

May 2011

Executive Branch Czars, Who Are They? Are They Needed? Can Congress Do Anything About Them?

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EXECUTIVE BRANCH CZARS, WHO ARE THEY? ARE THEY NEEDED? CAN CONGRESS DO ANYTHING ABOUT THEM?

Jonathan D. Puvak*

A czar is someone who can run it all. In a town like Washington that has so many fiefdoms and committees with long acronyms, calling someone simply a ‘czar’ gets the point across.¹

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INTRODUCTION

In the 1830s, *Washington Globe* Publisher, Frank Blair, dubbed then-President of the Bank of the United States, Nicholas Biddle, “Czar Nicholas.”² President Andrew

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¹ Susan Trausch, *In This Corner; Washington Has Gone Czar Crazy; Hang on, America*, BOSTON GLOBE, Feb. 21, 1989, at 29 (quoting Alixe Glen, Deputy Press Secretary to President George H. W. Bush).

² Ben Zimmer, *Czar Wars: How Did a Term for Russian Royalty Work its Way into American Government?*, SLATE (Dec. 19, 2008, 11:24 AM), <http://www.slate.com/id>

Jackson fundamentally opposed the centralized power of the National Bank and was embroiled in a feud with Biddle.³ Over the course of the nineteenth century, “czar” emerged as a “label for anyone with tyrannical tendencies.”⁴ Later, in the mid-twentieth century, the term “czar” was proliferated by the media as a slang term when referring to presidential advisors appointed to handle specific policy directives without the advice and consent of the Senate.⁵

The present and previous presidential administrations of Barack Obama and George W. Bush respectively, demonstrated a remarkable increase in the number of non-confirmed advisors.⁶ For the Obama administration, the increase has resulted in a great deal of media coverage and, in particular, sparked debate among supporters⁷ and opponents,⁸ legislation by the United States House of Representatives,⁹ and congressional hearings.¹⁰ Despite the proliferation, President Obama is not the first President to appoint policy advisors; the practice dates back to 1939 and President Franklin D. Roosevelt.¹¹ Despite the historical recognition that some level of presidential advice

/2207055/ (discussing the historical rise and usage of “czar” in American politics in the early twentieth century; concurrently, Russia’s own tsar “Nicholas I was at the height of his repressive nationalist regime”).

³ *Id.* (pointing out that the feud between President Jackson and Biddle became the “Bank War” of 1832–36).

⁴ *Id.*

⁵ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 455 (4th ed. 2000) (defining “czar” as “[a] person having great power; an autocrat,” or “[a]n appointed official having special powers to regulate or supervise an activity”); Zimmer, *supra* note 2.

⁶ See Cody M. Brown & Jeffrey D. Ratner, *White House Czars: Is Congress to Blame?*, CHRISTIAN SCI. MONITOR (Oct. 19, 2009), <http://www.csmonitor.com/Commentary/Opinion/2009/1019/p09s04-coop.html>.

⁷ See Mike Memoli, *DNC Czar Memo*, REAL CLEAR POLITICS (Sept. 16, 2009), <http://realclearpolitics.blogs.time.com/dnc-czar-memo/>.

⁸ *Questions Raised Over Influence of Obama ‘Czars,’* FOXNEWS (July 13, 2009), <http://www.foxnews.com/politics/2009/07/13/questions-raised-influence-obama-czars/>; *Van Jones’ 9/11 Truther Past Raises Questions About Obama’s ‘Czars,’* FOXNEWS (Sept. 4, 2009), <http://www.foxnews.com/story/0,2933,546602,00.html>.

⁹ See Czar Accountability and Reform (CZAR) Act of 2009, H.R. 3226, 111th Cong. (2009); Sunset All Czars (SAC) Act, H.R. 3569, 111th Cong. (2009); Full-Year Continuing Appropriations Act, H.R. 1, 112th Cong., amend. 89 (2011).

¹⁰ *Presidential Advice and Senate Consent: The Past, Present, and Future of Policy Czars: Hearing Before the S. Comm. on Homeland Sec. & Gov’t. Affairs*, 111th Cong. 37 (statement of Sen. Susan M. Collins, Ranking Member, S. Comm. on Homeland Sec. & Gov’t. Affairs); *Examining the History and Legality of Executive Branch Czars: Hearing Before the Subcomm. on the Const. the S. Comm. on the Judiciary*, 111th Cong. 42 (2009) (statement of Sen. Russell Feingold).

¹¹ *Presidential Advice and Senate Consent: The Past, Present, and Future of Policy Czars: Hearing Before the S. Comm. on Homeland Sec. & Gov’t. Affairs*, 111th Cong. 14 (2009) (statement of Harold C. Relyea, specialist in American national government with the Congressional Research Service) [hereinafter Relyea Statement].

is necessary, the exponential increase of czar appointments is troubling.¹² This upward trend demonstrates an unwary and unchecked expansion of the power of the executive branch. The public debate appears to reflect two separate, but related issues. For those concerned with constitutional adherence the primary issue is that the appointment of new executive branch officials and White House advisors may not be consistent with the Appointments Clause of the United States Constitution.¹³ While, for others the practical issue is that the expansive use of czars raises accountability, legislative oversight and governmental efficiency concerns.¹⁴ Both categories of issues implicate constitutional concerns of separation of powers,¹⁵ checks and balances,¹⁶ and doctrinal constitutional adherence.

Since taking office, President Obama has notably increased the number and authority of advisors appointed through this controversial appointment practice,¹⁷ continuing an executive branch trend that should be controlled and slowed. The rampant increase crosses the line between positioning the President to make the most informed policy decisions and abusing the executive appointment power in disregard of constitutional principles. The Czar Accountability and Reform Act (CZAR Act), introduced in the House of Representatives in July 2009, attempts to exercise Congress's power over the purse in order to curb the appointment of czars.¹⁸ This legislation is

¹² Brown & Ratner, *supra* note 6.

¹³ U.S. CONST. art. II, § 2, cl. 2 (“[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 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.”).

¹⁴ Letter from Sen. Robert C. Byrd to President Barack Obama (Feb. 23, 2009), *available at* http://www.eenews.net/public/25/9865/features/documents/2009/02/25/document_gw_02.pdf [hereinafter Sen. Byrd Letter]; Letter from Sen. Susan M. Collins to President Barack Obama (Sept. 15, 2009), *available at* <http://collins.senate.gov/public/continue.cfm> (follow “Press Releases” hyperlink; then search for “September 15, 2009”) [hereinafter Sen. Collins Letter]; Letter from Sen. Russell Feingold to President Barack Obama (Sept. 15, 2009), *available at* <http://thehill.com/blogs/blog-briefing-room/news/59071-Feingold-questions-obama-czars> [hereinafter Sen. Feingold Letter]. Sen. Collins’s letter was also signed by Senators Lamar Alexander, Kit Bond, Mike Crapo, Pat Roberts and Bob Bennett.

¹⁵ THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961).

¹⁶ *Id.*

¹⁷ *See* Brown & Ratner, *supra* note 6.

¹⁸ *See* CZAR Accountability and Reform (CZAR) Act of 2009, H.R. 3226, 111th Cong. As of January 2011, this bill never moved beyond the House Committee on Oversight and Government Reform. The relevant text of the CZAR Act appears below:

To provide that appropriated funds may not be used to pay for any salaries or expenses of any task force, council, or similar office which is established by or at the direction of the President and headed by an individual who has been inappropriately appointed to such position (on other than an interim basis), without the advice and consent of the Senate. . . .

a step in the correct direction towards limiting the controversial trend of presidential czar appointments, but does not go far enough to create the accountability, government efficiency and legislative oversight that should be required from all branches of government.

This Note argues that legislation regulating the appointment of czars—which would impose financial constraints, mandate legislative oversight, and provide legislative removal—is necessary to minimize the constitutionality and accountability concerns. Part I provides a history of czar appointments by the executive branch, and introduces several of the most prominent czar positions and their stated policy functions. Part II discusses the legitimacy of czar appointments within the case law of the Appointments Clause and the federal appointments process. Administrative and public laws and regulations govern much of the processes in the appointment arena and are discussed in this section.¹⁹ In particular, this analysis attempts to explain the constitutional frictions between the czar appointments and the intended accountability and checks and balances of the Appointments Clause. Part III discusses current legislative attempts to regulate and argues that the legislation does not fully alleviate public concerns and, further, shows a diminished chance of actual passage. This section suggests modifications or supplemental legislation that will provide for accountability and oversight and allow for informed and efficient executive leadership. Additionally, this section discusses the feasibility and impact of any suggested legislation.

I. RISE OF THE CZARS

These single-purpose administrators had the great advantage of simplicity of mission. They, their staffs and the public knew exactly what

-
- (a) In General-Appropriated funds may not be used to pay for any salaries or expenses of any task force, council, or similar office—
- (1) which is established by or at the direction of the President; and
 - (2) the head of which—
 - (A) is appointed to such position (on other than an interim basis) without the advice and consent of the Senate;
 - (B) is excepted from the competitive service by reason of its confidential, policy-determining, the policy-making, or policy-advocating character; and
 - (C) performs or delegates functions which (but for the establishment of such task force, council, or similar office) would be performed or delegated by an individual in a position to which the President appoints an individual by and with the advice and consent of the Senate.

Id. § 2.

¹⁹ However, exhaustive coverage of the intricacies of administrative law in this topic area is beyond the scope of this Note.

they were trying to do. In general they ‘got results.’ They ‘bulled their way through,’ overcoming many obstacles. But they also made a great deal of confusion for other programs . . .²⁰

A. Creation and Criticism

The sixteenth century Russian meaning of “tsar” has evolved to become a colloquial term in American politics.²¹ Publisher Frank Blair introduced the term czar into American politics,²² and Franklin D. Roosevelt’s rapid expansion of the government and administrative reform during World War II secured a permanent home for the term within the executive branch.²³

The term czar is most commonly used by the media, but President Obama and other government officials have, on occasion, referred to presidential advisors as czars.²⁴ Other government officials have spoken in opposition to referring to someone as a czar. For example, Senator Joseph Lieberman has denounced the historical usage of czar and expressed his personal discontent with the present usage of this term to refer to those serving in specific advisor positions.²⁵

²⁰ LUTHER GULICK, *ADMINISTRATIVE REFLECTIONS FROM WORLD WAR II*, at 100 (1948) (quoting Gulick, commenting on the President Franklin D. Roosevelt’s use of czardoms).

²¹ *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 455 (4th ed. 2000) (defining “czar” as “[a] male monarch or emperor who ruled Russia until the revolution of 1917”); Zimmer, *supra* note 2. “Tsar” or “Tzar” historically refers to an emperor, autocrat or equivalent of a King. Slavic in origin, “tsar” or “czar” historically reflected images of the tyrannical Romanov dynasty that controlled Russia from approximately 1613 to the Revolution in 1917. Now, “czar” represents an individual with significant power or someone acting with tyrannical tendencies. See ROBERT SERVICE, *A HISTORY OF MODERN RUSSIA: FROM TSARISM TO THE TWENTY-FIRST CENTURY*, at xxiii, 1 (3d ed. 2009).

²² See Zimmer, *supra* note 2.

²³ *Id.*

²⁴ President Barack Obama, Remarks at Urban and Metropolitan Policy Roundtable (July 13, 2009) (transcript available at <http://www.whitehouse.gov/the-press-office/remarks-president-urban-and-metropolitan-roundtable>) (referring to Gil Kerlikowske as the “Drug Czar” and not his official title: Director of the Office of National Drug Control Policy).

²⁵ *Presidential Advice and Senate Consent: The Past, Present, and Future of Policy Czars: Hearing Before the S. Comm. on Homeland Sec. & Gov’t. Affairs*, 111th Cong. 29–30 (2009) (statement of Sen. Joseph I. Lieberman, Chairman, S. Comm. on Homeland Sec. & Gov’t. Affairs).

I am sure many people here will remember the moment in the classic story “Fiddler on the Roof” when one of the citizens of Anatevka, Russia, asks the local rabbi, “Rabbi, is there a prayer for the czar?” And the local rabbi answers, “Yes, my son, there is. It is ‘God bless and keep the czar, far away from us.’” May I paraphrase that prayer this morning and ask that God bless and keep the title of ‘czar’ forevermore away from the American Government. I am going to try to do my best not to

Critics and the media use czar as a pejorative, attention-grabbing title and have effectively increased the public criticism of czar appointments since President Obama took office. Legislators,²⁶ political commentators,²⁷ and the public at large have expressed opinions on this appointments practice.²⁸ Eric Cantor, a Virginia Congressman, pointed out that President Obama promised to reverse the ever increasing power of the executive branch during his campaign rhetoric.²⁹ Cantor maintains that Obama failed to deliver on his promise and has instead “appoint[ed] a virtual army of ‘czars’ [and] . . . embarked on an end-run around the legislative branch of historic proportions.”³⁰ Cantor emphasizes that the broad authority of the czars presents a threat to the system of checks and balances.³¹

Conservative commentator Michelle Malkin devoted an entire chapter to czars in her 2009 book, *Culture of Corruption*.³² Malkin states, “[i]n effect, the Obama administration has created a two-tiered government—fronted by Cabinet secretaries able to withstand public scrutiny (some of them, just barely) and run behind the scenes by shadow secretaries with broad powers beyond the reach of congressional accountability.”³³ Although Malkin’s observations reflect her personal opinions, many of her suggestions highlight public concerns. Malkin and Cantor present similar arguments in suggesting that the Obama administration has created new posts by executive orders to avoid the potential pitfalls of the Senate nomination process.³⁴

use the word ‘czar’ in this regard again. So from now on, I am going to try to call the drug czar the ‘National Anti-Drug Policy Coordinator,’ the environmental czar the ‘National Environmental Advisor,’ and the pay czar, well, today he probably should be called the ‘National Pay Master.’”

Id.

²⁶ See Eric Cantor, Op-Ed, *Obama’s 32 Czars*, WASH. POST, July 30, 2009, at A19; *supra* note 14 (citing letters from members of Congress to President Obama).

²⁷ See Van Jones’ 9/11 Truther Past Raises *Questions About Obama’s ‘Czars,’ supra* note 8.

²⁸ See We Support H.R. 3226: The Czar Accountability and Reform Act of 2009, FACEBOOK, <http://www.facebook.com/group.php?gid=231172810626#!/group.php?gid=128143764145> (last visited Apr. 10, 2011) (featuring a “common interest” Facebook group dedicated to sharing thoughts about the concerns over “czar” appointments); Presidential “CZARS” are Unconstitutional, FACEBOOK, <http://www.facebook.com/group.php?gid=231172810626> (last visited Apr. 10, 2011) (offering a public forum for opposition to new czar appointments).

²⁹ See Cantor, *supra* note 26 (“The biggest problems that we’re facing right now have to do with George Bush trying to bring more and more power into the executive branch and not go through Congress at all. And that’s what I intend to reverse when I’m [P]resident of the United States.” (quoting then-Senator Barack Obama)).

³⁰ *Id.*

³¹ *Id.*

³² MICHELLE MALKIN, *CULTURE OF CORRUPTION: OBAMA AND HIS TEAM OF TAX CHEATS, CROOKS, AND CRONIES* 141 (2009).

³³ *Id.*

³⁴ *Id.*; see also Cantor, *supra* note 26.

Representative Jack Kingston stands strongly opposed to the presidential appointment of czars.³⁵ Kingston has vehemently criticized the Obama administration for its increased appointment of advisors not confirmed by the Senate.³⁶ His criticism is directly targeted at the Obama administration and what Kingston believes is an unnecessary proliferation of the appointment of non-Senate confirmed advisors.³⁷ Accountability and the financial resources necessary to support the advisor positions are the targets of Kingston's criticisms.³⁸ Like other critics, Kingston recognizes that the "President has the right to pick his own team and push his own agenda," and Congress should demand "transparency, accountability and balance."³⁹ Kingston advocates adherence to the framework of the Appointments Clause because he believes the structure offers the appropriate middle ground to allow the President his freedom, but places a sensible limit on such freedom.⁴⁰

Criticism not only arises from Republicans and conservative commentators, as Democratic leaders including the late Sen. Robert Byrd and former Sen. Russell Feingold have also raised similar concerns directly to President Obama.⁴¹ Statistics demonstrate that the Bush and Obama administrations have continued to expand the number of policy-specific, non-Senate confirmed advisors, but, historically, other presidential administrations have varied in the appointments of policy specific advisors.⁴²

³⁵ Jack Kingston, *Who Czar They? President Obama's Czars Leave More Questions Than Answers* (July 27, 2009), available at <http://kingston.house.gov/News/DocumentSingle.aspx?DocumentID=139512>. Representative Kingston (R-GA), as a member of the House Appropriations Committee, has extensively criticized the Obama administration's appointment of czars. Kingston introduced the Czar Accountability and Reform Act in the United States House of Representatives in July 2009. *Id.*

³⁶ *Id.*

³⁷ *Id.*

Who are these people and why are they necessary? . . . What qualifies a college professor to set executive salaries? We don't know the answers to these questions because unlike cabinet secretaries, judges, and hundreds of other presidential appointments, these czars have bypassed Article II, Section 2 of the U.S. Constitution which mandates the advice and consent of the Senate when the President appoints principle officers. Since these czars are the President's point persons—many only reporting directly to him—on important issues, coming before the Senate for confirmation hearings would be important . . . [t]ransparency isn't the only issue. In these times of tight budgets, we need to know what these new offices are going to cost us. Most czars make \$172,000. Each has an office, a staff, transportation and travel budgets. Who's watching this?

Id. For more information on the salaries and financial concerns of czars, visit Rep. Kingston's website at <http://kingston.house.gov/czar/>.

³⁸ See Kingston, *supra* note 35.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See Letter from Byrd, *supra* note 14; Letter from Feingold, *supra* note 14.

⁴² Randy James, *A Brief History of White House Czars*, TIME, Sept. 23, 2009, available at <http://www.time.com/time/politics/article/0,8599,1925564,00.html>; Nancy Matthis, *The*

B. Varied Presidential Use of Czars

Czar appointments have steadily increased since their inception in the middle of the twentieth century, though some presidential administrations have appointed more than others. The waves of usage appear to transcend party lines, with some Democrat and Republican administrations expanding the use and others just maintaining or declining to appoint.⁴³ Some presidents have frequently appointed czars while others have declined their use entirely.⁴⁴ Presidents Nixon, Reagan, Carter, H.W. Bush and Clinton each had far fewer czar positions than either George W. Bush or Barack Obama.⁴⁵ By some accounts, President Obama has as many as forty-four czars,⁴⁶ either newly appointed or held over from the previous Bush administration.⁴⁷ Regardless of holdovers, President Obama has increased the number of new appointments by at least ten.⁴⁸

C. Meet the Current Czars

The broad policy functions of many of the current Obama administration czars can generally be derived from their titles. Some of the present czar positions include: Car, Counterterrorism, Energy, Health, Science, and Trade.⁴⁹ Others appear to have more specific functions, such as: Afghan-Pakistan, AIDS, Food, Government Performance, Great Lakes, Green Jobs, Guantanamo Closure, Health, Mideast Peace, Mideast Policy, Pay, Domestic Violence, Safe Schools, Troubled Asset Relief Program

Compleat List of Czars, AM. DAUGHTER (Aug. 3, 2009, 6:05 AM), <http://frontpage.american-daughter.com/?p=2385>.

⁴³ See James, *supra* note 42; Matthis, *supra* note 42.

⁴⁴ James K. Glassman, *Close, But No Big Czar*, REASON, Dec. 18, 2000, available at <http://reason.com/archives/2000/12/18/close-but-no-big-czar> (reflecting that history shows that Roosevelt created the first czar position, but commentators disagree on which “modern” President appointed the first czar (Nixon or Reagan) (in this respect czar refers to someone appointed by the President without Senate confirmation who provides advice on a specific policy issue)).

⁴⁵ *Examining the History and Legality of Executive Branch Czars: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 7 (2009) (statement of Matthew Spalding, Director, B. Kenneth Simon Center for American Studies, Heritage Foundation).

⁴⁶ News Release, Rep. Patrick T. McHenry, Rep. McHenry: 44 Czars Must Testify Before Congress (Sept. 10, 2009), available at 2009 WLNR 17706185 (referencing a letter from Rep. Patrick T. McHenry to Rep. Edolphus Towns, Chairman of House Committee on Oversight and Government Reform requesting a congressional hearing on czars).

⁴⁷ See Matthis, *supra* note 42.

⁴⁸ Letter from Gregory B. Craig, Counsel to the President, to Sen. Russell Feingold (Oct. 5, 2009), available at <http://theplumline.whorunsgov.com/wp-content/uploads/2009/10/feingoldletter.pdf>.

⁴⁹ Cantor, *supra* note 26, Matthis, *supra* note 42 (providing updated list of all the czars currently serving in the Obama administration).

(TARP), Water, and Weapons of Mass Destruction (WMD).⁵⁰ Each of these positions are currently occupied.⁵¹

Notably, the presidential cabinet consists of the Vice-President and the secretaries of fifteen executive departments including: Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Homeland Security, Housing and Urban Development, Interior, Justice, Labor, State, Transportation, Treasury, and Veterans Affairs.⁵² Comparison of cabinet-level positions and czar positions reveals a substantial overlap. For example, consider that there is an Energy Czar and a Secretary of Energy, a Secretary of Labor and a Pay Czar, and a Secretary of State and a Mideast Peace Czar.

In recent months, some czars have received greater notoriety and media coverage than others. Kenneth Feinberg, the once “Pay Czar” provides a prominent current example.⁵³ The Obama administration appointed Feinberg as the Special Master of Compensation in June 2009, to handle concerns over executive compensation for Troubled Asset Relief Program (TARP) recipients.⁵⁴ TARP was created under the Emergency Economic Stabilization Act of 2008,⁵⁵ in which Congress directed the Treasury Department to ensure that all TARP recipients implement acceptable standards for executive compensation.⁵⁶ Feinberg was appointed to determine and set compensation for the recipients of the TARP funding.⁵⁷ Feinberg was appointed, like most other czars, without Senate confirmation.⁵⁸ The actions of Feinberg have drawn the greatest constitutional criticism because he has exercised significant legal authority

⁵⁰ See Cantor, *supra* note 26; Matthis, *supra* note 42.

⁵¹ Cantor, *supra* note 26; Matthis, *supra* note 42.

⁵² The Cabinet, <http://www.whitehouse.gov/administration/cabinet/> (last visited Apr. 10, 2011).

⁵³ Blank Rome Government Relations, *Obama Introduces ‘Pay Czar’ and ‘Say on Pay,’* FINANCIAL REFORM WATCH (June 10, 2009), <http://www.financialreformwatch.com/2009/06/articles/executive-pay/obama-introduces-pay-czar-and-say-on-pay/>.

⁵⁴ TARP Standards for Compensation and Corporate Governance 74 Fed. Reg. 28, 394 (Jun. 15, 2009) (codified at 31 C.F.R. pt.30 (2011)); see also Michael W. McConnell, Op-Ed, *The Pay Czar is Unconstitutional*, WALL ST. J., Oct. 30, 2009, at A25.

⁵⁵ Emergency Economic Stabilization Act (EESA) of 2008, Pub. L. No. 110-343, 112 Stat. 3765 (codified in scattered sections of 2, 5, 7, 11, 12, 15, 16, 28, 29, 30, 21, 42, 43, and 49 U.S.C.); see also *Investment Programs, Financial Stability*, U.S. DEPT. OF TREASURY, <http://www.treasury.gov/initiatives/financial-stability/investment-programs/Pages/default.aspx> (last visited Apr. 10, 2011) (explaining that the purpose of EESA was to prevent further economic collapse and TARP was designed to stabilize the United States financial system).

⁵⁶ See McConnell, *supra* note 54.

⁵⁷ *Id.* (“Treasury Secretary Timothy Geithner created the office of ‘Special Master’ for compensation, delegated his TARP authority to set compensation standards to this officer, and appointed Mr. Feinberg (a lawyer and mediator) to this position, without obtaining Senate confirmation.”).

⁵⁸ *Id.*

by issuing regulations that carry the force of law.⁵⁹ The implications of Feinberg's actions are discussed in further detail in Part II. C.

Currently, more than 1,200 executive branch positions require Senate confirmation.⁶⁰ This high number creates an administrative roadblock for appointees. Recent presidential administrations have spent the majority of their first year in office attempting to fill positions, but forty years ago, a President could appoint a full staff in two or three months.⁶¹ Such a daunting task can be costly for a new administration eager to institute new policies. The presidential headaches of dealing with the appointments process help to explain the proliferation in the appointment of advisors without the advice and consent of the Senate. Although these practical concerns present a compelling argument to permit the expansion of non-confirmed appointments, the constitutional structure should not be ignored. An evaluation of the Appointments Clause and subsequent precedents allow for a better understanding of how the czar appointments fit into the long-established constitutional framework.

As suggested by members of Congress, scholars, and the public, the appointment of a large number of high-ranking officers presents the potential upheaval of the checks and balances system and a dilemma between two viewpoints.⁶² First, absent accountability, these advisors are left to advance policy and largely dictate the agenda of social directives. Second, the President should be encouraged to surround himself with the "best and brightest" individuals to advise him on his most important decisions.⁶³

II. EXECUTIVE BRANCH APPOINTMENTS

It is the business of removal and appointment which presents the serious difficulties. All others compared with these, are as nothing.⁶⁴

A. Appointments WITH the "Advice and Consent" of the Senate⁶⁵

The appointments process has long been a troubling area for Presidents,⁶⁶ even though the vast majority of executive branch positions are filled by political

⁵⁹ Ben Votava, "Pay Czar" Could Bring First Legal Challenge for Constitutionality of Appointees, EXAMINER, (Oct. 22, 2009, 8:04 PM), <http://www.examiner.com/dupage-county-libertarian-in-chicago/pay-czar-could-bring-first-legal-challenge-for-constitutionality-of-appointees>.

⁶⁰ See Jeff McDermott, *Reform of the Presidential Appointment Process*, 56 FED. LAWYER 6 (2009).

⁶¹ *Id.* ("[W]hat took two and one-half months for President John F. Kennedy took President George W. Bush nearly nine months.")

⁶² See *supra* Part I.A.

⁶³ See McDermott, *supra* note 60, at 24.

⁶⁴ MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS*, at xiii (2003) (quoting Thomas Jefferson).

⁶⁵ See U.S. CONST. art. II, § 2, cl. 2.

⁶⁶ See GERHARDT, *supra* note 64, at xv–xvii.

appointment.⁶⁷ While Presidents are elected without formal requirement of prior federal government service, the only required qualification for political appointees is the Senate confirmation process.⁶⁸ The intention is that the Senate will sort out and select those most qualified for these important governmental positions. The executive branch includes thousands of positions that are directly or indirectly appointed by the President.⁶⁹ Some of these positions are housed within the White House and others among executive branch agencies such as the Departments of State, Treasury, Homeland Security, Labor, and the Environmental Protection Agency.⁷⁰

The United States Constitution provides only Article II, Section 2, Clause 2, to dictate the appointment of officers.⁷¹ As noted by commentators, the appointment is a single mechanism: presidential nomination and Senate confirmation.⁷² This structure provides no explicit recognition of exceptions and appears to apply broadly to all officials, regardless of their status or power.⁷³ Further, there is a “presumption of confirmation that works to the advantage of the president and his nominees.”⁷⁴ Only a majority of Senate votes are required for approval, much less than other constitutional provisions that require two-thirds.⁷⁵ The presumption of confirmation results from the practical difficulty for a small group of Senators to garner the necessary support to block a seemingly qualified nominee.⁷⁶ The President can work proactively to staff “influential federal offices with people committed to his political or constitutional views.”⁷⁷

The Framers’ intent for balance between executive power and congressional encroachment is embodied in the structure of the Appointments Clause.⁷⁸ “The Framers anticipated that the President would be less vulnerable to interest-group pressure and

⁶⁷ See G. Calvin Mackenzie, *The State of the Presidential Appointments Process*, in INNOCENT UNTIL NOMINATED: THE BREAKDOWN OF THE PRESIDENTIAL APPOINTMENTS PROCESS 2 (G. Calvin Mackenzie ed., 2001); DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE 2–8 (2008).

⁶⁸ Mackenzie, *supra* note 67, at 2.

⁶⁹ See McDermott, *supra* note 60.

⁷⁰ *The Executive Branch*, WHITE HOUSE, <http://www.whitehouse.gov/our-government/executive-branch> (last visited Apr. 10, 2011) (providing a list of all of the Executive branch agencies and their stated missions); *Official U.S. Executive Branch Web Sites*, LIBRARY OF CONGRESS, <http://www.loc.gov/tr/news/fedgov.html> (last visited Apr. 10, 2011).

⁷¹ U.S. CONST. art. II, § 2, cl. 2.

⁷² See MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 39 (2003).

⁷³ *Id.* at 40.

⁷⁴ *Id.* at 41 (explaining that the standard for approval for nominees is much lower than other legislative action, like passage of laws or treaties).

⁷⁵ *Id.*

⁷⁶ *Id.* at 42.

⁷⁷ *Id.* at 43.

⁷⁸ *Edmond v. United States*, 520 U.S. 651, 659 (1997).

personal favoritism than would a collective body.”⁷⁹ By providing the appointment power only to the President, “[t]he sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation.”⁸⁰ The presidential nomination provision provides executive autonomy, but the “Advice and Consent”⁸¹ requirement prevents executive abuses and promotes “a judicious choice of [persons] for filling the offices of the Union.”⁸² In *The Federalist Papers*, Alexander Hamilton noted:

The blame of a bad nomination would fall upon the president singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the senate. . . . If an ill appointment should be made the executive for nominating and the senate for approving would participate though in different degrees in the opprobrium and disgrace.⁸³

Presidential nomination and Senate confirmation is the default appointment mechanism, but the last portion of Clause 2 provides another appointment mechanism that allows Congress to deviate from presidential nomination.⁸⁴ This last portion of the clause is often referred to as the “Excepting Clause,”⁸⁵ and the Supreme Court has noted that the purpose of the Excepting Clause was administrative convenience.⁸⁶ However, the Court, in *United States v. Germaine*, clarified that administrative convenience only applies to the appointment of “inferior” officers.⁸⁷

Some authors have explained the Appointments Clause as embodying two related clauses that create two distinct appointment procedures.⁸⁸ These distinct procedures, as explained above, are: “presidential nomination and Senate confirmation as the default method, and vesting in one of three authorized appointers as an optional alternative method for certain types of officers.”⁸⁹

⁷⁹ *Id.*

⁸⁰ THE FEDERALIST NO. 76, at 510–11 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

⁸¹ U.S. CONST. art. II, § 2, cl. 2.

⁸² THE FEDERALIST NO. 76, *supra* note 80, at 510 (Alexander Hamilton).

⁸³ THE FEDERALIST NO. 77, *supra* note 80, at 517 (Alexander Hamilton).

⁸⁴ U.S. CONST. art. II, § 2, cl. 2 (“[B]ut 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”).

⁸⁵ *Edmond v. United States*, 520 U.S. 651, 660 (1997).

⁸⁶ *United States v. Germaine*, 99 U.S. 508, 510 (1878).

⁸⁷ *Id.*

⁸⁸ See Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745, 748–51 (2008).

⁸⁹ *Id.* at 745 (examining the two related clauses and the requirements of each respective appointments process). See generally 91 C.J.S. *United States* § 53 (2010) (providing case citations dealing with specific issues relating to the appointments process such as: “purpose,” the

The boundaries of the Appointments Clause have been the topic of both significant debate and litigation. The Appointments Clause refers to “Officers of the United States,” and several cases have wrestled with a definition of “Officer” and attempted to draw a distinction between “principal” and “inferior” officer.⁹⁰ The text of the Appointments Clause makes a distinction between officers and “inferior” officers, permitting Congress to “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.”⁹¹ The Court, in *Buckley v. Valeo*, found that the phrase “Officers of the United States” was “intended to have [a] substantive meaning” and stated that “[w]e think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States,’ and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of that Article.”⁹²

The conclusion in *Buckley* follows from the two-class framework articulated in *United States v. Germaine*: one class requiring presidential nomination and Senate confirmation and an inferior class of officers whose appointment is otherwise.⁹³ However, the Supreme Court has noted that the *Buckley* decision is helpful in marking the line between officer and non-officer, but does not mark the line between principal and inferior officer.⁹⁴ But, under the *Buckley* framework, an “Officer of the United States” is someone who exercises “significant authority pursuant to the laws of the United States.”⁹⁵

Other cases have specifically pronounced whether a particular office is or is not inferior, but none have set forth a definitive test to determine if an office is “inferior” under the Appointments Clause.⁹⁶ In *Morrison v. Olson*, the Supreme Court wrestled with the distinction between principal and inferior officer.⁹⁷ At issue in *Morrison* was

“[d]istinction between officer and non-officer,” “[i]nferior officer’ defined,” and “[a]ppointee exercising significant authority is officer and must be appointed”); Adam J. White, *Toward the Framers’ Understanding of “Advice and Consent”*: A Historical and Textual Inquiry, 29 HARV. J.L. & PUB. POL’Y 103 (2005) (detailing the historical origins of the Appointments Clause and the ratification process).

⁹⁰ See *Edmond*, 520 U.S. at 662–63; *Buckley v. Valeo*, 424 U.S. 1, 125–26 (1976); *Hobson v. Hansen*, 265 F. Supp. 902, 912–14 (D.D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1968).

⁹¹ U.S. CONST. art. II, § 2, cl. 2.

⁹² *Buckley*, 424 U.S. at 126.

⁹³ *United States v. Germaine*, 99 U.S. 508, 509–10 (1878).

⁹⁴ *Edmond*, 520 U.S. at 662 (citing *Buckley*, 424 U.S. at 126).

⁹⁵ *Buckley*, 424 U.S. at 126.

⁹⁶ See *Morrison v. Olson*, 487 U.S. 654, 669–72 (1988) (holding that the independent counsel created by the provisions of the Ethics in Government Act was an inferior officer); *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629–32 (1935) (discussing legislative encroachment on the executive removal and appointment power); *Myers v. United States*, 272 U.S. 52, 114, 176 (1926) (holding that the President has the sole removal power); *Ex parte Hennen*, 38 U.S. 225, 228–29 (1839) (wrestling with the judicial power to remove).

⁹⁷ *Morrison*, 487 U.S. at 670–72.

the Ethics in Government Act of 1978, which provided for the appointment of an independent counsel to investigate and prosecute government officials for violations of federal criminal laws.⁹⁸ The Act permitted the Attorney General to request the appointment of an independent counsel, and a panel consisting of three Federal judges would select the counsel and define her jurisdiction.⁹⁹ The independent counsel was vested with broad powers, but could be removed for cause by the Attorney General.¹⁰⁰ Independent counsel, Alexia Morrison, was appointed to investigate Ted Olson, Assistant Attorney General, for providing false and misleading testimony to a House committee.¹⁰¹ Olson challenged the constitutionality of the independent counsel appointment.¹⁰² Since the Ethics and Government Act did not provide for nomination by “the President with the advice and consent of the Senate,” the Court had to decide if the independent counsel was an inferior officer.¹⁰³ The Court analyzed the independent counsel using four factors and concluded that Morrison was an inferior officer.¹⁰⁴ The four factors that supported the Court’s decision were: “First, [Morrison] is subject to removal by a higher Executive Branch official. . . . Second, [Morrison] is empowered by the Act to perform only certain, limited duties. . . . Third, [Morrison’s] office is limited in jurisdiction Finally, [Morrison’s] office is limited in tenure.”¹⁰⁵ Justice Scalia dissented in *Morrison* because of the use of these four factors and instead promulgated a test premised on a literal interpretation of “inferior.”¹⁰⁶ Justice Scalia’s literal interpretation test became the basis for the majority opinion in *Edmond v. United States*.¹⁰⁷

The *Morrison* Court did not purport to define a test to determine an “inferior” officer. However, in *Edmond v. United States*, the Court recognized the Framers’ intentional design of Article II, Section 2, Clause 2 to preserve political accountability and stated that “we think it evident that ‘inferior officers’ are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.”¹⁰⁸

Edmond involved the appointment of two civilian judges by the Secretary of Transportation.¹⁰⁹ The statute provided the Secretary the power to appoint department

⁹⁸ *Id.* at 659–60.

⁹⁹ *Id.* at 661.

¹⁰⁰ *Id.* at 663.

¹⁰¹ *Id.* at 665–67 (Morrison was a replacement independent counsel after James C. McKay resigned).

¹⁰² *Id.* at 668.

¹⁰³ Andrew Croner, *Annual Review of Administrative Law: Morrison, Edmond, and the Power of Appointments*, 77 GEO. WASH. L. REV. 1002, 1008 (2009).

¹⁰⁴ *Id.* at 1008–09; see *Morrison*, 487 U.S. at 671–72.

¹⁰⁵ *Morrison*, 487 U.S. at 671–72.

¹⁰⁶ Croner, *supra* note 103, at 1009.

¹⁰⁷ See 520 U.S. 651, at 662–63.

¹⁰⁸ *Id.* at 663.

¹⁰⁹ *Id.* at 655–56.

officials.¹¹⁰ The Court found that not only were the civilian judges supervised by the Judge Advocate General, but also that the judges could be removed from their judicial assignment without cause by the Judge Advocate General.¹¹¹ The supervision and the removal power were enough to classify the civilian judges as “inferior officers” within the meaning of the Appointments Clause.¹¹²

Most recently, the Supreme Court in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, applied the rationale of *Edmond* and determined that the Securities and Exchange Commission’s oversight of the Board was sufficient to render the Board members inferior officers.¹¹³

The decisions in *Buckley*, *Morrison*, *Edmond*, and *Free Enterprise Fund*, arguably, provide a framework to determine the proper classification of officers within the context of the Appointments Clause. As *Morrison* and *Edmond* remain the two most important decisions of the Supreme Court concerning the inferior and principal officer distinction,¹¹⁴ Part II.C below compares this case law to the czar appointments.

B. Appointments WITHOUT the “Advice and Consent” of the Senate

Presidents are continually faced with specialized problems and often address these issues by appointing individuals to coordinate their efforts.¹¹⁵ Czar appointments purport to operate within the Appointments Clause framework, but this appointment process also has roots in various administrative and public laws and presidential executive orders.

President George Washington quickly formed a close circle of advisors to provide administrative assistance on both management and advice.¹¹⁶ This group arrangement spawned the cabinet.¹¹⁷ Subsequent Presidents utilized the cabinet to varying degrees, but the federal government began to change in the early twentieth century.¹¹⁸ New agencies and departments of government regulation gave rise to the administrative

¹¹⁰ 49 U.S.C. § 323(a) (2006) (“The Secretary of Transportation may appoint and fix the pay of officers and employees of the Department of Transportation and may prescribe their duties and powers.”).

¹¹¹ *Edmond*, 520 U.S. at 664.

¹¹² *Id.* at 666.

¹¹³ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3139, 3162 (2010).

¹¹⁴ *See Croner*, *supra* note 103, at 1004.

¹¹⁵ BRADLEY H. PATTERSON, JR., *THE RING OF POWER: THE WHITE HOUSE STAFF AND ITS EXPANDING ROLE IN GOVERNMENT* 273 (1988) (“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.”).

¹¹⁶ Relyea Statement, *supra* note 11, at 1.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 2–3.

state.¹¹⁹ President Franklin D. Roosevelt began his second term in 1937 and sought to undertake administrative reform and specifically, a reorganization of the executive branch.¹²⁰ Roosevelt intended “to improve the President’s ability to manage the executive branch.”¹²¹ Out of this reform movement came committee reports that discussed the power and authority of presidential assistants.¹²² The report stated that the assistants’ functions would be “to guide . . . [the President] in making his responsible decisions,” but clearly stated that the assistants “would remain in the background, issue no orders, make no decisions, emit no public statements.”¹²³

On September 8, 1939, Roosevelt issued Executive Order 8248, formally organizing the Executive Office of the President (EOP).¹²⁴ Order 8248 took the first step towards federal coordination by creating the White House Office (WHO) and consolidating other executive agencies.¹²⁵ Preparation for World War II provided Roosevelt the flexibility to place agents, special assistants, and close advisors into different agencies, especially the WHO.¹²⁶ During the remainder of World War II, Roosevelt continued to use his new administrative system to surround himself with advisors, and some believed that EOP allowed for a more coordinated war effort.¹²⁷

Roosevelt and his successor, Truman, appointed many individuals and granted them broad authority, but Congress recognized the accountability concerns and reacted

¹¹⁹ *Id.* at 3. The Progressive Movement brought greater intervention and regulation by the government into sectors of the American economy. The Department of Labor and the Federal Reserve were established in 1913 and additional administrative agencies were created from this time through the Great Depression and New Deal. *Id.*

¹²⁰ *Id.* at 4.

¹²¹ *Id.*

¹²² THE PRESIDENT’S COMM. ON ADMIN. MGMT., REORGANIZATION OF THE EXECUTIVE DEPARTMENTS: MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A REPORT ON REORGANIZATION OF THE EXECUTIVE DEPARTMENTS OF THE GOVERNMENT, S. DOC. NO. 8-75, at 19 (1937). The report suggested organizing all of the executive branch agencies under one of the existing cabinet departments and increasing the president’s staff to include “a small number of executive assistants who would be his direct aides in dealing with the managerial agencies and administrative departments of the Government.” However, the report pointed out that the aides “would have no power to make decisions or issue instructions in their own right” and “[t]hey would not be assistant presidents in any sense.” *Id.*

¹²³ *Id.*

¹²⁴ Exec. Order No. 8248, 3 C.F.R. 576 (1938–1943) (“[e]stablishing the divisions of the Executive Office of the President and defining their functions and duties . . .”).

¹²⁵ Relyea Statement, *supra* note 11, at 5–6. The Bureau of the Budget, the National Resources Planning Board, and the Office for Emergency Management were several of the agencies created by Executive Order 8248 or later orders amending it. *Id.*

¹²⁶ *Id.* at 6 (describing the rising number of assistants with unclear position descriptions and authority).

¹²⁷ *Id.* at 7 (quoting Luther Gulick, a Roosevelt advisor and member of the President’s Committee on Administrative Management, as saying “Where would we have been in this war without the Executive Office of the President . . . no one can question the extraordinary total effectiveness of the Presidency under the administrative system which we had through the war years.”).

through legislation and investigation. One example of congressional legislation was the creation of an independent agency that significantly overlapped with the authorities of a president-created agency.¹²⁸ Congress permitted the President to nominate the new director, subject to Senate confirmation, and limited the director's term to two years.¹²⁹ Upon signing the law, Roosevelt cooperated and transferred the functions of his agency to the new legislatively created agency.¹³⁰

Later presidents continued Roosevelt's appointment practice, and during the Nixon administration, some commentators again recognized the overlap of authority between presidential assistants and Cabinet Secretaries.¹³¹ Presidential policymakers were becoming more and more influential, but there was no accountability to Congress. Nixon's appointment of Henry Kissinger provides an example because Kissinger, as National Security Advisor, undermined the Department of State and refused to testify before Congress.¹³² Congress attempted to increase accountability by providing restrictions on funding.¹³³ Presidents have found ways to continue the practice by exercising executive privilege or finding other sources of funding.¹³⁴

Another important consideration is Public Law 95-570, passed in 1978,¹³⁵ which gives the president the power to create his staff and to set their compensation in accordance with executive branch pay scales found elsewhere in the United States Code.¹³⁶ The text of this law limits the assistants to only the White House Office, but permits appointment "without regard to any other provision of law regulating the employment or compensation of persons in the Government service. Employees so appointed shall perform such official duties as the President may prescribe."¹³⁷ Public Law 95-570 provides the President the ability to appoint staff to assist in his daily functions and maintenance care for the White House itself. Despite the specific language and intent, the language reflects a congressional recognition that the President must be given

¹²⁸ *Id.* at 11–12 (discussing the Office of War Mobilization, headed by James F. Byrnes, and the Office of War Mobilization and Reconversion, the similar agency created by Congress in 1944).

¹²⁹ *Id.* at 12.

¹³⁰ *Id.*

¹³¹ *Id.* at 15 (former White House Press Secretary George Reedy commenting on the increasing authority and influence of the WHO staff).

¹³² *Id.*

¹³³ *Id.* at 16. At the end of the Second World War, Congress enacted legislation that prevented agencies in existence for more than one year from using appropriated funds without a specific appropriation or authorization by law. This functions as a check on new EOP agencies. *Id.* at 17. However, agencies still exist within the EOP that do not have specific authorizations. *Id.*

¹³⁴ *Id.* at 17.

¹³⁵ Act of Nov. 2, 1978, Pub. L. No. 95-570, 92 Stat. 2445 (codified at 3 U.S.C. §§ 105–106 (2006)). Section 105 has been amended several times since its passage during the Truman administration in 1949, and has been relied upon for the appointment of advisors.

¹³⁶ 3 U.S.C. § 105; *see* 5 U.S.C. §§ 5313–5314, 5332 (2006).

¹³⁷ 3 U.S.C. § 105(a).

flexibility to appoint assistants and provides explicit funding for such presidential assistants.¹³⁸ Even though this law was designed to trump other laws regulating employment of government service, it cannot proscribe a practice that is inconsistent with the Constitution. Nonetheless, this legislation supports at least some congressional acquiescence to the President's power to appoint assistants and has been used to appoint positions like the National Security Adviser and National Security Council staff.¹³⁹

C. Czars and the Appointments Clause

1. Executive Branch Viewpoint on Czar Appointments

With this overview of the administrative and interpretative framework, the legal status of the czar appointments can be further examined. The Obama administration responded to congressional concerns and relied on tradition to support the appointment of policy advisors, stating:

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 This is, and *always has been*, the traditional role of White House staff.¹⁴⁰

Relying on an Office of Legal Counsel (OLC) opinion drafted during the George W. Bush administration, Obama's advisors concluded that none of the appointed officials qualify as "Officers of the United States" because they do not exercise any independent authority or sovereign power.¹⁴¹ The OLC opinion examines the judicial opinions concerning the Appointments Clause and articulates its own test to support their definition of an "Officer of the United States."¹⁴² According to the opinion, to be subject to the Appointments Clause, a federal office must have two essential characteristics: "(1) it is invested by legal authority with a portion of the sovereign powers of the federal Government, and (2) it is 'continuing.'"¹⁴³ The memorandum explains that legal authority is the ability to "bind[] the Government or third parties for the benefit of the public, such as by administering, executing, or authoritatively interpreting the laws."¹⁴⁴

¹³⁸ *Id.*

¹³⁹ Thomas M. Franck, Comment, *The Constitutional and Legal Position of the National Security Adviser and Deputy Adviser*, 74 AM. J. INT'L L. 634, 635 (1980).

¹⁴⁰ See Letter from Gregory B. Craig, *supra* note 48 (emphasis in original).

¹⁴¹ See Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 1, 4 (2007), available at <http://www.justice.gov/olc/2007/appointmentsclausev10.pdf>.

¹⁴² *Id.* at 1.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 4. The opinion points out that someone who serves in a purely advisory role and thus, should have no legal authority "does not hold a position with delegated sovereign authority of the federal Government and therefore does not hold a federal office." *Id.*

An office is “continuing” when it “is permanent or that, even though temporary, it is not personal, ‘transient,’ or ‘incidental.’”¹⁴⁵ Additionally, the opinion indicates that non-continuing offices need not be appointed in accordance with the Appointments Clause, “even if they temporarily exercise delegated sovereign authority.”¹⁴⁶ OLC concludes that when these two characteristics—invested with independent legal authority and continuing—are present, then the person holding the position is viewed as an officer of the United States and must be appointed under the framework of the Appointments Clause.¹⁴⁷

Despite OLC’s conclusion, the constitutionality of czars remains debatable. The opinion makes an interesting distinction and seems to encourage the appointment of temporary positions of authority because, in the OLC’s opinion, these individuals fall outside of the requirements of the Appointments Clause. Conversely, a czar appointee, like Kenneth Feinberg, seems to fit the OLC definition of an “Officer of the United States” because he is invested with legal authority and his appointment is “continuing.”¹⁴⁸

2. *Edmond, Morrison, and Czar Appointments*

The most popular defense of czar appointments is that these individuals serve purely advisory roles.¹⁴⁹ At a Senate committee hearing in October 2009 on the history and legality of executive branch czar appointments, governmental experts provided their own analyses on the constitutionality of czar appointments.¹⁵⁰ Multiple commentators testified that as long as the czars/advisors do not exercise legal authority, then there is no constitutional concern over their appointment.¹⁵¹ As noted above, the OLC opinion memorandum, written in 2007, proceeds along a similar line of reasoning. However, recent actions by individuals in czar positions, in particular the “Pay Czar,” Kenneth Feinberg, blur the line between purely advisory roles and the exercise of significant legal authority.¹⁵² In October 2009, Feinberg announced his first round of limitations on executive salaries.¹⁵³ This first round of rulings limited

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1.

¹⁴⁸ See *supra* notes 57–59 and accompanying text (discussing the legal authority and activities of Pay Czar Kenneth Feinberg); *infra* notes 152–56 and accompanying text (same).

¹⁴⁹ See Letter from Gregory B. Craig, *supra* note 48 (stating that the “[Czars’] one and only role is to advise the President”).

¹⁵⁰ See *Presidential Advice and Senate Consent: The Past, Present, and Future of Policy Czars: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 111th Cong. 9–16 (2009) [hereinafter *Presidential Advice and Senate Consent*].

¹⁵¹ *Id.*

¹⁵² See *supra* notes 57–59 and accompanying text (discussing the creation and appointment of the “Pay Czar”).

¹⁵³ See Press Release, U.S. Dep’t of the Treasury, The Special Master for TARP Exec. Comp. Issues First Rulings (Oct. 22, 2009), available at <http://www.treasury.gov/press-center/>

the compensation for the top twenty-five employees at each of the TARP recipient firms.¹⁵⁴ Again, in December 2009, Feinberg further asserted his authority by extending his salary caps to reach more executive salaries.¹⁵⁵ These decisions by Feinberg were not recommendations, but rather regulations that carried the force of law to any recipient of TARP funds.¹⁵⁶ Feinberg unilaterally made these decisions, which were promulgated and enforced by the Department of the Treasury. These actions give credence to criticism and countenance against a finding that Feinberg is serving in a purely advisory role. Turning to the case law of *Edmond* and *Morrison*,¹⁵⁷ an evaluation of the approaches taken by the Court in both these situations demonstrates the questionable constitutional status of czar appointees like Feinberg. Recall, the four factors that supported the Court's inferior officer finding in *Morrison*: "[f]irst, appellant is subject to removal by a higher Executive Branch official. . . . Second, appellant is empowered by the Act to perform only certain, limited duties. . . . Third, appellant's office is limited in jurisdiction. . . . Finally, appellant's office is limited in tenure."¹⁵⁸ Applying these four factors to Feinberg's authority: Feinberg is subject to removal by a higher executive branch official (i.e., the President or Secretary of Treasury) and his duties are to be limited to executive compensation.¹⁵⁹ The first two factors support a finding that Feinberg is acting as more of an inferior officer. However, the final two factors, jurisdiction and tenure, suggest principal authority. Feinberg has set limitations on executive compensation in the entire financial sector and his appointment included no specific end date.¹⁶⁰ Feinberg's position could become permanent depending on the repayment of TARP funds and Feinberg or his successor could continue to promulgate further limitations and potentially extend his reach beyond presidential advice.

In *Buckley v. Valeo*, the Supreme Court specifically stated that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,'" and should be appointed in accordance with the Appointments Clause.¹⁶¹ As shown above, Feinberg has asserted governmental authority into the

press-releases/Pages/2009102616583827419.aspx; Eamon Javers, 'Pay Czar' Caps Pay of Midlevel Execs, POLITICO (Dec. 11, 2009, 5:58 AM), <http://www.politico.com/news/stories/1209/30480.html>.

¹⁵⁴ See Javers, *supra* note 153.

¹⁵⁵ See Press Release, U.S. Dep't of the Treasury, The Special Master for TARP Exec. Comp. Rules On Comp. Structures for Certain Exec. Officers and Most Highly Compensated Emps. 26–100 (Dec. 11, 2009), available at <http://www.treasury.gov/press-center/press-releases/Pages/2009121111464313585.aspx>.

¹⁵⁶ Javers, *supra* note 153.

¹⁵⁷ *Edmond v. United States*, 520 U.S. 651 (1997); *Morrison v. Olson*, 487 U.S. 654 (1988).

¹⁵⁸ *Morrison*, 487 U.S. at 671–72.

¹⁵⁹ TARP Standards for Compensation and Corporate Governance, 74 Fed. Reg. 28, 394 (Jun. 15, 2009) (codified at 31 C.F.R. pt. 30 (2011)) (discussing the appointment of a Special Master for TARP Executive Compensation and delegating authority directly to Feinberg to oversee and create regulations concerning executive compensation).

¹⁶⁰ See *id.*; *Presidential Advice and Consent*, *supra* note 150, at 2.

¹⁶¹ *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

private sector by limiting executive TARP recipient salaries under the authority of the Emergency Economic Stabilization Act of 2008.¹⁶² Feinberg's broad exercise of unchecked power, under this analysis, suggests status as a "principal officer of the United States" and his appointment should only be upheld if confirmed by the Senate.

The simpler approach of the *Edmond* Court may also suggest that Feinberg should qualify as a principal officer.¹⁶³ Although subject to removal by the Secretary of Treasury or the President, there has been no evidence of direct oversight of his actions.¹⁶⁴ *Edmond* defined an inferior officer as someone "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."¹⁶⁵ Mr. Feinberg directly stated his regulations and did not channel them through the Secretary.¹⁶⁶ Conversely, room for interpretation exists and if some oversight were evident this would suggest that Feinberg is within the definition of an inferior officer as articulated in *Edmond*.¹⁶⁷ While Feinberg provides a viable example for this analysis, closer inspection of the activities of other czar appointees may lead to similar conclusions.

3. Policy Considerations of Czars

Beyond the constitutional argument lies a more practical argument as to whether the appointment of czars actually benefits the efficiency and operation of the Government. Traditionally, presidents have surrounded themselves with individuals to aid in their decision-making.¹⁶⁸ To a certain extent, Congress has acknowledged the need for presidential advice and permitted the tradition to continue.¹⁶⁹ Despite the historical acquiescence, at times, members of Congress have raised concerns for accountability and congressional oversight.¹⁷⁰ Presidents have argued that close advisors assist in "addressing important matters of great public concern" and are more readily able to engage problems because of their specific focus.¹⁷¹ The policy debate continues as the

¹⁶² See Javers, *supra* note 153.

¹⁶³ See *Edmond v. United States*, 520 U.S. 651, 662–63 (1997); *supra* notes 108–10 and accompanying text (discussing *Edmond*).

¹⁶⁴ See 31 C.F.R. § 30.16 ("[T]he final determination of the Special Master shall be final and binding and treated as the determination of the Treasury."); *Whether the Special Master for Troubled Asset Relief Program Executive Compensation Is a Principal Officer under the Appointments Clause* 34 Op. O.L.C. 1, 11 (2010) (including the argument of the OLC that the lack of express oversight is not determinative).

¹⁶⁵ *Edmond*, 520 U.S. at 663.

¹⁶⁶ See *Whether the Special Master for Troubled Asset Relief Program Executive Compensation Is a Principal Officer under the Appointments Clause*, *supra* note 164.

¹⁶⁷ *Id.*

¹⁶⁸ See Relyea Statement, *supra* note 11, at 1–3.

¹⁶⁹ See Letter from Gregory B. Craig, *supra* note 48, at 3 (helping the President to address "pressing challenges . . . always has been, the traditional role of White House staff").

¹⁷⁰ See Byrd Letter, *supra* note 14; Collins Letter, *supra* note 14.

¹⁷¹ See Letter from Gregory B. Craig, *supra* note 48, at 3.

ability to dispatch an individual with a narrow direction allows a president to demonstrate his concern for the particular issue without getting too personally involved.

III. RESOLUTIONS AND RECOMMENDATIONS FOR LEGISLATION

*A. Review of Proposed and Pending Legislation*¹⁷²

To date, Congress has initiated several pieces of legislation to remedy its concern about czars. The CZAR Act of 2009 intended to inhibit the use of czar appointments by limiting their funding.¹⁷³ The Sunset All Czars Act (SAC Act), introduced in the House of Representatives in September 2009, aimed to remove any individual that is not confirmed by the Senate by December 31, 2009.¹⁷⁴ Most recently, in February 2011, the House of Representatives passed an amendment to their continuing resolution spending bill that eliminates funding for several czar positions, including among others, the Special Master for TARP Executive Compensation.¹⁷⁵

All pieces of legislation were written to limit the functions and funding of non-Senate confirmed individuals. Specifically, the CZAR Act would have prohibited funding for any individual or department that was created by the President without the advice and consent of the Senate and performs a function that could be completed by an individual or agency that is subject to Senate confirmation.¹⁷⁶ The plain meaning of this legislation appeared to be that the President should not appoint someone to do a job when someone else (previously nominated and confirmed by the Senate) is capable of doing the job. This duplicative appointment structure exists throughout the executive branch and in some instances, the duplication is intentional.¹⁷⁷ The attempt to eliminate funding is Congress's most effective tool and was successfully exercised by Congress following World War II.¹⁷⁸

The SAC Act aimed "to provide a sunset date for all presidentially appointed czars, to require Senate confirmation of those positions, and to provide that appropriated

¹⁷² See Czar Accountability and Reform (CZAR) Act of 2009, H.R. 3226, 111th Cong.; Sunset All Czars (SAC) Act, H.R. 3569, 111th Cong. (2009); Full-Year Continuing Appropriations Act, H.R. 1, 112th Cong, amend. 89 (2011).

¹⁷³ See H.R. 3226.

¹⁷⁴ H.R. 3569 § 4.

¹⁷⁵ Full-Year Continuing Appropriations Act, H.R. 1, 112th Cong, amend. 89 (2011).

¹⁷⁶ H.R. 3226 § 2(a)(2)(c).

¹⁷⁷ See Relyea Statement, *supra* note 11, at 8, 14 ("A White House advisor may see a departmental problem in a wider context than a Secretary" (quoting THEODORE SORENSON, *DECISION-MAKING IN THE WHITE HOUSE: THE OLIVE BRANCH OR THE ARROWS* 71–72 (Columbia University Press 1963))); Tom Hamburger & Christi Parsons, *White House Czar Inflation Stirs Concern*, L.A. TIMES, Mar. 5, 2009, at A1 (noting the overlap between the healthcare czar and the recently appointed Health and Human Services Secretary).

¹⁷⁸ See *supra* note 133 and accompanying text (discussing successful historical congressional attempts at limiting funding for some appointees).

funds may not be used to pay for any salaries and expenses associated with those positions.¹⁷⁹ The language of the SAC Act was very similar to the CZAR Act. However, the SAC Act raised the issue of removal.¹⁸⁰ Removal is an important and much analyzed congressional restriction on the executive branch's power.¹⁸¹

Neither the CZAR Act or the SAC Act left the respective committees to which they were referred upon introduction.¹⁸² With the close of the 111th Congressional term, both pieces of legislation were cleared from the books. However, politicians still show a concern as demonstrated by the passage of the recent amendment to the continuing resolution.¹⁸³ Although clear of the House of Representatives, the amendment must still survive the Senate.¹⁸⁴ Both the CZAR and SAC Act were steps in a direction to curb the upward trend of czar appointments, however, several changes could be included in order to balance the accountability, executive efficiency, and legislative oversight. The amendment offered by Rep. Steve Scalise (R-La) is a more direct approach by enumerating particular positions and eliminating funding for czars' salaries.

B. Suggested Changes to Improve the Pending and Proposed Legislation

As discussed above, the constitutional implications of the appointment of czars are debatable.¹⁸⁵ Regardless of which side of the debate prevails, Congress could alleviate their concerns over the increased number of czars by reintroducing and amending the prior legislation or by creating new legislation that imposes additional restrictions. Effective restrictions or requirements should allow the President to surround himself with the number of advisors that he deems necessary, but also provide Congress with constitutionally mandated tools of oversight. The text and structure of the Appointments Clause recognizes that the President has the power to appoint, but the separation of powers and checks and balances mechanism contemplated by the framers should not be ignored.

In order to strike a balance between the executive and legislative branches, when the President chooses to appoint without the advice and consent of the Senate and

¹⁷⁹ H.R. 3569.

¹⁸⁰ *Id.* § 4.

¹⁸¹ *Bowsher v. Synar*, 478 U.S. 714, 723 (1986); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 626 (1935); *Myers v. United States*, 272 U.S. 52, 117 (1926) (the power to appoint implies the power to remove).

¹⁸² GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h111-3226> (last visited Apr. 10, 2011) (tracking the status of the CZAR Act, no movement occurred on the legislation after it was referred to committee on July 15, 2009); GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h111-3569> (last visited Apr. 10, 2011) (the SAC Act also remained in the committee to which it was referred on September 15, 2009).

¹⁸³ Robin Bravender, *House Votes to Overthrow 'Czars'*, POLITICO (Feb. 17, 2011, 7:20 PM), <http://www.politico.com/news/stories/0211/49781.html>.

¹⁸⁴ *Id.*

¹⁸⁵ *See supra* Part II.C (providing a constitutional evaluation of the appointment of a czar).

achieve a level of accountability, efficiency, and oversight, any legislation concerning the appointment of czars should include two additional restrictions: requiring appearances before and/or reports to congressional committees and vesting removal power in a person other than the President. The additional restrictions should maintain consistency with the current structure and traditional understanding of the Appointments Clause and would further remedy the legislative and public concerns.¹⁸⁶

1. Appearances Before or Reports to Congressional Committee

Advisors and presidential assistants have historically not answered calls to appear before congressional bodies.¹⁸⁷ However, simple appearances before legislators would remove many of the concerns for transparency. Czars are said to lack “independent authority or sovereign power.”¹⁸⁸ The executive branch maintains that advisors have no need to report or testify before Congress,¹⁸⁹ but it would be helpful for Congress to hear from the advisor and allow the advisor to articulate the President’s position on specific policy matters. Perhaps the number of appearances could be limited in the legislation, to avoid an undue burden on the czar or his or her ability to advise the President. As Obama’s counsel points out, in recent months, some of Obama’s advisors have testified at the request of Congress.¹⁹⁰ However, Obama’s counsel also specifies that the White House will refuse further requests from Congress for the new czar appointees to testify.¹⁹¹

2. Authority to Remove Vested with Someone Other than the President

Any provision that limits the appointment power will certainly be subject to controversy and potential constitutional challenge. Notably, former Supreme Court cases have discussed the balance of power between Congress and the executive branch over appointment and inherent removal power.¹⁹² “Removal” does not appear in the text of the Appointments Clause, but the Supreme Court has read the Clause to imply that the power to appoint implies the power to remove.¹⁹³ The constitutional issues arise because Congress attempts to limit the appointment power by vesting removal in an individual or department, other than the President.¹⁹⁴

¹⁸⁶ See GERHARDT, *supra* note 64, at 39–44; *supra* text accompanying notes 78–80.

¹⁸⁷ See Relyea Statement, *supra* note 11, at 15–16; Byrd Letter, *supra* note 14 (“[cabinet officials] rarely testify before congressional committees . . .”).

¹⁸⁸ See Letter from Gregory B. Craig, *supra* note 48.

¹⁸⁹ Christopher Neefus, *White House to Keep Obama’s ‘Czars’ from Testifying Before Congress*, CNSNews (Oct. 22, 2009), <http://www.cnsnews.com/news/article/55973>.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² See *supra* Part II.A, II.C.2.

¹⁹³ See *Myers v. United States*, 272 U.S. 52, 117 (1926).

¹⁹⁴ Note, *Congressional Restrictions on the President’s Appointment Power and the Role of Longstanding Practice in Constitutional Interpretations*, 120 HARV. L. REV. 1914, 1917

There are two prevalent and generally accepted views on Congress's authority to restrict the President's appointment and removal power.¹⁹⁵ As articulated in a 2007 Harvard Law Review note, these two views are the formalist ("purist") view and the functionalist ("office qualifications") view.¹⁹⁶ The purist view is to accept the plain meaning of the Appointments Clause and recognize that "the President's nomination power is illimitable."¹⁹⁷ On the other hand, the opposing view realizes that "Congress can impose some limited restrictions on the President's appointment power,"¹⁹⁸ and "the goal of functionalism is to maintain balance between the three branches."¹⁹⁹ The Supreme Court has not held which view of the Appointments Clause is correct, but in *Buckley v. Valeo*, the Court seemed to embrace the formalist view and reject congressional infringement on the President's appointment power.²⁰⁰

As noted above, several important cases have discussed congressional attempts to restrict the appointment power. In 1986, the Supreme Court decided *Bowsher v. Synar*,²⁰¹ at issue was the Gramm-Rudman-Hollings Act that required a legislative official, the Comptroller, to provide a report on the budget to the President and the President would then institute reductions after consideration of the Comptroller's report.²⁰² The Court invalidated the Act because Congress was, in effect, executing the laws.²⁰³ The Court found that because Congress had the ability to remove the Comptroller, they were exercising power that is constitutionally mandated to the President.²⁰⁴ Additionally, the Comptroller was acting like the executive because he was making policy and interpreting the laws.²⁰⁵ The *Bowsher* opinion can be viewed as a formalist judicial opinion.

In *Myers v. United States*,²⁰⁶ the Supreme Court upheld the power of the President to remove officials from office. *Myers* involved the firing of a postmaster that was in violation of a Federal law that required removal of the postmaster with the consent only of the Senate.²⁰⁷ The Court struck down the law that required the consent of the Senate for removal and indicated that the Appointments Clause vests the power of removal in the President.²⁰⁸ One of the most important aspects of the *Myers* decision is

(2007); Michael G. Locklar, Comment, *Is the 1996 Line-Item Veto Constitutional?*, 34 HOUS. L. REV. 1161, 1181 (1997).

¹⁹⁵ Note, *supra* note 194, at 1917–18.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 1917.

¹⁹⁸ *Id.* at 1920.

¹⁹⁹ Locklar, *supra* note 194, at 1182.

²⁰⁰ See Note, *supra* note 194, at 1921.

²⁰¹ 478 U.S. 714 (1986).

²⁰² *Id.* at 717–20.

²⁰³ *Id.* at 732–34.

²⁰⁴ *Id.* at 732.

²⁰⁵ *Id.* at 732–34.

²⁰⁶ 272 U.S. 52 (1926).

²⁰⁷ *Id.* at 106.

²⁰⁸ *Id.* at 176.

the broad judicial recognition that the power to appoint implies the power to remove, and only the President has removal power.²⁰⁹

Another case dealing directly with congressional removal power was *Humphrey's Executor v. United States*.²¹⁰ In *Humphrey's Executor*, the Court distinguished the power of the Federal Trade Commission official and found that the character of the office was not purely executive.²¹¹ Consequently, it was permissible for Congress to place restrictions on the President's removal power and provide that the Federal Trade Commission official could only be removed for specific reasons.²¹² In this particular circumstance Congress was able to effectively limit the President's power to remove.

Examining these precedents, well-crafted legislation could find a way to fit within the Constitution and remain consistent with the Appointments Clause. The text of the Appointments Clause gives Congress the power to vest the appointments,²¹³ but of primary concern would be the individual or body that would hold the appointment and removal power. With the failure of the CZAR and SAC Act legislation, a more comprehensive approach, as discussed above, could implement some suitable changes and assuage much of the criticism.

CONCLUSION

Few people could deny that President Obama's time in office has included increased criticism over the appointments of czars. Much of the criticism reflects bipartisan concerns. Legislators, legal scholars, Facebook subscribers, cable pundits, radio show hosts, and American taxpayers have directed criticism and demanded changes. As detailed in this Note, this appointment practice has an extensive historical tradition and concerns and protests to this practice existed prior to the Obama administration. However, the sharp rise in discontent indicates that the executive branch may have disturbed the prior legislative and public acquiescence to this practice.

Since the 1940s, presidents have used their appointment power to surround themselves with a handful of advisors, but never has a sitting President been surrounded by forty-four designated policy czars. While a few have been confirmed by the

²⁰⁹ See *id.* at 126; Steven Breker-Cooper, *The Appointments Clause and the Removal Power: Theory and Séance*, 60 TENN. L. REV. 841, 862–65 (1993) (discussing *Myers* and stating, "Congress may reserve no role for itself, nor may it in any way limit the President's power to remove."). Interestingly, this article also discusses the implications of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), on the President's removal power. Breker-Cooper, *supra*, at 842–44. See William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 9–10 (discussing *Marbury's* impact on removal).

²¹⁰ 295 U.S. 602 (1935).

²¹¹ *Id.* at 628.

²¹² *Id.* at 629–32.

²¹³ U.S. CONST. art. II, § 2, cl. 2.

Senate, the majority have not. Obama, speaking through his legal counsel, expresses little concern with czar appointments and shows no indication that he will slow the upward trend.

The public demands transparency, accountability, and oversight from government officials. The President is accountable to the electorate and most constitutionally appointed officers that serve high level functions in our government must withstand the rigors of Senate advice and consent, but czars are treated differently. Czars hold positions without clear boundaries, serving at the pleasure of the President, but exerting significant responsibility in directing and shaping policy decisions. Little is known about most czar appointees and their positions; and most taxpayers would find it objectionable that a “Great Lakes Czar” and a “Radio-Internet Fairness Czar” are on the Government payroll amid a significant economic downturn.

This Note has provided context to the friction with the Appointments Clause, but more importantly, has suggested a solution that will allow for legislative oversight and accountability, and will promote a more efficient, effective, and transparent executive branch. The suggested changes to legislation maintains presidential executive autonomy to surround himself with advisors to help make important decisions; upholds the values of separation of powers and still provides for checks and balances, while imposing congressional removal, consistent with precedent.

The executive branch argues that czars serve only as presidential advisors and do not dictate policy, however, recent examples have shown otherwise. The expanded use of unconfirmed advisors provides for a limitless reach far beyond the accepted level of executive authority. Without accountability and oversight, czars are left to advance government policy and largely dictate the direction of social directives. The unchecked power of these advisors raises concerns that could be alleviated through legislation to define oversight, accountability and reporting.