring insights
 Regularly-conducted explanation results
 Regulatory fines and penalties
 Reporting on compliance performance metrics
 Reports on new laws and regulations
 General reports on office and culture
 Structure and performance of the compliance program
 Employee disciplinary actions
 None
 Other, please specify
 Don't know/Not applicable

88. Which individual(s) are responsible for reporting ethics and compliance matters to the board?
 (Select all that apply)
 Chief risk officer
 Chief compliance officer
 Chief financial officer
 Chief HR executive
 General Counsel
 Corporate secretary
 Other, please specify
 Don't know/Not applicable

Concluding question

89. Considering the topics included in this survey, which will be the top three areas of focus for your board in the next year?
 (Select up to three choices)
 Board election, recruitment, and composition
 Board leadership
 Board meetings and materials
 Board committee structure and roles
 Board constitution and bylaws
 Board deliberations
 Board performance
 Compensation matters
 Risk oversight
 Political contributions
 CEO succession planning
 Shareholder engagement
 Shareholder activism
 Technology and data analytics
 Cybersecurity
 Sustainability
 Compliance activities
 Culture and tone at the top
 Other, please specify
 Don't know/Not applicable

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USAID
FROM THE AMERICAN PEOPLE

CORRUPTION ASSESSMENT: UKRAINE

FINAL REPORT

FEBRUARY 10, 2006

This publication was produced for review by the United States Agency for International Development. It was prepared by Bertram I. Spector and Svetlana Winbourne of Management Systems International, and Jerry O'Brien and Eric Rudenshield of USAID.

CORRUPTION ASSESSMENT: UKRAINE

FINAL REPORT

February 10, 2006



**Management Systems
International
Corporate Offices**

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Washington, DC 20024 USA

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List of Acronyms

ACN	Anti-Corruption Network for Transitioning Economies
ABA-CEELI	American Bar Association Central European and Eurasian Law Initiative
ACU	Accounting Chamber of Ukraine
BEEPS	Business Environment and Performance Survey
CAOCC	Parliamentary Committee Against Organized Crime and Corruption
CCAA	Chief Control and Auditing Administration
CIPE	Center for International Private Enterprise
COI	Conflict of Interest
CSO	Civil Society Organization
COE-GRECO	Council of Europe- Group of States Against Corruption
CURE	Center for Ukrainian Reform Education
DAI	Development Alternatives, Inc.
DOJ	Department of Justice
EBRD	European Bank for Reconstruction and Development
EMG	Emerging Markets Group
ERUM	Economic Development of Ukrainian Municipalities
EU	European Union
FBI	Federal Bureau of Investigation
FOIA	Freedom of Information Act
FSU	Former Soviet Union
GOU	Government of Ukraine
IFES	International Foundation for Election Systems
IFMS	Integrated Financial Management Systems
IMF	International Monetary Fund
INL	International Narcotics and Law Enforcement
ISC	Institute for Sustainable Communities
IRI	International Republican Institute
MCC	Millennium Challenge Corporation
MOH	Ministry of Health
MOJ	Ministry of Justice
NDI	National Democratic Institute
NGO	Non-Governmental Organization
NSDC	National Security and Defense Council
OECD	Organization for Economic and Co-Operative Development
OPDAT	Office of Overseas Prosecutorial Development Assistance and Training

PDP	Parliamentary Development Project
RTI	Research Triangle Institute
SBU	State Security Service
SCRPE	State Committee of Ukraine for Regulatory Policy and Entrepreneurship
SME	Small Medium Enterprise
STA	State Tax Administration
UCAN	Ukraine Citizen Action Network
USAID/DCHA	United States Agency for International Development/Democracy Conflict and Humanitarian Assistance
USG	United States Government
VAT	Value Added Tax
VR	Verkhovna Rada
WB	World Bank
WTO	World Trade Organization

Executive Summary

The fight against corruption in Ukraine received a welcome boost in November-December 2004 as a result of the Orange Revolution. A year after the change in administration, some positive rhetoric has been heard and some reform activities have been accomplished, but a strong and clear national policy and strategic direction against corruption, with accompanying programs to increase transparency, strengthen accountability and build integrity, are still absent. This report analyzes the status of corruption and the anti-corruption program in Ukraine, focuses on several principal sectors, functions and institutions in depth, and offers priority programming options for USAID to consider in support of enhanced anti-corruption initiatives in the coming years.

Corruption in Ukraine still remains one of the top problems threatening economic growth and democratic development. Administrative corruption is widespread and visible in the everyday lives of citizens and businesspeople, and grand corruption is also widespread, though not as visible, in the higher levels of government where large sums of money and political influence are at stake.

Ukraine can be categorized as a *closed insider economy*¹ -- a country strongly influenced by elite cartels. Top political and business figures collude behind a façade of political competition and colonize both the state apparatus and sections of the economy. Immediately after independence, these influential elite and their organizations grew into major financial-industrial structures that used their very close links with and influence over government, political parties, the mass media and the state bureaucracy to enlarge and fortify their control over the economy and sources of wealth. They used ownership ties, special privileges, relations with government and direct influence over the courts and law enforcement and regulatory organizations to circumvent weaknesses in governmental institutions to their own private advantage. Their tactics and their results can be viewed as a clear exercise of *state and regulatory capture*. At the same time, there is a high tolerance for corrupt practices throughout society, facilitating a trickle-down effect that allows petty, administrative corruption to flourish.

This corrupt environment is a clear obstacle to future sustainable economic growth and integration into the European Union and world economy. It hinders fair competition, encourages under-the-table deals and collusion between state officials and business, promotes rent-seeking behaviors, discourages foreign investment, and decreases adaptability over time.

In more recent years, several of these Ukrainian cartels/clans have grown and subdivided, increasing the number of clans that compete with one another for wealth and power. Sometimes, for convenience, these clans coalesce on political issues. After the Orange Revolution, the network of “bosses” within the government bureaucracy that could “make things happen” for the cartels/clans was partially dissembled, resulting in some

¹ World Bank, *Ukraine: Building Foundations for Sustainable Growth, A Country Economic Memorandum: Volume 1* (August 2004).

uncertainty and a slowdown for major businesses. It is to be seen if the Yushchenko government rebuilds with a responsive, accountable and professional bureaucracy.

While the current situation may appear to the Western eye as an incipient competitive market economy, the system still operates largely in a collusive and opaque fashion, subverting the rule of law, and with apparent disregard for the public good.

Why is there corruption in Ukraine?

There are many factors that contribute to and facilitate corruption in Ukraine, including:

- An incomplete and inadequate legal framework.
- Selective enforcement of existing laws and regulations and the exercise of excessive discretion by public and elected officials at all levels.
- Excessive regulation of the economy by the state.
- Excessive executive control and influence over the judicial branch and the civil service, while at the same time, inadequate oversight of the executive branch by the Verkhovna Rada.
- Collusive ties between the political and economic elite, where the former use the state to enhance their wealth and the latter use their wealth to enhance their power.
- Low capacity for advocacy in civil society.
- Weak accountability mechanisms within government and in civil society to control potential abuses.
- Uneven public access to information of government decisions and operations.
- Resistance to decentralizing authority and resources to the regional and local levels which could break corruptive networks.
- High tolerance for corrupt practices among the population and the general belief that corruptive abuses and misconduct for public officials are low risk events and can be conducted with impunity.

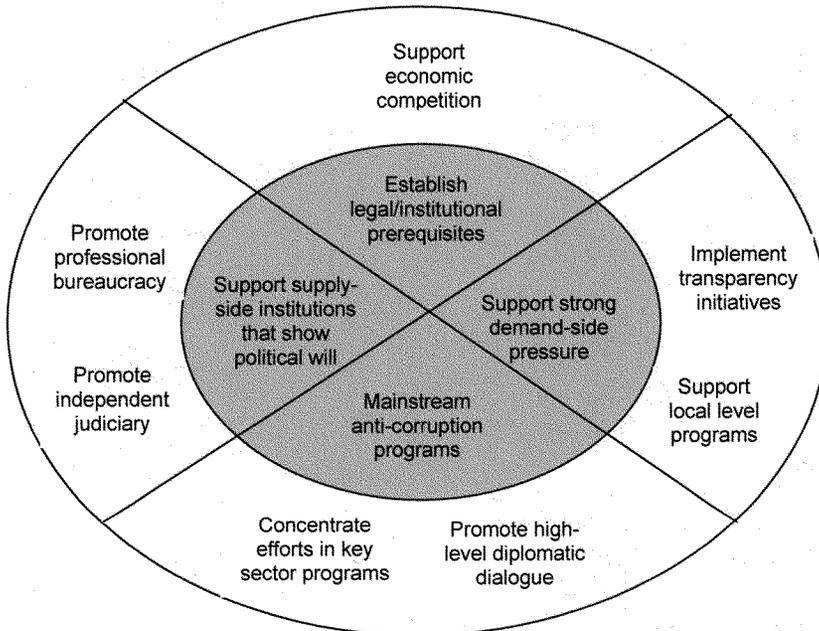
Despite this discouraging picture, there are many positive factors in Ukraine that have the potential to inhibit corrupt behaviors and facilitate the promotion of good governance, assuming the necessary commitment and sincere political will of leaders. These include:

- The Orange Revolution, which mobilized popular frustration about corruption, strengthened the voice of civil society, and brought the issue to the top of the political agenda.
- President Yushchenko, who has pledged to deal effectively with the problem. The President has directed several ministries and agencies to develop a National Anti-Corruption Strategy and to formulate a new interagency Anti-Corruption Commission.
- A range of anti-corruption reform activities in the State Customs Service, the State Tax Administration, and the Civil Service – departments typically identified as the most corrupted institutions in government.
- Important legislation that appears to be on the verge of approval and adoption by the Rada to reform the judiciary and enhance other anti-corruption laws.

- Civil society, business associations and the mass media that were energized by the revolution but require additional support to further develop their capacity to effectively use their resources and power.

What needs to be done?

While USAID/Ukraine has supported major anti-corruption programming in the past, increased attention to reinvigorate and expand these initiatives is now essential. The proposed strategic direction for future USAID anti-corruption programming includes several major themes – (a) establishing the legal, institutional and economic conditions within which anti-corruption programs will thrive, (b) promoting capacity building within key government institutions, the civil service, and the judiciary if they demonstrate a serious political commitment to change, (c) strengthening civil society and business to advocate for change and oversee government including activities at local levels and transparency initiatives, and (d) mainstreaming anti-corruption programs so that the problem is attacked at many levels, but concentrating efforts in major sectors and promoting high level diplomatic dialogue and multi-donor coordination.



Based on these strategic directions, the report recommends priority programs in various sectors and functional domains, as well as in several cross-sectoral areas, to fight and control corruption in Ukraine. These recommended programs are described more fully later in this report.

Cross-Sectoral and Prerequisite Conditions. Many activities need to be conducted that will establish the basic foundation upon which continued anti-corruption programs across

all sectors can be launched. These include: supporting the design and execution of a national and coordinated anti-corruption strategy, supporting the passage of missing anti-corruption legislation and the establishment and strengthening of anti-corruption institutions in government, and improvements in public procurement procedures and institutions. In addition, the demand-side of fighting corruption needs to be enhanced: advocacy skill of citizen, business and media groups must be strengthened, citizen oversight/watchdog groups must be formed, and civic education programs related to corruption must be supported. To facilitate these activities and encourage the inclusion of anti-corruption elements into existing programs, an anti-corruption mainstreaming workshop should be conducted for USAID program officers, as well as implementing partners.

Judicial Sector. Key activities must be supported to reform the judicial selection process and bring it into line with modern meritocracies. In addition, reforms in court administration and procedures need to be promoted to increase transparency.

Health Sector. Major remedies need to be promoted to make the procurement of pharmaceuticals more transparent and accountable. In addition, it is critical to develop tracking systems to monitor and oversee budgetary expenditures to stem leakages. Overall, organizational, management and institutional reforms are needed to improve the efficiency and effectiveness of healthcare delivery and reduce mismanagement which can encourage corrupt practices.

Education Sector. It is important to support CSO budget oversight initiatives to put external pressure on the educational system to be accountable for its use of public funds and to encourage greater transparency. Continued expansion of standardized testing procedures for higher school entrance exams is merited.

Public Finance. Support should be given to ensure effective implementation of new procurement laws and ongoing tax reform initiatives. In addition, the accounting chamber and the Chief Control and Auditing Administration should be strengthened, especially in the enforcement of their findings and recommendations. Finally, budget and expenditure oversight – internally and externally – should be promoted.

Private Sector. The business community needs to be mobilized to advocate for conflict of interest and transparency laws, and to support regulations that promote the business environment and eliminate administrative barriers. Expanded support should be given to private sector associations to conduct continuous monitoring of the implementation of business laws and regulations.

Parliament. Continued pressure and support needs to be applied to the Rada to promote adoption of an adequate anti-corruption legal framework. MPs need to be made more accountable to their constituents and various monitoring and transparency programs can be supported. Legislator skills training and resources need to be provided to improve legislative drafting, coalition building and negotiation/compromise skills.

Political Parties. Programs are needed to build more transparency into party financing.

Subnational Government. Local government institutions need to be strengthened so that they can deliver services in a transparent and accountable fashion. CSO advocacy and watchdog capacity building at the subnational level is also a major requirement to control corrupt tendencies.

Where to Start

Logically, it is important to begin a comprehensive anti-corruption program by ensuring an adequate foundation – an acceptable legal and institutional framework that is sensitive to corruption issues – on which other reforms can be built. Such activities should certainly be started immediately. However, it must be understood that these prerequisites often take time to establish and they should be considered as medium- to long-term efforts. At the same time, it is essential not to wait until these fundamentals are in place to begin other initiatives that could yield early and visible successes. In this regard, strengthening demand-side capacity is critical to sustain the pressure on government and for the public to believe that progress is being made. As well, an additional early step should involve conducting mainstreaming workshops and providing one-on-one technical assistance to current USAID implementers to help them incorporate targeted anti-corruption elements quickly into their projects.

Suggested Starting Points for a USAID/Ukraine Anti-Corruption Program

- 1. Mainstream anti-corruption goals in ongoing USAID projects**
- 2. Establish the Prerequisites**
 - Promote passage of key corruption-related legislation in the Rada
 - Promote better implementation of current corruption-related laws
 - Support design and implementation of a comprehensive national anti-corruption strategy
 - Begin activities to reform the judiciary
- 3. Support Demand-Side Capacity Building**
 - Establish civil society monitoring and watchdog groups in key areas, such as budgeting, procurement, the courts, and the legislature
 - Establish constructive civil society-government dialogues
 - Support a network of Citizen Advocate Offices that provide citizen victims of corruption with legal services to act on grievances
- 4. Target a Key Government Sector**
 - Select a major public service delivery sector, such as health, and initiate a comprehensive anti-corruption program there, to serve as a model for other future efforts

1. Introduction

The Orange Revolution and the election campaign leading up to it clearly highlighted the new leadership's interest in dealing with the longstanding problem of corruption in Ukraine. The rhetoric of the revolution raised expectations and provided an outlet for massive citizen frustration concerning official abuse and weak rule of law. The installation of the Yushchenko government elevated the hopes of many, both domestically and internationally, that the traditional systems of Ukrainian corruption would be drastically changed, quickly and decisively. However, a year later, only a little has been accomplished – and in a disorganized and not so visible fashion -- to actualize the anti-corruption promises of the campaign, and public disappointment and cynicism have grown.

In this report, we analyze the status of Ukraine's policy and legal framework to fight corruption, constituencies for and against reform, and several of the principal government sectors, functions and institutions that Ukrainians and country specialists believe to be highly vulnerable to corruption, but open to reform. These include the judicial, health, education, and private sectors; public finance functions; and Parliament, political parties and subnational governmental institutions. We offer recommendations and programmatic options in each of these areas to foster transparency, accountability and integrity reforms.

The most important findings of this study touch upon larger questions than the "who, what, where and how" of corrupt behavior in any given sector. The *why* of corruption is a far more critical question and the answer has to do with the evolving nature of democracy in Ukraine. Full democracy is still emerging in Ukraine and the problems that undermine democracy are in large part the same ones that facilitate corruption—lack of transparency, the reduced importance of serving the public in the political calculus of leaders, impunity, and minimal checks and balances on government officials.

The proposed program options presented later in this report have as much to do with improving the quality of Ukraine's democracy as with new prevention or control regimes targeted at corruption weaknesses. It is important to recognize, in this regard, that the fight against corruption in Ukraine will not occur overnight – as the Orange Revolution promised – but will take time and considerable effort. Thus, one of this study's most central recommendations involves the need to strengthen indigenous organizations and institutions that can serve to balance the power of the executive in Ukraine, producing greater oversight and improved accountability. These organizations and institutions include Parliament, the judiciary, civil society groups, the mass media, and private sector groups.

The question of true and demonstrated political will must be addressed as well. An axiom of corruption studies is that real change rarely happens in the absence of

committed and motivated political leadership. Without a sincere and demonstrated commitment from the very highest levels of government in Ukraine, current corruption trends are likely to persist. Serious and coordinated pressure for change from the diplomatic and donor communities can help; their leverage, in conjunction with indigenous demands for change, can be a critical voice determining the path for change.

Structure of this Report

The objectives of this assessment are twofold. First, this report provides a broad analysis of the state of corruption in Ukraine – taking into account the political-economic context that facilitates or inhibits corruption, the legal/regulatory/oversight framework that can control corrupt tendencies, the constituencies for and against reform, ongoing anti-corruption programs, and entry points for appropriate anti-corruption initiatives. In accordance with the new USAID Anticorruption Strategy,² this assessment examines multiple levels of corruption (petty, grand and state capture) and the key sectors and functions where corruption has impaired governance capacity and the achievement of development objectives.

Second, the assessment reaches certain conclusions and provides particular guidance to the USAID mission in Ukraine concerning programmatic options it might consider to deal with corruption vulnerabilities. The report offers suggested programs, sector-by-sector and function-by-function, that the mission can use to design its anti-corruption strategy and promote targeted anti-corruption activities in its existing programs as well as new initiatives. Cross-cutting recommendations that apply to several sectors are intentionally included in each relevant section of the report so that the sectoral discussions are complete unto themselves.

This assessment was conducted using a new Corruption Assessment Methodology which has been developed by Management Systems International for USAID/DCHA.³ The methodology is organized to minimize time and effort and to help the assessment team hone in on the real problems, whose solution are likely to make a difference. It starts by integrating existing studies, surveys and analyses about corruption in the country and drawing upon local experts to help pinpoint areas of greatest vulnerability to corruption. A corruption syndrome analysis follows that helps to frame the broad nature of the problem in the country by characterizing its particular proclivities to corruption. Together, these analyses help delimit the sectors and government functions that are most vulnerable to corruption, but that have the greatest opportunities for reform and are of the greatest interest to major domestic and international stakeholders. These areas are then diagnosed in depth and detailed recommendations are identified and formulated into an overall plan.

² Adopted in 2005, the USAID Anti-Corruption Strategy addresses four broad actions: (1) confront the dual challenges of grand and administrative corruption, (2) deploy Agency resources to fight corruption in strategic ways, (3) incorporate anti-corruption goals and activities across Agency work, and (4) build the Agency's anti-corruption knowledge.

³ Management Systems International (2006) *Handbook for Conducting a Corruption Assessment*. Washington, DC: MSI.

This study was conducted by a small assessment team composed of USAID/Washington and Management Systems International staff between November 2-18, 2005 during which they held meetings with governmental and nongovernmental stakeholders, gathered data, reviewed documents, and analyzed the results. The MSI team consisted of Drs. Bertram Spector, Svetlana Winbourne, Vladimir Dubrovskiy and Svetlana Gornaya; the USAID team consisted of Jerry O'Brien and Dr. Eric Rudenshiold.

This team would like to extend its thanks to the USAID/Ukraine cross-sectoral team that was established to advise our efforts and especially to Kathryn Stevens and Irina Bogomolova of the DG Office and Katherine Kuo, the USAID Desk Officer for Ukraine, Moldova and Belarus, for facilitating our access to people and information. We are grateful to all those who granted us their time and thoughts on these sensitive issues – from the community of USAID implementing partners, international donor organizations, government officials, and local NGOs, institutes, businesses and journalists.

The content and conclusions of this report are the authors and do not necessarily reflect the policies or opinions of the United States Agency for International Development (USAID).

2. Overview of Corruption in Ukraine

The Orange Revolution signaled the beginning of a new transformation in Ukrainian social, economic and political life. During this transformation process, many transparency, accountability and integrity issues have emerged as laws, rules, institutions, procedures and incentives change and Ukrainians at all levels - in and out of government - seek to develop truly democratic governance, a fair market economy, and equitable delivery of essential public services. During such times of major upheaval and change, corruption can be both tolerated and nurtured – to get necessary things accomplished in the short run under uncertain conditions. However, the distortions generated by corruption to the social, economic and political fabric of Ukraine need to be counteracted quickly to avert permanent damage and a deceleration of development objectives. Certainly, the pronouncements of the Yushchenko government to fight corruption and its pledge to work toward European Union accession are positive signals that need to be translated into implementable programs that yield visible results.

Much of the corruption that is discussed in this report deals with institutional and procedural weaknesses that contribute to pervasive corruption at the administrative level—the near-daily bribes required by citizens and businesspeople to obtain government services, permits, licenses, etc. However, grand corruption and state capture – where elites use their wealth to seek power or vice versa -- are also pervasive features of abuse of public office in Ukraine where accountability is weak and transparency in government operations is uneven. Without significant changes in the incentives faced by these elites and a significant strengthening in the capacity of civil society and the

business community to effectively demand accountability from public officials, little is likely to change in this corruption environment.

Ukraine's Corruption Syndrome

A country's political-economic dynamics strongly influence the degree and nature of corruption in that country. The way corruption manifests itself differs from country to country depending upon the ways that people seek and use wealth and power, the strengths or weaknesses of the state, and political and social institutions that sustain and restrain these processes. Differences in these factors give rise to several major syndromes of corruption.⁴ On the basis of Ukrainian expert evaluations that were supported by interviews with additional specialists in Ukraine, our analysis characterizes corruption in Ukraine as fitting into the *Elite Cartels* syndrome (described in the text box below). The implications of being in this syndrome play out later in this report in terms of the kinds of programmatic options likely to be effective in reducing corruption in Ukraine.

In Elite Cartel countries such as Ukraine, top political and business figures collude behind a façade of political competition and colonize both the state apparatus and sections of the economy. From the early 1990s, powerful officials in government and politics acquired and privatized key economic resources of the state. As well, shadowy businesses, allegedly close to organized crime, became powerful economic forces in several regions of the country.⁵ Over the course of the past decade, these business groupings – or *clans* – as they became called, grew into major financial-industrial structures that used their very close links with and influence over government, political parties, the mass media and the state bureaucracy to enlarge and fortify their control over the economy and sources of wealth. They used ownership ties, special privileges, relations with government and direct influence over the courts and law enforcement and regulatory organizations to circumvent weaknesses in governmental institutions. Their tactics and their results can be viewed as a clear exercise of *state and regulatory capture*.

A recent report by the World Bank⁶ refers to this clan-based Elite Cartel syndrome in Ukraine as a “closed insider economy” that can be an obstacle to future sustainable economic growth and integration into the EU and world economy. It hinders fair competition, encourages under-the-table deals and collusion between state officials and business, promotes rent-seeking behaviors, discourages foreign investment, and decreases adaptability over time.

⁴ Michael Johnston, *Syndromes of Corruption: Wealth, Power, and Democracy* (New York: Cambridge University Press, 2005)

⁵ Roman Kupchinsky, “Analysis: The Clan from Donetsk,” RFE/RL Poland, Belarus and Ukraine Report (January 12, 2003) <http://www.ukrweekly.com/Archive/2003/020304.shtml>

⁶ World Bank, *Ukraine: Building Foundations for Sustainable Growth, A Country Economic Memorandum: Volume I* (August 2004).

Elite Cartels Corruption Syndrome Defined

Elite Cartels are extended networks linking diverse elites who share a strong stake in the *status quo* and in resisting political and economic competitors. Such competition, in most cases, is intensifying at least gradually. Elites in the cartel may include politicians, party leaders, bureaucrats, media owners, military officers and business people—in both private and, often, parastatal sectors—in various combinations. Corruption will be moderate to extensive, but tightly controlled from above, with the spoils shared among (and binding together) members of the elite network. Leaders of nominally competing political parties may share corrupt benefits and power among themselves, again as a way of minimizing competition. Elite cartel systems are often marked by ineffective legislatures, extensive state power in the economy, politicization of development policy and banking, and a process of mutual “colonization” among business, political parties, and the bureaucracy.

Elite cartel corruption underwrites a kind of *de facto* political stability and policy predictability, partially compensating for moderately weak official institutions; as a result, international investors may find the situation tolerable or even attractive. Elite Cartels may be an attractive alternative to more disruptive kinds of corruption in the short to middle term, but it delays democratization and/or the growth of genuine political competition, while the shared interests of interlinked elites may make for inflexible policy and reduced adaptation over the longer term. Elite cartel corruption often features large and complex corrupt deals, frequently marked more by collusion than outright theft or violence, orchestrated from above, and closed to outsider elites.

-- Michael Johnston, *Syndromes of Corruption: Wealth, Power, and Democracy* (New York: Cambridge University Press, 2005)

In more recent years, several Ukrainian clans have grown and subdivided, increasing the number of clans that compete with one another for wealth and power, and establishing what appears to the Western eye as an incipient competitive market economy. Sometimes, for convenience, these clans coalesce on political issues.

After the Orange Revolution, the network of “bosses” within the government bureaucracy that could “make things happen” for the clans was partially destroyed by Prime Minister Tymoshenko, resulting in instability and uncertainty and a slowdown for major businesses. It lies in the hands of the Yushchenko government to take hold of this current opportunity to create new administrative procedures and institutions that are based on fair and equitable rules and a professional, meritocratic and disciplined bureaucracy. Ukraine appears to be at a crossroads -- from a clan-based Elite Cartel system to a more Western market economy based on transparency, the rule of law and fair competition, and patterns of good governance.

To move Elite Cartel countries, such as Ukraine, away from corruptive clan practices, state, political, and social institutions need to be strengthened, and existing trends toward increasingly open political and market competition must continue on a *gradual* path. The behind-the-scenes collusion, favoritism, and the colonization of bureaucracies and economic sectors that mark Elite Cartel corruption suggest that the “consensus package” of liberalization, improved public management, and enhanced transparency may be productive, as long as change is accompanied by institution-building in the state,

political, economic and social realms. The Yushchenko government professes these to be their goals. If directed action follows the words of this government, the political-economic habits of Elite Cartel societies may change quickly in Ukraine. Otherwise, it may take a series of genuinely competitive elections, and of alternations of power, to reduce their corruptive impact. But if citizens can reward effective government and punish the most corrupt over time – as evidenced by the thousands that staged demonstrations in Independence Square in 2004 - strong disincentives to collusion will have been created.

Factors that Contribute to the Spread of Corruption

What are the particular factors that facilitate the spread of corruption throughout a wide range of sectors and government functions in Ukraine? Many of the legal and institutional preconditions for dealing effectively with the problem of corruption have yet to be put in place. A year into the revolution, the existence of *demonstrated* political will among the new leadership to control corruption is still questionable and the government's capacity to actually manage such a considerable adjustment to Ukraine's widespread and pervasive corruption – even in the presence of strong *rhetorical* political will -- is debatable. Ukraine's major anti-corruption deficiencies include the following:

- **Inadequate Legal Framework.** The legal framework as it relates to corruption, transparency, accountability and integrity requires major revisions, amendments and additions. According to some counts, more than 28 laws need to be modified and/or adopted anew. Drafts of many of these legal changes have been on hold in the Parliament for years. Public discussion on these needed reforms has been uneven.
- **Selective Enforcement of Law.** Enforcement of existing laws and regulations is selective, subject to political and business influence and corrupt practices. Excessive discretion is exercised by public and elected officials at all levels.
- **Excessive Regulation of the Economy.** There is excessive regulation by the state of the economic sphere which yields many opportunities for corrupt behavior.
- **Excessive Executive Control.** The executive branch exercises control and influence over the judicial branch, reducing its independence and its capacity to provide equal and fair justice to all citizens. The legislative branch conducts minimal oversight of executive power.
- **Business-Government Ties.** There are strong ties between the political and economic elite in Ukraine. Many political leaders have extensive business interests. And business leaders seek to enhance their wealth through their close connections with the state. Despite the goals of the Orange Revolution, vested interests – both political and economic – do not want to see these relationships fade.

- **Manipulation of the Bureaucracy.** The activities of the civil service are subject to political manipulation. This situation is fostered by clan influence in hiring, low salaries, and the minimally adequate candidates for bureaucratic positions due to low salaries. The absence of a strong ethic of professionalism and enforced performance standards within the bureaucracy, along with unclear regulations and poor procedures, create opportunities for excessive discretion and abuses of office.
- **Low Capacity in Civil Society.** Civil society organizations are numerous, but lacking in the capacity and experience to oversee government operations effectively or in exercising firm pressure on government to reform itself.
- **Weak Accountability Mechanisms.** The government has few effective accountability mechanisms and external guarantors of accountability are very few. Internal and external audits and inspections are not conducted frequently enough and are insufficiently funded, and if abuses are identified, there is minimal follow up authority within the judicial or administrative systems. Supervision and management within the civil service is generally ineffective. Citizen watchdog groups that monitor and oversee government departments and their use of the public budget rarely exist. Investigative journalists, often natural watchdogs of government operations, have not been a major force for transparency and accountability.
- **Uneven Transparency.** Transparency in government decisions and activities is uneven. Public accessibility exists to some information, but not all. Even where there is public access, citizen awareness is low and the ability to use the information effectively is inadequate for advocacy activities.
- **Resistance to Decentralization.** Government operations and decisions in Ukraine are highly centralized, which helps to maintain collusive practices among political and economic elite. The movement toward devolving power and resources to regional and local levels, a goal of the current administration and a possible tool in breaking corruptive networks, has already been derailed, at least temporarily.
- **Impunity for Corrupt Behavior.** Abuse of power, rent-seeking behaviors, and other corruption actions are viewed as low risk events for public officials. Management and supervision, internal and external audits, and checks and balances are relatively weak in most sectors and functions of government. As a result, public officials believe that they can engage in corrupt activity with impunity. Moreover, the public has high tolerance for corrupt practices.

Even in this kind of environment, if political will existed at the top levels, some positive actions could be taken by executive decree at a minimum. However, many of the presidential decrees that have been put forth have primarily been rhetorical platforms and have not yielded real change. Moreover, recent Presidential directives to several

ministries and top level agencies have led to a confusing situation where there are multiple uncoordinated draft national anti-corruption strategies and proposed organizational structures to manage a yet-to-be-approved anti-corruption program.

Factors that Reduce the Spread of Corruption

Despite this discouraging picture, the team identified many factors in Ukraine that have the potential to inhibit corrupt behaviors and facilitate the promotion of good governance, assuming the necessary commitment on the part of leaders.

- **The New Government.** The Orange Revolution mobilized popular frustration about corruption and President Yushchenko has pledged to deal effectively with the problem. The recent sacking of the Cabinet, primarily over corruption problems, may be an indication of political will to follow up on these words. The President has also directed several ministries and agencies to develop a National Anti-Corruption Strategy and to formulate a new Anti-Corruption Commission.
- **Preventive Measures Taken.** A recent memorandum issued by the Presidential Secretariat outlines successful actions taken over the past year to deal with the problem of corruption.⁷ They include:
 - Reforms in the State Customs Service have resulted in large increases in revenues collected.
 - The State Tax Administration has conducted a large number of workshops for its officers on corruption issues.
 - The Central Department of the Civil Service has increased its activities to enhance the legal literacy of public officials.
 - There is more stringent adherence to recruitment procedures for applicants into the civil service.
 - Enhancements to the legal framework related to corruption issues have progressed, with several new draft laws under consideration.
 - There is an increasing trend in corruption cases submitted to and considered by the courts during 2004.

Corruption Indicators

These trends in corruption have been captured in several aggregate indicators measured by the World Bank and other organizations.

Aggregate Indicators

The state of corruption in Ukraine can be seen in broad perspective by reviewing aggregate governance indicators.

⁷ Presidential Secretariat, General Information on Measures on Combating Corruption in Ukraine in 2005.

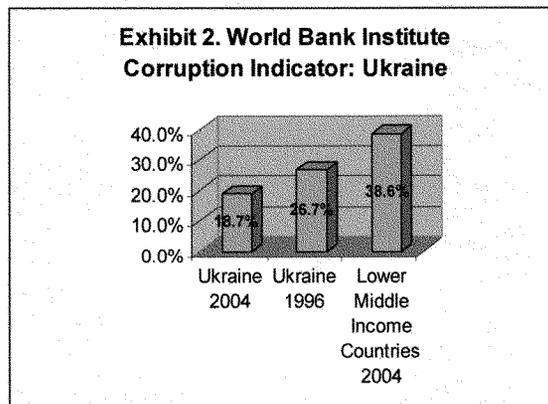
Transparency International issues an annual aggregate index for corruption in 159 countries. This index is based on a composite of survey results on the perception of corruption by experts and businesspeople. As portrayed in Exhibit 1, Ukraine's score has fluctuated over the past six years, but has remained consistently in the category of countries that are scoring worst on corruption (10 is least corrupt and 0 is most corrupt).

Exhibit 1. Transparency International's Corruption Perception Index for Ukraine

Year	Corruption Perception Index
2000	1.5
2001	2.2
2002	2.4
2003	2.3
2004	2.2
2005	2.6

The World Bank Institute regularly monitors key governance indicators over time for many countries.⁸ These governance indicators are one way of assessing change in corruption levels over time and comparing levels with other countries. One of the World Bank indicators is "Control of Corruption," – which measures the extent of corruption in a country, defined as the *perceived* exercise of public power for private gain.

The Exhibit 2 identifies Ukraine's results on the corruption indicator (a) between 1996 and 2004 and (b) in comparison with the average of lower middle income countries in 2004. (The ratings are indicated as percentages; the lower the percentage, the worse off the country on that indicator.)



Source: D. Kaufmann, A. Kraay, and M. Mastruzzi, *Governance Matters IV: Governance Indicators for 1996-2004* (www.worldbank.org/wbi/governance/pubs/govmatters4.html), 2005.

⁸ D. Kaufmann, A. Kraay, and M. Mastruzzi, *Governance Matters IV: Governance Indicators for 1996-2004* (www.worldbank.org/wbi/governance/pubs/govmatters4.html), 2005.

Ukraine's trend of backsliding on corruption during the Kuchma administration is starkly portrayed. From a 26.7 percent corruption index in 1996, Ukraine measured 18.7 percent in 2004, indicating a substantial increase in corruption. Comparing Ukrainian corruption levels with the average of the world's lower middle income countries in 2004, Ukraine scores worse on the corruption indicator – 18.7 percent -- in comparison to the other country average of 38.6 percent. Overall, these findings suggest a definite negative trend toward more embedded corruption in Ukraine.

While more recent measurement to account for the Yushchenko presidency has yet to be released, improvement in these scores is not likely to be evident in the near term. A public opinion survey conducted by the Razumkov Center between November 3-13, 2005 indicated that only 12.4 percent of voters backed Yushchenko's Our Ukraine Party for upcoming parliamentary elections (in March 2006), lagging behind Yanukovych's Regions Party (17.4 percent support) and Tymoshenko's bloc (12.8 percent support).⁹ Respondents indicated that public sector corruption is still rife, while the economy is faltering. In another survey by the same organization,¹⁰ 34.3 percent of respondents indicated disappointment with the lack of visible success in fighting corruption, while only 4.6 percent admitted a decrease in corruption as a visible achievement of the new government.

Public Perceptions of Corruption

Another approach to understanding the state of corruption in Ukraine is to review public opinion surveys on the subject. While public perceptions of corruption do not always tell an accurate story about the nature and spread of corruption in a country, they do provide useful insights on the "culture of corruption" by which citizens interact with their governments and how that culture changes over time. According to a survey taken in 2003 under the Partnership for a Transparent Society Program, 75 percent of respondents believed corruption to be very widespread in the central government, while 62 percent indicated they had actual personal encounters with corrupt officials over the previous five years.¹¹ The most corrupted institutions identified were health care (33 percent), small and medium sized businesses (19 percent), municipal services (15 percent), educational institutions (15 percent), and land privatization offices (13 percent). Forty-three percent of respondents indicated that bribery, by far the most common form of corruption identified by the respondents, was initiated by government officials, but 29 percent of respondents indicated that citizens also often initiate the transaction. Almost half of the respondents (49 percent) said that they have very low confidence in the government and 41 percent believed that it would be impossible to eradicate corruption in Ukraine. The basic direction of these survey findings are confirmed by other, more recent, polling

⁹ Daryna Krasnoslutska, Yushchenko's Party May Lose Ukraine Election as Economy Slows (November 28, 2005) <http://www.bloomberg.com/apps/news?pid=10000085&sid=a.pvAFQelR.g&refer=europe>

¹⁰ Razumkov Center, <http://www.zerkalo-nedeli.com/ie/show/573/51852>

¹¹ Image Control Research Center, Ukrainian Citizen's Attitudes towards Corruption and Transparency in Society (Kyiv: PTS, 2003)

results.¹² While these results are pre-Yushchenko, focus group discussions conducted by the assessment team suggest that popular perceptions now are at similar levels, if not worse. In fact, an IFES survey conducted in November 2005 found that only 21 percent of respondents believed that there was some improvement in the government's fight against corruption. Forty percent believed there was no change and 29 percent believed that there was a decline in government's commitment.¹³

3. Policy and Legal Framework to Fight Corruption

Fighting corruption was highlighted among the top three objectives of the current administration in the governmental program, *Towards the People*.¹⁴ However, after almost a year in office, no significant, consistent and visible actions have been accomplished. The legal framework remains incomplete, in particular in the corruption prevention area, though some laws and amendments have been drafted. Implementation of law remains a critical problem. There is no governmental institution empowered to lead anti-corruption efforts in the country. National policy and priorities are not defined. Rhetoric about fighting corruption on the highest level is not translated in a clear message and in deeds. Several agencies are drafting different versions of a national anti-corruption strategy with limited coordination. Few agencies have developed or are implementing internal anti-corruption programs. On the other hand, the government has signed or ratified several international conventions, committing itself to join the Council of Europe Group of States Against Corruption (GRECO) and implement its recommendations, and reactivating its cooperation under the OECD-sponsored Anti-Corruption Network for Transition Economies (ACN).

The Status of National Anti-Corruption Policy

Until the end of 2005, the *Concept on Fighting Corruption for 1998-2005* served as the principal policy document directing national efforts in fighting corruption. The Concept outlines major strategic directions, but did not provide benchmarks and specific terms. Year after year since 1997, the government drafted Plans of Action to Fight Organized Crime and Corruption and year after year, Parliamentary hearings on their implementation were concluding unsatisfactorily. Typically Soviet-style in their format and evaluation procedures, these Plans proved to be ineffective and often harmful. Since its adoption, the Concept has never been revised to align it with changing situations or international guidance. There have been a number of Presidential Decrees, Cabinet of Ministers Ordinances, and legislation issued over the past ten years to patch gaps in the deficient institutional and legal framework. The Presidential Coordinating Committee on

¹² Institute of Applied Humanitarian Studies, *Corruption in Ukraine: An analysis of its nature and causes* (CIDA, 2004).

¹³ IFES, *Preliminary Findings: IFES November 2005 Survey in Ukraine*.

http://www.ifes.org/publication/cbbe1bf1d5fcfe778b3785f3642b8d9/Ukraine_Public_Opinion_Key_Findings_2005.pdf

¹⁴ http://www.kmu.gov.ua/control/en/publish/article?art_id=15998559&cat_id=15998458

Combating Corruption and Organized Crime, an institution that was supposed to assume responsibility for coordinating and monitoring implementation of the national policy, was not effective either.

Failure to achieve meaningful results in implementing the Concept or the annual plans can be explained: the government never spelled out clear objectives, did not establish benchmarks, never revisited its policy, did not identify result indicators, and did not establish a credible monitoring system. According to the Ministry of Justice, the Plan of Anti-Corruption Actions for 2004 approved by Cabinet of Ministers Decree 383 of 17 June 2004 (the Decree is not a public document) produced a review of the national legal framework and developed a concept for a corruption monitoring system. Since documents describing the results of these efforts are not publicly available, it is impossible to determine their effectiveness or utility for the future.

A recent Decree of President Yushchenko, *On urgent measures to deshadow the economy and counteract corruption (No 1615/2005)*, was the first policy document by the new Administration calling for strengthened measures in several corruption areas: defining corruption and the subjects of corruption, public monitoring of corruption, conflicts of interest and financial disclosure, separation of business and public duties, securing privatization, and defining political appointees versus civil servants, among other items. While the Decree touched upon a number of important issues, the measures appear rather random and disconnected. Some of the measures are being developed already in the form of draft laws or amendments, and the decree can be viewed as a demonstration of the President's commitment to address the corruption problem.

At the current time, there are at least three new draft national anti-corruption strategies and concepts that employ a cross-sectoral approach developed by three separate agencies: the Parliamentary Committee against Organized Crime and Corruption (CAOCC), the State Security Service (SBU), and the Ministry of Justice (MOJ). Although the government seems to be aware of these dispersed efforts, little has been done to reconcile and consolidate these drafts into one document, though each party appeared to be in favor of joining forces and were ready to start a dialogue. Recently, with assistance from USAID/Kyiv and the US Embassy, these parties agreed that the National Security and Defense Council will serve as the coordinator of anti-corruption reforms within the GOU.

Recommendations

The Government needs to define its priorities for preventing and fighting corruption and to formulate them in a systematic single national strategy (or program) supplemented with plans of action. In view of Ukraine's intention toward joining the European Union, the priorities should be harmonized with EU standards. Adopting and implementing GRECO principles, EU Conventions, and other EU legal instruments should be major benchmarks in the strategy. OECD's ACN recommendations and the UN Convention can serve as additional sources to help define the strategy.

The Strategy should establish benchmarks and milestones. Indicators of results and a system of monitoring and evaluation should be developed. This is very important to assess progress. The Strategy should be a dynamic document and subject to review on an annual basis along with the action plans.

The Strategy should have short- and long-term priorities. The short-term priorities should be highly visible and have an impact on the broad public and its most insecure sectors. Activities and results should be broadly publicized.

New opportunities for Ukraine came about in November 2005 when the Millennium Challenge Corporation approved Ukraine for participation in the Threshold Country Program, making it eligible for intensive technical support in implementing anti-corruption efforts. Some of this assistance can be focused on designing, gaining consensus for and implementing a national anti-corruption strategy.

The Status of Anti-Corruption Enforcement Legislation

Ukraine's anti-corruption legislation remains incomplete and inconsistent. The principal legal enforcement documents that directly address corruption are the Law of Ukraine on Fighting Corruption and the Criminal Code (Part 17, in particular). The Law of Ukraine on Fighting Corruption was passed in 1995 and went through nine insignificant amendments since then. Most experts and practitioners agree that this law needs further modification or replacement with a new law to harmonize it with today's international legal standards and requirements.

There are several recent draft amendments in the Rada. The latest one was submitted on 15 April 2004 by the Parliamentary Committee on Fighting against Organized Crime and Corruption to extend applicability of the law to high level officials in the executive branch, including the Prime Minister, Vice Prime Ministers, and Ministers. This draft is currently being prepared for its second reading. On 14 July 2004, a draft Law on the Basis for Preventing and Fighting Corruption (Про засади запобігання та протидії корупції) was submitted to the Parliament (registration number 5776). The Main Scientific-Expert Department (Головне науково-експертне управління) reviewed the draft and recommended some changes prior to submitting it to the first reading. This draft law is supposed to replace the current Law of Ukraine on Fighting Corruption. Although it is not clear if it is still under consideration, the government has referred to it at several recent international forums and in official reports and statements. There are several other draft laws at different stages of development.

Implementation of this anti-corruption enforcement legislation is generally problematic. Until recently, it has been used against low-level public officials and bureaucrats for small and often questionable offenses; higher level officials generally are untouched. Sometimes the law is used as political retribution or as an instrument of suppression. After the Yushchenko administration came to power, many investigations into high profile corruption allegations were initiated, but there have been few court hearings to date.

Recommendations

Rapid adoption and implementation of new law enforcement legislation can be a useful addition to the government's overall anti-corruption program.

Donor pressure can be placed on the administration to bring some high profile cases to court. While "frying big fish" is not effective as a sustainable anti-corruption program by itself, it can be a useful and dramatic demonstration of the Yushchenko government's determination to crack down on high level abuse of office.

The Status of Corruption Prevention Legislation

Several pieces of important corruption prevention legislation are currently under consideration as described below.

Conflict of Interest and Code of Conduct. There is no particular law on conflict of interest (COI), though COI provisions can be found in the Civil Service Law and the Main Rules of Civil Servant Conduct (both are applicable to career civil servants and local public officials, but not to officials at the ministerial level), the Ukrainian Constitution, the Law on Public Deputies of Ukraine, and some other pieces of legislation. These provisions generally interpret conflicts of interest in a very limited fashion. They prohibit public officials and civil servants from being involved in any business activities or holding any other office and restrict them from supervising or being supervised by a family member. There are no policies or procedures for resolving conflicts of interest once detected. Rather, current provisions stipulate that these conflicts should be dealt with prior to taking public office otherwise the official will be subject to the Law of Ukraine on Fighting Corruption or other enforcement laws.

As for high-level public officials in the executive branch, the only law that regulates them is the Constitution. The Law on Public Deputies of Ukraine has a very brief article on Deputies' ethics. All existing legislative documents are very sketchy about COI provisions and not very practical. A Draft Code of Conduct of Public Officials [Кодекс добросовісної поведінки осіб, уповноважених на виконання функцій держави] was developed by the Ministry of Justice and is posted on their website for public comments. This draft discusses, with some specificity, the conduct of public officials, conflicts of interest, employment upon retirement, and other issues. In addition, the Draft Law on Administrative Procedures is being developed by the MOJ and is supposed to define the administrative procedures and responsibilities of public officials and civil servants clearly.

Public Hiring and Appointments. Hiring is regulated by the Civil Service Law and regulations developed by the Main Department of the Civil Service of Ukraine. The Department has issued guidance on hiring procedures, but nepotism and favoritism remain a common practice to fill open positions. A new Draft Civil Service Law was

drafted and discussed with the international community at a June 2005 conference and with the public via discussions at the administration's Public Collegia. The principal objective of this new law is to bring Ukraine in harmony with EU standards. However, the problem lies not so much in the law but in the way it is implemented.

Assets Disclosure. Several laws require financial disclosure for candidates and holders of public office and for civil servants and their immediate families. Only information on candidates running for elected office is available to the public. Financial disclosure information for public officials and civil servants is not publicly available due to privacy and personal safety restrictions. However, there is much skepticism about how these requirements are implemented in practice and how they can be used to control corruption.

Access to Information. There are several laws, presidential decrees and other legislative acts that regulate information availability to the public, among them: the Law on Information, the Law on Providing Information about the Government to the Media, the Law on Television and Radio, the Law on the Press, the Presidential Decree on Further Measures to Ensure Openness in Government, the Cabinet of Ministers Order On Measures to Develop a System of "Electronic Government", etc. Although all of these pieces of legislation discuss different aspects of how information is provided to the public, implementation of these laws by different governmental institutions is very uneven and the level of detail and the format in which information is provided are generally not adequate for meaningful use by citizens or organizations.

For example, the annual budget that is published on the government's website is 50 pages long and provides information at only the highest levels of generality. Governmental institutions, even those that have the most informative websites, publish press releases and information on legislation, but do not post reports and analysis of their performance. Studies conducted by several NGOs on governmental transparency at the central and local levels have revealed frequent abuses of citizen rights related to information access. On the other hand, civil society rarely demands better and more detailed information.

Citizen Complaint Mechanisms and Whistleblower Protection. There is a law that regulates citizen inquiries and complaints submission and handling procedures by governmental agencies. Every governmental institution is obligated to have mechanisms to collect and respond to citizen complaints. In addition, almost every governmental agency recently has introduced telephone and web-based hotlines. But most studies of the effectiveness of these mechanisms identify the public's general frustration and skepticism. To strengthen these options or provide an alternative, Presidential Public Reception offices were opened recently in all oblasts and report a mounting number of complaints. It is too early to say if this new initiative is helping to improve the situation.¹⁵

On the other side of the coin, there is no particular law that provides protection for public officials or civil servants who report on corruption or misconduct in their offices. Some general provisions are included in existing laws that ostensibly protect *any* citizen. For

¹⁵ ABA-CEELI is currently conducting a study of these offices for USAID.

example, the Law on Citizen Inquiries prohibits retribution against citizens and their family members who submit complaints or criticize any governmental or private institution or officials. In the Criminal Code, persons who report paying extorted bribes are not liable for the crime if at the time they report it there was no open case against them.

Sunshine Law (laws requiring that meetings of boards or commissions must be open to the public) ***and Citizen Participation***. Sunshine laws do not exist in Ukraine. However, parliamentary sessions are broadcast on TV in full and there are no particular restrictions for civil society groups to attend Parliamentary Committees (if they know when they are convened). As for the executive branch, there are no regulations and there is no practice to allow citizens to attend its meetings. On the other hand, a recent Presidential Decree obligated all governmental institutions at the central and local levels to establish public councils or collegiums to involve civil society in policy development and decision making processes. A new Draft Law on Openness and Transparency of the Government was drafted by the Ministry of Justice and posted on the Ministry website for public comment.

Recommendations

Technical assistance can be provided to develop meaningful legislation in these areas in harmonization with EU and international standards. Support should include not only comparative analysis of laws and legal drafting but assistance in implementation of the laws once adopted. This could take the form of establishing an Office of Governmental Ethics, development of web technology for information access, and expansion of the role of the Ombudsman office, for example.

4. Anti-Corruption Stakeholders in Ukraine

The enactment of anti-corruption reforms requires active promotion and mobilization by multiple constituencies and stakeholders that want to see greater transparency, accountability and integrity. Government and nongovernment actors need to be activated. The principal institutions and groups that are likely to be involved and may need support from donors are described below. Among these actors are the current and future champions of Ukraine's anti-corruption programs.

Governmental Institutions

Cross-Sectoral Institutions

Until recently, there was no single institution in the executive branch or any interagency institution that was responsible for fighting corruption in a comprehensive cross-sectoral fashion in Ukraine. Although the functions of the former Coordination Committee on Combating Corruption and Organized Crime that existed under the Presidential Administration since 1993 were transferred to the National Security and Defense Council

(NSDC) by one of the very first decrees of the new President in January 2005, NSDC did not take any significant step to assume this responsibility.

According to the Secretary of the NSDC in an official statement on 25 November 2005, an Interregional Commission against Corruption is supposed to be established soon to coordinate the anti-corruption-related activities of the Security Service of Ukraine, Ministry of Internal Affairs, Prosecutor General, and representatives of the court system. It is planned that the Commission will also include representatives from the legislature and civil society organizations, but it is unclear if it will represent other agencies from all branches of government.

The other institution that may play a very substantial role in anti-corruption efforts is the recently established Presidential Commission on Democracy and the Rule of Law chaired by the Minister of Justice. The major objective of the Commission is to align Ukrainian policy with the Copenhagen criteria toward joining the EU and to implement an EU-Ukraine Action Plan. Under the Action Plan, there are a number of activities that directly or indirectly relate to fighting and preventing corruption.

The recent agreement establishing the NSDC as anti-corruption coordinator within the GOU is the starting point for real dialogue among governmental agencies on how an interagency anti-corruption institution should be organized, under whose auspices, with what membership, and with what responsibility and authority.

Oversight Institutions

There are several governmental institutions whose mission it is to oversee the executive branch and some of them are directly involved in overseeing corruption abuses. They include the following:

The Parliament has conducted oversight over issues of corruption since 1992 when the first Temporary Parliamentary Commission was established. Since 1994, the Parliament has a permanent *Parliamentary Committee against Organized Crime and Corruption*. The Committee is very active in promoting anti-corruption policies and initiating new legislation. Among other functions, it reviews governmental and other annual reports on corruption. Recently, the Committee drafted an Anti-Corruption Strategy on its own initiative. According to the Committee head, they wanted to set an example and push the executive branch to develop and implement a national anti-corruption policy.

The *Ombudsman* does not play a significant role in fighting or preventing corruption. While it collects thousands of citizen complaints, it does not analyze this information to identify problem trends but rather acts on a case-by-case basis and rarely passes this information to the offending governmental institutions to bring their attention to abuses and violations. The Ombudsman's Annual Report to Parliament primarily contains statistics on complaints and complainers but no systematic analysis or recommendations for reform.

The *Accounts Chamber* is an independent governmental oversight institution that is empowered to conduct performance and financial control and analysis of all governmental programs and institutions, as well as review of how legislation is implemented. In 2004, the Chamber uncovered the misuse or ineffective use of budget and extra-budget funds totaling over USD1.5 billion. The Chamber is proactive in its efforts to reach out to governmental institutions to improve legislation and practices. It cooperates with the Prosecutor's office and monitors the further development of cases it passed to them for investigation.

The *Main Control and Revision Office of Ukraine* under the Ministry of Finance conducts financial audits of budget expenditures. It conducts such audits for over 15,000 organizations and agencies funded from the public budget throughout the country on an annual basis. During the first 9 months of 2005, it audited over 11,000 organizations and uncovered the unlawful use or misappropriation of public funds in the amount of about USD 200,000 and recovered about USD 71,000.

Law Enforcement Institutions

Most of Ukraine's law enforcement agencies (police, tax police, prosecutor's office) that have the responsibility to fight corruption are typically rated in public opinion surveys as being the most corrupted governmental institutions. Law enforcement reform is currently under development, but it is too early to tell how it will affect internal controls and law enforcement effectiveness in fighting corruption.

In March 2005, the President issued an order to establish a working group to draft a concept to establish a National Bureau of Investigation with responsibilities to investigate high profile crime and corruption. Such an institution is not a new idea in Ukraine. An attempt to establish such a bureau in 1997 failed, in part, because of a disagreement among law enforcement agencies about the role of the bureau and the division of responsibilities. Since then, there have been at least seven drafts to establish a new bureau. The current idea is being forcefully debated and many experts believe that strengthening and reforming existing agencies would be more effective.

Other Governmental Institutions

Many governmental institutions could be instrumental in preventing corruption, but are not currently involved. Some would rather maintain the *status quo*. A brief overview of some of these institutions follows.

The *Main Department of Civil Service of Ukraine* became very active in 2005 in issuing guidance to prevent and detect corrupt behavior, for example, guidance for state and local self-governance institutions on setting up corruption prevention frameworks, guidance on drafting professional responsibilities for public servants to prevent abuses, and guidance on monthly compliance reporting with anti-corruption regulations. All these documents attempt to establish better control

over corrupt practices in the civil service system at all levels and jurisdictions. However, there is no evident attempt to establish indicators to measure the effectiveness of these measures and to monitor implementation.

The *Tax Administration* adopted an Anti-Corruption Action Plan for 2004-2008. According to this plan, a Code of Ethics was adopted, a special Anti-Corruption Department was established in addition to the Internal Control Department, and regulations on job responsibilities are being drafted. The Anti-Corruption Department issues monthly reports on internal investigations and results. These reports are posted on its website. According to the latest summary report for the first eight months of 2005, regional branches conducted 2,259 internal investigations, among which about 30 percent were triggered by citizen complaints, resulting in administrative sanctions against 1,078 employees including 142 that were fired. The Department also conducts preventive measures through training of Administration staff and public outreach programs.

The *Customs Administration* aggressively pursues a campaign against corruption and abuses of power in its operations. Over the past year, it removed or rotated executive staff members, conducted about 100 internal investigations resulting in over 200 dismissals and administrative sanctions, opened a hotline for citizens, imposed a set of rules and restrictions for its personnel, and limits for cash that officers are allowed to have while on duty. The Customs Administration introduced a One-Stop Shop for processing freight customs clearance to reduce business-government interactions and opportunities for bribe-taking. The Customs Administration also issued a "Stop-Card" that businesses can use against customs officers who create unjustified delays or other barriers during customs procedures. Officers that receive these cards will be investigated by internal control units.

Civil Society Organizations

Civil society organizations and business associations are potential sources of important demand pressure on government to reform. The number of NGOs in Ukraine has been increasing, from 25,500 in 2000 to approximately 40,000 in 2004, of which about 10 percent are active.¹⁶ Many of these operate on the demand side: helping their constituencies voice their concerns and interests and advocating for change with official bodies that will help their constituents. According to a 2003 report, the largest percent of Ukrainian NGOs are involved in advocacy and lobbying, training and information dissemination.¹⁷ However, despite the incredible force they exerted during the Orange Revolution, Ukraine's civil society and business do not present a cohesive and mature front for change *vis à vis* the government. In general, there are few strong advocacy groups, few strong watchdog groups, uneven access to information about government

¹⁶ Vera Naniivska, *NGO Development in Ukraine*. Kyiv: International Center for Policy Studies, 2001; 2004 *NGO Sustainability Index for Central and Eastern Europe and Eurasia*, 8th edition, USAID, 2005.

¹⁷ Counterpart Creative Center, *Civil Society Organizations in Ukraine: The State and Dynamics (2002-2003)*. Kyiv, 2004.

operations and decisions, and limited experience in using information as a valuable tool in forcing government action. Their deficiencies are attributed to the fact that many have stayed away from highly political policy debates, they have minimal management capacity, and they are overly dependent on foreign donors. The business community is also poorly organized into associations (only about 25 percent of businesses belong to associations). Most businesses are very skeptical about their associations' willingness and capacity to provide services to members and represent member interests.

That said, there are many local and national NGOs and business groups that conduct very effective advocacy and watchdog functions related to anti-corruption reforms. For example, the All-Ukraine Network for People Living with AIDS gathered difficult-to-access cost data on pharmaceutical procurements conducted by the Ministry of Health (MOH) and compared them with similar procurements conducted in Ukraine by the Global Fund. They uncovered extremely wide cost differentials – procurements by the MOH as high as 27 times the cost of Global Fund procurements for the same medications. Apparently, collusion and special deals between the MOH procurement commission and the vendors were producing extremely unfavorable results and greatly endangering the public at large which is being deprived of necessary drugs. The Network presented their results to the MOH, the Ombudsman, the Prosecutor's Office, and international donors. Further investigations are now under way to validate their findings.

Other groups, such as the Laboratory for Legislative Initiatives, conduct very professional watchdog monitoring activities of Rada deputies. They maintain a website that contains deputy campaign promises, complete voting records of deputies that reveal if campaign promises were kept, and deputy linkages to business interests.

Among business associations, the Coordinating Expert Center of the Entrepreneurs' Union of Ukraine that currently unites over 60 business associations has been successful in promoting business-friendly legislation. Another strong voice for business interests is the Council of Entrepreneurs, the advisory body to the Cabinet of Ministers. Although it is established under government decree, it has recently become very active and vocal in monitoring regulatory reform implementation and serving as a channel for direct dialogue between government and the business community.

Mass Media

While there are certainly many exceptions, the mass media in Ukraine is generally deficient in investigative reporting, a major channel by which journalists can serve as effective public watchdogs. The media suffers from the lack of public access to government information and from a poor understanding of the linkages among the law, the judicial system and corruption. Since the revolution, the strong control of media outlets by clans/cartels has lessened and repressive actions against them have been relaxed.¹⁸

¹⁸ Nations in Transit 2005, Freedom House.

Recommendations

Government Institutions: Several key anti-corruption institutions are in transition or under development. If they are established and visibly demonstrate early commitments, donor support and technical assistance can be offered for implementation of programs. Encouragement should be given to government agencies to coordinate their efforts and develop partnerships with civil society groups. Monitoring and evaluation programs should be developed to measure and track progress of these government institutions toward achieving their anti-corruption objectives; those institutions that achieve their results can be rewarded through additional technical assistance programs.

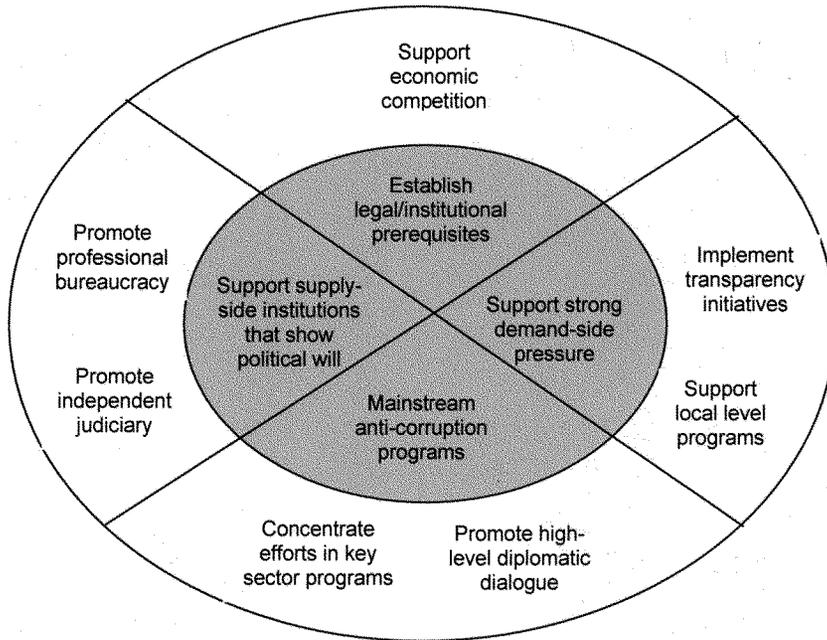
Civil Society, Business Associations and Media Organizations: Capacity building programs should be supported to upgrade civil society organizations and business associations as effective advocacy and watchdog groups. Investigative reporting training and competitions can be supported for journalists. Freedom of information and public access to information law reforms can be supported as well. Additional assistance can be provided to support the establishment of anti-corruption coalitions across NGOs and business associations, and among journalists to bolster their activities, facilitate sharing of experiences, and promote a single voice demanding reform.

5. Proposed Strategic Directions for USAID

The preceding analysis of corruption and anti-corruption trends, policies, legislation, and institutions in Ukraine suggests several strategic directions for future USAID and donor support to promote anti-corruption programs. These directions address the problems associated with Ukraine's corruption syndrome – as a closed insider economy/elite cartel grouping. The core and intermediate strategies are depicted below. Specific anti-corruption program options that operationalize these strategic directions are identified in subsequent sections of the report. The table in Section 8 links the proposed initiatives to these strategic directions.

We propose several major strategic themes – (a) establishing the legal, institutional and economic conditions within which anti-corruption programs will thrive, (b) promoting capacity building within key government institutions, the civil service, and the judiciary if they demonstrate a serious political commitment to change, (c) strengthening civil society and business to advocate for change and oversee government including activities at local levels and transparency initiatives, and (d) mainstreaming anti-corruption programs so that the problem is attacked at many levels, but concentrating efforts in major sectors and promoting high level diplomatic dialogue and multi-donor coordination.

Proposed Strategic Directions for USAID/Ukraine Anti-Corruption Programs



Core Strategies

- **Support establishment of the prerequisite conditions for effective anti-corruption programs.** The legal, policy and institutional frameworks for the government and civil society to pursue major and comprehensive anti-corruption programs are not fully established. Since the Orange Revolution, it appears as if the political will and trajectories exist to upgrade or revise these frameworks to establish a strong foundation for future activity. USAID and donor support is warranted to bring these frameworks to the required levels of competence. The MCC Country Threshold Program can serve as a major resource to bolster the prerequisite conditions for effective anti-corruption programs.
- **Support the development of strong demand-side pressure for anti-corruption reforms.** The revolution clearly demonstrated the power and inclination of Ukrainian civil society and media to make their voices heard and demand for reform. More capacity building is needed, as well as organizational coordination across civil society organizations, to establish them as a permanent and forceful source of external demand on government. Support for watchdog and advocacy activities should be provided.
- **Support supply-side institutions contingent upon visible demonstration of their political will.** There is much rhetoric by government leaders about their

desire to reduce and control corruption, but little demonstrated action or progress. The recent selection of Ukraine to participate in the Millennium Challenge Account Threshold Program provides Ukraine with a major incentive to turn its words into deeds. In addition, USAID and major donors can be encouraged to enhance their dialogue, coordination and messages to the government. Moreover, they can develop a set of clear benchmarks and initiate a monitoring and evaluation program by which positive actions and results demonstrating the government's sincere commitment to anti-corruption goals can be measured and tracked. If demonstrated progress can be presented, then the government should be rewarded with appropriate technical assistance and resources.

- **Mainstream anti-corruption activities throughout the portfolio of donor programs.** USAID and other donors should seek ways to inject anti-corruption objectives and activities into all their programs in Ukraine – across all sectors and functions. This mainstreaming approach will yield a more comprehensive and visible assault against corruption. Moreover, USAID and other donors should encourage the Ukrainian government and civil society groups to do the same. Technical assistance to USAID implementing partners to incorporate anti-corruption elements in their projects can be helpful. Mo

Intermediate Strategies

- **Support implementation of transparency initiatives.** Many Ukrainian laws and regulations mandate transparency, publication of government information, and openness in government operations. However, implementation of these requirements does not always meet the necessary standards. USAID and other donors should apply pressure to government agencies to achieve their transparency objectives quickly. Where technical assistance is reasonably required to meet these goals, it can be offered. Demand from civil society for improved government transparency should be generated and supported.
- **Support programs at the central and local levels.** While the drama of the Orange Revolution and political pronouncements against corruption occurred in Kyiv, much can be done to deal with the problem at the regional and local levels, where the effects of corruption are felt most personally. As a result, USAID and other donor programs should be targeted at both central and subnational levels to allow for trickle down and trickle up effects.
- **Promote an independent judiciary and improve access to information:** Support programs for court reform that ensure a separation of powers that will reduce executive interference in judicial decision making. A major objective of donor support should be not only to strengthen public and media access to information, but to build the capacity of civil society, business and the media to *use* the information that they gain access to effectively monitor and oversee government functions.

- **Promote a professional bureaucracy:** Emphasize efforts to shore up administrative quality, autonomy and professionalism in the civil service, and sustain them over the long run.
- **Support economic competition:** Strengthening and expanding ongoing programs to enhance economic competition will reduce opportunities for state capture by monopolistic forces. The subdivision of business-administrative groups into competing units is a positive sign that will dilute the influence of each particular elite group. Promoting economic and political competition at all levels will reduce the extent of state capture by economic elite over time.
- **Promote anti-corruption programs in key sectors and functional areas.** This and other assessments have shown that corruption in Ukraine is widespread and affects almost all government sectors and functions. However, it is not reasonable to expect USAID and other donors to direct their anti-corruption efforts against *all* sectors and functions. As a result, this assessment identifies key areas where corruption weaknesses are high, but opportunities to deal with the corruption problems are available and strong. These areas include the judicial, health, education and private sectors; the public finance function; and the institutions of the parliament, political parties, and municipalities.¹⁹
- **Promote high-level diplomatic dialogue and multi-donor pressure:** Since the revolution, anti-corruption has risen on the Ukrainian political agenda to the highest level. To capitalize on this status, high level diplomatic dialogue and multi-donor pressure is needed, along with anti-corruption donor programming, to mobilize Ukrainian counterparts and ensure that there continues to be strong movement forward.
 - It is important to maintain diplomatic and donor pressure on the top leadership so they stay the anti-corruption course and that they maintain pressure, in turn, on their mid-level managers
 - There is a need to maintain pressure to mobilize Parliamentary leaders as well, so that they adopt major pieces of legislation that have been languishing in committee.
 - NGOs need to know that donors are strongly behind their activities – both in terms of financial and moral support. This is especially important due to the sensitive and dangerous nature of corruption issues they deal with.

¹⁹ The sectoral and functional priorities referred to and elaborated on in subsequent sections were established based on a systematic questionnaire completed by six Ukrainian experts who rated a large number of government sectors and functions in terms of the extent of corruption, the existence of a legal/regulatory framework in each sector/function to deal with corruption problems, and the adequacy of the implementation mechanisms to handle corruption in a practical and operational fashion. Sectors and functions were prioritized for future support when the corruption problems were rated high *and* the framework and implementation were also strong. The results of this questionnaire were validated against open-ended interviews conducted with additional Ukrainian specialists. Detailed assessments of these sectors, functions and institutions are presented in the following sections.

- The MCC threshold program can be used as a carrot to push leadership to strongly initiate anti-corruption actions. Ukrainian leadership needs to demonstrate their political will and achieve solid progress within a two-year time frame to be eligible for larger MCC compact funding.

6. Corruption in Government Sectors and Functions

6.1 Judicial Sector

Overview

The judicial system usually scores as one the most highly corrupted institutions in public opinion surveys in Ukraine. It is supposed to offer citizens access to fair and equal justice, but as currently configured its operation falls short of necessary independence from the Executive branch of government, it suffers from excessive discretion on the part of judges and court administrators, it lacks sufficient internal controls to effectively reduce abuse of power, and it is not as transparent in its procedures and decisions as it ought to be. While many of these problems stem from inadequate legal, regulatory and institutional frameworks, the chronic underfunding of the judicial budget certainly does not help. Several draft laws are under consideration in the Verkhovna Rada that would fix some of these problems. Adoption of these laws, followed by meaningful and rapid implementation, will demonstrate the government's political will to reduce corruption in the judicial sector in a visible way. (A recent positive step is the enactment by the Rada of a new law establishing a registry of judicial decisions.) Based on passage of these prospective reforms, additional donor support programs to fully implement change activities will be warranted.²⁰

There are planned and ongoing USAID/USG programs to strengthen commercial law, administrative courts, and criminal judicial reform, through both implementing partner programs and the work of the Regional Legal Advisor. Other USG providers also offer support to reform initiatives in the judicial area, including INL, OPDAT, FBI and others. The OSCE has been providing assistance to help establish the new Administrative Court. The World Bank is just starting to plan a judicial reform program that is likely to focus heavily on court facility rehabilitation. EC/TACIS in conjunction with the Council of Europe are supporting judicial training, court administration, and procuracy reform to bring the Ukrainian practice into harmony with European approaches.

Corruption Vulnerabilities

The principal components of the judicial sector are each severely vulnerable to corruption:

²⁰ See the recent assessments of the judicial system by J.T. Asscher and S.V. Konnov, *Ukraine Justice System Assessment Report (TACIS, June 2005)* and David Black and Richard Blue, *Rule of Law Strengthening and Anti-Corruption in Ukraine: Recommendations for USAID Assistance* (USAID, May 2005) for more detailed reviews of the judicial sector and potential reform options.

- **Judicial Selection.** Despite a thin veil of merit-based competition for judicial recruitment and appointments, there are extensive corruption-prone problems in the selection process. Patronage from the Heads of Court (who are appointed themselves by the President) is essential to get appointed to a court seat. In larger cities, where competition is greatest, seats allegedly can be bought from the Head of Court for USD 2000 for the general jurisdiction courts. The process of testing in the Qualification Commissions is not transparent. The Presidential Secretariat, which has no role in the appointment process by law, has inserted itself into the process and can pull or insert judicial candidates. The result of these problems is a judiciary that is plagued by favoritism, nepotism, and political influence.
- **Judicial Discipline.** There is minimal monitoring and oversight of judicial conduct. Disciplinary investigations, hearings, and punishment are very infrequent. In this atmosphere, judges are likely to believe that they can act with impunity.
- **Court Procedures and Administration.** Interference in judicial decision-making by the executive and parliamentary branches, higher level judges, and businesspeople is common. As a result, the law is not applied equally or without excessive discretion. The Heads of Court are responsible for case allocation, vacation vouchers, bonuses, and equipment and facility budgets; there is little control over their discretion on these matters. Open trials are not common in Criminal Court and oral hearings are not common in Commercial Court; as a result, there is little transparency in these proceedings. Moreover, court decisions are not published. Oversight of court clerks is minimal. The State Judicial Administration, whose Head and Deputy are appointed by the President, is responsible for the court system's budget, facilities and logistics; this arrangement places the judicial system into an overly dependent position relative to the executive branch. As a result of these factors, the incentives for corruption in the judicial process are increased.
- **Enforcement of Judicial Decisions.** Enforcement of judicial decisions is in the hands of the Ministry of Justice's State Enforcement Department, which is not extremely effective and allegedly subject to corrupt practices.

Opportunities and Obstacles

Some recent actions bode well for meaningful judicial reforms:

- A major salary increase for all judges will go into effect on 1 January 2006. The intention of this raise is to eliminate the excuse of low wages for taking bribes.
- The Rada Committee on Legal Policy is a key actor that appears to be ready to support judicial reform. A working group of this committee is synthesizing 15 draft laws into a single draft that will be proposed to amend the existing 2002 Code on the Judicial System. It is hoped that this integrated draft will be discussed and adopted by the Rada immediately after the legislative elections in 2006.
- The Rada has just approved a new law to establish a registry of judicial decisions.
- The establishment of the new Administrative Court offers a new venue to deal with citizen-government problems. However, the court is operating without an

Administrative Procedures Code, its planned regional and appellate division expansion is not sufficiently funded, and its judicial selection procedures suffer from the same problems as the other jurisdictional courts.

- The current Minister of Justice is seen as a genuine reformer and now leads a national commission to develop a strategy to tackle rule of law and judicial reform issues.
- The Council of Judges, a self-governing body of judges, is an entity that can be called upon to handle several of the executive independence issues that currently plague the judiciary.

There are certainly many obstacles confronting effective judicial reform, among them::

- The continuing problem of extreme case overload, which is in large part due to the fact that over 1500 judicial positions are currently vacant.
- The budget for the court system is wholly inadequate. It barely covers salary costs and there is extensive leakage of funds in the distribution of the budget to the courts.
- Many judges are inadequately trained for their jobs.
- The Criminal Procedure Code is an outmoded holdover from Soviet times and needs to be modernized.
- Excessive political and economic influence over judges is difficult to control.

Recommendations

Contingent upon the adoption by parliament of effective judicial reform laws, the following programming options would be useful in support of Ukrainian implementation of those reforms. USAID programs should be carefully integrated with the activities of other donor organizations already working in this sector in judicial and procuracy reform, including the World Bank, OSCE, and EC/TACIS-Council of Europe. Specific initiatives are identified within each component area.

To address problems in the judicial selection process,

- Technical assistance for the Qualification Commissions to design criteria, improve testing procedures, develop merit-based assignment procedures, and conduct training programs at the Academy of Judges. Develop control mechanisms to reduce the influence of the Heads of Court in the selection process.
- Support development and training for an electronic registry to track judicial candidate processing and support assignment and placement of judges.

To address problems in the judicial discipline process,

- Provide support that emphasizes prevention, including randomization of case allocation and strengthening of the Code of Judicial Conduct with associated monitoring and enforcement of the Code by the self-governing body of judges (the Council of Judges).

To address problems in court administration procedures,

- Provide technical assistance to transfer the State Judicial Administration under the authority of the Supreme Court, supporting design of its internal regulatory framework, and providing organizational and budgetary training.
- Support the systematic publication of court decisions on the web. This will make judges more accountable for their decisions.
- Support further development and adoption of Alternative Dispute Resolution mechanisms to reduce case overload.
- Provide support to clarify and strengthen court administration procedures and make them more transparent. Support training of court management staff.
- Support development and adoption of civic education programs for high schools that includes, among other topics, the workings of the judicial system.

To address problems in the execution of judicial decisions,

- Provide technical assistance to reinforce the bailiff function and develop stronger control and oversight mechanisms.

Summary of Anti-Corruption Program Options²¹

Anti-Corruption Program Option	Major Counterparts	Potential Obstacles	Potential Impact on Corruption	Short-term success	Impact Timing
Support reform in judicial selection process (Qualifications Committee, Academy of Judges, Academy of Judges, electronic registry, etc.)	Academy of Judges, Qualifications Committee, Council of Judges	Heads of Court and Presidential Administration that will lose clout	High impact – more professional and qualified judges recruited and placed	Some early success are feasible if judiciary embraces these reforms wholeheartedly	Mid-term – organizational and IT changes to the process will take some time to put in place
Support reform in judicial discipline process (strengthen and enforce code of conduct, prevention measures, etc.)	Council of Judges	Sitting judges and existing judicial system	Moderate impact – continuous oversight of judges and actual disciplinary action taken against corrupt judges	Not likely except if examples are made of a few highly corrupt judges	Mid-term – requires many organizational and procedural changes, as well as changes to existing “culture of impunity”

²¹ Many of these recommended options are or will be supported by ongoing or planned USAID programs.

Anti-Corruption Program Option	Major Counterparts	Potential Obstacles	Potential Impact on Corruption	Short-term success	Impact Timing
Support reform in court administration and procedures (SJA transfer, publish court decisions, ADR, transparent court procedures, civic education)	SJA, Council of Judges, NGOs	Business and political interests that seek to circumvent judicial system; Heads of Court	High impact - reforms will be visible to public; more professional administration	Early successes are possible – especially in increased transparency	Mid-term – Requires many changes to current procedures
Support reform in execution of court decisions (controls and oversight of bailiff function)	MoJ, State Enforcement Agency	Business and political interests that seek to circumvent judicial system	Moderate impact – reforms will yield judicial results that will be visible to the public; more professionalized bailiff service	Early successes are possible – especially if examples are publicized of judicial decisions carried out	Mid-term – Requires changes to current procedures and organizational culture

6.2 Health Sector

While Ukraine faces fast growing HIV and tuberculosis epidemics, government health expenditures are low (ranging between three and five percent of gross domestic product as compared to a European Union average of 8.5 percent) and equity and access to health care services are problematic.²² The ratio of doctors to population is very high – 4.5 doctors per 1000 population in Ukraine versus 2.9 doctors per 1000 in Germany, for example – but these medical staff are disproportionately concentrated in urban areas.²³ Moreover, expert teams have called for a major reorganization of the Ukrainian health system, indicating that accountability by authorities to initiate changes required to meet these looming health crises is lacking, management capacity in the health system is weak, and governance practices in health care provision need to be improved.²⁴

Corruption Vulnerabilities

Many of the common healthcare corruption problems found in other countries exist in Ukraine: abuses in public procurement tenders, leakage in budget resources from the center to the facilities, small bribes to obtain services that are supposed to be provided for free, and lack of transparency in the provision of services. Other problems that are often

²² World Health Organization, World Health Report 2005, Geneva; Guy Hutton, Equity and access in the health sector in five countries of Eastern Europe and Central Asia: A brief review of the literature, Swiss Agency for Development and Cooperation, November 2002; World Health Organization, Summary Country Profile, July 2004.

²³ US Foreign Commercial Service/US State Department, Ukrainian Market for Health Care Services, 2001.

²⁴ United Nations Country Team, Common Country Assessment for Ukraine, October 2004.

found elsewhere apparently are not major issues for Ukraine. These include the presence of ghost workers that draw salaries but do not provide services, and conflict of interest situations for healthcare providers who are both on the public payroll and operate private services at the same time (the private health care market is still very small).

Studies have found that in 66 percent of cases, the patient knows it is necessary to make an under-the-table payment to receive proper services, while in 25 percent of the cases, healthcare providers ask for payment outright.²⁵ In a cash-strapped health system, several schemes have been observed:²⁶

- **Charity:** State hospitals that cannot accept cash legally for medical care provided requests charitable contributions, which may accrue to the hospital or be pocketed by the staff.
- **Local coverage:** Local hospitals have been known to offer their own insurance policies to patients that provide holders with special privileges.
- **Virtual clinics:** Doctors or hospital administrators establish private clinics illegally within their hospitals and ask patients to pay.
- **Special hospitals:** Clinics or hospitals administered by government departments or ministries other than the Ministry of Health receive extra payments from private insurance companies.
- **Barter:** Private companies have been known to pay off the debts of public hospitals in return for free healthcare for their employees.

Opportunities and Obstacles

Healthcare providers and citizen groups at a local level are both motivated stakeholders for anti-corruption reform: an increase in transparency, a reduction in budget leakage, and a decline in procurement abuses would provide immediate and visible returns to both providers and consumers. The All-Ukrainian Network for People Living with AIDS, for example, is an excellent example of an NGO that has mobilized its resources to become an effective citizen watchdog of healthcare pharmaceutical procurement. Another example is a healthcare provider in Donetsk that is working under a USAID grant and found solutions to overstaffing in the hospital maternity ward; reorganization and reengineering of existing institutions and procedures are likely to reduce costs extensively and release funds that can be used to provide basic services.

On the positive side, the salaries of healthcare providers have recently been increased, diminishing wage levels as an excuse for extracting bribes from citizens seeking services. President Yushchenko has recently stressed his intention to establish a national health insurance fund soon, in part to help solve the problem of illegal payments in the healthcare system.²⁷

²⁵ Hutton, *op cit*.

²⁶ John Marone, "Ukraine's Health Care System: Finding the Right Cure," *The Ukrainian Observer*, Issue 208, 2005.

²⁷ V. A. Yushchenko, "Current State of Ukraine's Medical Sector One of the Most Disturbing Problems," Presidential radio address, November 12, 2005, www.president.gov.ua/en.

As to possible obstacles to anti-corruption action, it has been alleged that popularly considered reformers within the Ministry of Health have recently been dismissed. Obviously, the powerful stakeholders that benefit from procurement kickbacks are likely to oppose reforms.

Recommendations

The recommendations listed here are illustrative of anti-corruption initiatives that would promote greater accountability and transparency across several basic healthcare components. First, there are several program options available to strengthen the public procurement of pharmaceuticals and medical supplies/equipment, including:

- Support for strengthening the procedures and controls used by the Tender Commissions. This would include enhanced transparency measures in their procedures.
- Support for citizen and business watchdogs to monitor and oversee public procurements.
- Support for establishing a Procurement Audit Unit within the Ministry of Health to oversee tenders.

Leakage from already inadequate healthcare budgets reduces the quality and quantity of service delivery in this sector. Several program options can help detect and stem these leaks, for example:

- Support a study that tracks budget expenditures from the Ministry of Health budget plan to the oblast, rayon and city levels to detect leakage.
- Train health providers and managers at the local level (eg., hospital and clinic administrators) to how to monitor the flow of budgetary resources from the center to their facilities, and then how to track the expenditure of those funds. This effort can help to improve the transparency and accountability of the health budget.
- Support the establishment of Community Health Review Boards, involving the participation of citizens, NGOs, business groups, and health service providers at a community level, to monitor the expenditure of health resources and detect misuse.

Support can be provided to the Ministry of Health in formulating a national health insurance fund that will deal effectively with problems of corruption and control for informal payments, while providing for fair and equal access to healthcare services for all.

The healthcare system and healthcare facilities, in particular, are in need of organizational, management and institutional reform. There is some evidence from USAID programs (for example, the Maternal and Infant Health Program in Donetsk) that some healthcare facilities or departments may be overstaffed, while others are understaffed. There is a concentration of doctors in urban areas and sparse resources in rural areas. In addition, small bribes and informal payments for health services that are

supposed to be free have become customary in Ukraine, allegedly to compensate for low salaries. These imbalances can produce deteriorating effects on healthcare delivery, especially in situations where budget resources are inadequate. As a result, several program options are desirable:

- Support technical assistance in several pilot healthcare facilities to reassess, and reengineer staffing plans to bring them in line with the demand for services. Downsizing of staff, beds and hospitals; overall reorganization and redeployment of resources in relation to usage; and the introduction of “family doctors” to manage healthcare services at the local level are issues that can be addressed.
- Support several pilot tests introducing official “fee for services,” where the fees are openly posted and the revenues accrue to the healthcare facilities’ coffers.

Summary of Anti-Corruption Program Options

Anti-Corruption Program Option	Major Counterparts	Potential Obstacles	Potential Impact on Corruption	Short-term success	Impact Timing
Strengthen the public procurement of pharmaceuticals and medical supplies/equipment (Tender Commissions, citizen watchdogs, Audit Units)	MoH procurement committees, healthcare NGOs	Vested business interests and corrupt tender committees	High impact – public funds will go further in purchasing needed drugs and supplies	Yes – more medications purchased at lower prices	Near-term – oversight and procedural changes can be implemented quickly
Support detection and monitoring of budget leakage (track budget expenditures, Community Health Review Boards, etc.)	Local NGOs, local healthcare providers	Intermediate actors that siphon off funds	High impact – more money available to provide healthcare services	Yes – oversight bodies can probably identify problems quickly and seek near-term remedies	Mid-term – long-lasting changes to budget allocation and expenditure may take some time
Support Ministry of Health in formulating a national health insurance fund that deals effectively with problems of corruption	MoH	Vested interests that benefit from under-the-table payments	Moderate impact – more rational and better funded approach to providing healthcare	Not likely	Long-term – establishment of fund will probably take some time
Support organizational and management reforms of healthcare system (reengineer staffing plans, pilot test “fee for service” programs, etc.)	MoH, particular healthcare facilities	Vested interests in existing system	High impact – rationalized structure and deployment of resources to provide best service	Yes – Pilot testing of reforms in sample facilities	Long-term – reengineering the entire healthcare system will take time

6.3 Education Sector

The Ukrainian educational system is still in need of major reform and overhaul. As with many Ukrainian state structures, the Education Ministry lacks transparency and accountability at many levels. There is little involvement of CSOs in the Ministry's work, but the education system touches most families in the country and civil society is involved to a degree at local levels. With corruption widely perceived as rampant from the classroom on up, education is one area that motivates many families to care and be concerned.

Widespread acknowledgement of low teacher salaries lends some credibility to the practice of students making payments under the table at schools. However, it is also quite prevalent for normal, graduation and entrance exams all to require the payment of special fees or bribes. The pervasiveness of corruption in this sector poses three serious development concerns—(1) a further financial strain on families with children in school, (2) an attendant increase in frustration with Government's inability to deliver promised services, and (3) the further institutionalization of bribe payment as an acceptable norm for young people attending schools.

Corruption Vulnerabilities

A number of issues plague the education sector in Ukraine which contributes to a serious problem of corruption at all levels in the school and higher education systems. From procurement to grading to entrance examinations, corruption is currently fused into Ukraine's education system. Centralized financing without transparency to show the allocation and spending of funds down to the local school level has resulted in what appears to be misappropriation and misallocation of monies and has frequently resulted in shortfalls at the local level. The lack of involvement and participation of CSOs in various school and Ministry processes also inhibits transparency and accountability. Some officials may seek to sell grades and passing scores for higher school placement.

Opportunities and Obstacles

The President has mandated that computerized higher school entrance exams be administered nationally to reduce corruption and to provide equal opportunities. The period prior to the elections has enabled parties, politicians and CSOs to address the need for higher wages and reform of testing standards nationally, while combating corruption as a cross-cutting issue. Education reform has powerful salience among voters and is not an extremely divisive issue among politicians. Current government officials see reform in this sector as achievable.

First and foremost, parents are constituents for reform; they seek better educational opportunities for their children and more responsiveness from the government on this matter. Most academics are opposed to and even shamed over the need to take bribes.

There also appears to be a willingness to reform in the Ministry itself, but this is at least partially tied to policy issues as well. Many government officials and parliamentarians are sensitive to the frustrations of families and feel this is a safe issue to tackle. Even corrupted politicians do not generally feel threatened by reform in this area.

Administrative practice and bureaucratic intransigence appear to be the major stumbling blocks to reform, outside of a few who may benefit from the status quo system.

Recommendations

- Meetings between CSOs and budget watchdog groups with teacher organizations should be promoted to work on common strategies to solve corruption issues in schools and the Ministry. They should target transparency in the expenditure of budget and extra-budget funds.
- Assistance on standardized testing remains a serious entry-point opportunity to have an immediate impact on families and show progress in the fight for reform. The US Embassy's Public Affairs Section has piloted standardized testing at three sites.
- Programs that enhance legal literacy among students should be promoted, in order to build a broader, more educated constituency for anticorruption behavior and reform.

Summary of Anti-Corruption Program Options

Anti-Corruption Program Option	Major Counterparts	Potential Obstacles	Potential Impact on Corruption	Short-term success	Impact Timing
Strengthen demand-side pressure and oversight of education budget; promote budget transparency	Ministry, CSOs	Medium. Capacity needs to be developed.	Medium to high.	Mid- to long-term	Mid- to long-term
Mainstream a/c provisions into school entrance testing procedures and all testing throughout schools/universities	Ministry, CSOs, Center for Testing Technology	Medium. Ministerial intransigence and capacity to reform.	Medium to high and perceived nationwide by almost every family.	High impact in short-term	Mid-term
Promote legal literacy through civic education programs	Ministry, CSOs, UCAN	Medium. Ministerial capacity to change.	Medium to high. Builds constituency for reform.	Medium.	Mid- to long-term.

6.4 Public Finance

The use of public funds stretches across a broad arena of government functions and departments. It is an area of critical concern both in terms of understanding corruption in Ukraine and designing approaches to combat it. It includes the entire cycle of the budget process (budget formulation, approval, execution and audit/oversight) and involves the executive and legislative branches at both national and sub-national levels. It also involves looking at IT capacity and financial management systems across ministries and government agencies. Procurement and government purchasing are central aspects of the budget execution phase. Both internal audit and controls, as well as external audit by the Verkhovna Rada's Chamber of Accounts are critical components. Intergovernmental finance includes policy and formulas for transfers as well as implementation. And finally, the important role of civil society participation and oversight must be examined.

Corruption Vulnerabilities

Public finance is a critical government function that affects all areas of public activity, and it encompasses the vast majority of corrupt behaviors in one way or another. Vulnerabilities in this area typically stem from three weaknesses: a poor legal/regulatory framework, weak capacity (technological, organizational, human and resource), and/or a lack of transparency/oversight. In Ukraine, the problems in the public finance area emanate clearly from a lack of transparency and oversight, both by the appropriate government bodies and civil society.

Specific technical problems, such as the fact that the GOU uses the cash basis²⁸ of accounting rather than the more appropriate accrual basis, certainly exist. Strengthening government capacity might have a positive impact. But no interviewees suggested that the GOU lacked the necessary capacity to perform well in this area.

Likewise, the legal/regulatory framework in Ukraine is far from ideal. For example, there is no comprehensive FOIA-type legislation. But a number of existing laws, decrees and regulations provide for obligatory transparency and accountability, notably in the budget and procurement areas. The GOU, however, fails to comply with these existing requirements in important ways. While the GOU claims to be transparent, and gets credit from the international community for being so, it falls far short of real transparency. It appears that the GOU is either unwilling or unable to create an environment of real transparency and accountability.

Civil society appears to have strong analytical capacity in this area, but we did not identify many NGOs working in the area of budget oversight and advocacy, procurement watch, or other watchdog roles. Neither the media nor the business community appears to be aggressively engaged in this area in a major way.

²⁸ *Diagnostic Report: Fiscal Transparency and Openness in Ukraine* by Institute for Economic Research and Policy Consulting, 2003, p. 17.

It should be noted that transparency in the use of public funds does not attack corruption directly. However, it creates the environment in which it is much more difficult to divert these resources and in which the risk of discovery and punishment is dramatically higher. It is a necessary enabling precondition for the success of any other anti-corruption efforts.

Budget

The legal and technical aspects of the budget process in Ukraine generally comply with international standards (such as IMF and OECD requirements) and are consistent with EU requirements in many regards. There are, however, two concerns in this area. The GOU does not appear to offer extensive opportunities for citizen involvement in the process either at the national or local levels. While there may be public hearings or opportunities to present testimony or analysis to the VR, there is little evidence that such input has any impact on the budget. The GOU appears to be following the letter rather than the spirit of public participation in the budget process. More importantly, the transparency of the budget and its execution is quite low. A superficial analysis shows that the GOU does, indeed, provide extensive information to the public. The budget is posted on the Verkhovna Rada website. However, a more complete analysis shows that the VR website posts the government's *budget proposal*, but not necessarily the amendments to it or their discussions surrounding them. Many budget numbers are available only in summary form and additional detail is not available. Interbudgetary transfer calculations use complicated formulas that often have plugged-in numbers that do not have justification. The government does not typically report on variances from budget either on the expenditure or the revenue side, even when the variance is significant. Annual reports lack important information on certain assets and there are no longer-term budget forecasts. The numbers released by the social funds are particularly opaque.²⁹ Budget information not posted is typically difficult or impossible to obtain. Although accessibility to information has improved in recent years, this lack of transparency is a critical vulnerability for corruption.

Sub-national governments typically release even less information on their budgets and their execution. Generally, access to public information at these levels is usually restricted. Even information which is public by law is often not provided. "Officials use excuses like 'the information is not available temporarily,' 'the requested data has not been collected yet' and 'the data can not be disseminated because of technical difficulties.'"³⁰

²⁹ "Documents of [the] pension fund are not fully available to the public; only general figures on budget execution and the amount of arrears are published. [The p]lanned budget is not published...." *Diagnostic Report: Fiscal Transparency and Openness in Ukraine* by Institute for Economic Research and Policy Consulting, 2003.

³⁰ *Diagnostic Report: Fiscal Transparency and Openness in Ukraine* by Institute for Economic Research and Policy Consulting, 2003, p. 81.

Procurement

The practice of competitive tendering is relatively new to Ukraine. No interviewees suggested that the current legal/regulatory framework was inadequate. But the issue of corruption in procurement was regularly raised. Without doing a comprehensive analysis of this complex and highly technical area, it would be impossible to comment extensively on it. It appears that the percentage of public funds that are competitively bid grows steadily, however, a large portion is still spent through a multiple bid system which is far short of full and open competition and inherently more susceptible to political or corrupt manipulations.

The concerns about corruption are more likely to stem from policy weaknesses and lack of transparency and external oversight than from technical or legal/regulatory weaknesses. For example, very few government entities publish a comprehensive procurement plan for the upcoming year. Information of specific procurements can be difficult to locate, and tenders may not be announced publicly until shortly before the deadline. Arbitrary pre-qualification requirements can exclude otherwise qualified bidders from the running. There does not appear to be a procurement review board including non-government actors, the policies for contesting a decision are weak and there appears to be little citizen input into what is to be procured in the first place.

A new amendment to the Procurement Law was passed in 2005 to create a more competitive environment in the area of public procurement while ensuring transparent procedures. In particular, there are provisions on additional procedures of publication of procurement plans in the internet, electronic tendering, guarantees for nondiscrimination of participants and equal access to procurement information. New wording includes guarantees against unfair acts of bidders. The law also has provisions to control conflicts of interest: it prohibits participation in procurement committees of close relatives of bidder's representatives; officials of consolidated companies; and their representatives and close relatives of these persons. Violation of these restrictions will result in cancellation of the tender or its outcome. In addition, the Law has a section on "social control in the area of public procurement" and establishes a new independent controlling body – the Tender Chamber – a non-profit union of NGOs. The Law provides for procedure and guarantees of activities of this body: administration of complaints, conducting inspections, conducting public discussions of bidding procedures, etc.

Taxation

The State Tax Administration (STA) oversees all taxes in Ukraine. The main revenue sources are personal and business income taxes, VAT, and excise taxes on items such as alcohol, tobacco, and certain entrepreneurial activities. Tax laws and regulations are not always clear, change often, contain numerous loopholes and can conflict internally. Administrative procedures for tax collection and management are likewise unclear. This results in a high level of tax evasions, very large collections arrears and an extremely large shadow economy.³¹ In addition, citizens complain that taxpayers' rights are

³¹ Estimated by the Ministry of Economy and European Integration as 42.3% of GDP.

routinely violated. Tax exemptions or tax breaks are typically granted by the legislative branch as a result of lobbying, a clear manifestation of state capture by influential business. A tax reform designed to reduce tax rates, simplify legislation and eliminate many loopholes and exceptions was implemented in 2004. It lowered the profit tax for enterprises from 30 to 25 percent and introduced a flat 13 percent tax on personal incomes.

Large-scale corruption is suspected in the VAT refund scam that allegedly constituted about \$1 billion in 2004, involving kickbacks to tax officials of 30-50 percent of the amount refunded. Currently, the Tax Administration is considering a new reform to deal with this problem by developing a list of “low risk” firms that would be allowed to file electronic VAT tax returns.

To look at the tax system in a more systematic way, a working group at the Presidential Secretariat was established to draft a new Concept to Reform the Tax System in Ukraine. The Concept has been drafted and is being discussed broadly among stakeholders. This document suggests a further reduction in the tax burden but also stabilization of the tax system, making it more transparent and streamlined. In addition, a National Commission on Developing Main Directions for Tax Reform in Ukraine was established in 2005 with representatives from the business community and the government. The Commission has drafted a Charter on Tax Relations, which is now open for public discussion.

Audit

The GOU has appropriate internal and external audit agencies. The external audit (or Supreme Audit Institution, as it is generically called) is accomplished by the Accounting Chamber of Ukraine (ACU). It is independent, reports to the VR and appears free from political and operational interferences. The internal audit function is the Chief Control and Auditing Administration (CCAA), reporting to the Ministry of Finance. Both of the bodies appear to have significant technical capacity. They conduct not only financial audits, but also compliance audits of various types, as well as performance audits (value for money audits) of government programs.

The ACU reports findings to the VR and the agency under audit and makes recommendation for improvements. However, compliance with these recommendations by the audited entity is not high. The ACU publishes extensive data on its website, including the detailed findings of certain audits. However, critics of the ACU point out that the results of sensitive audits are not published or only summary results are released. Audits of the four Social Funds, thought to be particularly susceptible to corruption, are typically not released.

Opportunities and Obstacles

Existing legal instruments that require transparency are important tools in demanding greater compliance from government. The relatively free press and the growing business

community, together with the extant capacity of NGOs are important forces that could harness these instruments. The points of access for information which are already in place (VR website, etc.) indicate that organizational structures and capacity do not have to be created from scratch. Some governmental institutions, such as the Tax Administration and Chief Control and Auditing Administration, demonstrated recently under the new administration a willingness to improve their functions and implement reforms. All of these tools suggest that, with firmer political will and greater demand from civil society, the GOU could make real progress on public finance reform in the short term.

Virtually anyone interested in reducing corruption should recognize the importance of increasing transparency and accountability in the public finance area. Not only NGOs whose specific mission relates to budget, procurement, municipal finance and the like, but also sectoral NGOs should be more engaged in advocating and overseeing these functions. Business, whether large or small, domestic or international, also has a natural interest in how government spends public money. Finally, international donors, especially those who provide direct budget support, should be much more concerned about transparency of public funds.

Those who benefit from the corrupt *status quo* will commit significant efforts to ensure that these government functions remain opaque and unaccountable. The oligarchs and senior government officials, current and prospective, who benefit from state capture and other corrupt practices are likely to be the strongest of these opponents.

Recommendations

As in other areas, we recommend that USAID/Kyiv design a top-down/bottom-up approach. The top-down aspect should concentrate on supporting political will of the GOU through concerted donor coordination and focused diplomatic dialogue on the need for increased transparency. It should also provide the GOU assistance in policy implementation in order to comply with its transparency obligations under current law.

The bottom-up aspect should focus on mobilizing the range of interested actors to increase their advocacy and demand from transparency by engaging directly with government actors and by collaborating in activist coalitions for reform.

To increase demand for transparency, a coalition of CSOs (for example, an “access to information” coalition) can be formed among existing civil society groups or existing coalitions can be strengthened around anti-corruption issues. Such a coalition might ultimately seek the passage of a FOIA-type law, but in the short term, it could mobilize actors across sectors and in the media to push for greater transparency on specific issues. USAID and others have supported access to information efforts in a number of countries using a variety of approaches.

USAID needs to clearly articulate its demand for transparency in the IFMS sector and embed this demand as a conditionality for future assistance whether in the form of training, technical assistance or equipment. It appears that the lack of transparency is not a capacity or resource problem, but rather one of political will.

Here are some specific recommendations in each sub-sector:

For budget:

- Promote implementation of the OECD Best Practices for Budget Transparency policies³² in budget planning, implementation, reporting, and monitoring. In particular, among other policies: limit possibilities for discretion in budget revenue planning and the interbudgetary transfer system by introducing clear formulas and by promoting performance-based budgeting.
- USAID/Kyiv should consider supporting a budget advocacy organization, such as those supported by the International Budget Project³³ in other countries, to lobby for greater participation and transparency in the budget. Such an NGO could also provide training and technical assistance to sectoral NGOs to assist them in advocating for such reforms in their sectors.

For procurement:

- Ensure the division and separation of functional responsibilities for implementing and monitoring; consider establishing a central internal supervisory body; provide support for documentation and communication systems and e-procurement.
- Monitor implementation of the recent amendment to the Procurement Law requiring better transparency, conflicts of interest management, and external oversight. Involve business associations in public procurement monitoring.

For taxation:

- Support ongoing efforts to reform the tax system in Ukraine to ensure that it reduces incentives for tax evasion and limits the discretionary power of tax officials.
- Reform regulations on VAT refunds to make it impossible to create bogus firms, to eliminate opportunities for extortion by tax inspectors evaluating tax return claims, and to streamline tax return procedure for reliable businesses.

For audit:

- Support efforts to improve enforcement of recommendations from the Accounting Chamber (ACU) and the Chief Control and Auditing Administration (CCAA).
- Promote greater transparency and detail in audit institutions' reports.
- Support CSOs and the media in conducting watchdog activities to monitor and investigate public abuses in public funds spending.

³² OECD Best Practices for Budget Transparency policies , <http://www.oecd.org/dataoecd/33/13/1905258.pdf>

³³ www.internationalbudget.org

Summary of Anti-Corruption Program Options

Anti-Corruption Program Option	Major Counterparts	Potential Obstacles	Potential Impact on Corruption	Short-term success	Impact Timing
BUDGET AREA					
Promote implementation of the OECD Best Practices for Budget Transparency policies ³⁴ in budget planning, implementation, reporting, and monitoring. In particular: remove possibility for discretions in budget revenue planning and interbudgetary transfer system by introducing clear formulas and promote performance-based budget.	Parliamentary Budget Committee and Sub-Committee on Local Government USAID partners (RTI, EMG), WB, EU	Issues it very complex and influenced by vested interests of those who benefit from current system.	High impact.	Rather long-term success in a large scale but can be visible in specific localities	Mid- to long-term
Support CSOs to serve as Budgeting Watchdog Groups (similar to those that are supported by the "International Budgeting Project" in other countries)	CSOs (such as, for example: Institute for Economic Research and Policy Consulting) USAID partners (ISC, Internews, DAI)	Information is not completely available, lack of skill in local CSOs	Can have high impact if it is done by professionals and broad media campaign	Short-term success possible	Mid- to long-term
PUBLIC PROCUREMENT					
Ensure division and separation of functional responsibilities for implementation and monitoring; consider establishing a central internal supervisory body; support of documentation and communication systems and e-procurement	Department of Coordination of the Public Procurement (Ministry of Economy) USAID partners (RTI, EMG)	Vested interests	High impact	Mid-term successes	Mid- to long term
Monitor implementation of the recent amendment to the Procurement Law requiring better transparency, conflicts of interest management, and external oversight. Involve business associations in public procurement monitoring	CSOs (such as, for example: Institute for Economic Research and Policy Consulting) USAID partners (ISC, Internews, DAI)	Lack of experience of the CSOs, lack of information	High impact	Short-term successes	Mid- to long term

³⁴ OECD Best Practices for Budget Transparency policies ,
<http://www.oecd.org/dataoecd/33/13/1905258.pdf>

TAXATION					
Support ongoing effort in reforming tax system in Ukraine to ensure that it reduces incentives for tax evasions and limits the discretionary power of tax officials.	State Committee on Regulatory Reform and Entrepreneurship, Presidential Working Group on Tax Reform, Business Council, Tax Administration USAID partners (DAI)	No particular obstacles	High impact	Mid-term successes	Mid-to long term
Reform regulations on VAT refund to make it impossible to create bogus firms to scam VAT refund, to eliminate opportunities for extortion by tax inspectors evaluating tax return claims, and to streamline tax return procedure for reliable businesses	Tax Administration, the business community USAID partners (DAI, ISC, Internews)	Vested interests	Medium impact	Mid-term successes	Mid-to long term
AUDIT					
Support efforts to improve enforcement of the Accounting Chamber (ACU) and the Chief Control and Auditing Administration (CCAA) decisions.	Accounting Chamber (ACU), Chief Control and Auditing Administration (CCAA), Parliamentary Committees. USAID partners (EMG)	Long-term practices, lack of interagency coordination	High impact	Mid-term successes	Mid-to long term
Promote better transparency and details in the audit institutions' reports	ACU, CCAA, Parliamentary Committees. CSOs. USAID partners (ISC, Internews)	Long-term practices	Medium impact	Mid-term successes	Mid-to long term
Support CSOs and the media in conducting watchdog activities to monitor and investigate public abuses in public funds spending	USAID partners (ISC, Internews)	Lack of information, lack of CSOs experience	High visible impact	Short-term success	Mid-to long term

6.5 Private Sector

Overview

Corruption in the business sector is widespread due to flaws, loopholes, and inconsistencies in legislation, but even more so due to negative practices in interpreting and enforcing the law and intentional abuses and disregard for the law. Recent revisions

of all business-related legislation uncovered over 5,500 regulations that do not comply with state regulatory policy, or are outdated, contradictory or excessive. Such regulations and wide discretion have resulted in 82 percent of businesses making unofficial payments to deal with public officials, and 84 percent of businesses operating in the shadow economy and not paying their taxes in full.³⁵ Corruption occurs on a petty, grand and state capture level. While small businesses pay frequent rents to bureaucrats, millions of dollars are embezzled from larger firms through lucrative procurements, privatizations, or massive VAT tax scams.

The business community is very poorly organized. Only 25 percent of businesses are members of business associations. Generally, they are not prepared to provide their members with necessary services or advocacy support. Businesses, in particular small ones, lack legal knowledge of their rights or of constantly changing regulations.

In the late 1990s, the Government of Ukraine undertook some steps toward improving the business environment and simplifying business regulations, but soon these efforts slowed down and faded. The new Administration that came to power in 2005 revived and reinforced the course. Within a very short period of time, an effort to review all business regulations was initiated throughout the country with the participation of all interested parties. Mandatory streamlining of procedures for business registration and the issuing of permits in hundreds of municipalities was conducted, a new procurement law was passed, customs reform was begun, and a business advisory council was reactivated, among other reforms. It is too early to determine the impact of these efforts on reducing corruption, but the initiatives were started in the right direction. There are still many gaps and priorities that need to be addressed to prevent and reduce corruption in business-government transactions.

Corruption Vulnerabilities

A number of surveys show that corruption is ranked as one of the most significant problems that hinder business development in Ukraine. According to the IFC survey of 2004, 75 percent of businesses identified corruption as the second major barrier, after unstable legislation, for business operations.³⁶ Corruption has had an almost 25 percent increase in significance in comparison with the 2002 survey and almost a 30 percent increase since 2000.³⁷ The recently issued EBRD-World Bank Business Environment and Enterprise Performance Survey (BEEPS) report places corruption among the top four significant problems for Ukraine out of a list of 21 business development obstacles.

Petty corruption - extortion, bribery, speed money, influence peddling, and favoritism - is common practice in most business-government transactions starting from business registration, numerous government permits issuing, inspections, and leasing of public

³⁵ IFC. *Business Environment in Ukraine. - 2004*

³⁶ IFC. *Business Environment in Ukraine. 2004. page 6*

³⁷ IFC. *Business Environment in Ukraine, 2003. page 17*

property. These forms of corruption have the greatest impact on small and medium-sized businesses that feel insecure and helpless to confront authorities and bureaucrats.

Thousands of regulations issued by more than a dozen governmental agencies that regulate almost every aspect of business activity are often complicated, contradictory, outdated or difficult to comply with. Some of the regulations have not been reviewed or updated since the 1950s or earlier. Others are subject to broad interpretation. Rather than pursuing business compliance with regulations, governmental agencies often establish fiscal targets for inspection agencies, thus creating quotas for fines collection. Entrepreneurs often lack knowledge of existing and frequently changing legal and regulatory requirements. On the other hand, governmental agencies do not rush to educate businesses on the law, but rather take advantage of them to collect rents. Businesspeople often are aware of the major laws and newest amendments, but do not necessarily have knowledge of agency-specific regulations that are vital for day-to-day business operations. High legal fees and widespread corruption in the courts usually result in entrepreneurs paying the rents.

Corruption in tax administration is one of the most disturbing and it occurs as a result of extensive flaws in legislation and discretion in implementation practices. Businesses consider tax administration as one of the most overly burdensome, complicated, contradictory and severe transactions, but at the same time, one of the most flawed and unstable. For example, tax legislation creates numerous opportunities for abuses by providing a wide range of fines that can be imposed for the same violation, the right of granting postponements for tax payments, and some others.

Large-scale corruption is also suspected in the VAT refunds scam that allegedly totaled about \$1 billion in 2004 and caused long delays in legal VAT refunds to law-abiding exporters. Allegedly, VAT refunds are possible in exchange for a kickback of 30-50 percent of the amount refunded. At the same time, tax evasion in the amount of just US\$350 (about two average monthly salaries) can be subject to criminal investigation and prosecution. On such charges of tax evasion, the tax police have the right to occupy a firm's office, abuse its employees, arrest all of the firm's assets and documents, and basically destroy the business. Supposedly, this right has been widely abused both for suppressing political and economic competitors and mere harassment.

Grand corruption in the form of kickbacks, nepotism, and clientelism are frequent in public procurement, privatization, in granting tax privileges and subsidies, and in export-import operations. These types of corruption apply primarily to large and medium-sized businesses and often involve the collusion of both parties. When the auctions or procurements are conducted, the conditions, requirements and criteria can be influenced by the interested parties in exchange for kickbacks promised to officials. Poorly regulated and controlled subsidies are often provided for political reasons (in coal mining and agriculture, for instance). Tax privileges are granted to some companies and localities, allegedly in exchange for kickbacks. Tax evasion and VAT tax manipulation that involves public authorities are well known and well documented. Privatization of lucrative property and enterprises is accomplished behind closed doors and often involves

kickbacks and other illegal financial and non-fiscal transactions. Protectionism, at least within some markets (vehicles, sugar, vegetable oil), was allegedly lobbied with massive buying of votes in parliament. Business-administrative groups (or clans) emerged in the 1990s in control of vital industries and influence political leaders allegedly by buying votes or government and court decisions, financing election campaigns, and populating the legislature or civil service ranks. The absence of effective conflict of interest policies is a major problem resulting in business and political leaders easily crossing the line of propriety.

Governmental policies to improve the business environment, promote small businesses, and deregulate business operations had some positive results at the beginning but quickly slowed down and became highly bureaucratized. More recent efforts by the new Administration in mid-2005 to review regulations throughout all governmental agencies (9,866 regulations were reviewed as of September 1, 2005) have resulted in identifying over 5,500 regulations at all levels that need to be eliminated or modified. Unrealistically short deadlines set by the central government may jeopardize the quality of future reform legislation. The Customs Service, for example, has demonstrated its intentions to clean up its agency and introduce new policies and procedures to prevent corruption; this has resulted in a significant increase in customs revenue collected during the last quarter. It is too early to say if this initiative will bring results.

Constituencies for reform

Central level government. The current Administration has declared an aggressive course of action toward business deregulation using several Presidential decrees. The State Committee of Ukraine for Regulatory Policy and Entrepreneurship (SCRPE) which is at the vanguard of this effort has a long history of promoting regulatory reform and supporting business development. With support from the President and the Cabinet of Ministers and with clearly defined objectives, SCRPE has been successful in reaching out to governmental agencies at all levels and jurisdictions. The current “guillotine” reform towards improving the legal framework and removing major barriers and obstacles is expected to become a significant step forward to improve the overall business environment and ultimately reduce opportunities for corruption.

Government on a local level, represented by three different jurisdictional branches - local self-governmental bodies, regional administrations, and local branches of the central executive government agencies – often represent different interests and objectives. Dual subordination of some executive branch departments and resource dependency of local elected self-governmental bodies on regional administrations make it difficult to mobilize all parties along common goals, such as anti-corruption. There have been some successful examples of anti-corruption initiatives at the local government level, but these often depend on the personalities of local officials.

The business community remains poorly organized and very passive, especially among the smallest firms. However, being a frequent victim of corruption and abuse, small

businesses are looking for opportunities to deal with this problem and business associations might be very instrumental if further developed. The Council of Entrepreneurs, an advisory body to the Cabinet of Ministers, has recently been activated with a change in leadership and demonstrated focus on pursuing business interests. To date, the Council has proved to be an effective mechanism for public-private dialogue, but risks being captured by government interests, since it is not a self-organized group.

Another example of effective mobilization of the business community is the Coordinating-Expert Center of the Entrepreneurs' Union of Ukraine that currently unites over 60 business associations, two-thirds of which are regional associations. The major mission of the Center is to promote business interests by commenting on laws and draft laws.

Opportunities and points of entry

The current Administration has opened the door to positive improvements in the business environment. Several laws and Presidential Decrees issued over the past year demonstrate political will and an intention to make a difference. The central government was able to move forward deregulation reform quickly; this initiative creates a favorable path for further promotion of corruption prevention reforms.

The business community, small and medium-sized enterprises in particular, is by means the very path to promote anti-corruption programs. The business community needs to be mobilized and organized into strong and vocal associations with the capabilities to advocate for their constituency interests.

The prospects for WTO and EU accession offer a good opportunity for building coalitions for increased transparency, trade liberalization, and limited special privileges. The need to increase social spending was used as an excuse for eliminating tax privileges. Similarly, the need to maintain price stability was successfully used for advocating for trade liberalization. Similar opportunities can be marshaled to fight corruption relative to the business community.

Recommendations

Support in drafting and implementing new legislation that separates public and private interests and improves transparency in government:

- Support drafting, approving, and implementing conflict of interest legislation to prevent biased decision making and collusion among public and private interests. The legislation should be applied to public officials at all levels, including members of Parliament.
- Support drafting, approving, and implementing legislation: (1) on regulating lobbying activities and reducing opportunities to buy votes of parliamentary members and other corrupt practices influencing legislation; and (2) on public

access to information to ensure that essential governmental information is available to the public in a timely and comprehensive fashion.

Support development and implementation of specific regulations to promote a better business environment:

- Support developing and implementing transparent and fair regulations and controls for further privatization of state-owned enterprises, land, and other kinds of state and municipal property.
- Support policies to change the incentives of controlling and inspecting agencies from collecting revenue through fines to promoting better business compliance with regulations.
- Improve the regulatory framework for taxation to reduce incentives for tax evasion and to limit the discretionary powers of tax officials. Reform regulations on VAT refunds to make it impossible to create bogus firms to scam VAT refunds, to eliminate opportunities for extortion by tax inspectors evaluating tax return claims, and to streamline tax return procedures for reliable businesses.

Support monitoring of legislation and reforms:

- Support regulatory reform policy that will improve the business environment and make laws and regulations consistent, straightforward, enforceable, and fair. Support should be provided to the central government (SCRPE in particular) as well as local governments and the business community.
- Support implementation of the Law on State Regulatory Policy that requires that all drafts laws should be broadly discussed by all interested parties prior to adoption, cost-benefit and social impact conducted, indicators of effectiveness are established, and monitoring mechanisms are developed. Consider including requirements to assess draft laws on their “corruption risk” and their likely impact on reducing corruption.
- Ensure proper implementation of the recently passed legislation to improve public procurement practices – the Law of Ukraine “On Introduction of Amendments to Some Legal Acts of Ukraine with Respect to Additional Guarantees of Protection of Financial Interests of the State” that amended the Law of Ukraine “On Procurement of Goods, Works and Services at Public Expense.”

Implement programs to support business association strengthening and promote corporate governance practices:

- Support development of business associations that advocate business interests, government transparency and accountability. Train and provide support to business associations in advocacy and lobbying, and in providing services and legal support to association members.
- Promote the drafting and implementation of a corporate governance law. Support introducing corporate governance practices in large businesses.

Summary of Anti-Corruption Program Options

Anti-Corruption Program Option	Major Counterparts	Potential Obstacles	Potential Impact on Corruption	Short-term success	Impact Timing
Support in drafting and implementing new legislation that separates public and private interests and improves transparency in government	Parliamentary committees, Civil Service Administration, State Committee on Regulatory Reform, Business Council. USAID partners, CIPE, EU	Opposition to some laws can come from interests groups. Laws might not be practical or implementation mechanisms are not established.	High impact - If laws drafted and enacted they will have big impact	Visible success can be obtained within mid-term period	Impact should be in a mid-term
Support development and implementation of specific regulations that promote a better business environment (privatization, taxation, inspecting agency incentives)	Civil Service Administration, State Committee on Regulatory Reform, Business Council, sectoral governmental institutions. USAID partners, CIPE, EU	On privatization and taxation a strong opposition can come from interest groups. On inspections mindset "to catch" rather than "to prevent" can dominate to oppose reform	High impact- Impact should be very visible and significant	Success should be visible and can be achieved within short and mid-term period	Results can be achieved within mid-term time period
Support monitoring of enacted legislation and reforms (Law on the State Regulatory Policy, Procurement Law, 'guillotine' initiative)	Business community, State Committee on Regulatory Reform. USAID partners, WB	There is always a risk that newly enacted law will not be properly implemented and new initiatives will fade out. Regular monitoring and evaluation are essential	High impact - Impact should be very visible and significant	Success should be visible and can be achieved within short and mid-term period	Results can be achieved within mid-term time period
Implement programs to support business association strengthening and promote corporate governance practices	Business associations USAID partners, CIPE, EU	Poorly organized and skeptical business community. Lack of incentives for corporate governance.	Medium impact	Success will not be very visible. Can be achieved within mid-term period	Results can be achieved within mid- or long-term time period

7. Corruption in Institutions

7.1 Parliament

Whereas political will appears evident at the highest levels of Ukraine's executive branch of government, the legislature's record suggests the prevalence of only discrete pockets

of interest for anticorruption reform initiatives. Indeed it appears that many if not most legislators have amassed fortunes through business interests and other means while in office, with little transparency or accountability, due to parliamentary immunity provisions. Though the legislature currently displays a variety of political viewpoints and represents geographic, ethnic, business, oligarchic and other often competing interests, individual conflicts of interest along with the inability of parties and blocs to coalesce have slowed and even buried critical pieces of reform legislation.

Constitutional reforms, going into effect after January 2006, will have a significant impact upon the operational abilities of the subsequent parliament (to be elected in March), changing the style of government to a parliamentary-presidential system. Though most presidential systems in the FSU have suffered from abuse of power issues, the impact of implementing these systemic changes in Ukraine remains unclear. Relations between the executive and the legislature will be subject to changes and an evolutionary process. It is important to note that, though Parliament should begin to play a more substantive role in overall governing, this capacity will likely be held hostage to internal developments and dynamics.

Party discipline may well be strengthened in the legislature through the closed-list party system of candidate selection, yet there will be no regional accountability to voters. The alignment of parties into ruling coalition and opposition blocs in the new Parliament will require negotiation and pragmatic dealing on a number of issues. It is estimated that 70% or more of currently seated MPs will return to office, resulting in a contradiction between old styles of conducting business and the new realities of the party-list system. However, with so many incumbents likely to be reelected, there is questionable impetus for the new parliament to engage in self-initiated reform.

Further complicating any assessment of post-electoral legislative capacity will be the need for parties to coalesce into blocs in order to reach a ruling majority. Alignments between the almost evenly divided major political parties are very uncertain and subject to negotiation. Given the uncertainty of parliamentary internal relations and balances between reformist and status quo forces, it is difficult to foresee the rapid establishment of working relationships in the newly elected body.

Corruption Vulnerabilities

The corruption syndrome model indicates that the state, political and social institutions are weak and highly open to manipulation by oligarchs in Ukraine. Nascent civil society is divided, intimidated, and impoverished, with political parties and political followings weak, personalized, and too narrow and numerous to produce broad-based mandates. Many MPs are heavily engaged in business activities which may well pose a challenge to their legislative objectivity. Political campaigns in Ukraine are very expensive and both parties and candidates are susceptible to bribery or taking payments to recover their expenditures. Parliamentary immunity can be a guarantor of legislative independence, but may also well obscure any ability to corruption investigations against MPs.

As privatization and other key financial issues continue to be discussed and decided in the legislature, the lack of conflict of interest provisions for MPs, a code of ethics or a high-profile legislative watchdog becomes more acute in the current post-Revolutionary climate. A pervasive “what is not forbidden is allowed” post-Soviet legacy among many old guard legislators is a hindrance to the passage of needed reforms. When combined with a lack of transparency on political finance and other related issues, the lack of a stronger civil society mechanism to lobby and oversee legislative function and performance is a serious weakness. Also lacking are mechanisms and practices for parliamentary oversight of the executive bodies and structures.

Constituents for/against reform

There are MPs both in favor of anticorruption reform, as well as those opposed to it. This mirrors the political party spectrum that will be represented in the new legislature and theoretically exert more influence on policy after the elections. The Parliament’s Anticorruption Committee serves as an important forum for discussion on the general issue of combating corruption and providing a venue for CSO involvement in the debate. Individual and collective business interests appear to be serious impediments to the passage of critically needed reform legislation.

Opportunities

In the period before the elections, diplomatic and donor pressure may be exerted upon key legislators to push for needed reforms, for the passage of key legislation and for further increasing transparency provisions in the legislature. MCC discussions will be occasions for further discussion on priorities and necessities, if further assistance is to be forthcoming in key areas. Existing coalitions and committee constellations in the Parliament may be more capable of addressing key legislation in the period up to the elections, using corruption as a campaign issue, than waiting until after the elections.

After the March elections, there will necessarily be a period of alignment and adjustment, committee assignments and coordination of party and bloc policies. Continued diplomatic and donor pressure will be needed to reinforce a unified message to disparate political elements as they formulate their post-electoral strategies. During this period, combating corruption can be again used as a unifying area of discussion and a legislative agenda focal point. Societal frustration over corruption, as embodied in the Orange Revolution, does exert some oversight and pressure on legislators, resulting in an opening for MPs to address anticorruption issues. Media enfranchisement after the Revolution also places greater scrutiny on legislative activity or inactivity in this area of needed reform.

Recommendations

Support the development of an anti-corruption legal framework, regulations, institutions and procedures:

- The backlog of critical reform legislation must be addressed (i.e. civil service reform, etc.), to create a legal framework for the foundation of how business, government, life in Ukraine is to be conducted.
- The impact of Constitutional and electoral law changes on the new parliament is unknown at this time. The *modus operandi* of the existing legislature is a known quantity and should be a target of programming and diplomatic efforts to pressure for the passage of reform legislation.
- A code of ethics for MPs and conflict of interest issues need to be addressed, probably through an amendment to the Law on the Status of Deputies.
- Parliamentary programming needs to supplement the legislative calendar so that legislation can be discussed and passed more rapidly.

Promote high-level diplomatic dialogue on anti-corruption issues:

- High-level diplomatic pressure needs to be applied to the Government and Legislature to pass critical reform-enabling laws *before and after the elections*. (Anticorruption can be used as a common-cause rallying point to build majority votes.)
- Diplomatic pressure needs to be placed on key faction leaders to process and pass essential legislation.

Promote legislative accountability by bringing CSOs and elected officials together:

- With corruption more openly discussed in Parliament, media and popular pressure are at least a distant threat to those in elected office. These are entry points for media, civil society, party and parliamentary programming to focus on anticorruption as a key area of concern to raise issues and try to hold elected politicians accountable.
- Critical pieces of legislation need to be lobbied by CSO's in parliamentary committee hearings, reinforcing the needed advocacy and watchdog roles that civil society needs to play. Media needs to be a tool of CSO strategies.
- Assistance should support citizen watchdog organizations to monitor MPs and party factions, voting records, conflicts of interest, campaign finances, etc.

Support training and resources to improve legislative drafting, coalition building, and negotiation/compromise skills

- Legislative drafting training appears necessary, as the current situation results in only selective implementation of impractical laws. Clarification of many pieces of legislation is needed to plug loopholes, but also to enhance transparency for civil society and enhance the accountability of officials.
- Training for MPs should also include negotiation and compromise skills to transform the current winner-take-all approach to a win-win approach.
- Parliament/legislators can be trained to promote general awareness on what the laws and rights of citizens are.
- New member orientation programs for after the elections need to focus on anticorruption as a priority for legislation.
- Coalition building among parties for bloc relations will be vital.

- Parliament needs access to external sources of comparative information (what is and is not acceptable elsewhere—comparative legislation and international standards).

Support strengthening of legislative oversight of executive:

- Parliamentary committees should be supported to assist them in exerting their executive oversight function.
- Assist legislative support for enhancing the transparency of committee operations, including skills training for MPs and their staffs.
- The parliamentary Committee on Corruption needs to pressure the Government for consolidation of the five draft working plans into a single national anticorruption strategy. CSO, legislative and party programming can support this legislative effort. This can begin a process of using this Committee as a check on the Executive.

Summary of Anti-Corruption Program Options

Anti-Corruption Program Option	Major Counterparts	Potential Obstacles	Potential Impact on Corruption	Short-term success	Impact Timing
Support development of anti-corruption legal framework., regulations, institutions and procedures	Parliament, CSOs, IRI, NDI, UCAN, PDP	Medium. Some legislators will oppose passing a/c laws.	High. Laws will facilitate change, transparency, accountability.	High.	Short-to mid-term
Promote high-level diplomatic dialogue on anti-corruption issues	Parliament, parties, CSOs, Embassies, donors, NDI, IRI	Low	High. Raise awareness in Gov't on int'l concerns over a/c, conditionality	High	Short-to mid-term
Promote legislative accountability by bringing CSOs and elected officials together	CSOs, media, parliament, NDI, IRI, UCAN, PDP	Medium. Some legislators will balk; CSO capacity, interest.	Medium to high. Will raise CSO interest and empowerment	Medium	Mid- to long-term.
Support training and resources to improve legislative drafting, coalition building, and negotiation/compromise skills	Parliament, ABA-CEELI, PDP	Medium. Parliamentary capacity is limited, especially staff.	Medium. Will facilitate better legislation.	Medium.	Mid- to long-term.
Support development of legislative oversight of executive.	Parliament, Ministries, IRI, NDI, PDP	Medium to high. Many Gov't officials and bureaucrats will object.	Medium to High. Some areas of gov't will be held to high scrutiny	Mid- to long-term.	Mid- to long-term.

7.2 Political Parties

There is a comparatively small group of major political parties that will predominate in the new Ukrainian legislature, once Constitutional changes take effect. The forging of alliances and political coalitions between these organizations is not likely to take place before the election, as some parties are likely to gain more electoral support by remaining independent in the pre-election period. Nevertheless, there will be a serious battle for creating coalitions and blocs in the period after the elections. Parties are currently divided on pre- and post-election strategies.

Despite threshold provisions that should eventually reduce the number of political parties in Ukraine, the electoral campaign has already seen the creation of a number of new smaller parties that feature both oligarchs and familiar faces. These structures will also play a role in the pre-election period, seeking to become vehicles to project key personalities into the elections process and eventual coalition blocs.

Parties will need to play a more decisive role in articulating platforms and programs, enforcing party discipline during campaigns and after the elections, and in creating and lobbying for positions in legislative blocs. At the same time, parties will be subject to criticism for the selection of some MPs in the closed-list system and will have to bear the brunt of civic discord over the impact of Constitutional changes and the lack of direct accountability of elected officials.

The lack of accountability and transparency in the party system mirrors what is seen on the broader, national scale. There is a general skepticism over major party figures and politicians in general. The Yushchenko presidential victory has not been able to translate its stated goals and ambitions into a successful reform agenda. Political parties are using this issue as a major campaign issue. Whereas political competition is real in Ukraine, and citizens may choose from a discrete number of parties and well-known names, this competition has yet to provide for a truly effective check on corruption. With constitutional changes in effect, some parties may become an initial force for enhanced transparency, oversight and control.

However, high levels of poverty in Ukraine mean that budgets are not generated from party membership fees, but from elsewhere. To this end, some parties—and their leaderships—have become vehicles for business interests. Virtually all powerful and active Ukrainian political parties receive funding from business interests. To a degree, party finances are dependent upon these alternative sources of funding and, therefore, vulnerable to various forms of capture and corruption. Some of these susceptibilities may change, given the implementation of Constitutional and election law amendments. Although parties may oppose these reforms, persistent pressure from civil society can keep these issues high on the public agenda and result in positive change over time.

The tradition of a powerful Presidency in Ukraine will evolve in January, requiring more politicking and compromise in the political system. The requirement to create coalitions will be a further step in breaking Soviet, winner-take-all legacies. However, it is likely

that the former ruling forces will levy charges of corruption and undue influence on the electoral processes which have been subject to charges of corruption in the past. A lack of transparency and accountability in campaign finance processes may further exacerbate social frustration with politicians in general. State funding will be provided for campaigns after this election, according to electoral showing, heightening competition to pass the threshold bar and not lose out altogether.

Ukraine's political landscape has changed somewhat after the Revolution, but the topography still reflects a deep cleft between East and West and between party ideologies. President Yushchenko's ruling party is not widely seen as effective in translating its platform and promises into policies. The party itself has been rocked by the split in the ruling coalition and with the former Prime Minister. Efforts to govern by reaching out to opposing political forces has not helped solidify the ruling party's platform, message and commitment to reform for many citizens. Still Yushchenko's party maintains an organized base of support and has been successful in keeping volunteers mobilized and active. This style of organization comes as a sharp contrast to the cronyism and clientelism of the prior ruling forces.

Corruption Vulnerabilities

Individual business interests and the influence of oligarchs remain major challenges to combating corruption in political parties. Party structures in some regions of Ukraine are still tied to old-style patronage and clan networks in local administrations. Party finances are still murky, with a strong dependence upon business contributions, as opposed to membership dues and private contributions. Immunity provisions that extend all the way down to local-level positions provide powerful incentives to get elected at all costs and for the influence of illicit funding to enter party campaigning efforts. Closed party lists may result in some candidates seeking to buy their way into party graces.

Constituents for/against reform

Changes to the Constitution and election law will bring about a number of pivotal changes for political parties. State financing will promote greater transparency over campaign funding and expenditure, yet immunity provisions for more than 250,000 elected positions provides a powerful incentive for corruption. Parties will need to coalesce and stand by platforms and messages in the Parliament, meaning a greater opportunity to hold parties accountable. Legislators will be elected from closed party lists, eliminating single-mandate accountability. Social pressure and frustration with politics as usual in Ukraine, along with media more willing to address and discuss the issue of corruption, are credible sources of reform pressure on parties.

Opportunities

The period prior to the elections enables parties to address corruption as a cross-cutting coalition-building issue. Corruption is a powerful electoral issue with voters. Campaign promises and platform planks on combating corruption will provide a measure of

accountability after the elections and an opportunity for civil society to hold party officials at least somewhat accountable for the actions (or inactivity) of their representatives on this topic.

Recommendations

- Political party training should promote anti-corruption themes; hopefully, these themes will become more than party rhetoric. Technical assistance can help parties develop specific anti-corruption goals and practical and measurable approaches to achieve them and articulate them to the public.
- Technical assistance should be provided to MPs and parties for the adoption of codes of conduct that would highlight a no-tolerance policy for corruption.
- CSOs need to work closely with parties and advocate for specific anticorruption policies.
- CSOs and the media should be trained and assisted on how to demand passage of regulations party financing, including requirements for regular audits. They should also be trained how to take on the responsibility of monitoring these audit reports.
- Training for party leaders in faction leadership and negotiation skills should be strengthened. Training should also be provided to help party leaders work more productively with CSOs on critical civic issues such as corruption.

Summary of Anti-Corruption Program Options

Anti-Corruption Program Option	Major Counterparts	Potential Obstacles	Potential Impact on Corruption	Short-term success	Impact Timing
Strengthen demand-side pressure on political parties to be accountable through common anticorruption platform	CSOs, NDI, IRI	No party will want to appear pro-corruption and will believe they can control any downside	Medium to high. This will empower CSOs to hold parties and elected officials accountable.	Medium to high. Can be very visible in near term.	Near term
Strengthen accountability provisions for MPs and political parties	ABA-CEELI, PDP, NDI, IRI	Some MPs will oppose, but popular pressure will be powerful weapon to promote this work.	Medium to high. Again, officials held accountable by set standard.		Near term

Anti-Corruption Program Option	Major Counterparts	Potential Obstacles	Potential Impact on Corruption	Short-term success	Impact Timing
Build closer lobbying relationship between CSOs and parties	NDI, IRI, UCAN	Some parties may oppose	Medium to high. Parties will want to appear cutting edge and responsive in the new Parliament	High. As parties organize after elections, they will be approachable by CSOs and open to influence	Mid- to long-term
Increase youth involvement in combating corruption	NDI, UCAN	Few to no obstacles.	Medium to high. Depending upon how politicized they become, these groups can be very vocal.	High. This is a motivated population segment and corruption is a strong rallying cry	Mid- to long-term
Build transparency into party financing	NDI, IRI, UCAN, ABA-CEELI	Parties will oppose.	High. Party financing is very suspect and closed.	Medium. Popular pressure is strong threat to Gov't.	Mid- to long-term

7.3 Subnational Government

Overview

Ukraine's highly centralized government provides a perfect vehicle for retaining strong control throughout the country, transmitting instructions to the local level and manipulating decisions. As a result, corrupt practices at the central level often become adopted at the sub-national and local levels. Although greater responsibilities for service delivery were delegated to local officials over the last several years, financial dependency on the center was strengthened and the risk of corruption increased.

The levels of corruption and anti-corruption efforts are very uneven throughout the country. In most instances, the situation depends on the political will of local leaders. Civil society and the business community in the majority of municipalities remain weak and unsophisticated in terms of developing demand pressure and advocating for reforms. Several donor programs have been successful in developing the local capacity of communities and local groups to address these issues. USAID has championed this effort

among donors since the 1990s, but more needs to be done and existing experience should be rolled out.

The status of decentralization reform in Ukraine remains ambiguous. Ambitious reform is rather controversial and incomplete. After extensive discussion in 2005, it has been postponed awaiting further developments.

While decentralization in government can produce decentralization of corruption as well, it also offers another level on which to fight corruption and additional highly motivated constituencies for reform, closer to citizens.

Corruption Vulnerabilities

Strongly vertical executive power serves as a perfect structure to extend central policies and practices to subnational levels. Appointed from the center, oblast and raion heads often overshadow elected regional councils' authority and exercise complete control over their regions.

The subnational level mirrors national level corruption patterns: state capture, embezzlement, kickbacks in procurement and privatization, nepotism, patronage, etc. But in addition, corruption has arisen in specific sub-national level functions, such as service delivery, local business regulation, taxation, and healthcare.

Local branches of the central controlling and law enforcement agencies, such as tax administration, inspecting agencies, the police, the prosecutor, and the courts are viewed by the public and businesses as the most corrupt institutions on the local level. Quotas to collect fines established on the central level for most of the inspecting agencies establishes additional incentives to harass local businesses and extort bribes. Local courts, the prosecutor and the police can be very selective in their actions and judgments due to their financial dependency on the center *and* the local budget that can supplement deficient allocations. As a result, often only the lowest local officials and very small financial mismanagement cases (as small as US\$100) are prosecuted for corruption while large illegal activities remain untouched. On the other hand, local departments on fighting economic crime are also given a quota from the center to "find" corrupt officials and they often waste their time looking for those officials turning anti-corruption programs into witch hunts.

Municipalities have been given a range of responsibilities for the provision of services such as health, education and urban services. However, the planning and decision making processes, along with the financial decisions, are still controlled from the center. Financial dependence leads to political and administrative dependence. Distribution of the scarce budget is subject to shadow deals and favors between all levels. The formula for intergovernmental transfers is not completely transparent, therefore it is difficult if not impossible for cities to hold the central government accountable for the revenue they receive (or fail to receive). As a result, many municipalities and raion level governments are not provided sufficient funds for the vital services and responsibilities delegated to

them. Further allocation of budget funds at the local level is easily influenced by vested interests.

Elected local/municipal governments are freer to make their choices on policies and practices. However, lack of accountability, a passive civil society, and ineffective law enforcement breeds temptation among some mayors and councils to consolidate complete control over all aspects of financial and administrative matters. This can easily result in widespread abuse of power in property leasing, privatization, issuing of permits, granting tax benefits, etc. But this is not necessarily a widespread practice. Some mayors are increasingly recognizing the value of increased citizen participation and greater government transparency, both in terms of legitimizing their mandates and in terms of the improvements in decision making that result.

Low salaries, in particular at the raion and municipality levels, cause high-level professionals to find alternate employment. For example, town mayors sometimes have a salary that is lower than the official minimum monthly wage in Ukraine (about USD 70). But even these positions are often bought or transferred through nepotism or clientelism. Low salaries and low professionalism result in low performance and widespread abuses.

Some reforms to improve transparency and accountability of local administrations have been implemented over the last two years: the local budget is published in the local media and in many cities discussed at public hearings, city council meetings are open to the public, public councils have been established as advisory bodies within administrations, and business registration has been simplified. However, many aspects of governmental functioning remain closed for citizens, reinforcing public perception of potential wrongdoing.

Civil society and the business community remain weak in most municipalities and do not generally mobilize demand for government openness and accountability. The media is often controlled by the local administration.

Opportunities and points of entry

It is reasonable to assume that Ukraine will continue down a path of greater decentralization. USAID should encourage this direction vigorously. Political leadership at the municipal level, in some localities, is keen to embrace more European approaches to local governance and sees in them a comparative electoral advantage. This, too, should be strongly encouraged. The inflated expectation that arose during the revolution, and the resultant disappointment, can be harnessed to convert dissatisfaction into demand for reform.

Local programs to promote transparency and accountability in government, build professionalism, implement best practices, improve legal literacy of the public and government staff, and strengthen civil society and business community advocacy and government monitoring skills will bear fruit in reducing corruption on a local level.

Local civil society and citizens' groups, along with the emerging SME community are the logical champions for reform. However, mayors and other city officials who recognize the political benefit they can derive from being seen as transparent, participative, accountable and honest are perhaps the most important allies. The possible role of the Association of Cities as an anti-corruption force should be further explored.

Recommendations

The most effective way to address corruption on a local level is to involve both the government and non-governmental sectors. Action requires political will and readiness on both sides which is not always there. If there is a political will on the side of government, a set of initiatives should be undertaken to align government efforts with the priorities of the local community by establishing an effective dialogue and coordinating activities. If there is little or no political will, the focus of the program should be on building local civil society capacity to effectively demand reforms from government. Here are several specific recommendations for programming options:

Local government:

- Assist local government in implementing professional administrative management practices: promote professionalism by establishing job requirements and offering training; develop and implement programs to eliminate conflicts of interest; introduce performance-based incentives, internal control, and reporting requirements; implement computerized reporting and decision record systems.
- Assist municipal governments in implementing reforms to standardize and simplify administrative procedures and provide better services to the public. Conduct public service report cards.
- Assist local government in developing and implementing effective and proactive transparency policies and involving citizens in decision making processes.
- Promote effective public-private dialogue mechanisms that involve all local stakeholder groups to coordinate efforts in addressing corruption

Civil society program options:

- Support civil society programs to build citizen activism to oversee service delivery and make demands for greater transparency. Promote establishment of citizen watchdog groups to conduct meaningful and professional monitoring of governmental institutions and functions (budgeting, procurement, service delivery, etc.)
- Support to improve citizen legal literacy of their rights and government's responsibilities.
- Support establishing independent legal support offices to provide legal services and legal education to victims of alleged corruption and excessive bureaucracy.

Decentralization:

- Assist government in decentralization reform to ensure that it will not breed “decentralized corruption” but rather establish a clear division of responsibilities and resources. Call for transparency. Introduce strict checks and balances. Ensure citizen participation in government decision making processes.

Summary of Anti-Corruption Program Options

Anti-Corruption Program Option	Major Counterparts	Potential Obstacles	Potential Impact on Corruption	Short-term success	Impact Timing
Local government anti-corruption initiatives: management, professionalism internal controls, openness, public-private dialog	Local governments primarily on the municipal level (also possible on the raion and oblast levels) that expressed political will for reforms. USAID partner current local government projects	Frequent directive from the center can either help or destruct. Possible upcoming decentralization reform may preclude from effective work on the raion level.	High impact- Citizen and businesses satisfaction with service delivery and improved trust in local government. Report cards on public services can serve as a useful tool to evaluate impact.	Short-term successes can be achieved.	Near and mid-term impact and results
Civil society advocacy and watchdog groups trained, established and active	Civil society groups. USAID partner current civil society, business, and media projects	Lack of professionalism of the CSOs. Opposition and obstacles by local government lacking political will in reforms. Tendency of the CSOs to either became adversary to the government instead of being constructive.	High impact- Society will be more informed and proactive in monitoring government and thus opportunities for corruption will be reduced.	Short and mid-term successes	Near and mid-term impact and results
Promote anti-corruption embedded in decentralization reform	Central and local (elected) governments and non-governmental sector. Think tank groups. USAID partner current projects in all sectors. Potentially EU and the WB and other donors.	Complexity and a cost of the reform. Domination currently of the proposed by the central government reform. Opposition from the central and local executive governments to implement comprehensive reform	Medium impact - Depends on how reform is designed it can have either positive or negative impact on corruption.	It is likely will have long-term impact	Long-term results.

8. Priority Recommendations for Anti-Corruption Programming

The recommendations for USAID programming options in this report are guided by the proposed strategic directions discussed earlier in Section 5. Those strategic directions take into account Ukraine's corruption syndrome as a closed insider economy/elite cartel grouping and the study team's assessment and insights.

In the following table, each recommended programming option from the sectoral discussions in this report has been ranked as either high (in bold) or medium priority for USAID based on its potential impact on corruption and its potential in achieving early and visible success. In addition, each option is linked to its core strategic target. For more detail on each option, refer to the earlier sectoral discussions.

Major existing USAID programs are also included in the table as they relate to each of the sectoral or functional areas.³⁸ Many of these programs already include anti-corruption components, but others can, with minor modifications of emphasis, incorporate anti-corruption tasks that could produce meaningful impacts.

Highlighted Recommendations

The following highlights summarize the recommended programs:

Cross-Sectoral and Prerequisite Conditions. Many activities need to be conducted that will establish the basic foundation upon which continued anti-corruption programs across all sectors can be launched. These include: supporting the design and execution of a national and coordinated anti-corruption strategy, supporting the passage of missing anti-corruption legislation and the establishment and strengthening of anti-corruption institutions in government, and improvements in public procurement procedures and institutions. In addition, the demand-side of fighting corruption needs to be enhanced: advocacy skill of citizen, business and media groups must be strengthened, citizen oversight/watchdog groups must be formed, and civic education programs related to corruption must be supported. To facilitate these activities and encourage the inclusion of anti-corruption elements into existing programs, an anti-corruption mainstreaming workshop should be conducted for USAID program officers, as well as implementing partners.

Judicial Sector. Key activities must be supported to reform the judicial selection process and bring it into line with modern meritocracies. In addition, reforms in court administration and procedures need to be promoted to increase transparency.

Health Sector. Major remedies need to be promoted to make the procurement of pharmaceuticals more transparent and accountable. In addition, it is critical to develop

³⁸ The discussion of USAID programs in the table is only illustrative of major ongoing activities and not meant to be comprehensive.

tracking systems to monitor and oversee budgetary expenditures to stem leakages. Overall, organizational, management and institutional reforms are needed to improve the efficiency and effectiveness of healthcare delivery and reduce mismanagement which can encourage corrupt practices.

Education Sector. It is important to support CSO budget oversight initiatives to put external pressure on the educational system to be accountable for its use of public funds and to encourage greater transparency. Continued expansion of standardized testing procedures for higher school entrance exams is merited.

Public Finance. Support should be given to ensure effective implementation of new procurement laws and ongoing tax reform initiatives. In addition, the accounting chamber and the Chief Control and Auditing Administration should be strengthened, especially in the enforcement of their findings and recommendations. Finally, budget and expenditure oversight – internally and externally – should be promoted.

Private Sector. The business community needs to be mobilized to advocate for conflict of interest and transparency laws, and to support regulations that promote the business environment and eliminate administrative barriers. Expanded support should be given to private sector associations to conduct continuous monitoring of the implementation of business laws and regulations.

Parliament. Continued pressure and support needs to be applied to the Rada to promote adoption of an adequate anti-corruption legal framework. MPs need to be made more accountable to their constituents and various monitoring and transparency programs can be supported. Legislator skills training and resources need to be provided to improve legislative drafting, coalition building and negotiation/compromise skills.

Political Parties. Programs are needed to build more transparency into party financing.

Subnational Government. Local government institutions need to be strengthened so that they can deliver services in a transparent and accountable fashion. CSO advocacy and watchdog capacity building at the subnational level is also a major requirement to control corrupt tendencies.

Where to Start

Logically, it is important to begin a comprehensive anti-corruption program by ensuring an adequate foundation – an acceptable legal and institutional framework that is sensitive to corruption issues – on which other reforms can be built. Such activities should certainly be started immediately. However, it must be understood that these prerequisites often take time to establish and they should be considered as medium- to long-term efforts.

At the same time, it is essential not to wait until these fundamentals are in place to begin other initiatives that could yield early and visible successes. In this regard, strengthening demand-side capacity is critical to sustain the pressure on government and for the public to believe that progress is being made. Thus, civil society, private sector and mass media initiatives should also be promoted early in USAID's anti-corruption program. In addition, we found great potential among many existing USAID projects in Ukraine for meaningful anti-corruption activities within their current domains; these areas for anti-corruption intervention need to be designed and implemented. So, an additional early step should involve conducting mainstreaming workshops and providing one-on-one technical assistance to current USAID implementers to help them incorporate targeted anti-corruption elements into their projects.

Suggested Starting Points for a USAID/Ukraine Anti-Corruption Program

- 1. Mainstream anti-corruption goals in ongoing USAID projects**
- 2. Establish the Prerequisites**
 - Promote passage of key corruption-related legislation in the Rada
 - Promote better implementation of current corruption-related laws
 - Support design and implementation of a comprehensive national anti-corruption strategy
 - Begin activities to reform the judiciary
- 3. Support Demand-Side Capacity Building**
 - Establish civil society monitoring and watchdog groups in key areas, such as budgeting, procurement, the courts, and the legislature
 - Establish constructive civil society-government dialogues
 - Support a network of Citizen Advocate Offices that provide citizen victims of corruption with legal services to act on grievances
- 4. Target a Key Government Sector**
 - Select a major public service delivery sector, such as health, and initiate a comprehensive anti-corruption program there, to serve as a model for other future efforts

Priority Recommendations for USAID/Ukraine Anti-Corruption Programming

	Core Strategic Directions				Ongoing/Planned USAID Programs
	Establish prerequisites	Develop demand pressure	Conditional supply side support	Mainstream anti-corruption	
<p align="center">Priority Program Options (H = High priority) (M = Medium priority)</p>					
<p><u>Cross-Sectoral and Prerequisite Conditions</u></p> <ul style="list-style-type: none"> H Conduct mainstreaming and TA for USAID & partners H Support design/execution of anti-corruption strategy H Support passage of anti-corruption legislation H Support government’s anti-corruption institutions H Advocacy skills citizen, business & media groups H Strengthen public procurement procedures/institutions H Strengthen citizen oversight/watchdog groups H Support civic education related to corruption 	<ul style="list-style-type: none"> • • • • • • • • 	<ul style="list-style-type: none"> • • • • • • • • 	<ul style="list-style-type: none"> • • • • • • • • 	<p>The CURE project can be expanded to include corruption-specific awareness campaigns on particular topics. The Internews media project can be expanded to include more components specifically related to investigative reporting on corruption issues. The UNCAN project can expand and direct its advocacy programs toward rule of law and anti-corruption issues. It can also support citizen watchdog groups.</p>	
<p><u>Judicial Sector</u></p> <ul style="list-style-type: none"> H Support reforms in judicial selection process H Support reforms in court administration & procedures M Support reforms in judicial discipline process M Support reforms in execution of court decisions 			<ul style="list-style-type: none"> • • • • 	<p>ABA-CEELI’s Rule of Law Development and DoJ-sponsored programs can be expanded to enhance regional public complaint offices, donor coordination on anti-corruption legal initiatives, law enforcement reform, criminal justice initiatives, and work with the Council of Judges, the High Council of Justice and the State Judicial Administration. The Commercial Law Project activities related to judicial enforcement and case management can be expanded.</p>	
<p><u>Health Sector</u></p> <ul style="list-style-type: none"> H Strengthen procurement practices 			<ul style="list-style-type: none"> • 	<p>Existing health programs – including Policy II, Families for Children, Policy Dialogue and Implementation – can incorporate enhanced</p>	

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	Core Strategic Directions				Ongoing/Planned USAID Programs
	Establish prerequisites	Develop demand pressure	Conditional supply side support	Mainstream anti-corruption	
<p align="center">Priority Program Options (H = High priority) (M = Medium priority)</p>					
<p>H Support oversight of budget expenditures H Support management and organizational reforms M Support formulation of national health insurance fund</p>		•	•	•	advocacy and oversight activities to promote greater transparency and accountability over budgeting, financial management, staffing, and procurement of pharmaceuticals purchases and healthcare delivery.
<p><u>Education Sector</u> H Support CSO budget oversight initiatives H Mainstream anti-corruption into testing procedures M Promote civic education on legal literacy</p>		•		•	Eurasia's Promoting Democracy and Market Reforms project can mobilize CSOs to have a greater voice with regard to education budgets and programs.
<p><u>Public Finance</u> H Support budget and expenditure watchdogs H Monitor implementation of new procurement law H Support ongoing tax reform initiatives H Strengthen Accounting Chamber and CCAA M Promote budget transparency policies M Strengthen procurement institutions and procedures M Support streamlining of VAT refunds and tax returns M Promote transparency in audit reporting</p>	•	•	•	•	The Municipal Budgeting Project can continue to make the budget process more transparent and reduce opportunities for corruption in the tax system. The FMI Capital Markets project needs to emphasize good corporate governance procedures and can be expanded to address transparency and accountability issues related to the pension fund and tax reform.
<p><u>Private Sector</u> H Support conflict of interest and transparency laws H Support regulations to promote business environment</p>	•		•		BIZPRO activities that promote business regulatory reforms and one-stop shops can be expanded to include additional advocacy and dialogue by businesses. Business oversight groups could be established

	Core Strategic Directions				Ongoing/Planned USAID Programs
	Establish prerequisites	Develop demand pressure	Conditional supply side support	Mainstream anti-corruption	
<p align="center">Priority Program Options (H = High priority) (M = Medium priority)</p>					
<p>H Support monitoring of supportive business laws M Strengthen business associations & corporate governance</p>		•	•	•	at the regional level to ensure that tenders are conducted properly, for instance. The ULTI/NLAE land titling project can be continued and strengthened.
<p><u>Parliament</u> H Support adoption of anti-corruption legal framework H Promote legislative accountability H Support training and resources for legislator skills M Promote diplomatic pressure/dialogue with Parliament M Strengthen Parliamentary oversight of executive</p>	•	•	•		The Parliamentary Strengthening Program can be continued to build legislative capacity to conduct effective oversight of the executive branch.
<p><u>Political Parties</u> H Strengthen demand pressure on parties M Strengthen accountability for MPs and parties M Support party financing transparency M Build CSO-party lobbying relationships M Promote youth involvement in combating corruption</p>		•	•	•	The Political Party Building Program can expand its efforts to support transparency in party financing, citizen-party dialogue, and citizen monitoring of party activity.
<p><u>Subnational Government</u> H Support strengthening of local government institutions H Support CSO advocacy & watchdog capacity building M Promote decentralization policy as path to fight corruption</p>	•	•	•		The Municipal Budget Reform Project can be expanded to additional localities and specific anti-corruption elements, such as citizen budget watchdog groups can be added. The ERUM Project can be expanded to additional cities and particular anti-corruption components can be added, such as public ethics training for local officials and municipal

	Core Strategic Directions				Ongoing/Planned USAID Programs
	Establish prerequisites	Develop demand pressure	Conditional supply side support	Mainstream anti-corruption	
<p>Priority Program Options (H = High priority) (M = Medium priority)</p>					
					<p>complaint centers. The UCAN Project can be expanded to promote government transparency and citizen participation in a wider range of sectoral issues and municipalities.</p>

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Appendix: List of Interviewees

United States Agency for International Development

Earl Gast, Mission Director
 Karen Hilliard, Deputy Mission Director
 Cherkas, Oleksandr, Office of Health and Social Transition
 Chomiak, Bohdan, Office of Economic Growth
 Godfrey, Nancy, Office of Health and Social Transition
 Kornilova, Tatiana N., Project Management Specialist- Energy
 Koshukov, Petro, LED Advisor
 Linden, Gary, Office of Economic Growth
 Malikova, Evgenia, Private Enterprise Development
 Parkhomenko, Volodymyr, LED Advisor
 Piskun, Oleksander, Office of Democratic and Social Transition
 Rachkevich, Victor, Project Management Specialist, Municipal Development
 Ryabiko, Kateryna, Political Parties
 Schlansker Bill, Municipal Government
 Sharp, Kevin C., Office of Economic Growth
 Shcherbyna, Iryna, Budget and Fiscal Policy Group
 Stevens, Kathryn, Office of Democracy and Governance
 Yatsenko, Volodymyr, Office of Economic Growth

United States Embassy

John E. Herbst, Ambassador
 Sheila Gwaltney, Deputy Chief of Mission
 Scanlon, Michael, Law Enforcement Section
 Klymovych, Oksana, Law Enforcement Section

Donor Organizations

Syroyid, Oksana, Organization for Security and Co-operation in Europe (OSCE)
 Neal, Craig R., The World Bank
 Spivak, Andrei, Project Manager, EC Delegation in Ukraine
 Romaniv, Roman, Renaissance Foundation

USAID Partners:

Dettman, David, NDI
 Felitti, Barbara, UCAN
 Greer, David A., EMG, Commercial Law Center Project
 Gryshyn, Oleg, Democratising Ukraine
 Harding, Ray, ABA/CEELI,
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 Initiative (ABA/CEELI)
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 Kukharchyk, Vasili, American Bar Association Central European and Eurasian Law Initiative (ABA/CEELI)
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 Oliynyk, Valeriy, UCAN
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 Rudyk, Artem, Tax Analyst, Local Budget Reform Project
 Scherbina, Iryna, Fiscal and Budget Policy Group Director,
 Sedova, Irina, Parkhomenko, Vladimir, Chemonics
 Seroid, Oksana, Role of Law Project
 Steffy, John R., American Bar Association Central European and Eurasian Law Initiative (ABA/CEELI)
 Stevens, Nick, UCAN
 Vasylychenko, Olena, PADCO, Ukraine Pension Reform Implementation Program
 Vorobiov, Oleksandr, Strengthening of electoral administration project
 Wallace, Ann, FMI

Ukraine Non-Governmental Organizations

Alperovitch, Michail, Consulting Firm "Intron", Donetsk
 Datsyuk, Serhei, "Guardaryka"
 Drupp, Yuri, and Olha Ostapenko, Mother and Infant's Health (Donetsk)
 Dubrovskiy, Vladimir, Center for Social and Economic Research
 Ghosh, Mridula, East European Development Institute
 Grynevych, Lilia, Center of Independence Testing, Director
 Gusyna, Lidia, Rule of Law Foundation
 Kochuyev, Valeriy, CPP, Director of Eastern Regional training Center (Donetsk)
 Kohut, Ihor, Agency for Legislative Initiatives
 Kovryzhenko, Denis, Agency for Legislative Initiatives
 Kuybida, Roman, Centre for Political and Legal Reforms
 Latsyba, Maxym, Ukrainian center of Independent Political Studies
 Leshenko, Natalia, Institute for Economic Research and Policy Consulting
 Liapin, Dmitriy, Institute for Competitive Society
 Maidan, Oksana, Serhiy Kokeziuk, Ukrainian Center of Education Reform
 Maksimova, Svetlana, "Justinian" Edition
 Medvedev, Victor, Rotary Club, Lubny
 Ovsepyan, Arthur, All-Ukrainian Network of PLWH
 Proskuryakov, Alexey, National Center for State Courts
 Shcherbakov, Ruslan, Foundation "Regional Center of Economic Studies and Business Support" (Lubny)
 Shkotnikov, Volodymyr, Pensioners' Organisation (Lubny)
 Soskin, Oleg, Institute of Society Transformation
 Spornykov, Oleg, Rule of Law Foundation
 Velichko, Volodymyr, Coalition "Volunteer" (Lubny)
 Yakota, Volodymyr, Poltava Branch of the Committee of VotersVoters
 Zakalyuk, Anatoliy, Academy of Legal Sciences
 Zanoza, Mykola, Ukrainian Human Rights Committee (Globin Branch), Poltava oblast

Zhovtyak, Volodymyr, National Coordination Council on the Prevention of the Spread of HIV/AIDS

Ukraine Government Organizations

Bilak, Daniel A., Ministry of Justice

Denysenko, Larisa, Ministry of Justice

Hurzhiy, Serhiy, State Committee for Financial Monitoring of Ukraine

Kasian, Olexiy Petrovych, Appellate Court Judge, President of the Ukrainian Independent Judges Association

Khmelik, Volodymyr Borysovykh, Senior Warrant Officer, Ministry of Internal Affairs

Kirsanov, Valerii, State Committee for Financial Monitoring of Ukraine

Kluchnikov, Danylo Victorovych, Deputy Head, Department to Combat Trafficking in Persons, Ministry of Internal Affairs

Klyuchnikov, Daniil, Ministry of Internal Affairs of Ukraine

Markeyevam Oksana, Head of International Department, Council of National Security and Defense of Ukraine

Moysyk, Volodymyr, Head, VR Committee on Legal Enforcement Provisions

Oleshchenko, Vyacheslav I., Secretariat of the President of Ukraine

Ostash, Ihor, Parliamentary Member

Palyanytsia, Andrii, Advisor to the Secretariat of the President of Ukraine

Parkhomenko, Andriy A., State Committee for Financial Monitoring of Ukraine

Pasenyukm Oleksandr, Head, High Administrative Court of Ukraine

Pylypets, Svitlana, High Administrative Court of Ukraine

Sheybut, Viktor, State Committee for Financial Monitoring of Ukraine

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Teres, Valeriy Mykolayovych, Ombudsman's office

Tsap, Valeriy Volodymyrovych, Head of International Department, Ministry of Internal Affairs

Local Governments

Alekseenko, Victor, Head of the lubny Raion Administration

Grymchak, Yuriy, Deputy Governor of Donetsk Oblast

Pluzhnik, Vasyl, Deputy Mayor of the city of Lubny

Sobolev, Anatoliy, Mayor of the city of Lubny

Tereschenko, Grigoriy, Lubny Raion Administration

Yanovskiy, Deputy Head of the Lubny Raion Administration

Mayors from Khorol and Kremenchug

President Trump @POTUS · 30 Jan 2017
Statement on the Appointment of Dana Boente as Acting Attorney General:
[facebook.com/DonaldTrump/po...](https://www.facebook.com/DonaldTrump/post/)
6.8K 5.9K 24K

Mark S. Zaid @MarkSZaidEsq
Replying to @POTUS
#coup has started. As one falls, two more will take their place. #rebellion #impeachment
6:52 PM - 30 Jan 2017
872 Retweets 582 Likes

SUBPOENA

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To BRIAN MCCORMACK

You are hereby commanded to be and appear before the Permanent Select Committee on Intelligence

of the House of Representatives of the United States at the place, date, and time specified below.

- to produce the things identified on the attached schedule touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of production:
Date:
Time:

- to testify at a deposition touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: Permanent Select Committee on Intelligence, HVC-304, U.S. Capitol
Date: NOVEMBER 4, 2019
Time: 2:00 PM

- to testify at a hearing touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony:
Date:
Time:

To The U.S. Marshals Service, or any authorized Member or congressional staff

to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, D.C. this 1st day of NOVEMBER, 2019.

Chairman or Authorized Member

Attest: Gloria J. Lett, Deputy Clerk
Clerk

SUBPOENA

**BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE
CONGRESS OF THE UNITED STATES OF AMERICA**

To JOHN EISENBERG

You are hereby commanded to be and appear before the
Permanent Select Committee on Intelligence

of the House of Representatives of the United States at the place, date, and time specified below.

- to produce the things identified on the attached schedule touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of production: _____
 Date: _____ Time: _____

- to testify at a deposition touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: Permanent Select Committee on Intelligence, HVC-304, U.S. Capitol
 Date: NOVEMBER 4, 2019 Time: 9:00 AM

- to testify at a hearing touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____
 Date: _____ Time: _____

To The U.S. Marshals Service, or any authorized Member or congressional staff
_____ to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at
the city of Washington, D.C. this 1st day of November, 2019.

[Signature]
Chairman or Authorized Member

Attest
[Signature]
Clerk

Exhibit 1



From: Noble, Daniel [REDACTED]
 Sent: Thursday, November 7, 2019 6:36 PM
 To: Mulvaney, Mick M. EOP/WHO
 Cc: Bergreen, Timothy <[REDACTED]>; Bitar, Maher <[REDACTED]>; Goldman, Daniel <[REDACTED]>; Mitchell, Nicolas <[REDACTED]>; Wirkkala, Rheanne <[REDACTED]>; Rapallo, Dave <[REDACTED]>; Grooms, Susanne Sachsman <[REDACTED]>; Kenny, Peter <[REDACTED]>; Carey, Laura <[REDACTED]>; Bair, James <[REDACTED]>; Purpura, Michael M. EOP/WHO

Subject: Subpoena - House Impeachment Inquiry

Mr. Mulvaney,

Please see the attached subpoena commanding you to appear for a deposition as part of the House of Representatives' impeachment inquiry at the previously noticed date, time, and location: **November 8, at 9:00 a.m. in HVC-304, The Capitol.**

This subpoena is being issued by the Permanent Select Committee on Intelligence under the Rules of the House of Representatives in exercise of its oversight and legislative jurisdiction and after consultation with the Committee on Foreign Affairs and the Committee on Oversight and Reform. The deposition transcript shall be collected as part of the House's impeachment inquiry and shared among the Committees, as well as with the Committee on the Judiciary as appropriate. Your failure or refusal to comply with the subpoena, including at the direction or behest of the President, shall constitute further evidence of obstruction of the House's impeachment inquiry and may be used as an adverse inference against you and the President. Moreover, your failure to appear shall constitute evidence that may be used against you in a contempt proceeding.

Attached for your reference are the House deposition regulations and HPSCI's Rules of Procedure.

Please confirm receipt.

Sincerely,

Daniel S. Noble
 Senior Investigative Counsel (Majority)
 House Permanent Select Committee on Intelligence
 The Capitol (HVC-304)
 Desk: [REDACTED]
 Cell: [REDACTED]
 Secure: [REDACTED]

SUBPOENA

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To THE HONORABLE JOHN MICHAEL ("NICK") MULVANEY
You are hereby commanded to be and appear before the
Permanent Select Committee on Intelligence

of the House of Representatives of the United States at the place, date, and time specified below.

- to produce the things identified on the attached schedule touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of production: _____
Date: _____ Time: _____

- to testify at a deposition touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: PERMANENT SELECT COMMITTEE ON INTELLIGENCE, HUC-304, U.S. CAPITOL
Date: NOVEMBER 8, 2019 Time: 9:00 AM

- to testify at a hearing touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____
Date: _____ Time: _____

To The U.S. Marshals Service, or any authorized Member or congressional staff
_____ to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at
the city of Washington, D.C. this 4th day of NOVEMBER, 2019.

Attest:
[Signature]
Clerk

[Signature]
Chairman or Authorized Member

PROOF OF SERVICE

Subpoena for THE HONORABLE JOHN MICHAEL ("MIKE") MULLANEY
Address _____
_____ before the Permanent Select Committee on Intelligence
_____ *U.S. House of Representatives*
116th Congress

Served by (print name) Maher Bitar
Title General Counsel
Manner of service Electronic Mail
Date 11/7/2019
Signature of Server 
Address Permanent Select Committee on Intelligence, HVC-304, U.S. Capitol

106TH CONGRESS }
1st Session }

SENATE

{ TREATY DOC.
106-16 }

TREATY WITH UKRAINE ON MUTUAL LEGAL
ASSISTANCE IN CRIMINAL MATTERS

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

TREATY BETWEEN THE UNITED STATES OF AMERICA AND
UKRAINE ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MAT-
TERS WITH ANNEX, SIGNED AT KIEV ON JULY 22, 1998, AND
WITH AN EXCHANGE OF NOTES SIGNED ON SEPTEMBER 30,
1999, WHICH PROVIDES FOR ITS PROVISIONAL APPLICATION



NOVEMBER 10, 1999.—Treaty was read the first time, and together with
the accompanying papers, referred to the Committee on Foreign Rela-
tions and ordered to be printed for the use of the Senate.

U.S. GOVERNMENT PRINTING OFFICE

LETTER OF TRANSMITTAL

THE WHITE HOUSE, *November 10, 1999.*

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Treaty Between the United States of America and Ukraine on Mutual Legal Assistance in Criminal Matters with Annex, signed at Kiev on July 22, 1998. I transmit also, for the information of the Senate, an exchange of notes which was signed on September 30, 1999, which provides for its provisional application, as well as the report of the Department of State with respect to the Treaty.

The Treaty is one of a series of modern mutual legal assistance treaties being negotiated by the United States in order to counter criminal activities more effectively. The Treaty should be an effective tool to assist in the prosecution of a wide variety of crimes, including drug trafficking offenses. The Treaty is self-executing. It provides for a broad range of cooperation in criminal matters. Mutual assistance available under the Treaty includes: taking of testimony or statements of persons; providing documents, records, and articles of evidence; serving documents; locating or identifying persons; transferring persons in custody for testimony or other purposes; executing requests for searches and seizures; assisting in proceedings related to restraint, confiscation, forfeiture of assets, restitution, and collection of fines; and any other form of assistance not prohibited by the laws of the requested state.

I recommend that the Senate give early and favorable consideration to the Treaty and give its advice and consent to ratification.

WILLIAM J. CLINTON.

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
Washington, October 19, 1999.

The PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit to you the Treaty Between the United States of America and Ukraine on Mutual Legal Assistance in Criminal Matters with Annex ("the Treaty"), signed at Kiev on July 22, 1998. I recommend that the Treaty be transmitted to the Senate for its advice and consent to ratification.

Also enclosed, for the information of the Senate, is an exchange of notes under which the Treaty is being provisionally applied to the extent possible under our respective domestic laws, in order to provide a basis for immediate mutual assistance in criminal matters. Provisional application would cease upon entry into force of the Treaty.

The Treaty covers mutual legal assistance in criminal matters. In recent years, similar bilateral treaties have entered into force with a number of other countries. The Treaty with Ukraine contains all essential provisions sought by the United States. It will enhance our ability to investigate and prosecute a range of offenses. The Treaty is designed to be self-executing and will not require new legislation.

Article 1 sets forth a non-exclusive list of the major types of assistance to be provided under the Treaty, including taking the testimony or statements of persons; providing documents, records and other items of evidence; locating or identifying persons or items; serving documents; transferring persons in custody for testimony or other purposes; executing requests for searches and seizures; assisting in proceedings related to immobilization and forfeiture of assets, restitution, and collection of fines; and, rendering any other form of assistance not prohibited by the laws of the Requested State. The scope of the Treaty includes not only criminal offenses, but also proceedings related to criminal matters, which may be civil or administrative in nature.

Article 1(3) states that assistance shall be provided without regard to whether the conduct involved would constitute an offense under the laws of the Requested State.

Article 1(4) states explicitly that the Treaty is not intended to create rights in private parties to obtain, suppress, or exclude any evidence, or to impede the execution of a request.

Article 2 provides for the establishment of Central Authorities and defines Central Authorities for purposes of the Treaty. For the United States, the Central Authority shall be the Attorney General

or a person designated by the Attorney General. For Ukraine, the Central Authority shall be the Ministry of Justice and the Office of the Prosecutor General. The article provides that the Central Authorities shall communicate directly with one another for the purposes of the Treaty.

Article 3 sets forth the circumstances under which a Requested State's Central Authority may deny assistance under the Treaty. A request may be denied if it relates to a military offense that would not be an offense under ordinary criminal law. A further ground for denial is that the request relates to a political offense (a term expected to be defined on the basis of that term's usage in extradition treaties). In addition, a request may be denied if its execution would prejudice the security or similar essential interests of the Requested State, or if it is not made in conformity with the Treaty.

Before denying assistance under Article 3, the Central Authority of the Requested State is required to consult with its counterpart in the Requesting State to consider whether assistance can be given subject to such conditions as the Central Authority of the Requested State deems necessary. If the Requesting State accepts assistance subject to these conditions, it is required to comply with the conditions. If the Central Authority of the Requested State denies assistance, it is required to inform the Central Authority of the Requesting State of the reasons for the denial.

Article 4 prescribes the form and content of written requests under the Treaty, specifying in detail the information required in each request. The article permits other forms of requests in emergency situations but requires written confirmation within ten days thereafter unless the Central Authority of the Requested State agrees otherwise.

Article 5 requires the Central Authority of the Requested State to execute the request promptly or to transmit it to the authority having jurisdiction to do so. It provides that the competent authorities of the Requested State shall do everything in their power to execute a request, and that the courts or other competent authorities of the Requested State shall have authority to issue subpoenas, search and arrest warrants, or other orders necessary to execute the request. The Central Authority of the Requested State must make all arrangements for representation of the Requesting State in any proceedings arising out of an assistance request.

Under Article 5(3), requests are to be executed in accordance with the laws of the Requested State except to the extent that the Treaty provides otherwise. However, the method of execution specified in the request is to be followed except insofar as it is prohibited by the laws of the Requested State.

Article 5(4) provides that if the Central Authority of the Requested State determines that execution of the request would interfere with an ongoing criminal investigation, prosecution, or proceeding in that State, it may postpone execution or, after consulting with the Central Authority of the Requesting State, impose conditions on execution. If the Requesting State accepts assistance subject to the conditions, it shall comply with such conditions.

Article 5(5) further requires the Requested State, if so requested, to use its best efforts to keep confidential a request and its contents, and to inform the Requesting State's Central Authority if the

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request cannot be executed without breaching confidentiality. This provides the Requesting State an opportunity to decide whether to pursue the request or to withdraw it in order to maintain confidentiality.

This article additionally requires the Requested State's Central Authority to respond to reasonable inquiries by the Requesting State's Central Authority regarding the status of the execution of a particular request; to report promptly to the Requesting State's Central Authority the outcome of its execution; and, if the request is denied, to inform the Requesting State's Central Authority of the reasons for the denial.

Article 6 apportions between the two States the costs incurred in executing a request. It provides that the Request State shall pay all costs, except for the following items to be paid by the Requesting State: fees of expert witnesses, costs of interpretation, translation and transcription, and allowances and expenses related to travel of persons pursuant to Articles 10 and 11. If during the execution of the request, it becomes apparent that extraordinary expenses will be entailed, the Central Authorities shall consult to determine the terms and conditions under which execution may continue.

Article 7 requires the Requesting State to comply with any request by the Central Authority of the Requested State that information or evidence obtained under the Treaty not be used for proceedings other than those described in the request without its prior consent. Further, if the Requested State's Central Authority asks that information or evidence furnished under this Treaty be kept confidential or be used in accordance with specified conditions, the Requesting State must use its best efforts to comply with the conditions. Once information is made public in the Requesting State in accordance with either of these provisions, no further limitations on use apply. Nothing in the article prevents the use or disclosure of information to the extent that there is an obligation to do so under the Constitution of the Requesting State in a criminal prosecution. The Requesting State is obliged to notify the Requesting State in advance of any such proposed use or disclosure.

Article 8 provides that a person in the Requesting State from whom testimony or evidence is requested pursuant to the Treaty shall be compelled, if necessary, to appear and testify or produce items, documents and records. The article requires the Central Authority of the Requested State, upon request, to furnish information in advance about the date and place of the taking of testimony or evidence pursuant to this Article.

Article 8(3) further requires the Requested State to permit the presence of persons specified in the request and to permit them to question the person giving the testimony or evidence. In the event that a person whose testimony or evidence is being taken asserts a claim of immunity, incapacity, or privilege under the laws of the Requesting State, Article 8(4) provides that the testimony or evidence shall be taken and the claim made known by written notification to the Central Authority of the Requesting State for resolution by its competent authorities. Finally, in order to ensure admissibility of evidence in the Requesting State, Article 8(5) provides a

mechanism for authenticating evidence that is produced pursuant to or that is the subject of testimony taken in the Requested State.

Article 9 requires that the Requested State provide the Requesting State with copies of publicly available records in the possession of government departments and agencies in the Requesting State. The Requested State may further provide copies of any documents, records or information in the possession of a government department or agency, but not publicly available, to the same extent and under the same conditions as it would provide them to its own law enforcement or judicial authorities. The Requested State has the discretion to refuse to execute, entirely or in part, such requests for records not publicly available. Article 9(3) provides that records produced pursuant to this Article shall, upon request, be certified by the appropriate form attached to the request. Article 9(3) also provides that no further authentication shall be necessary for admissibility into evidence in the Requesting State of official records pursuant to this Article.

Article 10 provides a mechanism for the Requesting State to invite the voluntary appearance in its territory of a person located in the Requested State shall indicate the extent to which the expenses will be paid. It also states that the Central Authority of the Requesting State has discretion to determine that a person appearing in the Requesting State pursuant to this Article shall not be subject to service of process or be detained or subjected to any restriction of personal liberty by reason of any acts or convictions that preceded his departure from the Requested State. Any safe conduct provided for by this article ceases seven days after the Central Authority of the Requesting State has notified the Central Authority of the Requested State that the person's presence is no longer required, or if the person has left the Requesting State and voluntarily returns to it.

Article 11 provides for temporary transfer of a person in custody in the Requested State or in a third State to the Requesting State for purposes of assistance under the Treaty (for example, a witness incarcerated in the Requested State may be transferred to have his deposition taken in the presence of the defendant), provided that the person in question and the Central Authorities of both States agree. The article also provides for voluntary transfer of a person in the custody of the Requesting State to the Requested State for purposes of assistance under the Treaty (for example, a defendant in the Requesting State may be transferred for purposes of attending a witness deposition in the Requesting State), if the person consents and if the Central Authorities of both States agree.

Article 11(3) further establishes both the express authority and the obligation of the receiving State to maintain the person transferred in custody unless otherwise agreed by both Central Authorities. The return of the person transferred is subject to terms and conditions agreed to by the Central Authorities, and the sending State is not required to initiate extradition proceedings for return of the person transferred. The person transferred receives credit for time served in the custody of the receiving State.

Article 12 establishes the authority of the Requested State to authorize transit through its territory of a person held in custody by a third State whose appearance has been requested by the Re-

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requesting State. The Requested State further has the authority and the obligation to keep the person in custody during transit. The Parties retain discretion to refuse to grant transit of their own nationals, however.

Article 13 requires the Requested State to use its best efforts to ascertain the location or identity of persons or items specified in a request.

Article 14 obligates the Requested State to use its best efforts to effect service of any document relating, in whole or in part, to any request for assistance under the Treaty. A request for the service of a document requiring a person to appear in the Requesting State must be transmitted a reasonable time before the scheduled appearance. Proof of service is to be provided in the manner specified in the request.

Article 15 obligates the Requested State to execute requests for search, seizure, and delivery of any item to the Requesting State if the request includes the information justifying such action under the laws of the appropriate. The Central Authority of the State receiving such information is required to inform the Central Authority that provided the information of any action taken.

Article 17 also obligates the Contracting States to assist each other to the extent permitted by their respective laws in proceedings relating to forfeiture of the proceeds and instrumentalities of offenses, restitution to victims of crime, and collection of fines imposed as sentences in criminal prosecutions. This may include action to temporarily immobilize the proceeds or instrumentalities pending further proceedings. The Contracting State having custody over proceeds or instrumentalities of offenses is required to dispose of them in accordance with its laws. Either Contracting State may transfer all or part of such assets, or the proceeds of their sale, to the extent permitted by the transferring State's laws and upon such terms as it deems appropriate.

Article 18 states that assistance and procedures provided in the Treaty shall not prevent either Contracting State from granting assistance to the other Contracting State through the provisions of other applicable international agreements or through the provisions of its national law. The Contracting States may also provide assistance pursuant to any bilateral arrangement, agreement, or practice which may be applicable.

Article 19 provides that the Central Authorities of the Contracting States shall consult, at times mutually agreed, to promote the most effective use of the Treaty, and may agree upon such practical measures as may be necessary to facilitate the Treaty's implementation.

Article 20 provides that the Treaty is subject to ratification and the instruments shall be exchanged at Washington as soon as possible. The Treaty enters into force upon the exchange of instruments of ratification. Article 20 further provides that either Contracting State may terminate the Treaty by written notice to the other Contracting State, with termination to be effective six months following the date of notification.

A Technical Analysis explaining in detail the provisions of the Treaty is being prepared by the United States negotiating delegation, consisting of representatives from the Departments of Justice

and State, and will be transmitted separately to the Senate Committee on Foreign Relations.

The Department of Justice joins the Department of State in favoring approval of this Treaty by the Senate as soon as possible.

Respectfully submitted,

STROBE TALBOTT.

**TREATY
BETWEEN
THE UNITED STATES OF AMERICA
AND
UKRAINE
ON
MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS**

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The United States of America and Ukraine,

Desiring to improve the effectiveness of the competent authorities of both countries in the investigation, prosecution, and prevention of crime through cooperation and mutual legal assistance in criminal matters,

Have agreed as follows:

ARTICLE 1 SCOPE OF ASSISTANCE

1. The Contracting States shall provide mutual assistance, in accordance with the provisions of this Treaty, in connection with the investigation, prosecution, and prevention of offenses, and in proceedings related to criminal matters.
2. Assistance shall include:
 - (a) taking the testimony or statements of persons;
 - (b) providing documents, records, and other items;
 - (c) locating or identifying persons or items;
 - (d) serving documents;
 - (e) transferring persons in custody for testimony or other purposes;
 - (f) executing searches and seizures;
 - (g) assisting in proceedings related to immobilization and forfeiture of assets, restitution, and collection of fines; and
 - (h) any other form of assistance not prohibited by the laws of the Requested State.
3. Assistance shall be provided without regard to whether the conduct that is the subject of the investigation, prosecution, or proceeding in the Requesting State would constitute an offense under the laws of the Requested State.
4. This Treaty is intended solely for mutual legal assistance between the Contracting States. The provisions of this Treaty shall not give rise to a right on the part of any private person to obtain, suppress, or exclude any evidence, or to impede the execution of a request.

ARTICLE 2 CENTRAL AUTHORITIES

1. Each Contracting State shall have a Central Authority to make and receive requests pursuant to this Treaty.
2. For the United States of America, the Central Authority shall be the Attorney General or a person designated by the Attorney General. For Ukraine, the Central Authority shall be the Ministry of Justice and the Office of the Prosecutor General.
3. Each Central Authority shall make only such requests as it considers and approves. The Central Authority for the Requesting State shall use its best efforts to ensure that a request is not made where, in its view:

- (a) the offense on which the request is based does not have serious consequences; or
 - (b) the extent of the assistance to be requested is disproportionate to the sentence expected upon conviction.
4. The Central Authorities shall communicate directly with one another for the purposes of this Treaty.

ARTICLE 3 LIMITATIONS ON ASSISTANCE

1. The Central Authority of the Requested State may deny assistance if:
- (a) the request relates to an offense under military law that would not be an offense under ordinary criminal law;
 - (b) the request relates to a political offense;
 - (c) the execution of the request would prejudice the security or similar essential interests of the Requested State; or
 - (d) the request does not conform to the requirements of this Treaty.
2. Before denying assistance pursuant to this Article, the Central Authority of the Requested State shall consult with the Central Authority of the Requesting State to consider whether assistance can be given subject to such conditions as it deems necessary. If the Requesting State accepts assistance subject to these conditions, it shall comply with the conditions.
3. If the Central Authority of the Requested State denies assistance, it shall inform the Central Authority of the Requesting State of the reasons for the denial.

ARTICLE 4 FORM AND CONTENTS OF REQUESTS

1. A request for assistance shall be in writing except that the Central Authority of the Requested State may accept a request in another form in urgent situations. If the request is not in writing, it shall be confirmed in writing within ten days unless the Central Authority of the Requested State agrees otherwise. The request shall be in the language of the Requested State unless otherwise agreed.
2. The request shall include the following:
- (a) the name of the authority conducting the investigation, prosecution, or proceeding to which the request relates;
 - (b) a description of the nature and subject matter of the investigation, prosecution, or proceeding, and the applicable provisions of law for each offense;
 - (c) a description of the evidence, information, or other assistance sought; and
 - (d) a statement of the purpose for which the evidence, information, or other assistance is sought.
3. To the extent necessary and possible, a request shall also include:

- (a) information on the identity and location of any person from whom evidence is sought;
- (b) information on the identity and location of a person to be served, that person's relationship to the proceedings, and the manner in which service is to be made;
- (c) information on the identity and suspected location of a person or item to be located;
- (d) a precise description of the place or person to be searched and of the item to be seized;
- (e) a description of the manner in which any testimony or statement is to be taken and recorded;
- (f) a description of the testimony or statement sought, which may include a list of questions to be asked of a person;
- (g) a description of any particular procedure to be followed in executing the request, including certifications specified in Articles 8, 9, and 15 of this Treaty through completion of the appropriate forms annexed to this Treaty;
- (h) information as to the expenses related to travel and subsistence of a person asked to appear outside the Requested State; and
- (i) any other information that may be brought to the attention of the Requested State to facilitate its execution of the request.

ARTICLE 5 EXECUTION OF REQUESTS

1. The Central Authority of the Requested State shall promptly execute the request or, when appropriate, shall transmit it to the authority having jurisdiction to do so. The competent authorities of the Requested State shall do everything in their power to execute the request. The competent authorities of the Requested State shall have authority to issue subpoenas, search and arrest warrants, or other orders necessary to execute the request.
2. The Central Authority of the Requested State shall represent or make arrangements for representation of the interests of the Requesting State in the execution in the Requested State of a request for assistance.
3. Requests shall be executed in accordance with the laws of the Requested State except to the extent that this Treaty provides otherwise. However, the method of execution specified in the request shall be followed except insofar as it is prohibited by the laws of the Requested State.
4. If the Central Authority of the Requested State determines that execution of a request would interfere with an ongoing criminal investigation, prosecution, or proceeding in that State, it may postpone execution, or make execution subject to conditions determined to be necessary after consultations with the Central Authority of the Requesting State. If the Requesting State accepts the assistance subject to the conditions, it shall comply with the conditions.
5. The Requested State shall use its best efforts to keep confidential a request and its contents if such confidentiality is requested by the Central Authority of the Requesting State. If the request cannot be executed without breaching such

confidentiality, the Central Authority of the Requested State shall so inform the Central Authority of the Requesting State, which shall then determine whether the request should nevertheless be executed.

6. The Central Authority of the Requested State shall respond to reasonable inquiries by the Central Authority of the Requesting State concerning progress toward execution of the request.

7. The Central Authority of the Requested State shall promptly inform the Central Authority of the Requesting State of the outcome of the execution of the request. If the execution of the request is denied, delayed, or postponed, the Central Authority of the Requested State shall inform the Central Authority of the Requesting State of the reasons for the denial, delay, or postponement.

ARTICLE 6 COSTS

1. The Requested State shall pay all costs relating to the execution of the request, except for the following:

- (a) the fees of experts;
- (b) the costs of interpretation, translation, and transcription; and
- (c) the expenses related to travel and subsistence of persons travelling either in the Requested State for the convenience of the Requesting State or pursuant to Articles 10 and 11 of this Treaty.

2. If during the execution of a request it becomes apparent that complete execution will entail expenses of an extraordinary nature, the Central Authorities shall consult to determine the terms and conditions under which execution may continue.

ARTICLE 7 LIMITATIONS ON USE

1. The Central Authority of the Requested State may require that the Requesting State not use any evidence or information obtained under this Treaty in any investigation, prosecution, or proceeding other than that described in the request without the prior consent of the Central Authority of the Requested State. In such situations, the Requesting State shall comply with the requirement.

2. The Central Authority of the Requested State may request that evidence or information furnished under this Treaty be kept confidential or be used only subject to terms and conditions that it may specify. If the Requesting State accepts the evidence or information subject to such conditions, the Requesting State shall use its best efforts to comply with the conditions.

3. Nothing in this Article shall preclude the use or disclosure of evidence or information to the extent that there is an obligation to do so under the Constitution of

the Requesting State in a criminal prosecution. The Requesting State shall notify the Requested State in advance of any such possible use or disclosure.

4. Evidence or information that has been made public in the Requesting State in a manner consistent with paragraph 1 or 2 of this Article may thereafter be used for any purpose.

ARTICLE 8 TESTIMONY OR EVIDENCE IN THE REQUESTED STATE

1. A person in the Requested State from whom testimony or evidence is requested pursuant to this Treaty shall be compelled, if necessary, to appear and testify or produce items, including documents and records. A person who gives false testimony, either orally or in writing, in execution of a request shall be subject to prosecution in the Requested State in accordance with the criminal laws of that State.
2. Upon request, the Central Authority of the Requested State shall furnish information in advance about the date and place of the taking of the testimony or evidence pursuant to this Article.
3. The Requested State shall permit the presence of such persons as specified in the request during the execution of the request, and shall allow such persons to question the person giving the testimony or evidence.
4. If the person referred to in paragraph 1 asserts a claim of immunity, incapacity, or privilege under the laws of the Requesting State, the testimony or evidence shall nonetheless be taken and the claim made known by written notification to the Central Authority of the Requesting State for resolution by the competent authorities of that State.
5. If specified in a request, evidence produced in the Requested State pursuant to this Article or referred to in testimony taken under this Article shall be certified by the appropriate form attached to the request. Business records certified as authentic by the appropriate form, or the form certifying the absence or non-existence of such records, shall be admissible in evidence in the Requesting State as proof of the matters set forth therein.

ARTICLE 9 OFFICIAL RECORDS

1. The Requested State shall provide the Requesting State with copies of publicly available records, including documents or information in any form, in the possession of government departments and agencies in the Requested State.
2. The Requested State may provide copies of any records, including documents or information in any form, that are in the possession of a government department or agency in that State, but that are not publicly available, to the same extent and under the same conditions as such copies would be available to its own law enforcement or judicial authorities. The Requested State may in its discretion refuse to execute, entirely or in part, a request for records not publicly available.
3. If specified in a request, evidence produced in the Requested State pursuant to this Article shall be certified by the appropriate form attached to the request. Official records certified as authentic by the appropriate form, or the form certifying the absence or non-existence of such records, shall be admissible in evidence in the Requesting State as proof of the matters set forth therein.

ARTICLE 10
TESTIMONY OR EVIDENCE OUTSIDE THE REQUESTED STATE

1. When the Requesting State requests the appearance of a person in that State or in a third State, the Requested State shall invite the person to appear before the appropriate authority in the Requesting or in the third State. The Central Authority of the Requested State shall promptly inform the Central Authority of the Requesting State of the person's response.
2. The Requesting State shall indicate the extent to which the person's expenses will be paid. A person who agrees to appear may ask that the Requesting State advance money to cover these expenses. This advance may be provided through the Embassy or a consulate of the Requesting State.
3. The Central Authority of the Requesting State may, in its discretion, determine that a person appearing in the Requesting State pursuant to this article shall not be subject to service of process, or be detained or subjected to any restriction of personal liberty, by reason of any acts or convictions that preceded the person's departure from the Requested State.
4. The safe conduct provided for by this Article shall cease after a competent authority of the Requesting State has notified a person appearing pursuant to this Treaty that the person's presence is no longer required, and that person, being free to leave, has not left within seven days or, having left, has voluntarily returned.

ARTICLE 11
TRANSFER OF PERSONS IN CUSTODY

1. A person in the custody of the Requested State whose presence in the Requesting State or in a third State is sought for purposes of assistance under this Treaty shall be transferred from the Requested State to the Requesting State or to the third State for that purpose if the person consents and if the Central Authorities of both States agree.
2. A person in the custody of the Requesting State whose presence in the Requested State is sought for purposes of assistance under this Treaty may be transferred from the Requesting State to the Requested State if the person consents and if the Central Authorities of both States agree.
3. For purposes of this Article:
 - (a) the receiving State shall have the authority and the obligation to keep the person transferred in custody unless otherwise agreed by both Central Authorities;
 - (b) the receiving State shall return the person transferred to the custody of the sending State as soon as circumstances permit or as otherwise agreed by both Central Authorities;
 - (c) the receiving State shall not require the sending State to initiate extradition or any other proceedings for the return of the person transferred; and
 - (d) time served in the custody of the receiving State by the person transferred shall be credited toward the service of the sentence imposed in the sending State and shall not exceed the time remaining to be served on that sentence.

ARTICLE 12
TRANSIT OF PERSONS IN CUSTODY

1. The Requested State may authorize the transit through its territory of a person held in custody by a third State whose personal appearance has been requested by the Requesting State to give testimony or evidence or otherwise provide assistance in an investigation, a prosecution, or a proceeding related to a criminal matter.
2. The Requested State shall have the authority and the obligation to keep the person in custody during transit.
3. Each Contracting State may refuse to grant transit of its nationals.

ARTICLE 13
LOCATION OR IDENTIFICATION OF PERSONS OR ITEMS

If the Requesting State seeks the location or identity of persons or items in the Requested State, the Requested State shall use its best efforts to ascertain the location or identity.

ARTICLE 14
SERVICE OF DOCUMENTS

1. The Requested State shall use its best efforts to effect service of any document relating, in whole or in part, to any request for assistance made by the Requesting State under the provisions of this Treaty.
2. The Requesting State shall transmit any request for the service of a document requiring the appearance of a person before an authority in the Requesting State a reasonable time before the scheduled appearance.
3. The Requested State shall return a proof of service to the Requesting State in the manner specified in the Request.

ARTICLE 15
SEARCH AND SEIZURE

1. The Requested State shall execute a request for the search, seizure, and transfer of any item to the Requesting State if the request includes the information justifying such action under the laws of the Requested State.
2. If specified in a request, every official in the Requested State who has had custody of a seized item shall certify, through the use of a form attached to the request, the identity of the item, the continuity of custody, and any changes in condition. Such certificates shall be admissible in evidence in the Requesting State as proof of the matters set forth therein.
3. The Central Authority of the Requested State may require that the Requesting State agree to the terms and conditions deemed necessary to protect third party interests in the item to be transferred.

ARTICLE 16
RETURN OF ITEMS

The Central Authority of the Requested State may require that the Central Authority of the Requesting State return, as soon as possible, any items, including documents and records, furnished to it in execution of a request under this Treaty.

ARTICLE 17
ASSISTANCE IN FORFEITURE PROCEEDINGS

1. If the Central Authority of one Contracting State becomes aware of proceeds or instrumentalities of offenses that are located in the other State and may be forfeitable or otherwise subject to seizure under the laws of that State, it may so inform the Central Authority of the other State. If the State receiving such information has jurisdiction in this regard, it may present this information to its authorities for a determination whether any action is appropriate. These authorities shall issue their decision in accordance with the laws of their country. The Central Authority of the State that received the information shall inform the Central Authority of the State that provided the information of the action taken.

2. The Contracting States shall assist each other to the extent permitted by their respective laws in proceedings relating to the forfeiture of the proceeds and instrumentalities of offenses, restitution to the victims of crime, and the collection of fines imposed as sentences in criminal prosecutions. This may include action to temporarily immobilize the proceeds or instrumentalities pending further proceedings.

3. The Contracting State that has custody over proceeds or instrumentalities of offenses shall dispose of them in accordance with its laws. Either Contracting State may transfer all or part of such assets, or the proceeds of their sale, to the other State, to the extent permitted by the transferring State's laws and upon such terms as it deems appropriate.

ARTICLE 18
COMPATIBILITY WITH OTHER TREATIES

Assistance and procedures set forth in this Treaty shall not prevent either Contracting State from granting assistance to the other Contracting State through the provisions of other applicable international agreements, or through the provisions of its national laws. The Contracting States may also provide assistance pursuant to any bilateral arrangement, agreement, or practice that may be applicable.

ARTICLE 19
CONSULTATION

The Central Authorities of the Contracting States shall consult, at times mutually agreed to by them, to promote the most effective use of this Treaty. The Central Authorities may also agree on such practical measures as may be necessary to facilitate the implementation of this Treaty.

ARTICLE 20
RATIFICATION, ENTRY INTO FORCE, AND TERMINATION

1. This Treaty shall be subject to ratification, and the instruments of ratification shall be exchanged at Washington as soon as possible.

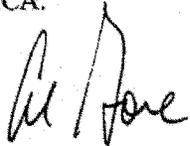
2. This Treaty shall enter into force upon the exchange of instruments of ratification.

3. Either Contracting State may terminate this Treaty by means of written notice to the other Contracting State. Termination shall take effect six months following the date of notification.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Treaty.

DONE at Kyiv this twenty-second day of July, 1998, in duplicate in the English and Ukrainian languages, both texts being equally authentic.

FOR THE UNITED STATES
OF AMERICA:



FOR UKRAINE:



**ANNEX
TO THE TREATY
BETWEEN
THE UNITED STATES OF AMERICA
AND
UKRAINE
ON
MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS**

- Form A: Certification of Business Records
- Form B: Certification of Absence or Non-Existence of Business Records
- Form C: Certification of Official Records
- Form D: Certification of Absence or Non-Existence of Official Records
- Form E: Certification with respect to Seized Items

FORM A

CERTIFICATION OF BUSINESS RECORDS

I, (name) having been advised as a witness that a false attestation subjects me to a penalty of criminal punishment, attest as follows:

I am employed by/associated with (name of business from which documents are sought) in the position of (business position or title) and by reason of my position am authorized and qualified to make this attestation.

Each of the records attached hereto is a record in the custody of the above-named business that:

- (A) was made, at or near the time of the occurrence of the matters set forth therein, by, or from information transmitted by, a person with knowledge of those matters;
- (B) was kept in the course of a regularly conducted business activity;
- (C) was made by the business as a regular practice; and,
- (D) if not an original record, is a duplicate of the original.

(date of execution)

(place of execution)

(signature)

FORM B**CERTIFICATION OF ABSENCE OR NON-EXISTENCE OF BUSINESS RECORDS**

I, (name), having been advised as a witness that a false attestation subjects me to a penalty of criminal punishment, attest as follows:

I am employed by/associated with (name of business from which documents are sought) in the position of (business position or title) and by reason of my position am authorized and qualified to make this attestation.

As a result of my employment/association with the above-named business, I am familiar with the business records it maintains. The business maintains business records that:

- (A) are made, at or near the time of the occurrence of the matters set forth therein by, or from information transmitted by, a person with knowledge of those matters;
- (B) are kept in the course of a regularly conducted business activity; and
- (C) are made by the business as a regular practice.

Among the records so maintained are records of individuals and entities that have accounts or otherwise transact business with the above-named business. I have made or caused to be made a diligent search of those records. No records have been found reflecting any business activity between the business and the following individuals and entities: _____

If the business had maintained an account on behalf of or had participated in a transaction with any of the foregoing individuals or entities, its business records would reflect that fact.

(date of execution)

(place of execution)

(signature)

FORM C

CERTIFICATION OF OFFICIAL RECORDS

I, (name), certify as follows:

1. (name of public authority) is a government office or agency of (country) and is authorized by law to maintain official records setting forth matters authorized by law to be reported and recorded or filed;
2. my position with the above-named public authority is (official title);
3. in my official capacity I have caused the production of true and accurate copies of records maintained by that public authority; and
4. those copies are described below and attached.

Description of records:

(signature)

(Official Seal or Stamp)

(date)

FORM D

CERTIFICATION OF ABSENCE OR NON-EXISTENCE OF OFFICIAL RECORDS

I, (name), certify as follows:

1. (name of public authority) is a government office or agency of (country) and is authorized by law to maintain official records setting forth matters that are authorized by law to be reported and recorded or filed;
2. records of the type described below set forth matters that are authorized by law to be reported and recorded or filed, and such matters regularly are recorded or filed by the above-named public authority;
3. my position with the above-named public authority is (official title);
4. in my official capacity I have made, or caused to be made, a diligent search of the above-named public authority's records for the records described below; and
5. no such records have been found to exist therein.

Description of records:

(signature)

(Official Seal or Stamp)

(date)

FORM E

CERTIFICATION WITH RESPECT TO SEIZED ITEMS

I, (name), having been advised as a witness that a false attestation subjects me to a penalty of criminal punishment, attest as follows:

1. I am employed by (country) and my position or title is (position or title) ;
2. I received custody of the items listed below from (name of person) on (date) at (place) ; and
3. I relinquished custody of the items listed below to (name of person) on (date) at (place) in the same condition as when I received them (or, if different, as noted below).

Description of items:

Changes in condition while in my custody:

(date of execution)

(place of execution)

(signature)

(Official Seal or Stamp)

DEPARTMENT OF STATE
WASHINGTON

September 30, 1999

Excellency:

I have the honor to refer to the Treaty Between the United States of America and Ukraine on Mutual Assistance in Criminal Matters (hereafter "the Treaty") signed on July 22, 1998.

The Government of the United States of America plans to submit the Treaty in the near future to the United States Senate for Senate advice and consent to ratification, and to seek favorable action by the Senate at the earliest possible date. Because of the pressing need to enhance law enforcement cooperation between our two governments to the extent possible at this time, I have the honor to propose that until such time as the Treaty enters into force through an exchange of instruments of ratification between our governments as provided for under Article 20(2) of the Treaty, our governments apply the terms of the Treaty to the extent possible under the respective domestic laws of the United States and Ukraine.

I have the further honor to propose that if the foregoing is acceptable to the Government of Ukraine, Your Excellency confirm this fact in a note in reply.

His Excellency

Anton Buteiko,

Ambassador of Ukraine.

1262

20

- 2 -

Accept, Excellency, the renewed assurances of my
highest consideration.

For the Secretary of State:

A handwritten signature in cursive script, reading "Steph Sestanovich". The signature is written in dark ink and is positioned below the typed name "Steph Sestanovich".

*Unofficial translation
into English*

Your Excellency:

I have the honor to acknowledge receipt the note of Your Excellency's note dated of September 30, 1999 which reads as follows:

"I have the honor to refer to the Treaty between the United States of America and Ukraine on Mutual Assistance in Criminal Matters (hereafter "the Treaty") signed on July 22, 1998.

The Government of the United States of America plans to submit the Treaty in the near future to the Senate for Senate advice and consent for ratification, and to seek favorable action by the Senate at the earliest possible date. Because of the pressing need to enhance law enforcement cooperation between American and Ukrainian Parties to the extent possible at this time, I have the honor to propose that until such time as the Treaty enters into force through an exchange of instruments of ratification as provided for under Article 20(2) of the Treaty, American and Ukrainian Parties apply the terms of the Treaty to the extent possible under the respective domestic laws of the United States of America and Ukraine.

I have the further honor to propose that if the foregoing is acceptable to the Ukrainian Party, Your Excellency confirm this fact in a note in reply.

Accept, Your Excellency, the assurances of my highest consideration."

I have the honor to confirm that the proposal set forth in the note of Your Excellency is acceptable to the Ukrainian Party.

Accept, Your Excellency, the assurances of my highest consideration.

Anton Buteyko
Ambassador

H.E. Madeleine Albright
The Secretary of State

P2016

RACE FOR THE WHITE HOUSE

PRESS RELEASES, ADVISORIES, STATEMENTS...**DEMOCRACY IN ACTION**

Donald Trump « Announcement Speech

ed. note-actual speech was much longer; see the video, partial transcript at bottom...

**Donald Trump
Announcement of Candidacy
Trump Tower
New York, NY
June 16, 2015**

[Remarks as Prepared for Delivery | [C-SPAN video](#)]

Our country is in serious trouble. We are not respected by anyone. We are a laughing stock all over the world.

ISIS, China, Mexico are all beating us. Everybody is beating us. Our enemies are getting stronger and we are getting weaker.

Politicians are all talk and no action. They will never be able to fix our country. They will never bring us to the Promised Land, and I cannot sit back and watch this incompetence any longer.

Ladies and gentlemen, I am officially running for President of the United States.

While I love my company and what I have built, I love my country even more. When was the last time the US won at anything? When was the last time we beat China or Japan in trade? or Mexico at the border? or anybody in negotiation? When was the last time we had a military victory that was so complete and total that the other side just said "We Quit!" It just doesn't happen for the US anymore.

Our country needs and deserves a comeback...but, we are not going to get that comeback with politicians. Politicians are not the solution to our problems-- they are the problem. They are almost completely controlled by lobbyists, donors and the special interests--they do not have the best interests of our people at heart.

We will never achieve our full potential if we send yet another politician to the White House. They will grow government, not cut it--they will grow debt, not stop it. We are right now in a massive bubble that could be ready to explode--real unemployment in the range of 20%, artificially induced low interest rates, and a stock market that bears no relation to reality-- are symptoms of something that could be catastrophic. We better have a great leader who truly understands what's going on.

Our country has a debt which will soon pass \$20 trillion. We have unsecured borders. There are over 90 million Americans who have given up looking for work. We have 45 million Americans on food stamps and nearly 50 million Americans living in poverty.

Clearly, our so called "leaders" in Washington are failing us. They have failed to honor their sacred duty to care for our veterans and their families. They have failed to keep our military strong and vibrant. Through gross incompetence, we give billions of dollars of high grade military equipment to our enemies. Our President truly doesn't have a clue!

At the same time, the world is becoming far more dangerous every day. Iran is racing towards developing nuclear weapons. China is exponentially expanding its military power. ISIS is beheading Christians simply for being Christian. In Benghazi, Islamic terrorists killed our diplomats without any consequences. Iran and ISIS, separately, are taking over vast areas in the Middle East and with it the largest oil reserves in the world. Our President has no plan.

The America we love will continue its decline because Washington is broken. We will never fix Washington from the inside unless we send someone to Washington from the outside. It is time for government to be run efficiently and effectively. It is time to get things done, and by done I mean properly done!

This is our time to once again make our government a government of the people, by the people and for the people. That is why today I am declaring my candidacy for President. I will Make America Great Again!

We will change Washington together and defeat the special interests. I am not a politician. I can't be bought. I won't be running around the country begging people for money for my campaign. I won't owe anybody anything. I won't be beholden to anyone except to you, the American people, if you elect me to serve as your President.

It is time to take our country in a bold new direction.

It is time to get Americans back to work.

It is way past time to build a massive wall to secure our southern border – and nobody can build a bigger and better wall than Donald Trump. A country without borders is, quite simply, not a country. Mexico is not our friend. They are beating us at the border and hurting us badly at economic development. They are sending people that they don't want—the United States is becoming a dumping ground for the world.

It is of primary importance to take care of our veterans and their families -- to make sure that every veteran has access to great medical care and attention. Our veterans are our heroes but are treated as third class citizens.

It is essential to rebuild our military so we have a strong presence that will send a clear message to our enemies that America is the leader of the free world. As President Reagan proved, there is only peace through strength.

The government must honor its obligations to our seniors. We must protect Social Security, Medicare and Medicaid, without cuts...there will no longer be any waste, fraud and abuse on my watch.

ObamaCare must be repealed and replaced with something far superior and at far less cost.

Likewise, we must greatly simplify our tax code. Our middle class, which has been totally forgotten, will thrive once again under President Trump.

It is time to stop sending jobs overseas through bad foreign trade deals. We will renegotiate our trade deals with the toughest negotiators our country has... the ones who have actually read "The Art of the Deal" and know how to make great deals for our country.

It is time to close loopholes for Wall Street and create far more opportunities for small businesses.

It is necessary that we invest in our infrastructure, stop sending foreign aid to countries that hate us and use that money to rebuild our tunnels, roads, bridges and schools—and nobody can do that better than me.

We have to stop Common Core. We must keep education local and under parental control. Unelected Washington bureaucrats shouldn't determine what is best for our children.

It is important for our allies to know they can once again depend on us. We will no longer bow down to our enemies.

We must stand by Israel. We will remind the world that a threat against Israel is a threat against the United States.

We need to stop Iran from developing nuclear weapons. We cannot allow a nuclear arms race in the Middle East.

It is time to defeat ISIS. With a proper plan, it can be done quickly and effectively.

It is time to get tough with the Chinese on currency manipulation and espionage. We will tax China for each bad act, and if they continue then we will tax them at an even higher level.

Quite simply, it is time to bring real leadership to Washington.

The fact is, the American Dream is dead -- but if I win, I will bring it back bigger and better and stronger than ever before.

Together we will Make America Great Again!

Thank You!

Introduction by Ivanka Trump

Today, I have the honor of introducing a man who needs no introduction. His legend has been built and his accomplishments are too many to name. That man is my Father.

Most people strive their entire lives to achieve great success in a single field. My father has succeeded in many—at the highest level and on a global scale. He's enjoyed success in a vast diversity of industries because the common denominator is him—his vision, his brilliance, his passion, his work ethic, and his refusal to take no for an answer.

I've enjoyed the good fortune of working alongside my father for 10 years now and I've seen these principles in action—daily.

I remember my father telling me as a little girl, "Ivanka, if you're going to be thinking anyway,

you might as well be thinking big." That's how he approaches any task he undertakes—he thinks big.

He has employed tens of thousands of people throughout his career and has inspired them to do extraordinary things. He has the strength to make hard decisions and motivate those around him to achieve the impossible. He is an optimist who chases big dreams and sees potential where others do not. He leads by example and will outwork anyone in any room.

He is the opposite of politically correct—he says what he means and means what he says. My father is also the best negotiator I have ever met. Countless times, I've stood by his side and watched him make deals that were seemingly impossible to get done. He has the discernment to understand exactly what the other party needs and then get exactly what he wants.

My father knows how to be a fierce opponent, but also how to be a very loyal friend. When it comes to building bridges, he can do so figuratively, but also has the rare ability to do so literally—on time and under budget.

Throughout his career, my father has repeatedly been called upon by both local and federal governments to step in and save long-stalled, grossly over-budget public projects. Whether building a skating rink in Central Park, meticulously restoring the exterior façade of Grand Central Terminal, enabling the development of NYC's Jacob Javits Convention Center, creating a championship public golf course for the City of New York, or redeveloping the iconic, but underutilized, Old Post Office Building on Pennsylvania Avenue, my father succeeds, time and time again, where government has failed before him.

I consider myself fortunate to have learned from the best—both as an entrepreneur, and, most importantly, a parent. My father is a man who is deeply grounded in tradition. He raised my siblings and me to work hard and strive for excellence in all that we do. He taught us that we have a responsibility to make a positive contribution to society. Here today, my father is again leading me by example.

My generation finds itself at a crossroads. Our leadership has been mired in bureaucracy of its own creation. If we don't adapt politically and economically our country will be left behind.

To address the many challenges we face, we don't need talk. We need action! We need execution! We need someone who is bold and independent, with a proven track record of successfully creating, building and running large, dynamic and complicated organizations—and in the process enabling many Americans to better their lives.

I can tell you that there is no better person than my father to have in your corner when you are facing tough opponents or making hard decisions. He is battle-tested. He is a dreamer, but, as importantly, he is a doer.

Ladies and gentlemen, it's my honor to introduce to you today, a man who I have loved and respected my entire life, my father, Donald J. Trump.

Cruz for President

Cruz Welcomes Donald Trump to Presidential Race

HOUSTON, Texas — U.S. Sen. Ted Cruz, R-Texas, issued the following statement following Donald Trump's announcement that he will seek the 2016 Republican nomination for President of the United States:

"I'm pleased to welcome Donald Trump into the race for the 2016 Republican nomination for President of the United States. His experience as a successful businessman and job creator will prove crucial to ensuring the eventual GOP nominee is not only well-equipped to defeat Hillary Clinton in November, but also to make America great again."

Democratic National Committee

DNC Statement on Donald Trump 2016 Announcement

Washington, D.C. — With Donald Trump's announcement that he is running for president, DNC National Press Secretary Holly Shulman released the following statement:

"Today, Donald Trump became the second major Republican candidate to announce for president in two days. He adds some much-needed seriousness that has previously been lacking from the GOP field, and we look forward hearing more about his ideas for the nation."

###

Trump Smashes Social Records Following Presidential Announcement

Trump First Candidate to Announce on Periscope While Trending Worldwide on Twitter and Facebook During Declaration Speech

(New York, NY) June 17th, 2015 – Yesterday, Donald Trump declared his candidacy for President of the United States of America. Immediately following his historic announcement, Mr. Trump was the most searched Republican Presidential candidate in every state in the country. 3.4 million Facebook users in the US generated 6.4 million interactions regarding the launch of his campaign, the highest by far, among all 2016 GOP candidates.

Google Trends is reporting that in addition to being the most searched republican candidate in every state in the US yesterday, one hour after his announcement his search interest was at 87%. Comparatively, another GOP candidate also launching his campaign this week, registered just 13% interest the previous day. Additionally, Mr. Trump was the first 2016 candidate to use Periscope to announce his candidacy.

Mr. Trump has a tremendous audience across the country and he will continue to utilize his reach via various social media platforms to share his vision to Make America Great Again.

Visit donaldtrump.com for more information and follow @realdonaldtrump via Twitter, Periscope and Instagram. Follow Mr. Trump at [Facebook.com/DonaldTrump](https://www.facebook.com/DonaldTrump).

###

Press Contact:
Hope Hicks

Partial Transcript (*beginning of speech...*)

Wow. That is some group of people. Thousands. So nice. Thank you very much. That's really nice. Thank you.

It's great to be at Trump Tower. It's great to be in a wonderful city, New York, and it's an honor to have everybody here. This is beyond anybody's expectations. There's been no crowd like this.

And I can tell you, some of the candidates, they went in, they didn't know the air conditioner didn't work. They sweated like dogs. They didn't know the room was too big because they didn't have anybody there. How are they going to beat ISIS? I don't think it's going to happen.

Our country is in serious trouble. We don't have victories anymore. We used to have victories, but we don't have them. When was the last time anybody saw us beating, let's say China in a trade deal? They kill us. I beat China all the time, all the time. When did we beat Japan at anything? They send their cars over by the millions-and what do we do? When was the last time you saw a Chevrolet in Tokyo? It doesn't exist, folks. They beat us all the time. When do we beat Mexico, at the border? They're laughing at us, at our stupidity. And now they're beating us economically. They are not our friend, believe me, but they're killing us economically.

The U.S. has become a dumping ground for everybody else's problems.

[shout from attendee] Thank you.

It's true. And these aren't the best in the finest. When Mexico sends its people, they're not sending their best. They're not sending you. [gesturing to audience] They are not sending you. [pointing to audience]

They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs, they're bringing crime, they're rapists, and some, I assume are good people, but I speak to border guards and they tell us what we're getting. And it only makes common sense. It only makes common sense. They're sending us not the right people. It's coming from more than Mexico. It's coming from all over South and Latin America, and it's coming probably, probably from the Middle East, but we don't know because we have no protection and we have no competence. We don't know what's happening. And it's got to stop, and it's got to stop fast.

Islamic terrorism is eating up large portions of the Middle East. They've become rich. I'm in competition with them. They just built a hotel in Syria. Can you believe this? They built a hotel. When I have to build a hotel I pay interest. They don't have to pay interest because they took the oil that when we left Iraq I said we should have taken. So now ISIS has the oil, and what they don't have, Iran has.

And in 19-- And I will tell you this, and I said it very strongly - years ago I said -- and I love the military and I want to have the strongest military that we've ever had and we need it now more

then ever -- but I said don't hit Iraq because you're going to totally destabilize the Middle East. Iran is going to take over the Middle East. Iran and somebody else will get the oil. And it turned out that Iran is now taking over Iraq. Think of it. Iran is taking over Iraq, and they're taking it over big league. We spent \$2 trillion in Iraq. Two trillion. We lost thousands of lives, thousands in Iraq. We have wounded soldiers who I love, I love; they're great. All over the place thousands and thousands of wounded soldiers. And we have nothing.

We can't even go there. We have nothing, and every time we give Iraq equipment, the first time a bullet goes off in the air, they leave it. Last week I read 2,300 Humvees--these are big vehicles--were left behind for the enemy. Two thous-- you would say maybe two, maybe four, 2,300 sophisticated vehicles. They ran and the enemy took them.

[audience member shouts: We need Trump now!]

You're right.

Last quarter, it was just announced, our gross domestic product, a sign of strength, right? But not for us. It was below zero. Who ever heard of this? It's never below zero. Our labor participation rate was the worst since 1978. But think of it. GDP below zero. Horrible labor participation rate. And our real unemployment is anywhere from 18-20%. Don't believe the 5.6. Don't believe it.

That's right. A lot of people up there can't get jobs. They can't get jobs because there are no jobs, because China has our jobs and Mexico has our jobs. They all have our jobs. But the real number, the real number is anywhere from 18, 19 and maybe even 21% and nobody talks about it because it's a statistic that's full of nonsense.

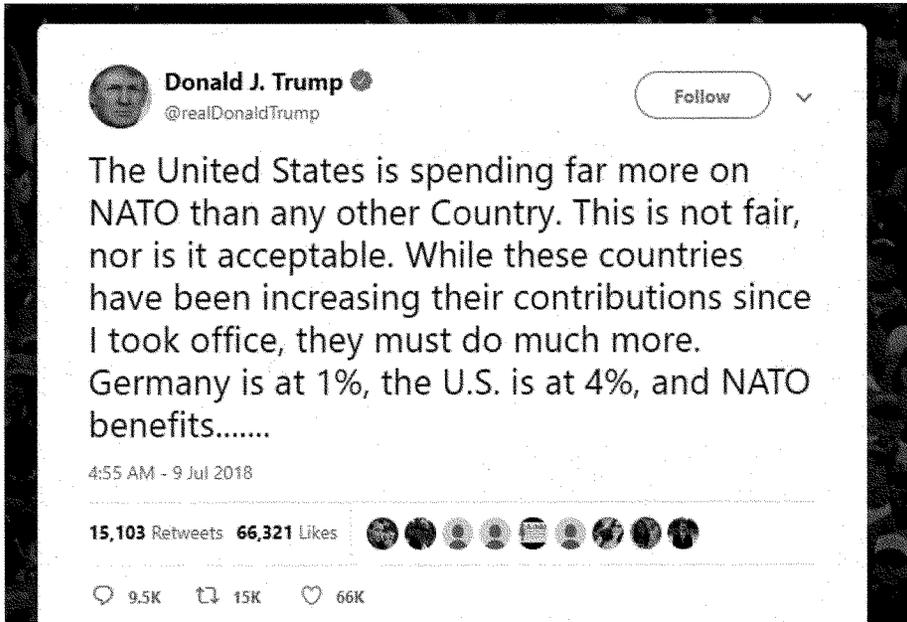
Our enemies are getting stronger and stronger by the day, and

June 25, 2015

Fallout over remarks about Mexicans in speech.

July 27, 2015

ADLF Files Complaint Following Possible Donald Trump Violation



A screenshot of a tweet from Donald J. Trump. The tweet text discusses NATO spending and contributions. The interface shows the user's name, handle, a follow button, the tweet text, the time, retweet and like counts, and a row of profile pictures of users who interacted with the tweet.

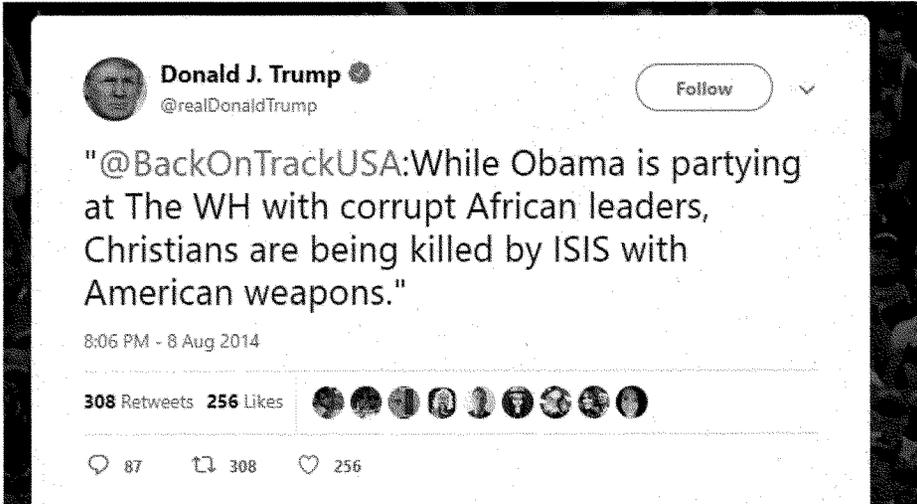
Donald J. Trump 
@realDonaldTrump Follow 

The United States is spending far more on NATO than any other Country. This is not fair, nor is it acceptable. While these countries have been increasing their contributions since I took office, they must do much more. Germany is at 1%, the U.S. is at 4%, and NATO benefits.....

4:55 AM - 9 Jul 2018

15,103 Retweets **66,321** Likes 

 9.5K  15K  66K



A screenshot of a tweet from Donald J. Trump (@realDonaldTrump) dated August 8, 2014. The tweet contains a quote from @BackOnTrackUSA. The interface shows the user's profile picture, name, and handle, along with a 'Follow' button. Below the text, the tweet's timestamp, engagement metrics (308 retweets, 256 likes), and a row of user avatars are visible. At the bottom, icons for replies (87), retweets (308), and likes (256) are shown.

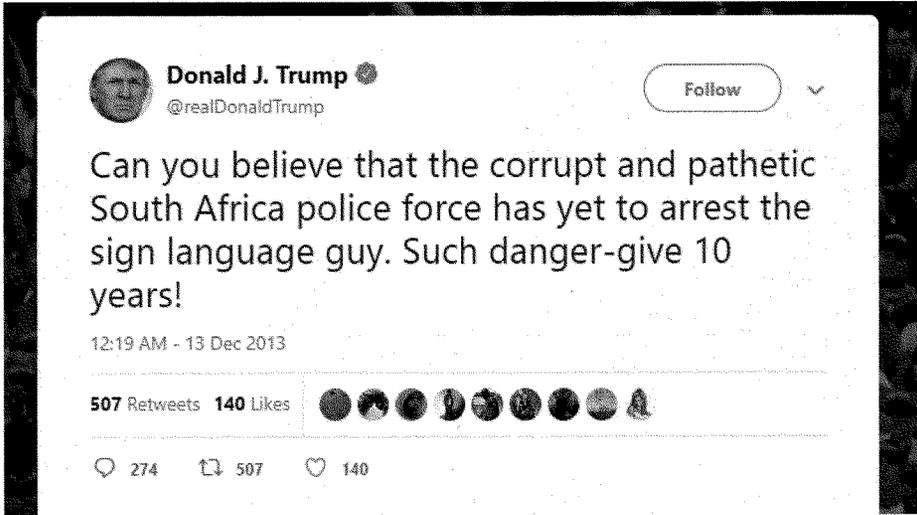
Donald J. Trump 
@realDonaldTrump Follow

"@BackOnTrackUSA:While Obama is partying at The WH with corrupt African leaders, Christians are being killed by ISIS with American weapons."

8:06 PM - 8 Aug 2014

308 Retweets **256** Likes 

 87  308  256



A screenshot of a tweet from Donald J. Trump. The tweet text reads: "Can you believe that the corrupt and pathetic South Africa police force has yet to arrest the sign language guy. Such danger-give 10 years!". The tweet is dated 12:19 AM - 13 Dec 2013. It has 507 Retweets and 140 Likes. The interface includes a profile picture of Donald Trump, his name "Donald J. Trump" with a verified badge, and his handle "@realDonaldTrump". A "Follow" button is visible in the top right corner. Below the text, there are icons for replies, retweets, and likes, with corresponding counts: 274 replies, 507 retweets, and 140 likes. A row of ten small circular profile pictures shows the users who interacted with the tweet.

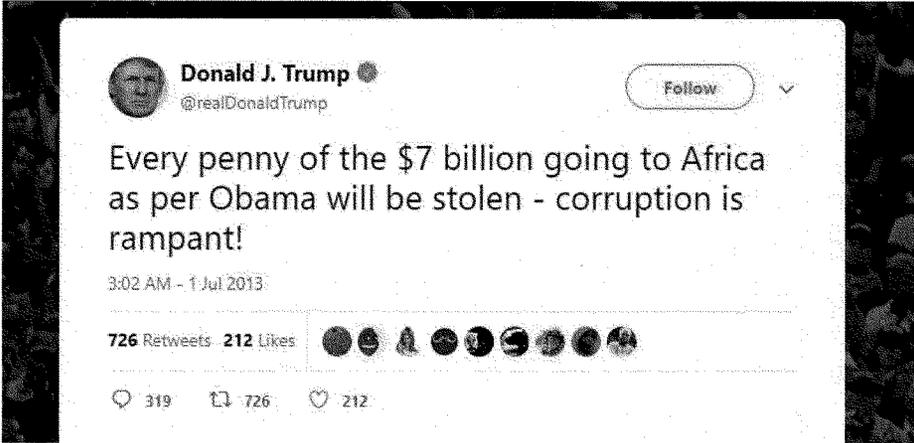
Donald J. Trump 
@realDonaldTrump Follow

Can you believe that the corrupt and pathetic South Africa police force has yet to arrest the sign language guy. Such danger-give 10 years!

12:19 AM - 13 Dec 2013

507 Retweets 140 Likes 

 274  507  140



Donald J. Trump

@realDonaldTrump

Follow



Every penny of the \$7 billion going to Africa as per Obama will be stolen - corruption is rampant!

3:02 AM - 1 Jul 2013

726 Retweets 212 Likes



319

726

212



A screenshot of a tweet from Donald J. Trump. The tweet text reads: "Mexico's totally corrupt gov't looks horrible with El Chapo's escape—totally corrupt. U.S. paid them \$3 billion." The tweet is dated 9:21 AM on July 13, 2015. It has 1,755 retweets and 2,098 likes. The interface includes a profile picture, name, handle, a follow button, and icons for replies, retweets, and likes.

 **Donald J. Trump** 
@realDonaldTrump Follow 

Mexico's totally corrupt gov't looks horrible with El Chapo's escape—totally corrupt. U.S. paid them \$3 billion.

9:21 AM · 13 Jul 2015

1,755 Retweets 2,098 Likes 

 715  1.8K  2.1K



Donald J. Trump 
@realDonaldTrump

Follow 

Instead of attacking me, Ashish J. Thakkar should worry about the culture of corruption plaguing Uganda bit.ly/14MUXnd

10:34 AM - 2 Jul 2013

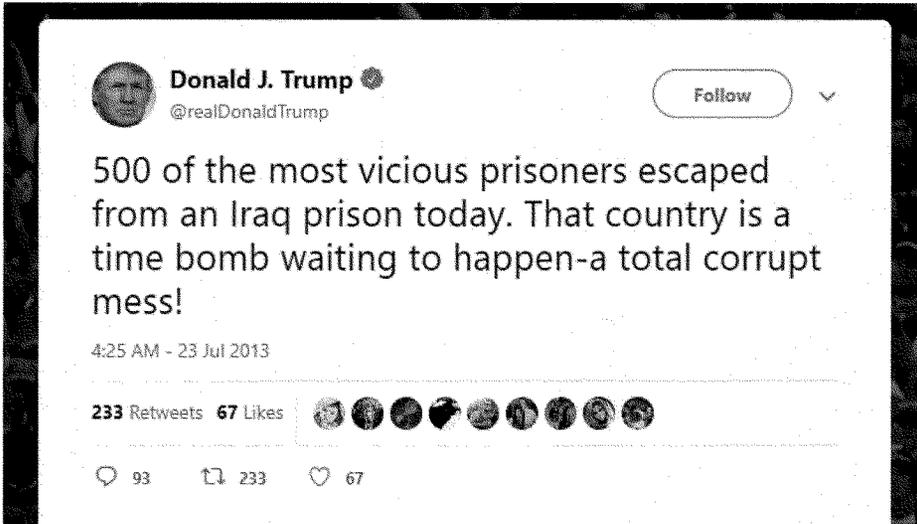
43 Retweets 20 Likes



 54

 43

 20



A screenshot of a tweet from Donald J. Trump. The tweet text reads: "500 of the most vicious prisoners escaped from an Iraq prison today. That country is a time bomb waiting to happen-a total corrupt mess!". The tweet is dated 4:25 AM - 23 Jul 2013. It has 233 Retweets and 67 Likes. The interface includes a profile picture, name, handle, a 'Follow' button, and icons for replies, retweets, and likes.

Donald J. Trump 
@realDonaldTrump

[Follow](#) 

500 of the most vicious prisoners escaped from an Iraq prison today. That country is a time bomb waiting to happen-a total corrupt mess!

4:25 AM - 23 Jul 2013

233 Retweets **67** Likes 

 93  233  67



(((Rep. Nadler)))

@RepJerryNadler

Follow



Joining @HouseJudDems for hearings on IRS misconduct - a fake impeachment meant to distract from important issues



7:01 AM - 21 Sep 2016 from Washington, DC

1 Retweet 4 Likes



2

1

4



Randy Credico @Credico2016 · 5 Oct 2016

Replying to @RepJerryNadler

@RepJerryNadler @HouseJudDems



1974 WL 174854 (U.S.) (Appellate Brief)
 Supreme Court of the United States.

UNITED STATES OF AMERICA, Petitioner,

v.

Richard M. NIXON, President of the United States, et al., Respondents.

Richard M. Nixon, President of the United States, Petitioner,

v.

United States of America.

Nos. 73-1766, 73-1834.

October Term, 1973.

June 21, 1974.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Brief for the United States

Leon Jaworski, Special Prosecutor, Philip A. Lacovara, Counsel to the Special Prosecutor, Watergate Special Prosecution Force, Department of Justice, 1425 K Street N.W., Washington, D.C. 20005, Attorneys for the United States.

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9 <i>Weekly Compilation of Presidential Documents</i> 1349 (Nov. 26, 1973)	60
10 <i>Weekly Compilation of Presidential Documents</i> 451-452 (May 6, 1974)	110, 120
8 Wigmore, <i>Evidence</i> (McNaughton rev. 1961)	58, 70, 85, 90, 92, 121, 122
<i>Works of Jeremy Bentham</i> (Bowring ed. 1843)	69-70
8 Wright & Miller, <i>Federal Practice and Procedure</i> (1970 ed.)	57, 63

*1 OPINION AND ORDERS BELOW

The district court's order of April 18, 1974 (Pet. App. 47¹) issuing the subpoena *duces tecum* in question is unreported. The district court's opinion and *2 order of May 20, 1974, denying the motion to quash the subpoena, enforcing compliance therewith, and denying the motion to expunge (Pet. App. 15) is not yet officially reported.

JURISDICTION

The order of the district court (Pet. App. 23) was entered on May 20, 1974. On May 24, 1974, Richard M. Nixon, President of the United States, filed a timely notice of appeal from that order in the district court, and the certified record was docketed in the United States Court of Appeals for the District of Columbia Circuit that same day (D.C. Cir. No. 74-1534). Also on May 24, 1974, the President filed a petition for a writ of mandamus in the court below seeking review of the district court's order (D.C. Cir. No. 74-1532).²

On May 24, 1974, the Special Prosecutor filed a petition for a writ of certiorari before judgment on behalf of the United States (No. 73-1766),³ and certiorari was granted on May 31, 1974. On June 6, 1974, President Nixon filed a cross-petition for a writ of certiorari before judgment (No. 73-1834), which was granted on June 15, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1), 1651, and 2101(e).

*3 In response to the Court's order of June 15, 1974, two jurisdictional questions are being discussed in our Supplemental Brief.

QUESTIONS PRESENTED

In No. 73-1766:

1. Whether a federal court must determine itself if executive privilege is properly invoked in a criminal proceeding or whether it is bound by the President's assertion of an absolute "executive privilege" to withhold demonstrably material evidence from the trial of charges of conspiracy to defraud the United States and obstruct justice by his own White House aides and party leaders, upon the ground that he deems production to be against the public interest.
2. Whether the President is subject to a judicial order directing compliance with a subpoena *duces tecum* calling for production of evidence, under his sole personal control, that is demonstrably material to a pending federal criminal prosecution.
3. Whether the President's claim of executive privilege based on the generalized interest in the confidentiality of government deliberations can block the prosecution's access to material evidence for the trial of criminal charges against the former officials who participated in those deliberations, particularly where there is a *prima facie* showing that the President is a co-conspirator and that the deliberations occurred in the course of and in furtherance of the conspiracy.
4. Whether any executive privilege that otherwise might have been applicable to discussions between the President and alleged co-conspirators concerning the Watergate matter has been waived by previous testimony *4 given pursuant to the President's approval and by the President's public release of edited transcripts of forty-three such conversations.
5. Whether the district court properly determined that the subpoena *duces tecum* issued to the President satisfied the standards of Rule 17(c) of the Federal Rules of Criminal Procedure because an adequate showing had been made that the subpoenaed items are relevant to issues to be tried and will be admissible in evidence.

In No. 73-1834:

6. Whether the district court acted within its discretion in declining to expunge the federal grand jury's naming of the President as an unindicted co-conspirator in offenses for which the grand jury returned an indictment.

The two questions the parties were requested to brief and argue by the Court's order of June 15, 1974, are discussed in our Supplemental Brief.

CONSTITUTIONAL PROVISIONS, STATUTES, RULE, AND REGULATIONS INVOLVED

The constitutional provisions, statutes, rule, and regulations involved, which are set forth in the Appendix, *infra*, pp. 141-53, are: Constitution of the United States:

Article II, Section 1

Article II, Section 2

Article II, Section 3

Article III, Section 2

Statutes of the United States:

5 U.S.C. 301

28 U.S.C. 509, 510, 515-519

*5 Rule:

Rule 17(c), Federal Rules of Criminal Procedure

Regulations:

Department of Justice Order No. 551-73 (November 2, 1973), 38 Fed. Reg. 30,738, adding 28 C.F.R. §§ 0.37, 0.38, and Appendix to Subpart G-1

Department of Justice Order No. 554-73 (November 19, 1973), 38 Fed. Reg. 32,805, amending 28 C.F.R. Appendix to Subpart G-1

STATEMENT

This case presents for review the denial of a motion filed on behalf of respondent Richard M. Nixon, President of the United States, pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure, seeking to quash a subpoena *duces tecum* issued in a criminal case, directing the President to produce tape recordings and documents relating to sixty-four specifically described Presidential conversations. This subpoena (Pet. App. 39) issued on behalf of the United States at the request of the Special Prosecutor covers evidence which is demonstrably material to the trial of charges of conspiracy to defraud the United States and obstruct justice by former aides and associates of the President.

1. APPOINTMENT OF A SPECIAL PROSECUTOR

On May 25, 1973, Attorney General Elliot L. Richardson established the Office of the Watergate Special Prosecution Force, to be headed by Special Prosecutor *6 Archibald Cox, with "full authority for investigating and prosecuting offenses against the United States arising out of the unauthorized entry into Democratic National Committee headquarters at the Watergate."⁴ The appointment of the Special Prosecutor, together with his specific duties and responsibilities, including full authority for determining whether or not to contest the assertion of "executive privilege," was settled in connection with the hearings of the Senate Judiciary Committee on the nomination of Mr. Richardson to be Attorney General.⁵

2. ENFORCEMENT OF THE 1973 GRAND JURY SUBPOENA DUCES TECUM

On July 16, 1973, Alexander Butterfield, formerly chief administrative officer at the White House, testified before the Senate Select Committee on Presidential Campaign Activities that at the President's direction the Secret Service as a matter of course had been recording automatically all conversations in the President's offices in the White House and Old Executive Office Building.⁶ Because there had been sharply contradictory testimony regarding the relationship between several Presidential meetings and telephone conversations and an alleged conspiracy to conceal the identity of the persons responsible for the Watergate *7 break-in, the Special Prosecutor issued a grand jury subpoena *duces tecum* to the President, who had assumed sole personal control over the recordings,⁷ requiring him to produce the recordings of these meetings.

When the President refused to comply with the subpoena, the grand jury unanimously instructed the Special Prosecutor to apply for a court order requiring production. After a hearing, the court ordered the President to produce the subpoenaed items for *in*

camera inspection, rejecting the President's contentions that he is immune from compulsory process and that he has absolute, unreviewable discretion to withhold evidence from the courts on the ground of executive privilege. *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon*, 360 F. Supp. 1 (D.D.C. 1973). The Court of Appeals for the District of Columbia Circuit upheld this order, with modifications, in an *en banc* decision denying the President's petition for a writ of mandamus. *Nixon v. Sirica*, 487 F. 2d 700 (1973). The court of appeals *sua sponte* then stayed its order to permit the President to seek review by this Court.

3. DISMISSAL OF THE SPECIAL PROSECUTOR

The President decided, however, not to seek review by this Court, and instead proposed a "compromise" to the Special Prosecutor which would have supplied edited transcripts of the subpoenaed recordings for use before the grand jury and at any subsequent trial. *8 At the same time the President issued an order to Special Prosecutor Cox forbidding him ever again to resort to the judicial process to seek evidence from the President. The Special Prosecutor refused to accept this compromise or to accede to the order that would have barred him from exercising his discretion to seek evidence necessary for prosecutions within his jurisdiction. When the President then ordered Attorney General Richardson to dismiss the Special Prosecutor, the Attorney General resigned rather than obey, and Deputy Attorney General William Ruckelshaus was fired when he too refused to carry out the President's order.⁸ On the night of October 20, 1973, Solicitor General Robert H. Bork, upon whom the responsibilities of Acting Attorney General devolved, elected to obey the President's instruction and peremptorily discharged Special Prosecutor Cox and abolished the Watergate Special Prosecution Force.⁹

On October 23, 1973, after considerable congressional and public reaction, counsel for the President announced to the district court that the President would comply with the district court's order as modified *9 by the court of appeals.¹⁰ Counsel for the President subsequently disclosed for the first time that two of the subpoenaed conversations were not recorded, and that eighteen and one-half minutes of the subpoenaed recording of the meeting between the President and H. R. Haldeman on June 20, 1972, had been obliterated.¹¹

4. APPOINTMENT OF A NEW SPECIAL PROSECUTOR

In response to the discharge of Special Prosecutor Cox, both the Senate Judiciary Committee and the House of Representatives Judiciary Subcommittee on Criminal Justice began hearings on legislation to establish a court-appointed Special Prosecutor independent of control by the President.¹² Both committees *10 reported out such bills for action by the House and Senate.¹³

Neither House considered the legislation on the floor, however, because on October 26, 1973, the President announced that Acting Attorney General Bork would appoint a new Special Prosecutor. The President explained that he had no greater interest than seeing that the Special Prosecutor has "the independence that he needs" to prosecute the guilty and clear the innocent.¹⁴

On November 2, 1973, the Acting Attorney General re-established the Watergate Special Prosecution Force and appointed Leon Jaworski as Special Prosecutor, vesting in him the same powers and authority possessed by his predecessor, including "full authority" to "contest the assertion of 'Executive Privilege' or any other testimonial privilege" (Appendix pp. 146-51, *infra*).¹⁵ The only change in the regulations relevant to this Court's consideration was the addition of a provision, in "accordance with assurances given by the President to the Attorney General," that the *11 President would not limit the jurisdiction of the Special Prosecutor or effect his dismissal without first consulting with the Majority and Minority Leaders of both Houses of Congress and their respective Committees on the Judiciary (Appendix pp. 151-52, *infra*).¹⁶ Thereafter both Houses tabled the legislation for court appointment of an independent Special Prosecutor, but the bills remain on their respective calendars.

5. THE INDICTMENT IN THIS CASE AND THE NAMING OF THE PRESIDENT AS A CO-CONSPIRATOR R R R R R R R

On March 1, 1974, a grand jury of the United States District Court for the District of Columbia returned an indictment (A. 5A) charging respondents John N. Mitchell, H. R. Haldeman, John D. Ehrlichman, Charles W. Colson, Robert C. Mardian, Kenneth W. Parkinson and Gordon Strachan with various offenses relating to the Watergate matter, including a conspiracy to defraud the United States and to obstruct justice. *United States v. Mitchell, et al.*, D.D.C. Crim. No. 74-110. At some or all of the times in question, respondent Mitchell, a former Attorney General of the United States, was Chairman of the Committee for the Re-Election of the President; respondent Haldeman was Assistant to the President and his chief of staff; respondent Ehrlichman was Assistant to the President for Domestic Affairs; respondent Colson was Special Counsel to the President; respondent *12 Mardian, a former Assistant Attorney General, was an official of the President's re-election campaign; respondent Parkinson was an attorney for the re-election committee; and respondent Strachan was Staff Assistant to the President.

In the course of its consideration of the indictment, the grand jury, by a vote of 19-0, determined that there is probable cause to believe that respondent Richard M. Nixon (among others) was a member of the conspiracy to defraud the United States and to obstruct justice as charged in the indictment, and the grand jury authorized the Special Prosecutor to identify President Nixon (among others) as an unindicted co-conspirator in connection with subsequent legal proceedings.

6. ISSUANCE OF THE TRIAL SUBPOENA TO THE PRESIDENT

In order to obtain additional evidence which the Special Prosecutor has reason to believe is in the custody of the President and which would be important to the government's proof at the trial in *United States v. Mitchell, et al.*, the Special Prosecutor, on behalf of the United States, moved on April 16, 1974, for the issuance of the subpoena *duces tecum* in question (Pet. App. 39). On April 18, 1974, the district court ordered the subpoena to issue, returnable on May 2, 1974 (Pet. App. 47). The subpoena called for production of the evidence in advance of the September 9, 1974, trial date in order to allow time for any litigation over the subpoena and for transcription and authentication of any tape recordings produced.

*13 On April 30, 1974, the President released to the public and submitted to the House Judiciary Committee conducting an impeachment inquiry 1,216 pages of edited transcripts of forty-three conversations dealing with Watergate. Portions of twenty subpoenaed conversations were included. On May 1, 1974, President Nixon, through his White House counsel, filed in the district court a "special appearance," a "formal claim of privilege," and a motion to quash the subpoena (A. 47A). At the suggestion of counsel for the President and the Special Prosecutor and with the approval of counsel for the defendants, subsequent proceedings were held *in camera* because of the sensitive nature of the grand jury's finding with respect to the President, which was submitted to the district court by the Special Prosecutor as a ground for denying the motion to quash. Defendants Colson, Mardian, and Strachan formally joined in the Special Prosecutor's motion for issuance of the subpoena, and all seven defendants (respondents herein) argued in opposition to the motion to quash at the hearing in the district court. At that hearing, counsel for the President also moved to expunge the grand jury's finding and to enjoin all persons, except for the President and his counsel, from ever disclosing the grand jury's action.

7. THE DECISION BELOW

In its opinion and order of May 20, 1974 (Pet. App. 15), the district court denied the motion to quash and the motion to expunge and for protective orders. *14 It further ordered "the President or any subordinate officer, official or employee with custody or control of the documents or objects subpoenaed" to deliver to the court the originals of all subpoenaed items as well as an index and analysis of those items, together with tape copies of those portions of the subpoenaed recordings for which transcripts had been released to the public by the President on April 30, 1974. The district court stayed its order pending prompt application for appellate review and further provided that matters filed under seal remain under seal when transmitted as part of the record (Pet. App. 22-23).¹⁷

In requiring compliance with the subpoena *duces tecum*, the district court rejected the contention by counsel for the President that it had no jurisdiction because the proceeding allegedly involved solely an “intra-executive” dispute (Pet. App. 18). The court ruled that this argument lacked substance in light of jurisdictional responsibilities and independence with which the Special Prosecutor had been vested by regulations that have the force and effect of law and that had received the explicit concurrence of the President. The court noted the “unique guarantee of unfettered operation” given to the Special Prosecutor and emphasized that under these regulations the Special Prosecutor’s jurisdiction, which includes express authority to contest claims of executive privilege, cannot be limited without the President’s first consulting *15 with the leaders of both Houses of Congress and the respective Committees on the Judiciary and securing their consensus (Pet. App. 18-19). In these circumstances, the court found that there exists sufficient independence to provide the court with a concrete legal controversy between adverse parties and not simply an intra-agency dispute over policy. Moreover, the court later noted that as a recipient of a subpoena in this criminal case, the President “as a practical matter, is a third party” (Pet. App. 19).

On the merits, and relying on the *en banc* decision in *Nixon v. Sirica*, *supra*, the district court held that in the circumstances of this case, the courts, and not the President, are the final arbiter of the applicability of a claim of executive privilege for the subpoenaed items (Pet. App. 17). Here, the court ruled, the presumptive privilege for documents and materials reflecting executive deliberations was overcome by the Special Prosecutor’s *prima facie* showing that the items are relevant and important to the issues to be tried in the Watergate cover-up case and that they will be admissible in evidence (Pet. App. 20-21).¹⁸

Finally, the district court held that the Special Prosecutor, in his memorandum and appendix submitted to the court, satisfied the requirements of Rule 17(c) that the subpoenaed items be relevant and evidentiary (Pet. App. 19-20).

*16 The President has sought review of this decision in the court of appeals, and the case is now before this court on writs of certiorari before judgment granted on May 31, 1974, and June 15, 1974, on the petition of the United States and the cross-petition of the President, respectively.

SUMMARY OF ARGUMENT

The narrow issue presented to this Court is whether the President, in a pending prosecution against his former aides and associates being conducted in the name of the United States by a Special Prosecutor not subject to Presidential directions, may withhold material evidence from the court merely on his assertion that the evidence involves confidential governmental deliberations. The Court clearly has jurisdiction to decide this issue. The pending criminal prosecution in which the subpoena *duces tecum* was issued constitutes a “case or controversy,” and the federal courts naturally have the duty and, therefore, the power to determine what evidence is admissible in that prosecution and to require that that evidence be produced. This is only a specific application of the general but fundamental principle of our constitutional system of government that the courts, as the “neutral” branch of government, have been allocated the responsibility to resolve all issues in a controversy properly before them, even though this requires them to determine authoritatively the powers and responsibilities of the other branches.

Any notion that this controversy, arising as it does from the issuance of a subpoena *duces tecum* to the *17 President at the request of the Special Prosecutor, is not justiciable is wholly illusory. In the context of the most concrete and vital kind of case—the federal criminal prosecution of former White House officials—the Special Prosecutor, as the attorney for the United States, has resorted to a traditional mechanism to procure evidence for the government’s case at trial. In objecting to the enforcement of the subpoena, the President has raised a classic question of law—a claim of privilege—and the United States, through its counsel and in its sovereign capacity, is opposing that claim. Thus, viewed in practical terms, it would be hard to imagine a controversy more appropriate for judicial resolution.

The fact that this concrete controversy is presented in the context of a dispute between the President and the Special Prosecutor does not deprive this Court of jurisdiction. Congress has vested in the Attorney General, as the head of the Department of Justice, the exclusive authority to conduct the government’s civil and criminal litigation, including the exclusive authority for

securing evidence. The Attorney General, with the explicit concurrence of the President, has vested that authority with respect to Watergate matters in the Special Prosecutor. These regulations have the force and effect of law and establish the functional independence of the Special Prosecutor. Accordingly, the Special Prosecutor, representing the sovereign authority of the United States, and the President appear before the Court as adverse parties in the truest sense. The President himself has ceded any *18 power that he might have had to control the course of the pending prosecution, and it would stand the Constitution on its head to say that this arrangement, if respected and given effect by the courts, violates the "separation of powers."

I

Throughout our constitutional history the courts, in cases or controversies before them, consistently have exercised final authority to determine whether even the highest executive officials are acting in accordance with the Constitution. In fulfilling this basic constitutional function, they have issued appropriate decrees to implement those judicial decisions. The courts have not abjured this responsibility even when the most pressing needs of the Nation were at issue.

In applying this fundamental principle, the courts have determined for themselves not only what evidence is admissible in a pending case, but also what evidence must be produced, including whether particular materials are appropriately subject to a claim of executive privilege. Indeed, this Court has squarely rejected the claim that the Executive has absolute, unreviewable discretion to withhold documents from the courts.

The unbroken line of precedent establishing that the courts have the final authority for determining the applicability and scope of claims of executive privilege is supported by compelling arguments of policy. The Executive's legitimate interests in secrecy are more than adequately protected by the qualified privilege defined and applied by the courts. But as *19 this Court has recognized, an absolute privilege which permitted the Executive to make a binding determination would lead to intolerable abuse. This case highlights the inherent conflict of interest that is presented when the Executive is called upon to produce evidence in a case which calls into question the Executive's own action. The President cannot be a proper judge of whether the greater public interest lies in disclosing evidence subpoenaed for trial, when that evidence may have a material bearing on whether he is impeached and will bear heavily on the guilt or innocence of close aides and trusted advisors.

In the framework of this case, where the privilege holder is effectively a third party, the interests of justice as well as the interests of the parties to the pending prosecution require that the courts enter a decree requiring that relevant and unprivileged evidence be produced. The "produce or dismiss" option that is sometimes allowed to the Executive when a claim of executive privilege is overruled merely reflects a remedial accommodation of the requirements of substantive justice and thus has never been available to the Executive where the option could not satisfy these requirements. This is particularly true where the option would make a travesty out of the independent institution of the Special Prosecutor by allowing the President to accomplish indirectly what he cannot do directly—secure the abandonment of the Watergate prosecution.

*20 II

There is nothing in the status of the President that deprives the courts of their constitutional power to resolve this dispute. The power to issue and enforce a subpoena *duces tecum* against the President was first recognized by Chief Justice Marshall in the *Burr* case in 1807, in accordance with two fundamental principles of our constitutional system: First, the President, like all executive officials as well as the humblest private citizens, is subject to the rule of law. Indeed, this follows inexorably from his constitutional duty to "take Care that the Laws be faithfully executed." Second, in the full and impartial administration of justice, the public has a right to every man's evidence. The persistent refusal of the courts to afford the President an absolute immunity from judicial process is fully supported by the deliberate decision of the Framers to deny him such a privilege.

Although it would be improper for the courts to control the exercise of the President's constitutional discretion, there can be no doubt that the President is subject to a judicial order requiring compliance with a clearly defined legal duty. The crucial

jurisdictional factor is not the President's office, or the physical power to secure compliance with judicial orders, but the Court's ability to resolve authoritatively, within the context of a justiciable controversy, the conflicting claims of legal rights and obligations. The Court is called upon here to adjudicate the obligation of the President, as a citizen of the United States, to cooperate with a criminal prosecution by *21 performing the solely ministerial task of producing specified, unprivileged evidence that he has taken within his sole personal custody.

III

The qualified executive privilege for confidential intra-governmental deliberations, designed to promote the candid interchange between officials and their aides, exists only to protect the legitimate functioning of government. Thus, the privilege must give way where, as here, it has been abused. There has been a *prima facie* showing that each of the participants in the subpoenaed conversations, including the President, was a member of the conspiracy to defraud the United States and to obstruct justice charged in the indictment in the present case, and a further showing that each of the conversations occurred in the course of and in furtherance of the conspiracy. The public purpose underlying the executive privilege for governmental deliberations precludes its application to shield alleged criminality.

But even if a presumptive privilege were to be recognized in this case, the privilege cannot be sustained in the face of the compelling public interest in disclosure. The responsibility of the courts in passing on a claim of executive privilege is, in the first instance, to determine whether the party demanding the evidence has made a *prima facie* showing of a sufficient need to offset the presumptive validity of the Executive's claim. The cases have held that the balance should be struck in favor of disclosure only if the showing of need is strong and clear, leaving the courts *22 with a firm conviction that the public interest requires disclosure.

It is difficult to imagine any case where the balance could be clearer than it is on the special facts of this proceeding. The recordings sought are specifically identified, and the relevance of each conversation to the needs of trial has been established at length. The conversations are demonstrably important to defining the extent of the conspiracy in terms of time, membership and objectives. On the other hand, since the President has authorized each participant to discuss what he and the others have said, and since he repeatedly has summarized his views of the conversations, while releasing partial transcripts of a number of them, the public interest in continued confidentiality is vastly diminished.

The district court's ruling is exceedingly narrow and, thus, almost no incremental damage will be done to the valid interests in assuring future Presidential aides that legitimate advice on matters of policy will be kept secret. The unusual circumstances of this case—where high government officials are under indictment for conspiracy to defraud the United States and obstruct justice—at once make it imperative that the trial be conducted on the basis of all relevant evidence and at the same time make it highly unlikely that there will soon be a similar occasion to intrude on the confidentiality of the Executive Branch.

IV

Even if the subpoenaed conversations might once have been covered by a privilege, the privilege has been waived by the President's decision to authorize voluminous *23 testimony and other statements concerning Watergate-related discussion and his recent release of 1,216 pages of transcript from forty-three Presidential conversations dealing with Watergate. A privilege holder may not make extensive disclosures concerning a subject and then selectively withhold portions that are essential to a complete and impartial record. Here, the President repeatedly has referred to the conversations in support of his own position and even allowed defendant Haldeman access to the recordings after he left public office to aid him in preparing his public testimony. In the unique circumstances of this case, where there is no longer any substantial confidentiality on the subject of Watergate because the President has made far-reaching, but expurgated disclosures, the court may use its process to acquire all relevant evidence to lay before the jury.

V

The district court, correctly applying the standards established by this Court, found that the government's showing satisfied the requirements of Rule 17(c) of the Federal Rules of Criminal Procedure that items subpoenaed for use at trial be relevant and evidentiary. The enforcement of a trial subpoena *duces tecum* is a question for the trial court and is committed to the court's sound discretion. Absent a showing that the finding by the court is arbitrary and had no support in the record, the finding must not be disturbed by an appellate court. Here, the Special Prosecutor's analysis of each of the sixty-four conversations, submitted *24 to the district court, amply supports that court's finding.

ARGUMENT

**INTRODUCTION: THE ISSUES BEFORE THE COURT
PRESENT A LIVE, CONCRETE JUSTICIABLE CONTROVERSY**

In the district court, counsel for the President, in a sealed reply to the government's papers opposing the motion to quash, raised for the first time the contention that the court lacked "jurisdiction to consider the Special Prosecutor's request of April 16, 1974, relating to the disclosure of certain presidential documents." Counsel was referring to the trial subpoena applied for by the Special Prosecutor on behalf of the United States (Pet. App. 39) and issued by the district court on April 18, 1974 (Pet. App. 47). It was that subpoena that the President moved to quash. The basis for the President's contention that the court lacked jurisdiction to "consider" that "request" for evidence was the assertion that the subpoena involved merely a "dispute between two entities within the Executive Branch."

The district court rejected this contention, ruling that under the circumstances established by applicable statutes and regulations, the President's "attempt to abridge the Special Prosecutor's independence with the argument that he cannot seek evidence from the President by court process is a nullity and does not defeat the Court's jurisdiction" (Pet. App. 19). Before addressing the issues before this Court on the merits, we pause to express the reasons why this litigation *25 between the United States, represented by the Special Prosecutor, and the President presents a live, concrete, justiciable controversy.

A. THIS CASE COMES WITHIN THE JUDICIAL POWER OF THE FEDERAL COURTS

This litigation is not merely a dispute between two executive officers over preferred policy, or even over an interpretation of a statute. The courts have not been called upon to render an advisory opinion upon some abstract or theoretical question. Rather, in the context of the most concrete and vital kind of case—the federal criminal prosecution of former White House officials, styled *United States v. Mitchell, et al.*—the Special Prosecutor as the attorney for the United States has resorted to a traditional mechanism to procure evidence for the government's case at trial—a subpoena—in the face of the unwillingness of a distinct party or entity—the President—to furnish the evidence voluntarily. In objecting to the enforcement of the subpoena, the President has raised a classic question of law—a claim of privilege—and the United States, through its counsel, is opposing that claim. Thus, viewed in practical terms, it would be hard to imagine a controversy more appropriate for judicial resolution and more squarely within the jurisdiction of the federal courts. This Court is called upon to review questions that are well "within the traditional role accorded courts to interpret the law." ¹⁸ *Powell v. McCormack*, 395 U.S. 486, 548; see, e.g., ¹⁹ *Roviano v. United States*, 353 U.S. 53; ²⁰ *United States v. Reynolds*, 345 U.S. 1.

*26 Ever since ²¹ *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, it has been settled that, as long as a federal court is properly vested with subject-matter jurisdiction,¹⁹ it has the judicial power to render an authoritative, binding decision on the rights, powers, and duties of the other two branches of government. See, e.g., ²² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579; ²³ *United States v. United States District Court*, 407 U.S. 297; ²⁴ *Kendall v. United States ex rel. Stokes*, 12 Pet. (37 U.S.)

524; *Kilbourn v. Thompson*, 103 U.S. 168; *Doe v. McMillan*, 412 U.S. 306. This judicial power extends fully to disputes between representatives of the other two branches, e.g., *United States v. Brewster*, 408 U.S. 501; *Gravel v. United States*, 408 U.S. 606; *Senate Select Committee on Presidential Campaign Activities v. Nixon*, --- F.2d --- (D.C. Cir. No. 74-1258) (May 23, 1974), as well as to disputes within one of those other branches, e.g., *Powell v. McCormack*, *supra*; *Service v. Dulles*, 354 U.S. 363; *Sampson v. Murray*, --- U.S. --- (42 U.S.L.W. 4221, February 19, 1974).

As we shall discuss below, the fact that the President and the Special Prosecutor (on behalf of the United States) are the legal adversaries in this phase of the controversy in no way undermines the existence of the judicial power to adjudicate the legal rights and duties at issue—namely, the existence *vel non* of *27 a privilege to withhold evidence from a criminal trial pending in the federal court.

B. THE UNITED STATES, REPRESENTED BY THE SPECIAL PROSECUTOR, IS A PARTY DISTINCT FROM THE PRESIDENT

We begin by making the fundamental point, overlooked by counsel for the President, that federal criminal prosecutions are brought in the name of the United States of America as a sovereign nation. Despite his extensive powers and even his status as Chief Executive and Chief of State, the President, whether in his personal capacity or his official capacity, is distinct from the United States and is decidedly *not* the sovereign. Although the Constitution vests the executive power generally in the President (Art. II, Sec. 1), it expressly contemplates the establishment of executive departments which will actually discharge the executive power, with the President's function necessarily limited to "take Care that the Laws be faithfully executed" by other officers of the government (Art. II, Sec. 3). Thus, Article II, Section 2 expressly provides that, instead of giving the President power to appoint (and, perhaps, remove) "inferior Officers" of the Executive Branch, "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, * * * in the Courts of Law, or in the Heads of Departments."

Congress has organized the Department of Justice and provided that the Attorney General is its head. 28 U.S.C. 501, 503. Under Article II, Section 2, Congress has vested in him alone the power to appoint subordinate officers to discharge his powers. *28 28 U.S.C. 509, 510, 515, 533. Among the responsibilities given by Congress to the Attorney General is the authority to conduct the government's civil and criminal litigation (28 U.S.C. 516):

Except as otherwise authorized by law, the conduct of litigation *in which the United States*, an agency, or officer thereof *is a party*, or is interested, *and securing evidence therefor*, is reserved to officers of the Department of Justice, under the direction of the Attorney General. (Emphasis added.)

As this Court has recognized, this section and companion provisions, see 28 U.S.C. 515-519, "impose on the Attorney General the authority and the duty to protect the Government's interests through the courts." *United States v. California*, 332 U.S. 19, 27-28. Under this framework it is not the President who has personal charge of the conduct of the government's affairs in court but, rather, it is the Attorney General acting through the officers of the Department of Justice appointed by him. This Court underscored the special status of the officers of the Department of Justice before the courts in *Berger v. United States*, 295 U.S. 78, 88, explaining that the federal prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty. * * * As such, he is in a peculiar and a very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."

Thus, as the district judge below pointedly recognized (Pet. App. 19), the subpoena *duces tecum* issued *29 by the prosecution to the President is directed to a person who "as a practical matter, is a third party."²⁰

It was in the capacity as attorney for the United States that the Special Prosecutor invoked the judicial process. Exercising his exclusive authority under 28 U.S.C. 516 to secure evidence for a pending criminal prosecution within his jurisdiction, the Special Prosecutor is seeking evidence from an adverse party—evidence which the Special Prosecutor has reason to believe is highly material to the trial. Under the law, the Special Prosecutor speaks for the United States in conducting this criminal trial, and under the applicable statutes and regulations he has authority, which can be enforced by the courts, to seek evidence even from the President. Not only is this authority expressly included in the Department of Justice regulations defining his powers (Appendix pp. 146-50, *infra*), but the record shows that the President personally acceded to the arrangement whereby his assertion *30 of privilege would not preclude the Special Prosecutor, in a proper case, from invoking the judicial process to litigate the validity of the claim.

Before agreeing to accept appointment as the new Special Prosecutor, Mr. Jaworski obtained an assurance from the President's chief of staff, General Alexander Haig, who had conferred with the President, that there would be no bar to his resorting to judicial process, if necessary, to fulfill his responsibilities as he viewed them.²¹ The Acting Attorney General, who appointed the Special Prosecutor, was fully apprised *31 of the understanding. He testified as follows before the Senate Judiciary Committee:

Although it is anticipated that Mr. Jaworski will receive cooperation from the White House in getting any evidence he feels he needs to conduct investigations and prosecutions, it is clear and understood on all sides that *he has the power to use judicial processes to pursue evidence if disagreement should develop.* (Emphasis added.)²²

He also assured the House Subcommittee on Criminal Justice: "I understand and it is clear to me that Mr. Jaworski can go to court and test out" any refusal to produce documents on the ground of confidentiality.²³

Similarly, the President's nominee to be Attorney General, William Saxbe, testified that the Special Prosecutor would have "sole discretion" in deciding whether to contest an assertion of executive privilege by the President and stated "he can go to court at any time to determine that."²⁴ Significantly, neither the *32 President, nor his counsel, nor Acting Attorney General Bork has ever disavowed the assurances given. In fact, in announcing the appointment of a new Special Prosecutor on October 26, 1973, President Nixon stated (9 Weekly Compilation of Presidential Documents (Oct. 29, 1973)):

And I can assure you ladies and gentlemen, and all our listeners tonight, that I have no greater interest than to see that the new special prosecutor has the cooperation from the executive branch *and the independence that he needs to bring about that conclusion [of the Watergate investigation].* (Emphasis added.)

The regulations governing the Special Prosecutor's jurisdiction and independence, together with the Presidential assurances given to the public directly and to the Special Prosecutor through General Haig, reflect the public demand for an independent prosecutor not subject to the direct or indirect control of the President and not dependent upon the discretion of the President for access to information upon which to base investigations and prosecutions.²⁵ From the first, the regulations establishing and then reestablishing the Office of the Watergate Special Prosecution Force²⁶ have had the force and effect of law, e.g., *33 *Vitarelli v. Seaton*, 359 U.S. 535; *Service v. Dulles*, *supra*; *Accardi v. Shaughnessy*, 347 U.S. 260; *Nader v. Bork*, *supra*, and empower the Special Prosecutor to contest the assertion of executive privilege in any case within his jurisdiction when he, not the President, concludes the assertion is unwarranted.²⁷ See *Accardi v. Shaughnessy*, *supra*, 347 U.S. at 266-67.

This Court has held that, by virtue of their office, public officials necessarily have a sufficient "personal stake in the outcome" of any litigation that challenges the performance of their duties on constitutional grounds. See, e.g., *Board of Education v. Allen*, 392 U.S. 236, 241 n. 5; *Coleman v. Miller*, 307 U.S. 433, 437-45. It follows, therefore, that under applicable statutes and regulations the Special Prosecutor has standing to take all necessary steps in court to promote the conduct of the cases

under his jurisdiction, including the litigation of claims of “executive privilege” advanced as a reason for withholding evidence considered important to one of those prosecutions.

C. THE SPECIAL PROSECUTOR HAS AUTHORITY TO SEEK, AND THE FEDERAL COURTS HAVE POWER TO GRANT, A PRODUCTION ORDER ADDRESSED TO THE PRESIDENT EVEN THOUGH THE SPECIAL PROSECUTOR IS A MEMBER OF THE EXECUTIVE BRANCH

What has been shown above makes clear the authority of the Special Prosecutor to bring such prosecutions as are within his jurisdiction and to seek court *34 orders for the production of such evidence as is necessary to the litigation. We have shown that, in so discharging his duties, the Special Prosecutor does not act as the mere agent-at-will of the President. He enjoys an independent authority derived from constitutional delegations of authority by the Congress to the Attorney General and from the Attorney General to him under valid regulations that reflect the solemn commitments of the President himself.

Since the Special Prosecutor has authority to bring prosecutions and to seek production of evidence and does not take such actions in the President's name or at his behest, and since, as we show in Part II of our argument below, the President can, in an appropriate case, be ordered to produce evidence, there would seem to be no obstacle to the Special Prosecutor's seeking an order that the President produce evidence. The proceedings surrounding such an order constitute a justiciable controversy whether or not the President could, through a complicated series of steps, lawfully replace the Special Prosecutor and despite the somewhat unusual appearance on opposite sides of two parties both of whom are members of the Executive Branch.

1. Whatever power the President may have to circumvent an adverse ruling by taking steps to abrogate the Special Prosecutor's independence cannot serve to render the controversy non-justiciable

The mere fact that the President is Chief Executive, with ultimate responsibility to “take Care that the Laws be faithfully executed,” does not destroy the Special Prosecutor's independence or standing to sue. *35 Whatever might be the situation in a proceeding conducted by a mere agent of the President, the Special Prosecutor's functional and legal independence empowers him, on behalf of the United States, to seek a subpoena against the President for evidence.

Congress frequently confers powers and duties upon subordinate executive officials, and in such situations the President's function as Chief Executive does not authorize him to displace the designated officer and to act directly in the matter himself. As long as the officer holds his position, the power to act under the law is his alone. A familiar example of this basic principle was illustrated by President Andrew Jackson's legendary battle over the Bank of the United States. Two Secretaries of the Treasury refused to obey the President's command to withdraw deposits from the Bank, a function entrusted to the Secretary by law. The President's only recourse was to seek a third, who complied with Jackson's wish. See generally Van Deusen, *The Jacksonian Era*, 1828-1848, pp. 80-82 (1959). Attorney General Roger Taney gave a similar opinion to President Jackson, advising him that as long as a particular United States Attorney remained in office, he was empowered to conduct a particular litigation as he saw fit, despite the wishes of the President. See 2 Op. Att'y Gen. 482 (1831).

More recently, President Nixon apparently recognized a similar limitation on his powers as Chief Executive when, in order to effect the discharge of the former Special Prosecutor over the refusal of Attorney General Richardson and Deputy Attorney General Ruckelshaus to dismiss him, the President had to procure *36 the removal of those officials and rest upon Acting Attorney General Bork's exercise of their power.

These principles, considered in light of the authority of the Special Prosecutor reviewed above, establish that, short of finding some way to accomplish the removal of the Special Prosecutor, the President has no legal right or power to limit or direct his actions in bringing prosecutions or in seeking the evidence needed for these prosecutions. Any effort to interfere in the Special Prosecutor's decisions is inadmissible and any order would be without legal effect so long as the Attorney General has not effectively rescinded the regulations creating and guaranteeing the Special Prosecutor's independence—a course he may be

legally barred from taking without the Special Prosecutor's consent, see *Nader v. Bork*, *supra*, 366 F. Supp. at 108. Even then any order would have to come from the Attorney General to satisfy statutory requirements.

The President is bound by duly promulgated regulations even where he has power to amend them for the future. *Accardi v. Shaughnessy*, 347 U.S. at 266-67. It is even clearer in the present situation that regulations and statutes which he has no power to modify prevent him from assuming direction of the Watergate prosecutions. Thus, there can be no argument that a case or controversy is lacking because the President could dismiss the prosecution or withdraw the subpoena even if he so desired.

Nor is any valid objection to the concrete reality of this dispute furnished by the hypothesis, *arguendo*, that the President could nullify any adverse ruling by *37 procuring the dismissal of the Special Prosecutor and finding another prosecutor who would not enforce the Court's decision. A similar argument was rejected well over a century ago. In *Kendall v. United States ex rel. Stokes*, 12 Pet. (37 U.S.) 524, it was argued that the Judiciary lacked power to issue a mandamus requiring the Postmaster General to credit a sum of money to a contractor on the ground that the President would frustrate performance of the decree by discharging the respondent and appointing a new Postmaster General. The Court rejected the argument and granted mandamus. The federal courts have continued to resolve legal controversies despite the theoretical power of one of the parties to avoid the impact of the judgment by lawful means. See, e.g., *Glidden Co. v. Zdanok*, 370 U.S. 530.

The same argument against jurisdiction fails in the present case, not only on the basis of precedent, but for three other reasons as well.

First, in the present situation, the President does not have the power to remove the Special Prosecutor and to appoint a replacement more to his liking. Under Article II, Section 2 of the Constitution, Congress has vested appointment of officers of the Department of Justice, like the Special Prosecutor, in the Attorney General, not the President.²⁷ And the *38 President explicitly has ceded any right and power he may have to restrict the independence of the Special Prosecutor or effect his discharge by agreeing to the issuance of regulations precluding such action unless the "consensus" of eight specified Congressional officials concurs in that course. The regulations establishing this condition precedent to any action by the President have the force of law, and the Special Prosecutor thus stands before the Court independent of any direct control by the Attorney General or the President. In short, the present regulations governing the Special Prosecutor's tenure and independence are even more restrictive of the residual authority of the President and the Attorney General than were the regulations that were held in *Nader v. Bork*, *supra*, to have been violated by the dismissal of Special Prosecutor Cox.²⁸

Second, even the dismissal of the Special Prosecutor would not nullify a ruling that the evidence must be produced, since the Attorney General and the Solicitor General, as officers of this Court, would be legally *39 obliged to attend to the proper enforcement of a decree by the Court, particularly one in favor of the United States. See *United States v. Shipp*, 203 U.S. 563; *United States v. Shipp*, 214 U.S. 386 (proceedings for criminal contempt initiated and conducted before this Court by Attorney General for defiance of Court's order); 28 U.S.C. 518(a).

Third, the speculative possibility that something might occur in the future cannot render a presently live controversy moot, when it is hardly inevitable that the Court's decision will be ineffective. Compare *DeFunis v. Odegaard*, --- U.S. --- (42 U.S.L.W. 4578, April 23, 1974). Just as "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot," *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, it follows *a fortiori* that the hypothetical-and possibly illegal-dismissal of the Special Prosecutor after a decision in his favor by this Court cannot render the present case moot. As this Court noted earlier this Term in rejecting a mootness claim involving a challenge to state welfare benefits to striking workers where the particular strike had ended: "The judiciary must not close the door to the resolution of the important questions these concrete disputes present." *Super Tire Engineering Co. v. McCorkle*, --- U.S. ---

(42 U.S.L.W. 4507, 4511, April 16, 1974). In the present case, the precise controversy is still very much alive, and the President has not even threatened to attempt to defeat an adverse ruling by effecting the dismissal of the Special Prosecutor.

*40 2. *There is no lack of a true case or controversy because the opposing parties are both members of the Executive Branch*

In the present matter, there can be no serious contention that this is a feigned or collusive suit or an abstract or speculative debate; the issues are sharply drawn over the production or nonproduction of specific evidence for a pending criminal trial, and the litigants—the United States and President Nixon—have manifestly concrete but antagonistic interests in the outcome, for if the subpoenaed materials are ordered produced the United States can proceed to trial in a major criminal case armed with important evidence, while a contrary decision would leave President Nixon in absolute control over those materials and thereby weaken the government's case against his former aides, whom he has publicly supported in this criminal investigation (see pp. 59-60, *infra*).

Thus, we submit that it is clear beyond peradventure that the Special Prosecutor, as the exclusively authorized attorney for the United States—the prosecuting sovereign in the pending criminal case of *United States v. Mitchell, et al.*, for which the instant trial subpoena was issued—has standing to seek enforcement of the subpoena, for the prosecution has “such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” *Baker v. Carr*, 369 U.S. 186, 204. See also *Flast v. Cohen*, 392 U.S. 83, 98-100.

Framing this controversy as a mere “intra-executive branch” dispute, as counsel for the President did *41 below, seems to invoke the sterile conceptualism, long ago discarded, that since “no person may sue himself,” suits between government officials cannot be maintained. As this Court said when it rejected such an argument in *United States v. ICC*, 337 U.S. 426, 430, “courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented.”²⁹ See also *Secretary of Agriculture v. United States*, 350 U.S. 162. This practical approach was underscored only this Term, when the Court noted probable jurisdiction and heard argument in two cases in which the United States, represented by the Justice Department, was appealing from two separate district court decisions dismissing the government's complaints attacking bank mergers under Section 7 of the Clayton Act. *United States v. Marine Bancorporation, Inc.*, No. 73-38; *United States v. Connecticut National Bank*, No. 73-767. The Comptroller of the Currency has responsibility for administering the Bank Merger Act and the National Bank Act, and in each case the Comptroller had approved a merger challenged by the Department of Justice under the Clayton Act. In each case the Comptroller of the Currency, an official of the Treasury Department, 12 U.S.C. § 1, ¶ 2, was named as an appellee and filed a brief in opposition to the position *42 taken by the Solicitor General on behalf of the Department of Justice. Although such litigation is relatively rare and typically involves disputes between an executive department and a “quasi-independent” regulatory agency, there is nothing in the “case or controversy” requirement of Article III that denies the federal courts the power to adjudicate concrete controversies between government officials over their respective legal powers and duties, see *e.g., Powell v. McCormack, supra*, particularly when—as in the present case—the resolution of the legal controversy has direct consequences upon them and private parties.

We do not suggest, of course, that the President or the Department of Justice could confer jurisdiction on the courts where such jurisdiction is constitutionally impermissible. What we do argue, however, is that the Court must look beyond the President's formalistic objections to the Court's jurisdiction, based as they are on a talismanic incantation of the “intra-executive” nature of the proceeding. By pointing to the mere formality of the Special Prosecutor's status as an executive officer, counsel to the President ignores the substantive concern underlying the “case or controversy” requirement of Article III. A proceeding is justiciable if it presents live, concrete issues between adverse parties that are susceptible of adjudication. See, *e.g., O'Shea v. Littleton*, --- U.S. --- (42 U.S.L.W. 4139, January 15, 1974); *United States v. SCRAP*, 412 U.S. 669, 687; *Flast v. Cohen*, 392 U.S. 83, 94-101; *Baker v. Carr*, 369 U.S. 186, 204. And it is against these standards that the Court must resolve the objections to its jurisdiction.

*43 Although counsel for the President has argued that somehow the “separation of powers” principle denies to the federal courts the power to decide this controversy between the President and the prosecution in *United States v. Mitchell*, this argument will not withstand analysis. The inescapable irony of the President's position can only be appreciated by focusing on the fact that the regulations creating a Special Prosecutor's office armed with functional independence and with explicit authority to litigate against Presidential claims of privilege do not reflect a statutory regime imposed by the Legislative Branch; these regulations were promulgated with the President's approval by his Attorney General. This, then, is the President's position—not that Congress has unconstitutionally invaded his sphere, but rather that the doctrine of separation of powers forecloses *him* from the ability to control his “own” Executive Branch in such a way as to safeguard public confidence in the integrity of the law enforcement process. The Office of the Watergate Special Prosecution Force was established with the approval of the President as an independent entity within the Department of Justice in response to the public demand for an impartial investigation of charges of criminal misconduct by officials in the Executive Office of the President. After Special Prosecutor Cox's dismissal, the Office was re-established amid a public reaction so severe that it has generated the first serious possibility of a Presidential impeachment in more than a century and made enactment of legislation for a court-appointed *44 Special Prosecutor almost certain.³⁰ Perhaps the most important assurance of independence built into the proposed role of the Special Prosecutor, as reflected in congressional testimony³¹ as well as public statements by the President and the Attorney General, was his authority to invoke the judicial process to obtain necessary evidence from the President. It simply stands the doctrine of separation of powers on its head to suggest that it precludes the Judiciary from giving full force and effect to the allocation of authority within the Executive Branch under an arrangement that was designed by the Attorney General and approved by the President as indispensable to forestall a further erosion of faith in the Executive Branch.

D. THE SPECULATIVE POSSIBILITY THAT THE PRESIDENT MAY DISREGARD A VALID COURT ORDER DOES NOT DEPRIVE THE COURT OF JURISDICTION

A theme advanced earlier by counsel for the President in opposition to enforcement of a grand jury subpoena *duces tecum* in *Nixon v. Sirica* was that the President has “the power and thus the privilege to withhold information.”³² This raw assertion in no way undermines the justiciability of this controversy. The naked power of the Chief Executive, despite a court order, to withhold evidence from a judicial proceeding does not deprive the courts of jurisdiction to *45 order its production. To link physical power with legal privilege runs contrary to our entire constitutional tradition. As this Court stated in *Kendall v. United States ex rel. Stokes*, *supra*, 12 Pet. at 613, “[t]o contend that the obligation imposed on the President to see the laws are faithfully executed implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible.” It might as well be said that a Secretary of State, acting upon orders of the President, would have had “the power and thus the privilege” to withhold the signed commission at issue in *Marbury v. Madison*, *supra*; or that a Postmaster General, acting upon instructions of the President, would have had “the power and thus the privilege” to refuse to pay money owed pursuant to a contract, contrary to the decision in *Kendall*, *supra*; or that the President has “the power and thus the privilege” to seize industrial property in a wartime labor dispute, contrary to *Youngstown Sheet & Tube Co. v. Sawyer*, *supra*; or to conduct warrantless electronic surveillance in domestic security investigations, contrary to the Fourth Amendment as interpreted in *United States v. United States District Court*, *supra*.

This Court has never allowed doubt about its physical power to enforce its commands to deter the issuance of appropriate orders. In *Worcester v. Georgia*, 6 Pet. (31 U.S.) 515, counsel strenuously argued that the Court should not order Georgia to surrender jurisdiction over a prisoner seized in Cherokee Indian territory because the President would not and the Court could not force Georgia to obey the judicial command, *46 but the Court did not abdicate its responsibility to decide the issues. In *McPherson v. Blackmer*, 146 U.S. 1, 24, the Court ruled upon the constitutionality of a Michigan statute providing for the choice of Presidential electors by congressional districts despite the argument that the State's political agencies might frustrate the decision, saying:

The question of the validity of this act, as presented to us by this record, is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the state as revised by our own.

Most recently in *Glidden Co. v. Zdanok*, *supra*, the Court rejected the argument that a money claim against the United States did not present a justiciable issue because the courts were without power to force execution of a judgment against the United States: "If this Court may rely on the good faith of state governments or other public bodies to respond to its judgments, there seems to be no sound reason why the Court of Claims may not rely on the good faith of the United States." 370 U.S. at 571.³³ In conformity with this principle, the court of appeals in *Nixon v. Sirica* rejected the attempt to equate physical power to disobey with legal immunity from the judicial process itself: "The legality of judicial orders should not be *47 confused with the legal consequences of their breach; for the courts of this country always assume that their orders will be obeyed, especially when addressed to responsible government officials." *Nixon v. Sirica*, *supra*, 487 F. 2d at 711-12.

The effect of a President's physical power to disobey a court order is wholly speculative at this juncture and undoubtedly will remain so. There is no reason to believe that President Nixon would disregard a decision of this Court fixing legal responsibilities, any more than he did the order of the district court, as modified by the court of appeals in *Nixon v. Sirica*, *supra*, requiring him to submit for *in camera* inspection recordings subpoenaed by the grand jury. In announcing that President Nixon would comply with the mandate in *Nixon v. Sirica*, counsel for the President stated in open court: "This President does not defy the law, and he has authorized me to say he will comply in full with the orders of the court."³⁴

The Court, therefore, can cast aside as wholly illusory any of the obstacles that may be suggested as barring its exercise of the judicial power of the United States to decide the evidentiary privilege issue interposed in this criminal case. The case is within the jurisdiction of the federal courts and is fully justiciable.

***48 I. THE COURTS HAVE BOTH THE POWER AND THE DUTY TO DETERMINE THE VALIDITY OF A CLAIM OF EXECUTIVE PRIVILEGE WHEN IT IS ASSERTED IN A JUDICIAL PROCEEDING AS A GROUND FOR REFUSING TO PRODUCE EVIDENCE**

A. THE COURTS HAVE THE POWER TO RESOLVE ALL ISSUES IN A CONTROVERSY PROPERLY BEFORE THEM, EVEN THOUGH THIS REQUIRES DETERMINING, AUTHORITATIVELY, THE POWERS AND RESPONSIBILITIES OF THE OTHER BRANCHES

Our basic submission, and the one we suggest controls this case, is a simple one—the courts, in the exercise of their jurisdiction under Article III of the Constitution, have the duty and, therefore, the power to determine all issues necessary to a lawful resolution of controversies properly before them. The duty includes resolving issues as to the admissibility of evidence in a criminal prosecution as well as the obligation to produce such evidence under subpoena. This allocation of responsibility is inherent in the constitutional duty of the federal courts, as the "neutral" branch of government, to decide cases in accordance with the rule of law, and it supports rather than undermines the basic separation of powers conceived by the Constitution.

The principle was clear at the very outset of our constitutional history. Since 1803 there has been no question that in resolving any case or controversy within the jurisdiction of a federal court, "[i]t is emphatically the province and the duty of the judicial department to say what the law is." *Marbury v. Madison*, *supra*, 1 Cranch at 177. See *Powell v. McCormack*, *supra*, 395 U.S. at 521. As *Marbury v. Madison* firmly establishes, this is true even though the controversy *49 before the courts implicates the powers and responsibilities of a co-ordinate branch. In conformity with this principle the courts consistently have

exercised final authority to determine whether even the highest executive officials are acting in accordance with the Constitution and have issued appropriate decrees to implement those judicial decisions. *E. g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, *supra* (alleged right of President to authorize the Secretary of Commerce to seize steel mills); *United States v. United States District Court*, *supra* (alleged power of the President, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval); *Kendall v. United States ex rel. Stokes*, *supra* (alleged power of the President, acting through the Postmaster General, to withhold money owed pursuant to a contract); *Land v. Dollar*, 190 F. 2d 623 (D.C. Cir. 1951), vacated as moot, 344 U.S. 806 (alleged right of Secretary of Commerce and Acting Attorney General to obey order of President inconsistent with judicial decree; officials adjudicated in civil contempt).

The courts have not retreated from this responsibility even when the most pressing and immediate needs of the Nation were at issue. President Truman directed the Secretary of Commerce to seize and operate specified steel facilities because of his judgment that a threatened work stoppage at the Nation's steel mills during the Korean War "would immediately jeopardize and imperil our national defense." Executive Order No. 10340 (April 8, 1952). Nevertheless, this *50 Court ruled that the President had exceeded his constitutional powers and upheld a preliminary injunction enjoining the seizure. Justice Jackson's concurring opinion expresses the fundamental principle underlying the Court's decision ⁴⁹ (343 U.S. at 655):

With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law.

Even Justice Frankfurter, one of the most ardent exponents of the separation of powers, who expressed "every desire to avoid judicial inquiry into the powers and duties of the other two branches of government," concurred in the judgment of the Court, albeit "with the utmost unwillingness." He recognized: "To deny inquiry into the President's power in a case like this, because of the damage to the public interest to be feared from upsetting its exercise by him, would in effect always preclude inquiry into challenged power * * *." ⁵⁰ 343 U.S. at 596.

It is too late in our history to contend that this duty and competence of the Judiciary is inconsistent with the separation of powers, either in general or as applied to questions of evidentiary privilege. As the court of appeals held in ⁵¹ *Nixon v. Sirica*, *supra*, 487 F. 2d at 715, such a claim, premised on the contention that the separation of powers prevents the courts from compelling particular action from the President or from reviewing his determinations, mistakes the true nature of our constitutional system. Focusing on the "separation" of functions in our tri-partite system *51 of government obscures a crucial point: the exercise by one branch of constitutional powers within its own competence frequently requires action by another branch within its field of powers. Thus, the Legislative Branch has the power to make the laws. Its enactments bind the Judiciary-unless unconstitutional-not only in the decision of cases and controversies, but in the very procedures through which the Judiciary transacts its business. ⁵² Congress, in scores of statutes, regularly imposes legal duties upon the President. ⁵³ The very essence of his constitutional function is the legal duty to carry out congressional mandates by taking "Care that the Laws be faithfully executed." Finally, the President may require action by the courts. The courts, for example, have a legal duty to give-and do give-effect to valid executive orders. ⁵⁴ Where the President or an appropriate official institutes a legal action in his own name or that of the United States, a judge is compelled to grant the relief requested if in accordance with law.

We enjoy a well-functioning constitutional government because each branch is independent and yet acknowledges its duties in response to the functioning of others. "Checks and balances were established in order *52 that this should be a 'government of laws and not of men.' * * * The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power." ⁵⁵ *Myers v. United States*, 272 U.S. 52, 292-93 (Brandeis, J.,

dissenting). At the same time, as Mr. Justice Jackson explained in *Youngstown Sheet & Tube Co. v. Sawyer*, *supra*, 343 U.S. at 635 (concurring opinion):

While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

Thus, there is no room to argue that the separation of powers makes each branch an island, alone unto itself. Despite the “separation of powers implications, the separation of powers doctrine has not previously prevented this Court from reviewing the acts” of a coordinate branch of the government when placed in issue in a case within the jurisdiction of the federal courts.

Doe v. McMillan, *supra*, 412 U.S. at 318 n. 12.

B. THE JUDICIAL POWER TO DETERMINE THE LIMITS OF EXECUTIVE AUTHORITY WHEN NECESSARY TO RESOLVE A JUSTICIABLE CONTROVERSY INCLUDES THE POWER TO RESOLVE CLAIMS OF EXECUTIVE PRIVILEGE MADE WITH REGARD TO EVIDENCE SOUGHT BY THE PROSECUTOR FOR USE IN A PENDING CRIMINAL CASE

In applying the fundamental principle that the Judiciary, and not the Executive, has the ultimate responsibility for interpreting and applying the law in any justiciable case or controversy, the courts consistently *53 have determined for themselves not only what evidence is admissible, but also what evidence must be produced, including whether particular materials are appropriately subject to a claim of executive privilege. This issue, like questions of the constitutionality and meaning of statutes or executive orders, is one of the matters that a court has a duty to resolve authoritatively whenever their resolution is an integral part of the outcome of a case or controversy within the court's jurisdiction.³⁸

*54 The question was decided squarely in *United States v. Reynolds*, 345 U.S. 1, where the Executive Branch argued that “department heads have power to withhold any documents in their custody from judicial view if they deem it to be in the public interest,” 345 U.S. at 6 (footnote omitted)—a position strikingly similar to the one advanced by counsel for the President. The case involved a Tort Claims Act suit arising out of the crash of a B-29 bomber testing secret electronic equipment. The plaintiffs sought discovery of the Air Force's official accident investigation report and the statements of the surviving crew members. Although this Court agreed that an evidentiary privilege covers military secrets, 345 U.S. at 6-7, 11, it held that “[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege * * *. Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.” 345 U.S. at 8, 9-10 (footnote omitted). See also *Roviaro v. United States*, *supra*, 353 U.S. at 62.

Since the decision in *Reynolds*, every court of appeals that has confronted the question has rejected a claim of absolute executive privilege to withhold evidence merely upon the assertion by the Executive that disclosure would not be in the public interest. The Court of Appeals for the District of Columbia Circuit, for example, which has had the most frequent occasion to consider and discuss this issue, has noted *55 that “this claim of absolute immunity for documents in the possession of an executive department or agency, upon the bald assertion of its head, is not sound law.” *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F. 2d 783, 792 (1971). In recently reaffirming the validity of this decision, the court ruled *en banc* that judicial determination “is not only consistent with, but dictated by, separation of powers doctrine.” *Nixon v. Sirica*, *supra*, 487 F. 2d at 714.³⁹

Even in the first case that firmly recognized a confidentiality privilege for “intra-agency advisory opinions,” *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (1958),⁴⁰ the Court of Claims, in an opinion by Justice Reed, held that documents reflecting executive deliberations “are privileged from inspection as against public interest *but not absolutely*. * * * The power must lie in the courts to determine executive privilege in litigation.”⁴¹ *56 157 F. Supp. at 946-47 (emphasis added). Thus, even in the embryonic stages of this relatively recently articulated version of “executive privilege,” the courts recognized that the legitimate interests of the Executive do not require unreviewable discretion to shield its decision-making processes from scrutiny by the Judiciary. A similar conclusion has been reached by the courts of almost all other countries following the common law.⁴¹

In short, the President’s assertion in the district court “that it is for the President of the United States, rather than for a court, to decide when the public interest requires that he exercise his constitutional privilege to refuse to produce information” flies in the face of an unbroken line of precedent.⁴²

*57 The uniform precedent of allocating to the Judiciary the determination of the applicability and scope of executive claims of privilege not to produce necessary evidence is supported by compelling arguments of policy. Certainly, there are legitimate interests in secrecy. But these interests are more than adequately protected by the qualified privilege defined and applied by the courts.⁴³ This Court, as we have noted, has adverted to the danger of abdicating objective judicial discernment “to the caprice of executive officers,” *United States v. Reynolds*, *supra*, 345 U.S. at 9-10, and stated that “complete abandonment of judicial control would lead to intolerable abuses.”⁴⁴ 345 U.S. at 8. This is necessarily true because the Executive has an inherent conflict of interest when its actions are called into question if it is to decide whether evidence is to remain secret. Thus, in *Committee for Nuclear Responsibility, Inc. v. Seaborg*, *supra*, the Court of Appeals for the District of Columbia Circuit has emphasized a related rationale for denying absolute executive discretion to assert a binding confidentiality privilege: “executive absolutism cannot override the duty of the court to assure that an official has not exceeded his charter or flouted the legislative *58 will.” 463 F. 2d at 793. The court presciently stated (463 F. 2d at 794):

[N]o executive official or agency can be given absolute authority to determine what documents in his possession may be considered by the court in its task. Otherwise the head of any executive department would have the power on his own say so to cover up all evidence of fraud and corruption when a federal court or grand jury was investigating malfeasance in office, and this is not the law.⁴⁴

In a similar vein, the Court of Appeals for the Fifth Circuit recently noted:

The granting or withholding of any privilege requires a balancing of competing policies, 8 Wigmore, § 2285 at 527-28. The claim of governmental privilege is no exception; in fact, the potential for misuse of government privilege, and the consequent diminution of information about government available to the public, is one more factor which strongly suggests the need *59 for judicial arbitration of the availability of the privilege.

Carr v. Monroe Manufacturing Co., *supra*, 431 F. 2d at 388.

We do not question the need for a qualified privilege to serve as an encouragement to the candid exchange of ideas necessary for the formulation of executive policy. Indeed, as the court of appeals held in *Nixon v. Sirica*, *supra*, 487 F.2d at 717, such

discussions are “presumptively privileged.” But this case brings into high relief the dangers that would be posed by unbridled, absolute discretion to invoke executive privilege and underscores the wisdom of the rule vesting ultimate power in the courts to rule upon such claims when they are advanced in the context of judicial proceedings. President Nixon cannot be a proper judge of whether the greater public interest lies in disclosing the subpoenaed evidence for use at trial or in withholding it. He is now the subject of an impeachment inquiry by the Committee on the Judiciary of the House of Representatives, and the subpoenaed evidence may have a material bearing on whether he is impeached and, if impeached, whether he is convicted and removed from office. This is an issue to which he can hardly be indifferent. In addition, the Special Prosecutor, as prosecuting attorney for the United States, seeks the subpoenaed evidence in prosecuting the President’s highest and closest aides and associates. The President is bound to them by the natural emotions of loyalty and gratitude. Thus, in *60 his Address to the Nation on April 30, 1973, announcing the resignation of defendants Haldeman and Ehrlichman, the President referred to them as “two of the finest public servants it has been my privilege to know.”⁹ Weekly Compilation of Presidential Documents 434 (May 7, 1973). And during a question-and-answer session between President Nixon and participants at the Associated Press Managing Editors Association annual convention on November 17, 1973, the President stated unequivocally: “* * * Mr. Haldeman and Mr. Ehrlichman had been and were dedicated, fine public servants, and I believe, it is my belief based on what I know now, that when these proceedings are completed that they will come out all right.”⁹ Weekly Compilation of Presidential Documents 1349 (November 26, 1973).

We call attention to these facts without disrespect to the President or his Office. But even if by extraordinary act of conscience, he could judge impartially the relative public advantages of secrecy and disclosure without regard to the consequences for himself or his associates, confidence in the integrity and impartiality of the legal system as between the high and the lowly still would be impaired through violation of the ancient precept that no man shall be a judge in his own cause. Compare ¹ *Ward v. Village of Monroeville*, 409 U.S. 57; ² *Mayberry v. Pennsylvania*, 400 U.S. 455; ³ *Offutt v. United States*, 348 U.S. 11; 28 U.S.C. 455.

***61 C. COURTS HAVE THE POWER TO ORDER THE PRODUCTION
OF EVIDENCE FROM THE EXECUTIVE WHEN JUSTICE SO REQUIRES**

When the court’s duty to decide a case or controversy requires the court to determine the validity of a claim of executive privilege, the court has the concomitant power to order the production of the evidence from the Executive Branch when justice so requires. This Court’s decision last Term in ⁴ *Environmental Protection Agency v. Mink*, 410 U.S. 73, clearly establishes the proposition that the constitutional separation of powers does not give the Executive any constitutional immunity from judicial orders for the production of evidence. The plaintiffs there had sought access under the Freedom of Information Act to a report prepared for the President by the Undersecretaries Committee of the National Security Council on the proposed underground nuclear test on Amchitka Island. The government opposed the request partly upon the ground that the documents were exempt from disclosure as “inter-agency memorandums or letters,”⁴⁵ arguing that the need to avoid disclosure of communications with the President was “particularly important.” Brief for the Petitioners 39–40. Nevertheless, this Court remanded for a judicial determination of the claim of privilege; the opinion states explicitly that in opposing disclosure the government carried the burden of establishing “to *62 the satisfaction of the District Court” that the documents were exempt from disclosure. ⁵ 410 U.S. at 93. Significantly, the Freedom of Information Act expressly provides that “[i]n the event of noncompliance with the order of the court” to disclose material found unprivileged, the court may punish the responsible executive officer “for contempt.” ⁶ 5 U.S.C. 552(a) (3). Neither in *Mink* nor in any other decision has any doubt been expressed about the constitutional power of the court to enter a mandatory order for the production of evidence after a claim of executive privilege has been overruled by the court.

Other precedents confirm the existence of judicial power to require the production of evidence by executive officials when the court determines the evidence to be material and unprivileged. ⁷ *United States v. Burr*, 25 Fed. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807), of course, is an early and clear example involving evidence in the possession of the President sought for use in a federal criminal case. In ⁸ *Bowman Dairy Co. v. United States*, 341 U.S. 214, 221, this Court treated contempt as a proper

sanction against government counsel if he refused to obey a subpoena for the production of documents after the court rejected a claim of privilege. Similarly, while holding that an FBI agent could not properly be held in contempt for refusing to obey a subpoena to produce information for use in a state prisoner's habeas corpus action without permission from the Attorney General, the Court implicitly assumed, and Justice Frankfurter explicitly stated in his concurring opinion, that the Attorney

*63 General himself could be required to litigate the underlying claim of privilege in court. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 473. In private litigation the lower courts consistently have assumed the existence of power to enforce a subpoena for documents in the Executive Branch over a claim of privilege.⁴⁶

Thus, Professor Charles Alan Wright, after explaining that-

The determination whether to allow the claim of [executive] privilege is then for the court * * *

goes on to say that-

In private litigation refusal of a government officer to comply with a court order overruling a claim of executive privilege and ordering disclosure could lead to conviction for contempt * * *.

⁸ Wright and Miller, *Federal Practice and Procedure* § 2019, at 171-72 (1970) (footnotes omitted).

*64 In some cases, it is true, the Executive Branch has been left free to decline to produce information if it is willing to suffer the loss of litigation in which it is a party. See, e.g., *Alderman v. United States*, 394 U.S. 165, 184; *Jencks v. United States*, 353 U.S. 657, 672; *Roviaro v. United States*, *supra*, 353 U.S. at 60-61; cf. *Reynolds v. United States*, *supra*, 345 U.S. at 12. But the existence of this remedial alternative in some cases does not support the proposition that the Executive rather than the courts has the final authority for determining whether, legally, a claim of privilege is well founded or not. Moreover, those decisions do not mark the limits of judicial power, for the underlying rationale in each was that the remedial "choice" fully protected the rights of the opposing party, the interests of the Executive and the integrity of the judicial process. In each case this Court recognized that the courts had the ultimate responsibility for passing upon the claim of privilege; only after the courts made the decisive determination could the government elect whether to sacrifice the case or produce the evidence found unprivileged.

In these "produce or dismiss" cases, the requirements of justice could be satisfied without compelling production of particular evidence sought by an adverse party, after judicial rejection of an executive claim of privilege, if the government preferred to accept the "remedy" of losing the case to which it was a party. See generally Rule 16(g), Federal Rules of Criminal Procedure; Rule 37(b), Federal Rules of Civil Procedure. Where dismissal is not an adequate *65 or proper remedy for the parties or is not consistent with judicial integrity, however, the "produce or dismiss" choice cannot be available to the Executive following a judicial ruling rejecting the claim of privilege. As the district court recognized in the present case, the subpoena *duces tecum* to the President here issued to a person who, "as a practical matter, is a third party" (App. 98A). The President has personal custody of evidence sought by the United States, through its attorney, for use in a proceeding in which the President is not a party. Clearly, a person who is not a party to the main lawsuit has no lawful "election" other than to comply with a judicial determination overruling his claim of a privilege to refuse to give material evidence. The cases have so held.⁴⁷

Furthermore, there is no such election when the very object of the legal proceeding is to acquire the information. Thus, for example, in the Freedom of Information Act cases, it could not be seriously contended that the government had some option other than to disclose any information the court finally determines was unprivileged. Indeed, as we observed above, the Act itself specifically provides the sanction of contempt for such an attempt to flout the court's decision.

Most basically, the "produce or dismiss" option reflects a realistic accommodation of the requirements of substantive justice in litigation. But any reliance on an alleged Presidential option to cause dismissal of this criminal prosecution by standing on a claim of *66 privilege, even if overruled by the courts, must be rejected out of hand as plainly insufficient to satisfy the needs of public justice. The seriousness of the charged offenses and the high offices held by those indicted brand that "solution" as impermissible. The President, himself subject to investigation with respect to the offenses charged in the indictment, is in no position to make the delicate judgment whether the greater public interest lies in producing the evidence and continuing the prosecution or abandoning the prosecution.

As we discussed above (pp. 27-39), under the regulations establishing the Watergate Special Prosecution Force as a quasi-independent office within the Department of Justice, the President has no authority directly-or through the Attorney General-to decide that the Watergate prosecution, *United States v. Mitchell, et al.*, should be abandoned. It would make a travesty out of the independent institution of the Special Prosecutor if the President could accomplish this objective by indirection-by claiming that the courts have no power to order the production of evidence in this criminal prosecution and insisting that the courts be content with posing the dilemma of "produce or dismiss."

Counsel for the President previously argued that "[i]n the exercise of his discretion to claim executive privilege the President is answerable to the Nation but not the courts."⁴⁸ This assertion merely highlights *67 the salutary effect of requiring the Executive to make its choice *after* the courts have adjudicated the relevant rights and obligations. Public responsibility cannot be fixed, however, until the alternatives are defined. Only then can the people, as the ultimate rulers, know who controlled the course of events and who took what decisions. The President cannot have it both ways: he cannot suggest that he could abort this investigation rather than comply with an order overruling his claim of privilege and use that hypothetical course to prevent the Court from ruling on the validity of the privilege claim itself. Unless and until the President attempts to exercise whatever powers he might have under the Constitution as Chief Executive to intervene directly in the conduct of this prosecution by the Department of Justice, as represented by the Special Prosecutor, and to procure the Special Prosecutor's dismissal and the countermanding of his conduct of the case, the President must allow the Special Prosecutor and the courts to conduct the prosecution in accordance with the regular processes of the law and without regard to any *potential* executive power to frustrate the administration of justice.

II. THE PRESIDENT IS NOT IMMUNE FROM JUDICIAL ORDERS REQUIRING THE PRODUCTION OF MATERIAL EVIDENCE FOR A CRIMINAL TRIAL

There is nothing in the position of the President, despite his status as Chief Executive, that deprives the courts of their constitutional power to resolve this dispute. The power to decide this case simply cannot differ because the President elected to take personal *68 control of the subpoenaed evidence. The Framers of our Constitution, concerned as they were about the abuses of royal prerogative, were very careful to provide for a Presidency with defined and limited constitutional powers and not the prerogatives and immunities of a sovereign. Under our Constitution, the people are sovereign, and the President, though Chief Executive and Chief of State, remains subject to the law.⁴⁹ Indeed, it is the very essence of the Presidential Office that it is subject to the commands of the law, for the President's basic governmental function is that of Chief Executive-whose duty it is to "take Care that the Laws be faithfully executed." It follows inexorably that in our system *even the President* is under the law.

No one would deny that every other officer of the executive branch is subject to judicial process,⁵⁰ and there is little basis in logic, policy or constitutional history *69 for concluding that a matter becomes walled off from judicial authority simply because the President has elected to become personally involved in it. More basically, however, a true regard for the constitutional separation of powers compels the conclusion that the President himself is appropriately subject to judicial orders.

It is the function of the courts to determine rights and obligations of public officers within the context of a justiciable controversy, including those of the President, and it is his sworn duty to "execute" those decisions. See *Cooper v. Aaron*, 358 U.S. 1, 12. It must follow that the courts have the power in appropriate cases to order even the President to perform a legal duty.

A. THE POWER OF THE COURTS TO ISSUE SUBPOENAS TO THE PRESIDENT, LONG RECOGNIZED BY THE COURTS, FLOWS FROM THE FUNDAMENTAL PRINCIPLE THAT NO MAN IS ABOVE THE LAW

At the heart of the court's power to issue and enforce a subpoena *duces tecum* directed to the President of the United States lies the "longstanding principle 'that the public * * * has a right to every man's evidence.'" *Branzburg v. Hayes*, 408 U.S. 665, 688;⁵¹ *70 *cf.* *Watkins v. United States*, 354 U.S. 178, 187. This power, which in the context of the Watergate investigation and prosecution has proved essential to the full and impartial administration of justice, was upheld in *Nixon v. Sirica*, *supra*, 487 F. 2d at 708-12, a decision with which President Nixon willingly complied, rather than seek review in this Court. As the court of appeals recognized, "incumbency does not relieve the President of the routine legal obligations that confine all citizens." 487 F. 2d at 711. "The clear implication [of the *Burr* case] is that the President's special interests may warrant a careful judicial screening of subpoenas after the President interposes an objection, but that some subpoenas will nevertheless be properly sustained by judicial orders of compliance." 487 F. 2d at 710.

The holding of the court in *Nixon v. Sirica* is hardly a newfound principle wrought from the exigencies of Watergate. The authority to issue a subpoena *duces tecum* to a sitting President was recognized as early as 1807 by Chief Justice Marshall in *United States v. Burr*, 25 Fed. Cas. 30 (No. 14,692d) (C.C.D. Va.).⁵² *71 This landmark decision was noted with approval by this Court in *Branzburg v. Hayes*, *supra*, 408 U.S. at 689 n.26. Although Chief Justice Marshall acknowledged that the power was one to be exercised with attention both to the convenience of the President in performing his arduous duties and to the possibility that the public interest might preclude coercing particular disclosures, he utterly rejected any suggestion that the President, like the King of England, is absolutely immune from judicial process (25 Fed. Cas. at 34):

Although he [the King] may, perhaps, give testimony, it is said to be incompatible with his dignity to appear under the process of the court. Of the many points of difference which exist between the first magistrate in England and the first magistrate of the United States, in respect to the personal dignity conferred on them by the constitutions of their respective nations, the court will only select and mention two. It is a principle of the English constitution that the king can do no wrong, that no blame can be imputed to him, that he cannot be named in debate. By the constitution of the United States, the president, as well as any other officer of the government, may be impeached, and may be removed from office on high crimes and misdemeanors. By the constitution of Great Britain, the crown is hereditary, and the monarch can never be a subject. By that of the United States, the president is elected from the mass of the people, and, on the expiration of the time for which he is elected, returns to the mass of the people again. How essentially this difference of circumstances must vary the policy of the laws of the two *72 countries, in reference to the personal dignity of the executive chief, will be perceived by every person. In this respect the first magistrate of the Union may more properly be likened to the first magistrate of a state; at any rate, under the former Confederation; and it is not known ever to have been doubted, but that the chief magistrate of a state might be served with a subpoena ad testificandum.

The decisions in the *Burr* case and *Nixon v. Sirica* are premised on the theory that every citizen, no matter what his station or office, has an enforceable legal duty not to withhold evidence the production of which the courts determine to be in the public interest. Stated more broadly, and in more familiar terms, they flow from the premise that this is a government of laws and not of men. This Court summed up this fundamental precept of our republican form of government nearly a century ago in *United States v. Lee*, 106 U.S. 196, 220:

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

*73 The Steel Seizure Case is perhaps the most celebrated instance where this Court has reviewed the assertion of Presidential power. *Youngstown Sheet & Tube Co. v. Sawyer*, *supra*. As we noted above, President Truman concluded that a work stoppage at the Nation's steel mills during the Korean War "would immediately jeopardize and imperil our national defense." In directing the Secretary of Commerce to seize certain of the mills, the President asserted that he "was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States."

343 U.S. at 582. District Judge Holtzoff denied a temporary restraining order on the ground that what was involved was the action of the President and that the courts could not enjoin Presidential action. Judge Pine, however, granted a preliminary injunction. This Court, deciding "whether *the President* was acting within his constitutional power" (343 U.S. at 582, emphasis added), upheld the preliminary injunction. In doing so, there was no doubt expressed that the Court could adjudicate the claim that the President had no constitutional power to issue the Executive Order. Nor, after reading the opinions of the Court, can there be any question that the Court would have granted relief against the President if he had directly ordered the seizure of the mills rather than acting through the Secretary of Commerce.⁵³ See, e.g., 343 U.S. at 585.

*74 The Executive's claim of total immunity from judicial decrees is not a new one. In *Land v. Dollar*, *supra*, the Court of Appeals for the District of Columbia Circuit held Secretary of Commerce Sawyer and Acting Attorney General Perlman and subordinate executive officials in civil contempt for failing to comply with a final order requiring them to deliver full and effective possession of certain stock to the prevailing litigant. They attempted to justify their conduct in part on the ground that they were following the directive of the President to Secretary *75 Sawyer "to continue to hold this stock on behalf of the United States" and they further asserted "that, even though the courts determine that a specific action is not within the official capacity of an executive officer, he is immune from compulsion by the courts in respect to that action." 190 F. 2d at 639. The court of appeals rejected the argument in the most emphatic terms (*ibid.*):

To claim that the executive has such power [to hold the shares despite the decree] is to claim the total independence of the executive from judicial determinations in justiciable cases and controversies. To characterize such judicial determinations as illegal coercion of the executive is to deny one of the fundamental concepts of our government.

Although there have been a few notorious instances in our history in which Presidents have refused to give appropriate force to judicial decrees, or are reputed to have made disdainful statements about the decisions, none involved direct disobedience of a court order. More importantly, it is the judgment of history that those were essentially lawless departures from the constitutional norm.⁵⁴ The responsible constitutional *76 position was expressed by President Truman—a defender of a strong Executive—in announcing that he would comply with an order of this Court in the Steel Seizure Case if it went against him, despite his claim of constitutional power to order the seizure. The President's position was stated through Senator Hubert Humphrey, who quoted the President as saying he would "rest his case with the courts of the land." The President was further quoted as saying:

I am a constitutional President and my whole record and public life has been one of defense and support of the Constitution.

New York Times, April 29, 1952, p. 1, col. 3. A report of a later press conference with President Truman on this issue stated:

Asked whether he had been quoted correctly in saying that he would accept the Supreme Court's decision on seizure, the President said certainly-he had no ambition to be a dictator.

New York Times, May 2, 1952, p. 1, col. 5. Of course, when this Court later rejected the constitutional bases for President Truman's action, he complied with the decision, in deference to the principle that even in the gravest matters, the President is under the law.

B. THERE IS NO BASIS EITHER IN THE CONSTITUTION OR IN THE INTENT OF THE FRAMERS FOR CONFERRING ABSOLUTE IMMUNITY ON THE PRESIDENT

The decisions in the *Burr* case and *Nixon v. Sirica* are in accord with settled decisions of this Court and others. They establish principles that faithfully reflect what historical evidence shows was the intent of the *77 Framers. Contrasted with the explicit privileges in Article I for Congress, no comparable privileges or immunities were specified for the President or Executive Branch in Article II, even though they had been commonplace for the King. The Founding Fathers were keenly aware of the dangers of executive power. Even James Wilson, who favored a strong Executive,⁵⁵ rejected "the Prerogatives of the British Monarch as a proper guide in defining the Executive powers."⁵⁶ He stated at the Pennsylvania Ratification Convention:

The executive power is better to be trusted when it has no screen. Sir, we have a responsibility in the person of our President; he cannot act improperly, and hide either his negligence or inattention; he cannot roll upon any other person the weight of his criminality * * *. Add to all this, that officer is placed high, and is possessed of power far from being contemptible; yet not a *single privilege* is annexed to his character * * *.⁵⁷

One might infer quite plausibly from the specific grant of official privileges to Congress that no other constitutional immunity from normal legal obligations was intended for government officials or papers. Indeed, Charles Pinckney stated in the Senate on *78 March 5, 1800, speaking of the express congressional privilege from arrest: They [the Framers] well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority should ever be exercised here. * * *

* * * * *

No privilege of this kind was intended for your Executive, nor any except that which I have mentioned for your Legislature.⁵⁸

The teaching of history is thus persuasive against the claim of an absolute Presidential prerogative to be immune from the judicial process. The Court of Appeals for the District of Columbia Circuit recognized this in rejecting President Nixon's claim of absolute immunity from a grand jury subpoena *duces tecum* (☞ *Nixon v. Sirica*, *supra*, 487 F. 2d at 711):

The Constitution makes no mention of special presidential immunities. Indeed, the Executive Branch generally is afforded none. * * * Lacking textual support, counsel for the President nonetheless would have

us infer immunity from the President's political mandate, or from his vulnerability to impeachment, or from his broad discretionary powers. These are invitations to refashion the Constitution, and we reject them.

*79 Similarly, a special panel composed of Senior Circuit Judges Johnsen, Lumbard and Breitenstein, speaking for the Seventh Circuit in connection with the prosecution of Circuit Judge Otto Kerner, recently rejected his argument, similar to the one made by counsel for the President, that the constitutional provision for impeachment (Art. I, Sec. 3, cl. 7) implicitly confers immunity on civil officers from the criminal process prior to impeachment and removal from office, *United States v. Isaacs and Kerner*, 493 F.2d 1124 (7th Cir. 1974), cert. denied, --- U.S. --- (June 17, 1974). The court concluded (493 F.2d at 1144): [W]hatever immunities or privileges the Constitution confers for the purpose of assuring the independence of the co-equal branches of government they do not exempt the members of those branches "from the operation of the ordinary criminal laws." Criminal conduct is not part of the necessary functions performed by public officials. Punishment for that conduct will not interfere with the legitimate operations of a branch of government.

The fact that the President is the *head* of the Executive Branch does not render these principles inapplicable here.⁵⁹ "We have no officers in this government from the President down to the most subordinate agent, who does not hold office under the law, with *80 prescribed duties and limited authority." *The Floyd Acceptances*, 7 Wall. (74 U.S.) 666, 676-77.

C. THE COURTS CAN ISSUE PROCESS TO THE PRESIDENT WHERE, AS HERE, IT DOES NOT INTERFERE WITH HIS EXERCISE OF DISCRETIONARY POWER BUT MERELY REQUIRES MINISTERIAL COMPLIANCE WITH A LEGAL DUTY

The argument that the President is immune from process is sometimes rested upon a misreading of *Mississippi v. Johnson*, 4 Wall. (71 U.S.) 475.⁶⁰ In that case the State of Mississippi sought leave to file an original bill to enjoin President Johnson from enforcing the Reconstruction Acts, which provided for reconstitution of the governments of the erstwhile Confederacy. Because the President was named as a defendant in the bill, this Court heard argument upon the question of jurisdiction before the bill was filed, instead of reserving the question to a later stage.⁶¹ Attorney General Stanbery argued to the Court that the President is "above the process of any court," asserting that "[h]e represents the majesty of the law and of the people as fully and as essentially, and with the same dignity, as does any absolute monarch or the head of any independent government in the world." 4 Wall. at 484.

*81 Faithful to the tradition that in the United States no man and no office are above the law, this Court refused to accept the Attorney General's claim of royal immunity for the President of the United States (4 Wall at 498). Rather, it held that it had "no jurisdiction of a bill to enjoin the President in the performance of his official duties" (4 Wall. at 501), distinguishing the power of the courts to require the President to perform a simple ministerial act from an attempt to control the exercise of his broad constitutional discretion (4 Wall. at 499):
In each of these cases [involving ministerial duties] nothing was left to discretion. There was no room for the exercise of judgment. The law required the performance of a single specific act; and that performance, it was held, might be required by mandamus.

Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill. * * * The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political.

Mississippi v. Johnson arose shortly after the Civil War, when there was a bitter political conflict over the proper national policy to be followed in dealing with the secessionist States. In declining to exercise its original jurisdiction over an equitable suit brought by a State seeking to enjoin the President from enforcing congressional policy, the Court had no occasion to decide that *no* federal court could ever issue *any* order to the President, and the Court was careful *82 to leave open the question of the President's amenability to the judicial process where only a clear legal duty, rather than the exercise of discretionary political judgment, is involved, as in the present case.

Shortly after the decision in *Mississippi v. Johnson*, the Court also declined jurisdiction of similar bills naming the Secretary of War or a military commander as respondent. *Georgia v. Stanton*, 6 Wall. (73 U.S.) 50. Their disposition is further proof that it was the character of the question presented and not the identity of the respondent that determined the issue in *Mississippi v. Johnson*. In the words of Chief Justice Marshall, “[i]t is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined.” *Marbury v. Madison*, *supra*, 1 Cranch at 170.

Later cases have confirmed that *Mississippi v. Johnson* did not turn on the fact that the respondent was the President, but was an early expression of the non-justiciability of “political questions.”⁶² This Court has cited the decision as an example of instances where the Court has refused “to entertain * * * original actions * * * that seek to embroil this tribunal in ‘political questions.’” *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 496.

*83 The crucial jurisdictional issue, then, is not the identity of the executive officer or the physical power to secure compliance with judicial orders,⁶³ but the Court's ability to resolve authoritatively the conflicting claims of legal rights and obligations. See *Baker v. Carr*, *supra*, 369 U.S. at 208-237. The Judiciary, of course, must be circumspect in issuing process against the President to avoid interference with the proper discharge of his executive functions. For example, it might not be proper, in the absence of strong necessity, to require the President to appear personally before a court if that appearance would interfere with his schedule or the performance of his duties. Similarly, the courts should not saddle the Chief Executive with requests that are administratively burdensome. Compare *United States v. Burr*, 25 Fed. Cas. 30, 34 (No. 14,692d) (C.C.D. Va. 1807). The court's discretionary power to control its own process and grant protective orders provides adequate safeguard against undue imposition on the President's time. Beyond that, there may be some Presidential acts that are beyond the court's ken entirely, such as his exercise of discretionary constitutional powers that implicate “political questions.” See *Mississippi v. Johnson*, *supra*, 4 Wall. at 499-501; *Marbury v. Madison*, *supra*, 1 Cranch at 165-66, 170. See also *National Treasury Employees Union v. Nixon*, 492 F. 2d 587, 606 (D.C. Cir. 1974).

But the question here is very different. The Court is called upon to adjudicate the obligation of the President, *84 as a citizen of the United States, to cooperate with a criminal prosecution by performing the solely ministerial task of producing specified recordings and documentary evidence. This Court has defined “ministerial duty” as “one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.” *Mississippi v. Johnson*, *supra*, 4 Wall. at 498. Judge Fahy, noting that “the word ‘ministerial’ is not sufficiently expressive to denote adequately every situation into which the courts may enter,” added, however, that “a duty often becomes ministerial only after a court has reached its own judgment about a disputable legal question and its application to a factual situation.” *Seaton v. Texas Co.*, 256 F. 2d 718, 723 (D.C. Cir. 1958). As we have shown above, the courts, and not the Executive, must decide the existence *vel non* of a privilege for evidence material to a criminal prosecution. A decision overruling the claim will be as fully binding on the President as it would be upon a subordinate executive officer who had custody or control of the subpoenaed evidence.⁶⁴

III. THE CONVERSATIONS DESCRIBED IN THE SUBPOENA RELATING TO WATERGATE LIE OUTSIDE THE EXECUTIVE PRIVILEGE FOR CONFIDENTIAL COMMUNICATIONS

The President, in his Formal Claim of Privilege submitted to the court below, asserted that the items *85 in the subpoena, other than the portions of twenty conversations already made public:

are confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce. Thus I must respectfully claim privilege with regard to them to the extent that they may have been recorded, or that there may be memoranda, papers, transcripts, or other writings relating to them.

The President was relying, of course, on “the long-standing judicial recognition of Executive privilege * * * [for] ‘intra-governmental documents reflecting * * * deliberations comprising part of a process by which governmental decisions and policies are formulated.’”⁶⁵ *Nixon v. Sirica, supra*, 487 F. 2d at 713.

The President made a similar claim in response to the grand jury's subpoena *duces tecum* at issue in the *86 earlier litigation involved in *Nixon v. Sirica*.⁶⁶ His counsel argued to the court that the “threat of potential disclosure of any and all conversations would make it virtually impossible for President Nixon or his successors in that great office to function.”⁶⁷ Counsel argued further that the President's absolute prerogative to withhold information “reaches any information that the President determines cannot be disclosed consistent with the public interest and the proper performance of his constitutional duties.”⁶⁸ Within the contours of the instant case, counsel for the President in effect poses the following question for the Court: Shall guilt or innocence in the criminal trials of former White House aides be determined upon full consideration of all the evidence found relevant, competent and unprivileged by due process of law? Or shall the evidence from the White House be confined to what a single person, highly interested in the outcome, is willing to make available?

By urging upon the courts the absolute, unreviewable discretion of the President to withhold evidence from the trial in *United States v. Mitchell, et al.*, *87 counsel for the President seemingly ignores the principle, articulated by Justice Reed, that executive privilege is granted “for the benefit of the public.”⁶⁹ *Kaiser Aluminum & Chemical Corp. v. United States, supra*, 157 F. Supp. at 944. Ultimately, the public interest must govern whether or not particular items are disclosed. When the participants in Presidential conversations are themselves subject to indictment and the subject matter of the conversations is material to the issues to be tried upon the indictment, denying the courts access to recordings of the conversations impedes the due administration of justice.

Moreover, production of the evidence sought, even upon order of the court, does not threaten wholesale disclosure of Presidential documents either now or in the future. It bears repeating that this is a case in which the other participants in the conversations are subject to indictment. The conversations covered by the present subpoena are demonstrably important-as the trial court below found-to defining the extent of the conspiracy in terms of time, membership, and objectives. Surely there will be few instances, if ever, where there are similar concrete circumstances warranting intrusion into an otherwise privileged domain of conversations involving the President and his aides. Thus, any slight risk that future conversations may be disclosable under such a standard hardly will intimidate Presidential aides in giving open and candid advice. Furthermore, the desirable public policy of encouraging frank advice to governmental officials does not and cannot depend on any expectation *88 of absolute confidentiality. It is almost common-place in our system for former officials, including Presidents, promptly to publish their memoirs, frequently based on documents reflecting governmental deliberations.⁶⁹ This is a generally understood phenomenon, and it is unthinkable that the court's entitlement to important evidence must be relegated to a lower priority.

Under these circumstances, the district court properly rejected the claim of privilege (Pet. App. 20), holding that the “Special Prosecutor’s submissions * * * constitute a *prima facie* showing adequate to rebut the presumption [of privilege] in each instance, and a demonstration of need sufficiently compelling to warrant judicial examination in chambers incident to weighing claims of privilege where the privilege has not been relinquished.” The court followed the “settled rule” that “the court must balance the moving party’s need for the documents in the litigation against the reasons which are asserted in defending their confidentiality.”

Committee for Nuclear Responsibility, Inc. v. Seaborg, supra, 463 F. 2d at 791. See also *United States v. Reynolds*, supra, 345 U.S. at 11; *Nixon v. Sirica*, supra, 487 F. 2d at 716; cf. *Doe v. McMillan*, supra, 412 U.S. at 320.

*89 Although the court below followed the “settled rule” of balancing particular need against the specific interest in confidentiality, that rule becomes applicable only where the “presumptive privilege” for the materials has not been vitiated by other factors. In the present case, there are two additional grounds for overruling the asserted privilege, each of which shows that the subpoenaed material has lost its character as “presumptively privileged.” First, the interest in confidentiality is never sufficient to support an official privilege where, as here, there is a *prima facie* showing that the subpoenaed materials cover conversations and activities in furtherance of a criminal conspiracy; thus, Watergate-related conversations are not even covered by the presumptive privilege recognized in *Nixon v. Sirica*, supra, 487 F. 2d at 717. Second, as we show in Part IV below, to the extent that the subpoenaed conversations relating to Watergate are deemed covered by some presumptive executive privilege, any claim to continued secrecy has been waived as a matter of law by the extensive testimony and public statements of participants, given with the President’s consent, concerning these conversations and by the President’s recent release of transcripts of forty-three Presidential conversations dealing with these issues.

Before turning to the discussion of the independent grounds for overruling the President’s claim of privilege, we briefly mention two basic principles that should guide this Court’s determination. First, whether particular documents or other materials are *90 privileged in the context of a criminal prosecution is *for judicial determination*—upon the extrinsic evidence if sufficient, but otherwise upon *in camera* inspection (see Part I(A), supra). Second, in making this determination, the Court must construe the privilege strictly. Evidentiary privileges generally are “an obstacle to the administration of justice” (8 Wigmore § 2192, at 73), and, as “so many derogations from [the] positive general rule” that the public has a right to every man’s evidence (*id.*, at 70), they must be confined to the narrowest limits justified by their underlying policies.⁷⁰ “To hold otherwise would be to invite gratuitous injury to citizens for little if any public purpose.” *Doe v. McMillan*, supra, 412 U.S. at 316-17. Such strictness in application of executive privilege conforms to the ideas of the Founding Fathers, who were keenly aware of the dangers of Executive secrecy.⁷¹

A. EXECUTIVE PRIVILEGE BASED UPON A NEED FOR CANDOR IN GOVERNMENTAL DELIBERATIONS DOES NOT APPLY WHERE THERE IS A PRIMA FACIE SHOWING THAT THE DISCUSSIONS WERE IN FURTHERANCE OF A CONTINUING CRIMINAL CONSPIRACY

As stated above, the only privilege relied upon by the President stems from his assertion that the “items sought are confidential conversations between a President and his close advisors.” We freely concede that a qualified or “presumptive” privilege normally attaches to “intra-governmental documents reflecting *91 advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966), aff’d on opinion below, 384 F. 2d 979 (D.C. Cir. 1967), cert. denied, 389 U.S. 952. But there can be no valid public policy affording the protection of executive privilege where there is a *prima facie* showing that the officials participating in the deliberations did so as part of a continuing criminal plan. In this case, where the grand jury has voted the Special Prosecutor the authority to identify the President himself as an unindicted co-conspirator in the events charged in the indictment and covered by the government’s subpoena, there is such a *prima facie* showing and the President is foreclosed from invoking a privilege that exists only to protect and promote the legitimate conduct of the Nation’s affairs.

The qualified privilege for governmental deliberations is based on “two important policy considerations * * *: encouraging full and candid intra-agency discussion, and shielding from disclosure the mental processes of executive and administrative officers.”⁷² *International Paper Co. v. Federal Power Commission*, 438 F.2d 1349, 1358-59 (2d Cir. 1971), cert. denied, 404 U.S. 827. The privilege, however, whether in the context of intra-agency communications or in *92 the context of deliberations at the highest level of the Executive Branch, exists only to promote the legitimate functioning of government. It cannot serve as a cloak to protect those charged with criminal wrong-doing. Executive privilege is granted “for the benefit of the public, not of executives who may happen to then hold office.” *Kaiser Aluminum & Chemical Corp. v. United States*, *supra*, 157 F. Supp. at 944.

This is a familiar principle in the law of evidentiary privileges generally. For example, a client may not hide behind the attorney-client privilege and prevent his attorney from being required to disclose plans of continuing criminal activity even though told to him in confidence. See, e.g., *United States v. Aldridge*, 484 F.2d 655 (7th Cir. 1973); *United States v. Rosenstein*, 474 F.2d 705 (2d Cir. 1973); *United States v. Shewfelt*, 455 F.2d 836 (9th Cir. 1972), cert. denied, 406 U.S. 944; *United States v. Bartlett*, 449 F.2d 700 (8th Cir. 1971), cert. denied, 405 U.S. 932; *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), cert. denied, 401 U.S. 974. Similarly, the courts have refused to recognize any privilege not to disclose communications by a patient which were not for the legitimate purpose of enabling the physician to prescribe treatment. See 8 Wigmore § 2383; McCormick, *Evidence* § 100 (2d ed. 1972). Even the privilege against disclosing marital communications or jury deliberations has been overruled when such communications were in furtherance of fraud or crime. See, e.g., *United States v. Kahn*, 471 F.2d 191 (7th Cir. 1972), *93 cert. denied, 411 U.S. 986. See generally Note, *Future Crime or Tort Exception to Communications Privileges*, 77 Harv. L. Rev. 730 (1964).

The Speech or Debate Clause provides a compelling illustration of this principle. That clause confers an explicit constitutional privilege on members of Congress in order to promote candid and vigorous deliberations in the Legislative Branch.⁷³ Like executive privilege, which is based upon the same underlying policies and interests, “[t]he immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process.” *United States v. Brewster*, *supra*, 408 U.S. at 507. The purpose of the Clause was to “assure a co-equal branch of the government wide freedom of speech, debate and deliberation without intimidation or threats from the Executive Branch.” *Gravel v. United States*, *supra*, 408 U.S. at 616. But even though the Clause protects a legislator in the performance of legislative acts, “it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts.” *Gravel v. United States*, *supra*, 408 U.S. at 626. See also *94 *Tenney v. Brandhove*, 341 U.S. 367, 376 (legislative immunity is restricted to “the sphere of legitimate legislative activity”). Thus, both the legislator and his aide may be compelled to give evidence in that situation, notwithstanding the explicit privilege. See also *Doe v. McMillan*, *supra*.

Similarly, discussions within the Executive Branch which are in furtherance of a criminal conspiracy cannot be subsumed within executive privilege. The privilege, which is limited by its underlying public purpose, see, e.g., *Halpern v. United States*, *supra*, 258 F.2d at 44, does not extend beyond the transaction of legitimate official activities so as to protect conversations that constitute evidence of official misconduct or crime. In *Rosee v. Board of Trade*, 36 F.R.D. 684, 690 (N.D. Ill. 1965), for example, the court overruled a claim of executive privilege invoked in the face of a substantiated charge of official misconduct where the party seeking the evidence showed “(1) that there is a reasonable basis for his request and (2) that the defendant government agents played some part in the operative events.”⁷⁴ When the governmental processes which are fostered and protected by a privilege of confidentiality are abused or subverted, the reasons for secrecy no longer exist and the privilege is lifted.

*95 Executive privilege compares in this respect to executive immunity. A government official, of course, may not be held liable for damages in a civil action for the consequences of acts within the scope of his official duties. *Barr v. Matteo*, 360 U.S. 564. This immunity, like privilege, has been considered necessary to foster “the fearless, vigorous, and effective administration of policies of government.” 360 U.S. at 571. But the immunity does not shield him for acts “manifestly or palpably beyond his authority.” *Spalding v. Vilas*, 161 U.S. 483, 498. See also *Doe v. McMillan*, *supra*; *Bivens v. Six Unknown Federal Bureau of Narcotics Agents*, 456 F.2d 1339 (2d Cir. 1972). And, as in the present case, the policy underlying executive immunity does not permit it to reach “so far as to immunize criminal conduct. * * *” *O’Shea v. Littleton*, *supra*, --- U.S. at --- (42 U.S.L.W. at 4144).

The Court of Appeals for the District of Columbia Circuit vividly highlighted the essence of this principle when it explained why the courts must not feel bound by the assertion of executive privilege but must instead scrutinize the propriety of the claim. “Otherwise,” the court said, “the head of any executive department would have the power on his own say so to cover up all evidence of fraud and corruption when a federal court or grand jury was investigating malfeasance in office, and this is not the law.” *Committee for Nuclear Responsibility, Inc. v. Seaborg*, *supra*, 463 F.2d at 794.

Justice Cardozo gave an eloquent statement of why this is not the law in *96 *Clark v. United States*, 289 U.S. 1, an analogous case dealing with the secrecy normally attaching to a jury’s deliberations. Speaking for a unanimous Court, he recognized that the privilege, based upon a need for confidentiality, is generally valid: “Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world.” 289 U.S. at 13. But Justice Cardozo also held that such a privilege, like other privileges based on the desirability of encouraging candid discourse and interplay, is subject to “conditions and exceptions” when there are other policies “competing for supremacy. It is then the function of the court to mediate between them.” *Ibid*. The Court then held that where there is a “showing of a *prima facie* case” (289 U.S. at 14) that the relation has been tainted by criminal misconduct, the interest in confidentiality must yield. The Court held that the jury’s privilege of confidentiality is dissipated if there is “evidence, direct or circumstantial, that money has been paid to a juror in consideration of his vote” (289 U.S. at 14). Justice Cardozo reasoned (*ibid*):

The privilege takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied, if the relation, honestly created and honestly main-juror may not invoke a relation dishonestly assumed as a cover and cloak for the concealment of the truth.

The Court then drew an analogy to the attorney-client privilege, one of the most venerable privileges in the *97 law, and emphasized: “The privilege takes flight if the relation is abused.” 289 U.S. at 215.⁷⁵

1. The grand jury’s finding is valid and is sufficient to show prima facie that the President was a co-conspirator

The present case is governed by these principles, as articulated in cases like *Clark*. On February 25, 1974, in the course of its consideration of the indictment in *United States v. Mitchell, et al.*, the grand jury, by a vote of 19-0, determined that there is probable cause to believe that Richard M. Nixon (among others) was a member of the conspiracy to defraud the United States and to obstruct justice charged in Count I of the indictment. The grand jury authorized the Special Prosecutor to identify Richard M. Nixon (among others) as an unindicted co-conspirator in connection with subsequent proceedings in *United States v. Mitchell, et al.* The district court below, denying the President’s motion to expunge the grand jury’s finding, ruled that this finding is relevant “to a determination that the presumption of privilege is overcome” (Pet. App. 23).

*98 The grand jury's authorization to the Special Prosecutor constitutes the requisite *prima facie* showing to negate any claim of executive privilege for the subpoenaed conversations relating to Watergate and is binding on the courts at this stage of the proceedings in *United States v. Mitchell, et al.* As this Court held in *Ex Parte United States*, 287 U.S. 241, 250, the vote of a "properly constituted grand jury conclusively determines the existence of probable cause * * *."⁷⁶ Despite the President's contention in No. 73-1834, therefore, the district court properly refused to expunge this finding.⁷⁷

*99 Each of the principal participants in the subpoenaed conversations has been identified by the grand jury as a co-conspirator, and, as demonstrated by the showing in the Appendix submitted to the district *100 court below in opposition to the President's motion to quash, it is probable that each of the subpoenaed conversations includes discussions in furtherance of the conspiracy charged in the indictment. Thus, there is no room to argue that the subpoenaed conversations are subject to a privilege that exists to protect the public's legitimate interests in effective representative government. The grand jury has returned an indictment charging criminal conduct by high officials in the Executive Branch, and the public interest requires no less than a trial based upon *all* relevant and material evidence relating to the charges.

In opposing the grand jury's subpoena *duces tecum*, counsel for the President argued that despite any showing that statements in the course of Presidential conversations were made in furtherance of a conspiracy to obstruct justice, the general principle of confidentiality must be maintained in order to assure the effective functioning of the Presidential staff system. *101 An analogous argument was made in *Clark* and decisively rejected by this Court in a passage we are constrained to quote at length (289 U.S. at 16):

With the aid of this analogy [to the attorney-client privilege] we recur to the social policies competing for supremacy. A privilege surviving until the relation is abused and vanishing when abuse is shown to the satisfaction of the judge has been found to be a workable technique for the protection of the confidences of client and attorney. Is there sufficient reason to believe that it will be found to be inadequate for the protection of a juror? No doubt the need is weighty that conduct in the jury room shall be untrammelled by the fear of embarrassing publicity. The need is no less weighty that it shall be pure and undefiled. A juror of integrity and reasonable firmness will not fear to speak his mind if the confidences of debate are barred to the ears of mere impertinence or malice. He will not expect to be shielded against the disclosure of his conduct in the event that there is evidence reflecting upon his honor. The chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the course of justice. It must yield to the overmastering need, so vital in our polity, of preserving trial by jury in its purity against the inroads of corruption.

It is hard to imagine a stronger need for piercing the cloak of confidentiality than in the present case. Requiring production of the evidence under these circumstances presents only a minimal threat to a President's ability to obtain advice from his aides with *102 complete freedom and candor, for surely there will be few occasions where there is probable cause to believe that conversations in the Executive Office of the President occurred during the course of and in furtherance of a criminal conspiracy. Counsel cannot seriously claim that the aides of any future President will be so "timid" in the face of such a remote danger of disclosure of their advice, or that some small risk of reticence is too great a price to pay to preserve the President's Office "against the inroads of corruption." In light of the grand jury's finding of probable cause to believe that the President was a co-conspirator in the indictment charging a conspiracy to defraud the United States and obstruct justice and the showing by the Special Prosecutor that the subpoenaed conversations in all probability occurred during the course of and in furtherance of the conspiracy, the conversations relating to Watergate cannot be shielded by a privilege designed to protect the objective, candid, and honest formulation of policy in government affairs.⁷⁸

***103 B. THE PUBLIC INTEREST IN DISCLOSURE OF RELEVANT CONVERSATIONS FOR USE AT TRIAL IN THIS CASE IS GREATER THAN THE PUBLIC INTEREST SERVED BY SECRECY**

Even apart from the *prima facie* showing that the President and the other participants in the subpoenaed conversations were co-conspirators, the claim of privilege cannot stand here. Executive privilege, unlike personal privileges (for example, the privilege against self incrimination) is an official privilege, granted for the benefit of the public, not of executives who may happen to hold office. Thus, when this privilege is asserted in a judicial proceeding as a reason for refusing to produce evidence, the overall public interest, as determined by the Judiciary, must control. It is now settled law "that application of Executive privilege depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case." ⁷⁶ *Nixon v. Sirica, supra*, 487 F. 2d at 716. See, e.g., ⁷⁷ *United States v. Reynolds, supra*, 345 U.S. at 11; ⁷⁸ *Carr v. Monroe Manufacturing Co., supra*, 431 F. 2d at 388; cf. ⁷⁹ *Doe v. McMillan, supra*, 412 U.S. at 320.

***104** Where the courts are left with the firm and abiding conviction that the public interest requires disclosure, particularly where disclosure does not pose any discernible threat to the interests protected by secrecy, the privilege must give way. Accordingly, even if the subpoenaed conversations here remain "presumptively privileged," despite the *prima facie* showing of the President's complicity, the privilege must yield. There is a compelling public interest in the availability of all relevant and material evidence for the trial of the charges in *United States v. Mitchell, et al.*, involving as they do a conspiracy to defraud the United States and obstruct justice by high government officials. The subpoenaed conversations consist of discussions by the defendants or other co-conspirators about the subject matter of the alleged conspiracy: Watergate. Such evidence is obviously of fundamental importance. Moreover, the public interest in continued secrecy is vastly diminished, if not nonexistent, in the wake of the extensive testimony on this subject permitted by the President and of the President's recent release of transcripts of parts of forty-three Presidential conversations relating to Watergate, including parts of twenty of the subpoenaed conversations.

1. The balancing process followed by the district court accords with decisions of this Court

In holding that the applicability of executive privilege depends upon a weighing of competing interests, the court in *Nixon v. Sirica* relied upon Chief Justice Marshall's decision in the misdemeanor trial of Aaron Burr. ⁸⁰ ***105** *United States v. Burr*, 25 Fed. Cas. 187 (No. 14,694) (C.C.D. Va. 1807). The Chief Justice, at the request of Burr, issued a subpoena duces tecum to the United States Attorney, who had possession of a letter written to President Jefferson by General Wilkinson. ⁸¹ In his return, the United States Attorney surrendered a copy of the letter "excepting such parts thereof as are, in my opinion, not material for the purposes of justice, for the defence of the accused, or pertinent to the issue now about to be joined." ⁸² 25 Fed. Cas. at 190. In ruling that only the President could assert "motives for declining to produce a particular paper" in such a situation, the Chief Justice did recognize "that the president might receive a letter which it would be improper to exhibit in public, because of the manifest inconvenience of its exposure." ⁸³ 25 Fed. Cas. at 191-92. The Chief Justice, however, clearly contemplated that the court could require production even though the President's showing was entitled to "much reliance": "The occasion for demanding it ought, in such a case, to be very strong, and to be fully shown to the court before its production could be insisted on." ⁸⁴ 25 Fed. Cas. at 192. ⁸⁵

***106** Similarly, this Court in *Reynolds, supra*, held that a claim of privilege may be rejected upon a sufficient showing ⁸⁶ (345 U.S. at 11):

Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted.

In reversing the lower court decisions which would have required *in camera* inspection to determine whether the privilege should be upheld, this Court held merely that there had only been a “dubious” showing of necessity for access to confidential investigative reports on the crash of a bomber testing secret equipment.⁸¹ Since state secrets were involved, the party seeking the evidence had not made the requisite threshold showing to overcome the presumptive privilege even to justify *in camera* inspection.

More recently the Court considered the government's privilege to withhold the identity of informants. *107 *Roviano v. United States*, *supra*. This privilege, like the privilege for government deliberations, encourages candor through secrecy. Persons are thought to be more likely to provide information to law enforcement agencies if they can remain anonymous. But the privilege is not absolute. “Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.” 353 U.S. at 60-61. See also *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*, 459 F. 2d 303, 305 (5th Cir. 1969).
 2. *There is a compelling public interest in trying the conspiracy charged in United States v. Mitchell, et al., upon all relevant and material evidence*

Whether one views the President's assertion of privilege as entitled to “much reliance,” see *United States v. Burr*, *supra*, 25 Fed. Cas. at 192, or “presumptively” valid, see *Nixon v. Sirica*, *supra*, 487 F. 2d at 717, the privilege is overcome here. In upholding the district court's order enforcing the grand jury's subpoena *duces tecum*, the court of appeals held that the “presumption of privilege * * * must fail in the face of the uniquely powerful showing made by the Special Prosecutor in this case.” *Nixon v. Sirica*, *supra*, 487 F. 2d at 717. According to the court, this showing was made possible by the “unique intermeshing of events unlikely soon, if ever, to recur.” 487 F. 2d at 705. It is clear that the “unique” circumstances which led to the rejection of the President's *108 claim of privilege in the context of a grand jury investigation have continued applicability. Indeed, now that the grand jury has returned an indictment charging a conspiracy to defraud the United States and obstruct justice, the need for full disclosure is, if anything, greater.

At the time *Nixon v. Sirica* was decided, the grand jury was investigating mere allegations of criminal wrongdoing by high government officials. That investigation has resulted in a finding of probable cause to believe that some of those officials have committed offenses which strike at the very essence of a “government of laws.” It is precisely this type of situation where this Court has spoken of the “over-mastering” need for preserving our institutions against “the inroads of corruption,” even to the extent of overcoming a privilege of confidentiality. *Clark v. United States*, *supra*, 289 U.S. at 16. The warning of the court of appeals in *Committee for Nuclear Responsibility, Inc. v. Seaborg*, *supra*, 463 F. 2d at 794, bears repeating:

But no executive official or agency can be given absolute authority to determine what documents in his possession may be considered by the court in its task. Otherwise the head of an executive department would have the power on his own say so to cover up all evidence of fraud and corruption when a federal court or grand jury was investigating malfeasance in office, and this is not the law.

That the privilege must yield regardless of the President's involvement is easily demonstrated by analogy. Justice Cardozo's opinion in *Clark* indicated that if there were direct or substantial evidence that *109 a juror had accepted a bribe, the veil of secrecy ordinarily surrounding a jury's deliberations would be dissipated and the arguments and votes of even the unsuspected jurors would be admissible as evidence upon whether the putatively guilty juror had in fact taken a bribe. 289 U.S. at 16. It would seem clear that, if there were a *prima facie* showing that a high executive official had accepted a bribe in consideration

of his fraudulently inducing the President to grant a pardon or take other executive action favorable to the one giving the bribe, executive privilege would not be allowed to bar proof of the official's representations to the President even though the President was totally ignorant of the wrongdoing and had acted innocently in exercising his constitutional powers. So here, regardless of the President's wish, the law cannot and does not recognize a privilege that would shield a miscreant adviser from prosecution for a criminal offense in violation of the President's confidence as well as his public trust.

It is thus immaterial whether the President was actually aware that other participants in the conversations were discussing criminal activities in which they themselves were involved. The district court below found that the Special Prosecutor had made a sufficient showing of relevancy and evidentiary value with respect to the subpoenaed conversations (Pet. App. 19-20), since the conversations are material to defining the scope, membership, and objects of the conspiracy. The public interest in laying this evidence before a jury, therefore, must be considered compelling.

*110 The President himself emphasized this interest, albeit in the context of impeachment, in discussing the factors that persuaded him to release transcripts of portions of forty-three conversations dealing with Watergate-

I believe all the American people, as well as their Representatives in Congress, are entitled to have not only the facts, but also the evidence that demonstrates those facts.⁸²

This judgment is highly relevant to any balance drawn by the courts. See *Nixon v. Sirica*, *supra*, 487 F. 2d at 717-18.

Counsel for the President, in his memorandum in support of the motion to quash, argued that because the Special Prosecutor signed the indictment, he must have been satisfied that there was sufficient evidence available to him to make a *prima facie* showing of guilt, thereby suggesting that the Special Prosecutor should be content with the evidence now available to him. The indictment, of course, rests upon the requisite finding of probable cause. The standard that the government now bears, however, is proof beyond a reasonable doubt, and the public is entitled to the most effective presentation of its case that can be made. Justice will be done here only if the jury hears the whole story and not just the excerpted evidence the President chooses to make available.

*111 This is not a case where the government is seeking incriminating evidence which is merely cumulative or corroborative. The analysis of the released transcripts in the Appendix submitted to the district court shows that conversations not previously available to the Special Prosecutor in fact contain evidence extremely important to material issues in the indictment-evidence that would not otherwise be available to the Special Prosecutor. See *Nixon v. Sirica*, *supra*, 487 F. 2d at 717.⁸³ Two of the principal areas are discussions relating *112 to the future testimony of White House officials and campaign aides and discussions of how to handle executive clemency and other benefits for various individuals as charged in the indictment. As the analysis in the Appendix shows, it is likely that the forty-four subpoenaed conversations for which no transcripts have been released include additional evidence which also is not merely cumulative or corroborative. When one is considering an on-going conspiracy, evidence of each link in the conspiracy, either in terms of time or in terms of objectives, may be crucial to a successful prosecution.⁸⁴

*113 We note that there has been not as much as a suggestion from counsel for the President that any of the subpoenaed conversations are *not* relevant to the criminal trial. Moreover, we emphasize that neither the President nor his counsel is in a position to make the refined judgments as to what evidence is necessary to the Special Prosecutor's case in chief or for use on cross-examination. Neither is familiar with the evidence in the possession of the government or with the theory on which the

government's case will be prosecuted. In our adversary system, the judgments of what evidence to offer and how to use that evidence must be left to the advocates. See, e.g., *Dennis v. United States*, 384 U.S. 855, 874-75.

The court of appeals in *Nixon v. Sirica* also emphasized the impact of existing contradictory testimony. E.g., 487 F. 2d at 705. Since that decision, the debate over the credibility of witnesses has heightened. On May 4, 1974, during the pendency of the present motion, the White House released a memorandum based on its expurgated transcripts, attacking the credibility of a prospective government witness, John W. Dean. 32 Congressional Quarterly 1154 (May 11, 1974). Conflicts in testimony continue. The tape recordings *114 of Presidential conversations will be critical to resolving these conflicts and weighing the credibility of trial witnesses.

3. Disclosure of the subpoenaed recordings will not significantly impair the interests protected by secrecy

It is axiomatic, of course, that once privileged communications are no longer confidential, the privilege no longer applies and the public interest no longer is served by secrecy. See, e.g., *Roviaro v. United States*, supra, 353 U.S. at 60. In *Nixon v. Sirica*, the court of appeals considered important to its calculus that “the public testimony given consequent to the President's decision [on May 22, 1973, to waive executive privilege] substantially diminishes the interest in maintaining the confidentiality of conversations pertinent to Watergate.” 487 F. 2d at 718. We argue in Part IV below that, as a matter of law, the President, as a result of his May 22, 1973, statement and the recent release of transcripts of portions of forty-three Presidential conversations, has waived executive privilege with respect to any Watergate-related conversations. There simply is no confidentiality left in that subject and no justification in terms of the public interest in keeping from public scrutiny the best evidence of what transpired in Watergate-related conversations. Whether or not this Court agrees that there has been a waiver as a matter of law, the “diminished interest in maintaining the confidentiality of conversations pertinent to Watergate” is an important consideration in this case in drawing any balance.

The enforcement of the subpoena in this case marks only the most modest and measured displacement of *115 presumptive privacy for Presidential conversations, and augurs no general assault on the legitimate scope of that privilege. This is not a civil proceeding between private parties or even between the United States and a private party, where masses of confidential communications might be arguably relevant in wide-ranging civil discovery. The more vigorous standards applicable in a criminal case have been satisfied here, and they sharply narrow the scope of possible future demands for such evidence. Nor is this one of a long history of congressional investigations seeking to expose to the glare of publicity the policies and activities of the Executive Branch. In such instances the evidence is often sought in order to probe the mental processes of the Executive Office in a review of the wisdom or rationale of official Executive action. Compare *Morgan v. United States*, 304 U.S. 1, 18; *United States v. Morgan*, 313 U.S. 409, 422. The threat to freedom and candor in giving advice is probably at the maximum in such proceedings; they invite bringing to bear upon aides and advisors the pressures of publicity and political criticism, the fear of which may discourage candid advice and robust debate.

The charges to be prosecuted here involve high Presidential assistants and criminal conduct in the Executive Office. Such involvement is virtually unique. Because it is hopefully-unlikely to recur, production of White House documents in this prosecution will establish no precedent to cause unwarranted fears by future Presidents and their aides or to deter them from full, frank and vigorous discussion of legitimate *116 governmental issues. Indeed, future aides may well feel that the greatest danger they face in engaging in free and trusting discussion is the type of partial, one-sided revelations that the President has encouraged in this case.

4. The balance in this case overwhelmingly mandates in favor of disclosure

Certainly, courts should not lightly override the assertion of executive privilege. But the privilege is sufficiently protected if it yields only when the courts are left with the firm and abiding conviction that the public interest requires disclosure. The factors in this case overwhelmingly support a ruling that Watergate-related Presidential conversations are not privileged in response to a reasonable demand for use at the trial in *United States v. Mitchell, et al.* There is probable cause to believe, based upon the indictment, that high Executive officers engaged in discussions in furtherance of a criminal conspiracy in the course of their deliberations. The veil of secrecy must be lifted; the legitimate interests of the Presidency and the public demand this action.

IV. ANY PRIVILEGE ATTACHING TO THE SUBPOENAED CONVERSATIONS RELATING TO WATERGATE HAS BEEN WAIVED AS A RESULT OF PERVASIVE DISCLOSURES MADE WITH THE PRESIDENT'S EXPRESS CONSENT

Even if the conversations described in the subpoena could be regarded as covered by a privilege for executive confidentiality, the privilege cannot be claimed in the face of the President's decision to authorize voluminous testimony and other statements concerning *117 Watergate-related discussions and his recent release of 1,216 pages of transcript from forty-three Presidential conversations, including twenty covered by the present subpoena. In his Formal Claim of Privilege submitted to the district court, the President stated that because "[p]ortions of twenty of the conversations described in the subpoena have been made public, no claim of privilege is advanced with regard to those Watergate related portions of those conversations." This concession reflects inevitable recognition that there can be no generalized claim of executive privilege based upon confidentiality where, in fact, no confidentiality exists. "[T]he moment confidence ceases, privilege ceases." *Parkhurst v. Lowten*, 36 Eng. Rep. 589, 596 (Ch. 1819). But as we show below, the waiver in this case extends beyond those transcripts released publicly, since a privilege holder may not make extensive but selective disclosures concerning a subject and then withhold portions that are essential to a complete and impartial record. The circumstances of this case compel the conclusion that, as a matter of law, the President has waived executive privilege with respect to *all* Watergate-related conversations described in the subpoena.

The rule that voluntary disclosure eliminates any privilege that would otherwise attach to confidential information has been applied in cases dealing with claims of governmental privilege, *Roviano v. United States, supra*, 353 U.S. 53; *Westinghouse Electric Corp. v. City of Burlington*, 351 F. 2d 762 (D.C. Cir. 1965), as well as in cases dealing with attorney-client *118 privilege, *Hunt v. Blackburn*, 128 U.S. 464; *United States v. Woodall*, 438 F. 2d 1317, 1325 (5th Cir. 1970); physician-patient privilege, *Munzer v. Swedish American Line*, 35 F. Supp. 493 (S.D.N.Y. 1940); and marital privilege, *Pereira v. United States*, 347 U.S. 1, 6. The general principles governing waiver are stated concisely and forcefully in Rule 37 of the Uniform Rules of Evidence.⁸⁵

A person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specified matter has no such privilege with respect to that matter if the judge finds that he * * * without coercion and with the knowledge of his privilege, made disclosure of any part of the matter or consented to such a disclosure made by any one.

This is precisely the situation here. In his statement of May 22, 1973, the President announced, in light of the importance of the "effort to arrive at the truth," that "executive privilege will not be invoked as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct, in the matters presently under investigation, including the Watergate affair and the alleged cover-up."⁸⁶ As the Court can judicially notice, in the months following that statement there has been extensive testimony in several *119 forums concerning the substance of the recorded conversations now sought for use at the trial in *United States v. Mitchell, et al.* The testimony, as the Court is also aware, is quite often contradictory and is pervaded by hazy recollections. See also *Nixon v. Sirica, supra*, 487 F. 2d at 705.

It could be argued that the express waiver of May 22, 1973, coupled with the subsequent testimony of participants in the conversations, is itself sufficient to preclude a claim of executive privilege based upon confidentiality for Watergate-related conversations. There has been a supervening event, however, which as a matter of law removes any vestige of confidentiality in the President's discussions of Watergate with Messrs. Colson, Dean, Ehrlichman and Haldeman. On April 30, 1974, the

President submitted to the Committee on the Judiciary of the House of Representatives and released to the public 1,216 pages of transcript from forty-three Watergate-related Presidential conversations.⁸⁷ The conversations range over the period from September 15, 1972, until April 27, 1973.

In his address on live television and radio on the evening prior to releasing the transcripts, the President explained that he was seeking “[t]o complete the record.” He further explained: “As far as what the President personally knew and did with regard to Watergate and the cover-up is concerned, these materials-together *120 with those already made available, will tell it all.”⁸⁸ This statement is not literally accurate, but it is true that the broad outlines of the President's conversations and conduct throughout the relevant period may be portrayed by the transcripts that have been publicly released. These disclosures are sufficient to cede any privilege to conceal from production pursuant to the subpoena either the original tapes from which the publicly released transcripts were purportedly made or the tapes of other relevant conversations which necessarily complete the picture the public and the jury are entitled to see.

A privilege holder who opens the door to an area that was once confidential can no longer control the fact-finder's search for the whole truth by attempting to limit the ability to discern the interior fully. The boundaries of the disclosure are legally no longer within his exclusive control. For example, in cases involving the analogous privileges accorded to attorney-client and physician-patient communications, it is clear that once testimony has been received as to a particular communication, either with the consent of the holder of the privilege or without his objection, the privilege is lost. There can be no assertion of the privilege to block access to another version of the conversation. See, e.g., *Hunt v. Blackburn*, *supra*, 128 U.S. at 470-71; *Rosenfeld v. Ungar*, 25 F.R.D. 340, 342 (S.D. Iowa 1960); *Munzer v. Swedish American Line*, *supra*, 35 F. Supp. at 497-98; *In re Associated Gas & *121 Electric Co.*, 59 F. Supp. 743, 744 (S.D. N.Y. 1944); 8 Wigmore §§ 2327, 2389, at 636 and 855-61.

The same principles apply to the Fifth Amendment's privilege against self-incrimination. Once the privilege holder elects to disclose his version of what happened, a due “regard for the function of courts of justice to ascertain the truth” requires further disclosure “on the matters relevantly raised by that testimony.” *Brown v. United States*, 356 U.S. 148, 156, 157. Once the privilege holder has opened the door, “he is not permitted to stop, but must go on and make a full disclosure.” *Brown v. Walker*, 161 U.S. 591, 597.

There is still another dimension that the Court should consider. The President in the past has used the recordings of Presidential conversations to aid in the presentation of the White House interpretation of relevant events. For example, in June 1973, the White House transmitted a memorandum to the Senate Select Committee on Presidential Campaign Activities listing “certain oral communications” between the President and John W. Dean. Subsequently, but prior to Mr. Dean's testimony before the Committee, J. Fred Buzhardt, Special Counsel to the President, telephoned Fred D. Thompson, to relate to him Mr. Buzhardt's “understanding as to the substance” of twenty of the meetings.⁸⁹

The President also has allowed, indeed requested, the recordings to be used in preparing public testimony. *122 Defendant H. R. Haldeman, one of the respondents in the case before the Court and hardly a disinterested witness, was allowed to take home the tapes of selected conversations even after he had resigned his position as Assistant to the President and to use them in preparing his testimony.⁹⁰

The general principle that the privilege holder's offer of his own version of confidential communications constitutes a waiver as to all communications on the same subject matter governs under these circumstances. “This is so because the privilege of secret consultation is intended only as an incidental means of defense, and not as an independent means of attack, and to use it in the latter character is to abandon it in the former.” 8 Wigmore § 2327, at 638. The President time and again—even before the existence of the recordings was publicly known—has resorted to the recordings in support of his position.⁹¹ In short, the President cannot have it both ways. He cannot release only those portions he chooses and then stand on the privilege to conceal the remainder. No privilege holder can trifle with the judicial search for truth in this way.

*123 The high probability that the yet undisclosed conversations include information which will be important to resolving issues to be tried in *United States v. Mitchell, et al.* provides a compelling reason for disclosure. As the President himself recognized, the public interest demands the complete story based upon the impartial sifting and weighing of all relevant evidence. That is emphatically the province of the judicial process for it is "the function of a trial * * * to sift the truth from a mass of contradictory evidence. * * *" *In the Matter of Michael*, 326 U.S. 224, 227. And in the unique circumstances of this case, where there is no longer any substantial confidentiality on the subject of Watergate because the President has chosen to make far-reaching but expurgated disclosures, the Court must use its process to acquire all relevant evidence to lay before the jury. In the present context it can do so with the least consequences for confidentiality of other matters and future deliberations of the Executive Branch by ruling that there has been a waiver with respect to this entire affair.

V. THE DISTRICT COURT PROPERLY DETERMINED THAT THE SUBPOENA "DUCES TECUM" ISSUED TO THE PRESIDENT SATISFIED THE STANDARDS OF RULE 17(C), BECAUSE AN ADEQUATE SHOWING HAD BEEN MADE THAT THE SUBPOENAED ITEMS ARE RELEVANT AND EVIDENTIARY

Once the privilege issues are passed,⁹² the only remaining question before the Court is whether the district judge properly found (Pet. App. 19-20) that the *124 government's subpoena satisfied the standards generally applied under Rule 17(c) of the Federal Rules of Criminal Procedure. The district court held that the standards of Rule 17(c) had been satisfied by the Special Prosecutor's submission of a lengthy and detailed specification setting out with particularity the relevance and evidentiary value of each of the tape recordings and other material being sought. This showing was submitted as a forty-nine page Appendix to the Memorandum for the United States in Opposition to the Motion to Quash Subpoena Duces Tecum included in the record before this Court.⁹³

Enforcement of a trial subpoena *duces tecum* is preeminently a question for the trial court and is committed to the court's sound discretion. For this reason, the district court's determination should not be disturbed absent a finding by the reviewing court that it was arbitrary and had no support in the record. See *125 *Covey Oil Co. v. Continental Oil Co.*, 340 F. 2d 993, 999 (10th Cir. 1965), cert. denied, 380 U.S. 964; *Sue v. Chicago Transit Authority*, 279 F. 2d 416, 419 (7th Cir. 1960); *Schwimmer v. United States*, 232 F. 2d 855, 864 (8th Cir. 1956), cert. denied, 352 U.S. 833; *Shotkin v. Nelson*, 146 F. 2d 402 (10th Cir. 1944). This is especially true where, as here, the assessment of the relevancy and evidentiary value of the items sought is primarily a determination of fact and the district judge is intimately familiar with the grand jury's investigation and the indictment in the case. Since the district court's findings are amply supported by the record and reflect the application of the proper legal criteria, those findings should not be disturbed by this Court. Indeed, in the absence of any dispute between the parties on the correctness of the legal principles applied by the district court under Rule 17(c), this essentially factual determination ordinarily would not merit review by this Court at all. In the interest of final disposition of the case, however, we urge the Court to uphold the lower court's action on this aspect of the case as well.

A. RULE 17(C) PERMITS THE GOVERNMENT TO OBTAIN RELEVANT, EVIDENTIARY MATERIAL SOUGHT IN GOOD FAITH FOR USE AT TRIAL

Rule 17(c) provides:

A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced *126 before the court at a time prior to the trial or prior to

the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

As all parties and the district court recognized (Pet. App. 19), the leading cases establishing the criteria for satisfaction of Rule 17(c) are *Bowman Dairy Co. v. United States*, *supra*, 341 U.S. 214, and *United States v. Iozia*, 13 F.R.D. 335 (S.D.N.Y. 1952). See generally 8 Moore, Federal Practice ¶ 17.07 (1973). In *Bowman Dairy*, the Court held that the government properly had been ordered, under Rule 17(c), to produce to the defendant prior to trial all documents, books, records, and objects gathered by the government during its investigation or preparation for trial which were either presented to the grand jury or would be offered as evidence at trial. The Court upheld the order to produce even though the defendant's subpoena did not further specify particular items sought.

In *Iozia*, the question presented was whether defendant properly could obtain material from the government under Rule 17(c) upon a mere showing that it might be material to the preparation of the defense. The district court, elaborating upon the *Bowman Dairy* standard, declared that a mere showing of possible use in pre-trial preparation was insufficient: the defendant must show (1) that the material was evidentiary and relevant, (2) that it was not otherwise procurable reasonably in advance of trial, (3) that the party seeking it could not properly prepare for trial *127 without it and failure to obtain it might delay trial, and (4) that the request was made in good faith and did not constitute a general "fishing expedition." These were the tests the district court below stated it was applying when it found that "the requirements of Rule 17(c) are here met" (Pet. App. 20).

The standard of relevancy established by these cases is clear. Material being sought under Rule 17(c) is relevant if it is "related to the charges" in the indictment, *United States v. Gross*, 24 F.R.D. 138, 140 (S.D.N.Y. 1959), or "closely related to the subject matter of the indictment," *United States v. Iozia*, *supra*, 13 F.R.D. at 339, even though it might not, for example, "serve to exonerate this defendant of the crime charged * * *." *Ibid.*

In contrast, the requirement that the material sought be "evidentiary" has not been as well defined in the case law. See 8 Moore, *supra*, ¶ 17.07, at 17-19. In the district court, counsel for the President asserted that under Rule 17(c) the government must show that the items sought would be admissible at trial in its case in chief. The reported decisions, however, show that the purpose of the "evidentiary" requirement articulated in *Bowman* and *Iozia* is to oblige the party seeking production to show that the items sought are of a character that they could be used in the trial itself, not simply for general pre-trial preparation. Thus, a subpoena can seek not only evidence that would be admissible in the party's direct case but can also demand material that could be used for impeachment purposes. "Rule 17(c) is applicable only *128 to such documents or objects as would be admissible in evidence at the trial, or which may be used for impeachment purposes." *United States v. Carter*, 15 F.R.D. 367, 371 (D.D.C. 1954) (Holtzoff, J.). See also 8 Moore, *supra*, ¶ 17.07, n. 16 ("the documents sought must be admissible in evidence (at least for the purpose of impeachment)").⁹⁴ For example, evidentiary material sought by the government such as prior inconsistent statements by defendants, even if not pertinent in the government's case in chief, would be admissible for purposes of impeachment if a defendant took the stand or in the government's rebuttal case.

Moreover, the "evidentiary" requirement of *Bowman Dairy* and *Iozia* has developed almost exclusively in cases in which defendants sought material prior to trial from the government in addition to that to which they were entitled by the comprehensive pre-trial discovery provisions of Rule 16 of the Federal Rules of Criminal Procedure. Courts have, therefore, taken special care, as the *Bowman* and *Iozia* opinions show, to insure that Rule 17(c) not be used as a device to circumvent the limitations on criminal pre-trial discovery *129 embodied in Rule 16. Rule 16 provides only for discovery from the parties. By contrast, in the instant case the government seeks material from what is in effect, as the district court observed, a third party. As applied to evidence in the possession of third parties, Rule 17(c) simply codifies the traditional right of the prosecution or the defense to seek evidence for trial by a subpoena *duces tecum*. Whether the stringent standards developed in *Bowman Dairy* and *Iozia* for Rule 17(c) subpoenas between the prosecution and the defense should be applied to subpoenas to third parties is a question

the Court need not reach, however, since the court below correctly found that the Special Prosecutor had fully met even the higher standards.

The final requirement enunciated in *Iozia*, that the application be made “in good faith” and not “as a general fishing expedition,” appears to be simply a requirement that the materials sought be sufficiently identifiable that the court can make a determination that they exist, that they are relevant, and that they would have some evidentiary use at trial. Indeed, the standard most often applied after *Iozia* in determining enforceability of subpoenas under Rule 17(c) appears to be a combination of the *Iozia* requirements of relevancy, evidentiary value, and good faith: the subpoena must be an “honest effort to obtain evidence for use on trial.” *United States v. Gross*, *supra*, 24 F.R.D. at 141; *United States v. Solomon*, 26 F.R.D. 397, 407 (S.D. Ill. 1960); *United States v. Jannuzio*, 22 F.R.D. 223 (D. Del. 1958).

*130 In the district court, counsel for the President took the position that a subpoena should be considered a “fishing expedition” unless the party seeking its enforcement can make a *conclusive* showing that each and every item sought is, beyond doubt, both relevant and evidentiary. As to the majority of conversations involved in the subpoena, this standard is satisfied by consideration of the transcripts made public by the White House, uncontradicted testimony, and other evidence. As to the remaining conversations, there is strong and un rebutted circumstantial evidence—the inferences from which are not denied—indicating that the standard is met.

But the position urged by counsel for the President is not supported and indeed is contradicted by the reported decisions. For instance, the subpoena held enforceable in *Bowman Dairy* was directed to all material in the government’s possession that had been presented to the grand jury in the course of the investigation or that would be presented at trial, without further specificity. The subpoena held enforceable in *Iozia* was directed at certain documents, correspondence, and files of a former associate of the defendant. The defendant alleged that he had reason to believe that certain activities may have been engaged in by still other persons and that the former associate was “in the best position to know” about these if they indeed occurred. The cases realistically recognize that the party seeking production often cannot know precisely what is contained in the material sought until he has the opportunity to inspect it. The Court in *Bowman Dairy*, for example, quoted with approval the statement of a member of the Advisory Committee on the Criminal Rules, to the effect that the purpose of Rule 17(c) was to permit a court to order production in advance of trial “for the purpose of course of enabling the party to see whether he can use it or whether he wants to use it.” 341 U.S. at 220 n. 5. Common sense dictates that the party seeking production cannot tell what it “can or will use until it has had the opportunity to see the documents.” *United States v. Gross*, *supra*, 24 F.R.D. at 141. As Chief Justice Marshall observed in considering a trial subpoena *duces tecum* directed to President Jefferson in *United States v. Burr*, *supra*, 25 Fed. Cas. at 191: “It is objected that the particular passages of the letter which are required are not pointed out. But how can this be done while the letter itself is withheld?”

Because the Special Prosecutor has been denied even preliminary access to the subpoenaed materials, it is obviously impossible for him to demonstrate *conclusively* with respect to a small number of the conversations that they are relevant and evidentiary. But Rule 17(c) and the cases interpreting it do not require that this be done. Rather, they require only that an adequate showing of relevancy and evidentiary value be made, based upon the evidence available. In short, A predetermination of the admissibility of the subpoenaed material is not the criterion of the validity of the process. It need only appear that the subpoena is being utilized in good faith to *132 obtain evidence * * * [citing *Bowman Dairy*]. *United States v. Jannuzio*, *supra*, 22 F.R.D. at 226.

B. THERE WAS AMPLE SUPPORT FOR THE FINDING OF THE DISTRICT COURT THAT THE GOVERNMENT’S SHOWING OF RELEVANCY AND EVIDENTIARY VALUE WAS ADEQUATE TO SATISFY RULE 17(C)

1. Relevance

Transcripts released to the public by the White House, uncontradicted testimony concerning the subject matter of certain conversations, and other evidence compiled in the Special Prosecutor's showing establish beyond any question the relevancy of the vast majority of the subpoenaed conversations.⁹⁵ Indeed, the White House transcripts that have been released of twenty of the subpoenaed conversations not only show conclusively the relevancy of those conversations but also tend to prove the relevancy of the rest of the sixty-four conversations sought by the subpoena.⁹⁶

*133 With respect to some of the conversations, particularly those listed in Items 32-40 of the subpoena, relevancy can be established at this time only by circumstantial and indirect evidence. Nevertheless, the available evidence that these conversations—all of which took place in the three days from April 18 to April 20, 1973—in fact concerned Watergate is strong. The evidence, set forth in detail in the government's Appendix below, shows that the primary subject of concern to the participants in the meetings sought over those three days—the President and defendants Haldeman and Ehrlichman—was Watergate; that Haldeman and Ehrlichman had withdrawn from their regular White House duties to work exclusively on a Watergate defense; and that meetings between these three persons very probably could have concerned only Watergate. Furthermore, with respect to these conversations, the evidence that is available is un rebutted. The Special Prosecutor argued below that since only the President was in a position to make more informed representations about the relevancy of the subpoenaed conversations, the showing made by the Special Prosecutor was at least sufficient to shift the burden to the President to demonstrate any alleged irrelevancy to the district court by providing the appropriate recordings for *in camera* inspection. In subsequent oral argument in the district court counsel to the President, responding to direct questions *134 from the court, stated that he could make no representations whatever concerning the relevancy *vel non* of any of the subpoenaed conversations.⁹⁷

2. Evidentiary nature

Tape recordings of conversations are admissible as evidence upon the laying of a proper and adequate foundation showing that “the recording as a whole [is] accurate and sufficiently complete.”⁹⁸ This foundation may be laid by the testimony of one of the participants in the conversation that the recording accurately represents the conversation that was held.⁹⁹ Alternatively, the government could introduce a recording in its direct case even if none of the participants were available as a prosecution witness by showing the circumstances and method by which the recording was made and the chain of custody of the particular recording sought to be introduced.¹⁰⁰

There can be no doubt that the tape recordings sought by the subpoena here, covering conversations of co-conspirators relating to the subject matter of *135 the alleged conspiracy, are of an evidentiary character. In *Nixon v. Sirica*, *supra*, in upholding enforcement of an earlier subpoena for Presidential tapes, the court squarely held: “Where it is proper to testify about oral conversations, taped recordings of those conversations are admissible as probative and corroborative of the truth concerning the testimony.”¹⁰¹ 487 F. 2d at 718 (footnote omitted). The same principle would apply to use of such recordings for impeachment purposes. Such materials are, therefore, amenable to a trial subpoena. In *Monroe v. United States*, 234 F. 2d 49, 55 (D.C. Cir. 1956), cert. denied, 352 U.S. 873, the court of appeals held that tape recordings made by a police officer of conversations between himself and defendants were “admissible as independent evidence of what occurred” and that they “were evidentiary, and therefore under the interpretation of Rule 17(c) adopted by the Supreme Court [in *Bowman Diary*] and already followed by this Court, the trial court in its discretion could have required pre-trial production.”¹⁰¹ See also *United States v. Lemonakis*, 485 F. 2d 941 (D.C. Cir. 1973), cert. denied, --- U.S. --- (42 U.S.L.W. 3541, March 26, 1974).

Statements recorded on tapes sought by the instant subpoena, while hearsay for some purposes, but see *136 *Anderson v. United States*, --- U.S. --- (42 U.S.L.W. 4815, June 3, 1974), would be admissible into evidence in the government's case in chief under one or more of the traditional exceptions to the hearsay rule.

First, it is settled that extra-judicial admissions made by one conspirator in the course of and in furtherance of a conspiracy are admissible against his fellow co-conspirators. *Dutton v. Evans*, 400 U.S. 74, 81 (1970); *Myers v. United States*, 377 F. 2d

412, 418-19 (5th Cir. 1967), cert. denied, 390 U.S. 929. Each of the principal participants in the subpoenaed conversations either has been indicted as a conspirator or will be named as an unindicted co-conspirator in the government's bill of particulars. As the Special Prosecutor demonstrated in his showing, the transcripts released by the White House, together with both direct and circumstantial evidence, establish a very strong probability that substantial portions of each and every one of the subpoenaed conversations occurred in the course of and in furtherance of the conspiracy alleged in the indictment. Subject to proof of this fact at trial, any recorded statements in furtherance of the conspiratorial objectives made by any one of the conspirators in the course of these conversations would be admissible under the co-conspirator exception to the hearsay rule.

Second, even absent proof *aliunde* that each and every subpoenaed conversation was held in the furtherance of the conspiracy, any relevant taped extra-judicial statements made by defendants Haldeman or *137 Ehrlichman would be admissible in the government's case in chief against that particular defendant. On *138 *Lee v. United States*, 343 U.S. 747, 756; *139 *United States v. Lemonakis*, *supra*, 485 F. 2d at 949.

Furthermore, other recorded statements made during these conversations may be useful to the government for the purpose of impeaching defendants Haldeman or Ehrlichman should they elect to testify in their own behalf. *E.g.*, *Calumet Broadcasting Corp. v. FCC*, 160 F. 2d 285, 288 (D.C. Cir. 1947); *140 *United States v. McKeever*, 169 F. Supp. 426, 430 (S.D.N.Y. 1958). And, statements on the tapes by government witnesses would be admissible to show the witnesses' prior consistent statements, should the defense attack the witnesses' credibility or the truth of their testimony on cross-examination.¹⁰²

The Special Prosecutor's showing submitted to the district court listed, by individual subpoenaed conversation, the admissions and other statements that are contained in the recordings (according to the White House transcripts released to the public) or should be found therein (according to sworn testimony and other evidence) which would be admissible for one or more of the above-stated reasons. With respect to those conversations in late April 1973 about which there has not been detailed testimony and for which *141 transcripts have not been made public by the White House, the Special Prosecutor argued below that the rich evidentiary vein running through the conversations already released constituted a sufficient showing that similar statements are likely to be contained in those not yet disclosed. Again, this showing was at least sufficient to shift the burden to the President to demonstrate, by submission of tape recordings of these conversations to the Court for *in camera* inspection or at least by certification of counsel, that no evidentiary material was in fact contained therein.

3. Need for the evidence prior to trial

In his affidavit in connection with the Motion of the United States for issuance of the subpoena, the Special Prosecutor stated that based on experience with other Presidential recordings a considerable amount of time would be necessary to analyze and transcribe the tapes sought by the instant subpoena and that pretrial production of the tapes was therefore warranted under Rule 17(c). At no point below has counsel for the President sought to contest this showing. A considerable amount of time is required to listen and relisten to recordings and filter or enhance them where necessary, to make accurate transcripts, to select and prepare relevant portions for trial, and to make copies for defendants where appropriate under the discovery rules. Moreover, much of this work can be performed only by attorneys knowledgeable about the case who must simultaneously prepare all other aspects of the case for trial. The Court should be advised that the *142 Special Prosecutor's staff originally estimated that the simple physical process described above of preparing the recordings sought for trial would require at least two months.

For these reasons, the district court correctly held that the subpoenaed items were genuinely needed prior to trial for preparation of the case and to avoid delay of the trial itself.

CONCLUSION

Settled principles of law, therefore, lead inevitably to the conclusion that the order of the district court, denying the President's motion to quash the subpoena *duces tecum* and directing compliance with it, and denying the motion to expunge the grand jury's action listing him as an unindicted co-conspirator, should be affirmed in all respects.

Respectfully submitted.

LEON JAWORSKI,

Special Prosecutor.

PHILIP A. LACOVARA,

Counsel to the Special Prosecutor.

Attorneys for the United States.

JUNE 1974.

***141 APPENDIX**

APPLICABLE PROVISIONS OF CONSTITUTION, STATUTES, RULES, AND REGULATIONS

I. The Constitution of the United States provides in pertinent part-

Article II, Section 1:

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Article II, Section 2:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may 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, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein *142 otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

* * * * *

Article II, Section 3:

* * * he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Article III, Section 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;-to all Cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction;-to Controversies to which the United States shall be a Party;-to Controversies between two or more States;-between a State and Citizens of another State;-between Citizens of different States;-between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * * * *

2. Title 5, United States Code, provides in pertinent part-
§ 301. DEPARTMENTAL REGULATIONS.

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance *143 of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

Title 28, United States Code, provides in pertinent part-
§ 509. FUNCTIONS OF THE ATTORNEY GENERAL.

All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General except the functions-

- (1) vested by subchapter II of chapter 5 of title 5 in hearing examiners employed by the Department of Justice;
- (2) of the Federal Prison Industries, Inc.;
- (3) of the Board of Directors and officers of the Federal Prison Industries, Inc.; and
- (4) of the Board of Parole.

§ 510. DELEGATION OF AUTHORITY.

The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.

§ 515. AUTHORITY FOR LEGAL PROCEEDINGS; COMMISSION, OATH, AND SALARY FOR SPECIAL ATTORNEYS.

(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand *144 jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

* * * * *

§ 516. CONDUCT OF LITIGATION RESERVED TO DEPARTMENT OF JUSTICE.

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

§ 517. INTERESTS OF UNITED STATES IN PENDING SUITS.

The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

§ 518. CONDUCT AND ARGUMENT OF CASES.

(a) Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested.

(b) When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United *145 States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so.

§ 519. SUPERVISION OF LITIGATION.

Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

3. Rule 17, Federal Rules of Criminal Procedure, provides in pertinent part-

SUBPOENA

* * * * *

(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

* * * * *

4. Department of Justice Order No. 551-73 (Nov. 2, 1973) 38 Fed. Reg. 30,738 adding 28 C.F.R. §§ 0.37, and 0.38, and Appendix to Subpart G-1, provides

***146 TITLE 28-JUDICIAL ADMINISTRATION**

CHAPTER I-DEPARTMENT OF JUSTICE

Part O-Organization of the Department of Justice

Order No. 551-73

Establishing the Office of Watergate Special Prosecution Force

By virtue of the authority vested in me by 28 U.S.C. 509, 510 and 5 U.S.C. 301, there is hereby established in the Department of Justice, the Office of Watergate Special Prosecution Force, to be headed by a Director. Accordingly, Part O of Chapter I of Title 28, Code of Federal Regulations, is amended as follows:

1. Section 0.1(a) which lists the organization units of the Department, is amended by adding "Office of Watergate Special Prosecution Force" immediately after "Office of Criminal Justice."

2. A new Subpart G-1 is added immediately after Subpart G, to read as follows:

"Subpart G-1-Office of Watergate Special Prosecution Force

§ 0.37 GENERAL FUNCTIONS.

The Office of Watergate Special Prosecution Force shall be under the direction of a Director who shall be the Special Prosecutor appointed by the Attorney General. The duties and responsibilities of the Special Prosecutor are set forth in the attached appendix which is incorporated and made a part hereof.

***147 § 0.38 SPECIFIC FUNCTIONS.**

The Special Prosecutor is assigned and delegated the following specific functions with respect to matters specified in this Subpart:

(a) Pursuant to 28 U.S.C. 515(a), to conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings, which United States attorneys are authorized by law to conduct, and to designate attorneys to conduct such legal proceedings.

(b) To approve or disapprove the production or disclosure of information or files relating to matters within his cognizance in response to a subpoena, order, or other demand of a court or other authority. (See Part 16(B) of this chapter.)

(c) To apply for and to exercise the authority vested in the Attorney General under 18 U.S.C. 6005 relating to immunity of witnesses in Congressional proceedings.

The listing of these specific functions is for the purpose of illustrating the authority entrusted to the Special Prosecutor and is not intended to limit in any manner his authority to carry out his functions and responsibilities.”

ROBERT H. BORK,

Acting Attorney General.

Date: November 2, 1973.

***148 APPENDIX**

DUTIES AND RESPONSIBILITIES OF THE SPECIAL PROSECUTOR

The Special Prosecutor

There is appointed by the Attorney General, within the Department of Justice, a Special Prosecutor to whom the Attorney General shall delegate the authorities and provide the staff and other resources described below.

The Special Prosecutor shall have full authority for investigating and prosecuting offenses against the United States arising out of the unauthorized entry into Democratic National Committee Headquarters at the Watergate, all offenses arising out of the 1972 Presidential Election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility, allegations involving the President, members of the White House staff, or Presidential appointees, and any other matters which he consents to have assigned to him by the Attorney General.

In particular, the Special Prosecutor shall have full authority with respect to the above matters for:

- conducting proceedings before grand juries and any other investigations he deems necessary;
- reviewing all documentary evidence available from any source, as to which he shall have full access;
- determining whether or not to contest the assertion of “Executive Privilege” or any other testimonial privilege;
- determining whether or not application should be made to any Federal court for a grant of immunity to any witness, consistently with applicable statutory requirements, or for warrants, subpoenas, or other court orders;
- *149** -deciding whether or not to prosecute any individual, firm, corporation or group of individuals;
- initiating and conducting prosecutions, framing indictments, filing informations, and handling all aspects of any cases within his jurisdiction (whether initiated before or after his assumption of duties), including any appeals;
- coordinating and directing the activities of all Department of Justice personnel, including United States Attorneys;
- dealing with and appearing before Congressional committees having jurisdiction over any aspect of the above matters and determining what documents, information, and assistance shall be provided to such committees.

In exercising this authority, the Special Prosecutor will have the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the Department of Justice. The Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions. The Special Prosecutor will determine whether and to what extent he will inform or consult with the Attorney General about the conduct of his duties and responsibilities. In accordance with assurances given by the President to the Attorney General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given, the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining *150 that their consensus is in accord with his proposed action.

Staff and Resource Support

1. *Selection of Staff.*-The Special Prosecutor shall have full authority to organize, select, and hire his own staff of attorneys, investigators, and supporting personnel, on a full or part-time basis, in such numbers and with such qualifications as he may reasonably require. He may request the Assistant Attorneys General and other officers of the Department of Justice to assign such personnel and to provide such other assistance as he may reasonably require. All personnel in the Department of Justice, including United States Attorneys, shall cooperate to the fullest extent possible with the Special Prosecutor.

2. *Budget.*-The Special Prosecutor will be provided with such funds and facilities to carry out his responsibilities as he may reasonably require. He shall have the right to submit budget requests for funds, positions, and other assistance, and such requests shall receive the highest priority.

3. *Designation and Responsibility.*-The personnel acting as the staff and assistants of the Special Prosecutor shall be known as the Watergate Special Prosecution Force and shall be responsible only to the Special Prosecutor.

Continued Responsibilities of Assistant Attorney General, Criminal Division.-Except for the specific investigative and prosecutorial duties assigned to the Special Prosecutor, the Assistant Attorney General in charge of the Criminal Division will continue to exercise all of the duties currently assigned to him.

Applicable Departmental Policies.-Except as otherwise herein specified or as mutually agreed between *151 the Special Prosecutor and the Attorney General, the Watergate Special Prosecution Force will be subject to the administrative regulations and policies of the Department of Justice.

Public Reports.-The Special Prosecutor may from time to time make public such statements or reports as he deems appropriate and shall upon completion of his assignment submit a final report to the appropriate persons or entities of the Congress.

Duration of Assignment.-The Special Prosecutor will carry out these responsibilities, with the full support of the Department of Justice, until such time as, in his judgment, he has completed them or until a date mutually agreed upon between the Attorney General and himself.

5. Department of Justice Order No. 554-73 (Nov. 19, 1973), 38 Fed. Reg. 32,805, amending 28 C.F.R. Appendix to Subpart G-1, provides-

TITLE 28-JUDICIAL ADMINISTRATION

CHAPTER I-DEPARTMENT OF JUSTICE

Part O-Organization of the Department of Justice*Subpart G-1-Office of Watergate Special Prosecution Force**Order No. 554-73***AMENDING THE REGULATIONS ESTABLISHING THE
OFFICE OF WATERGATE SPECIAL PROSECUTION FORCE**

By virtue of the authority vested in me by 28 U.S.C. 509, 510 and 5 U.S.C. 301, the last sentence of the fourth paragraph of the Appendix to Subpart G-1 is amended to read as follows: "In accordance *152 with assurances given by the President to the Attorney General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given, (1) the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action, and (2) the jurisdiction of the Special Prosecutor will not be limited without the President's first consulting with such Members of Congress and ascertaining that their consensus is in accord with his proposed action."

ROBERT H. BORK,

Acting Attorney General.

Date: November 19, 1973.

6. The letter from the Acting Attorney General to the Special Prosecutor on November 21, 1973, stating the intention of Department of Justice Order No. 554-73, is as follows-

OFFICE OF THE SOLICITOR GENERAL,*Washington, D.C. 20530, November 21, 1973.*

LEON JAWORSKI, Esq.,

*Special Prosecutor;**Watergate Special Prosecution Force,**1425 K Street, N.W.,**Washington, D.C. 20005*

DEAR MR. JAWORSKI: You have informed me that the amendment to your charter of November 19, 1973 has been questioned by some members of the press. This letter is to confirm what I told you in our telephone conversation. The *153 amendment of November 19, 1973 was intended to be, and is, a safeguard of your independence.

The President has given his assurance that he would not exercise his constitutional powers either to discharge the Special Prosecutor or to limit the independence of the Special Prosecutor without first consulting the Majority and Minority leaders and

chairmen and ranking members of the Judiciary Committees of the Senate and the House, and ascertaining that their consensus is in accord with his proposed action.

When that assurance was worked into the charter, the draftsman inadvertently used a form of words that might have been construed as applying the President's assurance only to the subject of discharge. This was subsequently pointed out to me by an assistant and I had the amendment of November 19 drafted in order to put beyond question that the assurance given applied to your independence under the charter and not merely to the subject of discharge.

There is, in my judgment, no possibility whatever that the topics of discharge or limitation of independence will ever be of more than hypothetical interest. I write this letter only to repeat what you already know: the recent amendment to your charter was to correct an ambiguous phrasing and thus to make clear that the assurances concerning congressional consultation and consensus apply to all aspects of your independence.

Sincerely,

ROBERT H. BORK,

Acting Attorney General.

Footnotes

- 1 "Pet. App." refers to the Appendix to the Petition in No. 73-1766. "A." refers to the printed joint Appendix.
- 2 In *Nixon v. Strica*, 487 F. 2d 700, 707 n. 21 (D.C. Cir. 1973), the court of appeals stated that an order of this type directed to the President is appealable under 28 U.S.C. 1291. In any event, the court also asserted jurisdiction pursuant to the All Writs Act, 28 U.S.C. 1651. See 487 F. 2d at 706-707.
- 3 Under 28 U.S.C. 510, 517, and 518, and Department of Justice Order No. 551-73, 28 C.F.R. § 0.37 *et seq.* (Appendix pp. 143-50, *infra*), the Special Prosecutor has authority, in lieu of the Solicitor General, to conduct litigation before this Court on behalf of the United States in cases within his jurisdiction.
- 4 Department of Justice Order No. 517-73, 38 Fed. Reg. 14,688, adding 28 C.F.R. § 0.37 and Appendix to Subpart G-1.
- 5 See *Hearings Before the Senate Judiciary Committee on the Nomination of Elliot L. Richardson to be Attorney General*, 93d Cong., 1st Sess. 144-46 (1973).
- 6 *Hearings Before the Senate Select Committee on Presidential Campaign Activities*, 93d Cong., 1st Sess., Book 5, at 2074-81 (1973).
- 7 Letter from Richard M. Nixon to Senator Sam J. Ervin, Chairman of the Senate Select Committee on Presidential Campaign Activities, July 23, 1973, *id.*, Book 6, at 2479.
- 8 See generally Congressional Quarterly, Inc., *Historic Documents 1973*, at 859-78.
- 9 The United States District Court for the District of Columbia later ruled that the Special Prosecutor's firing was illegal because Acting Attorney General Bork had relied simply upon instructions from the President and had not purported to find any "extraordinary impropriety," as had been specified by the regulations establishing the Office of the Watergate Special Prosecutor as the sole ground for dismissal. *Nader v. Bork*, 366 F. Supp. 104 (1973), appeal pending.
- 10 Hearing on October 23, 1973, *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon*, D.D.C. Misc. No. 47-73.
- 11 An Advisory Panel of experts, nominated jointly by the Special Prosecutor and counsel for the President, and appointed by the district court, has concluded that the only "completely plausible explanation" of the 18½ minute "buzz" section is a set of from five to nine erasures caused by manual operation of a recording machine. "Report on a Technical Investigation Conducted for the U.S. District Court for the District of Columbia by the Advisory Panel on White House Tapes," filed June 4, 1974. *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon*, D.D.C. Misc. No. 47-73.
- 12 See *Hearings Before the Senate Judiciary Committee on the Special Prosecutor*, 93d Cong., 1st Sess. (1973); *Hearings Before the House Judiciary Subcommittee on Criminal Justice*, 93rd Cong., 1st Sess. (1973).

- 13 The Senate Committee on the Judiciary reported out S. 2611 (S. Rep. 93-595)S. Rep. 93-595) and S. 2642 (S. Rep. 93-596)S. Rep. 93-596). See 119 Cong. Rec. D 1324 (daily ed. Nov. 21, 1973). The House Committee on the Judiciary reported out H.R. 11401 (H. Rep. 93-660)H. Rep. 93-660), which was rewritten as H.R. 11555 by the House Rules Committee. See 119 Cong. Rec. D 1371 (daily ed. Dec. 3, 1973). All three bills remain on the calendars of each House, subject to being called up on the floor without further hearings or committee action. See House Calendar, 93d Cong., 2d Sess., for June 5, 1974, at 138, 139 (Senate bills), 92 (House bill).
- 14 9 Weekly Compilation of Presidential Documents 1289 (October 29, 1973).
- 15 Department of Justice Order No. 551-73, 38 Fed. Reg. 30,738.
- 16 See also letter from the Acting Attorney General to the Special Prosecutor explaining this amendment (Appendix pp. 152-53, *infra*).
- 17 By order entered on June 7, 1974, the district court rescinded its orders sealing portions of the record. On June 15, 1974, this Court denied a motion to unseal the record except as it related to an extract concerning the grand jury's finding with respect to the President.
- 18 As to claims by defendants that they are entitled to the subpoenaed items under Rule 17(c), the court withheld ruling, stating that defendants' requests for access will be more appropriately considered in conjunction with their pre-trial discovery motions (Pet. App. 21-22). Accordingly, the court refused to decide whether *Brady v. Maryland*, 373 U.S. 83, applies to "privileged" evidence not in the possession of the prosecutor.
- 19 The district court's subject-matter jurisdiction over the pending criminal case and over the trial subpoena *duces tecum* issued in this case is clear. See 18 U.S.C. 3231; Rule 17, Federal Rules of Criminal Procedure.
- 20 District Judge Gesell, who is presiding over the trial in *United States v. Ehrlichman, et al.* (D.D.C. Crim. No. 74-116), which involves charges against former White House officials growing out of the break-in at the offices of Dr. Louis Fielding, Daniel Ellsberg's psychiatrist, has recognized the independent status of the Special Prosecutor and the peculiar and unique circumstances that surround prosecutions within his jurisdiction:
- "In one view of the matter, one portion of the Government is prosecuting another portion of the Government. Thus perhaps very unique circumstances are presented that require trial judges to use common sense to adapt criminal procedures and rules developed under more routine circumstances to the peculiar necessities of this special situation."
- Transcript of Hearing on June 3, 1974, at 7-8, *United States v. Ehrlichman, et al, supra*.
- 21 Mr. Jaworski testified as follows, under oath, before the Senate Committee on the Judiciary, which was considering legislation concerning establishment of an independent Special Prosecutor's office:
- "* * * And when I came to Washington I first met with General Haig for probably an hour or an hour and a half, during which time this matter was discussed in detail. And as a result of that discussion, there eventuated the arrangement that we have mentioned.
- "General Haig assured me that he would go and talk with the President, place the matter before him. And he came back and told me after a while, after maybe a lapse of 30 minutes or so, that it had been done, and that the President had agreed.
- "The CHAIRMAN. You are absolutely free to prosecute anyone; is that correct?
- "Mr. JAWORSKI. That is correct. And that is my intention.
- "The CHAIRMAN. And that includes the President of the United States?
- "Mr. JAWORSKI. It includes the President of the United States.
- * * * * *
- "Senator MCCLELLAN. May I ask you now, do you feel that with your understanding with the White House that you do have the right, irrespective of the legal issues that may be involved-that you have an understanding with them that gives you the right to go to court if you determine that they have documents you want or materials that you feel are essential and necessary in the performance of your duties, and in conducting a thorough investigation and following up with prosecution thereon, you have the right to go to court to raise the issue against the President and against any of his staff with respect to such documents or materials and to contest the question of privilege.
- "Mr. JAWORSKI. I have been assured that right. And I intend to exercise it if necessary." (Emphasis added.)
- Hearings Before the Senate Judiciary Committee on the Special Prosecutor*, 93d Cong., 1st Sess., pt. 2, at 571, 573 (1973).
- 22 *Id.*, at 450. See also *id.*, at 470.
- 23 *Hearings Before the House Judiciary Subcommittee on Criminal Justice on H.J. Res. 784 and H.R. 10937*, 93d Cong., 1st Sess. 266 (1973).
- 24 *Hearings Before the Senate Judiciary Committee on the Nomination of William B. Saxbe to be Attorney General*, 93d Cong., 1st Sess. 9 (1973).
- 25 After the appointment of the new Special Prosecutor with these assurances of independent authority, *inter alia*, to contest in court any Presidential claims of executive privilege, both Houses of Congress tabled bills that would have provided for court appointment of a Special Prosecutor pursuant to Article II, Section 2. See note 13, *supra*.

- 26 The authority of the Attorney General to issue the regulations is conferred by 28 U.S.C. §§ 509, 510 and 5 U.S.C. § 301. The legality of these regulations delegating the authority of the Attorney General has been sustained in *Nader v. Bork*, *supra*; *United States v. Andreas*, - F. Supp. - (D. Minn. No. 4-73-Cr. 201) (March 12, 1974); *United States v. Ehrlichman*, - F. Supp. - (D.D.C. Crim. No. 74-116) (May 21, 1974).
- 27 The locus of the appointment power may also fix the authority to remove, *United States v. Perkins*, 116 U.S. 483, although the removal power itself is not absolute. *Humphrey's Executor v. United States*, 295 U.S. 602; *Wiener v. United States*, 357 U.S. 349; *Myers v. United States*, 272 U.S. 52.
- 28 The regulations also provide that the Special Prosecutor's office will not be abolished without the consent of the Special Prosecutor and that the Attorney General will not countermand any decisions of the Special Prosecutor (see Appendix pp. 149, 151, *infra*). Judge Gesell in *Nader v. Bork*, *supra*, 336 F. Supp. at 108, indicated that those guarantees are legally binding and not unilaterally revocable. This Court has recognized, of course, that the President's power to remove subordinate officers of the government, even those in the Executive Branch, is not unlimited, and may be non-existent when the executive official exercises some "duties of a quasi-judicial character." *Myers v. United States*, *supra*, 272 U.S. at 135. See also *Humphrey's Executor v. United States*, *supra*; *Wiener v. United States*, *supra*.
- 29 Judge Holtzoff had held that the suit there had to be dismissed because "the United States of America always acts in a sovereign capacity. It does not have separate governmental and proprietary capacities." *United States v. ICC*, 78 F. Supp. 580, 583 (D.D.C. 1948). This Court reversed.
- 30 See note 13, *supra*.
- 31 *Hearings Before the Senate Judiciary Committee on the Special Prosecutor*, 93d Cong., 1st Sess., pt. 2, at 571, 573 (1973).
- 32 Brief in Opposition p. 3, *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon*, 360 F. Supp. 1 (D.D.C. 1973).
- 33 See also *Powell v. McCormack*, *supra*, 395 U.S. at 517-18; *Baker v. Carr*, *supra*, 369 U.S. at 208-37; *South Dakota v. North Carolina*, 192 U.S. 286, 318-21; *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 461-62.
- 34 Transcript of Hearing on October 23, 1973, *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon*, *supra*, D.D.C. Misc. No. 47-73.
- 35 See, e.g., 28 U.S.C. 2, 44(c), 45, 47, 48, 134(b), 144, 331, 332, 333, 455, 1731-1745, 1826(b), 1863, 2102, 2254(b), 2284(4), 2403; 18 U.S.C. 2519, 3006A, 3331(a), 6003(a), 6005(a).
- 36 See, e.g., *National Treasury Employees Union v. Nixon*, 492 F. 2d 587, 603 (D.C. Cir. 1974) (holding the President was obliged to submit a federal employee pay increase as required by Congress).
- 37 See, e.g., *Environmental Protection Agency v. Mink*, 410 U.S. 73 (security classification).
- 38 Because there is no legislative analogy to the historic judicial duty to determine all questions of law necessarily raised by a case or controversy, rejection of the claim of executive privilege in the present case does not necessarily suggest any answer to the distinct questions of the scope of the President's right to stand on a claim of executive privilege *vis-a-vis* the Congress or of the role, if any, of the courts in such a confrontation. History provides a great variety of opinions on the relative rights of the Executive and the Congress in such a situation. See generally Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A. L. Rev. 1043, 1078-98 (1965). The Court of Appeals for the District of Columbia Circuit recently affirmed a decision of the district court refusing a declaratory judgment that a subpoena issued to the President by the Senate Select Committee on Presidential Campaign Activities was valid and enforceable. *Senate Select Committee on Presidential Campaign Activities v. Nixon*, --- F. 2d --- (No. 74-1258) (D.C. Cir. May 23, 1974). By deciding that the Committee's "need" for the subpoenaed recordings was "too attenuated and too tangential to its functions to permit a judicial judgment that the President is required to comply with the Committee's subpoena," thereby reaching the merits of the claim of executive privilege, the court held implicitly that the Committee's action presented a justiciable controversy. *Cf. Powell v. McCormack*, *supra*.
- At one time it was generally assumed that a claim of executive privilege *vis-a-vis* the Congress presented a nonjusticiable political question. See, e.g., L. Hand, *The Bill of Rights 17-18* (1958). But no one has ever suggested that an application for an order requiring the Executive Branch to produce evidence in the usual course of judicial or grand jury proceedings presents a non-justiciable "political question."

- 39 Accord, *Eihyl Corporation v. Environmental Protection Agency*, 478 F.2d 47, 51 (4th Cir. 1973); *Carr v. Monroe Manufacturing Co.*, 431 F.2d 384, 388 (5th Cir. 1970), cert. denied, 400 U.S. 1000; *Sperandeo v. Milk Drivers & Dairy Employees Local 537*, 334 F.2d 381, 384 (10th Cir. 1964); *N.L.R.B. v. Capitol Fish Co.*, 294 F.2d 868, 875 (5th Cir. 1961); *Halpern v. United States*, 258 F.2d 36, 43 (2d Cir. 1958). See also *Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 368 F.Supp. 1098, 1139-40 (S.D.N.Y. 1973); *United States v. Article of Drug, etc.*, 43 F.R.D. 181, 190 (D. Del. 1967); *O'Keefe v. Boeing Co.*, 38 F.R.D. 329, 334 (S.D.N.Y. 1965); *Timken Roller Bearing Co. v. United States*, 38 F.R.D. 57, 63 (N.D. Ohio 1964); *Morris v. Atchison, Topcku & Santa Fe Ry. Co.*, 21 F.R.D. 155, 157-58 (W.D. Mo. 1957); *Snyder v. United States*, 20 F.R.D. 7, 9 (E.D.N.Y. 1956).
- 40 See generally R. Berger, *Executive Privilege: A Constitutional Myth* 353-55 (1974).
- 41 In *Conway v. Rimmer*, [1968] 1 All E.R. 874, the House of Lords unanimously overruled the prior English rule that an assertion of executive (or "Crown") privilege is absolute: The House of Lords ruled that the courts may require *in camera* inspection to weigh the competing interests. See generally Cappelletti and Golden, *Crown Privilege and Executive Privilege: A British Response to an American Controversy*, 25 Stanford L. Rev. 836 (1973).
- As the court of appeals noted in *Nixon v. Strica*, *supra*, 487 F.2d at 713-14, n. 60, judicial power to scrutinize claims of privilege has been recognized in nearly every common law jurisdiction. See, e.g., *Robinson v. South Australia* (No. 2), [1931] All E.R. 333 (P.C.); *Gagnon v. Quebec Securities Comm'n*, [1965] 50 D.L.R. 2d 329 (1964); *Bruce v. Waldron*, [1963] Viet. L.R. 3; *Corbett v. Social Security Comm'n*, [1962] N.Z.L.R. 878; *Amar Chand Butail v. Union of India*, [1965] 1 India S. Ct. 243.
- 42 This Court has not even afforded such status to the Speech or Debate Clause, which is an *express* constitutional privilege for congressmen and their aides similar to the privilege claimed by the President. This Court repeatedly has affirmed that the courts must determine the reach of the Clause. See, e.g., *Gravel v. United States*, *supra*; *United States v. Brewster*, *supra*; *United States v. Johnson*, 319 U.S. 503.
- 43 The courts never have decided whether executive privilege derives implicitly from the constitutional separation of powers, or whether it is merely a common law evidentiary privilege. See, e.g., *United States v. Reynolds*, 345 U.S. at 6-7; *Committee for Nuclear Responsibility, Inc. v. Seaborg*, *supra*, 463 F.2d at 793-94. Professor Charles Alan Wright has observed that "[t]he commentators * * * have not found much substance in the constitutional argument, based, as it is, on separation of powers." 8 Wright and Miller, *Federal Practice and Procedure*, § 2019, at 175 n. 44 (1970 ed.).
- 44 The rationale is equally well summarized by Wigmore (§ 2379, at 809-10):
 "A court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control if its applicability is left to the determination of the very official whose interest it may be to shield a wrongdoing under the privilege. Both principle and policy demand that the determination of the privilege shall be for the court."
 See also *United States v. Cotton Valley Operators Comm.*, 9 F.R.D. 719, 720-21 (W.D. La. 1949), *aff'd* by an equally divided Court, 339 U.S. 940.
- 45 Although the Court dealt within the framework of the Freedom of Information Act, 5 U.S.C. 552(b)(5), it recognized that Congress simply had incorporated the common law executive privilege. 410 U.S. at 85-89. The exemption was defined with specific reference to the court decisions that had developed the privilege at issue here.
- 46 See, e.g., *Westinghouse Electric Corp. v. City of Burlington*, 351 F.2d 762 (D.C. Cir. 1965); *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir. 1963), cert. denied, 175 U.S. 896; *Boeing Airplane Co. v. Coggeshall*, 280 F.2d 654 (D.C. Cir. 1960); *Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 368 F.Supp. 1098 (S.D.N.Y. 1973); *Pilar v. SS Hess Petrol*, 55 F.R.D. 159 (D. Md. 1972); *Hancock Bros., Inc. v. Jones*, 293 F.Supp. 1229 (N.D. Cal. 1968); *Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F.Supp. 708 (E.D. Pa. 1968); *McFadden v. Avo Corp.*, 278 F.Supp. 57 (M.D. Ala. 1967); *O'Keefe v. Boeing Co.*, 38 F.R.D. 329 (S.D.N.Y. 1965); *Rosee v. Board of Trade*, 35 F.R.D. 512 (N.D. Cal. 1964); *Morris v. Atchison, Topcku & Santa Fe Ry. Co.*, 21 F.R.D. 155 (W.D. Mo. 1957); cf. *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958) (Stewart, J.), cert. denied, 358 U.S. 910.
- 47 See cases cited in note 46, *supra*.
- 48 Brief in Opposition 4, *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon*, *supra*.
- 49 Alexander Hamilton explained the posture of the President in our constitutional system in *The Federalist* Number 69 (B. F. Wright ed. 1961):

"The President of the United States would be an officer elected by the people for *four* years; the king of Great Britain is a perpetual and *hereditary* prince. The one would be amenable to personal punishment and disgrace; the person of the other is sacred and inviolable." (Emphasis in original.)

50 See, e.g., *Panama Canal Co. v. Grace Lines, Inc.*, 356 U.S. 309, 317-18; *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206, 218-22; *Work v. United States ex rel. Rives*, 267 U.S. 175, 177-78; *Ballinger v. United States ex rel. Frost*, 216 U.S. 240, 249; *Garfield v. United States ex rel. Goldsby*, 211 U.S. 249, 262; *Roberts v. United States ex rel. Valentine*, 176 U.S. 221, 229-31; *United States ex rel. McBride v. Schurz*, 102 U.S. 378; *Kendall v. United States ex rel. Stokes, supra*, 12 Pet. at 609 *et seq.*; *Marbury v. Madison, supra*, 1 Cranch at 164-66.

51 This Court in *Branzburg* quoted Jeremy Bentham's vivid illustration:

"Are men of the first rank and consideration—men high in office—men whose time is not less valuable to the public than to themselves—are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary, they and everybody . . . Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly."

See 4 *The Works of Jeremy Bentham* 320-21 (Bowring ed. 1843).

See also *United States v. Dionisio*, 410 U.S. 1, 9; *Blackmer v. United States*, 284 U.S. 421, 438; *Blair v. United States*, 250 U.S. 273, 280-281; 8 *Wigmore, Evidence* § 2192 (McNaughton rev. 1961) [hereinafter cited as "Wigmore"].

52 For a complete exposition of the decisions in the *Burr* cases based upon the original record of the Burr trials, see Berger, *The President, Congress, and the Courts*, 83 *Yale L.J.* 1111-22 (1974).

53 It is true that custom dictates that legal process should not be addressed to the President of the United States whenever a Cabinet member or lesser official is available, even though the subordinate official is acting upon direct order of the President. E.g.,

Youngstown Sheet & Tube Co. v. Sawyer, supra, 343 U.S. 579; cf. *United States Servicemen's Fund v. Eastland*, 488 F. 2d 1252, 1270 (D.C. Cir. 1973). It became necessary to seek this evidence from the President only because he elected, by deliberate and affirmative actions, to displace the ordinary custodians of the materials and to assume personal control of them. To allow this device to render the tapes immune from ordinary legal process would exalt form over substance and set a President above the law, contrary to

our firm constitutional tradition. As the court of appeals stated in *Nixon v. Sirica, supra*, 487 F. 2d at 709, "[t]he practice of judicial review would be rendered capricious—and very likely impotent—if jurisdiction vanished whenever the President personally denoted an

Executive action or omission as his own." See also *National Treasury Employees Union v. Nixon, supra*, 492 F. 2d at 613.

In addition to the courts below in the present case and in *Nixon v. Sirica*, other courts have recognized that compulsory process may issue against the President, when necessary. See *Minnesota Chippewa Tribe v. Carlucci*, 358 F. Supp. 973, 975 (D.D.C. 1973) (holding that the President can be sued to compel performance of specific legal duties) (order vacated on grounds of mootness); *Meyers v. Nixon*, 339 F. Supp. 1388 (S.D.N.Y. 1972); *Atlee v. Nixon*, 336 F. Supp. 790 (E.D. Pa. 1972).

54 See, e.g., R. Scigliano, *The Supreme Court and the Presidency* 36-37 (1971) and C. Warren, *The Supreme Court in United States History* 759 (rev. ed. 1926) (President Andrew Jackson's failure to take steps to vindicate the Court's decision in the Cherokee Nation case, *Worcester v. Georgia*, 6 Pet. (31 U.S.) 515); Scigliano, *supra*, at 37-38 (Jackson's vetoing of the national bank bill on constitutional grounds, despite an earlier decision by this Court tending to sustain its validity); Scigliano, *supra*, at 41-43 (President Lincoln's ignoring of several writs of habeas corpus addressed to military commanders during the Civil War). See generally Scigliano, *supra*, 58-59.

55 See E. Corwin, *The President: Office and Powers* 11 (1948).

56 1 *Farrand, Records of the Federal Convention of 1787*, at 65-66 (1911) (hereinafter "Farrand"). See also 4 *Elliot's Debates* 108-09 (2d ed. 1836) (remarks of Iredell at the North Carolina Ratification Convention).

57 2 *Elliot's Debates* 480 (2d ed. 1836).

58 3 *Farrand* at 384-385.

The Founding Fathers were conscious of the "aversion of the people to monarchy." *The Federalist* Number 67 (B. F. Wright ed. 1961). Corwin has explained "that 'the executive magistracy' was the natural enemy, the legislative assembly the natural friend of liberty." E. Corwin, *The President: Office and Powers* 4 (1948).

59 We are not dealing in this case, of course, with the question whether, even in the absence of any explicit immunity, an incumbent
 60 President is entitled to implicit immunity from having to defend himself against criminal charges lodged against him in an indictment.
 Scattered district court opinions seem to have accepted that argument, at least where discretionary executive powers were at issue.
 See, e.g., *National Ass'n of Internal Revenue Employees v. Nixon*, 349 F. Supp. 18, 21 (D.D.C. 1972), rev'd, 492 F. 2d 587
 (D.C. Cir. 1974); *Reese v. Nixon*, 347 F. Supp. 314, 316-17 (C.D. Cal. 1972).

61 Fairman, *Reconstruction and Reunion 1864-88*, 6 History of the Supreme Court of the United States 379-80, 436-37 (1971).

62 See also *Colegrove v. Green*, 328 U.S. 549, 556; *Louisiana v. McAdoo*, 234 U.S. 627, 633-34; *Wisconsin v. Pelican Insurance*
Co., 127 U.S. 265, 296; *National Treasury Employees Union v. Nixon*, *supra*, 492 F. 2d at 613-15.

63 See pp. 44-47, *supra*.

64 The subpoena *duces tecum* is directed to "Richard M. Nixon or any subordinate officer" whom he may designate as having custody
 of the tape recordings and other documents.

65 We use the term "generalized claim of executive privilege" to cover a claim of privilege based on an asserted interest in the
 confidentiality of communications within the Executive Branch, as distinguished from more specific privileges sometimes covered
 by the term "executive privilege."
 Thus, the courts have recognized a specific privilege for "state secrets," covering government information bearing on international
 relations, military affairs and the national security. See, e.g., *United States v. Reynolds*, *supra*, 345 U.S. at 6-7; *United States v.*
Curtiss-Wright Export Corp., 299 U.S. 304, 320-21; 8 Wigmore § 2378. There is also a privilege for "investigative files," including
 information relating to confidential informants. See, e.g., *Alderman v. United States*, 394 U.S. 165, 184-85; *Roviano v. United*
States, 353 U.S. 53; *Machin v. Zuckert*, *supra*, 316 F. 2d at 339; 8 Wigmore §§ 2374-77; cf. *United States ex rel. Touhy v.*
Ragen, 340 U.S. 462.

The President has not claimed any such specific type of "executive privilege" for any of the conversations described in the subpoena.

66 In a letter to Chief Judge Sirica on July 25, 1973, the return date of that subpoena, President Nixon stated:
 I have concluded, however, that it would be inconsistent with the public interest and with the Constitutional position of the Presidency
 to make available recordings of meetings and telephone conversations in which I was a participant and I must respectfully decline
 to do so.
 Special Appearance of Richard M. Nixon, Exh. A, *In Re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon*, *supra*.

67 Brief in Opposition 2-3, *id.*

68 Brief in Opposition 12-13, *id.*

69 For example, Executive Order 11,652, "Classification and Declassification of National Security Information and Material," issued
 by President Nixon on March 8, 1972, provides for access to classified data by persons "who have previously occupied policymaking
 positions to which they were appointed by the President" (Sec. 12), although publication of the material is not authorized.
 See 8 Wigmore § 2192, at 73; Morgan, Foreword to ALI Model Code of Evidence 7 (1942).

70 For a discussion of the intent of the Framers, see pp. 76-80, *supra*.

71 Only the interest in confidentiality as an encouragement to candor is involved in the present case, for there is plainly no challenge
 to the rationale for any governmental decision or order.

72 The Speech or Debate Clause, Art. I, Sec. 6, cl. 1, provides that no Senator or Representative may be "questioned in any other Place"
 for "any Speech or Debate in either House." It prohibits inquiry "into those things generally said or done in the House or the Senate
 in the performance of official duties and into the motivation for those acts." *United States v. Brewster*, *supra*, 408 U.S. at 512.

74 See also *Black v. Sheraton Corp.*, 371 F. Supp. 97 (D.D.C. 1974); *United States v. Procter & Gamble Co.*, 25 F.R.D. 485, 490-91
 (D.N.J. 1960); cf. *Carl Zeiss Stiftung v. I.E.B. Carl Zeiss, Jena*, *supra*, 40 F.R.D. at 329 (footnotes omitted): "Here, unlike the
 situation in some cases, no charge of governmental misconduct or perversion of governmental power is advanced."

75 Recently the Court of Appeals for the Seventh Circuit held that the attorney-client privilege must yield upon a "prima facie" showing
 that the communications were made in furtherance of a continuing or future fraud or crime. *United States v. Aldridge*, *supra*, 484
 F. 2d at 658. Other circuits agree that a *prima facie* showing that some fraud or criminal misconduct may have tainted what would
 otherwise have been a privileged, confidential relationship is sufficient to require that the privilege yield. See, e.g., *Pfizer, Inc. v.*
Lord, 456 F. 2d 545 (8th Cir. 1972); *United States v. Friedman*, 445 F. 2d 1076 (9th Cir. 1971), cert. denied, 404 U.S. 958; *United*

States v. Bob, 106 F. 2d 37 (2d Cir. 1939), cert. denied, 308 U.S. 589. See also *O'Rourke v. Darbishire*, [1920] A.C. 581 (H.L.), establishing the same standard.

76

accord, *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 599; *United States v. King*, 482 F. 2d 768, 776 (D.C. Cir. 1973); *United States v. Kysar*, 459 F. 2d 422, 424 (10th Cir. 1972). The grand jury's finding cannot be challenged on the ground that it was based upon inadequate evidence. See, e.g., *United States v. Calandra*, --- U.S. ---, --- (42 U.S.L.W. 4104, 4106, Jan. 8, 1974);

Costello v. United States, 350 U.S. 359, 363 (1956).

The above decisions, of course, concern findings of probable cause which appear on the face of the indictment. The June 5, 1972 grand jury could likewise have listed every known co-conspirator in the indictment, in which case that finding of complicity in the conspiracy would have been conclusive in these pre-trial proceedings. Out of deference to the President's public position, however, the grand jury instead decided to vote *in camera* upon a finding of probable cause against each alleged co-conspirator, but not to name any formally in the indictment. The grand jury further authorized the Special Prosecutor to disclose and rely upon its determination of probable cause if and when such action became necessary. There is no reason why the same conclusive effect should not be given to the grand jury's determination in this case as would have been accorded if the grand jury had been less solicitous of the President's position.

77

There is no reason to believe that the grand jury's finding is unconstitutional or in any sense an abuse of the grand jury's power. In the district court, the President premised the motion to expunge on the contention that the President is not subject to indictment prior to removal from office. The Constitution, however, contains no explicit Presidential immunity from the ordinary process of the criminal law prior to impeachment and removal, and there are substantial arguments that an implicit immunity is likewise not warranted by the Constitution. See Berger, "The President, Congress, and the Courts," 83 Yale L.J. 1111, 1123-36 (1974); Rawle, *A View of the Constitution of the United States of America* 215 (2d ed. 1829). See also, *United States v. Isaacs and Kerner*, *supra*, holding that an impeachable officer is liable to criminal prosecution prior to impeachment and removal.

Here, however, the grand jury did not indict the President, but only named him as an unindicted co-conspirator. Therefore, the broader question of whether an indictment of a sitting President is constitutionally permissible need not be reached. None of the practical difficulties incident to indicting an incumbent President and requiring him to defend himself while still conducting the affairs of state exists when the grand jury merely names the President as an unindicted co-conspirator. This action does not constitute substantial interference with the President's ability to perform his official functions. For example, an unindicted co-conspirator need not spend time and effort in preparing his defense, time which a President may need to devote to carrying out his constitutional duties. Nor is there any inherent unfairness in such a course since an incumbent President has at his command all of the Nation's communications facilities to convey his position on the events in question. Thus, whatever may be the case with respect to indictment, there are no substantial arguments for creating an immunity for the President even from being identified as a co-conspirator when a grand jury finds it necessary and appropriate to do so in connection with an independent criminal prosecution of others.

Furthermore, even assuming *arguendo* that the grand jury's action was without legal effect, the district judge had ample discretion to refuse to expunge its finding. See *In re Grand Jury Proceedings*, 479 F. 2d 458, 460 n. 2 (5th Cir. 1973) and *Application of Johnson*, 484 F. 2d 791 (7th Cir. 1973), discussing the criteria to be applied in passing upon motions to expunge grand jury reports. The grand jury's action concerns a subject of legitimate public concern. The President has neither alleged nor established any prejudice from the grand jury's action. The strong public interest in placing before the petit jury what the grand jury believed was the full scope of the alleged conspiracy to obstruct justice which forms the basis for the indictment in *United States v. Mitchell, et al.* made it reasonable for the grand jury to designate all participants in the conspiracy as co-conspirators. In deference to the Office of the Presidency, and sensitive to the practical difficulties in indicting an incumbent President, the grand jury named him as an unindicted co-conspirator, and there is no constitutional impediment to such action, and no compelling reason to expunge that determination.

78

Executive privilege still may attach, of course, to any subpoenaed material irrelevant to the issues to be tried in *United States v. Mitchell, et al.* The district court, in accordance with the procedures established in *Nixon v. Sirica*, *supra*, 487 F. 2d at 716-21, and followed thereafter, has ordered the President or any subordinate officer to submit the originals of the subpoenaed items to that court. Briefly, under those procedures, the President or his designee must submit an "analysis" itemizing and indexing those segments of the materials for which he asserts a particularized claim of privilege (e.g., items subject to a claim of "national security") and those segments which he asserts are irrelevant to Watergate. The President may decline initially to submit for *in camera* inspection those items which he contends relate to "national defense or foreign relations." If there are any such claims, the district judge must hold a hearing to determine whether to sustain the claim of particularized privilege. As to all items for which there is no claim of particularized privilege or as to which the district judge rejects such a claim, the judge must inspect them *in camera* to determine which segments relate to Watergate and thus are not privileged. The judge may consult with the parties in determining relevancy.

- These procedures are fully consistent with the principles set forth by this Court in *Environmental Protection Agency v. Mink*, *supra*, 410 U.S. at 92-94, and *United States v. Reynolds*, *supra*, 345 U.S. at 7-10.
- 79 This was a different letter than the one for which the Chief Justice had issued a subpoena to the President in connection with the grand jury inquiry. *United States v. Burr*, 25 Fed. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807).
- 80 The Chief Justice continued: "The president may himself state the particular reasons which may have induced him to withhold a paper, and the court would unquestionably allow their full force to those reasons. At the same time, the court could not refuse to pay proper attention to the affidavit of the accused."
- 81 Justices Black, Frankfurter and Jackson dissented from the decision of the Court, relying on the opinion of Judge Maris below. 192 F. 2d 987 (3d Cir. 1951). Judge Maris, as did this Court, rejected the government's contention that the determination of the executive officer claiming the privilege must be accepted. Although Judge Maris recognized a privilege for "state secrets," he rejected the availability of a "housekeeping" privilege in an instance where the government had consented to be sued. Judge Maris predicted (192 F. 2d at 995): "[W]e regard the recognition of such a sweeping privilege against any disclosure of the internal operations of the executive departments of the Government as contrary to a sound public policy. * * * It is but a small step to assert a privilege against any disclosure of records merely because they might prove embarrassing to government officers. * * *"
- 82 The President's Address to the Nation, April 29, 1974, 10 Weekly Compilation of Presidential Documents 452 (May 6, 1974).
- 83 The recordings themselves are necessary for trial, and the President's release of portions of some transcripts cannot be considered adequate compliance with the subpoena. As this Court is well aware, the recordings themselves, and not the transcripts, constitute the most reliable evidence of what actually transpired. In *Lopez v. United States*, 373 U.S. 427, 439-40, the Court acknowledged that recordings of admissible conversations are "highly useful evidence" and the "most reliable evidence possible of a conversation." Cf. *United States v. White*, 401 U.S. 745, 753. In addition to providing the most accurate reflection of what was actually spoken, the recordings also are important because they reveal tone and inflection often necessary to evaluate the meaning of spoken words. Furthermore, a comparison of the transcripts prepared by the White House and the transcripts prepared by the Watergate Special Prosecution Force of recordings previously produced by the President reveals material differences. In some cases, the transcripts differ as to the words spoken. In other cases, a comparison indicates that the White House has failed to transcribe portions without indicating that material has been deleted or is unintelligible. A number of these discrepancies were called to the attention of the district court. See Memorandum for the United States in Opposition to the Motion to Quash Subpoena Duces Tecum 40-43. The White House transcripts also indicate that "material unrelated to Presidential actions" has been deleted. The reasonable inference to be drawn is that material has been deleted that relates to other persons' actions concerning Watergate. Clearly, such material is important to the prosecution of defendants in *United States v. Mitchell et al.*
- Finally, there is some question whether the transcripts, without the underlying recordings, would be admissible under the "best evidence" rule. Generally stated, that rule provides that where a party seeks to prove the terms of a "writing," the original writing must be produced unless it is shown to be unavailable. See McCormick, *Evidence* § 230, at 560 (1972). "The danger of mistransmitting critical facts which accompanies the use of written copies or recollection, but which is largely avoided when an original writing is presented to prove its terms, justifies preference for the original documents." *Id.*, § 231, at 561. Although recordings do not fall within the strict confines of the rule, "sound recordings, where their content is sought to be proved, so clearly involve the identical considerations applicable to writings as to warrant inclusion within the rule." *Id.*, § 232, at 563.
- 84 In *Senate Select Committee on Presidential Campaign Activities v. Nixon*, *supra*, the court of appeals ruled that the Committee's "need" for the five recordings it had subpoenaed "is too attenuated and too tangential to its functions to permit a judicial judgment that the President is required to comply with the Committee's subpoena" (slip op. at 17). The question the court asked was whether the recordings were "demonstrably critical to the responsible fulfillment of the Committee's functions" (slip op. at 13). Highly specific factfinding, of course, is rarely, if ever, "demonstrably critical" to the legislative function, whereas it is the very essence of the determination a trial jury is called upon to make beyond a reasonable doubt.
- 85 This rule was approved by the Court of Appeals for the District of Columbia Circuit in *Ellis v. United States*, 416 F. 2d 791, 801 n. 26 (1969). See also *United States v. Cote*, 456 F. 2d 142, 145 (8th Cir. 1972).
- 86 9 Weekly Compilation of Presidential Documents 697 (May 28, 1973).
- 87 *Submission of the Recorded Presidential Conversations to the Committee on the Judiciary of the House of Representatives by President Richard Nixon, April 30, 1974*. This document was before the district court. See Transcript of Hearing on May 13, 1974.
- 88 10 Weekly Compilation of Presidential Documents 451-52 (May 6, 1974).

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- 89 Affidavit of J. Fred Thompson dated August 9, 1973, *Hearings before the Senate Select Committee on Presidential Campaign Activities*. 93d Cong. 1st Sess., Book 4, at 1794-1800 (1973).
- 90 *Id.*, Book 7, at 2888-89; Book 8, at 3101-02.
- 91 See, e.g., Letter from President Richard M. Nixon to Senator Sam J. Ervin, Chairman of the Senate Select Committee on Presidential Campaign Activities, July 23, 1973, *id.*, Book 6, at 2479:
"Before their existence became publicly known, I personally listened to a number of them. The tapes are entirely consistent with what I know to be the truth and what I have stated to be the truth."
- 92 In the Formal Claim of Privilege which was submitted along with the Motion to Quash, the President expressly stated that he was not asserting any privilege with respect to the twenty conversations for which partial transcripts already have been released publicly by the White House. Since no privilege was asserted as to these conversations, no further inquiry was necessary by the district court into whether there would otherwise have been any privilege, or whether the government had a strong need for the evidence, or whether the government's need outweighed any available privilege. Thus, the Special Prosecutor's showing of relevancy and evidentiary value as to these conversations, which was held adequate to satisfy Rule 17(c), warranted enforcement of the subpoena (at least as to the portions of the tapes for which transcripts have been released) without more.
- 93 Some of the material contained in the Appendix, and additional material relating to conversations of June 4, 1973, being sought by Item 46 of the subpoena, were also discussed at oral argument before the district court on May 13, 1974.
- 94 In his Reply Memorandum below, counsel for the President argued that the Special Prosecutor's reliance on *Carter* and related cases was misleading because in some of those cases *pretrial* production of material admissible for impeachment of witness was in fact denied. In the instant case, of course, the necessity of pre-trial production is predicated on the government's showing-apparently not contested by counsel for the President-that delaying production of the recordings until trial would not allow adequate time for testing, enhancement, transcription, and preparation of the evidence that would be required for actual use at trial.
- 95 In some instances tape recordings already obtained by the Special Prosecutor contain strong evidence of the relevancy of additional conversations sought under this subpoena. For example, it was pointed out in oral argument in the district court that the June 4, 1973, recording of the President listening to prior recordings indicates why the March 13, 1973, telephone conversations sought by Item 46 of the subpoena are important. See Transcript of Hearing on May 13, 1974, at 57.
- 96 As pointed out below, the transcripts in some instances provide circumstantial evidence concerning what happened at meetings for which no transcripts were released. In addition, the Court certainly may take notice of the fact that each and every subpoenaed conversation for which a transcript was subsequently released did in fact substantially concern Watergate.
- 97 Transcript of Hearing, May 13, 1973, at 61-62.
- 98  *Stubbs v. United States*, 428 F. 2d 885, 888 (9th Cir. 1970), cert. denied, 400 U.S. 1009; *United States v. McKeever*, 160 F. Supp. 426 (S.D.N.Y. 1958).
- 99 *United States v. Madda*, 345 F. 2d 400, 403 (7th Cir. 1965).
- 100 See *Stubbs v. United States*, *supra*; cf. *United States v. Sutton*, 426 F. 2d 1202, 1207 (D.C. Cir. 1969) (authentication of writings); Proposed Federal Rules of Evidence, Rule 901 (b)(9).
- 101 The court upheld the district court's exercise of discretion not to compel production prior to trial because the government had already played the recordings for defendant and his counsel over a period of several days.
- 102 See *Monroe v. United States*, *supra*. Prior consistent statements have traditionally been admissible only to rebut charges of recent fabrication or improper influence or motive, but the Proposed Federal Rules of Evidence, Rule 801(d)(1)(B), would permit use of such statements as substantive evidence as well.



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UKRAINE Economic Update

October 5, 2015

Deterioration in Ukraine's terms of trade due to a drop in global commodity prices and re-escalation of the conflict in the east in the beginning of the year led to a larger than earlier expected decline in real GDP in the first half of 2015.

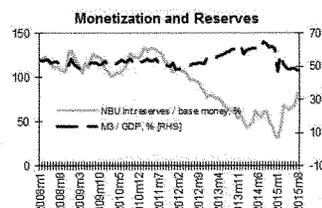
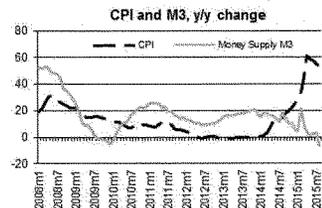
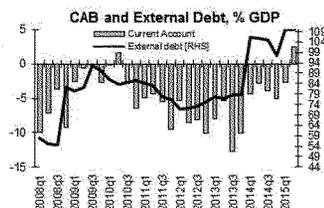
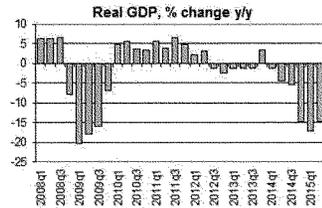
- There have been encouraging signs of stabilization since the middle of the year. Nonetheless, even as periodic flaring up of the conflict adds to uncertainties, Ukraine's economic prospects depend on whether the authorities continue to implement macroeconomic and structural reforms and ensure sustainability of its debt.
- We project real GDP to decline by 12 percent in 2015 compared with a contraction of 7.5 percent in our April Economic Update. We forecast recovery in the second half and next year to result in growth of 1 percent in 2016. Slower reform implementation or escalation of the conflict may delay economic recovery.

Recent Economic Developments

Economic activity appears to have stabilized since the middle of the year after a broad based decline across all sectors in the first half reduced GDP by 16 percent year-on-year (y/y). The conflict in the industrial east led to stoppages in production at a few steel factories as well as lower output in others because of disruption in supply and distribution chains. Overall industrial activity fell by 20.5 percent y/y in the first half of 2015, with large regional variations. A sharp decline in the east was partially compensated by relatively good performance in a few western and central regions. Meanwhile, macroeconomic adjustment is affecting all regions of Ukraine. Declining real incomes are weighing on retail trade (down 25 percent y/y) and consumption (down 20 percent y/y) during the first half of 2015. High frequency data indicates the tentative stabilization and recovery have begun since July: activity in industrial production slowed to 5.8 percent y/y and in trade to 18.8 percent in August. This suggests that GDP decline in the third quarter was limited to about 11 percent. Currency depreciation in the beginning of the year and a one-off utility tariff adjustment led to a hike in inflation. Twelve-month consumer price inflation recently peaked at 60.9 percent in April before declining to 52.8 percent in August.

The general government deficit is on track to narrow as budgeted this year, but pressures for financing Naftogaz and recapitalizing the banking system remain significant. Due to higher than budgeted inflation and fiscal measures implemented this year, revenues increased by 30 percent y/y in the first half of 2015. General government spending remained broadly unchanged in nominal terms despite higher inflation, and thus budget deficit narrowed compared to the annual target. However, the need to cover Naftogaz deficit and to boost confidence in the banking system by recapitalizing the Deposit Guarantee Fund and state-owned banks is putting pressure on government resources. An increase in VAT refund arrears is also worrisome.

The weaker currency and a large contraction in imports helped balance the current account in the first half of 2015 while pressures on the capital account have declined; however, risks remain high. After a sharp currency devaluation in early 2015 followed by administrative restrictions, the current account has been almost balanced since April. A large contraction in exports was offset by a decline in imports due to the weak economy, hryvnia depreciation, and the import surcharge. Capital outflows were mostly related to external debt payments by companies and banks. These outflows were partially offset by a decline in foreign-exchange outflows from the banking system, and an increase in FDI related to bank recapitalizations. Overall, net capital outflows and external vulnerabilities persist. With over \$1 billion in official disbursements so far this year from the IMF, the World Bank and other development partners, international reserves increased to US\$12.6 billion by the end of August (equivalent to 3 months of imports).



Outlook

Despite early signs of stabilization, economic prospects for Ukraine depend on how the conflict in the east unfolds and whether the authorities continue carrying out reforms in the challenging domestic and international environment and ensure sustainability of its debt. We project real GDP to fall by 12 percent in 2015 taking into account a sharp contraction in the first half of the year, followed by a slower decline during the second half of the year. The decline is expected in all sectors including agriculture, but most notably in metals and mining that are most affected by the conflict and weak external demand. Meanwhile, retail trade is projected to continue declining because real disposable incomes have fallen due to sharp increases in utility prices, devaluation and declining wages. On the positive side, the devaluation is helping bolster net exports while further increases in tariffs together with fiscal discipline should create sufficient fiscal space to unlock government investment in the future. This, together with efforts to clean up the banking system and a gradual resumption of lending, is projected to set the stage for gradual economic recovery in 2016, with real GDP growth at 1 percent.

Sustaining reform implementation should help mitigate the impact of a vast array of risks confronting Ukraine. The macroeconomic policy mix adopted by the authorities so far has proven efficient in mitigating the negative impact of the sharp decline in the real sector on fiscal and current account balances. Given that risks remain high, it is essential to maintain the flexible exchange rate regime and prudent fiscal policy as well as to carry on with reforms aimed at reducing Naftogaz imbalances. In this case, the general government deficit is projected to adjust downwards from 4.2 percent of GDP in 2015 to 3.1 percent of GDP in 2017. The gas tariff increase is expected to help reduce to nil the below-the-line financing of Naftogaz deficit by 2016. Macroeconomic adjustment should help to keep the current-account deficit at about 1 percent of GDP in 2015. Financial pressures associated with net capital outflows would also ease in view of the restructuring of sovereign and quasi-sovereign debt and the ongoing restructuring of foreign private liabilities. If our expectations concerning modest economic recovery, gradual currency stabilization, and sustained fiscal discipline are indeed fulfilled, public and publicly-guaranteed debt should decline to 82 percent of GDP by 2017.

The outlook is subject to serious downside risks. These include an escalation of the conflict in the east that may further jeopardize investor and consumer confidence and destroy industrial potential, a further global commodity price decline that can negatively impact Ukraine's terms of trade, and a slowdown in reforms that may increase structural imbalances again and delay official financial assistance. While the first two risks are exogenous, mitigation of the latter risk is in the authorities' own hands. A fragile political environment, geopolitical challenges, possible social resistance to reforms in the absence of strong safety nets, opposition by vested interests who stand to lose from reforms — all these factors could undermine or slow down reforms. This would likely lower or delay international financial assistance and could exacerbate fiscal and balance of payment problems. This could result in a prolonged recession, as reorientation of Ukrainian exports towards other markets will require more time and investment.

Key Macroeconomic Indicators	(in % of GDP unless indicated otherwise)							
	2011	2012	2013	2014	2015F	2016F	2017F	2018F
Nominal GDP, UAH billion	1300	1405	1465	1567	1958	2373	2662	2962
Real GDP, % change	5.5	0.2	0.0	-6.8	-12.0	1.0	2.0	3.0
Consumption, % change	11.3	7.4	5.2	-7.4	-17.9	-2.0	-0.2	2.7
Fixed investment, % change	8.5	5.0	-8.4	-23.0	-24.6	9.4	13.0	5.9
Export, % change	2.7	-5.6	-8.1	-14.5	-19.8	6.0	5.0	5.1
Import, % change	15.4	3.8	-3.5	-22.1	-31.7	3.1	4.6	5.7
GDP deflator, % change	14.3	8.1	3.1	14.8	42.0	20.0	10.0	8.0
CPI, % change eop	4.6	-0.2	0.5	24.9	50.0	23.4	9.9	7.0
Current account balance	-6.3	-8.2	-9.2	-4.1	-1.1	-1.4	-1.4	-1.6
External debt	77.6	76.6	78.6	97.6	153.0	134.2	128.0	121.6
Budget revenues	42.9	44.5	43.6	41.7	40.8	39.7	40.0	40.0
Budget expenditures	45.6	48.9	48.4	46.3	45.0	43.4	43.1	42.6
Fiscal balance	-2.8	-4.5	-4.8	-4.6	-4.2	-3.7	-3.1	-2.6
Consolidated deficit, including Naftogaz	-4.4	-5.4	-6.7	-10.3	-7.3	-3.9	-3.1	-2.6
Public and guaranteed debt	36.3	36.6	40.6	70.3	90.5	84.7	81.8	77.3

Source: Ukrainian authorities; World Bank projections

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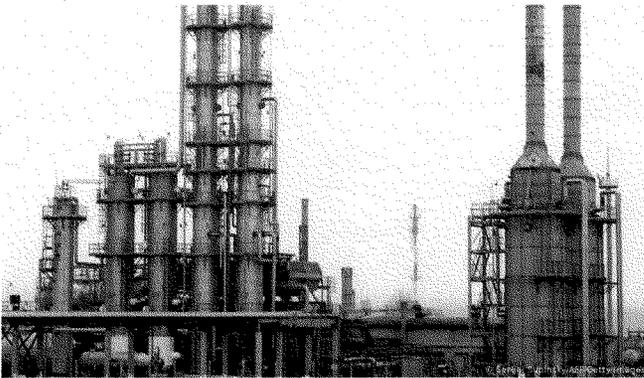
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EUROPE

Who are Hunter Biden's Ukrainian bosses?

The appointment of Joe Biden's son to the board of Ukrainian gas firm Burisma has raised eyebrows the world over. The names of the company's actual owners are being protected like state secrets.



Who does Hunter Biden *really* work for? It's the question the media has been asking since Wednesday (14.05.2014), when it was revealed that the son of the US vice president joined the board of the Ukrainian gas company Burisma Holdings in April.

The former Polish President Aleksander Kwasniewski also sits on the company's board, but his photo only appeared on Burisma's website on Friday (16.05.2014), even though he joined the company in January. Then the president of Ukraine was still Viktor Yanukovich, with whom Kwasniewski had previously negotiated on behalf of the European Parliament to secure the release of imprisoned former Prime Minister Yulia Tymoshenko.

The remaining board members include two Americans, two Cypriots, and four young Ukrainians, almost all of whom spent stints in Russia during their careers. The bulk of the company's management was replaced in 2013, and Oleksandr Kharchenko, director of the Energy Industry Research Center in Kyiv, says this may indicate a change in ownership. "It simply wasn't reported," he told DW. He sees Burisma as a company with a lot of potential, as does Hennadi Kobal of the Kyiv Center of Oil and Gas "Newfolk": "They've secured good land for themselves."

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11/25/2019

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Hunter Biden (right) has now joined Burisma last month

Anyone wanting to know more about the company needs time. Burisma's modest website says the firm was founded in 2002 and grew to become "one of Ukraine's largest independent gas producers." There's no mention of the owners.

London-based PR firm Bell Pottinger handles Burisma's media relations, though they failed to respond to a DW request about Burisma. One of Bell Pottinger's founders, Lord Timothy Bell, once advised former British Prime Minister Margaret Thatcher, as well as the first Russian President Boris Yeltsin. Prominent customers in recent years include Asma Assad, the wife of the Syrian President, and the government of Belarus.

Yanukovych's gas baron

Ukrainian media reports about Burisma reveal an impenetrable web of companies, most of which are registered in Cyprus. One name, Mykola Slotshevski, appears more than once. The 47-year-old is thought to have been the original owner of the company - at least until recently.

Slotshevski has built a career in the oil and gas business since the early 1990s. In 2013, the Ukrainian news magazine "Korrespondent" estimated his fortune at about \$238 million (173 million euros).

Slotshevski, known for having a fondness for British luxury cars like Rolls Royce and Bentley, was a member of the Ukrainian parliament, and headed the Environment Ministry between 2010 and 2012 before serving on the Security Council. He was well-connected in Yanukovych's government, ousted in February 2014.

Growth in gas

In late 2013, Slotshevski denied that he owned Burisma, and an employee in his office reported that he sold the company - but no evidence of this has come to light yet. Two oligarchs, Ihor Kolomojski and Viktor Pinchuk, have been named as the possible new owners. Kolomojski was appointed the new head of the regional administration in Dnipropetrovsk after the recent change of government in Kyiv. He is believed to wield more political influence than Pinchuk.

could not reach Kolomojski for comment about Burisma, Pinchuk refused to comment, but is said to have a good relationship with the Democratic Party in the US, and is also believed to have been a long time friend of former Polish President Kwasniewski.

According to expert estimates, Ukraine's own gas reserves only meet about a third - 15 to 20 billion cubic meters - of the country's gas needs. Most of the demand is covered by state-owned companies, but the private sector's share is growing, and there are believed to be extensive gas deposits in the country's east. But in order to mine there, Ukraine needs the expertise of Western corporations.

US firms in Ukraine

The US has been active in Ukraine for some time. In 2007, the firm Vanco won a contract to extract gas from the Black Sea, a deal that was annulled by Tymoshenko after the firm passed on the rights to another company that included eastern Ukrainian and Russian business interests.

Yanukovych's government worked hard to win over US and multinational firms for oil and gas extraction in Ukraine. Kyiv signed a contract with the US-based Chevron at the end of 2013 to extract shale gas in the west of the country. Another deal with the energy giant ExxonMobil - for gas in the Black Sea area - was abandoned following opposition protests.

But the news about the appointment of Hunter Biden has sparked allegations of nepotism - not least because it was revealed just a few weeks after his father's visit to Kyiv on April 22. Neither Burisma or the US State Department responded to DW's requests for comment. White House spokesman Jay Carney would say only that Hunter Biden was a private citizen and that his job had no impact on US policy.



Tymoshenko scuppered a deal to prevent Russian interests controlling Ukrainian gas

DW RECOMMENDS

Ukraine crisis reaches into the Arctic

pe and the United States are planning further sanctions against Russia, as the Ukrainian conflict continues. The political standoff is also creating tensions within the Arctic Council (16.05.2014)

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11/25/2019 **Who are Hunter Biden's Ukrainian bosses? | Europe | News and current affairs from around the continent | DW | 16.05.2014**

The US has included him on its sanctions list, yet Vladimir Yakunin is still welcome in Berlin. The head of Russian Railways, a critic of the West and close confidant to Putin, will speak on European-Russian relations. (15.05.2014)

Subdued business prospects: German companies in Russia

The political standoff between Russia and the West over the future of Ukraine is stressing the Russian economy, and German companies are feeling the effects. Many firms have seen revenues and investment volumes decline. (14.05.2014)

Date 16.05.2014

Author Roman Goncharenko / nm

Related Subjects Ukraine, OPEC (Organization of the Petroleum Exporting Countries), Vladimir Putin, Business, Russia, Dmitry Medvedev

Keywords Ukraine, Burma, gas, oil, Joe Biden, Hunter Biden, Russia, Black Sea, nepotism, business

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DEMOCRATS • Published March 12

Dem rep brushes off Pelosi pushback, says he'll pursue Trump impeachment



By Brooke Singman, Guerin Hays | Fox News

New Democratic fault line: Nancy Pelosi says she's opposed to impeaching Trump

House Speaker Nancy Pelosi says President Trump is 'not worth' risk of impeachment; chief congressional correspondent Mike Emanuel reports from Capitol Hill.

Outspoken Democratic Rep. Al Green is not letting House Speaker Nancy Pelosi's newly announced opposition to impeachment proceedings hold him back.

Green, D-Texas, speaking with Fox News, said Tuesday that he still intends to bring articles of impeachment against President Trump to the House floor for a vote.

PELOSI SAYS SHE'S OPPOSED TO IMPEACHING TRUMP: 'HE'S JUST NOT WORTH IT'

"Each member of the House has the prerogative to bring impeachment to a vote. I intend to bring impeachment to a vote, and I will do so because the president has been acknowledged by leaders and others that he is not fit to hold the office," Green said. "He's causing harm to society and as such, he should be impeached."

On the first day of the new Congress this year, Green and Rep. Brad Sherman, D-Calif., introduced articles of impeachment against the president. The pair also raised the issue in 2017 and 2018, to no avail.

"This is not about any individual. It's about liberty and justice for all. It's about maintaining our democracy. It's not about Democrats, it's about keeping the republic, and frankly, not about Republicans," Green said Tuesday. "It's about our country. I love my country."

12/15/2019

Dem rep brushes off Pelosi pushback, says he'll pursue Trump impeachment | Fox News



UNITED STATES - JANUARY 15: Rep. Al Green, D-Texas, speaks during a news conference in the Capitol Visitor Center on the full implementation of the Affordable Care Act in Texas. (Photo By Tom Williams/CQ Roll Call)

Green's comments follow Pelosi making her most-public attempt yet to tamp down impeachment chatter.

"I'm not for impeachment," Pelosi told The Washington Post Magazine in an interview published Monday. "Impeachment is so divisive to the country that unless there's something so compelling and overwhelming and bipartisan, I don't think we should go down that path, because it divides the country."

She added: "And he's just not worth it."

Trump's attorney, former New York City Mayor Rudy Giuliani said that Pelosi was "being realistic as to the political reaction" of impeachment.

"Maybe she doesn't see any real evidence of anything wrongful," Giuliani told Fox News on Tuesday.

TLAIB SAYS SHE'LL INTRODUCE ARTICLES OF IMPEACHMENT AGAINST TRUMP THIS MONTH

Meanwhile, senior Democrats appeared to get in line with Pelosi on the issue – for the time being.

"We need to have as much information as possible ... the American people are going to have to decide," House Majority Whip Steny Hoyer, D-Md., told reporters Tuesday. "While we have impeachment authority, we have to be very cognizant of what the American people need."

12/15/2019

Dem rep brushes off Pelosi pushback, says he'll pursue Trump impeachment | Fox News

"The distraction would be major," Hoyer said.

Even House Intelligence Chairman Adam Schiff, D-Calif., who is leading one of several Trump-ocussed investigations on Capitol Hill, sided with Pelosi, calling her "absolutely right" to hold back on impeachment proceedings.

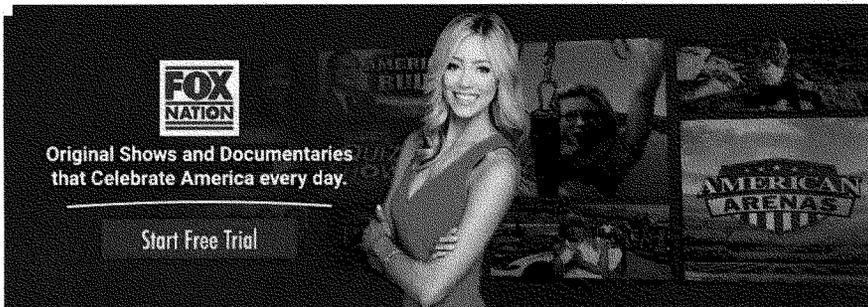
"A bipartisan process would have to be extra clear and compelling," Schiff told reporters. "I think the speaker is absolutely right. In its absence, an impeachment [process] becomes a partisan exercise doomed for failure. And I see little to be gained by putting the country through that kind of wrenching experience."

But freshman Rep. Rashida Tlaib, D-Mich., who has repeatedly advocated impeachment, suggested she'd continue to speak her mind on the issue.

"Speaker Pelosi has always encouraged me to represent my district, never has told me to stop," she told reporters. "Has never told me to do anything differently. Ever."

Fox News' John Roberts, Jared Halpern, and The Associated Press contributed to this report.

Brooke Singman is a Politics Reporter for Fox News. Follow her on Twitter at [@brookefoxnews](https://twitter.com/brookefoxnews).



Transcript: Donald Trump Expounds on His Foreign Policy Views

nytimes.com/2016/03/27/us/politics/donald-trump-transcript.html

March 26, 2016



Over two telephone conversations on Friday, Donald J. Trump, the Republican presidential candidate, discussed his views on foreign policy with Maggie Haberman and David E. Sanger of The New York Times. Here is an edited transcript of their interview (or just the highlights).

HABERMAN: I wanted to ask you about some things that you said in Washington on Monday, more recently. But you've talked about them a bunch. So, you have said on several occasions that you want Japan and South Korea to pay more for their own defense. You've been saying versions of that about Japan for 30 years. Would you object if they got their own nuclear arsenal, given the threat that they face from North Korea and China?

TRUMP: Well, you know, at some point, there is going to be a point at which we just can't do this anymore. And, I know the upsides and the downsides. But right now we're protecting, we're basically protecting Japan, and we are, every time North Korea raises its head, you know, we get calls from Japan and we get calls from everybody else, and "Do something." And there'll be a point at which we're just not going to be able to do it anymore. Now, does that mean nuclear? It could mean nuclear. It's a very scary nuclear world. Biggest problem, to me, in the world, is nuclear, and proliferation. At the same time, you know, we're a country that doesn't have money. You know, when we did these deals, we were a rich country. We're not a rich country. We were a rich country with a

very strong military and tremendous capability in so many ways. We're not anymore. We have a military that's severely depleted. We have nuclear arsenals which are in very terrible shape. They don't even know if they work. We're not the same country, Maggie and David, I mean, I think you would both agree.

SANGER: So, just to follow Maggie's thought there, though, the Japanese view has always been, if the United States, at any point, felt as if it was uncomfortable defending them, there has always been a segment of Japanese society, and of Korean society that said, "Well, maybe we should have our own nuclear deterrent, because if the U.S. isn't certain, we need to make sure the North Koreans know that." Is that a reasonable position. Do you think at some point they should have their own arsenal?

TRUMP: Well, it's a position that we have to talk about, and it's a position that at some point is something that we have to talk about, and if the United States keeps on its path, its current path of weakness, they're going to want to have that anyway with or without me discussing it, because I don't think they feel very secure in what's going on with our country, David. You know, if you look at how we backed our enemies, it hasn't – how we backed our allies – it hasn't exactly been strong. When you look at various places throughout the world, it hasn't been very strong. And I just don't think we're viewed the same way that we were 20 or 25 years ago, or 30 years ago. And, you know, I think it's a problem. You know, something like that, unless we get very strong, very powerful and very rich, quickly, I'm sure those things are being discussed over there anyway without our discussion.

HABERMAN: Will you –

SANGER: And would you have an objection to it?

TRUMP: Um, at some point, we cannot be the policeman of the world. And unfortunately, we have a nuclear world now. And you have, Pakistan has them. You have, probably, North Korea has them. I mean, they don't have delivery yet, but you know, probably, I mean to me, that's a big problem. And, would I rather have North Korea have them with Japan sitting there having them also? You may very well be better off if that's the case. In other words, where Japan is defending itself against North Korea, which is a real problem. You very well may have a better case right there. We certainly haven't been able to do much with him and with North Korea. But you may very well have a better case. You know, one of the things with the, with our Japanese relationship, and I'm a big fan of Japan, by the way, I have many, many friends there. I do business with Japan. But, that, if we are attacked, they don't have to do anything. If they're attacked, we have to go out with full force. You understand. That's a pretty one-sided agreement, right there. In other words, if we're attacked, they do not have to come to our defense, if they're attacked, we have to come totally to their defense. And that is a, that's a real problem.

Nuclear Weapons, Cyberwarfare and Spying on Allies

HABERMAN: Would you, you were just talking about the nuclear world we live in, and you've said many times, and I've heard you say it throughout the campaign, that you want the U.S. to be more unpredictable. Would you be willing to have the U.S. be the first to use nuclear weapons in a

confrontation with adversaries?

TRUMP: An absolute last step. I think it's the biggest, I personally think it's the biggest problem the world has, nuclear capability. I think it's the single biggest problem. When people talk global warming, I say the global warming that we have to be careful of is the nuclear global warming. Single biggest problem that the world has. Power of weaponry today is beyond anything ever thought of, or even, you know, it's unthinkable, the power. You look at Hiroshima and you can multiply that times many, many times, is what you have today. And to me, it's the single biggest, it's the single biggest problem.

SANGER: You know, we have an alternative these days in a growing cyberarsenal. You've seen the growing cybercommand and so forth. Could you give us a vision of whether or not you think that the United States should regularly be using cyberweapons, perhaps, as an alternative to nuclear? And if so, how would you either threaten or employ those?

TRUMP: I don't see it as an alternative to nuclear in terms of, in terms of ultimate power. Look, in the perfect world everybody would agree that nuclear would, you know, be so destructive, and this was always the theory, or was certainly the theory of many. That the power is so enormous that nobody would ever use them. But, as you know, we're dealing with people in the world today that would use them, O.K.? Possibly numerous people that use them, and use them without hesitation if they had them. And there's nothing, there's nothing as, there's nothing as meaningful or as powerful as that, and you know the problem is, and it used to be, and you would hear this, David, and I would hear it, and everybody would hear it, and — I'm not sure I believed it, ever. I talk sometimes about my uncle from M.I.T., and he would tell me many years ago when he was up at M.I.T. as a, he was a professor, he was a great guy in many respects, but a very brilliant guy, and he would tell me many years ago about the power of weapons someday, that the destructive force of these weapons would be so massive, that it's going to be a scary world. And, you know, we have been under the impression that, well we've been, I think it's misguided somewhat, I've always felt this but that nobody would ever use them because of the power. And the first one to use them, I think that would be a very bad thing. And I will tell you, I would very much not want to be the first one to use them, that I can say.

HABERMAN: O.K.

SANGER: The question was about cyber, how would you envision using cyberweapons? Cyberweapons in an attack to take out a power grid in a city, so forth.

TRUMP: First off, we're so obsolete in cyber. We're the ones that sort of were very much involved with the creation, but we're so obsolete, we just seem to be toyed with by so many different countries, already. And we don't know who's doing what. We don't know who's got the power, who's got that capability, some people say it's China, some people say it's Russia. But certainly cyber has to be a, you know, certainly cyber has to be in our thought process, very strongly in our thought process. Inconceivable that, inconceivable the power of cyber. But as you say, you can take out, you can take out, you can make countries nonfunctioning with a strong use of cyber. I don't think we're there. I don't think we're as advanced as other countries are, and I think you probably would agree with that. I don't think we're advanced, I think we're going backwards in so many different ways. I think we're

going backwards with our military. I certainly don't think we are, we move forward with cyber, but other countries are moving forward at a much more rapid pace. We are frankly not being led very well in terms of the protection of this country.

HABERMAN: Mr. Trump, just a quick follow-up on that question. As you know, we discovered in recent years that the U.S. spies extensively against its allies. That's what came up with Edward Snowden and his data trove including Israel and Germany.

TRUMP: Edward Snowden has caused us tremendous problems.

HABERMAN: But would you continue the programs that are in place now, or would you halt them, in terms of spying against our allies?

SANGER: Like Israel and Germany.

TRUMP: Right. They're spying against us. Edward Snowden has caused us tremendous problems. Edward Snowden has been, you know, you have the two views on Snowden, obviously: You have, he's wonderful, and you have he's horrible. I'm in the horrible category. He's caused us tremendous problems with trust, with everything about, you know, when they're showing, Merkel's cellphone has been spied on, and are – Now, they're doing it to us, and other countries certainly are doing it to us, and but what I think what he did, I think it was a tremendous, a tremendous disservice to the United States. I think and I think it's amazing that we can't get him back.

SANGER: President Obama ordered an end to the spying, to the listening in on Angela Merkel's cellphone, if that's in fact what we were doing. Was that the right decision?

TRUMP: Well you see, I don't know that, you know, when I talk about unpredictability, I'm not sure that we should be talking about me – On the assumption that I'm doing well, which I am, and that I may be in that position, I'm not sure that I would want to be talking about that. You understand what I mean by that, David. We're so open, we're so, "Oh I wouldn't do this, I wouldn't do that, I would do this, I would do that." And it's not so much with Merkel, but it's certainly with other countries. You know, that really, where there's, where there's a different kind of relationship, and a much worse relationship than with Germany. So, you know there's so, there's such predictability with our country. We go and we send 50 soldiers over to the Middle East and President Obama gets up and announces that we're sending 50 soldiers to the Middle East. Fifty very special soldiers. And they now have a target on their back, and everything we do, we announce, instead of winning, and announcing when it's all over. There's such, total predictability of this country, and it's one of the reasons we do so poorly. You know, I'd rather not say that. I would like to see what they're doing. Because you know, many countries, I can't say Germany, but many countries are spying on us. I think that was a great disservice done by Edward Snowden. That I can tell you.

How to Defeat ISIS

HABERMAN: Mr. Trump, you have talked about your plans to defeat ISIS, and how you would approach it. Would you be willing to stop buying oil from the Saudis if they're unwilling to go in and help?

SANGER: On the ground?

TRUMP: Oh yeah, sure. I would do that. The beautiful thing about oil is that, you know, we're really getting close, because of fracking, and because of new technology, we're really in a position that we weren't in, you know, years ago, and the reason we're in the Middle East is for oil. And all of a sudden we're finding out that there's less reason to be. Now, now, we're in the Middle East for really defense, because we can't allow them, I mean, look, I was against the war in Iraq. I thought it would destabilize the Middle East, and it has destabilized it, it's totally destabilized the Middle East. The way Obama got out of the war was, you know, disgraceful, and idiotic. When he announced the date certain, they pulled back, and they said, "Oh, well." As much as they don't mind dying, they do mind dying. And they pulled back, and then, you know, it's a, it was a terrible thing the way he announced that, and then he didn't leave troops behind so that, you know, whatever there was of Iraq, which in my opinion wasn't very much, because I think that, you know, the government was totally corrupt, and they put the wrong people in charge, and you know, that in its own way led to the formation of ISIS, because they weren't given their due. But, I think that President Obama, the way he got out of that war was unbelievable. I think Hillary Clinton was catastrophic in those decisions, having to do with Libya and just about everything else. Every bad decision that you could make in the Middle East was made. And now if you look at it, if you would go back 15 years ago, and I'm not saying it was only Obama, it was Obama's getting out, it was other people's getting in, but you go back 15 years ago, and I say this, if our presidents would have just gone to the beach and enjoyed the ocean and the sun, we would've been much better off in the Middle East, than all of this tremendous death, destruction, and you know, monetary loss, it's just incredible. 'Cause we're further, we're far worse off today than we were 15 years ago or 10 years ago in the Middle East. Far worse.

SANGER: But I just want to make sure I understand your answer to Maggie's question. So you said earlier this week that we should use air power but not send in ground forces. That had to be done by the regional Arab partners. We assume by that, you mean the Saudis, the U.A.E. and others from whom we might purchase oil or have alliances. I think Maggie's question, if I understood it right, was if these countries are unwilling to send in ground troops against ISIS, and so far they have been, despite President Obama's efforts to get them in, would you be willing to say, "We will stop buying oil from you, until you send ground troops?"

TRUMP: There's two answers to that. The answer is, probably yes, but I would also say this: We are not being reimbursed for our protection of many of the countries that you'll be talking about, that, including Saudi Arabia. You know, Saudi Arabia, for a period of time, now the oil has gone down, but still the numbers are phenomenal, and the amount of money they have is phenomenal. But we protect countries, and take tremendous monetary hits on protecting countries. That would include Saudi Arabia, but it would include many other countries, as you know. We have, there's a whole big list of them. We lose, everywhere. We lose monetarily, everywhere. And yet, without us, Saudi Arabia wouldn't exist for very long. It would be, you know, a catastrophic failure without our protection. And I'm trying to figure out, why is it that we aren't going in and saying, at a minimum, at a minimum it's a

two-part question, with respect to Maggie's question. But why aren't we going in and saying, "At a minimum, I'm sorry folks, but you have to, under no circumstances can we continue to do this." You know, we needed, we needed oil desperately years ago. Today, because – again, because of the new technologies, and because of places that we never thought had oil, and they do have oil, and there's a glut on the market, there's a tremendous glut on the market, I mean you have ships out at sea that are loaded up and they don't even know where to go dump it. But we don't have that same pressure anymore, at all. And we shouldn't have that for a long period of time, because there's so many places. I mean, they're closing wells all over the place. So, I would say this, I would say at a minimum, we have to be reimbursed, substantially reimbursed, I mean, to a point that's far greater than what we're being paid right now. Because we're not being reimbursed for the kind of tremendous service that we're performing by protecting various countries. Now Saudi Arabia's one of them. I think if Saudi Arabia was without the cloak of American protection of our country's, of U.S. protection, think of Saudi Arabia. I don't think it would be around. It would be, whether it was internal or external, it wouldn't be around for very long. And they're a money machine, they're a monetary machine, and yet they don't reimburse us the way we should be reimbursed. So that's a real problem. And frankly, I think it's a real, in terms of bringing our country back, because our country's a poor country. Our country is a debtor nation, we're a debtor nation. I mean, we owe trillions of dollars to people that are buying our bonds, in the form of other countries. You look at China, where we owe them \$1.7 trillion, you have Japan, \$1.5 trillion. We're a debtor nation. We can't be a debtor nation. I don't want to be a debtor nation. I want it to be the other way. One of the reasons we're a debtor nation, we spend so much on the military, but the military isn't for us. The military is to be policeman for other countries. And to watch over other countries. And there comes a point that, and many of these countries are tremendously rich countries. Not powerful countries, but – in some cases they are powerful – but rich countries.

SANGER: One more along the lines of your ISIS strategy. You've seen the current strategy, which is, you've seen Secretary Kerry trying to seek a political accord between President Assad and the rebel forces, with Assad eventually leaving. And then the hope is to turn all those forces, including Russia and Iran, against ISIS. Is that the right way to do it? Do you have an alternative approach?

TRUMP: Well, I thought the approach of fighting Assad and ISIS simultaneously was madness, and idiocy. They're fighting each other and yet we're fighting both of them. You know, we were fighting both of them. I think that our far bigger problem than Assad is ISIS, I've always felt that. Assad is, you know I'm not saying Assad is a good man, 'cause he's not, but our far greater problem is not Assad, it's ISIS.

SANGER: I think President Obama would agree with that.

TRUMP: O.K., well, that's good. But at the same time – yeah, he would agree with that, I think to an extent. But I think, you can't be fighting two people that are fighting each other, and fighting them together. You have to pick one or the other. And you have to go at –

SANGER: So how would your strategy differ from what he's doing right now?

TRUMP: Well I can only tell you – I can't tell you, because his strategy, it's open and it would seem to be fighting ISIS but he's fighting it in such a limited capacity. I've been saying, take the oil. I've been saying it for years. Take the oil. They still haven't taken the oil. They still haven't taken it. And they hardly hit the oil. They hardly make a dent in the oil.

SANGER: The oil that ISIS is pumping.

TRUMP: Yes, the oil that ISIS is pumping, where they're getting tremendous amounts of revenue. I've said, hit the banking channels. You know, they have very sophisticated banking channels, which I understand, but I don't think a lot of people do understand. You know, they're taking in tremendous amounts of money from banking channels. That, you know, many people in countries that you think are our allies, are giving ISIS tremendous amounts of money and it's going through very dark banking channels. And we should have stopped those banking channels long ago and I think we've done nothing to stop them, and that money is massive. Massive. It's a massive amount of money. So it's not only from oil, David, it's from also the bank, the bank. It's through banks. And very sophisticated channels. They call them the dark channels. Very sophisticated channels. And money is coming in from people that we think are our allies.

'NATO Is Obsolete'

HABERMAN: Mr. Trump, I also want to go back to something you said earlier this week about NATO being ineffective. Do you think it's the right institution for countering terror or do we need a new one and what might that new one look like?

TRUMP: Well I said something a few days ago and I was vastly criticized and I notice now this morning, people are saying Donald Trump is a genius. Because what I said – which of course is always nice to hear, David. But I was asked a question about NATO, and I've thought this but I have never expressed my opinion because until recently I've been an entrepreneur, I've been a very successful entrepreneur as opposed to a politician. And – I'd love to ask David, Maggie, if he's a little surprised at how well I've done. You know, we've knocked out a lot. We're down to the leftovers now, from the way I look at it. I call them the leftovers.

(Laughter.)

So anyway, but the question was asked of me a few days ago about NATO, and I said, well, I have two problems with NATO. No. 1, it's obsolete. When NATO was formed many decades ago we were a different country. There was a different threat. Soviet Union was, the Soviet Union, not Russia, which was much bigger than Russia, as you know. And, it was certainly much more powerful than even today's Russia, although again you go back into the weaponry. But, but – I said, I think NATO is obsolete, and I think that – because I don't think – right now we don't have somebody looking at terror, and we should be looking at terror. And you may want to add and subtract from NATO in terms of countries. But we have to be looking at terror, because terror today is the big threat. Terror from all different parts. You know in the old days you'd have uniforms and you'd go to war and you'd see who your enemy was, and today we have no idea who the enemy is.

SANGER: If you just think about Maggie's question about whether it's the right institution for this, when you go to NATO these days, in Brussels, not far from where we've seen — just miles from where we saw the attacks the other day —

TRUMP: Which is amazing, right? Which is amazing in itself. Yes?

SANGER: What they'll say to you is that Russia is resurgent right now. They are rebuilding their nuclear arsenal. They're [unintelligible] Baltics. We've got submarine runs, air runs. Things that have at least echoes of the old Cold War. The view is that their mission is coming back. Do you agree with that?

TRUMP: I'll tell you the problems I have with NATO. No. 1, we pay far too much. We are spending — you know, in fact, they're even making it so the percentages are greater. NATO is unfair, economically, to us, to the United States. Because it really helps them more so than the United States, and we pay a disproportionate share. Now, I'm a person that — you notice I talk about economics quite a bit, in these military situations, because it is about economics, because we don't have money anymore because we've been taking care of so many people in so many different forms that we don't have money — and countries, and countries. So NATO is something that at the time was excellent. Today, it has to be changed. It has to be changed to include terror. It has to be changed from the standpoint of cost because the United States bears far too much of the cost of NATO. And one of the things that I hated seeing is Ukraine. Now I'm all for Ukraine, I have friends that live in Ukraine, but it didn't seem to me, when the Ukrainian problem arose, you know, not so long ago, and we were, and Russia was getting very confrontational, it didn't seem to me like anyone else cared other than us. And we are the least affected by what happens with Ukraine because we're the farthest away. But even their neighbors didn't seem to be talking about it. And, you know, you look at Germany, you look at other countries, and they didn't seem to be very much involved. It was all about us and Russia. And I wondered, why is it that countries that are bordering the Ukraine and near the Ukraine — why is it that they're not more involved? Why is it that they are not more involved? Why is it always the United States that gets right in the middle of things, with something that — you know, it affects us, but not nearly as much as it affects other countries. And then I say, and on top of everything else — and I think you understand that, David — because, if you look back, and if you study your reports and everybody else's reports, how often do you see other countries saying "We must stop, we must stop." They don't do it! And, in fact, with the gas, you know, they wanted the oil, they wanted other things from Russia, and they were just keeping their mouths shut. And here the United States was going out and, you know, being fairly tough on the Ukraine. And I said to myself, isn't that interesting? We're fighting for the Ukraine, but nobody else is fighting for the Ukraine other than the Ukraine itself, of course, and I said, it doesn't seem fair and it doesn't seem logical.

HABERMAN: Mr. Trump, speaking of —

TRUMP: David, does that make sense to you, by the way?

SANGER: Well, President Obama said the other day in an interview he had that he thought that Russia, over time, was always going to have more influence over Ukraine than we would or anyone else would just given both the history and the geography.

TRUMP: And the location, right. The geography. I would agree with him.

SANGER: And so in the end do you agree that Russia is going to end up dominating the Ukraine?

TRUMP: Well, unless, unless there is, you know, somewhat of a resurgence frankly from people that are around it. Or they would ask us for help. But they don't ask us for help. They're not even asking us for help. They're literally not even talking about it, and these are the countries that border the Ukraine.

HABERMAN: Mr. Trump –

TRUMP: There doesn't seem to be any great anxiety over the Ukraine by everybody that should be affected and that's bordering the Ukraine.

SANGER: There are several countries that have joined NATO in recent times – Estonia, among them, and so forth – that we are now bound by treaty to defend if Russia moved in. Would you observe that part of the treaty?

TRUMP: Yeah, I would. It's a treaty, it's there. I mean, we defend everybody. *(Laughs.)* We defend everybody. No matter who it is, we defend everybody. We're defending the world. But we owe, soon, it's soon to be \$21 trillion. You know, it's 19 now but it's soon to be 21 trillion. But we defend everybody. When in doubt, come to the United States. We'll defend you. In some cases free of charge. And in all cases for a substantially, you know, greater amount. We spend a substantially greater amount than what the people are paying. We, we have to think also in terms – we have to think about the world, but we also have – I mean look at what China's doing in the South China Sea. I mean they are totally disregarding our country and yet we have made China a rich country because of our bad trade deals. Our trade deals are so bad. And we have made them – we have rebuilt China and yet they will go in the South China Sea and build a military fortress the likes of which perhaps the world has not seen. Amazing, actually. They do that, and they do that at will because they have no respect for our president and they have no respect for our country. Hey folks, I'm going to have to get off here now. Did you –

Tensions in the South China Sea

HABERMAN: I just had one quick follow-up on what you were saying about the South China Sea. How would you counter that assertiveness over those islands? Among other things, it's increasingly valuable real estate strategically. Would you be willing to build our own islands there?

TRUMP: Well what you have to do – and you have to speak to Japan and other countries, because they're affected far greater than we are – you understand that – I mean, they're affected far – I just think the act is so brazen, and it's so terrible that they would do that without any consultation, without anything, and yet they'll sell their products to the United States and rebuild China, and frankly, even the islands, I mean, you know, they've made so much economic progress because of the United States. And in the meantime we're becoming a third-world nation. You look at our airports, you look at our roadways, you look at our bridges are falling down. They're building bridges all over the place,

ours are falling down. You know, we've rebuilt China. The money they've drained out of the United States has rebuilt China. And they've done it through monetary manipulation, by devaluations. And very sophisticated. I mean, they're grand chess players at devaluation. But they've done it –

SANGER: I think what Maggie was asking was how would you deter their activity. Right now (*Crosstalk*) – But would you claim some of those reef scenarios to try to build our own military –

TRUMP: Perhaps, but we have great economic – and people don't understand this – but we have tremendous economic power over China. We have tremendous power. And that's the power of trade. Because they use us as their bank, as their piggy bank, they take – but they don't have to pay us back. It's better than a bank because they take money out but then they don't have to pay us back.

SANGER: So you would cut into trade in return –

TRUMP: No, I would use trade to negotiate.

HABERMAN: Oh, O.K. My last question. Sir, my last –

TRUMP: I would use trade to negotiate. Would I go to war? Look, let me just tell you. There's a question I wouldn't want to answer. Because I don't want to say I won't or I will or – do you understand that, David? That's the problem with our country. A politician would say, 'Oh I would never go to war,' or they'd say, 'Oh I would go to war.' I don't want to say what I'd do because, again, we need unpredictability. You know, if I win, I don't want to be in a position where I've said I would or I wouldn't. I don't want them to know what I'm thinking. The problem we have is that, maybe because it's a democracy and maybe because we have to be so open – maybe because you have to say what you have to say in order to get elected – who knows? But I wouldn't want to say. I wouldn't want them to know what my real thinking is. But I will tell you this. This is the one aspect I can tell you. I would use trade, absolutely, as a bargaining chip.

His Foreign Policy Team

HABERMAN: Mr. Trump, how did you come to settle on your foreign policy team? I know that it's still in formation and you've said –

TRUMP: Recommended by people. And we're going to have new people put in. In fact, we have additional people too. You've got the one list, I think, but we have – we actually have – I only gave certain names.

HABERMAN: But did you meet with them?

TRUMP: We have some others that I really like a lot and we're going to put them in. Maj. Gen. Gary Harrell. Maj. Gen. Bert Mizuwawa. (*Ed. note: It's Mizusawa.*)

HABERMAN: These are the additional ones?

TRUMP: Rear Adm. Chuck Kubic. Yeah. He's Navy, retired. Very good, nice, supposedly.

HABERMAN: Interesting. Interesting.

TRUMP: These are people recommended – people that I respect recommended them. People – I've heard very good things about them. In addition, we're going to be adding some additional names that I've liked over the years.

HABERMAN: Ah, O.K.

TRUMP: I have very strong – as you've probably noticed – I've had very strong feelings on foreign policy and I've had very strong feelings on defense and offense. And I've been right about a lot of the things I've been saying. I've been right about a lot. And The New York Times criticized me very badly with a very major article when I said Brussels is a hellhole, and I talked about Brussels in a very negative way because of what they're doing over there. And yesterday all over Twitter, as you probably saw, everybody said that Trump is right, The New York Times – You know, The New York Times really hit me hard on Brussels when I said recently that it's a hellhole, and waiting to explode. And I didn't even realize it, and then yesterday all over the place, Twitter was crazy that Trump was right, again, this time about Brussels.

HABERMAN: You mean after the attacks?

TRUMP: I've been right – Yeah, after the attack. I've been right about a lot of different things. So. Anyway. You know, in my book I mention Osama bin Laden, and I wrote the book in 2000, prior to the World Trade Center coming down and the reason I did is that I saw this guy and I read about this terrorist who was a very aggressive, bad dude. And I wrote about it in "The America We Deserve." I wrote about Osama bin Laden. You know, not a lot, but a couple paragraphs – about Osama bin Laden. Look at him. You better take a look at him. And a year and a half later the World Trade Center came down. And your friend Joe Scarborough, interestingly, in one of his – you know, somebody had mentioned that, and Joe said, 'No way. There's no way he wrote about it before the fact.' And they said no, no, and they sent out for the book, and they put it before him and he said, 'Wow, you're right. Trump wrote about Osama bin Laden before the World Trade Center came down. That's amazing.' So look, I've said a lot. I don't get a lot of credit. I do from the people. I don't from a lot of the media. But that's O.K. I'd rather keep it that way. Hey David, I'd rather have it that way, I guess, right?

(Laughter.)

The Iran Deal

SANGER: You have told us a lot about what your leverage would be over China in trade. Tell us on Iran: I know that you've said that you think that the Iran deal was an extremely bad deal. I'd be interested to know what your goals would be in renegotiating it. What your leverage would be and what you would renegotiate, what parts of the agreement.

TRUMP: Sure. It's not just that it's a bad deal, David. It's a deal that could've been so much better just if they'd walked a couple of times. They negotiated so badly. They were being mocked, they were being scorned, they were being harassed, our negotiators, including Kerry, back in Iran, by the

various representatives and the leaders of Iran at the highest level. And they never walked. They should've walked, doubled up the sanctions, and made a good deal. Gotten the prisoners out long before, not just after they gave the \$150 billion. They should've never given the money back. There were so many things that were done, they were so, the negotiation was, and I think deals are fine, I think they're good, not bad. But, you gotta make good deals, not bad deals. This deal was a disaster.

SANGER: So, it's a deal you would inherit if you were elected, so what I'm trying to get at is, what would you insist on. Are the restrictions on nuclear not long enough, are the missile restrictions not strong enough?

TRUMP: Certainly the deal is not long enough. Because at the end of the deal they're going to have great nuclear capability. So certainly the deal isn't long enough. I would never have given them back the \$150 billion under any circumstances. I would've never allowed that to happen. They are, they are now rich, and did you notice they're buying from everybody but the United States? They're buying planes, they're buying everything, they're buying from everybody but the United States. I would never have made the deal.

SANGER: Our law prevents us from selling to them, sir.

TRUMP: Uh, excuse me?

SANGER: Our law prevents us from selling any planes or, we still have sanctions in the U.S. that would prevent the U.S. from being able to sell that equipment.

TRUMP: So, how stupid is that? We give them the money, and we now say, "Go buy Airbus instead of Boeing," right? So how stupid is that? In itself, what you just said, which is correct by the way, but would they now go and buy, you know, they bought 118 approximately, 118 Airbus planes. They didn't buy Boeing planes, O.K.? We give them the money, and we say you can't spend it in the United States, and create wealth and jobs in the United States. And on top of it, they didn't, they in theory, I guess, cannot do that, you know, based on what I've understood. They can't do that. It's hard to believe. We gave them \$150 billion and they can't spend it in our country.

SANGER: So you would lift the domestic sanctions so they could buy American goods?

TRUMP: Well, I wouldn't have given them back the money. So I wouldn't be in that position. I would never have given them back the – that would never be a part of the negotiation. I would have never, ever given it to them, and I would've made a better deal than they made, without the money, and I would've made a better deal.

SANGER: And to stop the missile launches they've been doing?

TRUMP: Well, it's ridiculous, I mean, now they're doing missile launches, and they're buying missiles from Russia, and they're doing things that nobody thought were, you know, even permissible or in the deal, and they're doing them.

HABERMAN: Mr. Trump, one thing you didn't talk about –

TRUMP: That deal was one of the most incompetent deals of any kind I've ever seen.

HABERMAN: One thing you talked about at Aipac –

TRUMP: Right, David, so I wouldn't talk in terms of not buying because I would've never, ever given them the money. Go ahead.

HABERMAN: Sorry, sir, one thing that didn't come up at Aipac, I think in actually anyone's speeches, but in yours also, I'm curious, in terms of Israel, and in terms of the peace process, do you think it should result in a two-state solution, or in a single state?

TRUMP: Well, I think a lot of people are saying it's going to result in a two-state solution. What I would love to do is to, a lot of people are saying that. I'm not saying anything. What I'm going to do is, you know, I specifically don't want to address the issue because I would love to see if a deal could be made. If a deal could be made. Now, I'm not sure it can be made, there's such unbelievable hatred, there's such, it's ingrained, it's in the blood, the hatred and the distrust, and the horror. But I would love to see if a real deal could be made. Not a deal that you know, lasts for three months, and then everybody starts shooting again. And a big part of that deal, you know, has to be to end terror, we have to end terror. But I would say this, in order to negotiate a deal, I'd want to go in there as evenly as possible and we'll see if we can negotiate a deal. But I would absolutely give that a very hard try to do. You know, a lot of people think that's the hardest of all deals to negotiate. A lot of people think that. So, but I would say that I would have a better chance than anybody of making a deal. I'll tell you one thing, people that I know from Israel, many people, many, many people, and almost everybody would love to see a deal on the side of Israel. Everybody would, now with that being said, most people don't think a deal can be made. But from the Israeli side, they would love to see a deal. And I've been a little bit surprised here. Now that I'm really into it, I've been a little bit surprised to hear that. I would've said, I would've said that maybe, maybe you know, maybe Israel never really wanted to make a deal or doesn't really want to make a deal. They really want to make a deal, they want to make a good deal, they want to make a fair deal, but they do want to make a deal. And, almost everybody, and I'm talking to people off the record, and off the record, they really would like to see a deal. I'm not so sure that the other side can mentally, you know, get their heads around the deal, because the hatred is so incredible. Folks, I have to go.

Developing Views on Foreign Affairs

Second interview begins:

TRUMP: So go ahead, start off wherever you want.

SANGER: One place that might be a good place to start is where we ended up on the foreign policy advisers. Because we're trying to figure out how much time you're cutting out now for foreign policy as you said — it's not an area you focused on in your business career as much.

TRUMP: Well I enjoyed it, I enjoyed reading about it. But it wasn't something that came into play as a business person. But I had an aptitude for it I think, and I enjoyed reading about and I would read about it.

SANGER: One question we had for you is, first of all, since you enjoyed reading about it, is there any particular book or set of articles that you found influential in developing your own foreign policy views?

TRUMP: More than anything else would be various newspapers including your own, you really get a vast array and, you know a big menu of different people and different ideas. You know you get a very big array of things from reading the media, from seeing the media, the papers, including yours. And it's something that I've always found interesting and I think I've adapted to it pretty well. I will tell you my whole stance on NATO, David, has been — I just got back and I'm watching television and that's all they're talking about. And you know when I first said it, they sort of were scoffing. And now they're really saying, well wait, do you know it's really right? And maybe NATO — you know, it doesn't talk about terror. Terror is a big thing right now. That wasn't the big thing when it originated and people are starting to talk about the cost.

SANGER: Well it's geared toward state actors and you're discussing gearing something toward nonstate actors. Is it possible that we need a new institution that is not burdened by the military structure of NATO in order to deal with nonstate actors and terrorists?

TRUMP: I actually think in terms of terror you may be better off with a new institution, an institution that would be more fairly based, an institution that would be more fairly taken care of from an economic standpoint. You have many wealthy states over there that are not going to be there if it's not for us, and they're not going to be there if it is for terror. Whether it's Saudi Arabia or others. I actually do think, while I'd like to adapt it, I think you have a different set of players, frankly. You have more of a Middle Eastern player and others but you would have in addition, Middle Eastern players.

SANGER: Who are not currently members of NATO. You think the membership of NATO is not set up right for combating terror.

TRUMP: No, it was set up to talk about the Soviet Union. Now of course the Soviet Union doesn't exist now it's Russia, which is not the same size, in theory not the same power, but who knows about that because of weaponry, but it's not the same size and this was set up for numerous things but for the Soviet Union. The point is the world is a much different place right now. And today all you have to do is read and see the world is, the big threat would seem to be based on terror and based on what's going on in 90 percent, 95 percent of the horror stories. I think, probably a new institution maybe would be better for that than using NATO which was not meant for that. And it's become very bureaucratic, extremely expensive and maybe is not flexible enough to go after terror. Terror is very much different than what NATO was set up for.

SANGER: And requires a different kind of force.

TRUMP: I think it requires a different flexibility, it requires a different speed maybe, watching nations or a nation or nations. I think it requires flexibility and speed.

SANGER: So Maggie and I were at the end of our conversation this morning we were talking with you a little bit about your foreign policy advisers. There's been a little bit of a sense that you've had a hard time attracting some of the bigger names of your party. There were a lot of former deputy secretaries of state, of defense, others were out there. And the list of advisers you've released so far has been very strong on having military backgrounds but not many with diplomatic backgrounds. We were wondering whether or not you are looking for a different mix or whether you're having trouble attracting some of the big names.

TRUMP: It's interesting, it's not trouble attracting. Many of them that I actually like a lot and that like me a lot and that want to do 100 percent, many of them are tied up with contracts working for various networks, you understand? I mean, I've had some that are — I currently have some that are thinking about getting out of their contract 'cause they're so excited about it. I've had a lot of excitement but there are some that are tied up where they have a contract with, as an example, they might have a contract with Fox, they may have a contract with CNN and they can't do it. They have contracts with the various networks and maybe the media too. I don't know about The Times but it's possible — I think less likely, I'm not sure how that structure works with the actual newspapers. But there are some that I've spoken to that want to do it but they're tied up with contracts that are with somebody else. There are some that were with campaigns that have now imploded, and I think they're going to be free agents very shortly. Hey, a lot of campaigns have imploded in the last couple of months, which you people perhaps have seen just as vividly as I have. Right? Not as happily as I have, but nevertheless just as vividly. So you know there are actually, there are a lot of people available, there are a lot of good people available. But some of the good people are currently under contract. Does that make sense to you, David?

SANGER: Yup, Maggie, did you having anything more on that before we wanted to turn back to Israel?

HABERMAN: Yeah, Mr. Trump, if you could just say how much time are you devoting a week at this point either to briefings to studying, you know, and if there's no major change now what it might look like in the future?

TRUMP: I think that you know, what I've really had to do is get through 17, cause it was really 18 total when we started. So I had to get through 17 people. I've gotten through almost all of the 17 people. But I'm down to two, from 17 to two. And you know many of them were front-runners, and they weren't front-runners for very long. You can go through the list, you know the list as well as I do. And my primary focus was that.

But during the period I've been, I think very well versed on matters as we're discussing and many more than just what we're just discussing. Now as it gets — as we get you know closer to the end of the process it'll take place more and more. I'm setting up a council, I'm setting up — and I have other

people coming in, I gave you the other few names I think that we added, we have a few more coming in. But I have a few more that are going to come in. I just don't want to I just don't want to mention them unless they give me approval, meaning they're on board.

And we're going to have a very substantial council of very good people. And some of them are military. Look, the military is going to be very important because we have to do something with ISIS, David, and you know we do want the military. And I think that over the next few weeks I'll be able to give you some more names. People that are going to be coming in.

SANGER: Do you fear that if you have too many military on your council, they tend to search for the military solution first instead of the diplomatic or economic sanction solution first?

TRUMP: Yeah but I'd like to know the military solution and I'm working on the military solution. Because there's not huge negotiation involved with ISS, because there's an irrationality that is pretty — this is not something, 'Oh let's make a deal.' I don't see deals being made with ISIS. Nobody knows what ISIS is, nobody knows who is leading it, who is alive, who is not alive, I mean we're really not talking about too many diplomatic solutions. We're not talking about diplomatic solutions with ISIS, let me put it that way.

U.S. Influence in East Asia

SANGER: I wasn't referring to that in the ISIS context, I was referring more in the realm of dealing with our allies, dealing with China, dealing with Japan, the other places that we've discussed.

TRUMP: So ISIS I think you'd agree with me on that and the rest will come. I have really strong feelings on China. I like China very much I like Chinese people. I respect the Chinese leaders, but you know China's been taking advantage of us for many, many years and we can't allow it to go on. And at the same time we'll be able to keep a good relationship with China. And same with Japan and same with — you have to see the trade imbalance between Japan and the United States, it's unbelievable. They sell to us and we practically give them back nothing by comparison. It's a very unfair situation.

SANGER: They also pay more for troop support than any other country in the world.

TRUMP: They do but still far less than it costs us.

HABERMAN: Would you be willing —

TRUMP: You're right about that David, but it's — and they do pay somewhat more, but they pay more because of the tremendous amount of business that they do with us, uneconomic business from our standpoint.

HABERMAN: Would you be willing to withdraw U.S. forces from places like Japan and South Korea if they don't increase their contribution significantly?

TRUMP: Yes, I would. I would not do so happily, but I would be willing to do it. Not happily. David actually asked me that question before, this morning before we sort of finalized out. The answer is not happily but the answer is yes. We cannot afford to be losing vast amounts of billions of dollars on all of this. We just can't do it anymore. Now there was a time when we could have done it. When we started doing it. But we can't do it anymore. And I have a feeling that they'd up the ante very much. I think they would, and if they wouldn't I would really have to say yes.

SANGER: So we talked a little this morning about Japan and South Korea, whether or not they would move to an independent nuclear capability. Just last week the United States removed from Japan, after a long negotiation, many bombs worth, probably 40 or more bombs worth of plutonium or highly enriched uranium that we provided them over the years. And that's part of a very bipartisan effort to keep them from going nuclear. So I was a little surprised this morning when you said you would be open to them having their own nuclear deterrent. Certainly if you pull back one of the risks is that they would go nuclear.

TRUMP: You know you're more right except for the fact that you have North Korea which is acting extremely aggressively, very close to Japan. And had you not had that, I would have felt much, I would have felt differently. You have North Korea, and we are very far away and we are protecting a lot of different people and I don't know that we are necessarily equipped to protect them. And if we didn't have the North Korea threat, I think I'd feel a lot differently, David.

SANGER: But with the North Korea threat you think maybe Japan does need its own nuclear...

TRUMP: Well I think maybe it's not so bad to have Japan — if Japan had that nuclear threat, I'm not sure that would be a bad thing for us.

SANGER: You mean if Japan had a nuclear weapon it wouldn't be so bad for us?

TRUMP: Well, because of North Korea. Because of North Korea. Because we don't know what he's going to do. We don't know if he's all bluster or is he a serious maniac that would be willing to use it. I was talking about before, the deterrent in some people's minds was that the consequence is so great that nobody would ever use it. Well that may have been true at one point but you have many people that would use it right now in this world.

SANGER: For that reason, they may well need their own and not be able to just depend on us...

TRUMP: I really believe that's true. Especially because of the threat of North Korea. And they are very aggressive toward Japan. Well I mean look, he's aggressive toward everybody. Except for China and Iran.

See we should use our economic power to have them disarm — now then it becomes different, then it becomes purely economic, but then it becomes different. China has great power over North Korea even though they don't necessarily say that. Now, Iran, we had a great opportunity during this negotiation when we gave them the 150 billion and many other things. Iran is the No. 1 trading partner of North Korea. Now we could have put something in our agreement that they would have led the charge if we had people with substance and with brainpower and with some negotiating ability.

But the No. 1 trading partner with North Korea is Iran. And we did a deal with them, and we just did a deal with them, and we don't even mention North Korea in the deal. That was a great opportunity to put another five pages in the deal, or less, and they do have a great influence over North Korea. Same thing with China, China has great influence over North Korea but they don't say they do because they're tweaking us. I have this from Chinese. I have many Chinese friends, I have people of vast wealth, some of the most important people in China have purchased apartments from me for tens of millions of dollars and frankly I know them very well. And I ask them about their relationship to North Korea, these are top people. And they say we have tremendous power over North Korea. I know they do. I think you know they do.

SANGER: They signed on to the most recent sanctions, more aggressive sanctions than we thought the Chinese would agree to.

TRUMP: Well that's good, but, I mean I know they did, but I think that they have power beyond the sanctions.

SANGER: So you would advocate that they have to turn off the oil to North Korea basically.

TRUMP: So much of their lifeblood comes through China, that's the way it comes through. They have tremendous power over North Korea, but China doesn't say that. China says well we'll try. I can see them saying, "We'll try, we'll try." And I can see them laughing in the room next door when they're together. So China should be talking to North Korea. But China's tweaking us. China's toying with us. They are when they're building in the South China Sea. They should not be doing that but they have no respect for our country and they have no respect for our president. So, and the other one, and this is an opportunity passed because why would Iran go back and renegotiate it having to do with North Korea? But Iran is the No. 1 trading partner, but we should have had something in that document that was signed having to do with North Korea as the No. 1 trading partner and as somebody with a certain power because of that. A very substantial power over North Korea.

SANGER: Mr. Trump with all due respect, I think it's China that's the No. 1 trading partner with North Korea.

TRUMP: I've heard that certainly, but I've also heard from other sources that it's Iran.

SANGER: Iran is a major arms exchanger with...

TRUMP: Well that is true but I've heard it both ways. They are certainly major arms exchangers, which in itself is terrible that we would make a deal with somebody that's a major arms exchanger with North Korea. But had that deal not been done and they were desperate to do it, and they wanted to do it much more so than we know in my opinion, meaning Iran wanted to make the deal much more than we know. We should have backed off that deal, doubled the sanctions and made a real deal. And part of that deal should have been that Iran would help us with North Korea. So, the bottom line is, I think that frankly, as long as North Korea's there, I think that Japan having a capability is something that maybe is going to happen whether we like it or not.

Boots on the Ground

SANGER: O.K.. We wanted to ask you a little bit, and Maggie maybe you may have something on this as well, about what standards you would use for using American troops abroad. You've said you wouldn't want to send them in against ISIS, that that should be the neighbors. But you did say this morning that if we have a treaty obligation under NATO to protect the Baltics, you would do that. When you think of your standards under which you would put American lives...

TRUMP: Well I think, I do think I'd want to renegotiate some of those treaties. I think those treaties are very unfair, and they're very one-sided and I do think that some of those treaties, just like the Iran deal. But I think that some of those treaties would — will be — renegotiated.

SANGER: Such as the U.S.-Japan defense treaty?

TRUMP: Well, like Japan as an example. I mean that's not a fair deal.

SANGER: Do you have general standards in mind? And, we're trying to understand your hierarchy of threats.

TRUMP: Are you talking about for...

SANGER: For when you would commit American troops abroad?

TRUMP: O.K. You absol — I know you'll criticize me for this, but you cannot just have a standard. You cannot just say that we have a blanket standard all over the world because each instance is totally different, David. I mean, each instance is so different that you can't have a blanket standard. You may say... it sounds nice to say, "I have a blanket standard; here's what it is." Number one is the protection of our country, O.K.? That's always going to be number one, by far. That's by a factor of a hundred. But you know, then there will be standards for other places but it won't be a blanket standard.

SANGER: Humanitarian intervention: Are you in favor of that or not?

TRUMP: Humanitarian? Yes, I would be. You know, to help I would be, depending on where and who and what. And, you know, again — generally speaking — I'd have to see the country; I'd have to see what's going on in the region and you just cannot have a blanket. The one blanket you could say is, "protection of our country." That's the one blanket. After that it depends on the country, the region, how friendly they've been toward us. You have countries that haven't been friendly to us that we're protecting. So it's how good they've been toward us, et cetera, et cetera. So you can't say a blanket. You could say standards for different areas, different regions, and different countries.

Israel and the Palestinians

HABERMAN: You had said earlier, I think, when you called David that you had wanted to elaborate on your answer about Israel and a two-state solution. I just wanted to...

TRUMP: Well, not elaborate. I just put it off because I was running out of time and I didn't want to get into it too much because it's actually not that. So should we talk about Israel for a little while?

SANGER: Sure.

TRUMP: I have gotten some of the reviews of my speech at Aipac and, really, they've been very nice. They were very nice. Were you there? Were either of you at that speech?

HABERMAN: I was.

SANGER: I saw it on TV.

TRUMP: You saw the response Maggie, then, from the crowd?

HABERMAN: I did. I did.

TRUMP: Many, many standing ovations and they agreed with what I said. Basically I support a two-state solution on Israel. But the Palestinian Authority has to recognize Israel's right to exist as a Jewish state. Have to do that. And they have to stop the terror, stop the attacks, stop the teaching of hatred, you know? The children, I sort of talked about it pretty much in the speech, but the children are aspiring to grow up to be terrorists. They are taught to grow up to be terrorists. And they have to stop. They have to stop the terror. They have to stop the stabbings and all of the things going on. And they have to recognize that Israel's right to exist as a Jewish state. And they have to be able to do that. And if they can't, you're never going to make a deal. One state, two states, it doesn't matter: you're never going to be able to make a deal. Because Israel would have to have that. They have to stop the terror. They have to stop the teaching of children to aspire to grow up as terrorists, which is a real problem. So with that you'd go two states, but in order to go there, before you, you know, prior to getting there, you have to get those basic things done.

Now whether or not the Palestinians can live with that? You would think they could. It shouldn't be hard except that the ingrained hatred is tremendous.

Countering Extremism

HABERMAN: You had talked, and you've talked a lot recently, about wanting to expand laws regarding torture.

TRUMP: Yes.

HABERMAN: Much of that is governed by international law.

TRUMP: Yes.

HABERMAN: How would you go about bringing changes to...?

TRUMP: O.K., when you see a thing like an attack in Brussels, when you see as an example they have somebody that they've wanted very much, and they got him three, four days before Brussels, right? Before the bombing. Had they immediately subjected him to very serious interrogation — very, very serious — you might have stopped the bombing. He knew about the bombing. Just like the people, just like all of that people in the area where he grew up — where he was housed a couple of houses down the road — they all knew he was there. And they never turned him in. This is what I'm saying: there's something going on and it's not good. He was the No. 1 wanted fugitive in the world and he's living in his neighborhood, and I believe I saw a picture of him shopping in his neighborhood, right? In a grocery store? You know: shopping! Buying food! I mean, it's ridiculous they don't turn him in. Just like in California, the two people, where she probably radicalized him but they don't know, but the two — the married couple — that killed the 14 people: they had bombs all over the floor of their apartment and nobody said anything. And many people saw that apartment and many people saw bombs. You know, if you walk into an apartment, Maggie or David, you're going to say, "Oh, this is a little strange."

SANGER: So would you invest in programs, or help the Europeans invest in programs, for counter-radicalization? For finding jobs and so forth for the refugees who come in so that their temptation to go to become radicalized in Europe would be lower? In other words do you have a program in mind to stop the radicalization?

TRUMP: The one thing I'd do, David, is build safe zones in Syria. You know this whole concept of us accepting, you know, tens of thousands of people, and you see I was originally right when I said, many more people, you know he was talking about 10,000, you know it's many more people than 10,000 are coming in. And will come in.

SANGER: And who would protect those safe zones, you know as soon as you build one...?

TRUMP: O.K., what I would do is this: We could lead it, but I would get the Gulf states and others to put up the money. I mean Germany should put up money. Look what's happened to Germany. Germany's being destroyed and I have friends, I just left people from Germany and they don't even want to go back. Germany's being destroyed by Merkel's naiveté or worse. But Germany is a whole different place and you're going to have a problem in Germany. The German people are not going to take it. The German people are not going to take what's going on there. You have people leaving the country, permanently leaving the country. You have tremendous crime, you have tremendous, you know, you read the same stories that I do. You write them, actually, it's even better. So you have tremendous problems over there but I do believe in building a safe zone, a number of safe zones, in sections of Syria and that when this war, this horrible war, is over people can go back and rebuild if they want to and I would have the Gulf states finance it because they have the money and they should finance it. So far, they've put up very little money and they taken nobody in, essentially nobody in. I would be very strong with them because they have tremendous, they have unlimited amounts of money, and I would ask them to finance it. We can lead it but I don't want to spend the money on it, because we don't have any money. Our country doesn't have money.

A Strong China

SANGER: I wanted to take you back to something you said on China earlier because your arguments about China so far have really been, over the years, very much about how to deal with a strong and rising China. But what we've seen in the past six months to a year has been a China that is economically weakening. I'm sure you see it in your own businesses there. So do you have a sense...

TRUMP: Well, they're down to G.D.P. of 7 percent.

SANGER: If you believe their numbers.

TRUMP: Yeah, if we ever hit 7 percent we'd have the most successful country. We'd be in a boom, the likes of which we've rarely seen before, right?

SANGER: What I'm getting at is a weakening China may have different effects on the world and on the United States than a strengthening China. Do you fear a weaker China or a weakening China more than a strong China?

TRUMP: No. I want a strong United States and I hope China does well, but before I worry about China I have to worry about the United States and we're not doing well.

SANGER: You've given us a lot of your impressions of Vladimir Putin. We haven't heard you very much on Xi Jinping.

TRUMP: Well I haven't said anything. By the way, I've been really misquoted. Vladimir Putin said, "Donald Trump is brilliant and Donald Trump is a real leader. And Donald Trump will be the real leader." O.K.? I didn't say anything about him other than to say... I said, we were on "60 Minutes" the same night, remember? That was six months ago. But I never said good, bad, or indifferent. I said he is a strong leader, he is a strong leader. But I didn't say that, and I'm not saying that positively or negatively, I'm just saying he's a strong leader. That's pretty obvious that he's a strong leader.

SANGER: What's your impression of Xi Jinping?

TRUMP: I think they are in a very interesting position. The economy is going to be, I think actually very strong but the economy, I think they're doing better than people understand. Nobody has manipulated economic conditions better than they have. And I think they're doing just fine and I think they will continue to do just fine. But a lot of it's being taken out of the hide of our country and we can't allow that to happen. You know if you look at the number of jobs that we've lost, it's millions of jobs. It's not a little bit, it's millions. And if you look at our phony numbers of 5 percent unemployment, even opponents would say that, and would agree to that fact that the jobs that we have are bad jobs. They're not good jobs, they're bad jobs. We're losing, you know, when you see a Carrier move into Mexico, those are good jobs. We're losing the good jobs. We now have a lot of bad jobs, we have a lot of part-time jobs. It's not the same country. We're losing our companies. I mean when we lose Pfizer to Ireland, when we lose Ford and Carrier and many others to, Nabisco as an example from Chicago to Mexico, when we lose all of these companies going to Mexico and to many other places, we're going to end up having no comp—we're going to have nothing left. And it has to be stopped, and it has to be stopped fast and I know how to stop it. Nobody else, the politicians don't know how

to stop it. And besides that the politicians are all taken care of by the special interests and the lobbyists. Lobbyists for hire. And somebody will get to them and they will pay them a lot of money and the politicians will not do what they have to do, which is keep companies in this country. Those companies that want to leave will get to the lobbyists and the special interests and those politicians will do what they want them to do, which is not in the interest of our country. O.K.

Lessons Learned From Iraq

HABERMAN: Mr. Trump, I have heard you say for years now, including at your CPAC speech back in 2011, "Take the oil." That America should have taken the oil from Iraq.

TRUMP: I've said it for years.

HABERMAN: Why should the American...?

TRUMP: Originally I didn't say it. Originally I said, "Don't go into Iraq."

HABERMAN: Right.

TRUMP: Now, we went in, we destroyed a military base that was equal to, if not greater than, Iran. And we've destroyed that military, and they were holding each other off for many, you know for decades, decades, and we destroyed one of those military powers. And I said don't go in because if you dest — now, I didn't know that they didn't have weapons of mass destruction. But on top of everything else they had no weapons of mass destruction.

HABERMAN: Well, but sir, why should the American approach to rebuilding Iraq, or other countries where we have shed blood, why should that differ from how we rebuilt postwar Japan and Germany in the Marshall Plan?

TRUMP: Well it was much different. We rebuild Iraq and it gets blown up. We build a school? Gets blown up. Build it again? Gets blown up. You know, it's a mess. I mean you have government that's totally corrupt. The country is totally, totally corrupt and corruptible. The leader, I mean one of the big decisions that was made putting the people in charge of Iraq that were in charge of Iraq, and they were exclusionary. They excluded people that ultimately, you know large groups of people, that ultimately became ISIS. Became stronger than them. And the sad thing is, I always talk about the bad deal that we made with Iran as being one of the worst deals, actually the worst deal is what we've done again involving Iran, we've destroyed the military capability of Iraq and destroyed Iraq, period, and Iran is now going to take over Iraq, they've essentially already done that in my opinion, but they're going to officially take over Iraq in the very near future. And I mean Iraqis were already reporting to Iran, but Iran is going to take over Iraq, they've wanted to do it for decades. They're going to take over Iraq, they're going to take the oil reserves which are the second biggest in the world, extremely high quality oil under the ground, extremely high quality, they're going to take all of that over because of us. Because we destroyed —

SANGER: But Mr. Trump you've argued many times that you don't want to have ground troops, but "We take the oil" implies you're going to have to go in there and take it by force, defend it —

TRUMP: Well what I said is, I said when we left that we should have taken the oil.

SANGER: If you want to take the oil today you're going to have to go into a country that is now an ally, Iraq, even if it's a dysfunctional one, put your troops on the ground.

TRUMP: Yeah, yeah, O.K.. Ready? I said take the oil. I've been saying that for years. And many very smart scholars and military scholars said that'd be a great thing to do, but people didn't do it. So, but I have been saying that for years, I'm glad you know that. At least four or five years. When we left I said take the oil. We shouldn't have been there, we shouldn't have destroyed the country, and Saddam Hussein was a bad guy but he was good at one thing: Killing terrorists. He killed terrorists like nobody, all right? Now it's Harvard of terrorism. You want to be a terrorist you go to Iraq. But he killed terrorists. O.K., so we destroyed that. By the way, bad guy, just so you know, officially, I want to say that, bad guy, but it was a lot better of situation than we have right now. And he did not knock down the World Trade Center, O.K.? So officially speaking, he did not, Iraq did not knock down the World Trade center. We went in there after the World Trade Center, well he didn't knock down the World Trade Center, so you could say why are we doing this, all right, that was another thing. I never felt that he did it, and it turned out that he didn't. And it'll be very interesting when those documents are opened up and released in the future, I think maybe they should be opened up and released sooner rather than later.

HABERMAN: You mean the House, the House and Senate report?

TRUMP: Yes, yes, exactly. It'd be very interesting to see because they must know. They must know, if they're anything, they must know what happened in terms of who were the people. But it wasn't Iraq, O.K.? You're not going to find that it was Iraq. So it was very faulty, but I was, I was talking about, I was talking about taking the oil, now we have a different situation because now we have to go in again and start fighting, you know, at that time we had it and we should've kept it. Now I would say knock the hell out of the oil and do it because it's a primary source of money for ISIS.

SANGER: So in other words you don't want to take the oil right now, you want to just destroy the oil fields.

TRUMP: Well now, we have to destroy the oil. We should've taken it and we would've have it. Now we have to destroy the oil. We don't do it, I just can't believe we don't do it.

SANGER: So you know Mr. Trump, from listening and enjoying these two conversations we've had today which have been extremely interesting, I've been trying to sort of fit where your worldview and your philosophy here, your doctrine fits in with sort of the previous Republican mainlines of inquiry. And so if you think back to George H. W. Bush, the most recent President Bush's father, he was an internationalist who was in the realist school, he wanted to sort of change the foreign policy of other nations but you didn't see him messing inside those countries and then you had a group of people around —

TRUMP: Well he did the right thing, David, he did the right thing. He went in, he knocked the hell out of Iraq and then he let it go, O.K.? He didn't go in. Now I don't know was that Schwarzkopf, was that, was that —

SANGER: It was George W. Bush himself.

TRUMP: Or maybe it was him, but he didn't go in, he didn't get into the quicksand, right? He didn't get into the quicksand and I mean, history will show that he was right. And with that Saddam Hussein overplayed his card more than any human being I think I've ever seen. Instead of saying "Wow, I got lucky" that they didn't come in and take this all away from me. He should've just relaxed a little bit, O.K.? And instead he taunted Bush Sr. He taunted him. And Bush Jr. loves his father and didn't like what was happening, but I remember very vividly how Saddam Hussein was taunting, absolutely taunting, saying we have beaten the Americans, you know, meaning they didn't come in so he would tell everybody he beat them. Do you remember that, right?

SANGER: I do indeed.

TRUMP: And he was taunting to them, he was saying, and even I used to say "Wow" because I knew that we could've gone further. We went in for a short period of time and just knocked the hell out of them and then went back, sort of gave them a lesson, but we didn't destroy the country, we didn't destroy the grid, we didn't, you know, there was something left. There was a lot left. And instead of just sort of saying he got lucky and to himself, just going about, he was taunting the Bushes. And Junior said, "Well I'm not going to take it" and he went in. And you know, look that was —

'America First'

SANGER: There was something else to George W. Bush, Bush 43's philosophy. If we believed that his father was an internationalist, I think it's fair to say, at least a lot of the people around George W. Bush were transformational, they actually wanted to change the nature of regime. You heard this in George W. Bush's second inaugural address.

TRUMP: Yeah.

SANGER: What you are describing to us, I think is something of a third category, but tell me if I have this right, which is much more of a, if not isolationist, then at least something of "America First" kind of approach, a mistrust of many foreigners, both our adversaries and some of our allies, a sense that they've been freeloading off of us for many years.

TRUMP: Correct. O.K.? That's fine.

SANGER: O.K.? Am I describing this correctly here?

TRUMP: I'll tell you — you're getting close. Not isolationist, I'm not isolationist, but I am "America First." So I like the expression. I'm "America First." We have been disrespected, mocked, and ripped off for many many years by people that were smarter, shrewder, tougher. We were the big bully, but we were not smartly led. And we were the big bully who was — the big stupid bully and we were

systematically ripped off by everybody. From China to Japan to South Korea to the Middle East, many states in the Middle East, for instance, protecting Saudi Arabia and not being properly reimbursed for every penny that we spend, when they're sitting with trillions of dollars, I mean they were making a billion dollars a day before the oil went down, now they're still making a fortune, you know, their oil is very high and very easy to get it, very inexpensive, but they're still making a lot of money, but they were making a billion dollars a day and we were paying leases for bases? We're paying leases, we're paying rent? O.K.? To have bases over there? The whole thing is preposterous. So we had, so America first, yes, we will not be ripped off anymore. We're going to be friendly with everybody, but we're not going to be taken advantage of by anybody. We won't be isolationists — I don't want to go there because I don't believe in that. I think we'll be very worldview, but we're not going to be ripped off anymore by all of these countries. I mean think of it. We have \$21 trillion, essentially, very shortly, we'll be up to \$21 trillion in debt. O.K.? A lot of that is just all of these horrible, horrible decisions. You know, I'll give you another one, I talked about NATO and we fund disproportionately, the United Nations, we get nothing out of the United Nations other than good real estate prices. We get nothing out of the United Nations. They don't respect us, they don't do what we want, and yet we fund them disproportionately again. Why are we always the ones that funds everybody disproportionately, you know? So everything is like that. There's nothing that's not like that. That's why if I win and if I go in, it's always never sounds — I have a woman who came up to me, I tell this story, she said "Mr. Trump, I think you're great, I think you're going to be a great president, but I don't like what you say I got to make America rich again." But you can't make America great again unless you make it rich again, in other words, we're a poor nation, we're a debtor nation, we don't have the money to do, we don't have the money to fix our military and the reason we don't is because of the fact that because of all of the things we've been talking about for the last 25 min and other things.

When America Was 'Great'

HABERMAN: Mr. Trump, you — I was looking back at your speech in New Hampshire back in 1987 when you were releasing "The Art of the Deal" and a lot of your concerns are very similar to the ones you're voicing now.

TRUMP: Right, even similar countries.

HABERMAN: Right, and I'm just wondering what is the era when you think the United States last had the right balance, either in terms of defense footprint or in terms of trade?

TRUMP: Well sometime long before that. Because one of the presidents that I really liked was Ronald Reagan but I never felt on trade we did great. O.K.? So it was actually, it would be long before that.

SANGER: So was it Eisenhower, was it Truman, was it F.D.R.?

TRUMP: No if you really look at it, it was the turn of the century, that's when we were a great, when we were really starting to go robust. But if you look back, it really was, there was a period of time when we were developing at the turn of the century which was a pretty wild time for this country and

pretty wild in terms of building that machine, that machine was really based on entrepreneurship etc, etc. And then I would say, yeah, prior to, I would say during the 1940s and the late '40s and '50s we started getting, we were not pushed around, we were respected by everybody, we had just won a war, we were pretty much doing what we had to do, yeah around that period.

SANGER: So basically Truman, Eisenhower, the beginning of the 1947 national security reviews, that's the period?

TRUMP: Yes, yes. Because as much as I liked Ronald Reagan, he started Nafta, now Clinton really was the one that — Nafta has been a disaster for our country, O.K., and Clinton is the one as you know that got it done, but it was conceived even before Clinton, but you could say that maybe those people didn't want done what was ultimately signed because it was changed a lot by the time it got finalized. But Nafta has been a disaster for our country.

SANGER: But you think of that period time that you most admire: late '40s, early '50s, it was also the most terrifying time with the build up of the Cold War, it's when the Russians got nuclear weapons, we got into an arms race, we were —

TRUMP: But David, a lot of that was just pure technology. The technology was really coming in at that time. And so a lot of that was just timing of technology.

SANGER: It was also a period of time when we were threatening to use nuclear weapons against the North Koreans and the Chinese in the war. Was that approach you saw of Douglas MacArthur's approach at that time, so forth, is that what you're admiring?

TRUMP: Well I was a fan as you probably know, I was a fan of Douglas MacArthur. I was a fan of George Patton. If we had Douglas MacArthur today or if we had George Patton today and if we had a president that would let them do their thing you wouldn't have ISIS, O.K.? You wouldn't be talking about ISIS right now, we'd be talking about something else, but you wouldn't be talking about ISIS right now. So I was a fan of Douglas MacArthur, I was a fan of — as generals — I was a fan of George Patton. We don't have, we don't have seemingly those people today, now I know they exist, I know we have some very, I know the Air Force Academy and West Point and Annapolis, I know that great people come out of those schools. A lot of times the people that get to the top aren't necessarily those people anymore because they're politically correct. George Patton was not a politically correct person.

SANGER: Yeah I think we can all agree on that.

TRUMP: He was a great general and his soldiers would do anything for him.

SANGER: But the other day, I'm sorry, this morning, you suggested to us you would only use nuclear weapons as a last resort.

TRUMP: Totally last resort.

SANGER: And what did Douglas MacArthur advocate?

TRUMP: I would hate, I would hate —

SANGER: General MacArthur wanted to go use them against the Chinese and the North Koreans, not as a last resort.

TRUMP: That's right. He did. Yes, well you don't know if he wanted to use them but he certainly said that at least.

SANGER: He certainly asked Harry Truman if he could.

TRUMP: Yeah, well, O.K.. He certainly talked it and was he doing that to negotiate, was he doing that to win? Perhaps. Perhaps. Was he doing that for what reason? I mean, I think he played, he did play the nuclear card but he didn't use it, he played the nuclear card. He talked the nuclear card, did he do that to win? Maybe, maybe, you know, maybe that's what got him victory. But in the meantime he didn't use them. So, you know. So, we need a different mind set. So you talked about torture before, well what did it say — well I guess you had enough and I hope you're going to treat me fairly and if you're not it'll be forgotten in three or four days and that'll be the story. It is a crazy world out there, I've never seen anything like it, the volume of press that I'm getting is just crazy. It's just absolutely crazy, but hopefully you'll treat me fairly, I do know my subject and I do know that our country cannot continue to do what it's doing. See, I know many people from China, I know many people from other countries, I deal at a very high level with people from various countries because I've become very international. I'm all over the world with deals and people and they can't believe what their countries get away with. I can tell you people from China cannot believe what their country's, what their country's getting away with. At let's say free trade, where, you know, it's free there but it's not free here. In other words, we try sell — it's very hard for us to do business in China, it's very easy for China to do business with us. Plus with us there's a tremendous tax that we pay when we go into China, where's when China sells to us there's no tax. I mean, it's a whole double standard, it's so crazy, and they cannot believe they get away with it, David. They cannot believe they get away with it. They are shocked, and I'm talking about people at the highest level, people at — the richest people, people with great influence over, you know, together with the leaders and they cannot believe it. Mexico can't believe what they get away with. When I talked about Mexico and I talked about they will build a wall, when you look at the trade deficit we have with Mexico it's very easy, it's a tiny fraction of what the cost of the wall is. The wall is a tiny fraction of what the cost of the deficit is. When people hear that they say "Oh now I get it." They don't get it. But Mexico will pay for the wall. But they can't believe what they get away with. There's such a double standard. With many countries. It's almost, we do well with almost nobody anymore and a lot of that is because of politics as we know it, political hacks get appointed to negotiate with the smartest people in China, when we negotiate deals with China, China is putting the smartest people in all of China on that negotiation, we're not doing that. So anyway, I hope you guys are happy.

SANGER: Thank you, you've been very generous with your time.

Ukraine Court Rules Manafort Disclosure Caused 'Meddling' in U.S. Election

By Andrew E. Kramer

Dec. 12, 2018

MOSCOW — A court in Ukraine has ruled that officials in the country violated the law by revealing, during the 2016 presidential election in the United States, details of suspected illegal payments to Paul Manafort.

In 2016, while Mr. Manafort was chairman of the Trump campaign, anti-corruption prosecutors in Ukraine disclosed that a pro-Russian political party had earmarked payments for Mr. Manafort from an illegal slush fund. Mr. Manafort resigned from the campaign a week later.

The court's ruling that what the prosecutors did was illegal comes as the Ukrainian government, which is deeply reliant on the United States for financial and military aid, has sought to distance itself from matters related to the special counsel's investigation of Russia's interference in the 2016 presidential race.

Some of the investigation by the special counsel, Robert S. Mueller III, has dealt with Mr. Manafort's decade of work in Ukraine advising the country's Russia-aligned former president, Viktor F. Yanukovich, his party and the oligarchs behind it.

After President Trump's victory, some politicians in Ukraine criticized the public release by prosecutors of the slush fund records, saying the move would complicate Ukraine's relations with the Trump administration.

In Ukraine, investigations into the payments marked for Mr. Manafort were halted for a time and never led to indictments. Mr. Manafort's conviction in the United States on financial fraud charges related to his work in Ukraine was not based on any known legal assistance from Ukraine.

Ukrainian members of Parliament had pressed for investigations into whether the prosecutors' revelation of the payment records, which were first published in The New York Times, had violated Ukrainian laws that, in some cases, prohibit prosecutors from revealing evidence before a trial.

Both lawmakers asserted that if the release of the slush fund information broke the law, then it should be viewed as an illegal effort to influence the United States presidential election in favor of Hillary Clinton by damaging the Trump campaign.

The Kiev District Administrative Court, in a statement issued Wednesday, said that Artem Sytnik, the head of the National Anti-Corruption Bureau of Ukraine, the agency that had released information about the payments, had violated the law. The court's statement said this violation "resulted in meddling in the electoral process of the United States in 2016 and damaged the national interests of Ukraine."

A spokeswoman for the anti-corruption bureau said she could not comment before the court released a full text of the ruling. In an interview last June, Mr. Sytnik said he had revealed the information "in accordance with the law in effect at the time."

The court also faulted a member of Ukraine's Parliament, Serhiy A. Leshchenko, who had commented on Mr. Manafort's case and publicized at a news conference materials that the anti-corruption bureau had already posted on its website.

Mr. Leshchenko said he would appeal the ruling, and that the court was not independent and was doing the bidding of the Ukrainian government as it sought to curry favor with the Trump administration.

"This decision of the court is for Poroshenko to find a way to Trump's heart," he said, referring to President Petro O. Poroshenko. "At the next meeting with Trump, he will say, 'You know, an independent Ukrainian court decided investigators made an inappropriate move.' He will find the loyalty of the Trump administration."

Mr. Leshchenko said the prosecutors' revelations about Mr. Manafort were legal because they were "public interest information," even if they were also potential evidence in a criminal investigation.

Manafort has not been charged with a crime in Ukraine, and earlier this year, Ukrainian officials froze several investigations into Mr. Manafort's payments at a time when the government was negotiating with the Trump administration to purchase sophisticated anti-tank missiles, called Javelins.

Ukraine's prosecutor general said the delay on Mr. Manafort's cases was unrelated to the missile negotiations. In total, the United States provides about \$600 million in bilateral aid to Ukraine annually.

Earlier this month, the special counsel accused Mr. Manafort of violating a cooperation agreement by lying. Two of the five alleged lies, according to the filing, related to meetings or conversations with Konstantin V. Kilimnik, Mr. Manafort's former office manager in Kiev, whom the special counsel's office has identified as tied to Russian intelligence and as a key figure in the investigation into possible coordination between the Trump campaign and Russia.

Ukrainian law enforcement officials last year allowed Mr. Kilimnik to leave for Russia, putting him out of reach for questioning.


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After Trump's NATO Criticism, Countries Spend More On Defense

May 18, 2018 · 7:16 AM ET
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David Greene talks to NATO Secretary-General Jens Stoltenberg, who met with President Trump this week. Top on the agenda was defense spending, Iran and the war on terrorism.

DAVID GREENE, HOST:

President Trump once called the North Atlantic Treaty Organization obsolete, but the rhetoric Trump used on the campaign trail and in the early months of his presidency appears to have evolved. This was the president at the White House yesterday.

(SOUNDBITE OF ARCHIVE RECORDING)

PRESIDENT DONALD TRUMP: NATO has been working very closely with the United States. Our relationship is very good. Together, we've increased and really raised a lot of money from countries that weren't paying or weren't paying a fair share.

GREENE: Trump speaking there yesterday as he met with NATO's secretary general, Jens Stoltenberg, who joins us this morning in Washington. Mr. Secretary General, thanks again for coming on the program.

JENS STOLTENBERG: Thank you so much for having me.

GREENE: So did President Trump's strategy work? Did his earlier criticism of NATO pressure countries into spending more for defense?

STOLTENBERG: So his very strong message has helped. And what we see now is that after years of decline or reducing defense spending across NATO allies in Europe and Canada, all allies have stopped the cuts. All allies have started to increase defense spending. And more and more allies have spent 2 percent, which is a NATO guideline of GDP on defense. So we still have a long way to go, but I commended the president yesterday for his strong message on burden sharing because all allies have to contribute to an alliance as NATO.

GREENE: Well, he kept up with at least a part of that strategy it seemed yesterday. He said, countries that don't contribute enough. He singled out Germany - will be, quote, "dealt with." What does that mean?

STOLTENBERG: It means that all allies have to do what they promised. And as I just said, that's exactly what is now happening. We didn't promise to meet the 2 percent target - 2 percent of GDP for defense - in one year. We promised to stop the cuts, gradually increase and then move towards 2 percent within a decade. So...

GREENE: But forgive me, what does dealt with mean? I mean, do you approve of that sort of language when you're talking about allies?

STOLTENBERG: Well, what we all do is that we meet, we discuss and we focus on the gaps and the need for - especially those allies spending less than 2 percent, that they have to do a bit more. And that's the way we have handled this issue all the way since we made the decision back in 2014, and that has made it possible for us to move forward. So I think we should just continue to do exactly what we've done the last year and then we'll continue to make progress.

GREENE: So the president mentioned the Iran nuclear deal yesterday, saying, again, what he has said before that it's, quote, "terrible." The U.S. pullout from that deal has divided the United States and Europe. I mean, an EU leader said this week that the

U.S. seems almost like an enemy now. Are you feeling that in your job? And is that tension making it harder to keep the NATO alliance unified?

STOLTENBERG: So, honestly, there are differences. NATO is an alliance of 29 democracies, both sides of the Atlantic with different history, different geography but also sometimes different political views on serious issues like, for instance, the Iran nuclear deal or climate change, the Paris accord or trade issues. We have had that kind of differences before in NATO, dating back to the Suez Crisis in the 1950s or the Iraq War in 2003 and many other examples.

But the strength of NATO is that we, despite those differences, have proven again and again that we are able to unite around NATO's core task. And that is that we're able to protect each other and stand together because we are stronger together than alone. So I'm not saying that these differences are of no concern for me, but I'm saying that NATO has proven that, despite differences on important issues, we have been able to maintain the unity as a transatlantic alliance defending each other.

GREENE: Jens Stoltenberg is the secretary general of NATO. He was meeting with President Trump yesterday at the White House and was kind enough to join us this morning. We appreciate your time. Thank you so much.

STOLTENBERG: Thank you so much.

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FEB 5 1961

MEMORANDUM FOR THE HONORABLE JOHN D. EHRLICHMAN
 Assistant to The President for Domestic Affairs

Re: Power of Congressional Committee to Compel
 Appearance or Testimony of "White House
 Staff".

This subject obviously raises the question of "Executive Privilege", since generally speaking the power of a congressional committee to investigate is an extremely broad one--as broad as the potential power of Congress to legislate. Eszenblatt v. United States, 360 U.S. 109 (1959). And the power to investigate carries with it the power to compel the testimony of a witness:

"We are of the opinion that the power of inquiry--with process to enforce it--is an essential and appropriate auxiliary to the legislative function."
McGrain v. Baugherty, 273 U.S. 135.

Thus, if "White House staff" ^{1/} personnel are to be exempt from appearing or testifying before a congressional committee, it is because they have some special immunity or privilege not accorded others. It may be helpful to mention several closely related but not identical problems, any one of which could be the subject of a learned discourse which it would be neither possible nor profitable for you to read at length:

^{1/} The term "White House staff" is not used in any precise or technical sense. In view of the conclusions reached, no useful purpose would be served in attempting to fashion a definition of the term.

(a) Cabinet officers in the past have refused to accept subpoenas, but nonetheless have appeared and testified voluntarily on the subject matters specified in the subpoena; the technical question of the manner in which testimony may be compelled, if it is compellable at all, would, I think, be of relatively little concern unless one were defending a contempt prosecution. If a subpoena is insisted upon, and the committee has its back up, a subpoena will undoubtedly be sent, so that the presence or absence of a subpoena is not likely to be the critical element in a decision as to whether or not a presidential adviser should testify.

(b) Another slight variant of the problem is the subpoena requiring appearance at a place away from the Seat of Government. As you may recall, this question arose at the time of the trial of Aaron Burr for treason before John Marshall, sitting as a circuit judge in Richmond. Marshall issued a subpoena to Thomas Jefferson, who was then President, requiring Jefferson to produce certain documents; Jefferson responded with a letter saying in effect that if the courts were free to summon the President from place to place throughout the United States, he would be at their mercy in a manner incompatible with the coordinate status of the Executive Branch of the Government. That dispute between these two bitter enemies was not resolved--Jefferson did not in fact appear.

In the misdemeanor prosecution of Aaron Burr, Chief Justice Marshall, while adhering to his position that the President is subject to subpoena, conceded:

"In no case of this kind would a court be required to proceed against the president as against an ordinary individual. The objections to such a course are so strong and so obvious that all must acknowledge them." Roberson, Report of the Trials of Aaron Burr, Vol. 2, pp. 233, 236.

Everyone associated with the Executive Branch from then until now, so far as I know, has taken the position that the President himself is absolutely immune from subpoenas by anyone, at the Seat of Government or away from it. ^{2/} This, of course, does not answer the question as to whether his immediate advisers are likewise exempt.

In 1806, a United States circuit court sitting in New York subpoenaed three Cabinet officers to appear and give testimony in a civil proceeding pending before that court. The three Cabinet officers declined to respond to the subpoena, advising the Court by letter that the press of their official duties prevented their absenting themselves from the Seat of Government, but offering to give testimony by deposition. United States v. Smith, 27 Fed. Cases 1194 (No. 16,342) (C.C.D. NY 1806). A similar ruling involving a Cabinet officer was made by Attorney General Moody in 1905. 23 Ops. A.G. 326.

Thus, the Marshall-Jefferson precedent involved two very strong arguments in favor of privilege which may not be present in other situations. First, the President himself was sought to be subpoenaed; second, he was sought to be subpoenaed to a place away from the Seat of Government. When a lesser official in the Executive Branch is sought to be subpoenaed at the Seat of Government, the Jefferson precedent, in my opinion, cannot be regarded as controlling.

(c) Another related question is the obligation of the Executive Branch to furnish documents in its custody to a congressional investigating committee. This, too, involves a question of Executive privilege, and George Washington asserted such a privilege with respect to documents concerning the ill-fated St. Clair Expedition during

^{2/} President Jackson repeatedly claimed immunity from the congressional subpoena power. Warren, Presidential Declarations of Independence, 10 Boston University Law Review 1, 8-12 (1930).

his Presidency, and it has been unvaryingly claimed by his successors. But the claim of privilege for documents is not necessarily co-extensive with the claim for personal immunity from subpoena which is the subject of this memorandum. A claim for documents in the custody of the Executive Branch necessarily involves Executive business, whereas it cannot always be said to a certainty in advance that a White House adviser will necessarily be interrogated on a matter pertaining to his official duties. There is here, I think, a certain analogy to judicial proceedings, which have always made a distinction between a claim of absolute immunity from even being sworn as a witness, and a right to claim privilege in answering certain questions in the course of one's testimony as a witness. The former type of privilege, so far as I know, extends only to a criminal defendant (and, under a recent ruling of the Court of Appeals for the Ninth Circuit, of course, to Earl Caldwell, a New York Times reporter); the second type of privilege is available to attorneys, doctors, those who claim that an answer may incriminate them, and the like. But all of this second class must at least be sworn as witnesses, and invoke privilege only with respect to particular questions or particular lines of testimony.

On the other hand, the furnishing of a document to a congressional committee involves little, if any, inconvenience to the Executive Branch or to the President and his advisers. The requirement of personal attendance of a witness at a hearing, on the other hand, does involve some degree of inconvenience, depending on the length of time the witness is expected to be present, the place the hearing is to be held, and the closeness of the relationship between the witness and the President. To this extent, then, the requirement of personal attendance by a witness is more burdensome to the Executive than is the requirement that a document be furnished.

The practice with respect to past White House staff members has been erratic, and the only examples I have been able to find are ones concerning intimate advisers

of the President--people in the position such as you occupy, as opposed to the positions occupied by those who report to you.

On two occasions during the Administration of President Truman, a subcommittee of the House Committee on Education and Labor issued subpoenas to John R. Steelman, who held the title "Assistant to the President". In both instances he returned the subpoena with a letter stating that "In each instance the President directed me, in view of my duties as his Assistant, not to appear before your subcommittee."

In 1951, Donald Dawson, an Administrative Assistant to President Truman, was requested to testify before a Senate Subcommittee investigating the Reconstruction Finance Corporation, one aspect of which concerned Dawson's alleged wrongdoing. While President Truman felt that this request constituted a violation of the principle of the separation of powers, he nevertheless "reluctantly" permitted Mr. Dawson to testify in order to give him an opportunity to clear his name.

In 1944, Jonathan Daniels, an Administrative Assistant to President Roosevelt, refused to respond to a subpoena requiring him to testify with respect to his reported attempts to compel the resignation of the Rural Electrification Administrator. He grounded his refusal on the confidential nature of his relationship to the President. The subcommittee of the Senate Committee on Agriculture then unanimously recommended that he be cited for contempt. Thereupon Daniels wrote the Subcommittee Chairman that he still believed that a legislative committee could not require either the President or his Administrative Assistant to testify as to their conversations; that he had since conferred with the President; that the latter did not think in the particular matter his testimony would adversely affect the public interest, and that Daniels was therefore now willing to answer the subcommittee's questions.

Sherman Adams, during the Eisenhower Administration, declined to testify before a committee investigating the Dixon-Yates Power contract on the ground of his confidential relationship with the President, but at a later point in the Administration volunteered to testify with respect to his dealings with Bernard Goldfine.

During the hearings on the nomination of Abe Fortas to be Chief Justice of the United States, the Senate Judiciary Committee requested W. DeVier Pierson, Associate Special Counsel to the President, to appear and testify regarding the drafting of legislation authorizing Secret Service protection for Presidential candidates. It had been reported to the Committee that Justice Fortas had participated in the drafting of this legislation, at a time when he was sitting as Associate Justice of the Supreme Court. Pierson declined the invitation, writing Senator Eastland as follows:

"As Associate Special Counsel to the President since March, 1967, I have been one of the 'immediate staff assistants' provided to the President by law. (5 U.S.C. 105, 106) It has been firmly established, as a matter of principle and precedents, that members of the President's immediate staff shall not appear before a congressional committee to testify with respect to the performance of their duties on behalf of the President. This limitation, which has been recognized by the Congress as well as the Executive, is fundamental to our system of government. I must, therefore, respectfully decline the invitation to testify in the hearings."

These precedents are obviously quite inconclusive, particularly if one seeks to apply them to lower level White House staff members. In a strictly tactical sense, the Executive Branch has a headstart in any controversy with the Legislative Branch,

since the Legislative Branch wants something the Executive Branch has, and therefore the initiative lies with the former. All the Executive has to do is maintain the status quo, and he prevails. Congress, of course, has the authority to itself attach and detain a witness whom it regards as contumacious, and the threat to do this apparently prevailed in the Daniels incident.

But the question of legal remedies is not the only one involved, as you are well aware. When the President claims Executive privilege and refuses either to divulge a document or to permit a witness to testify, he immediately draws to himself some criticism for "withholding" relevant evidence from the Congress or from the public. While a soundly determined claim of Executive privilege is not only in the best interests of the Executive Branch as an institution but of the President himself, an inadequately justified claim of Executive privilege, hastily made at the behest of its beneficiary, may be an actual dis-service to the President. 3/ The Jonathan Daniels episode seems to be such an example.

To the extent that any generalizations may be drawn from the foregoing, they are necessarily tentative and sketchy. I offer the following:

(1) The President and his immediate advisers--that is, those who customarily meet with the President on a regular or frequent basis--should be deemed absolutely immune from testimonial compulsion by a congressional committee. They not only may not be examined with respect to their official duties, but they may not even be compelled to appear before a congressional committee. They are presumptively available to the President 24 hours a day, and the necessity of either accommodating a congressional committee or persuading a court to arrange a more convenient time, could impair that availability.

3/ During the Taspot Done investigation President Coolidge considered Attorney General Daugherty's recommendation to invoke Executive privilege as to his activities in the Department of Justice so ill-advised that he asked for his resignation. 101 Cong. Rec. 11461.

(2) I do not think this principle can or ought to be extended to all "members" of the White House staff, whatever that group may include. Whether one wants to classify on the basis of what appropriation their salaries are paid out of, the building in which they work, or otherwise, lower level White House staff members ought to have some form of testimonial privilege with respect to congressional investigating committees. But I think it far more in accordance with related doctrines in the law to say that such a privilege is not one which enables them to wholly disregard a subpoena, or to entirely refuse to appear before a congressional committee; instead, it is a privilege to refuse to testify with respect to any matter arising in the course of their official position of advising or formulating advice for the President.

As a practical matter, this distinction may not be of great importance because if the Committee specifies the subject of the testimony in its request, and the subject is one with respect to which privilege may be claimed, the request itself could be declined on that basis. But in terms of advancing a coherent set of defensible principles, I think the distinction is an important one. 4/

(3) With respect to Cabinet members, the role of the Legislative Branch is somewhat more substantial; all hold offices and administer departments which are created by Act of Congress. The Justice Department, for example, administers and enforces hundreds of statutes which are enacted by Congress. Whether or not the Attorney General himself may be compelled to appear as a witness before a congressional committee to testify as to the manner in which the Department performs these tasks, I think there is no question but that the Department is obligated to furnish some knowledgeable witness in response to a

4/ The President can, of course, waive the privilege and permit either class of advisers to testify. In view of this, the President should be advised of any instance in which a member of the White House staff is subpoenaed or requested to testify.

congressional request for testimony on this subject. On the other hand, I think it equally clear that no Cabinet officer could be interrogated at all with respect to what took place at a Cabinet meeting, or as to any portion of conferences or meetings which were called for the purpose of advising or formulating advice for the President.

(4) It is vital that a recommendation that the President assert privilege be a considered one, because the consequences of initially asserting the claim and then receding from it in the face of public criticism are obviously more hurtful than an initial decision not to assert the claim.

William H. Rehnquist
Assistant Attorney General
Office of Legal Counsel