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EXAMINING THE HISTORY AND LEGALITY OF EXECUTIVE BRANCH CZARS

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BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

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EXAMINING THE HISTORY AND LEGALITY OF EXECUTIVE BRANCH CZARS

TUESDAY, OCTOBER 6, 2009

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 1:32 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Russell D. Feingold, Chairman of the Subcommittee, presiding.

Present: Senators Feingold, Whitehouse, and Coburn.

OPENING STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Chairman FEINGOLD. The Committee will come to order, and I want to welcome everyone to the Constitution Subcommittee's hearing on "Examining the History and Legality of executive branch Czars."

I think it is fair to acknowledge that there has been a lot of discussion about the Obama administration's appointment of so-called czars to various positions in the White House and other departments or agencies. I called this hearing today because I think this is a serious issue that deserves serious study. But I want to be clear that I have no objection either to the people serving as advisers to the president, or to the policy issues they are addressing. These are some very talented people working on some very important issues that this administration absolutely should be addressing, from climate change to health care. So I hope that this hearing will enable us to get beyond some of the rhetoric out there and have an informed, reasoned, thoughtful discussion about the constitutional issues surrounding the President's appointment of certain executive branch officials.

I should note that while the term "czar" has taken on a somewhat negative connotation in the media in the past few months, several Presidents, including President Obama, have used the term themselves to describe the people they have appointed. I assume they have done so to show the seriousness of their effort to address a problem and their expectations of those that they have asked to solve it. But, historically, a czar is an autocrat, and it is not surprising that some Americans feel uncomfortable about supposedly all-powerful officials taking over areas of the Government.

While there is a long history of the use of White House advisers and czars, that does not mean we can assume they are constitutionally appropriate. It is important to understand the history for

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context, but often constitutional problems creep up slowly. It is not good enough to simply say, "Well, George Bush did it too."

Determining whether these czars are legitimate or whether they will thwart Congressional oversight requires analysis of the Constitution's Appointments Clause and a discussion of some complicated constitutional and administrative law principles. I am, therefore, very pleased that we have such an accomplished group of witnesses who can help us determine whether there is a basis for concern here or not, and if so, what are the possible remedies that Congress ought to consider. I want to thank very much the Ranking Member, Senator Coburn, for helping us to put together this distinguished panel and for his cooperation on the difficult timing of the hearing.

I think it is helpful to break down the officials whose legitimacy has been questioned into three categories to better understand the potential legal issues. The first group are positions that I have no concerns about, and, frankly, no one else should either. These positions were created by statute and are subject to advice and consent from the Senate. For example, some have called Dennis Blair the "intelligence czar." But he is the Director of National Intelligence, a position created by Congress based on the recommendation of the 9/11 Commission. Like his predecessors Mike McConnell and John Negroponte, he was confirmed by the Senate. Calling him a "czar" does not make him illegitimate or extra-constitutional. And there are roughly nine officials that fall into this category, yet somehow have appeared on some lists of czars. Any serious discussion of this issue has to conclude that there is no problem with these posts.

The second category of positions also does not appear to be problematic, at least on its face. These are positions that report to a Senate-confirmed officer, for example, a Cabinet Secretary. All of these positions are housed outside of the White House, and all of these officials' responsibilities are determined by a superior who Congress has given the power to prescribe duties for underlings. I will leave it to our distinguished constitutional law experts to further discuss this category, but as I understand it, these officials are likely to be considered "inferior officers" under the Appointments Clause, and, therefore, they are not automatically required to be subject to advice and consent of the Senate. Most of these positions are also housed within parts of the Government that are subject to open records laws like the Freedom of Information Act, and many of them have already appeared to testify before Congress. Indeed, of the 32 czars on a prominent media list, 16 have testified this year, and two others are in positions where their predecessors under Presidents Bush or Clinton testified. There does not appear to be a constitutional problem with these positions in theory, although it is possible people could identify one in practice if, for example, some of the people were determined to be taking away authority or responsibility from a Senate-confirmed position. However, I do not have any reason at this point to believe that that is the case.

Now, what I am most interested here is in the third category of positions, and I think we are talking about fewer than 10 people, in part because we know the least about these positions. These officials are housed within the White House itself. Three weeks ago,

I wrote to the President and requested more information about these positions, such as the Director of the White House Office of Health Reform and the Assistant to the President for Energy and Climate Change. The response to that letter finally came yesterday, and I will put the response in the record and plan to question our witnesses about it if there is no objection.

[The response appears as a submission for the record.]

Chairman FEINGOLD. The White House decided not to accept my invitation to send a witness to this hearing to explain its position on the constitutional issues we will address today. I think that is unfortunate. It is also a bit ironic since one of the concerns that has been raised about these officials is that they will somehow thwart Congressional oversight of the executive branch.

The White House seems to want to fight the attacks against it for having too many "czars" on a political level rather than a substantive level. I do not think that is the right approach. If there are good answers to the questions that have been raised, why not give them instead of attacking the motives or good faith of those who have raised questions?

No one disputes that the President is allowed to hire advisers and aides. In fact, the President is entitled, by statute, to have as many as 50 high-level employees working for him and making top salaries. But Congress and the American people have the right to ensure that the positions in our Government that have been delegated legal authority are also the positions that are exercising that authority. If—and I am not saying this is the case—individuals in the White House are exercising legal authority or binding the executive branch without having been given that power by Congress, now, that is a problem. And Congress also has the right to verify that any directives given by a White House czar to a Cabinet member are directly authorized by the President.

So I look forward to an open dialog on these important questions. I thank the witnesses for their time they devoted and the effort they have made to be here with us today. And with that, let me recognize Senator Coburn, who I want to thank again for his cooperation in helping us set this up.

STATEMENT OF HON. TOM COBURN, A U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator COBURN. Well, Mr. Chairman, thank you. As you noticed, I have not been outspoken on this issue. I do not see it as a partisan issue. And I would also compliment your opening statement.

One of the reasons I like to work with Senator Feingold is he is absolutely honest intellectually. He has raised the important questions. It is not in a partisan manner but, in fact, to protect the very document that he and I are sworn to protect. And so I thank you for your opening statement.

I would say there is another application to this question that I would think the President would want to address, and he spoken a lot about it in his campaign, this idea of an open, transparent Government. And when you create doubt or you sow doubt—and by not having a witness here today does not uphold any strengthening

of knowledge by the American public—I think he does himself and his administration a disservice.

I do not know the qualifications, I do not know what these people are actually doing, whether or not—as Senator Feingold outlined, whether they are actually binding the administration. But the fact is that what the American people lack today in Government is confidence, and the President ought to be about—and I think that is what Senator Feingold is attempting to do with this hearing—is to re-establish the confidence that the American people that everything is aboveboard, that it is transparent, that we can see it is working, and if people truly do have significant authority and are not confirmed by the Senate, then that is a problem.

And so I do not know whether that is the case or not, and I am very delighted that you are having this hearing. I know Senator Collins is going to have a similar hearing, and I look forward to being in attendance at that since I am ranking on a Subcommittee in that Committee as well.

So I thank you, Mr. Chairman. I thank you all for coming. It is not easy to take the time to come down here and do this, so I appreciate very much your efforts on that behalf.

I yield back.

Chairman FEINGOLD. Thank you, Senator.

Will the witnesses please stand and raise your right hand to be sworn in? Do you swear or affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. HALSTEAD. I do.

Mr. HARRISON. I do.

Mr. PATTERSON. I do.

Mr. SAMAHON. I do.

Mr. SPALDING. I do.

Chairman FEINGOLD. Thank you, and you may be seated.

Our first witness this afternoon is Bradley Patterson, an expert on the organization and functioning of the White House staff. A graduate of the University of Chicago, Mr. Patterson served 14 years in the White House, including as the Deputy Cabinet Secretary under President Eisenhower, as executive assistant to Leonard Garment under President Nixon, and as an Assistant Director of the Office of Presidential Personnel under President Ford. He also served in the Department of State for many years and as the Executive Secretary of the Peace Corps. Mr. Patterson is a senior staff member of the Brookings Institution's Center for Public Policy Education and the author of three books about the White House staff, including most recently "To Serve the President: Continuity and Innovation in the White House Staff."

So we would ask each of you to limit your remarks to 5 minutes and would be, of course, delighted to place your entire statement in the record. But let us begin with Mr. Patterson. We appreciate your presence here today.

STATEMENT OF BRADLEY H. PATTERSON, JR., AUTHOR, "TO SERVE THE PRESIDENT" (2008), BETHESDA, MARYLAND

Mr. PATTERSON. Thank you, Mr. Chairman. It is an honor to be with you this afternoon. I have six points to emphasize concerning the history and legality of executive branch czars.

Point one, "czar" is not an official title of anybody. It is a vernacular of executive branch public administration harking back, in one account, at least to the Coolidge years. It is a label now used loosely hereabouts, especially by the media.

Point two, to use the dictionary definition of "czar" as "one in authority" leads us straight to the question: Who in today's executive branch is a czar? A September 16 Washington Post story makes a list of 30 with which I differ. My definition of "czar" means, first, that this person reports only to the President. If the so-called czar reports to somebody in between, then that intermediate person is the czar, and the appointee is only a subordinate assistant. Special Envoys Stern, Holbrooke, and Mitchell, for instance, report to the President through or with Secretary of State Clinton. "Both Mitchell and Holbrooke said she oversees their work closely," explains a September 19 story in the Washington Post.

A careful reading of the White House announcement about so-called Urban Affairs Czar Adolfo Carrion, Jr. reveals that he answers not directly to the President but reports "jointly" to White House Assistants Valerie Jarrett and Melody Barnes. Performance Czar Jeffrey Zients and Information Czar Vivek Kundra are subordinates in the Office of Management and Budget. National AIDS Policy Czar Jeffrey Crowley in the White House reports to Melody Barnes.

My definition of "czar" also excludes appointees who have undergone Senate confirmation and are thus accountable to testify before congressional committees. This excludes from czardom the Director of National Intelligence and the Drug, Science, Technology, and Regulatory principals in the Executive Office of the President and the Domestic Violence Office Director in the Department of Justice. I note that the media constantly inject the adjectival words "White House" in front of the titles of most of the above-described czar officials. I regard this as misleading reporting.

Point three, the implication of Senator Feingold's September 15 letter to the President is that policy officers of the executive branch, especially those in executive positions, who have never been appointed with the advice and consent of the Senate, may hold positions, which are not consistent with the Appointments Clause of the Constitution.

Principal persons in the non-confirmable category are the 24 top White House staff officers with the title of Assistant to the President. Examples are so-called Health Czar Nancy-Ann DeParle and Carol Browner for energy and climate change. These two officers, and all of their colleagues in the White House, are appointed pursuant to Public Law 95–570 of November 1978, which specifies that "the President is authorized to appoint and fix the pay of employees in the White House Office without regard to any other provision of law regulating the employment or compensation of persons in the Government service." Public Law 95–570 is silent about any requirement for Senate confirmation of these appointments. I inter-

pret this silence as evidencing the intent of Congress to reconfirm, in 1978, the historic practice of not requiring Senate approval of White House staff members, whether they are called "czars" or not. Likewise, White House staffers do not give formal testimony to congressional committees, unless, as in the Watergate instance, criminality is alleged.

Point four, does that mean that senior White House staffers wall themselves off from the Congress, being "anti-democratic"—"a poor way to manage the Government?" as Senator Lamar Alexander alleges (Washington Post September 16). Consider the example of Ms. DeParle (New York Times, September 20). "When Senator Dianne Feinstein...expressed misgivings about how expanding Medicaid would affect California's budget, Ms. DeParle gathered some charts and dropped by [the Senator's home] on a Saturday. They spent nearly 3 hours talking over coffee in Ms. Feinstein's den." Rather un-czar-like behavior. As subcommittee members are aware, White House officers constantly visit the Hill for informal conferences with members and staffs.

Point five, the Post's September 16 story quotes Senator Byrd as having written the President criticizing White House staffers for "their rapid and easy accumulation of power." Are they powerful? Are they "czars"?

Well, no. Let us remember Franklin Roosevelt's Executive Order 8248 of September 1939: These Assistants "shall be personal aides to the President and shall have no authority over anyone in any department or agency." White House staff members have no legal responsibility other than to assist and advise the President. On occasion, when staff seniors communicate the President's instructions to Cabinet members, they sometimes do it in a forceful style. I have seen that happen.

Point six, "These guys don't get vetted," the Post quotes Republican Congressman Jack Kingston, "they have staff and offices and immense responsibility. All that needs to come before Congress." I differ.

Defending the new Constitution, and its three branches—executive, legislative, and judicial—Madison's Federalist 51 emphasized that "the constant aim is to divide and arrange the several offices in such a manner as each may be a check on the other...". This venerable tenet is as applicable to staff as well as to principals. It would be unthinkable that the law clerks of the Supreme Court should be in any way accountable to the President or to Congress. It would be unthinkable that the appointments of any of the personal legislative or committee staff here at the Capitol should be approved by the White House. And likewise vice versa.

The independence of these three groups of staff is indispensable to the separation of powers—which, as this subcommittee knows, is an implied mandate of the Constitution.

The President's personal staff are independently responsible only to the President, and in the end he is the only czar that is. And he is accountable to the American electorate.

Thank you.

[The prepared statement of Mr. Patterson appears as a submission for the record.]

Chairman FEINGOLD. Thank you very much, sir.

We also have with us this afternoon Matthew Spalding, the Director of the B. Kenneth Simon Center for American Studies at the Heritage Foundation. Mr. Spalding is a graduate of Claremont McKenna College with a Ph.D. in Government from the Claremont Graduate School whose scholarship has concentrated in Government, political philosophy, and early American political thought. He has taught an American Government course at George Mason University, Catholic University, Claremont McKenna College, and Hillsdale College. He is co-editor of the best-selling book, "The Heritage Guide to the Constitution."

Mr. Spalding, we certainly appreciate your presence here today, and you may proceed.

STATEMENT OF MATTHEW SPALDING, DIRECTOR, B. KENNETH SIMON CENTER FOR AMERICAN STUDIES, THE HERITAGE FOUNDATION, WASHINGTON, D.C.

Mr. SPALDING. Thank you, Senator, Senator Coburn. Let me begin by commending you for looking into this serious issue and writing about it.

"Czar" is a very confusing and also revealing term. No one officially holds the title. We do not know how many there are. There is no list. As you have pointed out, some are in positions that are created by Congress and confirmed; some are not.

But the word is quite revealing. It is a clever label. It is clearly meant to imply in certain positions a breadth of authority and level of status beyond the particulars of the formal title, seemingly beyond the confines of the normal process.

It is not new, either. In the modern era, Nixon had the first one. There were a few in the administrations of Ronald Reagan and George Herbert Walker Bush, and President Clinton had a few more. But there seems to have been a proliferation in the previous and in the current administration. At the very least, Congress—and here I note the letter you have sent, also the letters of Representatives Issa and Smith in the House and Senators Collins and Alexander and others—is absolutely right in calling for more information.

I believe the issue is not whether the proliferation of czars amounts to a usurpation of power by the executive branch. Rather, the fundamental issue is how the rise of modern administrative government has put us in this insoluble dilemma: whether policy should be made by technical experts, insulated from public accountability and control, or whether policy should be made by our elected representatives in Congress as well as the executive branch. The rise of government by bureaucrats—largely due to the delegation of power from Congress to administrative agencies, combined with the removal of those agencies from the President's control—has given rise to efforts by Presidents from both political parties to get the bureaucratic state under control through various mechanisms. The rise of czars in the current administration is merely another manifestation, albeit an unfortunate one, of this phenomenon.

My testimony goes into some history of this, concluding that the early 20th century reforms essentially shifted the authority to make policy, transferring it out of the elected branches of govern-

ment and into these newly created administrative boards and commissions.

In practice, this meant that the expansion of administrative agencies appeared to involve an expansion of executive power, but it actually resulted in a decline of executive control and, therefore responsibility for administrative policy, leading to the paradox of the expansion of administrative agencies, but the decline of Presidential control over those agencies.

Congress has always had several tools for controlling administrative officials—most notably the powers to authorize and fund agencies and through oversight.

Presidents have tried, the best they can, administrative reorganization, going back to FDR and under Richard Nixon. Ronald Reagan created the Office of Information and Regulatory Affairs, OIRA, currently occupied by the Clinton regulatory czar, Cass Sunstein, who was approved by Congress.

President Obama's attempt to centralize control over administrative agencies is, therefore, nothing new, nor is it peculiar to either of the two major parties in America. It is a symptom of a much more serious sickness, in my opinion—the fact that Congress has transferred a great deal of its authority to administrative agencies, and neglected to put anyone in charge of the whole structure. The Constitution does give us a few pointers to guide by.

The President has the authority to appoint his own staff and advisers to assist in the work of his office. It is perfectly legitimate for him to do so, and Congress cannot infringe on that authority.

Nevertheless, through its legislative and oversight functions, and more specifically through the Senate's participation in the appointment of officers under Article II, Congress also has significant responsibilities over the general activities of the administration in carrying out the operations of the government.

If executive authority is being used as a subterfuge to thwart confirmation requirements and accountability, and so evade constitutional requirements for individuals performing operational and managerial functions normally the responsibility of Cabinet Secretaries and department and agency executives who require Senate confirmations, that would certainly in my mind violate the spirit and probably the letter of the Constitution. A possible example of this, according to reports—and I note that heavily—was the fact that the climate czar was the lead negotiator in establishing new automobile emissions standards, all stemming from the Supreme Court's interpretation of the Clean Air Act.

As the number of czars expands, and the President's policy staff grows, and there are more and more individuals acting more and more seemingly as administrative heads rather than advisers, Congress should raise questions as to whether and to what extent they are protected by executive privilege.

There are numerous managerial problems with this that I raise in my paper, looking back to the Nixon administration, the lessons of the Tower Commission, the possibility of political influence over decisionmaking. And I conclude by noting that we have a dilemma between the current Congress that tends to give away large amounts of authority—for instance, under the TARP bill, which gave the Secretary of the Treasury extensive delegation of power,

$700 billion to purchase troubled assets. Lo and behold, we now own General Motors and we have a car czar. Setting aside the policy, was that Congress' intention?

The modern executive, on the other hand, attempts to get control of this vast bureaucracy under their authority, as they can, and we are seeing the current iteration of that battle.

But, in general, the combination of these two trends leads to a situation where more and more laws—in the form of rulemaking, regulations, and policy pronouncements—are made by administrative agencies not only outside of the open and transparent requirements of responsible government, without congressional approval and oversight, but generally beyond the principle that legitimate government arises out of the consent of the governed. And the more government regularly operates as a matter of course outside of popular consent, the more we become clients rather than rulers of a vast and distant government, the less we are self-governing, and the less we control our own fate. And as Alexis de Tocqueville warned in "Democracy in America," that is the recipe for a benign form of despotism that truly imperils our democratic experiment.

Thank you.

[The prepared statement of Mr. Spalding appears as a submissions for the record.]

Chairman FEINGOLD. Thank you very much, Mr. Spalding.

Our next witness is Tuan Samahon, Associate Professor at Villanova Law School where he teaches constitutional law, Federal courts, and administrative law issues. He previously taught at the University of Nevada-Las Vegas Boyd School of Law, where he was named Professor of the Year in 2007. Professor Samahon is a graduate of Georgetown University Law Center. Following law school, he clerked for the U.S. District Court for the Eastern District of Virginia and for the U.S. Court of Appeals for the Ninth Circuit.

Professor, thank you for being here today, and you may proceed.

STATEMENT OF TUAN SAMAHON, ASSOCIATE PROFESSOR, VILLANOVA UNIVERSITY SCHOOL OF LAW, VILLANOVA, PENNSYLVANIA

Mr. SAMAHON. Thank you, Senator Feingold and Senator Coburn, for inviting me to participate.

I have been asked to address the question of whether the President's use of so-called czars violates the Appointments Clause. My testimony will be limited to the general appointments issue presented by the use of these positions. I will explain the constitutional framework that the Senate should consider in addressing this question.

First, some generalities about the Appointments Clause. It is well established that the Appointments Clause controls the appointment of officers. There are at least two ways to think of this power. We could conceive of it either as being a specific grant of power to the President, that the President may nominate, shall nominate, and with the advice and consent of the Senate, appoint; or, alternatively, we might view the Appointments Clause as a qualification of the President's power to appoint, in which case in those circumstances in which the President appoints officers, he may do so only with the Senate's advice and consent.

Either way, if one of the positions that has been colloquially termed "czar" proves to be an office, the Appointments Clause or its Excepting Clause controls.

If a position is an office, the President must appoint the officer consistent with the Appointments Clause. The Supreme Court has interpreted that clause to distinguish between so-called principal officers and inferior officers. The President must secure the Senate's advice and consent to appoint principal officers. This requirement is non-negotiable. On the other hand, inferior officers may be opted out of Presidential nomination and Senate advice and consent. The choice to opt out or not is a Congressional prerogative. There, of course, is a built-in disincentive to opt out. When Congress exercises this option, Congress effectively eliminates itself from the formal appointments process. It, however, may opt back into the default arrangement of Presidential appointment with Senate advice and consent. To opt out, Congress need only by law, by statute, vest the appointment authority in one of three groups of authorized officers: the President alone, the heads of executive departments, or the courts of law.

Now, returning to the specific question of so-called czars, one way to think of a czar is as an inferior officer whose appointment Congress vested in the President alone. The three questions to ask in making this determination are:

First, is this czar even an officer at all, as a threshold matter? Second, if so, did Congress by statute vest the appointment power in the President alone if appointed by the President or in a head of an executive department if appointed by a department secretary or similar official appointed by Senate advice and consent? And, third, if so, is the officer inferior to the appointing authority? If all three conditions are met, the czar is an inferior officer whose appointment was vested by Congress outside the default process and is consistent, perfectly consistent, with the Appointments Clause. Alternatively, if the czar is not an officer at all but a non-officer, then the President has the power to appoint the non-officer without regard to the Appointments Clause.

So let us first talk about the threshold inquiry, the officer versus non-officer.

First, it is necessary to draw the line. This line between non-officer and officer is not defined by the Appointments Clause itself, but we do have some authority. Recently under the Bush Administration, the Justice Department's Office of Legal Counsel in April of 2007 issued an opinion that synthesized and harmonized the Supreme Court's opinions on who is an officer for Appointments Clause purposes. This OLC opinion boiled down the definition of "officer" to two requirements that are necessary; that is, in order to be an officer, you must hold an office, which in turn is defined as a position to which is delegated by legal authority a portion of the sovereign powers of the Federal Government—what the Supreme Court in *Buckley* v. *Valeo* termed "significant authority?" The second requirement is that this position must be continuing.

So as to this first requirement that a position be delegated sovereign authority, OLC provided us with some definition of what exactly constitutes sovereign authority. Delegated strategy authority is that power to bind the Government or third parties for the ben-

efit of the public, such as by administering, executing, or authoritatively interpreting the laws. And I quote here, "Delegated sovereign authority also includes other activities of the executive branch concerning the public that might not necessarily be described as the administration, execution, or authoritative interpretation of the laws but nevertheless have long been understood to be sovereign functions, particularly the authority to represent the United States to foreign nations or to command military force on behalf of the Government."

Now, OLC excludes as an office any purely advisory position. These purely advisory positions present a potential problem for Congress. Even if one is a non-officer, we do have to worry that powerful "advisers" in theory become final in fact.

If we have an officer, we can then determine whether Congress gave that power to the President alone to appoint, and then we must determine whether that officer is inferior. As my time has expired, I will save any elaboration of what constitutes an inferior officer for questions.

Thank you, Senator.

[The prepared statement of Mr. Samahon appears as a submission for the record.]

Chairman FEINGOLD. Thank you, Professor, and I appreciate your testimony. Of course, your full statement will be placed in the record, and I would ask unanimous consent that Senator Durbin's statement be placed in the record as well. Thank you.

[The prepared statement of Senator Durbin appears as a submission for the record.]

Chairman FEINGOLD. Now we will turn to John Harrison, a professor at the University of Virginia School of Law. Professor Harrison teaches constitutional history, Federal courts, civil procedure, and a number of other courses. He was Deputy Assistant Attorney General of the Justice Department's Office of Legal Counsel under President George H.W. Bush and recently served as counselor on international law in the Office of the Legal Adviser at the Department of State. Professor Harrison earned his J.D. from Yale Law School and served as editor of the Yale Law Journal. He clerked for Judge Robert Bork on the U.S. Court of Appeals for the District of Columbia Circuit.

Mr. Harrison, we welcome you, too, and thank you for making the time to be here this afternoon. You may proceed.

STATEMENT OF JOHN C. HARRISON, JAMES MADISON DISTINGUISHED PROFESSOR OF LAW, HENRY L. AND GRACE DOHERTY CHARITABLE FOUNDATION RESEARCH PROFESSOR, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, CHARLOTTESVILLE, VIRGINIA

Mr. HARRISON. Thank you, Mr. Chairman, Ranking Member Coburn.

There are two governing legal principles here. Professor Samahon just set out the first one, the Appointments Clause. It is a necessary condition for the exercise of actual legal authority in the Government for someone in the executive branch for anyone other than the President to have been appointed to an office pursu-

ant to the Appointments Clause. You have to be either a superior officer or an inferior officer.

The other necessary condition for the exercise of power by anyone other than the President is some source of statutory authority, because only the President has constitutional power and the President's constitutional powers are essentially non-delegable.

The consequence of those two principles is that it is extremely doubtful whether anyone on the White House staff, the sort of person sometimes called a "czar," could actually exercise legal authority, at least as a formal matter. Those are the first two points about the governing legal principles.

The next point I want to make is that there is a difference between actual legal power between formal authority and influence and importance in the Government. There are a great many people in all three branches of Government who do not have any actual legal authority but who, nevertheless, are quite important to the process of formulating policy or in the judicial branch, thinking of law clerks, to the process of deciding cases.

There is nothing legally problematic about that because the rules governing sources of authority and status of an officer look to actual legal authority. They do not look to informal power, what is sometimes called "clout." And I think that is appropriate as it is much easier to understand and, hence, make legal rules about actual formal authority than about clout.

As a consequence, it is not surprising that the legal rules do not seek to govern that. They seek to govern what people can actually do, whether they can genuinely bind the Government.

So that is the question with respect to anybody who does not have a source of authority or is not appointed consistent with the Appointments Clause, whether that person has ever purported to take a legally effective action. That is something that certainly needs to be thought about. I doubt that it has happened, because the legal principles governing this matter are relatively well established.

The last thing I would point out is that although it is common for there to be a divergence between influence in the Government and actual formal legal authority, especially with respect to the White House staff, it is extremely common for members of the White House staff to be extremely influential even though they cannot take any genuinely legal binding decision. Whether that division between legal authority and informal practical influence is a good thing is a difficult question of policy. It is one that the Government has been wrestling with as long as the Constitution has been in operation. It is a hard question both for Congress and for the President. But the important thing, I think, to understand is that that is a policy question; whereas, the fundamental legal question is, Is anybody who does not have Government authority seeking to exercise it?

Thank you.

[The prepared statement of Harrison appears as a submission for the record.]

Chairman FEINGOLD. Thank you very much, Professor.

Our final witness is T.J. Halstead, Deputy Assistant Director of the American Law Division of the Congressional Research Service

at the Library of Congress. Prior to assuming his current position, Mr. Halstead served both as a legislative attorney and section research manager in the American Law Division. Mr. Halstead, a graduate of the University of Kansas School of Law, specializes in the areas of constitutional law, administrative law and process, Congressional practice and procedure, and Congressional-executive relations.

Mr. Halstead.

STATEMENT OF T.J. HALSTEAD, DEPUTY ASSISTANT DIRECTOR, AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, WASHINGTON, D.C.

Mr. HALSTEAD. Mr. Chairman, Mr. Coburn, I am pleased to be here today to discuss the Subcommittee's consideration of historical and constitutional issues pertaining to Presidential advisers.

In my testimony I will address in a slightly different manner two interrelated issues that are relevant to today's hearing that have been touched upon by my fellow panelists—the first dealing with those Appointments Clause implications that are posed by the service of Presidential advisers, and then looking to identify the contours of an effective Congressional response to concerns raised by the apparent influence that is, in fact, exerted by those advisers.

As has been stated, the first issue with regard to the Appointments Clause centers on concerns that have been raised that the use of these advisers may circumvent the requirements of that clause by allowing persons who have not been subjected to the Senate confirmation process to exert significant, if not determinative, influence over important policy issues. Those concerns are certainly valid from a practical political perspective, but there does not appear to be any substantive basis for a determination that this is, in fact, a violation of the Appointments Clause, at least as a facial matter. I have laid this out in more detail in my prepared statement, but there is no indication that these advisers, particularly those serving in unconfirmed positions within the Executive Office of the President, have been vested with any actual executive authority, and that precludes a categorical conclusion that the requirements of the Appointments Clause apply to their service.

As a result of that dynamic, any constitutional challenge to these advisers, even assuming that someone could establish standing to mount such a challenge, would rest on a generalized argument that Presidential reliance on these advisers offends constitutional principles to such a degree as to be impermissible.

Now, given that these advisers are viewed widely as exerting wide and broad power over actions taken at the executive branch level, at the department level, and so on, that argument might have a certain intuitive appeal, especially in light of the care with which Congress has structured the modern administrative state. However, under current jurisprudential principles, it is difficult to discern a basis upon which a reviewing court would conclude, as a legal matter, that the existence of these advisers runs contrary to our constitutional system.

It is important to note that even assuming that a substantive argument against the service of such advisers could be forwarded, the

traditional reluctance of the judiciary to intervene in conflicts of this type between the Congress and the executive branch make a non-political resolution to the controversy unlikely. Also, it is not clear that legislative proposals, even if enacted, would have much, if any, effect on Presidential utilization of advisers as it does not appear possible for Congress to prohibit, either implicitly or explicitly, a President from relying upon personal advisers irrespective of whether they are confirmed or draw a salary.

Given the limitations that are inherent in any judicial or legislative response to this controversy, it seems that the most effective Congressional response may be one that is based simply on persistent and aggressive assertion of the oversight prerogatives of the House and Senate. Longstanding Supreme Court precedent recognizes the power of Congress to engage in oversight of any matter related to its legislative function, and even while there is no explicit provision in the Constitution authorizing Congressional oversight, the Supreme Court has declared that that power is so essential as to be implicit in the general vesting of legislative authority in the Congress.

And, furthermore, despite reports to the contrary, Congress' power in the oversight context certainly extends to the receipt of testimony from Presidential advisers. Research conducted by my colleagues at CRS has revealed numerous instances where such advisers have testified before committees, effectively disposing of the argument that separation of powers principles impose a structural bar to the appearance of these advisers before Congress.

This is not to say that the oversight process is easy. It requires sustained and focused effort from Members of Congress and their staff. However, a robust oversight regime, focusing on specific, substantive executive action taken in areas over which such advisers have political influence, could be an extremely effective approach and would enable Congress as an institution to more forcefully assert its constitutional prerogatives and to ensure compliance with its enactments.

That concludes my personal statement. I would be happy to answer any questions that the Committee might have, and I look forward to working with you on this issue in the future.

[The prepared statement of Mr. Halstead appears as a submission for the record.]

Chairman FEINGOLD. Thank you, Mr. Halstead. I thank all the witnesses. We will begin with 7-minute rounds for questions, and this is for all of you.

White House Counsel Gregory Craig responded to my letter to the President yesterday, and I forwarded a copy of that response to all of you.

First of all, do any of you disagree with the White House's conclusion that there is no Appointments Clause issue for so-called czars that are housed in Federal agencies and report to Senate-confirmed officials? Does anyone have any difficulty with that?

I will note that no one has indicated any difficulty.

White House Counsel Craig's letter states that with respect to the four new White House positions that have been called "czars" by some in the areas of health, energy and the environment, urban affairs, and domestic violence, they "assist the President in the for-

mulation of executive branch policy and exercise no independent legal authority." Later in the letter, he states of the White House and the NSC officials that none of them "exercise any independent authority or sovereign power."

Professor Harrison and Professor Samahon, I take it that this is a key fact in the legal analysis determining whether these individuals are officers of the United States implicating the Appointments Clause. Am I right about that?

Mr. HARRISON. That is absolutely correct. That is the question whether they are exercising legal power.

Chairman FEINGOLD. Professor.

Mr. SAMAHON. I would concur with Professor Harrison. Those individuals would not be officers of the United States.

Chairman FEINGOLD. So what would it take to change that analysis? In other words, what would these advisers have to be doing, how would they have to be acting that would trigger an Appointments Clause issue? And, specifically, how should we analyze the widely reported duty that some of these officials have to "coordinate policy development" between two or more departments? I will start with Professors Harrison and Samahon and then ask the others to respond.

Mr. HARRISON. I think the sort of thing that would be problematic would be if someone like that were to do one of two things: one, to give an order to someone with actual legal authority that did not simply represent carrying forward the President's order, that was not just communicating the President's order; or were that person—and I think this is highly unlikely—to purport to take some actual binding measure himself or herself, for example, issuing a regulation or authorizing an expenditure, an exercise of formal legal authority. That I think is the sort of thing that would be problematic.

Chairman FEINGOLD. Professor Samahon.

Mr. SAMAHON. I would agree with Professor Harrison. I think we are on the same page here, and so is the Bush administration's OLC on this particular point. Binding the Government, that would be an act where we would say that an assistant to the President is no longer an employee—administering, executing, authoritatively interpreting the laws, issuing regulations—I think those would be problematic.

Chairman FEINGOLD. Do any of the rest of you wish to respond? Mr. Halstead.

Mr. HALSTEAD. Just to make a tangential point on this issue. These individuals are exercising very significant—presumably significant political influence, and even if you had allegations that these folks were giving orders to agency heads to take certain action, I just want to touch back on this notion of the very small likelihood of any judicial resolution to this type of conflict.

You have, by way of analogy, a situation that is similar to this dynamic, that has been employed since 1981, where the Office of Information and Regulatory Affairs at OMB exercises significant control over actual regulatory decisions that are made by executive branch agencies. And in the mid-1980s, there were, in fact, allegations that they had effectively usurped the authority that had been vested in agency heads to make rulemaking decisions. And the

court in one case, *Public Citizens* v. *Tyson*, I believe, there was substantial evidence presented that that, in fact, had occurred. And the court just effectively refused to address the constitutional implications raised by that dynamic and addressed the issue in a manner that simply enabled it to ascribe the decision as, in fact, being that of the agency head.

Chairman FEINGOLD. Mr. Craig writes the following—yes, please, go ahead. I did not realize you wanted to respond.

Mr. SPALDING. Sorry, Senator. I agree with the technical points that have been raised here in terms of the questions at issue, and I also note we are working with a lack of information; hence, the letter is trying to get more information. So we are working on what we have here.

But the one example I did give in my testimony that I find to be somewhat troubling concerning the climate czar being a chief negotiator during automobile emission standards based on a Supreme Court interpretation of the Clean Air Act, that seems to me that you are now at several stages of separation, getting into some operational regulatory questions—not the EPA Administrator whom you have approved. That kind of thing, that kind of question, at least in my mind, is something that should be taken seriously from the point of view of Congress, because an individual who is operating—and I make the distinction between an adviser, someone who is going into an operational mode, who is more administering things, separated from legislative advice—this is an act of Congress from 1970 now being interpreted by the courts, Congress chose not to change when the current czar was the EPA Administrator in a previous administration, now actually doing that. I think there are some questions which do raise some serious consideration along those lines. And there might be others, but that is the one that has been reported.

Chairman FEINGOLD. Thank you, Mr. Spalding.

Mr. Craig writes the following concerning the number of alleged czars who are part of the staff of the National Security Council, or NSC. "According to Federal statute, the function of the NSC is to advise the President and to coordinate, subject to the President's discretion, the policies and functions of the departments and agencies of the Government relating to the national security. The NSC is supported by numerous professional staff members who have no independent legal authority. Their sole function is to advise the President often through recommendations that are formulated by NSC principals and deputies committees. NSC staff members have always had expertise in particular subject matters so they can most effectively advise these committees and ultimately the President."

Now, given their expertise and their role in advising NSC committees, it seems reasonable to suppose that NSC staffers can have significant influence whether or not they have ever been called "czars." While the NSC plays an important role in coordinating the work of different departments and agencies, should the Senate be concerned about the possibility that an NSC staffer may end up having more ability to influence foreign policy decisions than, say, a Senate-confirmed Assistant Secretary of State? Is there a solution to this problem or even a way of finding out whether and to what extent it is a problem?

Let us start with Mr. Patterson. Would you like to respond to that?

Mr. PATTERSON. Mr. Chairman, you will recall a year ago a group of 22 people called the Project on National Security Reform—Brent Scowcroft is one of them; General Jones was a member of that group—recommended in a 702-page volume issued a year ago—one of the recommendations—was that the Assistant to the President for National Security Affairs be confirmed by the Senate and be given a great deal more authority. That, of course, would presumably require legislation.

It was interesting to me to notice that General Jones did not sign the covering letter of the President, took his name off. Maybe he knew he was about to be appointed. But President Obama in his May 26th statement about the National Security Council did not accept that recommendation. And I do not think any future President would either.

So the NSC staff, to me, I regard them as part of the White House staff family, and there was a case a few years ago, the *Armstrong* case, which said, in effect the National Security Adviser is de facto a member of the White House staff. And so General Jones would be supervising all of the members of his staff, which numbers now well over 200. And so whatever recommendations they make would be through him to the President.

Chairman FEINGOLD. My time is up, but does anybody else want to respond to the NSC question? Professor Harrison.

Mr. HARRISON. Just quickly, Senator Feingold. My impression about the NSC process is that everyone involved in that process is well aware of their institutional prerogatives, that all of the agencies know what their jobs are, that the people at the State Department know that they alone conduct the foreign relations of the United States, and that the people at the NSC realize that they are uniquely close to the President and that something comes from that.

So I think that as a practical matter, the participants in the process do take into account their various roles and their different legal authorities.

Chairman FEINGOLD. We will just have further responses, and then we will go to Senator Coburn.

Mr. SAMAHON. Thank you, Senator Feingold. I did want to make clear that there are some legal alternatives, policy choices that Congress could make here. Again, the problem is powerful non-officers who might be more powerful than officers appointed with advice and consent.

One choice is a budgetary choice to exercise a check. You could not fund influential non-officer advisers. Given our need for such people, though, a more reasonable alternative might be to create formal offices staffed by inferior officers, either appointed by the President alone or appointed with Senate advice and consent. They would have not only the traditional advisory role given to them, but they would also have suitable powers such that they occupy offices.

Chairman FEINGOLD. OK. I am going to go to Senator Coburn. When I get my time again, if somebody else wants to talk about——

Senator COBURN. That is fine. Go ahead.

Chairman FEINGOLD. I did not see anybody raising their hand. Go ahead, Senator.

Senator COBURN. Thank you, Mr. Chairman.

Kenneth Feinberg, the current pay czar, recently stated, and I quote, "I have the discretion, conferred upon by Congress, to attempt to recover compensation that has already been paid to executives."

Now, based on your testimony, that would tend to imply that he is in a position of binding authority. What is your response—he was not confirmed by the Senate. He was appointed. Give me a legal analysis of here is the statement that is made by the person in that position, and yet no advice and consent. Can you help me walk through the conflict that I see based on your testimony and then his statement about his authority? Professor Harrison.

Mr. HARRISON. Senator, the question there would be whether Mr. Feinberg is permissibly operating as an inferior officer, appropriately appointed pursuant to the second part of the Appointments Clause. The first part says officers shall be appointed by the President with the advice and consent of the Senate. The second part says inferior officers, as prescribed by statute, may be appointed by the President alone, the heads of departments, or the courts of law.

So the question first would be whether the Secretary of the Treasury had the statutory authority to create that office pursuant to his authority under TARP or some other legislation, and then whether he has appropriately exercised it so as to constitute Mr. Feinberg an inferior officer. That is the first question.

The second question, because he is an inferior officer, clearly not a principal or superior officer because the Senate did not confirm him, the next question would be whether he receives adequate supervision from a principal officer, someone who is Senate confirmed. And to know that, you would need to know the extent to which he is overseen, presumably by the Secretary of the Treasury, perhaps some other higher officer in the Department of the Treasury.

There are a number of cases in the Supreme Court and the lower courts about how much supervision is required. The details remain somewhat unclear, but the basic principle is that for an inferior officer to operate permissibly, the inferior officer has to be subject to substantial supervision from somebody higher up. So that is the question you would need to answer about Mr. Feinberg.

Senator COBURN. So the dilemma then comes: How do we find out if we cannot get him to testify?

Mr. HARRISON. I do not know that—well, you can ask the Secretary of the Treasury.

Senator COBURN. Yes, but you are only getting one side of the story. The problem is—let us give them the benefit of the doubt. How do we do our oversight function to make sure we are not violating the Appointments Clause and that they are not? I think that is one of the key questions we are trying to find out here, is understanding superior officer versus inferior, understanding the ability to contract, understanding whether or not there is a statutory requirement that gives that authority, or there is statutory language to give that authority, how do we find out?

Mr. HARRISON. Senator, I do not think there is any difficulty with your calling an inferior officer to testify. And as I say, certainly you can call the Secretary of the Treasury so you can find out about the legal nature of the relationship. And I believe you could find out about both sides, about whether the Secretary thinks he is supervising Mr. Feinberg and how much supervision Mr. Feinberg thinks he is getting. I think it is entirely within your power to do that because both of them are officers of the United States. And I think the Treasury Department would have to take the position that Mr. Feinberg is an inferior officer, because I believe he is exercising some significant authority pursuant to the laws of the United States.

Senator COBURN. OK, thank you.

Mr. SPALDING. Can I add something to that?

Senator COBURN. Sure, I would be happy to hear it.

Mr. SPALDING. I would just like to underscore the fact that there is no reason why Congress cannot ask them to give testimony. I think the administration cannot have it both ways. Either these are individuals that they are going to claim fall under executive privilege, or they are not. And I think on the face of it, these individuals—almost all of them in some cases—seem to be doing the types of coordinating operational and administrative things that I think could legitimately fall under the requirement of testimony. It would be very hard for the executive to claim that they do not.

The second thing I would add, just in light of your conversation, is that, again, I would underscore the broader point I made that Congress needs to be more careful in the types of legislative discretion it gives, which in many cases gave rise to the creation of these czars in the first place. The TARP legislation is a great example of that, both in terms of this question and the question of the purchase of General Motors.

You know, do you give too much discretion, which then allows for the type of policy this person is pursuing, setting aside whether or not they do fall under the Appointments Clause. Is that actually violating your legislative direction to the officer, the Secretary of Treasury, in carrying out your legislative intent? I think that is an important question as well.

Senator COBURN. Let me just interject and then I will come to you, Professor Samahon. I do not mean to imply—I have never been turned down significantly by any of these people for information, so I do not want that to be the predicate under which we operate. But I will go back to my statement before. Transparency is the thing that creates confidence in Government, and so the message ought to be that. Professor Samahon.

Mr. SAMAHON. I would like to build on a point made by Mr. Spalding. When Congress intends to vest the appointment power (e.g. it might want to vest the appointment power in the President alone or the head of an executive department), this body might consider adopting its own clear statement rule as a matter of internal best legislative practices, i.e. it will actually parallel the language of grants of power under the Excepting Clause when it intends to vest that power elsewhere. The language is "but the Congress may by law vest the appointment of such inferior officers. . . ." If the statute plainly says "the Secretary is hereby vested with the

authority to appoint," that will make for grant of appointment authority clear. Moreover, it will make clear your judgement of who is actually an inferior officer and who is not. At the end of the day, you can give the President (or other executive oficers) various tools to supervise the subordinates."

I should note also, building on what Professor Harrison said, that there is some incoherence, heaven forbid, in the Supreme Court's approach to this question of inferior officer. Some of this might be resolved by a pending case, *Free Enterprise Fund* v. *PCAOB*. But at the moment, I take the better law to be that to be an inferior officer is, as Professor Harrison stated, to be a subordinate to someone who is either the President alone or someone appointed with Senate advice and consent.

There is a case out there, *Morrison* v. *Olson*, whose view of inferior is to in some sense be less powerful, in which case we might have problems, because under the subordinate formulation you can be extremely powerful, but just subordinate in the sense of hierarchically dependent upon a superior. But under the *Morrison* v. *Olson* approach, you could just be very, very powerful and, therefore, deemed not an inferior officer.

Senator COBURN. OK, thank you. Just one other comment. None of us want to handicap our President in terms of the advisers that he can have, and to clarify, we want him to have the best and brightest. But we also want him to be as transparent as he can be as he does that.

And so, Mr. Chairman, again, I am very appreciative of you having this hearing, and I will look forward to the hearing that we are going to have in Homeland Security and Governmental Affairs and see what kind of testimony we get there.

Chairman FEINGOLD. Thank you again, Senator Coburn, for your cooperation.

Senator COBURN. I would ask unanimous consent to enter into the record the following items: a letter from Senators Collins, Alexander, Bond, and Crapo; a letter from Senator Byrd; a letter from Congressman Issa; and a statement of Senator Cornyn.

Chairman FEINGOLD. Without objection.

[The information referred to appears as a submission for the record.]

Chairman FEINGOLD. Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman, and thank you for holding this hearing.

As I understand, we are talking about two different things so far. One, we have been talking about an inferior officer who is an appointee of an advice-and-consent principal officer. But the second is somebody who is a direct agent of the President and is, on the President's behalf, exerting the President's own authority, for instance, to sort out issues between Cabinet members to assure the smooth functioning of the President's own authority, to represent the President at meetings, to delivery decisions of the President, either finally or tentatively. That all strikes me as being very clearly within the Presidential authority. Those would tend to be people within the White House.

Is there any constitutional hesitation about somebody exercising those sorts of functions irrespective of whether you give them the

name "czar" or "principal adviser" or "White House adviser" or "Presidential adviser"? Professor Harrison.

Mr. HARRISON. Senator, no. Again, as long as the person involved does not claim, as we might say, "genuinely to exercise" any power of the President, because the President's constitutional authorities are almost certainly non-delegable. A phrase that occurs sometimes in the case law is that people like that advise and assist the President, and as long as they can find themselves to advising and assisting the President, as long as they can find themselves to coordination, to making sure that the agencies talk to one another and the President is fully apprised of what the agencies are doing, that is not legally problematic.

Senator WHITEHOUSE. And does anybody disagree with what Professor Harrison just said? That is a yes or no question before we get into other statements?

Mr. PATTERSON. They also would be violating a Presidential Executive order of 1939, President Roosevelt's Executive order that I cited from, that assistants "shall be personal aides and shall have no authority over anyone in any department or agency." That was the famous Roosevelt language which established the White House staff in that famous executive order. So that still controls.

Senator WHITEHOUSE. I think that is consistent with my question.

Professor Spalding, do you want to——

Mr. SPALDING. I would disagree only to say that I would add one thing, which is it does strike me that if an agent of the President is actually doing things that go to the extent of seeming to step on an officer that has been approved by Congress——

Senator WHITEHOUSE. In a way that the President could not.

Mr. SPALDING. In a way that the President—well, give the legislative instructions from Congress to carry out the law, that strikes me as potentially raising a serious issue.

Senator WHITEHOUSE. That implies that in these statutorily created executive offices there are legal authorities and responsibilities that belong to the occupant of that office per se and that not only an agent or adviser or assistant to the President, but the President himself cannot direct.

Mr. SPALDING. Well, one of the dilemmas we have here is the extent to which—the larger mega question, the extent to which the Executive has control over those things by virtue of the fact that that is the executive power of the President. I think that is one of the dilemmas we have here. But where they rub up together as a practical matter is when you have an individual working through Congressional legislation in a created position that has been approved by Congress here——

Senator WHITEHOUSE. With duties given him or her by Congress——

Mr. SPALDING. Given him by Congress, and you have a Presidential adviser here who has seemed to go beyond advice and mere coordination to actually taking on the job of the other, that is something that I think is murky, partially because of the way the legislation is written, partially because of the way the executive office works——

Senator WHITEHOUSE. I have a different point about that, which is that, to the extent that there are duties that are specifically given to an office by Congress, even if that office holder is an appointee of the President, it may very well be that there are authorities that belong to that office that the President cannot simply direct.

Mr. SPALDING. The only thing I would add quickly for others is that I think partially there is—inherent in all this is a debate over the nature of Executive power, and my position would be that many of the particular agencies we are talking about here actually properly fall under the power of the Executive, which means the Executive has a lot more authority over those things. That does not mean that the President can ignore the actual way Congress has written the laws, which he is to execute.

Senator WHITEHOUSE. Professor Harrison.

Mr. HARRISON. Senator, the question of the extent to which the President can direct the exercise of statutory authority that is vested in someone else in the executive branch is one of the great questions of American constitutional law. The important thing for these purposes, I think, is to see that it is quite distinct from the question of any role that the President's advisers have because that power, if it arises under the Constitution, is the President's alone.

Mr. PATTERSON. May I have the Chairman's permission to give an example that I lived through?

Senator WHITEHOUSE. I believe I still have the floor and the ability to ask questions.

Chairman FEINGOLD. The Senator——

Mr. PATTERSON. Excuse me.

Senator WHITEHOUSE. The point that I am trying to make is that, to the extent that there is some question about the authority that the President can exercise through his assistants and advisers, that is a limitation that pertains to the President himself, i.e., a Presidential assistant or adviser with the full support of the President exercising the President's power has as much authority as the President cares to imbue that person with as to that decision in terms of the delivery of a Presidential decision. Correct?

Mr. HARRISON. It is certainly the case that the ultimate limits here would be the limits on the President himself. And one of the great questions is what are those limits.

Senator WHITEHOUSE. But one of those limits, although it is somewhat ill-defined, is the statutory authority that pertains to office holders and restrictions of the Administrative Procedures Act and Federal regulatory law and so forth. Correct?

Mr. HARRISON. Well, some of those questions are very much in dispute historically, and there are judicial opinions in different directions on that, and there is no scholarly consensus and never has been. So I would not be comfortable going beyond saying that is one of the central and very difficult questions of American constitutional law.

Senator WHITEHOUSE. Thank you very much.

Chairman FEINGOLD. Thank you. We will start another round, and I want to give Mr. Patterson a chance to say what he wants to say and then——

Mr. PATTERSON. Mr. Chairman, I would like your permission to give a real example of a real-life situation which I experienced. It was November 20, 1969. I was executive assistant to Leonard Garment on the Nixon White House staff. The tickers came out with the news: "Indians Seize Alcatraz." Mr. Garment turned to me and said, "Patterson, who has Alcatraz?" I said, "Mr. Garment, I don't know, but I will find out." And it turned out to be the General Services Administration, which has authority over surplus Federal real property. Mr. Garment said, "Who is the head of it?" A gentleman named Robert Kunzig. Mr. Garment said, "Get Kunzig on the phone" or "I will get him on the phone."

He talked to Mr. Kunzig, and he said, "Mr. Administrator, what are you going to do about the Indians on Alcatraz?" And the Administrator said, "I am appointed by the President and confirmed by the Senate. This is my responsibility, in my agency, the General Services Administration. I am going to call in the marshals, and we are going to yank them out of there by noon tomorrow."

Mr. Garment said, "Mr. Administrator, you will do no such thing. That is the wrong thing to do. It is a terrible policy to follow. I am countermanding you."

And the Administrator said, "What do you mean? I am the Administrator here. I am responsible. I have the authority." Mr. Garment said, "You will do exactly what I tell you to do." The Administrator said, "I will never talk to you again," and slammed down the phone.

We did not bring in the marshals, and we negotiated with the Indians on Alcatraz for 18 months and finally removed them peacefully without any violence.

Chairman FEINGOLD. Thank you, sir.

Mr. Halstead, I understand that Mr. Feinberg has not yet testified before Congress, but if he is an inferior officer in the Treasury Department, is there any reason he cannot be asked to do so?

Mr. HALSTEAD. No, not at all. There are roughly 75 instances since the end of the World War II era where Presidential advisers, high-level Presidential advisers have appeared before Congressional committees. Now, the fact that there is no structural separation of powers prohibition against the appearance of these individuals is a much different thing than saying it is going to be easy to get them to appear before Congress. Certainly as we saw today, the administration simply declined the invitation to supply a witness to today's hearing. And at that point, it becomes a question for a Committee and Congress as an institution as to whether or not to assert the institutional prerogatives and powers it has to compel testimony from certain individuals.

Now, it is a road that is not gone down terribly often. Most recently, we saw with the ongoing inquiry into the dismissal of U.S. Attorneys during the Bush administration a very protracted effort to obtain the testimony of Harriet Myers and Karl Rove. They were held in contempt of Congress. The House of Representatives was given authority to pursue a civil action in the District Court for the District of Columbia to enforce those subpoenas. And it was not until the end of the Bush administration, well after the end of the Bush administration that those individuals, in fact, finally appeared to testify before the House Judiciary Committee.

So it is not necessarily an easy thing to do or something that can be accomplished overnight, and so that raises a question of are there other avenues, less formal avenues, that Congress could employ to obtain testimony of advisers. And one option—and this is just conjectural. One complaint that I have heard voiced or concern that I have heard voiced relating to the service of these Presidential advisers is that they are, in effect, circumventing the roles that are served by Cabinet heads, agency heads, so on and so forth. And it is not uncommon as a practical matter for the Senate to obtain the commitment of a nominee to an advice-and-consent position that they will affirmatively agree to appear before the Committee when requested.

And so one option during that type of process would be to get a commitment from the Secretary of the Treasury or any individual so appointed to any other position that they would not only adhere to that agreement in relation to their general duties, but also to inquiries from the Committee as to the impact that these advisers or other personnel are having on their carrying out or conduct of the legal authorities that are vested specifically in them.

Chairman FEINGOLD. Back to Mr. Patterson, I think your anecdote sort of relates to this matter. In your testimony regarding White House staffers, you stated that senior White House staff members often communicate the President's instructions to Cabinet members in a forceful manner. Would any recipient of an order from a White House adviser question whether the directive came directly from the President? And if not, don't these advisers end up having a lot of de facto authority? I would be curious, your response to that.

Mr. PATTERSON. I cannot think of an example right away, but it is clearly open to a Cabinet officer to question a White House staffer request. He could do that. In fact, every senior White House staff officer is aware that that rebuttal could come back from a Cabinet officer, and he better be sure that he is representing the President.

I think in the example I gave, my boss was quite sure, although he had not discussed this with the President. But he was confident that he was representing the President.

But it is an option every Cabinet member has to go straight to the President and find out, and then the White House staff officer loses his authority promptly.

Chairman FEINGOLD. Mr. Spalding, do you have anything to say about that one?

Mr. SPALDING. Yes, that is actually a very good question. Here I make a distinction between the technical legal questions we have been discussing and what I would consider the managerial problems these things raise, because one of the temptations here is always exerting undue and improper influence.

Now, I for one think the President has the prerogative to influence the administrative agencies below him as a matter of his authority. However, sometimes if that is not stemming from a legitimate source, it can sometimes cause practical problems. And the two examples I would give that are most recently in the current administration—although there are others previous to this; this is not unheard of—would be the story about the NEA conference calls

with artists implying that somehow this would be connected to NEA grants to pursue policy. That probably was a bad call that someone made. But the question, did they seem to suggest they were doing so on behalf of the White House or the President?

Another example would be the controversy not over President Obama's speech to the students, which is itself not controversial at all, but the issuance of what is implied to be curriculum being—was that a call from the White House over the Department of Education? And if so, was that an undue implication that somehow this was coming from the authority of the President? Which odds are it probably was not.

I think these questions actually raise some managerial processes that probably more likely than not—not technical legal problems at all, but will probably raise questions about who has the authority, where is this coming from, and in many cases probably are bad political calls on top of everything else.

Chairman FEINGOLD. Thank you. Senator—oh, excuse me. Professor? And then we will go to Senator Coburn.

Mr. SAMAHON. Thank you. I want to build on Mr. Spalding's point, namely, the problem that the sorcerer's apprentice then becomes the sorcerer. And there is a legal consequence here because OLC had excluded from the definition of officer—that is, you are a non-officer—if you are in a purely advisory position. What if you are not in a purely advisory position such that you hold forth that you have power to make final decisions?

I think that is probably a legislative question and subject to legislative oversight. Perhaps you make these people officers by marrying the policy and the legal authority.

Chairman FEINGOLD. Senator Coburn.

Senator COBURN. I just wanted to make one statement about Mr. Patterson's statement, that his boss had not checked with the President, but yet took a position otherwise. Now, he happened to be right. The question we should be worried about is how often do they make those same statements and they are not speaking for the President.

So I think it proves the point that there is a problem for us in terms of really line structure. If you go and look at management and styles of management and line authority and where we have line authority and where we do not, and I think our panel has pretty well testified there are some fairly murky areas out there that need to be distinguished.

Professor Harrison, if, in fact, one of these so-called czars exerts statutory authority when, in fact, they have none—let us say one does and they have no statutory authority, in your testimony you indicated that their actions have no legal effect. So if that is the case, how do you stop that from happening? What can be done?

Mr. HARRISON. Well ultimately, there could be circumstances under which there would be legal effect on some private person, and the private person would be able to take the position that what had happened was invalid and ineffective, in, for example, the extreme situation where someone who did not have the authority to issue a regulation, somehow it purported to issue the regulation, the person subject to the regulation could simply object to it on the grounds that it was invalid.

I think that the more practical likelihood is exactly what we have been talking about, that someone who does not have the authority to bind someone else in the executive branch would purport to give one of those orders that claim to come from the President and that did not really. And I think there probably the primary enforcement mechanism is Congress, because you do have access to the people who have the actual practical authority. And what ought to happen—this is sort of 51st Federalist inside the executive branch. What ought to happen is that the people who have the practical authority need to stand up for it and make sure that the orders are coming from the President, and you can, when you talk to them, as you routinely do, both in formal and in informal settings, make sure that they are standing up for the distinction between staff and line, which as an administrative matter is very important.

Senator COBURN. Which would go back to Mr. Patterson. Obviously, the GSA Administrator figured out that he was, in fact, speaking for the President.

Mr. PATTERSON. He made that assumption.

Senator COBURN. But the GSA Administrator ultimately did not send the marshall at noon tomorrow, and so he understood that your boss was speaking for the President.

Mr. PATTERSON. That is correct. I could give a couple of other examples that do occur to me. Help me a little bit on my history. I believe President Carter had an Assistant on Aging, and I believe he testified before Congress in opposition to the President. And he also had an assistant name Costanza, a woman named Costanza, who I think participated in a television program opposing the President. In both cases, their tenure at the White House was very brief.

Senator COBURN. Professor Spalding.

Mr. SPALDING. I just wanted to add and underscore what I think we are implying here is the main question at issue is responsibility and accountability. One of the problems with the modern administrative state, it is not oftentimes clear who is actually responsible and, thus, who is accountable, especially from a Congressional or executive point of view. And that is why some of these things are muddled.

It seems to me that two broad things that could be done is that Congress could write clear laws that make these things known. The car czar did not exist when TARP was written. If you can see things coming that ought to be taken care of in the legislation that ought to be done, you should be careful not to give away—to delegate so much authority that implies a much wider swath of delegation that gives rise to these kinds of things.

The second point I would make from an administrative point of view—that is, from the point of view of the Executive—is that I think these are touching on managerial questions that raise managerial style issues. And there I would point back to the fact that strong Presidents—the most successful Presidents, I would argue—tend to use Cabinet-style processes of management. And most recently we see a good example of that in President Reagan who had Cabinet Councils, which have been widely noted for being very successful; that is, he operated as much as possible through his Cabinet and, thus, down through the structure of management that co-

incides with positions approved by Congress and through Congressional legislation.

That seems to me to be a stronger way of management. That is not the style that is being followed in this administration or the previous administration, I would point out. As a result, it is no coincidence that we are seeing the rise of these individuals that seem to be outside of that management structure and in many cases raise questions as to the distinction between whether that person is within that structure or falls into the advisory category, is actually operating things, is actually coordinating. Thus, all of this blurriness occurs.

Mr. PATTERSON. With respect to President Reagan, I cannot help thinking of Ollie North and his operations.

Mr. SPALDING. Which was a great lesson of the Tower Commission, which was precisely when you start operational procedures within the White House structure, it tends to cause problems. That was the great lesson of the Tower Commission, and I would actually point out—I do not cover it in my testimony, but Ed Meese at great length talks about this operational problem from a managerial point of view in his own autobiography.

Senator COBURN. All right. Well, Mr. Chairman, thank you. You all have been fantastic in terms of giving us insight, both in terms of the Constitution as well as your advice, and I would like very much to be able to submit additional questions for the record, if possible.

Chairman FEINGOLD. Of course. Without objection.

[The questions appears in the questions and answers.]

Senator COBURN. I want to thank you for being here.

Chairman FEINGOLD. Let me just—potential constitutional issues that could arise in a circumstance where a czar or other executive branch adviser is charged with the same or some of the same duties and responsibilities as an inferior officer in an agency or department. For example, as Chairman of the African Affairs Subcommittee of the Foreign Relations Committee, I have supported the appointment of a special envoy to Sudan. There is also a Senate-confirmed inferior officer who is the Assistant Secretary for the Bureau of African Affairs. Should I be concerned that this special envoy and his staff may unconstitutionally infringe and/or ignore the Assistant Secretary's authority?

Mr. HARRISON. Senator, I doubt an arrangement like that would create a constitutional question, provided that the special envoy was appointed appropriately as an inferior officer and the lines of authority were clearly drawn both in the statute and in whatever the President and the State Department set up. You have to be careful sort of about the plumbing in these things, but it can be done.

I think in a situation like that the real concern is less constitutional and more practical. Any time you have overlapping responsibilities, it is extremely important that people know who makes what decisions and ultimately who is in charge of actually acting for the United States.

Chairman FEINGOLD. And I take it a legitimate concern for Congressional oversight regardless of whether it raises legal issues.

Mr. HARRISON. Making sure that the Government is set up properly and is functioning properly is a central role of the Congress.

Chairman FEINGOLD. Professor.

Mr. SAMAHON. I am going to be a little hesitant here because I think there is potentially a problem. I think, first of all, going back to the OLC April 2007 opinion, if one is exercising diplomatic functions, one would plainly seem to be an officer. What the question would then be is whether being a special envoy position is a continuing office such that the second requirement for officer-hood is met.

If that is the case, then we have someone who should be subject to Presidential nomination with Senate advice and consent. There is no opt-out for these principal officers. Ambassadors, as I would potentially consider even one denominated a "special envoy," must go through Senate advice and consent.

I am not certain what the contours of this particular office or position would be "special envoy"—but it does raise some cause for concern, certainly to learn more about what this special envoy does so you can make a judgment.

Chairman FEINGOLD. Well, I want to thank all of you—oh, I am sorry. Professor Harrison.

Mr. HARRISON. Yes, I do just want to stress that in a situation like that, Professor Samahon is exactly right. It is necessary to have an eye on the precise legal authority of the officers involved and, in particular, any special envoy.

Chairman FEINGOLD. Mr. Halstead.

Mr. HALSTEAD. Just a brief point. With regard to Congressional oversight prerogatives in such a context, the Supreme Court has stated that the oversight prerogatives of Congress are at their peak when looking into allegations of mal-administration, governmental inefficiency, et cetera. So it would clearly be something that would be very suited for Congressional inquiry.

Chairman FEINGOLD. Well, I thank all of you. The hearing I think was very informative. I think we cut through a lot of the rhetoric that has been flying back and forth and started to really examine not only the serious underlying constitutional issues, but also some of the policy issues that we should be looking at. Administrations going back decades have created positions with important portfolios that are not subject to Senate approval. This is certainly not an isolated issue of the Obama administration, as you have all been fair enough to point out. And Congress may need to act to make sure that, going forward, the proper checks and balances are in place.

And as Senator Coburn indicated, both the Chairman and the Ranking Member of the Homeland Security and Governmental Affairs Committee, Senators Lieberman and Collins, are interested in this issue as well. I will work with them as well as Senator Coburn, who is the Ranking Member of this Subcommittee, on possible next steps.

My thanks to all the witnesses, and that concludes the hearing.

[Whereupon, at 2:55 p.m., the Subcommittee was adjourned.]

[Submissions for the record follow.]

SUBMISSIONS FOR THE RECORD

Statement of Senator Robert C. Byrd

Submitted to

the Senate Judiciary Subcommittee on the Constitution

for the hearing on

"Examining the History and Legality of

Executive Branch 'Czars'"

October 6, 2009

Mr. Chairman,

I commend the Senate Judiciary Subcommittee on the Constitution for holding this hearing today. I am not a member of the Judiciary Committee, and so I thank you for the courtesy of allowing me to submit a statement for the record.

The Congress has become increasingly tolerant about the presidential designation of White House staff to coordinate policy agendas across executive departments and agencies, instead of relying on Senate-approved cabinet secretaries and other high-level executive branch officials. It is expected, for example, that a President will appoint an Assistant to the President for National Security Affairs, whom the Congress does not confirm, to direct the policy and coordinating functions of the National Security Council. Despite such influential roles, these presidential advisors rarely testify before the Congress, usually because presidents have maintained that the separation of powers indicates that such advisors are not obligated to do so.

Since 1993, the Director of the National Economic Council has been tasked (by executive order) with coordinating economic policy for the entire Executive Branch. Despite the enormous influence of such a position - - the president's chief spokesman and architect for economic policy - - no Director of the National Economic Council has ever testified before the Congress.

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President Obama is busily appointing even more of these presidential advisors, which some call "czars", to new, high-profile positions which exist to coordinate policy agendas all across the executive branch. In December 2008, the President announced the appointment of an Assistant to the President to coordinate energy and climate change policy. In February and April of this year, the President issued two executive orders creating White House Offices to coordinate urban affairs and health reform policy agendas. In May, the President announced the creation of a new White House Office to be led by a Cybersecurity Coordinator. In addition, the President has appointed three individuals to serve dual roles as White House advisors and executive officers. He has named a Chief Performance Officer, a Chief Information Officer, and a Chief Technology Officer (who will also serve as an Assistant to the President), and he simultaneously nominated these individuals to serve in statutory positions at the Office of Management and Budget, and the White House Office of Science and Technology.

I am sympathetic to every President's need for confidential advice, and to help ensure that presidential decisions are correctly implemented by the various departments and agencies. However, I have also had the experience of struggling with presidential assistants in previous Administrations who directed policy decisions from the White House, while claiming exemption from the Constitutional system of checks and balances in the face of congressional requests for testimony or information. The notorious Iran-Contra scandal is

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an excellent example. In Republican and Democratic Administrations, White House aides have directed policy decisions, and then declared themselves exempt from Congressional oversight through claims of executive privilege. My study of the U.S. Constitution, combined with those real-life experiences, has led me to conclude that presidential assistants and advisors should not be placed in a position to control policy unless the president is willing to accommodate Congressional oversight requests.

In a February 23, 2009, letter to President Obama, I raised this issue. My intent was – and is – to offer the benefit of my experience after 56 years in the U.S. Congress, and to help the Administration avoid an inevitable and unnecessary confrontation between the Executive and Legislative Branches by allowing a White House staffer to assume control of Administration policy and avoid Congressional scrutiny. I asked the President to favorably consider the following: that senior White House personnel be limited in the exercise of authority over any person, any program, and any funding within the statutory responsibility of a Senate-confirmed agency head; that the President be responsible for resolving policy disagreements between a Senate-confirmed agency head and his personal White House staff; that assertions of executive privilege be made only by the President, or with the President's specific approval; and that lines of authority and responsibility in the Administration be transparent and open to Congress and to the American public.

The White House Counsel responded to my letter in May. He emphasized "We are

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mindful of the historical examples identified in your letter, in which White House officials assumed increased authority, avoided oversight, and inhibited transparency. I assure you that the President did not create the new White House offices for those purposes, i.e., to shield information from Congress, obscure the decision-making process, or limit the roles of Senate-confirmed officials." That is comforting, but it does not absolve the Congress of its responsibility to ask questions. How much control will these presidential staffers actually have over the Senate-vetted and confirmed heads of executive branch departments and agencies? How will these White House advisors effectively interact with the Congress? In what way can necessary congressional oversight of their decisions and authorities be implemented? How can transparency in decision-making best be achieved?

Most of these White House coordinators are not subject to Senate confirmation hearings or confirmation by the full Senate, nor do they report to Senate-confirmed executive branch officials who routinely testify before the Congress. In the case of some of these positions, there is not even a publicly available charter establishing the position or stating its duties and functions. Instead, these "czars" are justified by the White House through general statutory authority granted to every president under Title III, Section 105, "to appoint and fix the pay of employees in the White House Office without regard to any other provision of law....[to] perform such official duties as the President may prescribe."

To help address some of these concerns, I have asked the Appropriations Committee to

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include language in the Committee-reported Fiscal Year 2010 Financial Services Appropriations bill, requiring officials designated within the Executive Office of the President, and tasked by the President to coordinate policy agendas across executive departments and agencies, to keep Congress fully and currently informed.

Whether an executive official is confirmed by the full Senate, or appointed by the President alone to serve on his White House staff, that official holds the position by virtue of the authority that the Congress has granted to the President. Such White House staffers receive a salary by virtue of the spending authority the Congress has granted to the Executive Branch. Even presidential assistants and advisors have a Constitutional obligation to answer questions before the Congress if it is necessary for the Congress to fulfill its constitutional oversight and investigative functions.

In addition, I note Title 31 of the United States Code, Section 1347 – known as the Russell Rule – which 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." The Congress wisely enacted this provision in 1944, and codified it again in 1982. Its sponsor Senator Richard B. Russell, stated that its purpose "is to retain in the Congress the power of legislating and creating bureaus and departments of the Government, and of giving to Congress the right to know what the bureaus and departments of the Government which have been created by Executive order are

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doing...regardless of what agencies might be affected, the purpose of this amendment is to require them all to come to Congress for their appropriations after they have been in existence for more than a year."

Should these new "czars" stretch their authority too far in order to achieve policy decisions on behalf of the White House, I believe the Russell Rule may assist the Congress in encouraging that these officials be held accountable to the elected representatives of the people.

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October 2, 2009

Honorable Russell D. Feingold
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510-6280

Dear Mr. Chairman:

This is pursuant to your letter of October 1, 2009, inviting T.J. Halstead of my staff to provide testimony at a hearing entitled "Examining the History and Legality of Executive Branch Czars." The hearing is scheduled to begin at 2:00 p.m. in room 226 of the Dirksen Senate Office Building on October 6, 2009.

Congressional guidelines on objectivity and non-partisanship require that our staff confine their testimony to technical, professional, and non-advocative aspects of the matters under consideration, and limit themselves to questions within their fields of expertise. With the understanding that his testimony will be prepared and delivered in accordance with these principles and limitations, I am pleased to authorize the appearance of Mr. Halstead.

We appreciate this opportunity to be of service and hope that you will continue to call upon CRS in the future.

Sincerely,

Daniel P. Mulhollan
Director

Congressional Research Service
The Library of Congress 101 Independence Avenue, S.E. Washington, D.C. 20540-7000

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Statement of Senator John Cornyn
***Hearing*: "Examining the History and Legality of Executive Branch 'Czars'"**
October 6, 2009

Chairman Feingold, I thank you for calling this hearing and applaud your efforts to ensure government transparency and accountability.

President Obama has committed his administration "to creating an unprecedented level of openness in Government." He has remarked that "a democracy requires accountability, and accountability requires transparency." But his unprecedented expansion of the number and power of policy czars undermines the openness and transparency he has promised.

It is true that every president since Franklin D. Roosevelt has used "czars" to manage certain policy initiatives. And there is little doubt that the President has the constitutional and statutory authority to name advisers. But President Obama has named more czars than any previous president. He has created 18 new czar positions that are neither well-defined nor subject to Senate confirmation. These czars present serious accountability concerns.

First, it seems that some of President Obama's czars may wield a measure of authority usually reserved to principal officers of the United States. In particular, some appear to exercise significant authority and have broad terms of duty, jurisdiction, and tenure. *See Morrison v. Olson*, 487 U.S. 654, 671-72 (1988). If these czars are principal officers, they must be subject to Senate confirmation as required by the Constitution.

Second, even if none of the czars are principal officers, their ability to exercise decision-making authority absent congressional oversight is troubling. Controlling access to the President and possessing great responsibilities, czars can act unchecked in ways that significantly influence or duplicate the duties of Senate-confirmed officials. Senator Byrd highlighted these concerns when he wrote to the President in February 2009:

> The rapid and easy accumulation of power by White House staff can threaten the Constitutional system of checks and balances. At the worst, White House staff have taken direction and self control of programmatic areas that are the statutory responsibility of Senate-confirmed officials. They have even limited access to the president by his own cabinet

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> members. As presidential assistants and advisers, these White House staffers are not accountable for their actions to the Congress, to cabinet officials, and to virtually anyone but the president. They rarely testify before congressional committees, and often shield the information and decision-making process behind the assertion of executive privilege. In too many instances, White House staff have been allowed to inhibit openness and transparency, and reduce accountability.

Like Senator Byrd, I am particularly worried about the consolidation of great power in a few isolated individuals. For instance, Carol Browner, the President's "Energy and Environment Czar," is tasked with "creat[ing] jobs, achiev[ing] energy security and combat[ting] climate change," but does not work within a congressionally sanctioned department and has not faced the scrutiny of a confirmation process. *Remarks of President-Elect Obama, Announcement of Energy and Environment Team* (Dec. 15, 2008). The "Health Czar," Nancy-Ann DeParle, is broadly charged with "integrat[ing] the President's policy agenda concerning health reform across the Federal Government . . . ; work[ing] with State, local, and community policymakers and public officials to expand coverage . . . ; [and] develop[ing] and implement[ing] strategic initiatives under the President's agenda to strengthen the public agencies . . . ." *Executive Order 13507* (Apr. 8, 2009). Ms. DeParle, however, has not testified before Congress or discussed her many ties to health care companies. These and other czars deserve our close review.

Third, any distribution of taxpayer funds by unaccountable czars is unacceptable. Because we do not know exactly what the czars do, it is difficult to determine how much influence they have over the granting of federal money. But some facts are clear. Cameron Davis, the President's "Great Lakes Czar," works primarily to coordinate the distribution of $475 million in funding. Aldolfo Carrion, the "Urban Affairs Czar," functions "to ensure that Federal Government dollars targeted to urban areas are effectively spent on the highest impact programs." *Executive Order 13503* (Feb. 19, 2009). The goals of these individuals are mostly positive, but it is inappropriate for them to steer the distribution of taxpayer funds without congressional oversight.

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Recently, through the resignation of Van Jones, the "Green Jobs Czar," we saw that significant details can elude detection when the Senate is not permitted to vet high-ranking officials. Because the President's many czars are not subject to such vetting, I believe they pose a threat to government accountability.

I expect that we will learn much through this hearing. With this knowledge, I hope that we can work with the President to limit and oversee his many czars.

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Statement of

The Honorable Richard J. Durbin

United States Senator
Illinois
October 6, 2009

Statement of Sen. Dick Durbin
October 6, 2009
Senate Committee on the Judiciary, Subcommittee on the Constitution,
"Examining the History and Legality of Executive Branch 'Czars'"

Today this subcommittee is looking at the issue of the use and constitutionality of so-called presidential czars. It is a legitimate inquiry, and I hope the subcommittee will approach this issue openly and honestly. President Obama is hardly the first commander-in-chief to invest authority and responsibility in his White House advisors. But he is the first to be attacked for doing so in such a partisan, orchestrated manner.

We can all agree that transparency and accountability to Congress are important principles. Public officials, including those who work for the President, should be responsive to congressional inquiries. Members of Congress can expect to be fully and timely informed about the activities of executive branch officials who are designated by the president to coordinate policy agendas across executive agencies.

But I disagree with those who say the Obama Administration is acting differently than past administrations when it comes to the use of czars and presidential advisors. One of today's witnesses, Bradley Patterson, has submitted written testimony that makes a compelling case in this regard. Mr. Patterson, who served on the White House staffs of three different Republican presidents and is one of the nation's leading authorities on presidential staffing, indicates that every president since Calvin Coolidge has used czars.

According to Mr. Patterson, the word "czar" should be reserved for a specific type of White House advisor: a person who works on pressing issues requiring interagency coordination, who has not undergone Senate confirmation, and who reports directly to the president. By this definition, President Obama's critics have vastly overstated the number of czars who are in place today. There are certainly fewer than 32 czars, which is the number thrown around by conservative firebrand Glenn Beck. Many of the 32 listed by Mr. Beck have been subject to Senate confirmation. And there are fewer than 18 czars, which is the number used by Republican critics in the Senate. Several of the 18 do not report directly to President Obama.

Furthermore, there is ample opportunity for congressional oversight over these advisors. In a

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letter sent yesterday to Senator Feingold, White House Counsel Gregory Craig explained that 10 of the 18 advisors listed by Republican Senators have either testified before the Senate this year or would be willing to do so upon request. The other advisors, as Mr. Patterson discusses in his testimony, are willing to meet with members of Congress and their staffs.

But regardless of how you define the word "czar," where was the Republican criticism during the last administration? According to a recent article in the Washington Post, there were 36 different czar positions under President Bush. The independent organization "Factcheck.org" lists 35 czars who served in the Bush Administration. I don't recall any Republican cries of runaway government or federal takeovers when they controlled the White House. I don't recall any Republican criticism of Karl Rove, an enormously powerful presidential advisor in the Bush Administration who wasn't subject to Senate confirmation. Today's czar controversy seems to be little more than an attempt by the political opposition to manufacture criticism and drive down the president's approval ratings.

As to the question of constitutionality, today's witness T.J. Halstead from the Congressional Research Service provides a thorough explanation of why President Obama's use of advisors is fully consistent with the Appointments Clause of the Constitution and with judicial decisions that have analyzed this issue. I commend Mr. Halstead's testimony to those who make the claim that President Obama's use of advisors represents an end run around the Constitution.

President Obama's advisors aren't doing anything more than the law and the Constitution allow. Today's hearing is a useful opportunity to set the record straight.

Opening Statement of U.S. Senator Russ Feingold

Hearing On "Examining the History and Legality of Executive Branch 'Czars'"
Senate Judiciary Committee, Subcommittee on the Constitution

As Prepared for Delivery

"I think it is fair to acknowledge that there has been a lot of discussion about the Obama administration's appointment of so-called czars to various positions in the White House and other departments or agencies. I called this hearing today because I think this is a serious issue that deserves serious study. But I want to be clear that I have no objection either to the people serving as advisors to the president, or to the policy issues they are addressing. These are some very talented people working on some very important issues that this administration absolutely should be addressing, from climate change to health care. I hope that this hearing will enable us to get beyond some of the rhetoric out there and have an informed, reasoned, thoughtful discussion about the constitutional issues surrounding the president's appointment of certain executive branch officials.

"I should note that while the term 'czar' has taken on a somewhat negative connotation in the media in the past few months, several presidents, including President Obama, have used the term themselves to describe the people they have appointed. I assume they have done so to show the seriousness of their effort to address a problem and their expectations of those they have asked to solve it. But historically, a czar is an autocrat, and it's not surprising that some Americans feel uncomfortable about supposedly all-powerful officials taking over areas of the government.

"While there is a long history of the use of White House advisors and czars, that does not mean we can assume they are constitutionally appropriate. It is important to understand the history for context, but often constitutional problems creep up slowly. It's not good enough to simply say, 'well, George Bush did it too.'

"Determining whether these czars are legitimate or whether they will thwart congressional oversight requires analysis of the Constitution's Appointments Clause and a discussion of some complicated constitutional and administrative law principles. I am therefore very pleased that we have such an accomplished group of witnesses who can help us determine whether there is a basis for concern here or not, and if so, what are possible remedies that Congress ought to consider. I want to thank the Ranking Member, Senator Coburn, for helping to put together this distinguished panel.

"I think it is helpful to break down the officials whose legitimacy has been questioned into three categories to better understand the potential legal issues. The first group are positions that I have no concerns about, and frankly, no one else should either. These positions were created by statute and are subject to advice and consent from the Senate. For example, some have called Dennis Blair the Intelligence Czar. But he is the Director of National Intelligence, a position created by Congress based on the recommendation of the 9/11 Commission. Like his predecessors Mike McConnell and John Negroponte, he was confirmed by the Senate. Calling him a 'czar' does not make him illegitimate or extra-constitutional. There are roughly nine officials that fall into this category, yet have appeared on some lists of czars. Any serious discussion of this issue has to conclude that there is no problem with these posts.

"The second category of positions also does not appear to be problematic, at least on its face. These are positions that report to a Senate confirmed officer, for example, a Cabinet Secretary. All of these positions are housed outside of the White House and all of these officials' responsibilities are determined

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by a superior who Congress has given the power to prescribe duties for underlings. I will leave it to our distinguished constitutional law experts to further discuss this category, but as I understand it, these officials are likely to be considered 'inferior officers' under the Appointments Clause, and therefore they are not automatically required to be subject to advice and consent of the Senate. Most of these positions are also housed within parts of the government that are subject to open records laws like the Freedom of Information Act, and many of them have already appeared to testify before Congress. Indeed, of the 32 czars on a prominent media list, 16 have testified this year and two others are in positions where their predecessors under President Bush or Clinton testified. There does not appear to be a constitutional problem with these positions in theory, although it is possible people could identify one in practice, if for example, some of these people were determined to be taking away authority or responsibility from a Senate-confirmed position. However, I do not have any reason at this point to believe that to be the case.

"I am most interested in the third category of positions, and I think we are talking about fewer than 10 people, in part because we know the least about these positions. These officials are housed within the White House itself. Three weeks ago, I wrote to the President and requested more information about these positions, such as the Director of the White House Office of Health Reform and the Assistant to the President for Energy and Climate Change. The response to that letter finally came yesterday, and I will put the response in the record and plan to question our witnesses about it.

"The White House decided not to accept my invitation to send a witness to this hearing to explain its position on the constitutional issues we will address today. That's unfortunate. It's also a bit ironic since one of the concerns that has been raised about these officials is that they will thwart congressional oversight of the Executive Branch.

"The White House seems to want to fight the attacks against it for having too many 'czars' on a political level rather than a substantive level. I don't think that's the right approach. If there are good answers to the questions that have been raised, why not give them instead of attacking the motives or good faith of those who have raised questions?

"No one disputes that the president is allowed to hire advisors and aides. In fact, the president is entitled, by statute, to have as many as fifty high-level employees working for him and making top salaries. But Congress and the American people have the right to ensure that the positions in our government that have been delegated legal authority are also the positions that are exercising that authority. If – and I am not saying this is the case – individuals in the White House are exercising legal authority or binding the executive branch without having been given that power by Congress, that's a problem. And Congress also has the right to verify that any directives given by a White House czar to a Cabinet member are directly authorized by the president."

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Statement of T.J. Halstead
Deputy Assistant Director, American Law Division
Congressional Research Service

Before

The Committee on the Judiciary
Subcommittee on the Constitution
United States Senate

October 6, 2009

on

"Examining the History and Legality of Executive Branch 'Czars'"

Mister Chairman and Members of the Subcommittee:

My name is T.J. Halstead. I am the Deputy Assistant Director of the American Law Division of the Congressional Research Service at the Library of Congress, and I thank you for inviting me to testify today regarding the Committee's consideration of historical and constitutional issues pertaining to presidential advisers.

While there is a long history of presidential reliance on advisers, Congress has, over the last several months, become increasingly concerned with the current Administration's utilization of such personnel. In particular, concerns have been raised that the use of these advisers may circumvent the requirements of the Appointments Clause of the Constitution by allowing persons who have not been subjected to the Senate confirmation process to exert significant, if not determinative, influence over important policy issues.

At the outset, it should be noted that there are no apparent facial or structural Appointments Clause concerns that adhere to a President's utilization of advisers. Moreover, even assuming that a substantial constitutional argument could be forwarded against a President's expansive use of advisers, it is unlikely that efforts to curb this presidential practice by means of a judicial or legislative response will be availing. Accordingly, after briefly elaborating on these two points, my testimony today will focus on identifying the contours of an effective congressional response to the concerns raised by the apparent influence that is exerted by presidential advisers.

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The Appointments Clause

The Appointments Clause states that:

> [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."[1]

Stated in practical terms, the Appointments Clause establishes that nomination by the President and confirmation by the Senate is the required protocol for the appointment of "principal officers" of the United States, but vests Congress with the discretionary authority to permit a limited class of federal officials to appoint "inferior officers" without confirmation. Given that presidential advisers serve without the advice and consent of the Senate, it seems unexceptional to conclude that these individuals are not principal officers of the United States, and may not validly exercise executive authority. Indeed, it does not appear that these individuals have been vested with any actual executive authority, precluding a categorical determination that they are constitutional officers in light of the Supreme Court's determination that the strictures of the Appointments Clause only apply to persons exercising "significant authority pursuant to the laws of the United States."[2] While it could be argued that the language of 3 U.S.C. § 105, the statute which authorizes the President to hire "administrative assistants," implies that these advisers may be characterized as inferior officers, such a line of reasoning would not seem to ameliorate the concerns voiced by some Members of Congress. This would appear to be the case due not only to the lack of confirmation of these advisers, but also to the cognitive dissonance (if not sheer constitutional impossibility) that would arise from an assertion that current congressional misgivings are belied by a dynamic whereby inferior officers in the Executive Office of the President are empowered to exert a greater degree of political influence than duly appointed and confirmed cabinet heads. Ultimately, it would appear that there is no substantial basis upon which it may be argued that the President's selection and employment of advisers constitutes a fundamental violation of the terms of the Appointments Clause.

Given that the aforementioned formalistic Appointments Clause argument is unpersuasive in light of long standing Supreme Court precedent, it seems evident that any substantive challenge to the practice at issue must rest on an inchoate, functional argument that presidential utilization of, and reliance upon, a cadre of high level personal advisers offends constitutional principles to such a degree as to be impermissible. Given that presidential advisers are widely regarded as exerting significant influence over actions taken at all levels of the Executive Branch, such an argument may have a certain intuitive appeal, particularly in light of the care with which Congress has structured the bureaucracy of the modern administrative state. However, under current jurisprudential principles, it is difficult to discern a basis upon which a reviewing court would conclude, as a legal matter, that the existence of these advisers is anathema to the nation's constitutional system. Moreover, even

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[1] U.S. Const. Art. II, § 2, cl. 2.

[2] Buckley v. Valeo, 424 U.S. 1, 125-126 (1976).

assuming that a substantive argument against the service of such advisers can be forwarded, the traditional reluctance of the judiciary to intervene in generalized conflicts between the Congress and the Executive would appear to pose a substantial barrier to a non-political resolution to the current controversy. A brief review of the judicial treatment of presidential review of agency rulemaking is instructive on this point.

In 1981, President Reagan issued Executive Order 12291, which effectively centralized presidential control over agency rulemaking efforts.[3] E.O. 12291 consolidated the review procedure for all agency regulations and delegated responsibility for this clearance requirement to the Office of Information and Regulatory Affairs (OIRA), which had recently been created within the Office of Management and Budget (OMB) as part of the Paperwork Reduction Act of 1980. The impact of E.O. 12291 on agency regulatory activities was immediate and substantial, generating controversy and criticism. Opponents of the order asserted that review thereunder was distinctly anti-regulatory and constituted an unconstitutional transfer of authority from the executive agencies.[4]

The order attempted to mitigate legal concerns regarding usurpation of agency decision making authority by mandating that none of its provisions were to "be construed as displacing the agencies' responsibilities delegated by law."[5] Additionally, the Department of Justice's Office of Legal Counsel (OLC) drafted an opinion shortly before the publication of E.O. 12291, supporting its constitutionality.[6] The OLC asserted that the provisions of the order were valid as an exercise of the President's power to "take care that the laws be faithfully executed," additionally relying upon its determination that "an inquiry into congressional intent in enacting statutes delegating rulemaking authority will usually support the legality of presidential supervision of rulemaking by executive agencies."[7] The opinion acknowledged, however, that "the President's exercise of supervisory powers must conform to legislation enacted by Congress," and went on to state that presidential "supervision is more readily justified when it does not purport to wholly displace, but only to guide and limit, discretion which Congress has allocated to a particular subordinate official."[8]

Despite these pronouncements in the OLC opinion and the order itself, allegations were made that OMB utilized E.O. 12291 to determinatively control agency rulemaking activities during the Reagan Administration. However, courts considering OMB involvement in agency rulemaking under the auspices of E.O. 12291 did not rule upon the constitutionality of such review. In *Public Citizen Health Research Group v. Tyson*, for instance, the court addressed the validity of a rule promulgated by OSHA governing ethylene oxide, including

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[3] Exec. Order 12291, 46 Fed. Reg. 13,193 (Feb. 17, 1981).

[4] For a thorough overview of the criticisms leveled at the Reagan orders, see Richard H. Pildes, Cass R. Sunstein, "Reinventing the Regulatory State," 62 U. Chi. L. Rev. 1, 4-6 (1995); Elena Kagan, "Presidential Administration," 114 Harv. L. Rev. 2245, 2279-80 (2001). *But see*, Frank B. Cross, "Executive Orders 12291 and 12498: A Test Case in Presidential Control of Executive Agencies," 4 J.L & Pol. 483 (1988) (supporting constitutionality and utility of review under these orders).

[5] E.O. 12291, § 3(f)(3).

[6] *See* "Proposed Executive Order Entitled 'Federal Regulation,'" Office of Legal Counsel, Department of Justice, 5 U.S. Op. Off. Legal Counsel 59 (Feb. 13, 1981).

[7] *Id.* at 61.

[8] *Id.* at 61.

a challenge based on the argument that a critical portion of the proposed rule had been deleted based on a command from OMB.[9] While stating that "OMB's participation in the rulemaking presents difficult constitutional questions concerning the executive's proper role in administrative proceedings and the appropriate scope of delegated power from Congress to certain executive agencies," the court nonetheless found that it had "no occasion to reach the difficult constitutional questions presented by OMB's participation" given its finding that the challenged deletion was not supported by the rulemaking record.[10]

The Reagan orders were retained during the George H.W. Bush Administration to similar effect and controversy, with Congress going so far as to refuse to confirm President George H.W. Bush's nominee for the position of Administrator at OIRA. In 1989, the Administration created the Council on Competitiveness, which was empowered to resolve disputes between OIRA and regulatory agencies covered under E.O. 12291.[11] The Council itself was likewise controversial, in one instance asserting its authority to uphold OMB's rejection of certain elements of a proposed Environmental Protection Agency rule. EPA acquiesced in the Council's decision, and excised the provisions from the final rule. When this deletion was challenged in court, the Court of Appeals for the District of Columbia did not address the propriety of the influence wielded by the Council, determining that the deletion was supported by the rulemaking record.[12] Touching upon the Council's involvement, the court declared that EPA's deletion of the provisions at issue "in light of the Council's advice...does not mean that EPA failed to exercise its own expertise in promulgating the final rules."[13] It is important to note that the court's treatment of the Council's involvement in the EPA rulemaking does not in any way indicate that the Council or OMB had actual legal authority to compel changes thereto. Instead, the court based its decision on a determination that there was a sufficient basis in the record to conclude that the EPA had exercised its independent expertise in promulgating a rule that was in accord with the Council's position.[14]

This approach by the judiciary is directly relevant to the current controversy. To the extent that the influence of any given presidential adviser is so great as to raise concern, a court is likely to employ a similar analytical approach to avoid the extremely difficult and portentous constitutional calculus that governs the question of how a President may constitutionally use, and rely upon, personal advisers. Stated alternatively, even in instances where there is direct evidence of a non-statutorily designated actor wielding determinative influence over a congressionally prescribed decision-making process, the courts will

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[9] 796 F.2d 1479 (D.C. Cir. 1986).

[10] *Id.* at 1507.

[11] *See* Caroline Dewitt, "The Council on Competitiveness: Undermining the Administrative Procedure Act with Regulatory Review," 6 Admin. L.J. Am. U. 759, 760 n.3 (1993).

[12] *See* New York v. Reilly, 969 F.2d 1147, 1153 (D.C. Cir. 1992).

[13] *Id.* at 1152.

[14] This regulatory review process has been retained, in modified form, by subsequent Administrations. However, the comparatively nuanced exercise of this asserted authority by these Administrations has largely diminished arguments against the constitutionality of presidential review. Accordingly, presidential review of agency rulemaking has become a widely used and increasingly accepted mechanism by which a President can exert significant and sometimes determinative authority over the agency rulemaking process.

generally seek to assign the responsibility for any final executive branch decision to the official who has specific, legally assigned, authority in that context. Given that presidential advisers have traditionally operated in a manner that makes it even more difficult to ascribe responsibility for substantive governmental action to them than is the case with OMB's regulatory review function, there is no reason to assume or expect that a reviewing court would rule upon their constitutional validity, lending credence to the proposition that it is "very difficult, if not impossible, for the judiciary to police displacement if the agency accepts it."[15] Given the low likelihood of sucess of any attempt to bring about a judicial resolution to the current controversy, it would appear that an appropriate safeguard against the exercise of undue influence by presidential advisers is for the Senate to engage in an advice and consent process that ensures, as effectively as is possible, that it confirms as principal officers of the United States only those individuals who will not succumb to such manipulations and who will fulfill their statutory responsibilities in a truly principled manner.

Different, yet conceptually similar, constraints adhere to bills that have been introduced to curb presidential reliance on advisers. To the extent that current legislative proposals focus on restricting a President's authority to retain, or consult with, advisers of his own choosing, they share a similar limitation with recent congressional attempts to restrain the issuance of signing statements by a President. In particular, such proposals, in either context, are not generally drafted in manner that explicitly prohibit a President from using the mechanism at issue. With regard to signing statements, salient legislative proposals purported to bar a President from using appropriated funds to produce, publish, or disseminate any statement contemporaneous to the signing of any bill or joint resolution presented for signing by the President.[16] Similarly, bills attempting to constrain presidential reliance upon advisers generally seek to bar the use of appropriated funds to pay for any salaries or expenses of any such position created by the President.[17] However, as with signing statements, it is not clear that a simple funding prohibition would have the intended substantive effect. While in the signing statement context such a limitation would not prevent a President from espousing his views on a particular piece of legislation through other means, in the current context it is not difficult to conceive of a dynamic whereby individuals whose counsel the President finds valuable would likewise find opportunities to express their viewpoints.[18] Moreover, just as a formalistic declaration that a congressional funding limitation may flatly prohibit a President from declaring his intention with regard to the interpretation or enforcement of legislation from Congress would be met with skepticism on First Amendment grounds, so would a legislative proposal that asserts to bar the Chief Executive from seeking the advice of trusted counsel. Additionally, while it would appear that properly crafted legislative proposals could generally impose categorical confirmation requirements on identifiable

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[15] Robert V. Percival, "Presidential Management of the Administrative State: The Not-So-Unitary Executive," 51 Duke L.J. 963, 994 (2001).

[16] *See, e.g.*, H.R. 264, 110th Cong., 1st sess. (2007).

[17] *See, e.g.*, H.R. 3226, 111th Cong., 1st Sess. (2009).

[18] For example, President Andrew Jackson, whose election and tenure in office 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. Arthur M. Schlesinger, Jr., *The Age of Jackson* (Boston, MA: Little, Brown, 1945), p. 67.

presidential advisers,[19] there does not appear to be a mechanism whereby Congress could validly prevent a President from relying upon confidants, irrespective of whether they are confirmed or receive a salary from the Treasury. Finally, from a practical perspective, just as legislative proposals aimed at halting the simple issuance of signing statements did not advance, it does not appear that current proposals aimed at prohibiting the retention or service of presidential advisers have a significant likelihood of being enacted into law. Accordingly, given the limitations inherent in any effort to resolve the current controversy through judicial or legislative recourse, it would appear that the most effective congressional response would be one based simply on the persistent and aggressive assertion of the oversight prerogatives of the House and Senate.

Congressional Oversight

While there is no definitive constitutional or statutory provision imbuing Congress with oversight authority, a long line of Supreme Court precedent establishes Congress' power to engage in oversight and investigation of any matter related to its legislative function.[20] Unless there is a countervailing constitutional privilege or a self-imposed statutory restriction upon its authority, Congress and its committees possess the essentially unfettered power to compel necessary information from executive agencies, private persons and organizations. Indeed, even though the Constitution does not contain any express provision authorizing Congress to conduct investigations and take testimony in support of its legislative functions, the Supreme Court has held conclusively that congressional investigatory power is so essential that it is implicit in the general vesting of legislative power in the Congress.[21]

In *Eastland v. United States Serviceman's Fund*, for instance, the Court stated that the "scope of its power of inquiry...is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[22] Also, in *Watkins v. United States,* the Court emphasized that the "power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."[23] The Court further stressed that Congress' power to investigate is at its peak when focusing on alleged waste, fraud, abuse, or maladministration within a government department. Specifically, the Court explained that the investigative power "comprehends probes into departments of the federal government to expose corruption, inefficiency, or waste."[24] The Court went on to note that the first Congresses held "inquiries dealing with suspected corruption or mismanagement

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[19] *See* Louis Fisher, The Politics of Shared Power, 98 (3d ed. 1993) (stating that the Necessary and Proper Clause vests Congress with "broad powers . . . to place restrictions on the president's powers of removal, appointment, organization, and reorganization").

[20] For a thorough analysis of legal principles governing congressional oversight, *See* Kaiser, *et al., Congressional Oversight Manual*, CRS Rep. No. RL30240 (2007).

[21] *E.g.,* McGrain v. Daugherty, 272 U.S. 135 (1927); Watkins v. United States, 354 U.S. 178 (1957); Barenblatt v. United States, 360 U.S. 109 (1959); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Nixon v. Administrator of General Services, 433 U.S. 425 (1977); See also, United States v. A.T.T., 551 F.2d 384 (D.C. Cir. 1976) and 567 F.2d 1212 (D.C. Cir. 1977).

[22] 421 U.S. at 504, n. 15 (quoting Barenblatt, *supra,* 360 U.S. at 111).

[23] 354 U.S. at 187.

[24] *Id.*

of government officials."[25] Given these factors, the Court recognized "the power of the Congress to inquire into and publicize corruption, maladministration, or inefficiencies in the agencies of Government."[26]

Accordingly, the rules of the House[27] and the Senate,[28] which confer both legislative and oversight authority, establish that committees may issue subpoenas in furtherance of an investigation within their subject matter jurisdiction, and subpoenas may be issued on the basis of either source of authority. It is important to note that an individual seeking to challenge the validity or sufficiency of a subpoena may only raise such objections in a limited fashion. The Supreme Court has held that courts may not enjoin the issuance of a congressional subpoena, declaring that the Speech or Debate Clause of the Constitution[29] provides "an absolute bar to judicial interference" with such compulsory process.[30] Consequently, the sole option in this context generally requires an individual to refuse to comply, risk being cited for contempt, and then raise objections as a defense in a contempt prosecution.

These constitutional maxims are fully applicable to the Subcommittee's efforts to examine the role of high level presidential advisers, particularly with regard to their influence on deliberations, decisions and actions that are statutorily vested in congressionally established departments and agencies. Indeed, the Subcommittee's oversight prerogatives are arguably at their peak in a context such as this, as the current inquiry would seem to be clearly related to determining whether the actions of such presidential advisers could result in, or contribute to, waste, fraud, abuse, or maladministration within executive departments or agencies.

Testimony of Presidential Advisers

It should also be noted that Congress' authority in the oversight context extends to the receipt of testimony from senior presidential advisers. While it is not uncommon for Presidents to assert that the separation of powers doctrine prevents Congress from receiving such testimony, ample historical precedent belies the assertion that the constitutional separation of powers serves as a structural impediment to the appearance of presidential advisers before congressional oversight committees. Research conducted by my colleagues Henry Hogue and Todd Tatelman, and their predecessors Harold Relyea and Jay Shampansky, has identified numerous instances since the closing years of World War II where presidential advisers have testified before a congressional committee or subcommittee.[31] This historical catalogue includes several instances where Thomas J. Ridge

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[25] *Id.* at 182.

[26] *Id.* at 200, n. 33.

[27] House Rule X, cl. 2.

[28] Senate Rule XXVI, cl. 8.

[29] U.S. Const., Art. I, sec. 6, cl. 1.

[30] Eastland, 421 U.S. at 503-507.

[31] *See* Henry B. Hogue & Todd B. Tatelman, *Presidential Advisers' Testimony Before Congressional Committees: An Overview*, CRS Rep. No. RL31351 (2008).

appeared before various committees of Congress while serving as Assistant to the President for Homeland Security.[32]

While these precedents establish that such advisers may appear before Congress, it remains a relatively rare event, ostensibly due to a tradition of comity between Congress and the White House, with presidential advisers primarily testifying in instances where the political climate renders it preferable to the President that such aides testify in order to diffuse congressional and public pressure.[33] While historical precedent appears to dispense with the argument that formal separation of powers principles prevent such testimony, executive privilege has also been invoked in the past as presenting a bar to the testimony of presidential advisers. While this issue has not been enjoined in the current controversy, it would not be surprising for the Obama Administration to follow the approach of its predecessors and to assert that the doctrine of executive privilege flatly precludes the testimony of presidential advisors. While it is conceivable that issues of executive privilege might be implicated by virtue of the functions served by high level presidential advisers, a brief overview of the privilege appears to indicate that it may not be successfully invoked as a complete and presumptive shield to congressional demands for information relating to their service to President Obama.

Executive Privilege

Just as the Constitution contains no provisions authorizing the investigatory and oversight functions of Congress, there is likewise no express grant of executive privilege. However, beginning with President Washington, the Executive Branch has claimed that the separation of powers doctrine implies that the President possesses the power to withhold confidential information in the face of legislative and judicial demands.[34]

Politically speaking, it is rare for interbranch disputes over contested information to reach the courts for a judicial determination on the merits. Consequently, the existence of a presidential confidentiality privilege was not judicially established until the Watergate era, when the courts recognized the presidential confidentiality privilege as an inherent aspect of presidential power.[35] In *United States v. Nixon*, the Supreme Court addressed a claim of executive privilege in response to a subpoena issued during a criminal trial to the President at the request of the Watergate Special Prosecutor. The Supreme Court found a constitutional basis for the doctrine of executive privilege, noting that "[w]hatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Article II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties."[36] The Court went on to explain that while it considered presidential communications to be "presumptively privileged," there was no

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[32] *Id.* at 15-16.

[33] *Id.* at 22-23.

[34] *See* Morton Rosenberg, *Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments*, Congressional Research Service, Rep. No. RL30319 (2008).

[35] United States v. Nixon, 418 U.S. 683 (1974); See also, Nixon v. Sirica, 487 F.2d 700 (D.C. Cir.1973); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974); Nixon v. Administrator of Gen. Services., 433 U.S. 425 (1977).

[36] United States v. Nixon, 418 U.S. at 705.

support for the contention that the privilege was absolute, precluding judicial review whenever asserted, as such a conclusion "would upset the constitutional balance of a 'workable government.'"[37] In particular, the Court explained that "when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent national security secrets we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production" of materials needed to enforce criminal statutes.[38]

Upon determining that a claim of privilege is not absolute, the Court weighed the President's interest in confidentiality against the judiciary's need for the materials in a criminal proceeding, stating that it was "necessary to resolve those competing interests in a manner that preserves the essential functions of each branch." Concluding this calculus, the Court held that the judicial need for the tapes, as established by a "demonstrated, specific need for evidence in a pending criminal trial," was of greater significance than the President's "generalized interest in confidentiality...."[39] It should be noted that the Court specifically limited the scope of its decision, stating that it was not concerned with "the balance between the President's generalized interest in confidentiality...and congressional demands for information."[40]

Coupled with related and subsequent decisions, the Court's decision in *Nixon* established the "contours of the presidential communications privilege."[41] Pursuant to the standards developed in these cases, the President may invoke the privilege "when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations and that the President believes should remain confidential."[42] As noted above, such an invocation renders the requested materials presumptively privileged, requiring an adequate showing of need to overcome the claim. This standard was further clarified in *In re Sealed Case* (hereinafter referred to as "*Espy*"), where the Court of Appeals for the District of Columbia Circuit addressed issues regarding the scope of the privilege, whether and to what extent the privilege extends to presidential advisers, whether the President must have seen or had knowledge of the material at issue, and the standard of need necessary to overcome a claim of privilege.[43]

Espy arose from an Office of Independent Counsel (OIC) investigation regarding allegations of impropriety by former Secretary of Agriculture Mike Espy. As part of the investigation, a grand jury issued a subpoena for all documents relating to a report prepared for the President by the White House Counsel's Office regarding the allegations. Regardless of the fact that the President had not viewed any of the documents underlying the report, he withheld 84 documents on the basis of "executive/deliberative privilege." The OIC moved

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[37] *Id.* at 707.

[38] *Id.* at 706.

[39] *Id.* at 685, 713.

[40] *Id.* at 712, n. 19.

[41] In re Sealed Case (Espy), 121 F.3d 729, 744 (D.C. Cir. 1997).

[42] *Id.*

[43] *Id.*

to compel production of the withheld documents. Subsequent to *in camera* review, the district court upheld the claims of privilege forwarded by the President. In its decision, the Court of Appeals agreed generally with the district court's determination that the documents in question were subject to the presidential communications privilege.[44] However, the court vacated and remanded in order to provide the OIC an opportunity to provide a sufficient justification for its need for certain items of evidence.[45]

At the outset of its opinion, the court distinguished between the presidential communications privilege and the deliberative process privilege, noting that while the former has a constitutional basis in the separation of powers doctrine, the latter is a common law privilege applicable to the decisionmaking of executive officials generally.[46] The court went on to explain that while both privileges are qualified, the deliberative process privilege "disappears altogether when there is any reason to believe government misconduct occurred," whereas "the presidential communications privilege is more difficult to surmount," requiring a "focused demonstration of need, even when there are allegations of misconduct by high level officials."[47]

Turning to the question of whether the subpoenaed documents could be claimed to be privileged even though the President had never viewed them, the court stated that "the public interest is best served by holding that communications made by presidential advisers in the course of preparing advice for the President come under the presidential communications privilege, even when these communications are not made directly to the President."[48] The court based this conclusion on what it characterized as "the President's dependence on presidential advisers and the inability of the deliberative process privilege to provide advisers with adequate freedom from the public spotlight," as well as "the need to provide sufficient elbow room for advisers to obtain information from all knowledgeable sources."[49] Further illuminating the scope of the privilege, the court stated that it "must apply both to communications which these advisers solicited and received from others as well as those they authored themselves. The privilege must also extend to communications authored or received in response to a solicitation by members of a presidential adviser's staff, since in many instances advisers must rely on their staff to investigate an issue and formulate the advice to be given to the President."[50]

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[44] *Id.* at 758.

[45] *Id.* at 761-762.

[46] *Id.* at 745-746.

[47] *Id.* at 746. The deliberative process privilege allows the government to withhold information that would reveal recommendations and deliberations pertaining to the formulation of governmental decisions and policies, and does not apply to documents that merely state or explain a decision made by the government, or material that is purely factual. *Id.* at 737.

[48] *Id.* at 752.

[49] *Id.* at 751-752.

[50] *Id.* at 752. Regarding the standard of need necessary to overcome a claim of privilege, the court determined that a party must demonstrate that the requested documents are relevant to the proceeding and cannot be obtained elsewhere with due diligence. *Id.* at 754-755.

Recognizing that a decision extending the presidential communications privilege to presidential advisers "could pose a significant risk of expanding to a large swath of the executive branch a privilege that is bottomed on a recognition of the unique role of the president," the court limited the privilege to White House advisers and staff that are in "operational proximity" to presidential decisionmaking. Specifically, the court stated that "the privilege should not extend to staff outside the White House in executive branch agencies. Instead the privilege should apply only to communications authored or solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given to the President on the particular matter to which the communications relate. Only communications at that level are close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisers."[51] The court went on to stress that the privilege was not applicable to information that does not "call ultimately for direct decisionmaking by the President."[52] Applying these factors to the case before it, the *Espy* court held that the independent counsel had "demonstrated sufficient need in order to overcome the presidential communications privilege," and ordered the disclosure of the disputed documents.[53]

The Court of Appeals for the District of Columbia Circuit reiterated the principles delineated in *Espy* in *Judicial Watch, Inc. v. Department of Justice*[54] In *Judicial Watch* the court was called upon to resolve a dispute between the DOJ and Judicial Watch, Inc. with regard to the latter's request for documents concerning pardon applications and pardon grants reviewed by the Office of the Pardon Attorney at DOJ as well as by the Deputy Attorney General for consideration by President Clinton.[55] The DOJ withheld roughly 4,300 documents on the grounds that they were protected by the presidential communications and deliberative process privileges. The district court had ruled that because the materials sought had been produced for the "'sole' function of advising the President on a 'quintessential and non-delegable Presidential power,' the extension of the presidential communications privilege to internal Justice Department documents was justified."[56] The D.C. Circuit reversed, noting that the documents at issue had not been solicited and received by the President or the Office of the President, thus necessitating the conclusion that "internal agency documents that are not solicited and received by the President or his Office are instead protected against disclosure, if at all, by the deliberative process privilege."[57]

Tracking the analysis employed in *Espy*, the court emphasized that the "solicited and received" limitation "is necessitated by the principles underlying the presidential

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[51] *Id.* at 752. "[I]t is 'operational proximity' to the President that matters in determining whether the '[t]he President's confidentiality interest' is implicated (quoting American Ass'n of Physicians and Surgeons, Inc. v. Clinton, 997 F.2d 898, 910 (D.C. Cir. 1993) (emphasis omitted)).

[52] *Id.* at 752.

[53] *Id.* at 762.

[54] 365 F.3d 1108 (D.C. Cir. 2004)

[55] The President has delegated the formal process of review and recommendation of his pardon authority to the Attorney General who in turn has delegated it to the Deputy Attorney General. The Deputy Attorney General oversees the work of the Office of the Pardon Attorney.

[56] 365 F.3d at 1111.

[57] *Id.* at 1112.

communications privilege, and a recognition of the dangers of expanding it too far."[58] The court went on to state that, under *Espy*, the privilege may be invoked only when presidential advisers in close proximity to the President, who have significant responsibility for advising him on non-delegable matters requiring direct presidential decision making have solicited and received such documents or communications, or the President has received them himself. In rejecting the Government's argument that the privilege should be applicable to all departmental and agency communications related to the Deputy Attorney General's pardon recommendations for the President, the panel majority held that:

> [S]uch a bright-line rule is inconsistent with the nature and principles of the presidential communications privilege, as well as the goal of serving the public interest. Communications never received by the President or his Office are unlikely to 'be revelatory of his deliberations.' Nor is there any reason to fear that the Deputy Attorney General's candor or the quality of the Deputy's pardon recommendations would be sacrificed if the presidential communications privilege did not apply to internal documents. Any pardon documents, reports or recommendations that the Deputy Attorney General submits to the Office of the President, and any direct communications the Deputy or the Pardon Attorney may have with the White House Counsel or other immediate Presidential advisers will remain protected....It is only those documents and recommendations of Department staff that are not submitted by the Deputy Attorney General for the President and are not otherwise received by the Office of the President, that do not fall under the presidential communications privilege.[59]

Indeed, the *Judicial Watch* panel makes it clear that the *Espy* rationale would preclude cabinet department heads from being treated as being part of the President's immediate personal staff or as some unit of the Office of the President:

> Extension of the presidential communications privilege to the Attorney General's delegatee, the Deputy Attorney General, and his staff, on down to the Pardon Attorney and his staff, with the attendant implication for expansion to other Cabinet officers and their staffs, would, as the court pointed out in *In re Sealed Case*, "pose a significant risk of expanding to a large swatch of the executive branch a privilege that is bottomed on a recognition of the unique role of the President."[60]

The court also elaborated upon how the decision in *Espy* and the case before it differed from the Nixon and post-Watergate cases. According to the court, "[u]ntil *In re Sealed Case*, the privilege had been tied specifically to direct communications of the President with his immediate White House advisors."[61] The *Espy* court, it explained, was for the first time confronted with the question whether communications that the President's closest advisers make in the course of preparing advice for the President and which the President never saw should also be covered by the presidential privilege. As such, and as noted by the court in *Judicial Watch*, the decision in *Espy* "espoused a 'limited extension' of the privilege 'down

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[58] *Id.* at 1114-15.

[59] *Id.* at 1117.

[60] *Id.* at 1121.

[61] *Id.* at 1116.

the chain of command' beyond the President to his immediate White House advisors only,"[62] "recogniz[ing] the need to ensure that the President would receive full and frank advice with regard to his non-delegable appointment and removal powers," while remaining "wary of undermining countervailing considerations such as openness in government."[63] The court then noted that the decision in *Espy* thus established that "while 'communications authored or solicited and received' by immediate White House advisors in the Office of the President could qualify under the privilege, communications of staff outside the White House in executive branch agencies that were not solicited and received by such White House advisors could not."[64]

The decision in *Judicial Watch* tested and affirmed the principles laid out in *Espy*. While the presidential decision involved was certainly a non-delegable, core presidential function, the operating officials involved (the Deputy Attorney General and the Pardon Attorney) were deemed to be too remote from the President and his senior White House advisers to be protected. The court conceded that functionally those officials were performing a task directly related to the pardon decision, but concluded that an organizational test was more appropriate for confining the potentially broad sweep that would result from a functional test; under the latter test, there would be no limit to the coverage of the presidential communications privilege. In such circumstances, the majority concluded, the lesser protections of the deliberative process privilege would have to suffice.[65] Accordingly, the appeals court reversed the district court's holding that the material in question was subject to the presidential communications privilege and remanded the case for its determination as to whether the DOJ's internal documents "not 'solicited and received' by the President or the Office of the President" were instead protected under the deliberative process privilege.[66]

It should be noted that the decisions in *Espy* and *Judicial Watch* stressed that the holdings therein were limited to the facts presented and were rendered in the context of judicial demands for information. Accordingly, these decisions do not necessarily extend to executive privilege issues that may arise during the course of a congressional investigation. However, the principles laid out in *Espy* and confirmed in *Judicial Watch* represent the most comprehensive consideration of the contours of executive privilege by the judicial branch, and it is not clear on what basis a reviewing court might apply a different analytical rubric in the congressional context. Thus, while there would almost certainly be documents or discussions covered by the presidential communications privilege implicated in any specific inquiry into the practical influence exerted by any given presidential adviser, it would not appear that the privilege may be invoked as a comprehensive structural bar to congressional inquiries regarding the role of such senior presidential advisers in the formulation and execution of Executive Branch policies.

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[62] *Id.* at 1115.

[63] *Id.* at 1116.

[64] *Id.* at 1116.

[65] *Id.* at 1118-24.

[66] *Id.* at 1110.

Conclusion

As noted at the beginning of this statement, presidential advisers have a substantial historical pedigree, and there does not appear to be any fundamental constitutional or legal basis upon which a President's reliance upon high level, political advisers may be questioned or prohibited. While the number of such advisers has grown substantially over the past few decades, that growth, even when coupled with the arguably concordant increase in their influence, does not render their service presumptively unconstitutional. Furthermore, while the service of these individuals carries significant implications, both practical and constitutional, for the traditional relationship between the Executive Branch and Congress, no conclusive showings have been made establishing that such advisers explicitly wield significant authority pursuant to the laws of the United States. Accordingly, it could be argued that the appropriate focus of congressional concern should center not on the service of such advisers as a practical matter, but on the broad implications that presidential reliance thereupon has for the effective operation of the administrative bureaucracy as established by Congress. Accordingly, a robust oversight regime focusing on specific, substantive executive action taken in areas over which such advisers reportedly have political influence would appear to be a potentially effective locus of congressional attention. As in the regulatory review and signing statement context, this approach would restrain congressional actors from spending scarce resources on judicial and legislative efforts that are likely to be unavailing, in turn assisting the Congress, as an institution, to more effectively assert its constitutional prerogatives and ensure compliance with its enactments.

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Mister Chairman, that concludes my prepared statement. I would be happy to answer any questions that you or other Members of the Subcommittee might have, and I look forward to working with all Members and staff of the Subcommittee on this issue in the future.

Statement of
John C. Harrison
Professor of Law
University of Virginia

Committee on the Judiciary
Subcommittee On the Constitution
United States Senate

Legal Issues Associated With Executive Branch "Czars"

October 6, 2009

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The Subcommittee has asked for my views regarding legal issues raised by the employment of so-called "Czars" within the executive branch.

Individuals who work in the executive branch are sometimes called "Czars" (or "Tsars") when they have responsibility with respect to some problem or issue. Thus the Director of the Office of National Drug Control Policy is sometimes called the Drug Tsar. The term has a popular, but as I will explain, not a legal, meaning. For that reason, rather than starting by describing that category of executive actors, I will describe the relevant legal principles and then discuss their application to the different kinds of government positions referred to by that name.

Any claim of authority by an executive actor must be founded in law. Article VI of the Constitution recognizes three sources of federal law: the Constitution, statutes, and treaties. Putting aside unusual cases in which a federal executive actor can rely on a treaty as a source of legal authority, and the even more unusual case in which a federal executive actor may rely on some non-federal source of law, the main potential sources of legal authority are the Constitution and federal statutes.

The only executive actor in whom the Constitution directly vests legal authority is the President. Several of the President's specific constitutional powers are almost certainly not subject to delegation. It is highly doubtful whether anyone but the President may sign a bill, veto a bill, issue a pardon, appoint an officer, or make a treaty, for example. It is also quite doubtful whether the President may delegate the authority, conveyed by the Vesting Clause of Article II, to oversee and direct the subordinates who perform the executive functions of government. In any event, I do not understand that the President claims to have delegated to anyone any of the powers vested in him by the Constitution, nor that any of this recent predecessors did so. As a result, in general any executive actor other than the President who claims legal authority must rest that claim on a statute.

One implication of this reasoning is that any member of the White House staff, whatever the official or unofficial title of that staff member, who does not have statutory authority does not have any legal power. That is not to say that members of the White House staff are not and may

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not be highly influential. They are and may be, and actors in the executive department who do have legal authority may regard the guidance given them by members of the White House staff as authoritative expressions of the President's policy. But it is only the President's power that makes that guidance significant, and no executive actor has any obligation to follow the instructions of a member of the White House staff who lacks statutory authority, except insofar as those instructions relay the President's. (The President may convey his instructions through any conduit he chooses, at least through any conduit who is an employee of the federal government, but the instructions, and not the person who relays them, have authority.) Thus a member of the White House staff who is referred to for descriptive purposes as a Tsar but who has no statutory authority cannot take actions with any legal effect.

The term "Czar" is also sometimes used to refer to individuals in the executive branch who exercise power conferred on them by statute and who are not members of the White House staff. For example, the Director of the Office of National Drug Control Policy, who as noted above is sometimes called the Drug Tsar, holds an office established by statute, heads an agency established by statute, and exercises power conferred by statute. (According to that statute, the Office of National Drug Control Policy is a component of the Executive Office of the President. It is not, however, part of the White House Office, so its the Director would not normally be referred to as a member of the White House staff.) As long as such officers exercise only their statutory powers, and exercise them in a lawful manner, it is a matter of indifference from a legal standpoint what terminology, official or unofficial, is used to describe the people who exercise those powers. As this observation demonstrates, "Czar" as it is used in this context is not the name of a category of executive actors that has legal significance as such. The term is thus not relevant to legal analysis.

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The foregoing reasoning focuses on potential sources of power, constitutional and statutory, and draws out the implications of the basic principle that any purported exercise of government authority must have some source of power. The Constitution contains another principle that is also relevant here. The Appointments Clause of Article II provides that officers of the United States are to be appointed by the President with the advice and consent of the Senate, but that if Congress so prescribes inferior officers may be appointed by the President alone, the heads of departments, or the courts of law.

The Appointments Clause singles out officers of the United States as a distinct legal category. The natural inference is that there is something legally special about them, and longstanding practice along with judicial decisions confirm that there is, and elaborate on its nature. The classic judicial statement is found in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), which deals with the legal authority of the Federal Election Commission. None of the members of the Commission was appointed in a manner consistent with the Appointments Clause. *Id.* at 113. The Court thus confronted the question of the legal significance of status as an officer within the meaning of the Appointments Clause. Rejecting the contention that the clause was wholly ceremonial, *id.* at 125, the Court concluded that it represents a substantive constitutional principle that only appointees who have received their legal authority in the way set out in the Appointments Clause may exercise "significant authority pursuant to the laws of the United States," *id.* at 126.[1]

As *Buckley* and other cases recognize, not everyone who works for the federal government exercises significant authority. As a result, it is permissible for a great many persons to work for the federal government without having been appointed in the manner set out in the Appointments Clause. The standard term for such non-officers is employees. It is entirely permissible for an employee to be hired, pursuant to statute, by an officer, inferior or superior, who is not a head of department and hence is not capable of making an appointment pursuant to the Appointments Clause.

1As the Court recognized in *INS* v. *Chadha*, 462 U.S. 919, 956 n. 21 (1983), each House of Congress has some authority to exercise power with respect to its internal affairs. The principles enunciated in *Buckley* apply to the exercise of government power outside that special sphere.

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Although non-inferior officers must be appointed by the President with the advice and consent of the Senate, inferior officers need not be. Inferior officers may be appointed by the President or a head of department (or the courts of law, though that is not relevant here). Moreover, the President and department heads may also have the authority to hire non-officer employees. As a result, it may be difficult to determine whether some specific government post is an office within the meaning of the Appointments Clause or an employment whose incumbent may not exercise so-called *Buckley* power. This difficult arises specifically with respect to Section 105(a) of title 3 of the United States Code, which authorizes the President to appoint individuals to assist him.[2] From the face of the statute it is not entirely clear whether Congress meant to give the President power to appoint inferior officers, which under the Appointments Clause it certainly may do, or the power to hire employees, which it also may do. As it says that the President may "appoint . . . employees," Section 105(a) uses either the term "appoint" or the term "employees" in a sense other than that word's technical sense with respect to the Appointments Clause, but it is not clear which one. Whether an individual like the Chief of Staff to the President or the White House Press Secretary is an inferior officer or an employee is thus something of a nice question. (As those individuals are not appointed with the advice and consent of the Senate, it is clear that, if officers, they are inferior officers. The distinction between superior and inferior officers is the subject of a somewhat intricate body of executive and judicial doctrine that I will not discuss here. *See, e.g.*, *Edmond* v. *United States*, 520 U.S. 651 (1997).)

Whether or not members of the White House staff qualify as inferior officers, they rarely if ever exercise any authority, or have any responsibility, under acts of Congress. Indeed, Presidents generally take care to ensure that members of their staff do not have any such authority or responsibility. Nor, I have suggested above, may they exercise any part of the President's constitutional power. For that reason, even if they do qualify as inferior officers, and so are eligible to exercise *Buckley* power, they do not in fact have any (except in unusual cases). As a result, there will be few if any situations where members of the White House staff may make legally binding decisions. If any of them have purported to do so without statutory

2Under 3 U.S.C. 105(a) the President may "appoint and fix the pay of employees in the White House Office" to the extent set out in that subsection.

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authority, those claimed exercises of legal power were invalid, whatever their official or unofficial title may be.

Although I have not examined the current facts in any but the most limited way, I do not know of any instance in which anyone on the White House staff has claimed legal authority that he or she did not possess. It is quite likely, of course, that members of the White House staff, and other individuals within and outside of the government,, exercise great practical authority because of their connection, official or personal, to the President. No doubt the Chief of Staff exercises great practical authority, as he is assumed to speak for his principal. That practical authority, however, is not legal authority, and as long as the distinction is rigorously maintained there will be no legal problem.

Whether an individual in the executive branch who does not serve on the White House staff is eligible to exercise significant government authority, and if so the extent to which that person must be supervised by executive officers other than the President, similarly depends on the applicable Appointments Clause principles. Any individual in the executive branch, whether or not called a "Czar," who claims to exercise power in a way inconsistent with the Appointments Clause acts without legal warrant. Although I have not looked into the question, I am not aware of any so-called "Czar" who lacks the type of appointment needed to authorize that person's actions.

With those legal principles in mind, I will point out that there is an important policy question as to whether legal and practical power should go together. To some extent the modern White House staff separates the two, and whether that is desirable is an important question concerning the appropriate structure of the executive branch. The Secretary of State has operational power and responsibility, under the President's direction, with respect to the conduct of the foreign relations of the United States. The National Security Adviser has no such power or responsibility. Keeping straight the operational and advisory roles of the two may create vexing problems for an Administration. These are important questions, but they turn on policy and not law.

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This testimony is prepared as a public service and reflects my views. It is not presented on behalf of and does not represent the views of any client or my employer, the University of Virginia.

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TESTIMONY OF

BRADLEY H. PATTERSON

Before the Senate Judiciary
Subcommittee on the Constitution

October 6, 2009

It is an honor to be here before you this afternoon.

I have served here in Washington for over 64 years, 14 of them as a member of the White House Staff – under Presidents Eisenhower, Nixon and Ford – and 12 as a senior staff member of the Brookings Institution.

I have six points to emphasize concerning the "history and legality of Executive Branch czars."

Point 1: "Czar" is not an official government title of anybody; it is a vernacular of executive branch public administration, harking back – in one account -- at least to the Coolidge years. It is a label now used loosely hereabouts, especially by the media.

Point 2: To use the dictionary definition of "czar" as "one in authority" leads us straight to the question: who in today's executive branch is a "czar?" A September 16 *Washington Post* story makes up a list of 30 -- with which I differ. My definition of "czar" means, first, that this person reports only to the president. If the so-called "czar" reports to someone in between, then that intermediate person is the "czar" and the appointee is only a subordinate assistant. Special Envoys Stern, Holbrooke and Mitchell, for instance, report to the president through or with Secretary of State Clinton. "Both Mitchell and Holbrooke said she oversees their work closely," explains a September 19 story in the *Washington Post.* A careful reading of the White House announcement about so-called "Urban Affairs Czar" Adolfo Carrion Jr. reveals that he answers not

directly to the president, but "reports jointly" to White House Assistants Valerie Jarrett and Melody Barnes. "Performance Czar" Jeffrey Zients, and "Information Czar" Vivek Kundra are subordinates in the Office of Management and Budget.

My definition of "czars" also excludes appointees who have undergone Senate confirmation and are thus accountable to testify before congressional committees. This excludes from czardom the Director of National Intelligence and the Drug, Science, Technology and Regulatory principals in the Executive Office of the President and the Domestic Violence Office Director in the Department of Justice. I note that the media constantly inject the adjectival words "White House" in front of the titles of most of the above-described supposed "czar" officials. I regard this as misleading reporting.

Point 3: The implication of Senator Feingold's September 15 letter to the president is that policy officers of the executive branch, especially those in "executive positions," who have never been appointed "with the advice and consent of the Senate" may hold positions which are not "consistent with the Appointments Clause" of the Constitution.

Principal persons in the "non-confirmable" category are the 24 top White House staff officers with the title of Assistant to the President. Examples are so-called "Health Czar" Nancy-Ann DeParle and Carol Browner for energy and climate change. These two officers, and all of their colleagues at the White House, are appointed pursuant to Public Law 95-570 of November, 1978 which specifies that "the President is authorized to appoint and fix the pay of employees in the White House Office without regard to any other provision of law regulating the employment or compensation of persons in the Government service." Public Law 95-570 is silent about any requirement for Senate

confirmation of those appointments. I interpret this silence as evidencing the intent of Congress to reconfirm, in 1978, the historic practice of not requiring Senate approval of White House staff members, whether they are called "czars" or not. Likewise, White House staffers do not give formal testimony to congressional committees – unless, as in the Watergate instance, criminality is alleged.

Point 4: Does that mean that senior White House staffers wall themselves off from the Congress, being "anti-democratic" – "a poor way to manage the government"? as Senator Lamar Alexander alleges (*Washington Post* story September 16). Consider the example of Ms. DeParle: (*New York Times*, September 20): "When Senator Dianne Feinstein... expressed misgivings about how expanding Medicaid would affect California's budget, Ms. DeParle gathered some charts and dropped by [the Senator's home] on a Saturday. They spent nearly three hours talking over coffee in Ms. Feinstein's den." Rather un-czar-like behavior... As Subcommittee members are aware, White House officers constantly visit the Hill for informal conferences with Members and staffs.

Point 5: The *Post's* September 16 story quotes Senator Byrd as having written the president criticizing White House staffers for "their rapid and easy accumulation of power." Are they powerful? Are they "czars"?

Well, no. Let us remember Franklin Roosevelt's Executive Order 8248 of September, 1939: These Assistants "shall be personal aides to the President and shall have no authority over anyone in any department or agency." White House staff members have no legal responsibility whatsoever other than to assist and advise the

president. On occasion, when staff seniors communicate the president's instructions to Cabinet members, they sometimes do it in a forceful style. I have seen that happen.

Point 6:"These guys don't get vetted," the *Post* quotes Republican Congressman Jack Kingston, "they have staff and offices and immense responsibility. All that needs to come before Congress." I differ.

Defending the new Constitution, and its three branches, Executive, Legislative and Judicial, Madison's Federalist 51 emphasized that "the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other..." This venerable tenet is as applicable to staff as well as principals. It would be unthinkable that the Law Clerks of the Supreme Court should be in any way accountable to the president or to the Congress; it would be unthinkable that the appointments of any of the personal legislative or committee staff here at the Capitol should be approved by the White House. And likewise vice versa.

The independence of these three groups of staff is indispensable to the separation of powers – which as this Subcommittee knows, is an implied mandate of the Constitution.

The president's personal staff are independently responsible only to the president -- and in the end he is the only "czar" that is. And he is accountable: to the American electorate.

Thank you.

[Attached are two pages from my 1988 book about the White House staff which identify the special czar-like offices used by presidents beginning with Eisenhower.]

THE RING OF POWER

The White House Staff and Its Expanding Role in Government

BRADLEY H. PATTERSON, JR.

Basic Books, Inc., Publishers

NEW YORK

Never mind that such a new White House special assistant will probably be a pain to the Cabinet and will appear to them to fuzz up their direct lines to the president. And don't mention that the problem against which the czar is aimed may be incurable by administrative fixes anyway. A czar conveys the flavor of action, will be publicized as the superman who will "knock heads," "cut red tape," and "mow down" resistance. The president can collect some praise for his "initiative"; the very fact of the czar's appointment will help rebut the political attack that the beleaguered chief executive is "doing nothing about" the problem at hand. None of the recent presidents has withstood these temptations.

As has already been described, the White House staff has a center of continuing offices. But the staff is—and always will be—the mirror of the president's priorities; as they surge and expand, it will change to reflect them. Flaring out from that center, therefore, will be a corona of ephemeral luminaries.

Eisenhower, for example, created special White House offices for Personnel Management (Young, followed by Ellsworth), Airways Modernization (Curtis and later Quesada), Disarmament (Stassen), Cold War Planning (Jackson), International Understanding and Cooperation (Rockefeller), Public Works Planning (Bragdon, followed by Peterson), Agricultural Surpluses (Francis), Foreign Economic Policy (Dodge and later Randall), Science and Technology (Killian and later Kistiakowsky), and Atomic Energy (Strauss). He also appointed Meyer Kestnbaum on his White House staff as a special assistant to follow up the reports of the two Hoover Commissions and of the Commission on Intergovernmental Relations which Kestnbaum himself had chaired.

Except for the Science and Technology Office, which finally became an institution in the Executive Office, Kennedy wiped them all out and started new ones of his own: Food for Peace (McGovern), Mental Retardation (Warren), Latin America (Mann), International Trade (Peterson), Transport Mergers (Prettyman), and Military Affairs (Taylor). Johnson established czars of his own, for the War on Poverty (Shriver), Alaskan Earthquake Rehabilitation (Anderson and Ink), the Arts (Stevens), and he reappointed Maxwell Taylor as a consultant for Military-Diplomatic Strategy. President Nixon, in addition to his extensive Public Liaison Office with its links to consumers and to minority groups, installed White House special assistants for Energy (Love and later DiBona), Physical

Fitness (Wilkinson), the Academic Community and the Young (Heard), the Business Community (Flanigan), and Manpower Planning (Hershey). Ford created czars for Labor-Management Negotiations (Usery), Urban Affairs (Fletcher), and Human Rights and Humanitarian Affairs (Wilson). Carter initiated a counselor for Aging (Cruikshank), and special assistants for Inflation (Strauss, followed by Kahn), for Reorganization (Pettigrew), for the Middle East (Strauss), Drugs and Health (Bourne and later O'Keefe), Information Management (Harden), White House Administration (Hugh Carter), and the Iranian Hostages (Ball). President Reagan has had his own assistants for Drug Abuse Policy (Turner, followed by Macdonald), for Private-Sector Initiatives (Ryan), and for Agricultural Trade and Food Aid (Alan Tracy)—this last a position ordained in statute.[1]

Not even counted here are the dozens of special ambassadors and envoys (such as Averell Harriman, Walter George, Donald Rumsfeld, Hamilton Jordan, Philip Habib, Ellsworth Bunker, Robert Strauss, and Cyrus Vance) whom presidents have sent for brief and sensitive missions to inflamed corners of the country and the world.

Beyond the catalog of czars created in fact, there have been others proposed but not deployed. Eisenhower ended his presidency arguing for a "first secretary of the government" to help in the "formulation of national security objectives." A 1964 Johnson Task Force recommended a "secretary at large" for "interagency program coordination." (Both would have required Senate confirmation.)

White House veteran Joseph Califano, while Secretary of Health, Education, and Welfare for Carter, suggested a White House "special representative for domestic assistance," while arts advocates called for a presidential Office of Cultural Affairs. Senior Reagan staffers reportedly urged him to create an "arms-control czar," Senator John Glenn proposed a White House assistant for "nonproliferation," and Reagan himself vetoed a bill that would have forced him to appoint a statutory, Cabinet-level drug-enforcement czar.

The few proposals that did not make it to White House status are outnumbered by the legions that did. What opens the door to such appointments? What conditions produce new ad hoc special presidential assistants?

Presidents are spurred to appoint czars when three incendiary elements converge: if action is needed, time is short, and several federal agencies must contribute to the urgent enterprise. If there is a hint of failure having occurred, and if political flak is exploding, the White House is doubly pressed to dramatize the president's personal concern and to center the needed initiative within his own perimeter.

Statement of
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Committee on the Judiciary
United States Senate

Potential Appointments Clause Issues Associated With Certain Types of "Czars"

October 6, 2009

I have been asked to address the question of whether the President's use of "czars" violates the Appointments Clause. My written testimony is limited to the general appointments issue presented by the use of these positions. It explains the constitutional framework that the Senate should consider in addressing this question.

I. The appointment of officers

It is well established that the Appointments Clause controls the appointment of officers. Buckley v. Valeo, 424 U.S. 1, 127 (1976). There, however, are at least two ways to characterize the source of the President's power to appoint. A Madisonian view of executive power looks to the Appointments Clause itself as an enumerated constitutional grant of power to the President to appoint with Senate advice and consent, except under certain specified circumstances. By contrast, a Hamiltonian view of executive power might look to Article II, § 1, clause one, the executive vesting clause, as the unqualified grant of the appointment power. On this latter interpretation, the Appointments Clause is read as a limitation or a qualification of the previously vested appointment power, i.e. the President appoints officers only with the Senate's advice and consent, barring congressional action to opt out of the default appointment process (the Excepting Clause) or upon the conditions necessary for presidential recess appointments (the Recess Appointments Clause). The Hamiltonian account adds the potential insight that the President's constitutional power to appoint *non-officers* (as opposed to officers) derives from the executive vesting clause itself. Thus, under this approach, the President retains a reservoir of power to appoint non-officers. This modest observation does not resolve the question of "czars" as plainly constitutional. After all, if a czar is an "officer" the Appointments Clause (or the Excepting Clause) controls.

If a position is an "office," the President must appoint the officer consistently with the Appointments Clause. The Supreme Court has interpreted that Clause to distinguish between so-called "principal" officers[1] and "inferior" officers. A President must secure

[1] I say "so-called" because the Appointments Clause does not call the listed categories of officers "principal," U.S. Const. art. II, § 2, cl. 2, and it is unclear that ambassadors and U.S. consuls are more "principal" in their domain than U.S. attorneys in their domain, who are considered to be "inferior officers." During the Federal Convention debates,

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the Senate's advice and consent to appoint principal officers (sometimes referred to as "PAS" appointments). This requirement is non-negotiable. On the other hand, "inferior" officers may be opted out of presidential nomination and Senate advice and consent. The choice to opt out or not is a congressional prerogative ("Congress *may...as they may think proper*"). There is a built in disincentive to opt out. When it exercises this option, Congress effectively eliminates itself from the formal appointments process. It, however, may opt back into the default arrangement of presidential appointment with Senate advice and consent. To opt out, Congress acts by statute ("by law") that vests the appointment authority in one of three groups of officers: the President alone, the Heads of (executive) Departments, or the Courts of Law.

One way to think of a "czar" is as an inferior officer whose appointment Congress vested in the President alone. The three questions to ask in making this determination are: (1) is the czar even an "officer" at all (see part II below); (2) if so, did Congress by statute vest the appointment power in "the President alone" if appointed by the President or in a "Head of an (executive) Department" if appointed by a department secretary or similar official appointed by Senate advice and consent; and (3) if so, is the officer "inferior" to the appointing authority. If all three conditions are met, the czar is an inferior officer whose appointment was vested by Congress outside the default process and is consistent with the Appointments Clause. Alternatively, if the czar is *not* an officer at all but a non-officer, then the President has the power to appoint the non-officer without regard to Senate advice and consent.

II. Determining the status of a czar

A. Officer/non-officer

First, as a threshold matter, it is necessary to draw the line between federal officer and non-officer in order to determine the constitutional status of a czar. If a czar is a non-officer, the Appointments Clause and its excepting provision simply do not apply. In such a case, there would be no Appointments Clause issue about the czar whatsoever. To this end, the Department of Justice's Office of Legal Counsel ("OLC") has issued an opinion synthesizing and harmonizing the Supreme Court's opinions on who is an officer for Appointments Clause purposes. *Officers of the United States Within the Meaning of the Appointments Clause* (April 16, 2007). An officer is one who holds an office that: (1) is "a position to which is delegated by legal authority a portion of the sovereign powers of the federal Government" (what the Court termed "significant authority" of the United States in Buckley v. Valeo, 424 U.S. at 126) and (2) that is "continuing."

As to the first requirement that a position be delegated sovereign authority, OLC defined such powers as primarily those

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Madison used the term "superior" as a synonym for "principal." 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 627 (rev. ed. 1966).

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> binding the Government or third parties for the benefit of the public, such as by administering, executing, or authoritatively interpreting the laws. Delegated sovereign authority also includes other activities of the Executive Branch concerning the public that might not necessarily be described as the administration, execution, or authoritative interpretation of the laws but nevertheless have long been understood to be sovereign functions, particularly the authority to represent the United States to foreign nations or to command military force on behalf of the Government. *Id.* at 4.

OLC excludes as an office "any purely advisory position (one having no legal authority)," "typical contractor[s] (providing goods or services)," and those "possess[ing]...authority from a State." *Id.*

Powerful "purely advisory positions" still present a potential problem for Congress. After all, even if a czar's functions are purely advisory and limited to making recommendations to the President, proximity to the President means power and may mean that non-officers closely situated to the President are more influential than even Senate confirmed principal officers.[2] The difficulty is heightened by having individuals whose capacity is formally advisory but who become functionally final decisionmakers – an outcome almost foreordained given the modern presidency's overwhelming need to delegate and defer to minute policy expertise. The answer to this difficulty is not to classify those purely advisory positions as "officers" rather than "non-officers." Likely the solution to this potential problem lies outside the Appointments Clause: Congress can assert its budgetary powers and not fund influential non-officer "advisors." Alternatively, it could opt to create formal offices staffed by inferior officers accountable to Senate advice and consent (or opted out of it) who have not only the traditional advisory roles but who also have relevant powers such that they are officers.

As to the requirement that a position must be "continuing," OLC offered its view that "the position is permanent or that, even though temporary, it is not personal, 'transient,' or 'incidental.'" *Id.* It excluded "special diplomatic agents, short-term contractors, qui tam relators, and many others in positions that have authority on an ad hoc or temporary basis." *Id.* Past executive-congressional practice informed this condition of officerhood.

B. Vested by law

Second, for a czar appointed outside of advice and consent, Congress must have vested that appointment power in the President alone or in the Head of an Executive

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[2] For example, then-Assistant Attorney General William Rehnquist concluded in 1969 that the Staff Assistant to the President did not hold office within the meaning of the Ineligibility Clause. *See* Memorandum for Lamar Alexander, Staff Assistant to the President, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel at 2 (Dec. 9, 1969).

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Department by a statute. The executive branch has on occasion found there to be a vesting of appointment power absent explicit language.

C. "Inferior" officer

Finally, the office must be "inferior" in order to vest the appointment authority outside of advice and consent. Although the Supreme Court's precedent on what constitutes an inferior officer is internally inconsistent,[3] the better (and later) authority is that an inferior officer means an officer hierarchically subordinate to the congressionally chosen appointing authority. *See* Edmond v. United States.[4] Under this interpretation of inferior, a powerful officer may still be "inferior," provided the office is supervised and directed at some level by the appointing authority. Justice Scalia, writing for the Court in *Edmond*, appeared to equate being a subordinate as a sufficient condition to establish one is an "inferior" officer.[5]

D. Implications

If a "czar" is merely an inferior officer opted out of Senate advice and consent and appointed by "the President alone," there are three important implications. First, if indeed Congress by law vested the appointment authority over a czar in the President alone, then that czar is appointed consistent with the Excepting Clause. Second, if that czar is an inferior officer, Congress could always opt back in to Senate advice and consent by choosing to repeal the statute delegating the appointment power. Third, if a czar is an officer, those constitutional provisions applicable to offices apply. These include: (1) the requirement to be appointed consistent with the Appointments Clause (or its excepting provision or the recess provision); (2) the requirements of the Incompatability and Ineligibility Clauses; and (3) liability to impeachment consistent with the Impeachment Clauses.

If it were determined that a czar occupies an office, but was not appointed consistent with the Appointments Clause because not opted out of advice and consent or because not inferior, then the actions of that officer would be legally voidable. The Court has declined to use the de facto officer doctrine to save unconstitutional appointments

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[3] For a discussion of why the cases are irreconcilable, see Tuan Samahon, *Are Bankruptcy Judges Unconstitutional? An Appointments Clause Challenge*, 60 HASTINGS L.J. 233, 258-66 (2008) (examining attempts to reconcile *Morrison v. Olson* and *Edmond v. United States*).

[4] Justice Scalia's opinion for the majority in *Edmond* "is too specific to the appointment at issue in Edmond. The President may appoint inferior officers if so vested, but of course the President is not appointed by advice and consent. U.S. Const. art. II, §1. The revised construction would provide that to be subordinate means to be supervised and directed at some level by the appointing authority." *Id.* at 287 n.431.

[5] This approach is a departure from Justice Scalia's earlier view in *Morrison v. Olson* that to be a subordinate was a necessary condition, but perhaps not sufficient, to being an inferior officer. *Id.* at 260 n.236.

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from challenge. *See* Ryder v. United States, 515 U.S. 177, 180 (1995). This reality makes the constitutional status of czars all the more important.

This testimony on the Appointments Clause issue represents my own views and does not represent the views of any client or Villanova University School of Law.

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CONGRESSIONAL TESTIMONY

Examining the History and Legality of Executive Branch Czars

Testimony before the

United State Senate
Committee on the Judiciary

October 6, 2009

Matthew Spalding, Ph.D.
Director, B. Kenneth Simon
Center for American Studies
The Heritage Foundation

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Thank you. Let me begin by commending the Senate Judiciary Committee, and especially Senator Feingold, for calling this hearing and giving serious consideration to this issue. Who would have thought that over 200 years after the Declaration of Independence indicted George III for having "erected a multitude of New Offices, and sent hither swarms of Officers to harass our people and eat out their substance" we would be debating the number and proliferation of "czars" in the administration of American government?

The very word, of course, is itself a significant part of the problem. An endless source of humor, it is both confusing and revealing. It is a confusing term because no one officially holds the title; it is a short-hand popularization used by the media and commentators as well as individuals in government to describe certain individuals in the administration who seem to be coordinating national policy and particular policy issues across agencies and programs. We don't know how many there are, as there is no official list. Complicating the matter further is that, of those who have been dubbed "czars," some are in positions created by Congress and have been confirmed by the Senate while others are not in such positions and have not been confirmed.

Yet the term is also revealing. While it is a clever label meant to simplify the proliferation of long, formal job titles it clearly was meant as well to imply in certain positions a breadth of authority and level of status beyond the particulars of the formal title, and seemingly beyond the confines of the normal administrative process. Americans have always bristled at such claims of undefined authority, and calling it by a title historically associated with lawlessness and despotism only serves to underscore the problem.

The use of the term is not new, of course. Nixon seems to have had the first in the modern era, and there were a couple under both Ronald Reagan and George Herbert Walker Bush and President Clinton had a few more. But there seems to have been a proliferation of the title in the previous and the current administration. I say "seems" because there is significant information we do not know about these positions, their duties and responsibilities, and their line of authority. This is why Congress--and here I note the letters from Senator Feingold, as well as a letter from Representatives Issa and Smith--is absolutely correct is asking for more information about the activities and authority of several of the individual czars.

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My guess is that there are actually many more individuals that could fairly be called "czars" in the administration. I say that because the problem is not in the title *per se*, or who made or didn't make the czar list, but with the activities associated with the particular position, and whether there is a general trend toward a centralization of czar power in White House. Congress, both in terms of preserving its own powers and checking those of the executive as well as encouraging open deliberation and responsibility in government, ought to be keenly interested in this question.

The issue is not whether the proliferation of "czars" amounts to a usurpation of power by the executive branch. Rather, the fundamental issue is how the rise of modern administrative government has put us in an unsolvable dilemma: whether policy should be made by technical experts, insulated from public accountability and control, or whether policy should be made by our elected representatives in Congress and the executive branch. The rise of government by bureaucrats – due to the delegation of power from Congress to administrative agencies, combined with the removal of those agencies from the President's control – has given rise to efforts by presidents from both parties to get the bureaucratic state under control through various mechanisms. The rise of "czars" in the current administration is just another manifestation – albeit, an unfortunate one – of this phenomenon.

To understand this argument, a quick synopsis of some background history is necessary. During the late nineteenth and early twentieth centuries (also known as the "Progressive Era"), leading intellectuals and politicians sought to transform American government, which they believed was set up to circumvent the public interest for the sake of narrow and parochial interests.

The problem, in their view, was that policy was being made politically – that is, by inexpert officials chosen by the people, who were unfamiliar with the practicalities of modern society. The solution they devised was to transfer policymaking authority to administrative experts, removed from day-to-day politics and political control, who would be social scientists, educated at top universities and trained to apply cutting-edge scientific research to modern problems. As one leading Progressive, John Dewey, argued, "the question of method in formation and

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execution of policies is the central thing in liberalism. The method indicated is that of maximum reliance upon intelligence."

Technical intelligence, rather than the will of the people expressed through elected representatives, would be the basis for policymaking in the Progressives' new state. Authority to make policy would have to be transferred *out* of the elected branches of government and *into* newly-created administrative boards and commissions, who would be staffed with these experts and tasked with making policy appropriate for a modern society.

The result of this movement was to transfer the authority to make law from Congress, filled with inexpert politicians, to administrative experts housed in administrative agencies. But politics would still exert a pernicious influence on these agencies unless they were also insulated from the control of the President, who was also an elected official and tied to the political impulses of his constituency. Therefore, two things had to be achieved: the delegation of legislative power to agencies, and the removal of presidential control over these new institutions. Both were achieved before and during the New Deal, with the creation of "independent regulatory commissions" which were not located within the executive branch. Rather, they would be outside of the traditional branches of government and not directly accountable to any of those traditional branches.

In practice, this meant that the expansion of administrative agencies *appeared* to involve an expansion of executive power, but it actually resulted in a decline of executive control and responsibility for administrative policy. This led to the paradox of the expansion of administrative agencies, but the decline of presidential control over those agencies. Harry Truman famously predicted the difficulty that Dwight Eisenhower would have in setting policy priorities for the administration: "He will sit here and he will say, 'Do this!, Do that!' And nothing will happen. Poor Ike – it won't be a bit like the Army." It was President Truman who breathlessly complained, "I thought I was the President, but when it comes to these bureaucrats, I can't do a damn thing." The Progressive impulse to put technical experts in charge of national policy led to the unfortunate consequence of popularly-elected Presidents being unable to change

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national policy. The ideal of scientific policy had been elevated over the principle of the consent of the governed.

This created a fundamental dilemma: how can the bureaucratic state the Progressives created be organized and controlled? Is it destined to result in a collection of disconnected, uncoordinated independent agencies that each pursue a focused goal such as workplace safety or the regulation of communications? How will these bureaucrats be held accountable to the people, if they do not answer to the President?

From the perspective of the domestic policy agenda of the president, the story of the twentieth century is the history of attempts by individual presidents to regain control of agencies which are ostensibly executive and which are primarily staffed with officials that the President cannot remove.

Nearly every president, from both parties, has devised a plan for bringing the bureaucracy under the control of the chief executive. Congress has always had several tools for controlling administrative officials – most notably the powers to authorize and fund agencies. But without the power to remove administrative officials, how can the vast administrative state be controlled?

Presidents have tried many devices for bringing agencies under their supervision. Administrative re-organization was a prominent agenda, employed both by the FDR and Nixon Administrations. The President's control over the administration was expanded by Presidents Carter and Reagan, most notably in the latter's creation of a regulatory review process in the Office of Information and Regulatory Analysis (OIRA), which is now headed by the legal scholar Cass Sunstein, otherwise known as President Obama's "regulatory czar." (Incidentally, Sunstein's nomination was approved by the Senate, despite the "czar" moniker) Elena Kagan, the current Solicitor General, wrote a famous law review article outlining the ways in which President Clinton had established a firmer grip on administrative agencies.

President Obama's attempt to centralize control over administrative agencies is therefore nothing new, nor is it peculiar to one of the two major parties in America. It is a symptom of a much

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more serious sickness – the fact that Congress has transferred a great deal of its authority to administrative agencies, and neglected to put anyone in charge of the whole structure. This entire framework is in tension with the original Constitution, but the Constitution nevertheless can give us some basic principles for thinking about the question of "czars" in the White House.

The United States Constitution does not create or *require* a cabinet under the executive branch, though it clearly anticipates the managerial structure and recognizes the significance of department heads to assist the president in overseeing the executive branch. From the very beginning, every president has used such a structure to manage the executive branch. The most recent example of strong cabinet government, revived after the failed executive models of the Nixon administration's heavy-handed centralization of White House authority as well as the Carter administration's small-minded micromanaging style, was the presidency of Ronald Reagan, who regularly turned to cabinet secretaries directly for advice and to carry out policy and created "cabinet councils" to coordinate the activities of the cabinet and respective departments. Presidents since, however, seem to be moving away from the cabinet structure and more in the direction of centralizing more authority directly in the Executive Office of the President.

The President has the authority to appoint his own staff and advisors to assist in the work of his office. It is perfectly legitimate for presidential staff to advance the president's policy objectives within the administration as a matter of course, and President's often appoint particular advisors to advance particular, high level policies. The executive has this authority as a separate and independent matter from officers created by the legislature to carry out the law, and Congress cannot infringe on that authority.

Nevertheless, through its legislative and oversight functions, and more specifically through the Senate's participation in the appointment of officers under Article II, Congress also has significant responsibilities over the general activities of the administration in carrying out the operations of the federal government. With this legislative power in mind, a number of senators have focused their attention on eighteen czar positions in the administration that may overstep Congress' express statutory assignment of responsibility and its oversight responsibilities.

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Where can the line be drawn between executive privilege and legislative responsibility? If executive authority is being used as a subterfuge to thwart confirmation requirements and accountability, and so evade constitutional requirements for individuals performing operational and managerial functions normally the responsibility of cabinet secretaries and department and agency executives that require Senate confirmation, that would certainly violate the spirit and probably the letter of the Constitution. A possible example of this problem may be the Climate Czar Carol Browner who, according to reports, was the lead negotiator in establishing new automobile emissions standards, stemming from the Supreme Court's interpretation of the Clean Air Act. In addition to seeming to be beyond congressional legislative intent, it also seems to circumvent the authority of the EPA administrator.

As the number of czars expands, and the President's policy staff grows, and there are more and more individuals acting more and more as administrative heads rather than advisors, Congress should raise questions as to whether those individuals should be subject to executive privilege or can be compelled to testify before Congress. The President cannot have it both ways.

In addition to the constitutional questions, I would also like to note concerns about the administrative problems inherent in this new executive management paradigm. Having policy operations run out of the White House causes confusion of responsibility for one thing. Who is in charge of healthcare reform: Kathleen Sebelius, the Secretary of Health and Human Services, or Nancy DeParle, the Healthcare czar? In general, running operations out of the White House can become very problematic: recall again the Nixon Administration, and the activities of Mr. Halderman and Mr. Erlichman. More recently, the Tower Commission warned against White House staff acting outside of the regular structure of policy decision-making. There will always be a temptation to use White House authority--real or implied--to exercise political influence over normal departmental activities. As long as that influence is not accountable, and thus responsible—-which seems to have been the case in recent stories concerning a conference call with the National Endowment for the Arts encouraging policy-oriented art or the issuance of curricula to accompany the president's recent speech to students—it is more likely than not to be inappropriate.

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In all of these cases, congressional oversight would serve as an important and legitimate check on executive authority. But additional oversight, with the requirement for approval of and testimony from as many presidential staff as possible, will not solve the fundamental problem behind the current czar wars, which I think has more to do with the general nature of modern administrative government and a growing popular concern about the limits (or lack thereof) on its activities.

For some time now, Congress has developed the habit of delegating vast amounts of authority to the executive branch to address a problem and after the fact looks to manage the exercise of that authority, as opposed to writing clear and detailed laws to be executed by the President. The Troubled Asset Relief Program (TARP), meant to purchase assets and equity from financial institutions as a way to address the subprime mortgage crisis, is a perfect example. Unbounded delegations allowed the Secretary of the Treasury to spend up to $700 billion at will to purchase "troubled" assets of any financial institution. Lo and behold, the United States is now majority owner of General Motors and there is a Car Czar. Setting aside the wisdom of the policy, can it fairly be said that this was the intention of Congress?

And in some cases the delegation of czar-like authority is even clearer. The healthcare legislation in the House of Representatives creates a "Health Choices Commissioner" at the head of a new Health Choices Administration. This duly created, and presumably Senate confirmed, Health Insurance Czar would exercise enormous control over the nation's insurance industry, an enormous concentration of power in one person.

The modern executive, on the other hand, increasingly attempts to get control of the vast bureaucracy under their authority and, in the most recent iteration of the battle, appoints *uber*-bureaucrats to shift that bureaucracy in the president's policy directions. This is partly a misconception of executive authority that seems to see cabinet officers as independent of that authority, or at least an unwillingness to exert authority over executive branch policy through the cabinet. But it also seems to be a general attempt to circumvent congressional oversight (or interference, depending on how you look at it) in shaping policies within the discretion of the

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executive branch. An executive desire to do more and more things outside of legislative authority, and with vast sums of money appropriated by Congress to do more and more things, makes matters all the worse.

The combination of these two trends creates a situation where more and more laws - in the form of rulemaking, regulations and policy pronouncements - are made by administrative agents not only outside of the open and transparent requirements of responsible government, and without congressional approval and oversight, but generally beyond the principle that legitimate government arises out of the consent of the governed. And the more government regularly operates as a matter of course outside of popular consent, the more we become clients rather than rulers of a vast and distant government, the less we are self-governing, and the less we control our own fate. And that, as Alexis de Tocqueville warned in *Democracy in America*, is the recipe for a benign form of despotism that truly imperils our democratic experiment.

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The Honorable Gregory B. Craig
Counsel to the President
The White House
Washington, D.C. 20050

Dear Mr. Craig:

Since taking office, President Obama has appointed a number of senior Administration advisors, otherwise known as "czars." These appointees, most of whom are not confirmed by the Senate, are responsible for coordinating high-level Administration policy within the Executive Office of the President and across the agencies. Some of these policies address the President's domestic agenda, including healthcare initiatives, the expenditure of $700 billion in Troubled Asset Relief Program ("TARP") funds, and the regulation of the auto industry. Others, however, focus upon homeland security, the intelligence community, and our military efforts overseas. While these are important issues affecting our country, there is considerable confusion surrounding the exact nature of these positions, the level of decision-making authority granted to them by the President and Department heads, and the vetting undertaken by this Administration during its hiring processes. These issues, in turn, raise concerns with respect to the privileges bestowed upon the Legislature by Article II, Section 2 of the U.S. Constitution, and with this Administration's promises of transparency and accountability.

According to publicly available information, there are 53 czar positions. Of these, approximately 45 are currently filled. Though the degree of importance varies from czar to czar, some of these officials wield considerable power and decision-making authority. For example, TARP Czar Herb Allison is responsible for managing $700 billion in bailout funds. Likewise, Stimulus Accountability Czar Earl Devaney oversees the tracking of $787 billion in American Recovery and Reinvestment Act spending. With respect to U.S. efforts overseas, Afghanistan Czar Richard Holbrooke is the senior-most official responsible for coordinating civilian and military efforts on behalf of the Administration. Together, these three individuals oversee nearly $1.5 trillion in spending and manage some of the most high- prohle Administration initiatives'

Other Administration czars have significant impact upon policies affecting the American people, though their job descriptions are less clear. Energy and Environment Czar Carol Browner, who works within the Executive Office of the President, advises the President directly on energy and climate change policy. Diversity Czar Mark Lloyd, who reports to FCC General Counsel Austin Schlick, is tasked with leveling the playing field in the communications marketplace. Green Jobs Czar Van Jones, who resigned on September 6,2009, held the official title of Special Advisor for Green Jobs, Enterprise, and Innovation within the White House's Council on Environmental Quality. Though his exact duties remain a mystery, he was purportedly responsible for developing policies that promote the creation of environmentally friendly jobs.

The latter group of presidentially appointed positions gives rise to a number of issues that this Congress must address. The first issue is whether these positions rise to the level of appointments

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that necessitate the advice and consent of the Senate. Article II, Section 2 of the U.S. Constitution states that 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. . .". The Constitution also provides that Congress may vest in the President the authority to appoint certain inferior officers. This means that the authority vested in certain officers and their ability to effectuate policy is proportional to the need for Congressional approval. The level of authority possessed by Carol Browner, Mark Lloyd, Van Jones, and other similarly situated individuals may, indeed, rise to this level.

There is also grave concern that, in the absence of the requirement for Senate confirmation, the Administration may be appointing individuals who would not otherwise withstand Congressional scrutiny. According to publicly available information, a pattern of behavior and associations maintained by some individuals runs contrary to the very core of our democracy. For example, former Green Jobs Czar Van Jones was a self described communist, and when asked about his job in the Administration, he described it as a "community organizer within the federal family." As EPA Administrator for eight years under President Clinton, Energy and Environment Czar Carol Browner presided over an agency festering with racial problems, according to a February 23,2007 Time Magazine story. Shortly before her czar appointment, reports indicated that she was a commissioner of an organization called Socialist International, a worldwide organization of social democratic, socialist and labor parties, At the National Conference for Media Reform in 2008, FCC Diversity Czar Mark Lloyd described Venezuelan President Hugo Chavez's takeover of privately owned media outlets as "incredible and democratic." These types of statements and ideologies raise serious questions as to whether this Administration lacks the appropriate standards for its senior unconfirmed political appointees.

Thus, it is vital that the Administration explain its hiring process, including what criteria it uses to vet senior-level appointees, the means by which it gathers background material, and which Administration officials, particularly within the Presidential Personal Office, are responsible at each level of the hiring process. Additionally, the Administration must provide specific information regarding the nature of each position and the duties performed by each czar. This information will assist this Congress in determining whether, in the absence of Congressional scrutiny, the Administration is employing the proper standards for hiring these public servants, and whether this Congress will need to legislate fuither on these matters.

As such, we respectfully request that the Administration provide the following information regarding these senior officials:

1. The names of all Administration' czars', their job titles, the nature of their duties, the matters in which they exercise discretion, their employing agency, and the physical location oftheir offices;

2. Dates of Presidential appointment and tenure of employment;

3. The total compensation of each individual including, but not limited to, salaries, bonuses, stipends, or any other such benefit or emolument;

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4. All records and communications, including employment contracts, referring or relating to the requests set forth in items 1,2 and 3;

5. A detailed job description of any person described in item 1 including, but not limited to, the areas of responsibility, any budgetary responsibility, the number of employees under their supervision, authority to hire and terminate personnel, and the name of the czat's immediate supervisor;

6. A detailed description of the organizational structure of these persons, including any relevant documents and illustrations, such as organization charts;

7. A detailed work history including, but not limited to, any existing or proposed policies that impact the private sector or alter the existing federal government structure;

6 (sic). All records and communications referring or relating to the policies and procedures by which these individuals are selected, teviewed, "vetted" or otherwise approved for appointment;

7. (sic) All records and communications referring or relating to the development of any policy or procedure for the selection, review, and approval of these appointees;

8. All records and communications referring or relating to the selection, review, and approval of each appointee referenced in item 1. This includes records of any oral or written responses submitted by
Administration candidates in response to information requests or forms provided by the Administration; and

9. Indicate whether, in keeping with promises of transparency and accountability, this Administration will, without subpoena, agree to make these individuals, both confirmed and unconfirmed, available to testify before relevant House and Senate committees of jurisdiction regarding their duties and policymaking decisions.

We respectfully request that the Administration provide the requested information no later than September 29,2009. Please note that, for purposes of responding to this tequest, the terms "records," "communications," and "referring or relating" should be interpreted consistently with the attached Definitions of Terms.

As you are aware, the Committee on Oversight and Government Reform is the main investigative committee in the U.S. House of Representatives. Pursuant to House Rule X, it has authority to investigate the subjects within the Committee's legislative jurisdiction as well as "any matter" within the jurisdiction of the other standing House Committees. This broad jurisdiction includes the oversight of Executive Branch operations and administrative functions.

Thank you for your prompt attention to this very important matter. We look forward to working with the Administration to resolve these matters of transparency and accountability to the

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American people. If you have any questions, please do not hesitate to contact Thomas Alexander, Senior Counsel, at(202)225-5074.

[Signatures removed]

Definitions of Terms

1. The term "record" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, teturns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A record bearing any notation not a part of the original text is to be considered a separate record. A draft or non-identical copy is a separate record within the meaning of this term,

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face-to-face, in a meeting, by telephone, mail, telexes, discussions, releases, personal delivery, or otherwise.

3. The terms "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is in any maliner whatsoever pertinent to that subject.

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United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6250

September 14, 2009

The Honorable Barack Obama
President of the United States
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

Dear Mr. President:

We write to express our growing concern with the proliferation of "czars" in your Administration. These positions raise serious issues of accountability, transparency, and oversight. The creation of "czars," particularly within the Executive Office of the President, circumvents the constitutionally established process of "advise and consent," greatly diminishes the ability of Congress to conduct oversight and hold officials accountable, and creates confusion about which officials are responsible for policy decisions.

To be clear, we do not consider every position identified in various reports as a "czar" to be problematic. Positions established by law or subject to Senate confirmation, such as the Director of National Intelligence, the Homeland Security Advisor, and the Chairman of the Recovery Accountability and Transparency Board, do not raise the same kinds of concerns as positions that you have established within the Executive Office of the President that are largely insulated from effective Congressional oversight. We also recognize that Presidents are entitled to surround themselves with experts who can serve as senior advisors.

Many "czars" you have appointed, however, either duplicate or dilute the statutory authority and responsibilities that Congress has conferred upon Cabinet-level officers and other senior Executive branch officials. When established within the White House, these "czars" can hinder the ability of Congress to oversee the complex substantive issues that you have unilaterally entrusted to their leadership. Whether in the White House or elsewhere, the authorities of these advisors are essentially undefined. They are not subject to the Senate's constitutional "advice and consent" role, including the Senate's careful review of the character and qualifications of the individuals nominated by the President to fill the most senior positions within our government. Indeed, many of these new "czars" appear to occupy positions of greater responsibility and authority than many of the officials who have been confirmed by the Senate to fill positions within your Administration.

With these concerns in mind, we have identified at least 18 "czar" positions created by your Administration whose reported responsibilities may be undermining the constitutional oversight responsibilities of Congress or express statutory assignments of responsibility to other Executive branch officials. With regard to each of these positions, we ask that you explain:

- the specific authorities and responsibilities of the position, including any limitations you have placed on the position to ensure that it does not encroach on the legitimate statutory responsibilities of other Executive branch officials;

- the process by which the Administration examines the character and qualifications of the individuals appointed by the President to fill the position; and,

- whether the individual occupying the position will agree to any reasonable request to appear before, or provide information to, Congress.

We also urge you to refrain from creating similar additional positions or making appointments to any vacant "czar" positions until you have fully consulted with the appropriate Congressional committees.

Finally, we ask that you reconsider your approach of centralizing authority at the White House. Congress has grappled repeatedly with the question of how to organize the federal government. We have worked to improve the Department of Homeland Security and bring together the disparate law enforcement, intelligence, emergency response, and security components that form its core. We established the Director of National Intelligence to coordinate the activities of the 16 elements of the Intelligence Community, breaking down barriers to cooperation that led to intelligence failures before the terrorist attacks of September 11, 2001. The bipartisan review by the Homeland Security and Governmental Affairs Committee of the failures associated with the response to Hurricane Katrina led to fundamental reforms of the Federal Emergency Management Agency, improving our nation's preparedness and ability to respond to disasters. In each of these cases, the Congress's proposed solution did not consolidate power in a single czar locked away in a White House office. Instead, working in a bipartisan fashion, we created a transparent framework of accountable leaders with the authorities necessary to accomplish their vital missions.

If you believe action is needed to address other failures or impediments to successful coordination within the Executive branch, we ask that you consult carefully with Congress prior to establishing any additional "czar" positions or filling any existing vacancies in these positions. We stand ready to work with you to address these challenges and to provide our nation's most senior leaders with the legitimacy necessary to do their jobs – without furthering the accountability, oversight, vetting, and transparency shortcomings associated with "czars."

Sincerely,

Susan M. Collins
U.S. Senator

Lamar Alexander
U.S. Senator

Christopher S. Bond
U.S. Senator

Mike Crapo
U.S. Senator

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Pat Roberts
U.S. Senator

Robert F. Bennett
U.S. Senator

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THE WHITE HOUSE

WASHINGTON

May 19, 2009

VIA FIRST CLASS MAIL

The Honorable Robert C. Byrd
United States Senator
311 Hart Senate Building
Washington, DC 20510

Dear Senator Byrd:

President Obama has asked me to respond to your letter dated February 23, 2009, and to address the important issues you raised concerning transparency, accountability, and congressional oversight. As an initial matter, I want to express my great personal admiration—and the admiration of the President—for your long, distinguished, and unparalleled record of service to the United States Senate and the American people. Secondly, let me just agree with you that protecting the Constitution and its fundamental system of checks and balances is of paramount importance. We look forward to working with you and your staff not only on these issues, but also on the many other challenges facing our nation.

Your letter focuses specifically on the various new White House policy offices. The President created these offices to address important matters of great public concern—in critical areas such as the economy, the environment, and health care—that require close coordination between multiple executive departments and agencies. The purpose of the new White House offices is not to supplant or replace existing federal agencies or departments, but rather to help coordinate their efforts and help devise comprehensive solutions to complex problems. For example, the White House Office of Health Reform was created to lead "a comprehensive effort to improve access to health care, the quality of such care, and the sustainability of the health care system." Similarly, the Office of Urban Affairs was created "to coordinate the actions of the many executive departments and agencies whose actions impact urban life."

We are mindful of the historical examples identified in your letter, in which White House officials assumed increased authority, avoided oversight, and inhibited transparency. I assure you that the President did not create the new White House offices for those purposes, *i.e.*, to shield information from Congress, obscure the decision-making process, or limit the roles of Senate-confirmed officials. Instead, the President has worked to ensure that each federal department and agency has the most effective leadership possible. The statutory duties and authorities of Cabinet officers—and the faith that was placed in those individuals by the Senate through confirmation—will be respected in this Administration. To the extent that any disagreements arise between Cabinet officers and White House staff, the President has made clear that he is responsible for resolving those differences and for making the difficult decisions necessary to lead the nation.

Your letter also raises the important issue of executive privilege, which is a well-established doctrine that protects confidential Executive Branch communications. We agree that assertions of executive privilege can be taken too far, and we will consider carefully the concerns you have identified. We also agree with your suggestion that assertions of privilege should be made only with the President's specific approval, since the privilege belongs to the President.

During the past four months, we have attempted to strike the appropriate balance between the often competing interests of open government and the need for frank, candid, and confidential communications. For example, shortly after taking office, the President brokered a compromise in the longstanding dispute between the former Bush Administration and the House Judiciary Committee involving the dismissal of certain United States Attorneys. Under the resulting agreement, the Committee has reviewed numerous internal White House communications that otherwise would be subject to a claim of executive privilege. In the coming weeks, the Committee will interview Karl Rove and Harriet Miers, and we expect there will be few, if any, assertions of privilege.

Of course, the U.S. Attorney matter was an unusual situation, and the appropriate resolution of future congressional requests will depend on the particular facts and circumstances. Nonetheless, I believe the President's actions in that case demonstrate a firm commitment to the fundamental Constitutional system of checks and balances. In the future, we will make every effort to comply with congressional requests to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch.

Thank you again for your letter. I would be happy to meet with you or your staff to discuss these issues further.

Respectfully,

Gregory B. Craig
Counsel to the President

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THE WHITE HOUSE

WASHINGTON

October 5, 2009

The Honorable Russell D. Feingold
United States Senate
506 Hart Senate Office Building
Washington, DC 20510-4904

Dear Senator Feingold:

Over the past several weeks, there has been some public discussion and debate concerning so-called "czars" within the Obama Administration. Unfortunately, legitimate inquiries seeking to understand how certain government functions are being administered have been overshadowed by a great deal of misinformation. For example, various lists of supposed czars created by President Obama have included positions created by Congress and signed into law by Republican Presidents—*e.g.*, the Director of the Office of Science and Technology Policy (President Ford); the Administrator of the Office of Information and Regulatory Affairs (President Reagan); and the Director of National Intelligence (President George W. Bush). The purpose of this letter is not to respond to frivolous attacks or to correct every false allegation. Instead, I write to address the specific, thoughtful concerns that you and other Members have raised in letters to the White House and in discussions with my Office.

I believe the concerns fall within two broad, related categories. First, certain Members have cautioned that so-called "czars" raise issues of accountability, transparency, and congressional oversight. Second, other Members have questioned whether new positions in the White House and in Executive Branch agencies may be inconsistent with the Appointments Clause of the United States Constitution. I recognize that it is theoretically possible that a President could create new positions that undermine congressional oversight or that usurp the authority of Senate-confirmed officials. In fact, I am mindful of certain historical examples of such conduct, which Senator Byrd identified several months ago. For the reasons that follow, however, that is simply not the case in the current Administration.

In a September 14 letter to President Obama, Senator Collins and five colleagues referred to "at least 18 'czar' positions created by your Administration whose reported responsibilities may be undermining the constitutional oversight responsibilities of Congress." The list of eighteen positions is enclosed, and a careful review is instructive. Of the eighteen total positions:

- Eight positions reside within federal agencies whose employees testify regularly before Congress. Four of the eight—Ron Bloom, Richard Holbrooke, Ed Montgomery, and Todd Stern—already have testified this year. A fifth individual—Alan Bersin—was prepared to testify, but Congress asked for a more senior witness. To the best of my knowledge, none of these individuals has declined a request to testify. Moreover, the documents of all eight individuals are subject to the Freedom of Information Act.

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- The ninth position is the Special Advisor for Green Jobs, Enterprise, and Innovation at the White House Council on Environmental Quality ("CEQ"). Although CEQ is located within the Executive Office of the President, it is no different than a federal agency for the sake of congressional oversight. CEQ officials testify before Congress; the Chair is confirmed by the Senate; and the documents of CEQ employees are subject to FOIA. The position is currently vacant; and, to the best of my knowledge, Congress never asked the former Special Advisor to testify.

- The tenth position is the Chairman of the President's Economic Recovery Advisory Board ("PERAB"). PERAB's charter is publicly available and states that the "functions of the PERAB are advisory only"—the board has no independent legal authority. PERAB also is subject to the Federal Advisory Committee Act ("FACA"), a statute that imposes strict requirements on the creation, membership, meetings, recordkeeping, and public disclosures of advisory committees. For example, the FACA requires that notice of each PERAB meeting must be published in the Federal Register at least fifteen days in advance; all PERAB meetings must be open to the public unless a specific statutory exemption applies; and PERAB must submit annual reports to the GSA and to the Library of Congress. Finally, the Chairman of PERAB, Paul Volcker, testified before Congress earlier this year.

- Four positions reside within the staff of the National Security Council ("NSC")—the supposed Information Sharing, Central Region, Cybersecurity, and WMD Policy "czars." According to federal statute, the function of the NSC is to advise the President and to coordinate, subject to the President's direction, "the policies and functions of the departments and agencies of the Government relating to the national security." 50 U.S.C. § 402(a)-(b). The NSC is supported by numerous professional staff members, who have no independent legal authority. Their sole function is to advise the President, often through recommendations that are formulated by NSC principals and deputies committees, which consist of Cabinet-level officials and deputies from national security agencies. NSC staff members have always had expertise in particular subject matters, so that they can most effectively advise these committees and ultimately the President. The four positions cited above are no different from the many other advisory positions that have long existed within the staff of the NSC.

- The remaining four positions reside within the White House Office and the Office of the Vice President—the supposed Health, Energy and Environment, Urban Affairs, and Domestic Violence "czars." As with the NSC positions, these four individuals are senior White House advisors, who assist the President in the formulation of Executive Branch policy and exercise no independent legal authority. Federal statute explicitly authorizes the President to employ a limited number of senior policy advisors to "perform such official duties as the President may prescribe." 3 U.S.C. §§ 105-06. All former Presidents have employed similar advisors. In fact, Senator Collins' letter acknowledges that Presidents are "entitled to surround themselves with experts who can serve as senior advisors." These positions fit squarely within this category.

In sum, none of the positions described above raises any valid concerns about accountability, transparency, or congressional oversight. It is true that the President has created a small number

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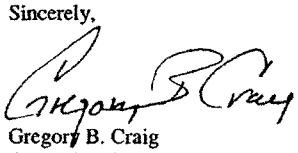
of new White House positions to assist him in addressing important matters of great public concern, in critical areas such as the environment and healthcare. Neither the purpose nor the effect of these new positions is to supplant or replace existing federal agencies or departments, but rather to help coordinate their efforts and help devise comprehensive solutions to complex problems. Every President has structured his staff in this manner—subject to the limits on the number of White House employees established by Congress—to help him address the most pressing challenges facing his administration. This is, and *always has been*, the traditional role of White House staff.

Moreover, none of the new White House or NSC positions violates the Appointments Clause. The Constitution requires that "Officers of the United States" be nominated by the President "by and with the Advice and Consent of the Senate." U.S. Const. art. II, § 2, cl. 2. The Department of Justice has concluded, in an opinion drafted during the prior Administration, that a position is a "federal office" if it is "invested by legal authority with a portion of the sovereign powers of the federal Government." *Officers of the United States within the Meaning of the Appointments Clause*, 2007 WL 1405459 (Apr. 16, 2007). As described above, none of the White House or NSC positions identified by Senator Collins exercises any independent authority or sovereign power. Their one and only role is to advise the President. Similarly, I am confident that none of the agency positions identified exercises any authority or sovereign power independent of their respective Senate-confirmed officials. In order to resolve the issue definitively, however, I have asked the general counsels of the various agencies at issue—the Departments of State, Treasury, Homeland Security, and Labor, as well as the EPA—to respond directly to this concern.

Thank you again for your letter. The President shares your firm commitment to protecting the Constitution and its fundamental system of checks and balances. We look forward to working with you in the future to ensure that Congress is able to fulfill its important constitutional role of providing "advice and consent" on significant appointments and conducting effective oversight of the Executive Branch. As always, I would be happy to discuss these issues further with you or your staff.

Sincerely,



Gregory B. Craig
Counsel to the President

Enclosure

cc. Hon. Lamar Alexander, U.S. Senator
Hon. Robert F. Bennett, U.S. Senator
Hon. Christopher S. Bond, U.S. Senator
Hon. Robert C. Byrd, U.S. Senator
Hon. Susan M. Collins, U.S. Senator

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Hon. Mike Crapo, U.S. Senator
Hon. Pat Roberts, U.S. Senator

Hon. Darrell Issa, U.S. Representative
Hon. Lamar Smith, U.S. Representative
Hon. Cliff Stearns, U.S. Representative

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