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RPTS BINGHAM

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TITLE 42: A REVIEW OF SPECIAL HIRING AUTHORITIES

FRIDAY, SEPTEMBER 14, 2012

House of Representatives,

Subcommittee on Health,

Committee on Energy and Commerce,

Washington, D.C.

The subcommittee met, pursuant to call, at 10:00 a.m., in Room 2123, Rayburn House Office Building, Hon. Joseph R. Pitts, [chairman of the subcommittee] presiding.

Present: Representatives Pitts, Burgess, Shimkus, Gingrey, Latta, McMorris Rodgers, Barton, Pallone, and Schakowsky.

Staff Present: Brenda Destro, Professional Staff Member, Health; Debbee Keller, Press Secretary; Katie Novaria, Legislative Clerk; Krista Rosenthall, Counsel to Chairman Emeritus; Alan Slobodin, Deputy Chief Counsel, Oversight; Heidi Stirrup, Health Policy Coordinator; Alli Corr, Minority Policy Analyst; Ruth Katz, Minority

Chief Public Health Counsel; and Anne Morris Reid, Minority Professional Staff Member.

Mr. Pitts. The time of 10 o'clock having arrived, the subcommittee will come to order.

The chair recognizes himself for 5 minutes for an opening statement.

Title 42 of the Public Health Service Act provides authority to appoint and set pay for difficult-to-fill, critical scientific and medical positions in the Public Health Service. The Department of Health and Human Services uses this authority, which allows them to pay individuals above the salary limits of other government employees, to attract and retain topnotch scientists and researchers who might otherwise go into academia or the private sector.

Clearly, the Secretary needs some flexibility to attract and retain the best and brightest in science and medicine, but these authorities should be limited and transparent.

Laws passed by Congress and regulations promulgated since the 1930s and 1940s show that the program was intended for special use when there was no other way to hire needed experts; it was never intended to be used as an alternative compensation program. Yet, in 2010, almost 7,000 employees at HHS were appointed using Title 42 authority, a 25 percent increase over 5 years. Some of those annual salaries have reached levels higher than $350,000.

HHS has recently moved to lower the caps on these salaries, yet the Secretary of HHS can still approve pay levels higher than the caps, which may give her more hiring and compensation authority than anyone else in the Federal Government.

In 2005, the Environmental Protection Agency began hiring experts using the Title 42 authority, once again, to fill critical science positions. Now, 15 of the 17 positions at the EPA are paid at or above Executive Level 4.

The extensive use of Title 42 and the unprecedented authority of the Secretary to compensate some experts at extraordinarily high rates led the committee to ask the GAO to analyze the laws that govern Title 42 and audit its use at HHS and the EPA. Today, we have asked GAO to share the results of that study.

Congressman Joe Barton has introduced H.R. 6214, the HHS Employee Compensation Reform Act of 2012, which makes simple, commonsense changes to the use of Title 42 authorities. It limits the use of Title 42 authority to HHS; caps the number of Title 42 hires to 5 percent of the total number of employees at HHS; ensures that compensation may not exceed 150 percent of Executive Level 1; allows up to 50 employees to be paid without regard to compensation limitation if the Secretary determines the position is vital; and requires a report to Congress 6 months after enactment. I commend Mr. Barton for his work on this issue.

And I would like, at this time, to yield the remainder of my time to Dr. Burgess.

[The prepared statement of Mr. Pitts follows:]

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Dr. Burgess. Thank you, Mr. Chairman.

Title 42 is a special hiring provision that Congress explicitly gave to HHS through the Public Health Services to allow HHS to attract the best and brightest. Many of these men and women hired under Title 42 could easily be making three or four times what they make working in the public sector but have chosen to dedicate their work to government service. Because of the salary constraints under normal Title 5 hiring practices, HHS's hands were tied as to what it could offer to leaders of these fields to attract them to HHS.

This program began with noble purposes and continues to be an important recruitment tool for HHS, the agency that Congress intended to be using it. It should come as no surprise that the minute other Federal agencies heard of this higher salary structure, they came to Congress asking for authority to pay themselves more. It would be one thing if these agencies had come to this committee, the authorizing committee, which wrote the Title 42 statute to begin with. Instead, the EPA did an end run around Energy and Commerce and went directly to Appropriations asking for the authority.

Every member of this committee should be shocked and outraged that an agency under our jurisdiction chose to ignore our authority as the authorizing committee for such hires. This is a congressional jurisdictional issue if there ever was one. Not only did the EPA do the end run for years, but in oversight hearing after oversight hearing they would refuse to give us information as to their hiring practices. It is a precedent that has been set, and what is to stop every Federal

agency, every Federal bureaucracy from doing the same thing?

I introduced earlier this Congress H.R. 2791, the Health and Human Services Hiree Clarification Act, which codifies this committee's clear intent that Title 42 is only to be used by officials at HHS -- not EPA, not Department of Labor, and not the Park Service. I am happy to see that Mr. Barton has included language from this legislation in his bill, as well. If other agencies believe so strongly that they need a special hiring authority, come to the authorizers, justify their request, and do it as regular order dictates.

This hearing is long overdue. I thank the chairman for the consideration. I will yield back balance of my time.

[The prepared statement of Dr. Burgess follows:]

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Mr. Pitts. The chair thanks the gentleman and recognizes the ranking member, Mr. Pallone, for 5 minutes for an opening statement.

Mr. Pallone. Thank you, Mr. Chairman.

I wanted to ask unanimous consent to include in the record the statement of our ranking member, Henry Waxman.

The Chairman. Without objection, so ordered.

[The prepared statement of Mr. Waxman follows:]

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Mr. Pallone. Today, we are here to discuss a special hiring authority available to the Department of Health and Human Services which is informally known as Title 42. The statute was created nearly 70 years ago to help the government recruit and retain the best and the brightest individuals in medicine, science, and other important fields.

While we all wish it would be the case, a sense of civic duty is not always enough. This is something that I can certainly sympathize with, as I am sure many Members of Congress can, too. Young people want to come and dedicate their lives to public service, but sometimes the salary of Congress simply does not compete with the private sector. And that is why the House Administration created the Student Loan Repayment Program, which serves as an incentive to recruit and retain bright, young professionals to work for us in Congress.

But, today, we will specifically hear from GAO about the recent studies that shed light on improvements that can be made to the Title 42 process. In fact, HHS even recognized the need to examine their hiring practice on their own prior to GAO, and they started an internal review back in 2010. They also currently implement a number of changes in response to this study and support its recommendations.

But I just wanted to say to my colleagues, let's tread carefully during this discussion. We must not react negatively simply for politics' sake. It is good to be concerned, and it is certainly fair for this committee to maintain its oversight responsibilities, but this statute has been used by Democrats and Republicans alike, and it is

critical to the quality and caliber of the work of the Department.

If we were to somehow restrict HHS's good work that has come about because of Title 42, we could be doing serious harm to the research in this country, both in terms of our ability to respond to public health emergencies like H1N1 and to drive toward the scientific breakthroughs like sequencing the human genome.

The agencies listed in the GAO report are devoted to enhancing health, lengthening life, and reducing the burdens of illness and disability, as well as protecting all Americans from significant risks, whether these risks are from illness, the environment, or bioterrorism.

NIH, as we know, is the premier biomedical research institute in the world. CDC, also an agency listed in the report, is globally renowned as a leader in disease prevention and health equity. Without dedicated funding of these agencies and top talent within their ranks, the U.S. would not be the leader in the biomedical and pharmaceutical industry, the global leader in disease prevention and public health, or a leader in the fight against devastating diseases such as cancer, obesity, and HIV.

Now, using NIH as an example, NIH is the driving force behind the biomedical research that has advanced and continues to improve the health of Americans and grow the U.S. economy. Thanks in large part to NIH research, Americans are living longer, living healthier, and suffering less from morbidity and mortality of countless diseases when compared to the past. Not only has the general health of the Nation been improved, but these gains have added an estimated $3.2 trillion

annually to the U.S. economy since 1970.

Yet it seems that we continue to ask NIH and CDC to do more with less. In the current climate, we are doing well if the budgets of these agencies just stay the same. Our reliance on their service has grown as new public health and environmental threats emerge and the burden of disease grows.

NIH employs nearly 19,300 civil servants in its workforce. Of those who are hired under Title 42, 44 percent are researchers and clinicians, and less than 2 percent of all NIH employees are paid above the general Federal schedule.

Meanwhile, the American Academy of Medical Colleges releases an annual report which describes compensation for professionals in the medical and research fields. And consider that an associate professor in radiology can make $430,000, while a department chair can make over $650,000 per year, a professor in plastic surgery can make over $650,000, and the department chief, more than $800,000.

HHS's current policy caps compensation at $275,000 unless an exception is approved by the Secretary. And a recent CBO report found that Federal workers with a professional degree or doctorate, which is currently a requirement for Title 42, earned about 23 percent less than their counterparts in the private sector.

I just think it is important to keep in mind the types of people we would be affecting if we restrict Title 42. Let me mention Dr. Fauci, director of the National Institute of Allergy and Infectious Disease at NIH. He is the recipient of the Presidential Medal of

Freedom, has been fighting a battle against HIV and AIDS since the epidemic began. He is recognized around the world as one of the greatest scientific minds of our generation. In 2003, there was an Institute for Scientific Information study that showed that over the 20-year period from 1983 to 2002, Dr. Fauci was the 13th most cited scientist among 2.5 million to 3 million authors in all disciplines and that he was the 10th most cited HIV-AIDS researcher in the period 1996 to 2006. And he is compensated under Title 42.

So I am just pointing out that we really have to be careful what we do here. I look forward to the discussion. I welcome our witnesses. I thank the Department, you know, for their input on this. But I do think we have to watch what we do, because I am concerned that we do not want to lose the best and the brightest.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Pallone follows:]

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Mr. Pitts. The chair thanks the gentleman and now recognizes the chair emeritus of the full committee, Mr. Barton, 5 minutes for an opening statement.

Mr. Barton. Thank you, Chairman Pitts. And I want to thank you and your staff and Dr. Burgess and his staff and Chairman Upton and his staff and my staff for working so diligently on this issue.

The ranking member, my good friend from New Jersey, Mr. Pallone's opening statement I thought was very good. He didn't state it, but he said that this might be about politics. Well, it is not. We have been investigating this for 3 years. You know, it is to Chairman Upton's credit and Chairman Pitts' credit that we finally have a full hearing just on this, unfortunately on a day when we have a bill on the floor that a lot of our members are engaged with concerning Solyndra.

But this is an important issue. We do want the best and the brightest, as Congressman Pallone just said, those that could find revolutionary cures for some of the dreaded diseases that we have been fighting so long. We want those scientists to work for the Health and Human Services and the National Institutes of Health. That is why Congress originally passed this legislation a number of years ago, to give special hiring authority so that we could get in those exceptional cases the best and the brightest.

The bill that I have introduced doesn't eliminate that. It still allows a large number of exemptions to hire those very special people.

What has happened, though, Mr. Chairman, is that what was a

well-intentioned piece of legislation 70 years ago has been used as a loophole to create an alternative pay scale. This special hiring authority that we commonly call Title 42 has become commonplace. It is almost an alternative pay scale, not just a special pay scale. Nearly 25 percent -- 25 percent -- one out of four, of NIH employees are hired under Title 42.

Mr. Pallone alluded to the director of NIH, who is an exceptional individual and is worth a lot more than we are paying him. But he is one of 6,500, you know? That is the problem. Not that we hired these extremely exceptional people under Title 42; it is that we hire thousands of people who are very competent, very qualified, but I doubt that they are all as exceptional as Dr. Fauci is.

Ten percent of all HHS employees -- 10 percent of all HHS employees are hired under Title 42. Believe it or not, even the Environmental Protection Agency is now using Title 42 to hire I think somewhere in the neighborhood of 25 people. That is just not acceptable, Mr. Chairman, in a time when we have budget deficits of over a trillion dollars every year.

Title 42 was not created to create an alternative pay scale. It was not created to inflate unnecessarily government salaries. Legislation, in my opinion, is needed to rein this in.

H.R. 6214 is not a draconian, slash-and-burn piece of legislation. It does limit the use of the provision of Title 42 to HHS; that means the EPA can't use it. I think that is common sense. It would cap the number of hires under this authority to 5 percent.

Now, 5 percent is hardly, you know, earth-shattering. That is still, at 60,000 people, 5 percent is 3,000 people. So surely within that 3,000-person cap we can get the best and the brightest if we need to.

It would ensure that compensation under Title 42 does not exceed 150 percent of the Executive Level 1 pay scale under Section 5312, Title 5 of the regular government employee compensation scale.

It would allow, no matter what the general pay scale is, up to 50 people, at the discretion of the Secretary of HHS, to be paid without regard to compensation limit -- up to 50. So if we get an Albert Einstein or if we get somebody who literally has the cure for cancer, if the Secretary wants to pay that individual, I don't know, a million dollars, this piece of legislation would allow that to happen, but only up to 50 employees.

The bill also would require an annual report to the Congress detailing the use of Title 42 and an enumeration of those that were receiving Title 42 compensation.

So, Mr. Chairman, this is an issue that the subcommittee has been looking at for a number of years. It is an issue that I requested a GAO report on several years ago, which we are about to get the executive summary given to us. And hopefully this is a bill that, on a bipartisan basis, in the very near future we can move in some shape, form, or fashion.

I will say this -- I know my time has expired. If there are tweaks to the bill and our minority friends want to change some of it, I am open to it, and I would expect that Mr. Pitts and Mr. Upton also would

be. And we encourage our NIH and HHS officials to work with us to perfect this bill.

And, with that, I yield back.

Mr. Pitts. The chair thanks the gentleman.

[The prepared statement of Mr. Barton follows:]

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Mr. Pitts. Now, standing in for the ranking member of the full committee, the gentlelady from Illinois, Ms. Schakowsky, is recognized for 5 minutes.

Ms. Schakowsky. Thank you, Mr. Chairman.

In order to improve our Nation's health and wellbeing and to stay competitive in the global marketplace, it is pretty clear to me that our government needs to recruit top talent in research and development. Title 42 has allowed us to bring in our Nation's top scientists to apply their expertise to discoveries that improve health and save lives. It is vital that our Federal agencies have the authority to recruit and retain vital scientific talent.

The Department of Health and Human Services, and in particular NIH, has cited difficulties in recruiting and retaining top individuals in medicine, science, and other critical fields. As a result, our government has made an effort to bridge skill gaps that threaten our agencies' ability to meet their missions.

Even prior to this report -- and I want to underscore that -- even prior to this report, HHS has been diligently working on improving its Title 42 hiring process. HHS recently implemented a policy that capped annual base salaries, clarified the definition of scientific positions for the purpose of Title 42 hiring, and use of a streamlined recruitment process to ensure that all other hiring authorities have been exhausted before Title 42 was used.

I am also pleased that NIH has heeded GAO's recommendations and is working to incorporate them into their Title 42 changes.

While I agree that it is important in our oversight role to ensure that NIH does not abuse this authority, an ill-advised effort to statutorily cap all pay under Title 42 or to cap HHS's ability to use Title 42, such as in H.R. 6214, would have a detrimental effect on critical government research.

Our Nation's top scientists could make significantly more in comparable private-sector jobs. When they agree to apply their skills and expertise to the public sphere, the American people benefit from their work. Congress must ensure that our government's esteemed research institutions are able to attract top talent, and, to do so, Title 42 funding should not be subject to an arbitrary cap.

I look forward to hearing the testimony from our witnesses concerning how HHS can build upon their work to modify its Title 42 policy, to work with my colleagues across the aisle to make sure that there are no abuses of this authority, and to ensure that the appropriate use and documentation of this important authority is available to us.

And I thank you, Mr. Chairman. And I yield back.

Mr. Pitts. The chair thanks the gentlelady.

[The prepared statement of Ms. Schakowsky follows:]

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Mr. Pitts. All the other opening statements of the Members will be made a part of the record.

[The information follows:]

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Mr. Pitts. I would like to introduce today's witnesses.

Mr. Robert Goldenkoff is the director of strategic issues for the Government Accountability Office.

Welcome.

Mr. Robert Cramer is the managing associate general counsel, also with the Government Accountability Office.

Your written statements will be made part of the record. Thank you both for being here today.

And, Mr. Goldenkoff, you are now recognized for 5 minutes for a summary of your testimony.

STATEMENT OF ROBERT GOLDENKOFF, DIRECTOR, STRATEGIC ISSUES, GOVERNMENT ACCOUNTABILITY OFFICE; ROBERT CRAMER, MANAGING ASSOCIATE GENERAL COUNSEL, GOVERNMENT ACCOUNTABILITY OFFICE

STATEMENT OF ROBERT GOLDENKOFF

Mr. Goldenkoff. Thank you.

Chairman Pitts, Ranking Member Pallone, members of the subcommittee, thank you for the opportunity to be here today to discuss Title 42, a special hiring authority used exclusively by the Department of Health and Human Services and the Environmental Protection Agency to help them overcome difficulties in recruiting and retaining individuals in medicine, science, engineering, and other fields.

The two agencies use the higher salaries and other flexibilities available under Title 42 to make them more competitive in the labor market for individuals in these highly specialized fields and more agile in meeting their mission requirements.

Joining me today is Robert Cramer, GAO's managing associate general counsel. As requested, our remarks will focus first on the extent to which HHS and EPA have used Title 42 to appoint and set pay for employees since January 2006; and, second, whether those appointments followed applicable internal controls. We were also asked to determine whether there were any statutory pay caps for individuals appointed under Title 42.

Overall, HHS's use of Title 42 has increased from 5,361 positions in 2006 to 6,697 positions in 2010, an increase of around 25 percent. HHS officials attributed this increase in Title 42 employees to, among other factors, the agency's response to urgent public health matters. For example, HHS officials said they used Title 42 to quickly hire experts needed to develop a vaccine in response to the H1N1 flu pandemic of 2009. Nearly all of HHS's Title 42 employees work in one of three operating divisions: NIH, FDA, and the CDC.

In implementing Title 42, HHS and EPA can set base pay as high as $250,000. In comparison, most Federal employees are paid under the general schedule, where the highest base pay amount was $155,500 in 2010, a threshold known as Executive Level 4. That same year, more than a fifth of HHS's Title 42 employees had a base salary that exceeded that Executive Level 4.

Importantly, special hiring authorities need adequate internal controls to ensure agencies use them cost-effectively. However, HHS lacks reliable data to manage and oversee its use of Title 42. As one example, because of shortcomings with its personnel database, it was difficult for HHS to provide accurate head counts of its Title 42 employees to us and to Congress.

For its part, since 2006, EPA has used Title 42 to appoint 17 employees, 15 of which earned over $155,500 in 2010. EPA appointment and compensation practices were generally consistent with its guidance; however, EPA does not have post-appointment procedures in place to ensure Title 42 employees meet ethics requirements to which

they have previously agreed.

In our report on which this testimony is based, we made recommendations to HHS to strengthen its oversight and management of its Title 42 authority and a recommendation to EPA to improve enforcement of its ethics requirements. HHS agreed with our recommendations, while EPA disagreed, citing actions it had already taken. We acknowledge the EPA's plans to address these issues but maintain that the recommendation was needed to ensure implementation of tighter ethics provisions.

I will turn now to my colleague, Bob Cramer, who will discuss the extent to which statutory pay caps apply to certain Title 42 appointments.

STATEMENT OF ROBERT CRAMER

Mr. Cramer. I am pleased to be here to discuss our legal opinion concerning pay caps for consultants appointed pursuant to Title 42 of the United States Code.

At the outset, let me say that this was a very difficult issue. It required us to analyze laws that have been enacted over the course of many years, from 1923 to 2009. Laws we analyzed are in different pay systems, and we encountered challenges in attempting to resolve ambiguities arising from pay laws enacted at different times over those many years, nearly 90.

What we did find was that a provision in a 1993 appropriations act established a permanent cap on the pay of individuals appointed on a limited-time basis under Title 42 at all the public health agencies except three. The cap currently limits base pay to $155,500. The permanent cap in the 1993 appropriation actually originated back in 1956, when Congress first enacted it. Congress included it again in every appropriation until 1993, each year, but in 1993 it made it permanent.

Now, in 1956, when the Public Health Services regulations included time limitations on employment of all consultants -- so everyone had a limited-time appointment, so the appropriation cap applied to everyone. But in 1966 the regulations changed and the time limitation was removed. But when Congress enacted the appropriation

cap in 1967 and in each of the following years, it continued to apply the cap only to those consultants appointed for limited periods of time.

We also examined two pay caps found in Title 5. The first of these is Section 3109, which limits pay for temporary consultants.

In 1992, Congress directed OPM to prescribe regulations to administer 3109, and OPM's regulations provide that 3109 does not apply to consultants under Title 42. Under the law, this interpretation is entitled to considerable weight since OPM is the agency charged by Congress with administering 3109. Moreover, OPM's interpretation is consistent with actions of Congress, which have signaled that 3109 does not apply to the Title 42 consultants.

Since 1970, the appropriation acts for HHS have contained separate provisions placing identical compensation limits for consultants subject to 3109 and for Title 42 consultants appointed for limited periods of time. Obviously, identical provisions would be unnecessary if Congress believed that 3109 applied to the Title 42 folks.

The other pay cap that we considered is Section 5373 of Title 5. It caps pay at level 4 of the executive schedule, currently $155,500 also.

In deciding that 5373 does not apply to Title 42 consultants, we were again guided by congressional actions. For example, after 5373 was enacted, Congress enacted the permanent pay cap that I spoke of before, which limits pay for Title 42 limited-time appointments to Executive Level 4. This provision would not have been necessary if

Congress believed that the pay cap in 5373 applied, since it also limits pay to Executive Level 4.

Additional evidence that 5373 does not apply to Title 42 is provided by Congress' actions when it extended the authority to EPA. Our review of the legislative history at the time indicates that EPA and HHS each informed Congress during the legislative process that they did not apply the 5373 cap to the Title 42 consultants.

In conclusion, if Congress wants to establish upper limits for appointments under Title 42, you may wish to consider, as indeed you are, enacting legislation to specifically enact such limits.

That concludes our statements, and Mr. Goldenkoff and I would both be happy to answer any questions you may have.

[The prepared statement of Mr. Goldenkoff and Mr. Cramer follows:]

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Mr. Pitts. The chair thanks both of you for your opening statements.

I will begin the questioning and recognize myself for 5 minutes for that pursuant purpose.

Mr. Goldenkoff, the report states that, according to HHS and EPA officials, the pay-setting flexibility is needed to compete with the private sector and academia pay schedules.

Did you review the existing pay schedules for research scientists and consultants in the private sector or academia? Did HHS do a review of existing pay schedules? If so, what were the differences? And, if not, how did they determine pay?

Mr. Goldenkoff. We did not review comparable pay in the private sector or in academia. That type of a study is extremely difficult to do. Mainly, it is hard to find apples-to-apples comparisons.

But having said that, HHS and EPA are in a labor market that is extremely competitive. They are competing for positions that are extremely well-paid. And so it is important for them to be able to compete and hire people, as has been said here. And pay is a big incentive.

Mr. Pitts. Please describe the role of the Secretary of HHS in determining pay levels outside of the civil service. Does any other Federal official have that kind of authority? Does the President have that authority?

Mr. Goldenkoff. With the Secretary of HHS, my understanding is that the Secretary has the authority to approve pay above a certain

cap, the highest level. But we did not look at the authorities of other department heads or agency heads.

Mr. Pitts. Did you determine why the use of Title 42 increased by 25 percent at HHS from 2006 to 2010?

Mr. Goldenkoff. Well, we did speak to agency officials about that, and, yes, it was a dramatic increase. And the reason, a key reason was, as I said, was to respond to these health emergencies. One was the H1N1 virus, where they needed to bring people on board extremely fast to develop a vaccine for it.

Mr. Pitts. And what was the basis for HHS dropping the annual Title 42 salary cap from $350,000 to $250,000, which is almost a 30 percent decrease?

Mr. Goldenkoff. Right. That I don't --

Mr. Pitts. Mr. Cramer?

Mr. Cramer. I don't know the basis upon which they decided to do it. I think it would seem like a policy judgment on their part.

Mr. Pitts. Referring back to the first question, was there any language in the existing laws or regulations that described Title 42 as a pay flexibility program needed to compete with the private-sector pay schedules?

Mr. Cramer?

Mr. Cramer. In the legislative history when Title 42 was passed, and also when EPA was granted the authority, there was discussion about the need for the Public Health Service and then EPA to be able to attract scientists to come work for them, yes.

Mr. Pitts. Where is the authority that allows HHS and EPA to operate the Title 42 in this manner?

Mr. Cramer. Well, it is actually Title 42, Section 209. And we are actually speaking about subsections F, which is the consultants, and then G, which are the fellows. The scientists were brought in as -- you know, to work for them for some period of time. It is those specific provisions.

Mr. Pitts. Mr. Goldenkoff, would you review the types of employees that were hired at HHS under Title 42 authority, such as nursing or research? And from your analysis of the laws, is there authority to hire a nurse under Title 42?

Mr. Goldenkoff. There is broad authority there. And, you know, for example, some of the occupations that they brought in people under Title 42, there was a staff scientist; there was a research fellow; a senior investigator; clinical research nurse, who specializes in the care of research participants and is responsible for showing participant safety. So they are not necessarily caring for patients but just caring for people who were involved in the research. The other position here, the other occupation was a clinical fellow.

So there does seem to be a lot of latitude in the positions that can be hired under Title 42.

Mr. Pitts. All right. My time has expired.

I recognize the ranking member for 5 minutes for questions.

Mr. Pallone. Thank you, Mr. Chairman.

I wanted to discuss why it is important that the HHS maintain the

hiring authority granted by Title 42.

I think we can all agree that it is essential for HHS to be able to recruit and retain highly trained and often specifically trained personnel in support of their mission. Because without it, you know, people like Dr. Tony Fauci, as I mentioned, or, you know, Dr. Harold Varmus, who is the director of the National Cancer Institute, or Dr. Neal Young, the NIH hematologist we read about in Wednesday's Washington Post -- he found a cure for aplastic anemia, which is a rare and fatal bone marrow disease.

So, in your perspective -- you know, I am asking the two of you -- in your perspective, how does Title 42 serve as an essential tool for HHS to fulfill its mission? And why is it important that the Department maintain the special hiring authority?

Either one can start. Dr. Goldenkoff, I guess?

Mr. Goldenkoff. Well, it is important for all agencies to have this flexibility because agencies -- it is about mission accomplishment. And agencies need to have the various tools that are required to compete in the labor market. And, you know, as we have already said, doctors and research scientists and engineers, these are highly paid professions, and the GS schedule is not always sufficient to match both the salaries and other forms of compensation that are available outside of government.

For example, in academia, you can have your base salary; you can also get money for publishing articles, for consulting. And those are things that are not available in the Federal Government, but those are

things that -- that is the competitive environment. And the Federal Government needs to have the flexibility to offer both the salary and other forms of compensation to get the best and brightest.

Mr. Pallone. Mr. Cramer, do you want to respond?

Mr. Cramer. Well, actually, you are asking about some policy issues, and my half of this is the legal side.

Mr. Pallone. Okay.

Mr. Cramer. So we leave the policy to you folks.

Mr. Pallone. All right.

Well, let me ask a second question, and that is -- I want to make the record clear on two points. First question: Is it correct that HHS agreed with each of your three recommendations?

Mr. Goldenkoff. Yes, that is correct. And they have already started taking action on them.

Mr. Pallone. Well, to the best of your knowledge, is HHS in the process of addressing each of these? And to the extent the Department hasn't don't so, do you want to describe what they are doing, if you could?

Mr. Goldenkoff. Yeah. I mean, just very briefly, there were two key issues that we found. One had to do with the reliability of the data that was in their personnel database. And that sounds somewhat technical, but having a reliable personnel database gives you visibility over the kinds of people that you are hiring. And so it is very important for internal controls to have accurate data on your personnel.

And so, for example, it was unclear how many people under the Sections F or G were being hired. And, as we said, they gave us inaccurate information, they provided the Congress inaccurate information on the head count. And it was also unclear -- and, initially, for example, it seemed as if they had hired people into components of HHS that was inconsistent with the Title 42 appointment authority. As it turned out, it wasn't; it was just the inaccurate data. So this data piece is an internal control issue.

The other finding where we made a recommendation was that they did not follow their internal guidelines in using Title 42 policies, for example, on making a business justification, the business case for why Title 42 was needed in the first place in terms of a particular appointment.

And so, while we were doing our audit work, they tightened up some of their procedures. And so they are making steps in the right direction, but we felt that they haven't gone far enough. And that was the basis for one of the recommendations dealing with better documentation was needed, to show that, yeah, they have basically exhausted all possibilities and now they have to use the Title 42. And so that is an internal control or an accountability -- it addresses those two issues.

And then on the data, we recommended that they -- when they input the information, there is a drop-down screen in there -- that they would ensure that they indicate whether it is a Section F or a Section G. And, again, that is the other piece of the internal control.

Mr. Pallone. Thank you, Mr. Chairman.

Mr. Chairman, I just wanted to clarify that this authority could only be used for doctoral-level training. It is only used for that purpose --

Mr. Goldenkoff. I am sorry?

Mr. Pallone. This authority, it is only used for doctoral-level training. That is my understanding.

Mr. Cramer. Doctoral training?

Mr. Pallone. Doctoral-level.

Mr. Cramer. I am not familiar with --

Mr. Pallone. I am just saying that, myself. I wasn't --

Mr. Cramer. G is for the fellowships, the scientists, individual scientists. And F is for the consultants, which can be a variety of things.

Mr. Pallone. Okay. Thank you.

Mr. Pitts. Will the gentleman yield just to follow up on that?

Mr. Pallone. Oh, sure. I don't have any time, but sure.

Mr. Pitts. Oh, you don't?

Mr. Pallone. Oh, I guess I do. I am sorry.

Mr. Pitts. What is the justification, then, for hiring 347 nurses at NIH under this authority?

Mr. Cramer. Well, I can try to say something about it.

You know, under F, it only talks about special consultants. They don't specifically mention nurses. But in this day and age, where consultants do so many things and we don't have a specific legal

definition of what we mean by "consultant" in 209, arguably one could say that a nurse could be brought in as a consultant.

You know, I used to be an assistant U.S. attorney, and we would pick juries. And people would be asked their occupation, and they would say, "I am a consultant." And so the question would be, well, what do you do? Because consultants do so many different kinds of things.

Mr. Pitts. Okay. Thank you.

The chair recognizes the gentleman, Mr. Barton, for 5 minutes for questions.

Mr. Barton. Thank you.

Before I start asking my questions, I wanted to make a general statement.

I am not opposed or on some jihad to people who want to work in government service at HHS or NIH. You know, I am a Federal employee. My late aunt was a long-time employee of the Department of Agriculture. My sister is an EPA enforcement attorney at the regional office at the EPA in Dallas. So I am absolutely supportive of good people working in the public service area for the Federal Government.

What I am opposed to is using a provision that was originally intended for short-time, special consultants to fill specific critical needs being used as a substitute pay scale. That is what I am opposed to.

And when you have, you know, 44 percent of all the researchers at NIH under Title 42 and you have, you know, I think, 25 percent of

the people at HHS under Title 42, something is out of control.

Now, I am going to ask a few questions that are trying to make that point.

Mr. Goldenkoff, are there any Title 42 employees that have won a Nobel prize?

Mr. Goldenkoff. We did not look into that.

Mr. Barton. Do you know of any?

Mr. Goldenkoff. I am not aware of any.

Mr. Barton. Do you know of any that are potential Nobel prize winners?

Mr. Goldenkoff. I am not in a --

Mr. Barton. Were there any employees hired with the understanding that they might compete for a Nobel prize?

Mr. Goldenkoff. No, we can't comment on that.

Mr. Barton. Or whatever the equivalent prize is.

Mr. Goldenkoff. It was mentioned that Dr. Fauci -- I mean, obviously, a Nobel prize is only, you know, within each scientific field, you know, a handful that are selected every single year. So that is certainly the pinnacle of one's career. We do know, for example, that Dr. Fauci has won and earned a number of awards.

Mr. Barton. And nobody begrudges what he is paid. I certainly don't. I have absolutely nothing but the highest esteem for him personally and professionally.

Is there any record at NIH or in HHS or, for that matter, EPA where there was a specific requirement for some unique skill set, that this

individual was hired and they specifically said, we had to pay more because this is one of a handful of people in the country that has this skill set? Any indication that they even tried to do a normal job search before they used this special compensation skill?

Mr. Goldenkoff. Well, and that is what we want to see more of. And that was the basis for our recommendation, is greater accountability. Because with flexibility, that is fine, but an agency needs to have greater accountability to use something.

And so, you know, we have said in some of the other work that we have done on personnel issues that pay flexibility to be able to compete in the marketplace, the labor market for the best and the brightest, that is fine, but agencies also need to be held accountable that they are using it properly, cost-effectively, consistent with applicable laws and regulations and guidance, and that there is no abuse going on.

And so when we looked, we pulled, of the roughly 6,500 Title 42 appointments at HHS, we looked at the paperwork on about 60 of them, and we did find some gaps in that sort of documentation. That is precisely the type of thing that we were looking for, that they had exhausted all other outlets, all other avenues for getting folks that met those qualifications. And so the goal of the recommendation is to tighten that up and to see more of that.

But in terms of how that translates into specific numbers, whether 6,000 is too many, you know, should it be more than 6,000, should it be fewer than 6,000, we don't have a basis for that. But we would have

a better sense, though, of knowing, if there was more robust documentation, that at least each one of those appointments met a certain threshold in terms of need and demand.

Mr. Barton. Well, now, I don't want to beat a dead horse, but it is clear to me that Title 42 has been used as a substitute pay scale. And instead of doing the due diligence and trying to use the normal pay scale and find somebody competent, this has just been used as kind of a recruitment tool. "We will hire you under Title 42, and you will get an extra $50,000 or $75,000." And anybody who is being hired is going to say yes to more money instead of less.

But to sit here and say that this had to be used, that it was used only in a last resort because they could not find competent people, when you increase the use of it by 25 percent in a 2-year period, it is being used sloppily, to say the least. And, hopefully, on a bipartisan basis, we can begin to do something about it.

And, again, the bill that has been introduced, it is not the Ten Commandments. If there is something we need to modify or change in consultation with the executive branch and the minority, I am very open to do that. But I do hope that we tighten this up.

And, with that, Mr. Chairman, thank you for the hearing, and I yield back.

Mr. Pitts. The chair thanks the gentleman and recognizes the gentlelady from Illinois, Ms. Schakowsky, for 5 minutes for questions.

Ms. Schakowsky. Thank you, Mr. Chairman.

I would like to point out, in response to the issue of Nobel

prizes, that Dr. Harold Varmus, who was the former head of the NIH -- Mr. Barton, I wanted to just let you know that Dr. Harold Varmus, who was the former head of NIH, he then went to Sloan Kettering --

Mr. Barton. I understand that, but that was before he worked at NIH.

Ms. Schakowsky. Oh. I thought the question was whether or not --

Mr. Barton. He didn't get hired and win this Nobel -- and, look, I am for him --

Ms. Schakowsky. No, I know. I know you are. And I don't want to be argumentative. I just wanted to say we actually do have, proudly, have someone, head of the National Cancer Institute, that won a Nobel prize.

Mr. Barton. I have met that gentleman, and I am impressed with him.

Ms. Schakowsky. Okay.

Mr. Barton. But he didn't get hired under Title 42 before he won the Nobel prize. That is all I am saying.

Ms. Schakowsky. Okay.

Let me also just say the enormous respect that I have for the GAO. And I certainly have found your advice and your studies so incredibly useful.

And I want to focus in on one part of what the GAO found, and wonder if it is not an area for bipartisan agreement. There are two sentences just in the cover sheet, one that HHS does not have reliable data to

manage and provide oversight of its use of Title 42. It seems to me that unless the steps that they have taken satisfy your requirements -- and I want going to ask you about that -- that certainly seems like something that we ought to focus on. And, two, that the EPA -- and you mentioned that in your testimony, I believe -- does not have post-appointment procedures in place to ensure Title 42 employees meet ethics requirements to which they have previously agreed. And that seems like a place that we all definitely ought to focus on.

So, one, let me ask you if HHS has responded to the oversight of its use sufficiently. Because I know it has made changes.

And, two, I wanted to ask you, in your opinion, how would caps on the use of this hiring authority, in your view, affect NIH's ability to hire the skilled workforce needed to quickly respond to public health crises?

I want to just add one point. The chairman asked, do you look at the private sector? It seems to me that one of the criteria when HHS or EPA or whoever hires -- and I am presuming that they do need to look at the private sector, that we are not just throwing out a number. Is there any requirement that they look at that?

So let me get those answers.

Mr. Goldenkoff. Well, under the general schedule, when general schedule pay is considered and adjusted on an annual basis, it is based on salary surveys with comparable jobs in the private sector. So at least for the general schedule -- now, you can argue with the methodology, and a lot of people have debated that -- but there is some

comparison with the private sector based on also location and level of position for GS positions.

But for the Title 42 positions, I am not familiar with exactly what they do to --

Ms. Schakowsky. Okay, but in our small time here, let's now talk about these management issues, the oversight and monitoring that I had asked you about. I mean, has NIH made any of those changes?

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[11:00 a.m.]

Ms. Schakowsky. And what about focusing on how they monitor the --

Mr. Goldenkoff. Yes, they agreed with the recommendations, so that is a start. They also had already taken steps to tighten up certain of their procedures in making the appointments.

And what we will be doing, as part of our routine follow-up effort, as we do with all agencies that we make recommendations to, we will continue to follow up with them to make sure that they implement those recommendations.

Ms. Schakowsky. And what do you think the effect of caps would be?

Mr. Goldenkoff. It is difficult to say. I mean, we have not looked into that. Just more conceptually, though, where we have looked at, whether it is caps or things that are more formulaic in other areas, sometimes it doesn't always get the result that you want and does affect mission accomplishment. In this case, though, we can't say. We have not looked into it.

But I would say, it is something to be sensitive to. Because, really, what this is about, as we said earlier, it is about mission accomplishment. And, you know, whether the number should be 5 percent, whether it should be 2 percent, whether it should be 10 percent, it

is really hard to say. And so, what is the basis for that number?

And this is why we keep coming back to the internal controls and the accountability. You know, so long as there is a justification for each one of those appointments -- and this is where, for example, the annual reporting requirement in the new legislation would probably be a good thing because it could force HHS to --

Ms. Schakowsky. That is what I was thinking, too, Mr. Barton, that the annual reporting requirement is something I think all of us certainly could easily agree with and should.

Thank you. I yield back.

Mr. Pitts. The chair thanks the gentlelady and now recognizes Dr. Burgess for 5 minutes for questions.

Dr. Burgess. Thank you, Mr. Chairman.

And, Mr. Goldenkoff, I think that is exactly the point. This whole process needs to be tightened up. And while we all want to see programs have flexibility to get the people in to get the work done that needs to be done, at the same time, if there is no oversight, I think we get the general impression that this is a program that hasn't been under tight control, and many things may have gotten away from not just HHS but other agencies, as well.

The chairman asked a good question about comparable salaries, and then I think Ms. Schakowsky followed up on that. You mentioned salary surveys. Would that also include salary history of the individual under consideration?

Mr. Goldenkoff. We did not -- it was outside the scope of the

study that we did.

Dr. Burgess. But wouldn't that be a reasonable thing to include if you are --

Mr. Goldenkoff. Oh, yes, yes. Most definitely.

Dr. Burgess. Again, I don't want to belabor the point, but the limited data I have available to me, which is the wiki org chart, the top salary earner on that, it is an individual named after a subatomic particle, who earns $350,000 a year. And I am sure he does a great job, I am sure his position is important, and the country is the better for having him there. He is the head of the endocrine oncology section's surgery branch at the National Cancer Institute -- a tough job. We want him to do it. But his previous position, apparently earned $256,000 in 2008.

So that is a pretty big jump, almost a $100,000 jump in salary. Now, again, I am not saying that this individual is not worth it, but I would hope that somebody has got their hand on the tiller who is making these decisions.

Let me ask you this. Any big company is going to have an HR department director who kind of oversees this stuff. Is there the equivalent of an HR director at HHS?

Mr. Goldenkoff. Well, there is a chief human capital officer.

Dr. Burgess. Okay. Who is that individual?

Mr. Goldenkoff. Off the top of my head, I don't know.

Dr. Burgess. Okay. Maybe you could provide that information to us.

Mr. Goldenkoff. Sure. We can get that.

[The information follows:]

******** COMMITTEE INSERT ********

Dr. Burgess. And, Mr. Chairman, that might be something we want to follow up on when we do our written questions.

And, as has just been said in so many ways, we want the people there to do the work that needs to be done when it needs to be done. Now, you referenced the H1N1 crisis, and that was a crisis. But it is odd that we think that that required a sudden increase in Title 42 hires at higher salaries because, you know, the stimulus bill passed not 2-1/2 months before that with an extra $10 billion to NIH. I mean, so they had cash, they had money in the coffers. Interesting to see how that was allocated.

And then, of course, the other thing is, we had also less than 10 years before come through 9/11, with all the beefing up of national labs and building the infrastructure.

So am I to understand from your line of reasoning that the NIH and these other national labs do not have the surge capacity to deal with an existential threat like H1N1?

Mr. Goldenkoff. Again, we have not looked at that. That was outside -- you know, we looked at something that was just very, very narrow, and that was Title 42.

Dr. Burgess. Yeah. And I appreciate that. But, again, at the same time, it is like we spend all this money on readiness, and then we spend all the money in the stimulus; surely we weren't having to then go out and shop for the best and brightest minds in the business in order to bring them in to do this work.

Mr. Cramer, let me ask you a question. The National Cancer Act

of 1971 made the positions of the Director of NIH and the Director of the National Cancer Institute into Presidential appointments. Since they are Presidential appointments, they were no longer Secretarial appointments. Under Title 42, does that mean the NIH Director and the NCI Director are not eligible for Title 42 salaries?

Mr. Cramer. I am not in the position to answer that specific question now because I haven't considered it before. So I can look into it and get back to you on it. But I don't know --

Dr. Burgess. Do you know the salary of Dr. Collins?

Mr. Cramer. No, I don't.

Dr. Burgess. I don't either. Is there anybody that earns more than Dr. Collins at the NIH?

Mr. Cramer. I didn't look into the salary issues of people. I was --

Dr. Burgess. Mr. Goldenkoff, do you have that information?

Mr. Goldenkoff. We have data on salaries, but we do not have it by specific individuals. The data was provided to us confidentially. We just have IDs, so we cannot link a particular salary level with a specific individual.

Dr. Burgess. Oh, go to WikiOrgChart; they will do it for you.

But it is just interesting if there are individuals at NIH who earn more than the Director, and just how many individuals there are who earn this. And perhaps a quick glance at the services that they provide, where they would earn a salary in excess of the Director of the entire NIH.

And we will submit that as a question to be responded to in written form. I don't expect an answer right now.

Mr. Goldenkoff. Yeah, we can provide that to you.

[The information follows:]

******** COMMITTEE INSERT ********

Dr. Burgess. All right. Very well.

Thank you, Chairman. I will yield back the balance of my time.

Mr. Pitts. The chair thanks the gentleman and recognizes the gentleman from Illinois, Mr. Shimkus, for 5 minutes for questions.

Mr. Shimkus. Thank you, Chairman.

And I do appreciate you all for coming. I do agree, I find the work of the GAO very helpful to us as public policy folks.

But in just listening to your opening statements and testimonies, and, Mr. Cramer, for you to go back to 1926 and then figure out what happened in 1956 and try to weave this path of how we got to where we are at and why, just that analysis says we need to clean this up.

So, I mean, just the opening statements saying we are cobbling this together to figure out how we got here, where what Mr. Barton would do is just say, let's just take a look at it, write an authorization, get bipartisan support, clean it up, try to get reliable data on the use of this Title 42 authority, as you stated in your report. So I am excited. I think this is much-needed.

Let me ask, I guess, a question. The Public Health Act -- and this is Title 42 of that big law -- EPA doesn't come under that authority under the Public Health Act, correct?

Mr. Cramer. That is right. It is separate.

Mr. Shimkus. So the EPA got dragged into this through an appropriation bill; is that right?

Mr. Cramer. Yes, it -- well, it was a bill that authorized the EPA to make use of Title 42 authorities.

Mr. Shimkus. And I understand that was under an appropriation bill that then became law, and that is --

Mr. Cramer. Yes. That is right. It was.

Mr. Shimkus. So we, as authorizers, also really dislike public policy created through spending authority versus authorization. So the other aspect would be, let's have this debate of whether EPA should be under this, let's go through the authorization process and have that debate, should this apply to -- versus, let's let these sneaky appropriators do it through their process. Right? I mean, so that is another aspect.

We should not be afraid of this debate. And, again, even on both sides -- and even my friend from Illinois, she has identified some things that I think we definitely can try to clean up and I wouldn't think would be that difficult.

Now, my question also comes from the report, to try to explain one of the footnotes here on page 2 of your report. And I will just read it to make it easy. It says, "The salary and compensation limits were lowered by HHS policy issued in February 2012 and in March 2007. HHS limits the annual base salary for employees hired under Section 209(f) to $350,000 and $375,000 in total compensation. These higher limits were in place during most years of our review of HHS's Title 42 use. Total compensation at HHS includes base pay, recruitment and retention," et cetera, et cetera, et cetera.

That is trying to make a statement that the administration itself said this thing has gotten overinflated -- and I guess we will go to

Mr. Goldenkoff -- is that how I am reading it, these things got overinflated? And they are pulling it back. And the main section of that page, which is page 2, you have annual base salary for many appointees under Title 42 at HHS cannot exceed $250,000. That was by policy from the administrative staff. Is that correct?

Mr. Goldenkoff. I believe so. Yes, that is correct.

Mr. Shimkus. And so, without proper -- going back to one of your main statements about there is no, really, market analysis of why we paid this, even the administration said, these things got overinflated, we are going to pull them back -- which I think goes to some of the questions about what positions are being used, how we are evaluating their salary range. And I concur with Mr. Barton; to some extent, it just seems like there was a different salary range outside of the normal process, and it has just grown over time, as things do here.

Again, I appreciate the testimony. It is a great hearing. Mr. Chairman, thank you for it.

And thank you for your great work.

Mr. Pitts. The chair thanks the gentleman.

And I now recognize the gentleman from Georgia, Dr. Gingrey, for 5 minutes for questions.

Dr. Gingrey. Well, I thank you, Mr. Chairman, for recognizing me. I came in at the very tail end of this. And, doggone it, Mr. Shimkus, as he always does, took my question, the last question on my list. But he did it better than I could.

Let me just make a comment and say that I thank the witnesses from

GAO for testifying this morning. And I would concur with my colleague from Illinois, that we are deeply appreciative of the work that you do, not just on this but in general. It is very, very helpful, as is CRS, to help us do our work and do a better job.

Maybe rather than me asking a question that has already been asked, the two of you could sort of summarize, if you have not already done that, if you don't mind, maybe in a condensed manner, do that for me in regard to what you have found in this report and what your recommendations are going forward, both for HHS and EPA, in regard to this issue?

Mr. Goldenkoff. Sir, I mean, in a nutshell, it was, you know, we recognize the importance of having pay flexibility, but, you know, we are GAO, our middle name is literally "accountability", so what we also were looking for was more accountability in their use of Title 42. Because we are in agreement, that we don't want abuse of it, we don't want any waste, we don't want there to be indiscriminate use of Title 42.

And so, when we went to look at within -- we looked at the extent to which the Title 42 appointments at both HHS and EPA were consistent with the law, applicable regulations, agency policies. And what we found was that, within HHS, there were issues in terms of their ability to even oversee their use of Title 42, and that is that data issue. They really didn't have a good accounting of who was Title 42(f) or Title 42(g). There was just some sloppiness in there. And, actually, a fair amount of time of the audit was spent working with HHS just

cleaning up their database. And so that was what led to one of the recommendations to HHS.

The second finding on HHS concerned their documentation, their justification for needing Title 42. And we found that, in some cases, they weren't always consistent with their own policies. And so that led to our other recommendation to HHS, dealing with the need to tighten up and better document the need for the authority.

And then for EPA, obviously they have far fewer Title 42 appointments. So what we did find there is that those 17 appointments were consistent with their policies, but we found that there were some issues with conflict-of-interest provisions, and they didn't always follow up with employees that did things that were -- basically, that had holdings, stock holdings, and they did not divest in them, as they were asked to --

Dr. Gingrey. Well, I will just interrupt you to say this. I think that was a very, very important finding, that conflict-of-interest issue, particularly in regard to EPA and all these rules and regulations that get handed down. So I thank you for that work.

Mr. Cramer, did you have any comments that you wanted to add?

Mr. Cramer. Well, we looked, essentially, at this question of pay caps and whether or not any of the pay caps that we considered that exist in the Federal compensation systems -- there are a number of different systems -- actually applied to the Title 42 folks. And we found that it was a very limited -- there is a very limited cap on the

pay involving those who work for a limited-time basis.

To sum it up, the statutory schemes are very complicated. And if the committee can begin to work on trying to harmonize the various things that have happened over the many years during which all of these laws have been passed, to bring it together and to make it simpler, it would be a great service to HHS and to the Federal Government.

Dr. Gingrey. I thank you.

And I yield back.

Mr. Pitts. Would you yield to Dr. Burgess, please?

Go ahead.

Dr. Burgess. I would just like to ask Mr. Goldenkoff about, how does the HHS implementation of Title 42 differ or compare to EPA's implementation of Title 42?

Mr. Goldenkoff. Compare to what?

Dr. Burgess. HHS and EPA, when they are governed under Title 42, is their approach identical, or are there differences between the two agencies?

Mr. Goldenkoff. It seemed that EPA's practices were a little bit tighter, a little bit more thorough, and certainly they were more consistent in following. Now, granted, there were also fewer cases to look at. So, you know, we were dealing with over 6,000 cases versus the 10 that we looked at in EPA, I believe. And, you know, so the likelihood was we were going to find more --

Dr. Burgess. So how many Title 42 employees are there at EPA?

Mr. Goldenkoff. Seventeen.

Dr. Burgess. And how many could they hire?

Mr. Goldenkoff. Up to 30.

Dr. Burgess. Do they need those slots if they are unfilled?

Mr. Goldenkoff. My understanding is there are plans to fill them.

Dr. Burgess. I would say don't.

Mr. Goldenkoff. And, you know, again, this is a policy issue. It is an internal management matter that we did not look --

Dr. Burgess. All right. We will.

Thank you. I yield back.

Mr. Pitts. I recognize Mr. Barton for 5 minutes.

Mr. Barton. Thank you, Mr. Chairman. I am not sure I will take the 5 minutes.

Under current law or current regulations, is there a limit on what the Secretary of HHS can pay an exceptional individual?

Mr. Cramer. There is a limit in the appropriation law if that person is a person who was appointed for a limited period of time.

Mr. Barton. What if they are not appointed for a limited period of time?

Mr. Cramer. No, there is no limit.

Mr. Barton. So, theoretically, under current law and regulations, the Secretary of HHS could pay somebody $2 million a year? They don't do it, I understand that. But there is no limit on it right now?

Mr. Cramer. There is no law that would prohibit that at this

time.

Mr. Barton. At this time. Thank you.

Should there be a law that puts a specific cap on compensation?

Mr. Cramer. If Congress decides there should be a law, there should be a law.

Mr. Barton. That is a great answer. You can't beat that.

My understanding is that Title 42 originally was established during World War II for temporary special consultants. Is that correct?

Mr. Cramer. Yes. Back in 1944, Title 42 was enacted into law. And, at that time, although the law itself did not specify that the employees had to be temporary, the regulations of the Public Health Service, which went into effect in 1946, actually, limited them in time.

But there is an interesting little twist here. It didn't limit them to, say, a year or 2 years or 3 years. What it provided was that consultants and fellows hired under Title 42 could only be employed for up to one-half the working days in any year. So, although they could have been there for many years, they could only work essentially half-time.

Mr. Barton. When did the word "temporary" -- or maybe I should -- of the people that have been hired most recently under Title 42, are they classified as temporary, or are the classified as full-time permanent?

Mr. Cramer. I can't speak to how HHS treats them on their books. I don't know if Mr. Goldenkoff --

Mr. Goldenkoff. Term appointments? Okay --

Mr. Barton. When they --

Mr. Goldenkoff. -- or indefinite.

Mr. Barton. They are what?

Mr. Goldenkoff. It is our understanding it is either term or indefinite.

Mr. Barton. Indefinite. So if I am hired under the general scale at HHS, GS-something, whatever, I am hired as a permanent full-time employee, correct?

Mr. Goldenkoff. That is correct.

Mr. Barton. But if I am hired under Title 42, I am considered an indefinite. And indefinite could be 30 years.

Mr. Goldenkoff. But we did not see that going on. I mean, we did look at that, just precisely that, and we did not see that in the data that we looked at.

Mr. Barton. Well, should a reform be that we either define what temporary is and put some specificity to it and require that Title 42 only be used for truly temporary special needs? Or should we go the other way and say, let's end this hypocrisy of indefiniteness and say that they are going to be full-time? In other words, let's be transparent about it.

Mr. Goldenkoff. To the extent -- and I think this is one of the other flexibilities that we haven't discussed yet, is that Title 42, the fact that these are term appointments, does allow for bringing people in for a limited period of time, and that can align with a

particular research project. And so, in theory, when that research project is over, then, you know, that --

Mr. Barton. But that is apparently not how they are doing it. They don't sign a contract for a research project. They are just hired as regular employees, and they get all the benefits, but it is for an indefinite period of time.

Mr. Goldenkoff. But then compared to, say, a permanent employee, who is there for, you know, the next 30 years --

Mr. Barton. Hopefully.

Mr. Goldenkoff. So, I mean, that flexibility is important. But, you know, you are correct, in that -- and, again, it is part of having this oversight, that folks aren't there for an indefinite period of time and they are not re-upped on a regular basis.

Mr. Barton. Well, my time is about to expire, and I appreciate the chairman letting me have a second round.

Should we legislatively define this program and put some definitions and caps in it? Or should it be left to the executive branch to handle it on an executive regulatory basis?

Mr. Goldenkoff. We would need to consider that more. You know, the implications of caps, in particular, and how that would affect the overall flexibility.

And, you know, certainly, there is the need to ensure that HHS and EPA don't use this indiscriminately or as an alternate to standard hiring procedures. But would a cap be too blunt of an instrument? And is the way to get around that through maybe tighter internal controls

to ensure that for every appointment that is made that they have exhausted all other appointments?

Mr. Barton. Well, my time has expired, but I just know, when I was in the private sector and had to make hiring decisions, if I really needed this position hired, you know, that was always the exceptional case, that I had to have that. I mean, I would go to my boss, if it was above my ability to pay them what I thought they needed, and say, "I have to have this individual, and we need to pay him 125 percent of the market." I never said, "Well, I really need him, but I just want to pay him 75 percent." I mean, if you leave it to the discretion at the executive level, they are always going to say we have to have that person and we need to pay them more.

And, with that, I yield back, Mr. Chairman.

Mr. Pitts. The chair thanks the gentleman.

And I now recognize the ranking member for 5 minutes.

Mr. Pallone. Thank you, Mr. Chairman.

Gentlemen, I just wanted to make it clear and basically commend the Department, HHS, for the actions it has already taken to respond to your recommendations. I want to make it clear that they have.

And if I could ask unanimous consent, Mr. Chairman, to enter into the record the HHS human resources manual that has been updated, or the section that has been updated in February 2012.

Mr. Pitts. Without objection, so ordered.

[The information follows:]

******** COMMITTEE INSERT ********

Mr. Pallone. And, specifically, because I did mention before about this policy only applying to doctoral candidates, and I know you had mentioned the nurses, or it had come up about the nurses. And part of the manual change, it says that, under qualifications, it requires that appointees have a doctoral-level degree in a scientific discipline related to the position and professional stature that is commensurate with the duties of the position being filled.

Prior HHS policy only required a bachelor's degree. So it was, in fact, the case that, before, you could just have a bachelor's degree, which is, I assume, the reference to the nurses. But it is not true under the revisions that they have made that we have now entered into the record.

And the other thing I wanted to point out is that -- and, again, this is my effort to try to make it clear that this is not or should not be partisan -- that the EPA was added to this program in 2005, and that was under a Republican President and a Republican majority in the Congress. So it is not that this is something that has just existed under the Democrats. It has existed under both administrations. And in the case of HHS, they are clearly trying to rectify some of the problems pursuant to your recommendations.

That is all, Mr. Chairman. I yield back.

Mr. Pitts. All right. Thank you.

And that concludes the questioning from our Members. Your report has raised a lot of questions. I am sure Members will have additional follow-up questions that they will submit in writing.

I remind the Members that they will have 10 business days to submit questions for the record, and I ask the witnesses to respond to the questions promptly. Members should submit their questions by the close of business on Friday, September the 28th.

[The information follows:]

******** COMMITTEE INSERT ********

Mr. Pitts. And, without objection, the subcommittee is adjourned.

[Whereupon, at 11:23 a.m., the subcommittee was adjourned.]