

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is centered in the narrow neck of the hourglass. The top bulb is filled with a dark blue color, and the bottom bulb is filled with a light blue color. The globe is centered in the narrow neck of the hourglass.

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Federal Hurricane Recovery Coordinator: Appointment and Oversight Issues

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Federal Hurricane Recovery Coordinator: Appointment and Oversight Issues

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Summary

On November 1, 2005, President George W. Bush issued an executive order directing the Secretary of Homeland Security to establish a new position that would coordinate federal Gulf Coast recovery and rebuilding efforts.¹ The executive order specifies that this official “shall be selected by the President and shall be appointed by and report directly to the Secretary.” Subsequently, the President selected then-Federal Deposit Insurance Corporation Board of Directors Chair Donald Powell for the new position, and Secretary Michael Chertoff formally appointed him. This method of establishing and making an appointment to a departmental position is unusual, and it may conflict with the constitutional role of Congress in the appointment and oversight processes. This report will not be updated.

In the aftermath of Hurricanes Katrina and Rita, dissatisfaction with the response of the Federal Emergency Management Agency (FEMA) at the Department of Homeland Security (DHS) was widespread among elected officials. The magnitude and scope of the disasters led some to call for a centralized authority to coordinate federal, state, and local activity in the aftermath of the hurricanes. Some Members of Congress urged the President to designate a Cabinet-level, or other prominent, official to head federal relief operations.² In addition, some Members proposed the creation of a federal authority that would oversee the recovery and rebuilding of the Gulf Coast Region. Several bills have been introduced that would establish, or assign to an existing entity, a centralized authority to oversee the recovery and rebuilding phases. For example, some legislative

¹ U.S. President (G.W. Bush), “Establishment of a Coordinator of Federal Support for the Recovery and Rebuilding of the Gulf Coast Region,” E.O. 13390, Federal Register, vol. 70, Nov. 4, 2005, p. 67327-67328. The order is issued under the authority of “the Constitution and the laws of the United States of America, including the Homeland Security Act of 2002 ... and the Robert T. Stafford Disaster Relief and Emergency Assistance Act.”

² Eric Lipton and Scott Shane, “Storm and Crisis: The Emergency Agency,” *New York Times*, Sept. 3, 2005, p. A17; Julie Mason, “Bush Vows to Aid Flow of Benefits to Victims; President Also Designates Sept. 16 as a Day of Prayer,” *Houston Chronicle*, Sept. 9, 2005, p. A24.

proposals would create authorities to coordinate and facilitate the federal response in conjunction with state and local governments.³ Other proposals focus on maintaining accountability for funds appropriated in response to the disasters by, for example, assigning financial oversight responsibilities to chief financial officers or inspectors general.⁴

The Bush Administration initially appeared reluctant to establish a hurricane “czar” who would take on all response, recovery, and rebuilding functions.⁵ In what was seen as an interim step, however, on September 9, 2005, DHS Secretary Michael Chertoff relieved FEMA Director Michael Brown of responsibility for the agency’s Gulf Coast response and appointed Coast Guard Vice Admiral Thad Allen as the “Principal Federal Official (PFO) overseeing Hurricane Katrina response and recovery effort [sic] in the field.”⁶

Position of Coordinator

Some seven weeks later, on November 1, 2005, President Bush issued Executive Order (E.O.) 13390, which directed the creation of a central figure in the Administration’s efforts to support the Gulf Coast recovery and rebuilding phases. Specifically, the President directed Secretary Chertoff to establish within DHS the position of Coordinator of Federal Support for the Recovery and Rebuilding of the Gulf Coast Region (coordinator). Under the order, the coordinator is to be selected by the President and appointed by the Secretary.⁷ The Secretary is further directed to provide the coordinator with appropriate personnel, funds, and other resources of the department for the purposes of carrying out the mission identified by the President. This mission is to “work with executive departments and agencies to ensure the proper implementation” of the President’s policy, as articulated in the order.⁸ That is, to:

provide effective, integrated, and fiscally responsible support from across the Federal Government to support State, local, and tribal governments, the private sector, and faith-based and other community humanitarian relief organizations in the recovery and rebuilding of the Gulf Coast region affected by Hurricane Katrina and Hurricane Rita (the “Federal Response”).⁹

³ See, for example, S. 1843, which would create an Office of the Louisiana Katrina Recovery Administrator in the Executive Office of the President.

⁴ See, for example, H.R. 3737, S. 1738, H.R. 3810, H.R. 3813, and S. 1700.

⁵ Mike Allen, “Cheney Wins — Again,” *Time Magazine*, Sept. 26, 2005, p. 13.

⁶ “Statement by Homeland Security Secretary Michael Chertoff,” Sept. 9, 2005, available at [<http://www.dhs.gov/dhspublic/display?content=4795>], accessed Nov. 14, 2005. Brown subsequently resigned as head of FEMA. (“Statement by Homeland Security Secretary Michael Chertoff,” Sept. 12, 2005, available at [<http://www.dhs.gov/dhspublic/display?content=4801>], accessed Nov. 14, 2005.)

⁷ By law, all “functions of all officers, employees, and organizational units of the Department are vested in the Secretary” (6 U.S.C. § 112(a)(3)).

⁸ E.O. 13390, § 3(a).

⁹ *Ibid.*, § 1.

The coordinator is also directed to “lead the process” of developing the principles and goals of the federal response and to communicate them to the federal officials involved.¹⁰ Consistent with these principles and goals, the coordinator is to lead the development of the policies and programs constituting the federal response, monitor the implementation of these policies and programs, and “ensure that those polices [sic] and programs are consistent with the principles and goals of the Federal Response.”¹¹ The coordinator is to be the principal point of contact for Congress, state and local governments, the private sector, and community leaders, and will be “responsible for managing information flow, requests for actions, and discussions regarding” the federal response with these interested parties.¹²

The executive order directs department and agency heads to be responsive to the coordinator, to provide, “consistent with applicable law, ... such information as the Coordinator deems necessary to carry out” the mission, and to “otherwise cooperate with the coordinator to the greatest extent practicable” in support of the mission.¹³

On the day this executive order was issued, President Bush selected Federal Deposit Insurance Corporation (FDIC) Board of Directors Chair Donald E. Powell to be the coordinator.¹⁴ Secretary Chertoff formally appointed Powell to the position as a non-career member of the Senior Executive Service, with a salary of \$152,000.¹⁵ As FDIC chair, Powell was compensated at Level III of the Executive Schedule¹⁶ — \$149,200 at the time of his coordinator appointment.¹⁷ The coordinator position is organizationally located in the immediate office of the Secretary.

Also on November 1, President Bush issued E.O. 13389,¹⁸ which created the Gulf Coast Recovery and Rebuilding Council (council) in the Executive Office of the President (EOP). Under the order, the council is to be chaired by the Assistant to the President for Economic Policy, and its membership is to include the coordinator, the heads of all of the departments (except the Department of State), the Administrator of the Environmental Protection Agency, the Chair of the Council of Economic Advisors, the Administrator of the Small Business Administration, the Director of the Office of Management and Budget, and the Assistants to the President for Domestic Policy and for Homeland Security and

¹⁰ Ibid., § 3(b).

¹¹ Ibid., § 3(c).

¹² Ibid., § 3(d).

¹³ Ibid., § 4.

¹⁴ “Fact Sheet: Coordinating Federal Support for Gulf Coast Rebuilding,” news release, Nov. 1, 2005, available online at [<http://www.whitehouse.gov/news/releases/2005/11/20051101-6.html>], visited Nov. 3, 2005.

¹⁵ Telephone conversation with representative of the Department of Homeland Security, 11/8/05.

¹⁶ 5 U.S.C. § 5314.

¹⁷ Office of Personnel Management Salary Table No. 2005-EX, available at [<http://www.opm.gov/oca/05tables/html/ex.asp>], accessed Nov. 8, 2005.

¹⁸ President (G.W. Bush), “Creation of the Gulf Coast Recovery and Rebuilding Council,” E.O. 13389, Federal Register, vol. 70, Nov. 4, 2005, pp. 67325-67326.

Counterterrorism. The chair is also empowered to designate additional executive branch officers and employees as council members.¹⁹ The executive order directs the council chair to lead the council “in consultation with the Coordinator.”

The purpose of the council is to take up issues related to the furtherance of the President’s policy on recovery and rebuilding of the Gulf Coast Region, as described above. These issues may be brought to the council’s attention by the chair, the coordinator, or, with the permission of the chair, any agency head on the council. The council may make recommendations to the President regarding these issues.²⁰ The council is to terminate after three years, unless the President extends it.²¹

Analysis

The coordinator and council established by the President’s executive orders may be seen as a unique framework for providing a government-wide response to a disaster of unusual scope and magnitude. An analysis of the framework, however, leads to two questions potentially of interest to Congress. First, is the coordinator appointment consistent with the appointments clause of the Constitution, which gives Congress a role in determining the appointment method for officers of the United States? Second, will Congress have restricted access to the coordinator when carrying out its oversight function?

President Bush has previously used his authority to establish a new coordinating office in response to a national crisis. As part of his response to the terrorist attacks of September 11, 2001, the President issued E.O. 13228, which established the Office of Homeland Security (OHS) in the EOP. At the same time, he appointed Tom Ridge as the Assistant to the President for Homeland Security. The order provided that the head of OHS would be the Assistant to the President for Homeland Security, thus making the OHS leader a member of the White House Office staff. The executive order specified that the “mission of the Office [was] to develop and coordinate the implementation of a comprehensive national strategy to secure the United States from terrorist threats or attacks.”²² As a presidential advisor rather than a statutory official, Ridge lacked statutory authority and resources. Nonetheless, as an assistant to the President, Ridge benefitted from access to, and the backing of, the President. Operating under the President’s authority, Ridge could potentially have held considerable sway in coordinating the homeland security-related functions and budgets of numerous federal agencies.

Because Congress had an interest in the government-wide coordination of homeland security activities and budgets, a number of congressional committees sought Ridge’s testimony during oversight hearings. Arguing that presidential assistants rarely testify before congressional oversight committees, the Administration declined to allow Ridge

¹⁹ Ibid., § 2(a).

²⁰ Ibid., § 3.

²¹ Ibid., § 5. Use, after the first year, of appropriated funds in support of the council may be prohibited by 31 U.S.C. § 1347 unless specifically appropriated or authorized.

²² U.S. President (G.W. Bush), “Establishing the Office of Homeland Security and the Homeland Security Council,” E. O. 13228, *Federal Register*, vol. 66, Oct. 10, 2001, pp. 51812-51817, § 2.

to appear in that context. After written exchanges between the White House and the chair and ranking member of the Senate Appropriations Committee, Ridge offered to come to the Capitol and brief Members of Congress informally, outside the context of oversight hearings.²³

The more recently created coordinator position has government-wide coordinative functions similar to those of the head of OHS. The organizational location and potential resources and authority of the position, however, differ from the OHS model. Nominally a Senior Executive Service-level appointee, the coordinator enjoys unusual positional power. His authority on the council exceeds that of any of the other members, many of whom are Cabinet members. Although the coordinator is not the chair, the chair is to consult with the coordinator in the leadership of the council. Furthermore, the coordinator is the one council member who is empowered to bring issues to the council's attention without the chair's permission. The coordinator, in his departmental role, is further empowered by the President in relation to department and agency heads government-wide. Consistent with existing law, these officials are to provide the coordinator with information and otherwise cooperate with him carrying out the coordinator's mission. The coordinator is then the focal point for "managing information flow, requests for actions, and discussions [with stakeholders] regarding" the Federal Response.²⁴ As spelled out in the executive order, the coordinator's role is arguably operational, as he is to "ensure the proper implementation" of the President's policy.²⁵ Furthermore, although neither of the November 1 executive orders provide the coordinator with any statutory authority, the coordinator's organizational location within DHS allows the Secretary of Homeland Security to delegate such authority to him.²⁶

Given the positional power and authority of the coordinator, particularly if the secretary delegates statutory authority to him, the question arises whether or not the coordinator would be considered an officer of the United States under the appointments clause of the Constitution. The Supreme Court has held that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed" in the Constitution.²⁷ Article II, § 2, cl. 2 provides that:

²³ See Louis Fisher, *The Politics of Executive Privilege* (Durham, N.C.: Carolina Academic Press, 2004), pp. 224-226; and CRS Report RL31148, *Homeland Security: The Presidential Coordination Office*, by Harold C. Relyea. See also CRS Report RL31351, *Presidential Advisers' Testimony Before Congressional Committees: An Overview*, by Harold C. Relyea and Jay R. Shampansky. This report discusses the Ridge case and also identifies more than 70 instances, since 1944, when presidential advisors have testified before Congress.

²⁴ E.O. 13390, § 3(d).

²⁵ *Ibid.*, § 3(a), emphasis added.

²⁶ The law provides that "except as otherwise provided by this chapter, [the Secretary] may delegate any of the Secretary's functions to any officer, employee, or organizational unit of the Department" (6 U.S.C. § 112(b)(1)). It appears, for example, that the secretary could re-delegate to the coordinator such FEMA functions as those identified in 6 U.S.C. § 317(a)(2)(D), which pertain to "recovery, by rebuilding communities so individuals, businesses, and governments can function on their own, return to normal life, and protect against future hazards."

²⁷ *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

[The President] 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 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.

Therefore, if the coordinator is to exercise “significant authority pursuant to the laws of the United States,” it could be argued that it is the role of Congress to prescribe, in law, how an appointment to the position shall be made. In effect, it could be argued, creation of a position with the power and authority that the coordinator could have would require action by Congress rather than the President or the Secretary of Homeland Security.

Because of the hybrid nature of the coordinator position, the lines of accountability are not clear. As the current officeholder sees it, “My accountability is to the president ... I report to the president.”²⁸ Inasmuch as the coordinator is to be the focal point of the federal government’s multibillion dollar recovery and rebuilding effort in the devastated Gulf Coast region, however, Congress may insist on direct accountability of that official to congressional oversight committees. Will these committees have unimpeded access to the coordinator? For those officials subject to Senate confirmation, the Senate usually gains during that process a commitment from the nominee to respond to requests to testify when asked. This commitment may not be necessary, under most circumstances, to obtain testimony. A White House official has indicated that the reason the coordinator position was established in DHS, rather than the White House, was to facilitate the kind of communication with Congress that was a point of contention in the Ridge case.²⁹

Additional oversight questions might arise, however, from the hybrid nature of the position. Because it has features of both a departmental position and a White House position, it is unclear if the coordinator will behave more like a department official or a presidential advisor with regard to providing testimony. Will the coordinator’s activities as a council member in the EOP be open to the same level of oversight as his departmental actions, or will these activities be subject to executive privilege claims?

The unusual hybrid coordinator position was created by the President in response to a national crisis of unique dimensions. This hybrid arrangement might arguably be more effective in coordinating federal recovery and rebuilding efforts than one in which the incumbent is more clearly an officer of the United States in DHS or, as in the OHS model, a presidential advisor in the EOP. The office has the clear backing of the President; government-wide information, cooperation, and access; the resources and infrastructure of DHS; and potential operational authority as delegated by the Secretary. As an unusual kind of office, however, this arrangement raises some questions about Congress’s constitutional appointment and oversight roles. Congress might elect to establish, in statute, a different mechanism for coordinating these efforts along more customary lines of authority and accountability.

²⁸ Spencer S. Hsu and Terence O’Hara, “A Bush Loyalist Tackles Katrina Recovery: Officials Hope Wealthy Texas Banker Has the Skills to Manage Reconstruction,” *Washington Post*, Nov. 21, 2005, p. A8.

²⁹ Telephone conversation with a representative of the White House, Nov. 23, 2005.