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RESOLVED, Presidential "czars" undermine Congress and the Constitution

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The Obama administration called him a "special master." Pretty much everybody else called him "czar." By any name, Kenneth Feinberg's task was the same: to set and oversee executive pay guidelines for companies that received federal monies from the \$700 billion Troubled Asset Relief Program (TARP) that became law in fall 2008. Obama certainly wasn't the first president to appoint a czar. In fact, he wasn't even the first to appoint Feinberg as czar. That distinction belonged to George W. Bush, who made Feinberg a czar—make that "special master"—of the September 11th Victim Compensation Fund. His job then was to decide how much of a \$7 billion government fund should go to each family of a September 11th victim.

No one can quite agree on who counts as a czar. It is best to think of the term, as political scientist William Howell suggests, as "political shorthand for a special policy adviser who is appointed by the president, without [Senate approval or] congressional oversight, for the purposes of coordinating and centralizing the activities of various executive branch offices."¹ Using this definition, czars have been with us for at least as long as the modern presidency, as has the term itself. On December 8, 1942, the *Washington Post* reported that

Executive orders creating new czars to control various aspects of our wartime economy have come so thick and fast in the last week that it is difficult for the public to remember all of them. In rapid succession we have acquired a petroleum czar, a manpower czar, and a food czar. These, of course, were added to a long list of other super-executives

directing war production, economic stabilization, price fixing, transportation, and so forth. So far as we can determine, the galaxy of czars is now complete, unless the President should decide to appoint a czar over the czars.

If Obama was far from the first president to appoint czars, his extraordinary reliance on them in his first year did attract unusually high levels of media attention and partisan criticism. John McCain, whom Obama defeated in the 2008 presidential election, took to Twitter in May 2009 to declare that "Obama has more czars than the Romanovs." *Politifact* fact checked the claim and pronounced McCain's charge to be true: there were eighteen Romanov czars, beginning with Michael Romanov in 1613 and ending with Nicholas II, while Obama had twenty-eight czars. (George W. Bush, it should be pointed out, also had more czars—twenty-eight—than the Romanovs.) Among the thirty-three czars Obama had appointed by the end of his first term were a health care czar, energy czar, Middle East czar, cybersecurity czar, domestic violence czar, auto recovery czar, stimulus accountability czar, and Guantánamo Bay closure czar.

It is not difficult to understand why presidents might decide to rely on czars. The federal bureaucracy in the twenty-first century is hugely complex, as are public policy problems that rarely fit neatly within the silo of a single department or agency. Many czar positions, as Obama's former press secretary Robert Gibbs explained, are "designed to bring many different efforts together and coordinate them in a way that is more structured and efficient than the governmental work chart might ordinarily allow." When all eyes are on the president to fix the nation's problems, particularly in times of crisis, it's not surprising that presidents take steps to make the bureaucracy more responsive to the policies they believe will address these problems.

That presidents find it advantageous to appoint czars who can increase their control over the bureaucracy and evade congressional oversight does not, of course, mean that the rest of us should accept these appointments as desirable or legitimate. Mitchel A. Sollenberger and Mark J. Rozell ask us to take seriously the damage czars do to the American political system. Czars, they maintain, violate the Constitution, undermine the separation of powers, and erode the accountability of government to Congress and the American people. Justin S. Vaughn and José D. Villalobos remain unconvinced. The hoopla about czars, they counter, is overblown. These appointees act in the name of the president and are accountable to the president, like any other White House aide. After all, what sort of czar can be summarily fired? The Romanovs would be unimpressed.

PRO: Mitchel A. Sollenberger and Mark J. Rozell

The problems that President Barack Obama inherited when he took office—two wars abroad and an economic crisis at home—generated widespread expectations that he would take resolute action. As with most crises, little thought was given to constraining the president's powers. Upon assuming office Obama acted quickly to appoint a wide array of so-called "czars" to coordinate the administration's response to the various crises the nation faced. These czars often wielded considerable power over regulatory policy and government spending, and yet they were not subject to a confirmation vote by the Senate.

For example, to deal with the effects of the financial crisis in the automobile industry, Obama appointed an auto recovery czar, Ed Montgomery.¹ The president tasked Montgomery with directing billions of federal dollars to communities most affected by the near collapse of the industry. Obama explained that Montgomery was to "direct a comprehensive effort that will help lift up the hardest-hit areas by using the unprecedented levels of funding available in our Recovery Act and throughout our government to create new manufacturing jobs and new businesses where they're needed most."² Obama then issued an executive order that created the White House Council on Automotive Communities and Workers and put the auto recovery czar in charge of directing and coordinating the activities of the council—a council that consisted of eleven cabinet secretaries, the attorney general, and numerous other high-level government officials.³

The position of auto recovery czar highlights the trouble with czars. The president appointed an official, not subject to Senate confirmation, to lead a newly created executive branch entity that had no statutory guidance and put him in charge of determining the distribution of public funds and coordinating policy among multiple departments and agencies. In such a world Congress is no longer a partner or even a participant in governance.

To be fair, the use of czars did not begin with the Obama administration. President George W. Bush appointed numerous czars with little protest from the conservative opinion leaders who now lambaste President Obama for engaging in the same practice. The Obama administration, however, has dangerously expanded the use of czars. Regardless of the partisan motivations of Obama's critics, the fact remains that czars are a constitutional aberration and a violation of core principles of separation of powers and governmental accountability. The practice of appointing czars should be stopped.

WHAT IS A CZAR?

Before making a case against czars, it is necessary to be clear about what is and is not an executive branch czar. Although the term has been popularized by media pundits and government officials, who have used it as shorthand for describing positions of great—perceived or actual—importance, there is no official title of "czar" in the U.S. Constitution, federal laws, or government manuals. There is not even a commonly accepted definition of the term among scholars. However, a helpful starting point is political scientist James Pfiffner's description of czars as "members of the White House staff who have been designated by the president to coordinate a specific policy that involves more than one department or agency in the executive branch; they do not hold Senate confirmed positions; nor are they officers of the United States."⁴

Czars have most famously been placed within the White House, but czars are also found within departments and agencies. Some of them have dual appointments; they are part of the White House staff and a part of a department or agency. Wherever they are housed within the executive branch, czars often make important decisions while operating largely outside of the normal constraints built into our constitutional system.

By our definition—building on Pfiffner's—a czar is an executive branch official who is not confirmed by the Senate and is exercising authority to promulgate rules, regulations, or any orders that bind government officials and the private sector. Although we do not attempt to classify czars based on where they fit in the executive branch structure, typically they include heads, assistant heads, deputies, and all other top-level personnel within departments and agencies. We do not consider government officials who merely advise or assist in the formation of policy to be czars. A czar's duties go well beyond advising and often entail supervising statutory programs, administering a policy area, controlling appropriated funds, or regulating industries.

The role of czars is troubling for a variety of reasons. Although the position of czar can have a statutory basis, more often czars exercise duties that are not grounded in law but are based on personal proximity to the president. Because czars are not subject to Senate confirmation, presidents can circumvent the customary processes of accountability built into the system of separated powers by appointing these officers. The lack of a Senate vetting process means that there is no check against presidents making poor choices. As czars often claim to exercise a merely advisory role to the president, they are further shielded by executive privilege from having to testify before Congress about their activities. Yet these officials often have responsibilities that go far beyond advising the president. To see why czars are so problematic, let's take a closer

look at what the Constitution envisioned and at how President Obama has used executive branch czars to subvert the nation's constitutional system of checks and balances.

HOW CZARS SUBVERT CHECKS AND BALANCES

Advocates of the use of czars maintain that these officials exercise advisory roles and that they do not exercise any controlling legal authority. If this were true, then it would appear that czars do not violate principles of governmental transparency and accountability. Certainly, few people would dispute that a president needs and is entitled to the assistance of trusted confidential advisers and that the president may rely on White House aides to fulfill that advisory function. The American political system has long recognized that presidents need help to carry out their duties. Even George Washington had the assistance of four cabinet secretaries and a handful of personal aides.

However, the Constitution never envisioned that staffing the presidency would be the president's prerogative alone. By constitutional design, the president cannot unilaterally create his own White House staff but instead must ask Congress to provide him with the needed staffing assistance. Likewise, the Constitution does not provide that the president unilaterally staff and manage the executive branch; as the appointments clause makes clear, the Senate must confirm principal officers. The Supreme Court has expanded on the meaning of the appointments clause to clarify that principal officers are those who exercise significant authority.⁵ Furthermore, the absolute authority of the legislative branch to control the structure and funding of the executive staff suggests that presidents should possess limited control over the form of help that they receive in the White House. The Constitution envisions that all White House aides must ultimately be answerable to Congress.

The risks of a loss of accountability and oversight are much greater when the president delegates authority to non-Senate-confirmed officials, especially ones placed within the White House or Executive Office of the President (EOP). To take one example, President Richard Nixon delegated his statutorily based economic powers to various officials, including the Cost of Living Council executive director Donald Rumsfeld, who also served as counselor to the president. As a dual appointee, Rumsfeld used his status as a White House adviser to refuse to appear before Congress.⁶ On at least two occasions Rumsfeld argued that he did not have to testify before a congressional committee in his role as executive director because of his "confidential relationship" with Nixon.⁷ Other examples abound of White House aides refusing to testify despite possessing more than just advisory powers.⁸

The lack of any clear delegation of authority is a substantial problem with President Obama's use of czars. For example, in 2009 Obama made Kenneth Feinberg his pay czar, a position that would establish and enforce executive pay guidelines for companies—including banks, insurance companies, and automobile makers—that had received federal bailout money from the \$700 billion Troubled Asset Relief Program. A year later Obama made Feinberg his claims czar to control a \$20 billion dollar fund established by British Petroleum (BP) in order to pay victims of the Gulf of Mexico oil spill of 2010. Neither position received Senate approval despite controlling billions of dollars of public and private money.

Consider the constitutional implications of the claims czar position. Assigning the duty of distributing large sums of private money from the BP spill victims fund effectively allows the president to engage in significant expenditures without congressional authorization or oversight. All can understand the necessity of BP compensating the victims, but that should happen through voluntary direct payment by the company itself or through litigation.⁹ The claims czar is exercising policy and regulatory authority, without being required to appear before Congress or account for expenditure decisions. That constitutes an end-run around the constitutional system and should never happen; no more than, for example, Exxon Corporation deciding to contribute billions of dollars to the government to set up a private non-appropriated fund to be administered by the president and a designated administrator not subject to Senate confirmation, with the president and the corporation negotiating over how to spend the money. Of course, the very idea is absurd but not significantly different from what is taking place between the president, claims czar, and BP.

One of the most controversial czar appointments was that of Carol Browner as the energy and climate czar. Obama tasked Browner, a former Environmental Protection Agency (EPA) administrator, with duties that far exceeded the role of his own EPA administrator, Lisa Jackson. Browner was the main force in the administration pushing climate change initiatives and played a key role in brokering a deal with automakers along with states to reduce greenhouse gas emissions. Her appointment thus elevated a White House czar above the role of a Senate-confirmed cabinet-level official. Indeed, during her tenure, Browner's profile and policy influence so vastly exceeded that of Jackson that few people outside Washington politics recognized the EPA head's name. Because Browner was not confirmed by the Senate and refused to testify on the Hill, congressional Republicans expressed strong opposition to Browner's expansive policy role and promised to challenge her authority if they were to achieve majority status. Very soon after the GOP took control of the House in January 2011, Browner resigned.

Another example is Nancy-Ann DeParle, who served as Obama's health czar charged with integrating "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."¹⁰ DeParle's vast duties placed her in a role similar to that of the Health and Human Services (HHS) secretary. Congress, by statute, chose to delegate certain powers to the HHS secretary, not to an unaccountable White House aide who does not have the same requirements to appear before Congress and report on various department programs and initiatives. Allowing nonelected and nonconfirmed officials who have little if any congressional oversight to exist through executive whim diminishes the accountability and checks built into our governing system.

The delegation of Congress's appropriations power clearly violates core constitutional principles as well. No one person, particularly someone who is in a nonstatutorily created position that does not require either Senate confirmation, routine testimony before Congress, or periodic reporting should have complete discretion over public funds.

To further illustrate, in September 2009, Obama appointed Ron Bloom as White House counselor for manufacturing policy—the car czar. Bloom simultaneously had an appointment within the Treasury Department as a senior adviser to Secretary Timothy Geithner. As car czar, Bloom took over for Steven Rattner, who left the administration when New York attorney general Andrew Cuomo's investigation into a state pension fund scandal involving him began to heat up.¹¹ As Obama's second car czar, Bloom had the primary role in negotiating a deal to provide government loans to General Motors and Chrysler. After negotiations fell apart between Chrysler and Fiat, Bloom made a call to Fiat CEO Sergio Marchionne, at which time the lingering issues were resolved and Marchionne took the leadership of the beleaguered Chrysler.¹² As a sign of the power and influence that Bloom held in the Obama administration, *Time* magazine named him one of the world's one hundred most influential people for 2010. Obama also appointed Adolfo Carrion as urban affairs czar "to ensure that Federal Government dollars targeted to urban areas are effectively spent on the highest impact programs."¹³ Sen. John Cornyn, R-Tex., protested, "It is inappropriate for them to steer the distribution of taxpayer funds without congressional oversight."¹⁴

The congressional effort to set up a legal and accountable structure—using statutes to create agencies and their programs and confirming the top officials—is greatly undermined by czars. The capacity of White House aides to operate outside the system of accountability has led to significant constitutional conflicts in the past, notably, for example, the Iran–Contra scandal

during the Ronald Reagan era. In that case, National Security Council (NSC) advisers Robert McFarlane and John Poindexter along with Lieutenant Colonel Oliver North, deputy director of political-military affairs for the NSC, carried out a scheme of selling arms, negotiating the release of hostages, and funneling money to the Contras—a rebel group that opposed and sought the overthrow of the Nicaraguan government. Reagan's White House aides operated outside any statutory authority and even violated Congress's clear restriction set forth in law that forbade the U.S. government from aiding the Contras.

CONCLUSION

The roles of executive branch czars raise serious constitutional issues. The U.S. Constitution specifies a system of accountability, with Congress having the power to enable the functions and funding of executive branch offices. Yet czars create a special dilemma in that they are not subject to confirmation by the Senate, they lack any statutorily created duties, and in many cases in the Obama White House they appear to be supplanting the roles of confirmed cabinet secretaries. Contemporary presidential aides increasingly exercise considerable policy, regulatory, and spending decision-making power but, in turn, there has not been a move to provide greater accountability as well. Instead, presidents claim their aides are protected from testifying before Congress by separation of powers concerns. Such an argument belies a commonsense understanding of a republican form of government based on checks and balances and a strong presumption in favor of legislative policymaking.

The argument against czars in no way discounts the need for presidents to seek policy advice from their staff, oftentimes in ways that are protected by executive privilege claims when core or quintessential presidential powers are involved. We respect the position of the defenders of czars that the scope of many contemporary policy problems validates the need for some system of coordination among departments and agencies. In this regard, czars may have a beneficial impact on the policy system even if various presidential scholars have shown that the concentration of power in the presidency creates an unworkable or, at best, less than ideal administrative structure.¹⁵ Nonetheless, merely because some office may have utility does not mean that it is constitutional.

Czars violate the constitutional principles of separation of powers and democratic accountability and thus should have no role in our governing system. If there is a need for new or modified government structure, then the president should go to Congress and not unilaterally create offices or augment the powers of existing executive branch officials.

DEBATING THE PRESIDENCY

Third Edition

Conflicting Perspectives On The American Executive

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