Baghdad, a young soldier who is a West Point graduate and a gung-ho Army guy. In his letter to me he said, ''Congressman, I am so proud of the Army. We are doing everything that we can here to help these people.'' But later on in his letter he said, ''My men are wondering why they do not have the protection of this interceptor vest, this high-tech vest that has the capacity because of its construction and the materials used to actually stop an AK–47 round.''

I started exploring that problem, and what I found was that we sent soldiers in the initial assault into Iraq without this most basic protection.

Now these vests were used in Afghanistan, and we found out in the Afghanistan conflict that they were effective. It is thought that as many as 19 lives of our soldiers were saved during the Afghanistan conflict because they had this interceptor vest. And yet when we sent our soldiers into battle in Iraq many went into those fights without this body armor.

So I wrote Secretary Rumsfeld; and I got a letter back from Mr. Brownlee, his Chief of Staff, and in that letter I was told that we hoped that we would have all of our soldiers equipped with this body armor by November. That was November of 2003. The war in Iraq started in March.

Then a couple of weeks later I get a second letter from General Myers, the Chair of the Joint Chiefs of Staff. In his letter General Myers informed me that it probably would be December before our soldiers were fully equipped with this body armor. And I remind you that the war started in March.

I asked Mr. Rumsfeld how many soldiers perhaps had lost their lives on the battlefield who were not equipped with this body armor, and he indicated to me he could not answer that question because they do not collect that data.

Well, Secretary Rumsfeld said November. General Myers said December. Before we left this city for our holiday period, Christmas, the Pentagon held a briefing; and one of my staff members went to the briefing and the person holding the briefing said it was likely to be January before our soldiers were equipped with this vest. The war began in March. And, lo and behold, about 3 weeks ago I get a letter indicating that finally, finally, a year after the war began, this administration is willing to say that all of our troops have access to the body armor.

Now, Chris Matthews visited many of the troops at Walter Reed and he had that on his show this weekend. During that show, near the end of the show, he indicated that the body armor could protect the lives but not the limbs of our soldiers.

I end my remarks, Mr. Speaker, by pointing out that we have unarmored Humvees in Iraq tonight. The only company that produces these armored vehicles is in Ohio. They tell me that they can produce 500 a month, and the Pentagon is only asking for 220 a month. How many soldiers will have their arms and legs destroyed because this administration is not providing them with the equipment that could keep them safe?

NATIONAL SECURITY ADVISOR SHOULD TESTIFY BEFORE 9/11 COMMISSION

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Michigan (Mr. CONYERS) is recognized for 5 minutes.

Mr. CONYERS. Mr. Speaker and Members of the House, I rise to review the debate that has been going on between the distinguished National Security Advisor of the President, Condoleezza Rice, and those who believe that she should be called back to testify under oath. The reason that has been put forward that this is not possible is that Ms. Rice claims that it is a matter of constitutional principle that the separation of powers prevents the President's close aides from testifying to Congress.

But, as many have noted, there have been senior aides that have testified before. As a matter of fact, they have held the same position that she holds. Mr. Sandy Berger has testified before Congress and Mr. Zbigniew Brzezinski has, in fact, testified before the Congress. So what we realize now is that there is no problem here. There is no separation of powers argument for her to present.

I happen to serve with the House Committee on the Judiciary, and I can recall when President Gerald Ford came before the committee to try to deal with a very extraordinary national issue in which he explained why he had granted some extraordinary relief or pardon to former President Nixon. It was a national issue. Well, in my view, I believe the death of more than 3,000 Americans is an extraordinarily important issue that should allow Ms. Rice to come before the 9/11 Commission.

But the traditions really do not mean anything and the separations of power argument fails completely because it turns out that Condoleezza Rice has for 4 hours or more already testified before the Commission on February 7. So there is no issue about separation of powers.

This would be the same as allowing a person to testify before the Committee on the Judiciary privately about conversations with their attorney, but then when they come before the Committee on the Judiciary they would certainly not be able to invoke the attorney-client privilege and refuse to testify on the same matters that they have at an earlier meeting.

So what we are concerned about is about whether we can separate from the American people the truth of what has been happening in our White House.

Now the concept of the separation of powers doctrine was conceived by James Madison to prevent any branch of this three-branch system of government from encroaching on the powers of the other two branches. This preserves the dispersal of power so that it is not concentrated in one branch, and it also preserves the constitutional system of checks and balances. But our friend has already testified to the Commission earlier. So that now that she has already given private testimony she cannot be heard to come back and claim that she is prevented from doing that.

The only problem that this raises is whether she wants to testify under oath. And I think that this makes it very important that she listen to one of the members of the panel, former Secretary of the Navy Lehman, appointee of the President, who said that this is very bad political strategy for you to claim that you are prevented from coming before the committee to give formal testimony.

It is not going to work. I think that it is very important that we realize that. The Congressional Research Service has done for me an analysis of the Presidential advisor's testimony before congressional committees.

Now this is made more curious by the fact that more recently, after the statements made by Richard Clarke, that Ms. Rice asked the Commission to again come before it to respond to the allegations of Mr. Clarke.

Mr. Speaker, I will insert into the RECORD the Report for Congress by the Congressional Research Service.

CRS REPORT FOR CONGRESS—PRESIDENTIAL ADVISERS' TESTIMONY BEFORE CONGRESSIONAL COMMITTEES: A BRIEF OVERVIEW, APRIL 5, 2002

(By Harold C. Relyea, Specialist in American National Government, Government and Finance Division, and Jay R. Shampansky, Legislative Attorney, American Law Division)

SUMMARY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

EXECUTIVE OFFICE OF THE PRESIDENT

Although efforts at gaining legislative approval of the Brownlow committee's recommendations lay in ruin in the spring of 1938, the President had not deserted the cause. By July, Roosevelt was meeting with Brownlow and the other committee members. The panel would not be officially reassembled, but he wanted each man's help with

a reorganization authority proposal. The resulting measure empowered the President to propose reorganization plans, subject to a veto by a majority vote of disapproval in both houses of Congress, and to also appoint six administrative assistants.

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

Following consultations with Budget Bureau Director Harold D. Smith, the Brownlow group presented two reorganization proposals to Roosevelt on April 23. Plan 1, submitted to Congress on April 25, transferred certain agencies to the Executive Office of the President, but offered no explanation of that entity. In Plan 2, a presidential emergency council was abolished and most of its functions were transferred to the Executive Office. While both plans were acceptable to legislators, their effective dates were troublesome in terms of accommodating fiscal calendar necessities. By joint resolution, Congress provided that both plans would be effective on July 1, 1939. Following this action, the President, on September 8, issued E.O. 8248, formally organizing the Executive Office and, thereby, defining it in terms of its components. Brownlow, who drafted the initial reorganization plan, viewed the Executive Office as the institutional realization of administrative management and ''the effective coordination of the tremendously wide-spread federal machinery.'' He called the initial version ''a little thing'' compared to its later size. It grew under Roosevelt and ''it continued to expand and was further regularized by statute, by appropriation acts, and by more reorganization plans'' during the succeeding years.

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

PRESIDENTIAL ADVISER GROWTH

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

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

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

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

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

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

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

With their growing number and influence, senior staff members of the White House Office and certain other Executive Office agencies began to become of interest to congressional committees when accountability for policymaking and administrative or managerial actions prompted requests for their testimony. Some, like War Production Board chairman Donald M. Nelson, who was popularly known as the ''arms czar,'' appeared before and cooperated with the Senate Special Committee to Investigate the National Defense Program (''Truman Committee'') during World War II to report on and discuss war material production and related coordination matters. Others, like Office of War Mobilization director James F. Byrnes, who was sometimes referred to as the ''assistant president,'' apparently avoided appearing before congressional committees during the World War II era, but were in communication with various individual Members of Congress in leadership positions and served as liaisons between the President and Congress on a number of war matters.

PRESIDENTIAL ADVISER TESTIMONY

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

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

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

Harry H. Vaughn, Military Aide to the President, White House Office, appeared before the Senate Committee on Expenditures in Executive Departments (now Governmental Affairs) on August 30 and 31, 1949, to discuss his personal involvement in certain government procurement contracts.

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

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

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

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

Jerome H. Jaffe, Special Consultant to the President, White House Office, and director, Special Action Office for Drug Abuse Prevention, appeared before the House Committee on Interstate and Foreign Commerce on June 28, August 2, October 27, and November 8, 1971, to discuss various aspects of the operations of the Special Action Office.

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

Bruce A. Kehrli, Special Assistant to the President, White House Office, appeared before the Senate Select Committee on Presidential Campaign Activities on May 17, 1973,

to discuss matters related to the Watergate incident.

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

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

Rose Mary Woods, Personal Secretary to the President, White House Office, appeared before the Senate Select Committee on Presidential Campaign Activities on March 22, 1974, to discuss matters related to the Watergate incident.

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

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

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

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

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

Samuel Berger, Deputy Assistant to the President for National Security Affairs, White House Office, appeared before the Senate Committee on Foreign Relations on May 3, 1994, to provide a briefing on United States policy toward Haiti.

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

PRESIDENTIAL ADVISER TESTIMONY REFUSED

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

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

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

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

Henry A. Kissinger, Assistant to the President for National Security Affairs, declined on February 28, 1972, to appear before the Senate Committee on Foreign Relations.

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

WHY PRESIDENTIAL ADVISERS DO NOT REGULARLY TESTIFY BEFORE COMMITTEES

''Although White House aides do not testify before congressional committees on a regular basis,'' it has been observed, ''under certain conditions they do. First, intense and escalating political embarrassment may convince the White House that it is in the interest of the President to have these aides testify and ventilate the issue fully. Second, initial White House resistance may give way in the face of concerted congressional and public pressure.''

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

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

The separation of powers doctrine was also cited in guidelines for White House staff issued during the Carter Administration as the basis for the ''immunity'' of the staff from appearing before committees. The guidelines ''articulated the traditional arguments against compulsory testimony to Congress by White House advisers (i.e., need for 'frank and candid discussions,' personal advisers are agents of the President).''

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

CONGRESS'S RIGHT TO EXECUTIVE BRANCH INFORMATION

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

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

A distinction has been recognized by the courts between two aspects of executive privilege—the presidential communications privilege and the deliberative process privilege. The former has a constitutional basis in the separation of powers doctrine, relates to ''direct decisionmaking by the President,'' and concerns ''quintessential and non-delegable powers,'' whereas the latter ''is primarily a common law privilege'' applicable ''to decisionmaking of executive officials generally.'' The former applies to entire documents (including factual material) and ''covers final and post-decisional materials as well as pre-deliberative ones.'' The latter covers predecisional and deliberative materials, not ''purely factual [material], unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations.'' Both privileges are qualified. When either privilege is asserted, the court will balance the public interests involved and assess the need of the party seeking the privileged information.

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

Following a review of Rehnquist's statement, precedents and practice concerning congressional access to executive branch information (particularly, the testimony of presidential advisers), and constitutional issues, it is possible to suggest some key legal factors that together may determine whether a congressional request for the testimony of one who advises the President will be honored. (1) In the view of the executive, the few individuals whose sole duty is to advise the President should never be required to testify because all of their duties are protected by executive privilege. (2) The executive has conceded that an official who has operational functions in a department or agency established by law may be required to testify, although at times such an official may invoke executive privilege. (3) Congress may increase its leverage if the position of the potential witness is subject to Senate confirmation.

PROCEDURE FOR OBTAINING EXECUTIVE BRANCH TESTIMONY

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

Conflicts concerning congressional requests or demands for executive branch testimony or documents often involve extensive negotiations, and may be resolved by some form of compromise as to, inter alia, the scope of the testimony or information to be provided to Congress. If the executive branch fails to comply with a committee subpoena, and if negotiations do not resolve the matter, the committee may employ Congress's inherent contempt authority (involving a trial at the bar of the Senate or House) or statutory criminal contempt authority in an effort to obtain the needed information. Both of these procedures are somewhat cumbersome, and their use may not result in the production of the information that is sought.

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

In addition to the options generally available in the event of a refusal by the executive to provide information sought by Congress, when a presidential adviser who is not serving in a department or agency declines to testify before a committee, Congress might wish to establish the entity in which he serves by law, and subject the head of the entity to Senate confirmation.

CONCLUSION

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

ANNOUNCEMENT BY THE SPEAKER PRO TEMPORE

The SPEAKER pro tempore. The Chair would once again remind all Members, even though other debate may have intervened, to refrain from personal references to the President.

THE COST OF PRESCRIPTION DRUGS IN THE UNITED STATES

The SPEAKER pro tempore. Under the Speaker's announced policy of January 7, 2003, the gentleman from Minnesota (Mr. GUTKNECHT) is recognized for 60 minutes as the designee of the majority leader.

GENERAL LEAVE

Mr. GUTKNECHT. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days within which to revise and extend and include extraneous material on the subject of my special order.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Minnesota?

There was no objection.

Mr. GUTKNECHT. Mr. Speaker, I rise and I hope to be joined by some of my colleagues tonight to talk about an issue that I have been coming down to the floor of this House for more than 5 years to talk about.

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That is the price that Americans pay for prescription drugs relative to the rest of the industrialized world, and I have often said that we as Americans are blessed and we should be prepared and willing to subsidize people in developing parts of the world, like sub-Saharan Africa. I do not believe, however, that we should be required to subsidize the starving Swiss, the Germans, the French and other industrialized powers.

In the last 5 years, I remember when we first started doing these Special Orders, and I would come down here, and it was basically just me and my charts and the chorus has been growing around the country and we have been joined by Republicans, by Democrats, by Independents and others.

Another point I always try to make is that this is not an issue of right versus left. It is not conservatives versus liberals. As I say, it is not right versus left. It is right versus wrong, and the issue really is that Americans are being held captive here in the United States; and the net result, very predictable result, is that whenever you have a captive market, particularly for a life-saving product like prescription drugs, it is inevitable that we, the world's best customers, would wind up paying the world's highest price.

I know there are some who believe that the answer is for the United States to have some kind of price controls. I am not one that shares that view.

About 4 years ago or 5 years ago now I guess, and one of the reasons I became very involved in this issue was something that happened that was totally unrelated to the price of prescription drugs. The price of live hogs in the United States dropped from about $37 per hundred weight to about $7, and these were the lowest prices for our hog farmers in 50 years. Many of my pork producers started calling me saying, Congressman, can you not do something about these incredibly low prices for these pigs? I said I do not know what I can do, and they said, well, could you at least stop all these Canadian hogs from coming across our borders, making our supply demand situation worse?

So, as their Congressman, I called the Secretary of Commerce, I called the Secretary of Agriculture, explained the situation that thousands of Canadian hogs were coming into our markets making the price of pigs in the United States even lower and can we not do something to at least stop all of these pigs from coming into American markets. The answer I got from both the Secretary of Agriculture and the Secretary of Commerce was essentially the same answer. They said that is called NAFTA. It is called free trade, and all of the sudden a light bulb went on over my head, and I said is it not ironic that we have open markets when it comes to pork bellies, not when it comes to Prilosec.

Literally, at that point, I moved from what Winston Churchill said the difference between a fan and a fanatic is, that a fanatic cannot change their mind and will not change the subject. I have become almost a fanatic on the issue of opening up markets to allow Americans to have world-class access to world-class drugs at world market prices.

I am joined by my friend from Illinois, and I would be happy to yield him some time; but I have a couple of charts.

Mr. EMANUEL. Mr. Speaker, if the gentleman would yield, why do you not do the charts because I think it is always the most informative for our audience.

Mr. GUTKNECHT. Let me talk a little bit about this particular chart. A year ago right now I was in Munich, Germany, with one of my staffers. We were on our way home and stopped at the Munich airport pharmacy. As a matter of fact, the name of the pharmacy, if you want to check it out, is the Metropolitan Pharmacy at the Munich airport. Those of us that travel a lot know if you want to get a bargain, the last place you go to get that bargain is to buy at the airport, but we were on our way out of town. We bought then some of the most commonly prescribed drugs here in the United States, and these are the prices that we paid in April of 2003 in Munich, Germany.

When we returned, we went and asked here in Washington, D.C., what the price for those same drugs in the same dosages with the same number of tablets would be here in the United States, and let me show you some of the examples.

Coumadin is a drug that my father takes. Here in the United States, 100 tablets in the United States, about $92.66. In Germany, the price was $28.44.

Glucophage, a very effective drug, been around for a long time for diabetes. Over in Germany, 30 tablets, 850