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PRESIDENTIAL ADVICE AND SENATE CONSENT: THE PAST, PRESENT, AND FUTURE OF POLICY CZARS

HEARING

BEFORE THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

OF THE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

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PRESIDENTIAL ADVICE AND SENATE CONSENT: THE PAST, PRESENT, AND FUTURE OF POLICY CZARS

THURSDAY, OCTOBER 22, 2009

U.S. SENATE,
COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 10:03 a.m., in room SD–342, Dirksen Senate Office Building, Hon. Joseph I. Lieberman, Chairman of the Committee, presiding.

Present: Senators Lieberman, McCaskill, Burris, Collins, Coburn, Ensign, and Bennett.

OPENING STATEMENT OF CHAIRMAN LIEBERMAN

Chairman LIEBERMAN. Well, good morning. The hearing will come to order. Welcome to this hearing, which has the title of "Presidential Advice and Senate Consent: The Past, Present, and Future of Policy Czars." The title "czar" has been used more in Washington in recent years than anywhere, anytime since 1917, when Czar Nicholas II of Russia came to his unhappy ending.

As one of our witnesses this morning will make clear, President Obama is not the first of our national leaders to bring non-Cabinet officials into the White House as policy advisers or coordinators, though he has added a number of them. Arguably and interestingly, it was that great populist Andrew Jackson, way back in the early 19th Century, who was the first President to rely on what he would be surprised and puzzled to learn are today called "White House czars."

The main questions raised in what might be called the current anti-czarist uprising seem to be: One, have Presidents of both parties, including President Obama, consolidated power excessively in the White House through the appointment of these officials contrary to at least the spirit of the Constitution, if not our laws, particularly as against the authority of members of the Cabinet? And if so, is there anything Congress can or should do about it?

Second, does the growing use of czars in the White House and the Administration, this and past ones, frustrate Congress in carrying out its constitutional responsibility to oversee the expenditure of the public's money, which we appropriate, and the decisions that are made by the so-called czars with that money? Again, if so, what should we be doing about it?

I also hope our witnesses—and it is a great panel of witnesses—will help us with the question of definition. Who is deserving in this instance of the title of "czar?" Is it only people in the White House or coordinators of policy, whether or not their positions are authorized in statute and they are confirmed by the Senate? Or does it include a larger group of public officials, statutorily authorized or not, confirmed by the Senate or not, working out of the White House, or not? Finally, I cannot resist saying with all respect to the aforementioned Nicholas II and his esteemed predecessors, I will ask our witnesses if there isn't some more American title that we can use instead of "czar" to describe these government employees. The term "czar" seems to me not only ethnically inappropriate, but the Federal officials to whom it has been applied have far less autocratic power than the Russian czars did, which may explain why, though some of the current crop of White House czars have been subjected to harsh media criticism, their time in office is unlikely to end as violently as that of Nicholas II.

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 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." Regardless of what one calls them, the proliferation of these positions really does raise serious questions that go right to the heart of the allocation of power in our Constitution as between the President and Congress, the authority and responsibility of Congress to oversee the expenditure of the money we appropriate to the executive, and, of course, the right of the executive to executive privilege, which is inherent in the presidency.

We have an excellent panel of witnesses with us this morning who can help us answer these questions and then ultimately help us decide whether we wish to propose corrective legislation.

Senator Collins was really early in raising these important questions in this Committee. I thank her for that, as I recognize her now for her opening statement. Senator Collins.

OPENING STATEMENT OF SENATOR COLLINS

Senator COLLINS. Thank you, Mr. Chairman, and I want you to know how much I enjoyed listening to your opening statement. I had a long discussion in my office late yesterday with the President's legal counsel, who also calls czars "policy coordinators," and I could not help but think that if that were all that they did, I would be happy to join you in calling them "coordinators" rather than "czars." But, alas, my conclusion is that they do much more, so for lack of another term, despite the deficiencies that you have noted so eloquently, I will continue to call them "czars," at least to the conclusion of this hearing and until a solution is found.

I, too, am turning back into history as I present my statement today. When the Founding Fathers put down their quills in Philadelphia on September 17, 1787, they had crafted a Constitution—the framework for our representative democracy. Their work established a system of government with three separate branches, a government whose leaders were to be accountable to the people through a carefully constructed system of checks and balances.

The responsibility of Congress to oversee the Executive Branch is fundamental to our constitutional system. That responsibility is on display whenever the Senate performs its explicit constitutional "advice and consent" role or whenever Congress holds hearings on particular policy matters. This oversight ensures the accountability and transparency our Founding Fathers envisioned, and it is that oversight obligation which brings us here today.

The proliferation of czars diminishes the ability of Congress to conduct its oversight responsibilities and to hold officials accountable for their actions. These czars can create confusion about which officials are responsible for various policy decisions. They can duplicate or dilute the statutory authority and responsibilities that Congress has conferred on Cabinet officers and other senior Executive Branch officials.

A perfect example is the health care debate underway right now. Who is in charge? Who is making policy? Who is accountable? Is it Kathleen Sebelius, the Secretary of Health and Human Services? Or is it Nancy-Ann DeParle, the White House czar or coordinator of health care policy?

In addition, the proliferation of czars can circumvent the constitutionally mandated process of advice and consent. Czars can exercise considerable power and influence over major policy issues, and yet they are not required to clear the rigorous Senate confirmation process. Czars bypass this important constitutional protection through a unilateral grant of authority from the President.

Some, including the White House—and I would note every White House—have sought to diminish the significance of this debate by declaring that the use of czars does not violate the Appointments Clause in our Constitution. But even if the appointment of all of the czars were consistent with the Appointments Clause—and, frankly, I believe that the jury is still out on that question—the proliferation of czars in the Executive Branch encroaches on the more fundamental constitutional principle of checks and balances.

Now, we all recognize that the President is entitled to appoint and to rely on senior advisers such as his chief of staff and his legal counsel, who are part of his personal staff. And to be clear, not every position identified in various media reports as a czar is problematic. And this is an important distinction. Positions subject to Senate confirmation or otherwise recognized by our laws, such as the Director of National Intelligence, the National Security Advisor, and the Chairman of the Recovery Accountability and Transparency Board, do not raise the same concerns with accountability, transparency, and oversight because they are recognized in law and because many of these positions are subject to Senate confirmation.

I would also note that czars are not new to the American political landscape, but this is not merely a question of past usage. The recent proliferation of czars is a cause for real concern because they

oversee a growing number of critical policy areas that are already supposedly under the purview of top Executive Branch officials.

Indeed, this Administration has appointed at least 18 new czars. None of these officials was vetted through the Senate confirmation process. Their authorities and duties remain unclear. While some of them exercise authority pursuant to executive orders, others have just been announced through press releases. Their future plans have received little public airing. Their relationship with Cabinet-level officials is often undefined. They rarely, if ever, testify before congressional committees. And, indeed, yesterday when I was talking to Greg Craig, the President's legal counsel, he made very clear that the White House would prohibit any of these officials with significant policy responsibility from coming to testify before us if they are located within the Executive Office of the President.

In short, this bumper crop of czars has left the public and the Congress with many worrisome, bottom-line questions:

Who is in charge?

Who is responsible for what?

Who is directing policy—the czar or the Cabinet official?

And, most important, whom can Congress and the American people hold accountable for government decisions that affect their lives?

This is not an academic exercise, although it is a fascinating constitutional issue. Czars—not Cabinet secretaries—are negotiating with Members of Congress even as we speak on key policy issues. Where is the Cabinet official in these talks?

As I have stated before, this is not a partisan issue, despite the attempts of people in both parties to make it so. This is not a political issue. It is an issue of institutional imperative and constitutional prerogative.

It is also a question of effective management. The proliferation of czars has created two separate tracks of top management within our Federal Government. On the one hand, we have Cabinet-level leaders with defined roles and clearly assigned duties. On the second track, we have czars with fuzzy roles and loosely defined functions. These separate tracks of management authority can create duplication of effort, dilution of responsibilities and focus, and management dysfunction.

I am looking forward to hearing the testimony of all of our expert witnesses today. I particularly appreciate Secretary Thomas Ridge joining us again. He has broad experience. He served as the chief executive of a State, as a Member of Congress, as a senior White House aide, and as a Cabinet-level officer. That experience informs every aspect of the debate over the use of "czars."

Finally, let me say that until the administration answers important questions about the role of its czars and makes all of them available to testify before Congress, I personally believe that it is undermining the promises that President Obama has made to the American people for increased transparency and accountability.

Thank you, Mr. Chairman.

Chairman LIEBERMAN. Thank you, Senator Collins, for a very thoughtful statement.

I do want to, with unanimous consent, enter into the record a statement that our colleague Senator Robert C. Byrd asked that we enter into the record.[1] He has thought a lot about this. He includes a letter that he wrote to President Obama on February 23rd and the response of White House Counsel Greg Craig to that letter. I think this exchange says that the issues at play here are not partisan; they are really institutional. And I am going to ask the witnesses some of the questions that Senator Byrd raises with what you would expect of him, characteristic thoughtfulness and passion for the institution of Congress.

Senator BENNETT. Mr. Chairman.

Chairman LIEBERMAN. Senator Bennett.

Senator BENNETT. I know it is the pattern that the Chairman and the Ranking Member give the opening statement and we do not. Could I request, as a point of personal privilege, a few moments in an opening statement? Because the White House has specifically identified me as being hypocritical on this issue by virtue of my position with respect to a Year 2000 (Y2K) czar, and I would like to make that clear. If it would not be appropriate, I will wait until after the panel.

Chairman LIEBERMAN. No. Go right ahead. Since we are upholding the institution of Congress, I suppose that suggests we should uphold the institution of an individual member to defend himself.

Senator BENNETT. Thank you very much, Mr. Chairman. I appreciate that.

OPENING STATEMENT OF SENATOR BENNETT

Senator BENNETT. In November 1997, I requested that President Clinton appoint a Y2K czar. I was the Chairman of the Y2K Committee created by the Minority Leader, Senator Tom Daschle, and the Majority Leader, Senator Trent Lott, here in the Congress to deal with the problem that cut across departmental lines. It did not have a legitimate home in any one committee. It cut across the entire government. Senator Lott and Senator Daschle decided to create a special committee to deal with it. I was appointed its chair. Senator Chris Dodd was appointed its vice chair. And we proceeded with our hearings and came to the conclusion that we, the Committee, needed a counterpart in the Executive Branch, someone that would cut across departmental lines, who had the authority behind him or her to speak for the President in focusing on this issue. And in February 1998, President Clinton appointed a Y2K czar, John Koskinen.

One of the first things John Koskinen did as the Y2K czar for the Executive Branch was to call me as the chairman of the Y2K Committee in the Senate and set up a pattern of regular consultation, every Wednesday afternoon, and we compared notes. I told him what we were doing in the Legislative Branch; he told me what he was doing in the Executive Branch. He invited me to go to a variety of activities with which he was engaged in the Executive Branch. I invited him to come deal with those of us that were

[1] The prepared statement of Senator Byrd with attachments appears in the Appendix on page 41.

trying to solve the problem in the Legislative Branch. We worked hand in glove together.

I agree with you, Mr. Chairman, that the title "czar" was not necessary, but it did give a sense of focus to what we were doing. And when it was all over and the Y2K problem turned out to be a non-problem—vice chairman, Senator Dodd, said, "You know, we are in a no-win position, because if there is no problem, they will say, 'You raised concern about something that did not have any difficulty.' And if there is a problem, it will be, 'Well, you did not do anything about it.' So either way we are going to get criticized." And we were after it was over. The *New York Times* wondered why we had spent all that money when, in fact, none of the computers failed.

That is a very different situation than the situation described by Senator Collins and the letter which I signed, and I do not feel in any way it is hypocritical for me to have taken the role I did with respect to Y2K and now to say there is something that needs investigating because the kind of circumstance we created then was very different from the kind of circumstance that we see now. And I think the record should be very clear that I am not changing positions just for political purposes, as some members of the White House press office may have suggested.

I thank you, Mr. Chairman, for allowing me to get that off my chest.

Chairman LIEBERMAN. Thank you, Senator Bennett.

Senator MCCASKILL. Mr. Chairman.

Chairman LIEBERMAN. I notice an outbreak of democracy here, which is very unsettling.

Senator MCCASKILL. There is an outbreak of democracy.

Chairman LIEBERMAN. Go ahead, Senator McCaskill.

OPENING STATEMENT OF SENATOR MCCASKILL

Senator MCCASKILL. I just want to say I think it is great you guys have called the hearing. I think the oversight of this Committee is essential to the balance of power between the different branches of government, and I welcome the testimony. But I had to think, while my friend Senator Bennett was talking about the Y2K czar that he recommended, that was not confirmed by the Senate, and that was created out of whole cloth because of a problem that had arisen, the way he described that czar, how ubiquitous the czar was, working with the legislature, that he was constantly around, I kept thinking of Nancy-Ann DeParle. I mean, we cannot walk down the hall without seeing her. She is in the chairmen's offices constantly of the committees and the ranking members, and she has visited across the aisle time after time after time.

So I think there are situations where a special adviser is created, and that does not mean they are not working closely with Congress in order to solve a problem. And I think the description that Senator Bennett made of the Y2K czar was very similar to what Nancy-Ann DeParle is doing. I hope that the outcome is as good.

Chairman LIEBERMAN. Thank you. Let us leave it at that. I am going to recognize Governor Ridge. Senator Collins acknowledged your unique service to our country and to your State. You are in a really excellent position to comment on this, having been both

Assistant to the President for Homeland Security—our first post-September 11, 2001—and then our first Secretary of Homeland Security. So we really thank you for taking the time to be here and welcome your testimony now.

TESTIMONY OF HON. THOMAS J. RIDGE,[1] FORMER ASSISTANT TO THE PRESIDENT FOR HOMELAND SECURITY AND SECRETARY OF HOMELAND SECURITY

Mr. RIDGE. Thank you. Well, Mr. Chairman, Ranking Member Collins, and Members of the Committee, thank you for inviting me to spend some time with you this morning.

As you have alluded to, Mr. Chairman, I have been privileged to hold a variety of public service positions throughout my career.

As I was then, I am now a citizen of a country that embraces its Constitution, its Bill of Rights, its values, the greatness of our victories, the lessons learned from our mistakes, and a 230-year desire to uphold the tenets of our Founding Fathers.

I take equal pride and awe in a government that today, as reflected in this hearing, remains committed to a recurring review of its structure, its function, and its fundamental tenets of checks and balances.

So I appreciate the discussion that Members of this Committee are having this morning. It seems to be one of those rare issues these days that overrides partisanship in favor of a serious willingness to consider all points of view.

First, I must tell you that, having been a congressman, a governor, a so-called czar, and a Cabinet secretary, I have empathy for everyone involved in today's discussion.

The huge complexities associated with good governance are real; they are to be respected. The good intentions of good people are not to be demeaned, but rather clarified for all involved, and hopefully informed and assisted by ongoing communication and civil debate.

Second, I am of the belief that Presidents have the discretion and authority to appoint advisers who can assist them in carrying out their presidential obligations.

My interests, rather, reside in the issues of effective management, transparency, and lines of authority.

Who's reporting to whom? How specific is the job description? Does the individual initiate, coordinate, or execute policy? To whom does that individual report? Is it the same person to whom the individual is accountable?

While my own White House experience cannot match all of the issues you are addressing today, I hope that sharing them will help the Committee as it examines the role of White House czars.

As we all know too painfully, the events of September 11, 2001, set in motion a series of events and actions—made by President George W. Bush, his staff, but also, I would say, by a united Congress and a united country.

My appointment came under those extraordinary times, under exceptional stress and grief and yet also, with a singular purpose. The people and its government, at its best, joined together in full

[1] The prepared statement of Mr. Ridge appears in the Appendix on page 49.

throttle to rebuild in those early days and to secure the country from another attack.

When I received the call from President Bush asking me to take on a new role, there was no job description. Yet 2 weeks later, on the same day of my swearing-in as Homeland Security Advisor, October 8, 2001, President Bush issued Executive Order 13228, establishing the Office of Homeland Security and defining with great specificity the responsibilities and authorities of the new White House Office and my role as its director.

Understandably there were legitimate questions and concerns about what I was doing, and many of those concerns came from my former congressional colleagues.

It was at the instruction of my President that I would not testify and did not testify; typically and historically, assistants to the President did not do so. But many in Congress on both sides of the aisle took exception to this.

I offered to speak to congressional members privately. However, on a couple of occasions, when I visited Senator Robert Byrd, in his gentlemanly manner, he would slip from his coat pocket, as you are aware, a copy of the Constitution. If I could paraphrase your colleague, he would observe that the Congress of the United States has the exclusive authority over appropriations and broad oversight responsibility. "Private briefings," he would utter, "are not a substitute for public hearings," he would say.

My responsibilities were detailed out for everyone to see from day one. Still, regardless of the Executive Order, no matter how specific, Congress was legitimately concerned about my role, the extent of what I was doing, and what influence I was having.

The unique distinction for me was that when I was appointed, no Cabinet agency existed. I was reporting to a President, not a secretary. But my role was a broad one—cutting across Federal jurisdictional lines and departmental lines as well as coordinating activity with State and local governments.

It was only after discussions began between the White House and Congress about establishing a new department that President Bush decided I should testify about those plans. And I did.

After I went over to the Department, I came to benefit from the work of my White House successors, General John Gordon and later, Fran Townsend.

In both these principals, I had advocates who assisted in developing policy but not setting it. In both, I had good counsel who worked closely with me and department officials to generate and coordinate measures that advanced the security of the Nation.

I think this offers up a significant point. Some of today's White House czars have come to their positions with little public clarification of duty, and they already have a department of subject authority, led by a Senate-approved secretary.

Are those roles as respected and beneficial to agency progress and management effectiveness as my successors' roles were to me?

And, again, do these individuals, these so-called czars, direct or develop policy? Are they accountable to the President, to the Secretary, or to both? To whom do private constituencies look to provide input, guidance, or opinion? Who resolves the conflict between the two?

My concern is that without a clear delineation of responsibilities and reporting authority, this creates both a potential management problem and clearly the appearance of potential conflict.

It can diminish the capacity—I will say this again. It can diminish the capacity of both adviser and secretary to operate effectively in accordance with the department's missions. And I certainly think from time to time it can cause confusion for those under the chain of command of the secretary as well as outside the departmental purview.

Greater transparency and communication about role delineation and reporting structure will promote greater collaboration and management effectiveness, which, in my judgment, promotes good governance.

Good governance is what the President and this country require to address today's serious challenges. And good governance is what the American people deserve and what I know Members of the Committee, by your civil, thoughtful consideration to this issue, want to ensure.

Again, I thank the Members of this Committee for inviting me to join you today, and I look forward to your questions. Thank you.

Chairman LIEBERMAN. Thanks very much, Governor Ridge. That was a great statement to begin this deliberation.

Our next witness is Dr. James Pfiffner, University Professor, School of Public Policy at George Mason, specializing in the subject of the American Presidency. Dr. Pfiffner has written or edited 12 books and dozens of articles on our national government. He was also a Special Assistant in the Office of the Director of the Office of Personnel Management during the Carter Administration.

Dr. Pfiffner, thanks very much for being here.

TESTIMONY OF JAMES P. PFIFFNER, PH.D.,[1] UNIVERSITY PROFESSOR, SCHOOL OF PUBLIC POLICY, GEORGE MASON UNIVERSITY

Mr. PFIFFNER. Mr. Chairman, Senator Collins, other Members of the Committee, I want to thank you for your invitation to appear before you and be able to present my testimony. It is an honor for me to do so.

The term "czar" in the United States has no generally accepted definition in the context of American Government. It is a term loosely used by journalists. For my purposes, however, the definition of "czar" refers to members of the White House staff who have been designated by the President to coordinate specific policy areas that involve more than one department or agency. Czars do not hold Senate-confirmed positions, nor are they officers of the United States. Officers of the United States—presidential appointees with Senate confirmation (PAS)—are created in law, and most of them exercise legal authority to commit to the United States. In contrast, members of the White House staff are appointed by the President without Senate confirmation. They are legally authorized only to advise the President; they cannot make authoritative decisions for the Government of the United States, such as hiring, firing, and committing budgetary resources.

[1] The prepared statement of Mr. Pfiffner appears in the Appendix on page 53.

For practical purposes, however, White House staff personnel certainly may have considerable power or influence, as opposed to authority. But this power is entirely derivative of the President. White House staffers may communicate orders from the President, but they cannot legally give those orders themselves.

In the real world, of course, White House staffers often make important decisions, but the weight of their decisions depends entirely on the willingness of the President to back them up. As the White House staff has grown, so has the power of czars. White House czars play essential roles that lift the burden of coordination from the President. They help to reduce the range of options. But if the number of czars proliferates, they can clog and confuse the presidential authority. Somebody then must coordinate the czars and their access to the President. Czars may create layers between the President and Cabinet secretaries, and too many czars can result in managerial overload and confusion.

From the President's perspective, a proliferation of czars raises the questions of who is in charge of policy short of the President. Members of Congress, as well as other national leaders, may be confused as to the locus of authoritative decisions. Foreign leaders may not know who speaks for the President. Unfortunately, czars can pull problems into the White House that could be and should be settled at the Cabinet level. But only those issues that are central to the President's policy agenda should be in the White House; others should be delegated to the Cabinet secretaries.

From the czar's perspective, the title is a mixed blessing. Prestige and perks of the White House staff are there, but czars are often frustrated because they are supposed to be in charge of policy area, but they do not have the authority commensurate with their responsibilities. Czars cannot enforce decisions on departments or agencies. Czars control neither personnel nor budgets. For these they must depend on Cabinet secretaries.

But from the perspective of a departmental secretary, having czars in the White House is most often frustrating. White House staffers have historically been the natural enemy of Cabinet secretaries. Each vies for the President's ear; each resents the other's "interference." White House staffers enjoy proximity to the President, but Cabinet secretaries have to worry about managing their departments and the many policies and programs for which they are responsible. Cabinet secretaries are often at a disadvantage in securing presidential attention.

In the real world, Presidents have to balance their desire for centralized control with the managerial imperatives of delegation. No President can do an effective job without talented people on the White House staff. But if Presidents allow White House staffers to shut out Cabinet secretaries, they will lose the institutional memory of Cabinet secretaries, their operational point of view, and a broader political sensitivity than Cabinet secretaries can provide.

So the real impact of czars must be judged by the role that they play and their approach to their responsibilities rather than to merely counting their numbers. Thus, insofar as President Obama's czars take active roles in policymaking—as opposed to policy advising—attempt to shut out Cabinet secretaries, or exercise power in their own right, they dilute authority and confuse the chain of com-

mand. But if they work closely with Cabinet secretaries and help coordinate policy, they can be very useful. It all depends on their behavior.

That said, the larger the White House staff and the more czars that the President designates, the more likely White House staffers will be difficult to manage, and relations between Cabinet secretaries and White House staff will be strained.

The keys to congressional control of Administrations are congressional authority to create agencies, to authorize programs, to appropriate money, and to oversee the faithful execution of the law. As a matter of comity, however, the President is entitled to the confidentiality of his or her own staff, just as Members of Congress are entitled to the confidentiality of their own staff and Supreme Court Justices are entitled to the confidentiality of their clerks.

In closing, I would like to step back from the immediate question of czars to the broader purpose of this hearing, which is the appropriate role of Congress in our constitutional system. The Framers of the Constitution placed Congress in Article I of the Constitution for a reason. In republican governments, the legislature should predominate in policymaking, as James Madison made clear in Federalist 51. The Framers understood that executives tend aggrandize power. From classical times of Greece and Rome, to King George III, to the 21st Century United States, Democrats or Republicans, executives want more power. Thus, it is the prerogative and the duty of Congress to assert its own constitutional role. I think that several issues, aside from the role of czars in the White House, are fundamental to the role of Congress in our democracy.

The explosion of signing statements to imply that a President might not faithfully execute the law presents a fundamental threat to the constitutional role of Congress, which possesses all legislative powers. If presidents create secret programs that effectively nullify or circumvent the laws, they are placing themselves above the law and claiming the authority to suspend the laws which the Framers explicitly rejected. If presidents use the State secrets privilege to avoid the disclosure of or accountability for their actions, the role of the courts is undercut. And if the President claims the right to suspend habeas corpus, he treads on Article I of the Constitution.

The use of czars by presidents presents serious questions of policymaking and management, but the constitutional prerogatives of Congress are more seriously undermined by the claims of Presidents to have the right to set aside the laws in favor of their own policy priorities.

Thank you, Mr. Chairman, Senator Collins, and other Members of the Committee.

Chairman LIEBERMAN. Thanks, Dr. Pfiffner. Interesting statement. I appreciate your attempt at a definition of these positions, too, and I look forward to question-and-answer time with you.

Our next witness is Lee Casey. Mr. Casey is a partner in the law firm of Baker Hostetler specializing in constitutional, environmental, and international law. He served in the Department of Justice in the Ronald Reagan and George H.W. Bush Administrations, including in both the Office of Legal Counsel and the Office of Legal Policy, and also served as Deputy Associate General Coun-

sel at the Department of Energy in the Administration of President George H.W. Bush.

I have been reading your stuff for a long time, and so it is a pleasure to meet you and have you here as a witness. Please proceed.

TESTIMONY OF LEE A. CASEY,[1] PARTNER, BAKER HOSTETLER; FORMER ATTORNEY-ADVISOR IN THE OFFICE OF LEGAL COUNSEL AT THE U.S. DEPARTMENT OF JUSTICE

Mr. CASEY. Thank you very much, Mr. Chairman. And, indeed, thank you and Senator Collins and the rest of the Committee for allowing me the opportunity to address you today on what is indeed a very important issue.

I should first emphasize, of course, that I am speaking here on my own behalf, and I would also like to ask that my written statement be included in the record.

Chairman LIEBERMAN. Without objection, so ordered. And that will be the case for all the witnesses.

Mr. CASEY. Thank you, Mr. Chairman.

As you will see in the written statement, my position is that the use of White House policy czars—and, again, I think we should and need to focus not on the offices created by Congress or on a number of the individuals who are called "czars" who actually hold agency positions. It is the White House adviser that I think has caused people the concern. The fact is, however, those advisers are just that. They have no power beyond the fact that they are close to the President. They cannot transform Executive Branch policy into the policy of the United States. They cannot sign regulations. They cannot submit legislation to Congress. Their authority is very limited, and, indeed, it has been the consistent position of the Justice Department under both Republican and Democratic Administrations that people in those advisory roles need not be appointed in accordance with the Appointments Clause—that is, by and with the advice and consent of the Senate. And most importantly of all, they cannot take action that would create a legal obligation either on behalf of the government or on behalf of the citizenry at large. The President can implement policy and transform it into government policy only through officers that have been appointed under the Appointments Clause and who are responsible through the oversight process to Congress.

However, I do understand the feeling of unease that many people have with the idea that there are presidential advisers with such great power. And, indeed, I think anyone educated in the Anglo-American legal tradition will feel a little bit of unease, and there is a reason for that.

I think it is important to understand why the Framers did what they did and made the distinction between advisory functions and actual lawmaking functions. Executive advisers, in other words, have a history, and the Framers were working within that context.

If you look back over the history of the efforts to limit the power of the British Crown, those efforts were almost invariably directed at limiting who the advisers to the monarch were, who were the

[1] The prepared statement of Mr. Casey appears in the Appendix on page 58.

people that were closest and who had his or her ear. There were efforts to impose such limitations in the 13th Century, in the 14th Century, in the 15th Century, not so much in the 16th Century since the monarchy was then at its apogee, but it came back with a vengeance in the 17th Century. And the fact is every single one of those efforts failed and usually failed miserably with the reformers either ending up dead or in exile.

The Framers understood this. They knew this. And, indeed, at the Constitutional Convention in 1787, there were proposals that there should be a council of advice or a privy council appointed, possibly by the Senate, through which the President would have to work, whose advice he must take. Important members of the Convention supported this idea, among others George Mason and Benjamin Franklin, who actually knew about that sort of thing from his service in France. Franklin noted that experience showed that "caprice, the intrigues of favorites, and mistresses" were, nevertheless, "the means most prevalent in monarchies," especially with respect to appointments. And he thought a council would not only be a check on a bad President, but a relief to a good one.

His colleagues, however, did not agree, and the Framers rejected the entire model, the entire effort to control who is advising the President, and they cut to the chase. What they did was say no one can exercise actual government power unless they are appointed in accordance with the Appointments Clause, by and with the advice and consent of the Senate. Indeed, that is the default. All officers of the United States must be appointed with the Senate's consent unless Congress has vested the right to appoint inferior officers in the office of the President, the heads of departments, or the courts.

And so as a result, if one of these individuals—presidential advisers, czars—attempts to take an action with legal force, the action has no legal force. It does not bind the government. It does not bind individuals. That is the ultimate check.

And I think if you need to look at a situation where the Framers' wisdom was vindicated, probably the most important is indeed the Saturday Night Massacre, when President Richard M. Nixon decided to fire Special Prosecutor Archibald Cox, which he had every legal right to do. The Attorney General refused and resigned. The Deputy Attorney General refused and resigned. The Solicitor General was about to refuse and resign, although the Attorney General convinced him that if he did that, the entire top leadership of the department would leave, and there would be no one in charge but a 26-year-old attorney-adviser who was waiting for the bar results. So Judge Robert Bork stayed, and he did fire Cox.

There were prices to be paid for that. President Nixon, of course—that was the beginning of the end. But the issue actually haunted Judge Bork. It was raised at his confirmation hearings for the Supreme Court. I think that shows the system worked.

Thank you, Mr. Chairman.

Chairman LIEBERMAN. Fascinating. Thank you. You raise a lot of good questions, very helpful.

The final witness is Dr. Harold Relyea, former Specialist in American National Government at the Congressional Research Service, specializing in the presidential office and powers, Executive Branch organization, and congressional oversight. Just within

your own areas of expertise, perfectly suited to either be extremely conflicted or to give us good advice. Maybe both. [Laughter.]

Mr. RELYEA. Maybe both.

Chairman LIEBERMAN. Dr. Relyea.

TESTIMONY OF HAROLD C. RELYEA, PH.D.,[1] FORMER SPECIALIST IN AMERICAN NATIONAL GOVERNMENT AT THE CONGRESSIONAL RESEARCH SERVICE

Mr. RELYEA. Mr. Chairman, Senator Collins, and Members of the Committee, thank you for your invitation to appear here today.

My prepared statement reviews the historical antecedents of the presidential czars, the conditions contributing to their creation, their initial use during the World War II period, their congressional accountability at that time, some later developments, and some considerations regarding their future relationships with Congress. Let me summarize.

Presidents initially utilized their department heads as advisers and the Cabinet as a means of coordination. Soon, however, they turned to circles of informal advisers and confidants who were often personal and political friends. These were called "Kitchen Cabinets" during the presidencies of Andrew Jackson and John Tyler. In more recent memory, President Franklin D. Roosevelt brought to the White House a group of advisers and agents known as the "Brains Trust," which was composed of intellectuals and other ideas people from the academic world. Their numbers and roles prompted the President to seek more White House staff positions and improved arrangements for Executive Branch coordination and management.

The result was the Reorganization Act of 1939 which empowered the President to create, by reorganization plan, the Executive Office of the President, but also the White House Office, and a subsequent Office for Emergency Management, and to appoint as well six new administrative assistants.

Thus, in 1940, on the eve of the United States' entry into World War II, the President had at least three havens for his agents, special assistants, and closest advisers, including coordinators who would come to be known in some instances as "czars."

For war mobilization, President Roosevelt had at least three successive primary czars: William S. Knudsen at the Office of Production Management, who was not given enough authority to be successful; Donald Nelson, Chairman of the War Production Board, who allowed his authority to become diluted; and James F. Byrnes, who led the Office of War Mobilization with great confidence, great ability, and great accomplishment.

But it also appears that these czars were accountable to Congress. An examination of the April 1941 to April 1943 hearings of the respected Senate Special Committee investigating the National Defense Program—this was the panel chaired by Senator Harry S Truman—indicate that Knudsen appeared once, his deputy appeared twice, and Nelson thrice. Moreover, lesser officials from Knudsen's agency made 17 appearances, and those from Nelson's

[1] The prepared statement of Mr. Relyea appears in the Appendix on page 73.

board made 24 appearances. This all in just 2 years. There was, indeed, cooperation with the Truman Committee.

In conclusion, let me just offer a couple of considerations that are in my statement.

When the President prohibits congressional testimony by a czar or other presidential agent, efforts should be made to obtain the desired information in some other way, such as the provision of responsive factual documents, like a Freedom of Information Act (FOIA) request, or written answers to interrogatories, testimony by a department or agency official heading the unit in which the czar or presidential agent is located, or a briefing of congressional committee leaders or staff.

Also let me note that in 1978 Congress established personnel authorizations for the White House Office, for two other Executive Office of the President units, and for the Executive Office of the Vice President. This authorization might be revisited with a view to the adequacy of its allotments, with a view to its reporting requirements, and its scope—should it be extended to other Executive Office entities.

Mr. Chairman, thank you again for your invitation to appear here today. I welcome the questions of Members.

Chairman LIEBERMAN. Thank you, Dr. Relyea.

For those who are interested, I think your description of the history here and your prepared testimony is really quite illuminating, and it is worth reading.

Mr. RELYEA. Thank you.

Chairman LIEBERMAN. So I am sure people will be waiting for the transcript of this hearing to appear.

Mr. RELYEA. Best-seller. [Laughter.]

Chairman LIEBERMAN. We will have 7-minute rounds of questions.

Dr. Pfiffner and Mr. Casey in different ways tried to define what we should be focused on, and if I heard you right, Dr. Pfiffner, you started with a kind of disclaimer I think is valid, which is, there is no generally accepted definition of what we are exactly talking about, but your definition of the category of employee that we should be concerned about are members of the White House staff who are not officers of the government within the definition, not statutorily authorized, not confirmed, and they are coordinators of policy. To some extent, Mr. Casey, I think you agreed with that.

Am I hearing that right? And let me ask first—perhaps I should wait for Senator Collins, but I know she feels that some of those working in executive agencies are also czars because of the role they play. But you would say at the outset that what we should be concerned about are the people in the White House?

Mr. PFIFFNER. They maybe have responsibility to coordinate, do interagency coordination and so forth, but they report to a Cabinet secretary, so they can report to Congress and they are responsible if they are not in the White House and if they are either PAS or report to a PAS position.

Chairman LIEBERMAN. Just define PAS for the record.

Mr. PFIFFNER. Presidential appointment with consent of the Senate. Those in the White House staff usually are just preisdentially appointed (PA).

Chairman LIEBERMAN. So in response to the direct question of their accountability to Congress and to—actually, there is a wonderful phrase that Senator Byrd quoted from President Obama: "A democracy requires accountability, and accountability requires transparency."

So in regard to that, you would say that someone in an executive agency who may be acting like the people in the White House we are concerned about is, nonetheless, accountable to us and can be called to testify or produce documents. Is that the distinction you would make?

Mr. PFIFFNER. Yes.

Chairman LIEBERMAN. Mr. Casey, go ahead.

Mr. CASEY. I generally agree with that, although, again, there is always a question of what testimony and which documents. Whenever you start getting close to advice that is prepared for and given to the President, you start, obviously, getting into some very difficult separation-of-powers issues. But to the extent that the czars who actually hold offices at the agencies, some of which have been confirmed by the Senate, undertake a policymaking role in addition to the role they serve in in their office, that is fine—again, so long as they do not attempt to exercise authority that was not otherwise properly delegated to them.

Chairman LIEBERMAN. So let us go back to the people in the White House, the category we are concerned about. What if the people that we are describing here are not just advisers but, as one might argue in some cases, both in this Administration and previous Administrations, actually begin to act like officers, that they are making decisions, they are forcing decisions on Cabinet secretaries, for instance? What should our response be? Because they will claim, as they have in this Administration and previous ones, that we do not have a right to call them to testify or to ask them to produce documents.

Mr. CASEY. Sure. I think, frankly, that is the key, and I think that is the key to the concern, that White House policy czars, White House advisers, will force the agencies to do things that they do not want to do.

I think in answer to the first question, to the extent they act like officers, their actions are not valid. Their actions are not legally enforceable. A court will not enforce an order or a rule signed by a presidential adviser.

With respect to whether they over-awing the agencies, in my limited experience, frankly, it is actually quite difficult for the White House to force an agency to do what it does not want to do. But assuming that is done, then I think your concern should be with the officers, with the Secretary, with the Under Secretaries, whoever actually signs the document that makes it law. They are the ones who must defend it. You sign it, you buy it. And if they believe, as Attorney General Elliott Richardson believed, that what the President wants them to do is wrong, they can resign.

Chairman LIEBERMAN. Yes. From your perspective, both of you—and all of the witnesses, having studied this—we have gone through it back and forth, over and over again with people in the White House, not just this one, but previously too—where they will not testify based on the claim of executive privilege, that they have

to be free to give the President advice and not have it become a matter of public testimony. And, generally speaking, we all agree with that. We always say, "Yes, but you are playing an independent policy coordination role, and we want to question you on that."

So I guess I would ask you a two-part question on that. Is there validity to their claim that they should not be called to testify on their policy coordination as opposed to the advice to the President? And either way, is there some way we should legislate to compel people in the White House holding these positions to come before Congress to testify about—not about the advice they have given the President, but about the policy coordination role that they are playing?

Mr. CASEY. Well, the thing is you start very quickly getting into difficulties of definition. Obviously, the advice someone gives directly to the President, the actual speech, what you tell the President is clearly privileged. But, in addition, to have an effective privilege, your activities, what you do for the President also needs to be privileged; otherwise, the privilege does not mean that much.

Again, these individuals, whatever independent authority they have is entirely based on the President's authority. They are his assistants. They can do nothing that he does not permit them to do, and there are things that he may not delegate to them.

In terms of possible legislation, Congress has regulated the White House Office, but it is difficult to think of a system where you are regulating the independence of presidential advisers that would not raise serious separation-of-powers issues.

Chairman LIEBERMAN. Governor Ridge, do you want to get into this? Actually, my time has expired, but do you have any responses to the back-and-forth that we have just had?

Mr. RIDGE. Just, first of all, I am very pleased to be with such a distinguished panel of historians and constitutional experts. I think one of the challenges associated with the ability of Congress to even have a legitimate basis for inquiry would be resolved if in making the appointment there was a public revelation of precisely the function that the adviser was going to play within the White House. And my sense is a lot of these have been appointed by virtue of a press release. And obviously the President can appoint whatever advisers he wants, but in terms of your ability to make inquiry, perhaps not of the adviser but of the Cabinet secretaries with whom this individual has coordinated responsibility would certainly be a very positive step. But right now I do not even think Congress is in a position to do that because the President has not outlined specifically what those coordinating responsibilities are.

Chairman LIEBERMAN. Thank you. I am going to yield to Senator Collins. I just want to read you a paragraph from Senator Byrd's letter. It is a very interesting argument, and maybe we will come back to it. "Whether an executive official is confirmed by the full Senate or appointed by the President alone to serve on the White House staff, that official holds the position by virtue of the authority that the Congress has granted to the President. Such White House staffers receive a salary by virtue of the spending authority that Congress has granted to the Executive Branch. Even presidential assistants and advisers have a constitutional obligation to

answer questions before the Congress if it is necessary for the Congress to fulfill its constitutional oversight and investigative functions."

That is something really to think about. Senator Collins.

Senator COLLINS. Thank you, Mr. Chairman.

I want to give the panel an actual example of a czar position that I think is very troubling. In 2007, this Committee wrote legislation that became law that created within the Executive Office of the President a Senate-confirmed position to be coordinator for the prevention of weapons of mass destruction (WMD), and the coordinator's role, which is defined in this law, says that this individual should serve as the principal adviser to the President on all matters relating to the prevention of weapons of mass destruction proliferation and terrorism. And, again, I am going to stress this was to be a Senate-confirmed coordinator located within the Executive Office of the President.

Now, neither President Bush nor President Obama ever filled this statutorily created position, but both of them created and filled a White House policy czar for weapons of mass destruction. That individual, the WMD czar, has exactly the same functions that were set forth in the law that the Chairman and I wrote. And to me, this is a prime example of both Presidents—this is not a partisan issue—appointing a White House policy czar, which completely circumvents a statutorily Senate-confirmed position created by Congress.

So I would like to get your reaction to this, because to me, this is a prime example of what troubles me. Secretary Ridge.

Mr. RIDGE. I was afraid you were going to call on me. [Laughter.]

Senator COLLINS. Would you like me to call on you last?

Mr. RIDGE. With that intervention, I am prepared to answer the question. I think it is fundamental to the inquiry that you are making today. The brilliance of the Founding Fathers years and years ago to create the three branches of government, the separation of powers, and one can say—and, remember, I used to sit up on that side of the dais—that the Congress of the United States has effectively said for public policy purposes there is a need for a position and you want it Senate-confirmed. Everybody agrees with that. That is circumvented by not filling a position but giving somebody else the exact same responsibilities.

Here is why I think that whole notion of transparency essential to the functioning of a democracy probably gives precedent to that individual testifying simply because it was apparently done in response to a statutorily—there was no position. You created the position. It was filled as an adviser. The name was not sent to the Hill. I guess I would put on my congressional hat and say that is sleight of hand that it would seem to me to be very troubling, because the basic strength of our country, of a democracy, is transparency. Here the conditions are so raw, so evident, in my judgment, that your claim for this individual to testify before you should be legitimized since you created the position. They filled it but did not send a name to the Hill.

Senator COLLINS. Dr. Pfiffner.

Mr. PFIFFNER. I agree. I think the Senate——

Mr. RIDGE. Good. [Laughter.]

Mr. PFIFFNER. The Congress can certainly create whatever positions in the U.S. Government that it wants to, setting aside the President's right to confidential advice and so forth. The fact that confidential responsibility overlaps or duplicates a position that is supposed to be PAS I think is very troubling. So I agree on that issue.

Senator COLLINS. Mr. Casey, you have been a strong advocate for a strong presidency, but does this specific example trouble you?

Mr. CASEY. Well——

Senator COLLINS. The answer is, "Yes." [Laughter.]

Mr. CASEY. With respect to this example, I think the question really is: Did Congress have the authority to create a position, the role of which is to act as chief adviser to the President on a particular topic area? Obviously, Congress is free to create offices and to vest those offices with whatever power it thinks necessary. But when you start getting to a point where you are effectively choosing the President's advisers—as I understand the way you described this office, this person will act as the President's chief adviser. That raises very serious separation-of-powers concerns simply because you are purporting to say this is the person the President has to listen to.

So in this instance, I do not actually find it troubling. In fact, I kind of wonder what the Administration statement on the proposed bill was when it came through and whether there was an objection to that office. Perhaps there was not, but it would be interesting.

Senator COLLINS. I do not believe there was.

Mr. CASEY. It would be interesting to find out.

But I think that is why the office has not been filled, because there is a feeling that it is simply too close to the President's own authority.

Senator COLLINS. We were just talking up here as you were responding that you could say that about almost any position. If the President disagrees with the creation of a Senate-confirmed position, he obviously could have vetoed the bill, and did not do so. Instead, it is being circumvented.

I want to get to the final witnesses' comments on this.

Mr. RELYEA. I have two points I would make. I am not in disagreement with what has been said, but I am reminded that in 1944, with Mr. Byrnes as the head of the Office of War Mobilization (OWM), that position was seen as too powerful in some regards. He was the President's agent. He was appointed without Senate confirmation. OWM had been created by executive order. Congress said, "We are going to reconstitute the office," and they did, by statute. Technically abolishing Byrnes' office and his role, Congress set it up as a Senate-confirmed position, in a statutorily created entity. I think that might be an answer here, that you eliminate either its funding or its role as a White House unit and go for something that is a congressional creation.

Now, there is another point here, too, and that is, on occasion, when Congress has created an Executive Office unit, the White House has played sleight of hand and put that unit for funding purposes—and by implication for managerial purposes—within the White House Office. The Homeland Security Council had that budgetary type of role. The Privacy and Civil Liberties Oversight

Board, before it was made an independent agency—and that is why it was made an independent agency—was also put behind that facade, creating a whole array of problems, czar or otherwise.

Senator COLLINS. Unfortunately, my time has already expired even though I have lots more questions. Let me just make a final point on this issue.

When Congress passed the Intelligence Reform and Terrorism Prevention Act, which we wrote in 2004, we created by statute a Director of National Intelligence. That individual acts as the chief adviser to the President on intelligence matters. When we made the powers of the Federal Emergency Management Agency (FEMA) Administrator stronger, we specifically designated that individual as being the principal adviser to the President. So this is done all the time. And I think it creates a real problem when Congress specifically creates in law a position that is Senate-confirmed, that is accountable to us, thus a person we can call up before us, and then the White House—and both President Bush and President Obama did this with the WMD coordinator position—does not fill the statutorily created position and instead creates a czar with exactly the same duties and who is not accountable to us at all.

Chairman LIEBERMAN. Well done. Very important question.

As you know, we call Senators in order of appearance. Just for your information, that is Senators Bennett, Burris, McCaskill, Coburn, and Ensign. Senator Bennett.

Senator BENNETT. Thank you very much, and thank you to the panel. Very well done and fascinating. Let me pick out a few comments that you made, however, to disagree with and see what your response is.

The comment, Mr. Casey, that it is difficult to force an agency to do what they do not want to do, anybody who has dealt with the Office of Management and Budget (OMB) who is a Cabinet officer will disagree with that. And they are now both dead, so I can tell the incident. When I was serving in the Executive Branch and we were at the White House making a very strong pitch for something we very significantly wanted to do to Cappy Weinberger, who was the head of OMB, it was very rough sailing. Cappy was called out of the meeting to meet with the President. We sat there waiting. He came back grinning like the Cheshire cat and said, "I just ran into John Ehrlichman, and he told me no. So you cannot do it. That is the Nixon Administration, period. You have gone to the highest possible authority. There is no point in our continuing the meeting."

Well, this is an unconfirmed presidential assistant who made the firm decision.

Now, you are correct in that he was able to do that because President Nixon allowed him to do that. I worked for John Volpe. I saw the circumstance where John Volpe offended John Ehrlichman, as a result of which Mr. Volpe did not see the President of the United States for 2 years.

So let us not kid ourselves that these unconfirmed folks only have the authority to advise. The reality is the White House is a court. The President is the king. The White House staffers are courtiers, and it is the century-long duty of every courtier to keep anybody else from access to the king. And the White House cour-

tiers do a very good job of that, regardless of which party is in charge or which Administration is doing it. And in President Nixon's case, he paid a very serious price for allowing his courtiers to keep people who would tell him the things he needed to hear away from him. But let us understand that is the case.

Now, one other quick comment, responding to my colleague and the comment that says, well, the Congress cannot tell the President who his principal adviser is going to be. Congress passed a law creating the Council of Economic Advisers, and yet there is an economic czar, Paul Volcker, at the current moment. Who has the President's ear on the economy? And then there is the other adviser, Larry Summers, and if you want to influence the President, if you are a Member of the Congress, whom do you call? Do you call the Council of Economic Advisers? Do you call Mr. Summers? Or do you call Mr. Volcker?

Reference has been made to Nancy-Ann DeParle, for whom I have enormous respect. I think she is terrific, and I have had a lot of conversations with her about health care. But we do happen to have a Cabinet officer of Health and Human Services with whom I have never had a conversation about health care—not because I have any opposition to her, but because it is my perception that Nancy-Ann DeParle is calling the shots rather than Secretary Sebelius.

We have an Energy Secretary with whom I have had a number of conversations about energy because that is an area now of my responsibility here in the Congress. But I think the person calling the shots here is Carol Browner.

This is the management issue that this whole thing raises. I said what I said about Y2K because that was a circumstance that cut across Department lines. There was no way you could raise that issue within existing White House or congressional staff. But in this circumstance, you have a Council of Economic Advisers, but the President has a czar. You have a Secretary of Health and Human Services, and the President has a czar. You have a Secretary of Energy, but the President has a czar. And somewhere in this circumstance, at OMB or surrounding OMB, there is a John Ehrlichman from Chicago who is going to say no, and that is going to end it.

Mr. CASEY. Actually, Senator, if I can respond.

First, with respect to the question of how difficult it is to make an agency do what it does not want to do, obviously the White House can and does make agencies do what they do not want to do. But it is a heavy lift, as they say. Not every issue can be elevated to the President. The agencies deal, obviously, with hundreds and hundreds of important issues. And, yes, if you get to John Ehrlichman, then ultimately you can probably close down debate. But you cannot do that on every issue because there are simply too many.

With respect to the question of whether John Ehrlichman was speaking for the President, to the extent the President wanted Ehrlichman to deliver the message, that is fine. But the Cabinet officers who were responsible for that issue had absolutely every right to say, "We want to hear that from the President."

Senator BENNETT. Let me hear from Secretary Ridge. Mr. Secretary, can you respond to that?

Mr. RIDGE. Well, I can appreciate people in the White House saying no, Senator, based on personal experience. Whether or not they would be considered as czars, I do not know. It is very interesting. A true incident has come to mind. I remember right after the anthrax incident—I was sworn in on October 8, 2004. The first anthrax death had been reported. We had that series of letters and deaths and just a horribly anxious time for this country post-September 11, 2001. The Executive Branch was not speaking with one voice. There was a cacophony of well-intentioned people going forward, but for 3 or 4 days there, we had the Centers for Disease Control and Prevention (CDC) speaking, the National Institutes of Health (NIH) speaking, everybody speaking. I must commend the present Administration getting around H1N1. They did a much better job of having a single point of focus.

But in my coordinating role as Assistant to the President for Homeland Security, I remember calling everybody together in the Roosevelt Room and saying, "We have got to do a better job than this, and from now on, we are going to coordinate the message. We are going to do it through the White House." So that worked very effectively.

But there were other occasions when, then as Secretary stepping in, I guess my concern was there were some organizational matters that I thought we had greater familiarity with, better understood than perhaps somebody in the White House in terms of the effectiveness of the proposal we had, just on an organizational chart, and was told no.

And so I guess the challenge you have is distinguishing those times when this individual, a confidant of the President, gives exclusively bad advice, and then occasionally, when whomever it is around the President has actually veto authority, can actually influence what that Cabinet secretary wants to do. So that is the gray area that I think the Executive and Legislative Branches have dealt with for 200-plus years, and you continue to deal with it. So I have had experiences in both directions.

Chairman LIEBERMAN. Thanks, Senator Bennett. I think you were here for my opening statement. I expressed some concern about the use of the term "czar." You have offered in its place "courtier." That actually describes more appropriately the power exercised here, although it is not yet quite American enough. [Laughter.]

Let us work on that together.

If I may, just to supplement your story, you brought to mind a story when you told the Ehrlichman story, it is not quite as direct, but Abraham A. Ribicoff was a governor of Connecticut and a Senator. He was a great inspiration and mentor to me. In between, he was in the Kennedy Cabinet for 2 years, and he left surprisingly quickly to run for the Senate. And I remember being at a dinner with him. Somebody said, "Abe, why did you leave the Cabinet so quickly?" "Oh," he said, "there were several reasons, but its wonderful to think about being a Senator." But he said, "You know, I just got tired of having these kids from the White House call me and tell me what to do."

Now, of course, he had been, as Governor Ridge knows, previously a governor, so no one tells a governor what to do. Senators are more accustomed to that. [Laughter.]

But those stories give us a certain degree of humility here, hopefully, in trying to deal with this, because whether they are called "czars" or special positions are created, there is no question that inherent in the people around the President—Ehrlichman, who had a high office, or "these kids," as Abe Ribicoff said—there is power. And it has over the years concentrated much more in the White House and away, unfortunately, from the Cabinet secretaries.

Senator Burris, do you want to say a word of defense on behalf of Chicago?

OPENING STATEMENT OF SENATOR BURRIS

Senator BURRIS. I would, Mr. Chairman. I have been a constitutional and political science student. I mean, this is Political Science 101 or maybe Political Science 1000. The panel has just been terrific. I have so many thoughts just rolling through my head, I do not even know where to start. This is the meat that causes us political scientists to even exist because you are dealing with these major issues of the separation of powers and the creation of this country, and whether or not you want the President to really have the powers that you granted him, and whether or not the Congress, which is on similar or equal footing, can then control or muscle in on those powers of the President based on the fact that—especially the House of Representatives, since they stand for re-election every 2 years, and Senators much longer. You have this constant power struggle as to who is really representing the people and what that representation is going to mean when it gets to the policy decision that is going to impact the public.

I do not think you can come up with a definition dealing with this. Having served in a governor's cabinet and having dealt with those staffers, it almost depends on how strong the Cabinet member is as to just what and how he is going to deal with those situations and those circumstances, because having experienced that on the State level and knowledgeable to some extent on the Federal level—I was very close to the Carter Administration and had good insights into the workings of the White House and all of those decisions that were being made and how the gatekeepers really sought to filter the information they got to the President. Every President is going to go through it. I do not know how we in the Congress can legally—I mean, I heard the distinguished Ranking Member say that we passed a law. We can pass a law and say that there is going to be a position in there, but I do not think the Congress can tell the President who to put in that position. And if we do that, then I think that we are violating the separation of powers. I mean, this is what we get into. And you can create a position—what happens if the President says, "I do not want to appoint anybody as Secretary of State. I am going to use the Under Secretary as an Acting Secretary"? Is there a law that would require a President to appoint a Secretary of State?

Mr. CASEY. A law that requires the President to appoint a Secretary of State?

Senator BURRIS. Yes.

Mr. CASEY. Specifically, there would not be a law requiring him to do that. Now, of course, if he wants the functions that you vested in a Secretary of State performed, he probably has to——

Senator BURRIS. But there is no law that says he has to even appoint a Secretary of State. Am I correct? There is a statute that says there is a Secretary of State position.

Mr. CASEY. Right, shall be appointed in the following—yes, I am unaware of any law to require it.

Senator BURRIS. But is there a law that says the President has to make that appointment?

Mr. CASEY. Not that I am aware of.

Senator BURRIS. That is the difficulty with which we are dealing. Is there a law that says that the President can appoint an acting person and how long can that person act?

Mr. CASEY. Yes, there is actually a law that governs that.

Senator BURRIS. How long can that person act?

Mr. CASEY. I would actually have to look at the statute, but it is a matter of months.

Senator BURRIS. A matter of months. So that person has the authority then should leave that position? And who then assumes that authority in that position if the President refuses to send a name up for confirmation to us?

Mr. CASEY. Well, yes, there are many circumstances in which an acting official can continue to serve, especially if they are the normal principal deputy of the office that you are talking about.

Senator BURRIS. And what about the midnight appointment of judges in the interim time while Congress is in recess.

Mr. CASEY. Recess appointments.

Senator BURRIS. The recess appointments, and they serve for only a certain period of time, and otherwise that person would have to leave the position? I mean, you can see all the questions that are just flowing through my process here as we try to talk about czars and policymakers. This is even bigger than czars. You are wrestling with this wonderful document that was created 200-plus years ago that created our Nation and this thing called separation of powers. We have not even gotten into the judiciary side of this, which could also raise a whole lot of other questions.

I have more questions than I have answers, Mr. Chairman, in reference to this because I just sit here and listen to the experts talk, and every time there was a statement made, there is a new question coming to my mind, well, what about this? What if? And so I find this so fascinating, and I am certainly going to read each and every testimony of the witnesses. I do not know how I am going to get back to the hearing again to try to follow up on this.

Mr. Chairman, I would imagine that our grandchildren are going to be still wrestling with this same problem. I do not know whether or not we want to have a weak President who is going to kowtow to Congress or a weak Congress who is going to let a President run all over us, which you see in some of these cases. If you say that we are going to appropriate some money and they do not want to spend it, they do not spend it. And you just heard what the distinguished Senator from Utah said, who the gatekeeper is to stop information from getting to the President? I am more frustrated than I am with the questions.

Thank you, Mr. Chairman. I am done. [Laughter.]

Chairman LIEBERMAN. Thank you, Senator Burris. No, I think this is actually a subject that has received a lot of heat lately, but I think there has been a lot of light shed this morning, and it is due to the quality of the witnesses and, I think, the interest of the Members of the Committee, including yourself, in going at this thoughtfully. I thank you.

Senator McCaskill.

Senator MCCASKILL. Thank you, Mr. Chairman.

The job we have today is to try to separate genuine concern over constitutional checks and balances versus the partisan food fight. And I think we are in the right Committee to do that. I think the Chairman and the Ranking Member have repeatedly shown in their tenure in this Committee that they are not partisan and that they are focused on accountability.

The context really is what is important here, and, really, the question boils down to the simple nugget of truth: To what extent is the President entitled to have advisers within the White House? And what power does the Congress have to limit those advisers in the White House? And I read every word of all of your testimonies. They were fascinating. I am a student of history, especially the Truman Committee because of my connection to that particular President in my home State and my interest in oversight in war contracting. So all of your testimony—I have to tell you, I have been a little offended at how frequently Richard Nixon's name has been used by members of the other party in the last few days. I think that is a little silly to be comparing the Obama Administration to some of the shenanigans that went on in the Nixon White House, and I have not appreciated that comparison.

And that is unfortunate for this studious look at this issue. This all began, as my kids would say, in reference to the Harry Potter series, from a rant by he who shall not be named, and in the rant that this person did include nine people who have been confirmed by the Senate in his list of czars. And of the nine people who were confirmed by the Senate, all but two of those were unanimously confirmed by the Senate.

Another large chunk of the czars that were identified report to Cabinet secretaries. They do not have any power outside of the power of the Cabinet secretary, as you all have pointed out as experts in this area of constitutional law.

So if you whittle it down, there is a very small number of White House advisers that we are really talking about here, and even a smaller number that are new. And so I think you all have done a very good job in a nonpartisan way, including you, Secretary Ridge, talking about the challenges of us overseeing White House advisers.

I was particularly interested in your testimony, Dr. Pfiffner, about what is perhaps a bigger threat to the constitutional checks and balances, which are things like signing statements and things like secret programs and the claim of executive privilege. And I find it a little ironic that some of my Republican friends have righteous indignation about White House policy advisers, especially in light of what I would call the very strong, muscular attempt in the

previous Administration to embrace signing statements and some of the other things I just talked about.

I would hope that this Committee would take a look at signing statements and their constitutional foundation and what we should be doing about signing statements. That is a direct affront to the constitutional power of the Legislative Branch.

Let me ask and confirm again, Is there anyone on the panel that believes we should be calling anyone outside of a White House adviser the term "czar"? Is it appropriate to anyone who works directly and answers, for example, to National Security Advisor Jim Jones or answers directly to Secretary of State Hillary Clinton or answers directly to the Environmental Protection Agency (EPA) Administrator or any of those? Is there any appropriate nomenclature that would put them under the rubric of the term "czar"?

Mr. RELYEA. I suspect what you are asking is to let us get away from the label.

Senator MCCASKILL. Right.

Mr. RELYEA. And let us see what these people are actually doing.

Senator MCCASKILL. Right.

Mr. RELYEA. Are they wielding power that someone else should use?

There is another caution here, I think. The word "czar," like the word "kaiser," both come from Caesar. That was a pretty authoritarian person.

Senator MCCASKILL. Right.

Mr. RELYEA. If not a dictator. So it has a pejorative quality to it, too. And where it is usually applied first is by the press. This may be a member of the press who did not get access to this person and so they labeled him a "czar" to sting him back.

It also may be shorthand—to come full circle in my comment, it falls on the part of the reporter or the journalist to actually look at what the person is doing. They go, "Oh, this person has a lot of power. Must be a czar. That is my story."

So I think it behooves us, wherever we see these actors, these presidential agents—Dr. Pfiffner makes the point that these are blessed somehow with access to and the authority of the President. I think that is a beginning point. And then are they doing somebody else's job, as Senator Collins was pointing our in her example.

So labels are neither here nor there. Titles may not be here or there. It is what are they doing, and that is the key question.

Mr. CASEY. I would agree. The real question is—"czar" is an unfortunate term. It has been with us for 30 years. The fact that now we have 30 or 40 people being called "czars" frankly debases what was already a debased currency. We really need to look at the authority that people are exercising.

Senator MCCASKILL. Dr. Pfiffner.

Mr. PFIFFNER. I think there is no doubt that some White House staffers try to exert personal power rather than representing the President, but only if and as long as the President is willing to listen to them. But I think that is the reality of power. Leaders need staff and advisers, and I think even Members of Congress probably have staffers that occasionally communicate with other staffers by delivering a message of the principal person. So a certain amount

of that stuff I think is legitimate in the White House as it is in Congress, as it is in the Supreme Court.

Mr. RIDGE. Senator, if I might just comment, please, I think I can put an exclamation point—and my colleagues are much more versed in this than I am. But whether the term is "czar" or "adviser," both defy definition. There is no definition, unless accompanying the appointment there is a specific delineation of responsibilities. If accompanying every appointment there is that delineation, then there is some functionality associated with the title. I think one of the reasons there is so much confusion and perhaps a point of delineation between those who should testify and those who should not, is if the Congress and the public in a transparent world understood completely what the authorities were.

Senator MCCASKILL. Right. I would just briefly also point out, I think Senator Collins had a good example of where we have to ask questions about the position that was created. I do know, however—and I know you guys are aware of this—that the Weapons of Mass Destruction Commission has recommended the repeal of that position, and President Bush wrote a letter to Congress in January requesting the repeal because the Commission has indicated they do not think it is an appropriate Senate-confirmed position.

I tend to agree with you, Senator Collins, that regardless of what the Weapons of Mass Destruction Commission said, if Congress has passed it, I think it would be incumbent to fill it unless and until it is repealed. But I do think that there has been some at least independent assessment concerning that position that at least I think has come to the attention of both the Bush Administration and the Obama Administration. But I thought your example was a good one because it was not about the Democrats versus theRepublicans; it was about Presidents ignoring Congress.

Thank you, Mr. Chairman.

Chairman LIEBERMAN. Thanks, Senator McCaskill.

We will do one more round. There is a vote in about 10 or 15 minutes.

Let me pick up on this example that Senator Collins mentioned and acknowledge it and acknowledge that attempts we make to deal with the problem that concerns us can be frustrated by executive action, but let me just focus in.

What really troubles me about this is the matter that we have talked about, which is the difficulty and really ultimately the impossibility of exercising our oversight authority with regard to people in the White House. And the elevation of some of these positions, which are really policy coordinators and coordinating Cabinet officials, to me they seem sometimes to be really acting as if they were officers of the Federal Government, that is the concern I have. So the question then is—because in the normal course of events, no matter which party controls Congress, which controls the White House, these are institutional conflicts that will go on, and Congress will not have the ability to obtain information.

So one possibility is to take some of these positions that are now within the White House, that appear to be policy coordinating, not within the inner circle, if you will, of the President, and make them

statutory. And, again, I understand the capacity of a President to frustrate this.

An interesting example here is the Office of National Drug Control Policy. A so-called drug czar was actually created by President Nixon. There we go again with President Nixon. Later it was made statutory, and the Director of the Office of National Drug Control Policy, statutorily authorized, confirmed by the Senate, does respond to requests by Congress to testify or produce documents.

So as we quite seriously search for some kind of answer to what to me is the heart of this question from a congressional point of view, how do we obtain testimony properly and exercise our oversight authority? I want to ask you, is that history that I have just described a good precedent for us? In other words, should Congress, for instance, create a White House office charged with coordinating national health policy, which is essentially the position of Nancy-Ann DeParle? And should we create a national adviser to the President for energy and climate change policy—which is the one that Carol Browner is in now—as a way to resolve this dilemma and subject these positions to Senate confirmation and, therefore, make sure that they will be responsive, acknowledging executive privilege, to a request to come before Congress and testify? Dr. Relyea, I think I will start with you.

Mr. RELYEA. I think it is worth pointing out that the drug czar, so-called, is in an agency which is within the Executive Office of the President. It is not in the White House Office. So there is a distinction that is important. Congress has on occasion created entities within the Executive Office, and those seem to be—up until the moment—far less of a problem than people who are in the White House Office.

The National Security Advisor is actually on the White House Office staff, not an official of the National Security Council. And on various occasions, since as far back as I can remember, like in the early 1970s, there had been attempts from time to time to make that position subject to Senate confirmation. We have come very close to the edge, but have always backed away at the last minute.

Chairman LIEBERMAN. Particularly around Henry Kissinger's time, if I recall correctly.

Mr. RELYEA. Yes, it was with Dr. Kissinger.

Chairman LIEBERMAN. He was exercising too much authority.

Mr. RELYEA. Yes, and it came up later.

Now, interestingly, out of Dr. Kissinger's experience, when he was National Security Advisor, and Governor Ridge did the same, while they were prohibited from coming before Congress, they gave briefings. They met informally, confidentially, off the record, with Members of Congress. So as I tried to point out in my statement, there are means for getting accountability or finding out what is going on and so forth. But I think, even though Congress creates a staff authorization for the White House Office, provides the funds for the White House Office personnel, thus far Congress has not seen fit to invade that domain and has left it to the President.

Now, a little saber rattling might cause a President to think, "Uh-oh, here they come. They are going to come in the White House and start telling me how I can hire people."

Chairman LIEBERMAN. In general, you would counsel against that?

Mr. RELYEA. I counsel against it because I think you have two great problems to overcome: A historical record, and I think it would take an extraordinary majority in both chambers to get that passed.

Chairman LIEBERMAN. Yes. Incidentally, as you know, Kissinger and Nixon solved that controversy by making Kissinger Secretary of State.

Mr. RELYEA. He had both roles for a while.

Chairman LIEBERMAN. Yes, that is right. Mr. Casey.

Mr. CASEY. I think the real question is whether by creating one of these offices you can then effectively prevent the President from looking to someone else to be his adviser on the issue or to speak for him on the issue, and I think that, frankly, is where the constitutional problem is.

There are certainly a lot of functions that you could consolidate in a particular office, be it in the White House, in the Executive Office of the President, or outside in an agency. But the key question is: By doing that, can you keep the President from looking to someone else? I do not think you can. I think it raises very serious separation-of-powers issues. I am not exactly sure what the courts would do, although I will say that in many areas where the question is whether legislation or regulations apply to the President's personal staff and office, the courts do somersaults to avoid answering the question.

Chairman LIEBERMAN. Thanks. Dr. Pfiffner.

Mr. PFIFFNER. I think Secretary Ridge is right, that the key here is the functions that these people perform. If you create an officer of the government, that person can exercise the authority of that office, but they are also subject to the Executive Branch chain of command.

Advisers to the President, on the other hand, can tell the President whatever they want, and you can create the position, but basically the President can listen to whomever he or she wants.

So I think the real solution, if there is one, to this problem is comity between the branches from both sides so that the President does not keep trying to keep things away from Congress, make things non-transparent, and that Congress does not get too heavy-handed, on the other hand. That is a difficult one, but I think that is the real solution.

Chairman LIEBERMAN. Governor Ridge.

Mr. RIDGE. Senator, a slightly different perspective. At some point in time, while you are interested in the kind of interaction and oversight incumbent upon you within the Legislative Branch, the perspective I offer you as a former Cabinet secretary, at what point in time does that assignment of responsibilities or a function begin to interfere, overlap, conflict, or create a real tension between the individual in the White House and a Cabinet secretary? So does the presidential nominee confirmed by the Senate have as much authority in this domain as the President's adviser who is not answerable to you right now under certain circumstances?

So I think if you would decide to legislate, I would just encourage you to be very cautious that you do not undermine the credibility

and the function of the Secretary, who ultimately is accountable to you.

Chairman LIEBERMAN. That is a good point. As you respond, it strikes me that the initial position you held in the White House, Homeland Security Advisor, was created by executive order.

Mr. RIDGE. Correct.

Chairman LIEBERMAN. And then made statutory. That is an interesting case. Now, it was not done to compel the testimony of the position. It was done as part of the creation of the Department of Homeland Security, the reforms that we were putting into effect over time to protect our country from terrorism. So we wanted to give it that extra measure of authority. And then—I think I am getting the time right—when you were Secretary, we had given the Homeland Security Council and Advisor statutory authority. In other words, you were dealing with a statutorily authorized Homeland Security Advisor when you were in the Cabinet.

Mr. RIDGE. Right. As I recall the legislation, my position within the White House as Assistant to the President for Homeland Security was created, and now President Obama, I think, has moved that within the National Security Council. I think John Brennan basically now holds that title.

Chairman LIEBERMAN. That is right.

Mr. RIDGE. I do not know whether he is subject to public inquiry from the Congress or not. I suspect the President is protecting that domain. And I do not recall, frankly, Senator, whether or not General Gordon or Fran Townsend were ever called to testify. I do not think they did, although, again, to Dr. Relyea, I think they are up here briefing constantly, but not publicly. Big difference.

Chairman LIEBERMAN. Thank you. Very good answers and helpful.

Senator Collins.

Senator COLLINS. Thank you, Mr. Chairman.

We have heard today, as well as from the President's legal counsel, the argument that Congress cannot compel individuals who fill these czar roles to testify before us because of the argument Mr. Casey made today that the President has the right to have personal assistants who advise him.

The problem for me is there is a big difference between the traditional staff of the President—his chief of staff, his legal counsel, his press secretary—and these czar positions which have significant policy responsibilities. And that is why I have been trying to come up with a reasonable approach to resolve this issue.

For example, I think Congress should be able to call Carol Browner, the President's energy and environmental czar, to ask her about the negotiations that she conducted with the automobile industry that led to very significant policy changes with regard to emission standards. I think that is particularly important because the Supreme Court in 2007 held that it was the Environmental Protection Agency that had that very responsibility under the Clean Air Act. And yet these negotiations were not undertaken by the EPA Administrator but, rather, by the White House czar.

Similarly, when Nancy-Ann Min DeParle was appointed to her position in the White House, the executive order does not just vest in her the authority to coordinate across Department lines. It does

not just say that her job is to advise the President. It specifically says that she is charged "to develop and implement strategic initiatives under the President's agenda" with a relationship to health care.

Implementation should be the job of the Secretary of Health and Human Services, so that is why I am troubled. And I am not proposing that the President be barred from creating these new positions to focus on important policy priorities. I am not saying that he should not be able to appoint whomever he wants to these positions. But if we are going to have these individuals in the White House have the ability to negotiate emission standards with the automobile industry or implementation health care policy initiatives, to me that is totally different. That goes far beyond a position responsible for advising the President where I would agree that we do not have the right to call them before us—in the vast majority of cases. I realize I need an out there just in case.

So what I have proposed—and what I offered on the Senate floor, but it fell to a point of order unrelated to the merits—is that the President make available to Congress to testify upon a reasonable request individuals who have responsibility for interagency development or coordination of any rule, regulation, or policy, and that it would apply to only those individuals who are without statutory authority. So I am narrowly defining who I believe should come and testify before us.

The second half of the amendment also called on the President to provide us twice a year with a written summary of the activities of these officers within the White House. That strikes me as a reasonable approach that would allow us to exercise our oversight responsibilities, that would introduce far more transparency and accountability into the process, while not infringing upon the ability of the President to create special policy advisers, to fill them with the people he wants without congressional confirmation, without Senate confirmation.

So I would like to get your judgment on whether you think that would be a reasonable compromise to a difficult issue for those of us who believe in a strong Congress. Secretary Ridge. Or would you like me to start on the other end of the panel, then work down.

Mr. RIDGE. Well, I would start if you let me finish. [Laughter.]

Revise and extend, whatever.

Senator COLLINS. Absolutely.

Mr. RIDGE. The operative word—I mean, it does make sense, if you can identify in your legislation the ability—and, again, language will be very important, as it always is—of these individuals within the White House, within the President's staff, who actually, as you pointed out, are told to implement and execute policy. I am there, then I think clearly you have that—I would favor your amendment.

The coordination role I have often viewed as a little different, if it is truly coordination. Because I think the notion that the President would have someone around him overlooking—because there is so much overlapping jurisdiction, to bring people together to coordinate existing policy—not to create it but to coordinate whatever Congress has said the Administration is obliged to do, whether or

not—I am agnostic on that. I cannot quite get there right now, but clearly on implementing and execution, you got me.

Senator COLLINS. Thank you. Dr. Pfiffner.

Mr. PFIFFNER. With respect to policy responsibilities of advisers and whether they can negotiate for the President, they can, I think, only do that with the President's permission. I think even Senators' staffs sometimes do something like negotiate with other staffs and so forth.

With respect to the implementation of health policy, I think that is very troubling, but I think that person cannot, with any personal authority, do any implementation.

The President I think can give permission to his or her staff to come and testify. I think that is a matter of comity usually rather than forcing the President to do that.

With respect to requiring a report from the President, I think you can absolutely require a report on the policies, but whether you can require a report on personal advice and activities, I am less certain about that.

Senator COLLINS. Thank you. Mr. Casey.

Mr. CASEY. Certainly with respect to the question of implementation, it raises a fair question for Congress to ask. It is absolutely true that an Assistant to the President cannot propose a rule, cannot finalize a rule. They cannot by law implement. But it would be a reasonable question to say what exactly did you mean by "implement."

With respect to negotiating on the outside, again, I agree, the individual acts solely as the President's personal representative. If you disagree with the policy that eventually came out of that, you have every right to call the Administrator and the Secretary of Transportation up here and say, "What made you think this was a good idea? Why did you sign it?" And in that way you can certainly oversee it.

With respect to legislation, again, the court analyzes this based not on hermetically sealed departments, but how much would it actually intrude upon the President's ability to do his job. And so it is not exactly clear what the result would be.

Senator COLLINS. The problem, if I may interrupt just briefly, is that we could call the Secretary of Transportation, the head of EPA, and the Secretary of Energy on the automobile emissions issue before us. You are right. But they are not the ones who made the deal. That is what troubles me. They are not going to be able to address the issues.

Mr. CASEY. If I may, you see, they did not negotiate the deal, but they did actually make the deal. They are the ones that had to act in order for that deal to become law, to be binding. And that I think is indeed the important issue.

Senator COLLINS. Not in terms of transparency. Mr. Relyea.

Mr. RELYEA. On your amendment that you were talking about, I think a central problem is the hair splitting of the functions that are legitimate and thought not to be legitimate. So I am basically sort of in agreement with what you are trying to do, but the beauty is in how it is crafted legislatively.

As to a report from the President, I am less hopeful. I have read many reports supposedly from the President, and they can be pret-

ty mushy. Nicely phrased, but they do not tell you much when you back away from them. A hollow meal.

I have a question, though. In your example you gave of Carol Browner's activity, did you ever consider asking her for a briefing on the issue of how she was negotiating and doing that?

Senator COLLINS. Let me say that I have talked with both Nancy-Ann DeParle and Carol Browner, not on the automobile emissions but other issues. But I agree with Senator Byrd that private meetings are not the same as public hearings. And they are not. The public cannot see them.

Mr. RELYEA. Right. There is no transparency.

Senator COLLINS. There is no transparency, and that is why this is difficult.

I know that my time is more than expired, and a vote has started.

Mr. RELYEA. Could I ask you one other question? You asked about the implementation point. This is a point for many Members of the Senate, or the House, for that matter. Did you consider legislation that would overturn the implementation capacity in that executive order?

Senator COLLINS. Well, we are going through the executive order with a fine-toothed comb, but, see, one of the problems is that several of the czars were just announced through press releases. There is not an executive order. But let me indicate that we are halfway through a vote, so I know we need to conclude this.

I just want to thank the Chairman for holding this hearing. This issue has been of concern to me for many months. I first raised it at a public hearing back in April when we were discussing whether there should be a cyber security czar, and I thought, "Here we go again." And it is of great concern to me. It implicates fundamental constitutional issues and responsibilities of the Congress, and I just want to thank the Chairman for putting together a superb hearing with excellent witnesses so that we could have a serious look at this issue.

So thank you very much, Mr. Chairman.

Chairman LIEBERMAN. Thank you, Senator Collins. You did raise it long before it got to be a hot topic on the airwaves, particularly from he whose name shall not be mentioned, who is my constituent and long-time acquaintance since he had a morning radio show in New Haven, Connecticut. But you raised it. I remember when you raised it earlier, and I am very grateful to you for your help in putting this hearing together, and to the four witnesses who have testified, this has been very informative, very provocative really, and I think we both share a desire to do something about this to help Congress uphold our constitutional responsibility for oversight. But we understand the balance here as reflected in the Constitution.

So thank you very much. The reward for your good testimony is that we will probably bother you again.

The record of the hearing will remain open for 15 days for additional statements and questions. With that, the hearing is adjourned.

[Whereupon, at 12:04 p.m., the Committee was adjourned.]

APPENDIX

Opening Statement of Chairman Joseph I. Lieberman

October 22, 2009

Welcome to this hearing, which has the title "Presidential Advice and Senate Consent: The Past, Present, and Future of Policy Czars." The title "czar" has been used more in Washington in recent years than anywhere, anytime since 1917, when Czar Nicholas the Second of Russia came to his unhappy ending. As one of our witnesses this morning will make clear, President Obama is not the first of our national leaders to bring non-cabinet officials into the White House as policy advisors or coordinators, though he has added a number of them. Arguably and interestingly, it was that great populist Andrew Jackson, way back in the nineteenth century, who was the first president to rely on what he would be surprised and puzzled to learn are today called "White House czars."

The main questions raised in what might be called the current anti-czarist uprising seem to be: First, have presidents of both parties, including President Obama, consolidated power excessively in the White House through the appointment of these officials contrary to at least the spirit of the Constitution, if not our laws, particularly as against the authority of members of the Cabinet and if so, is there anything that Congress can or should do about it. Second, does the growing use of czars in the White House and the administration, this and past ones, frustrate Congress in carrying its constitutional responsibility to oversee the expenditure of the public's money which we appropriate, and the decisions that are made by the so-called czars with that money. Again, if so, what should we be doing about it?

I also hope our witnesses will help us with the question of definition. Who is deserving of the title of "czar?" Is it only people in the White House, or coordinators of policy, whether or not the positions are authorized in statute and they are confirmed by the Senate? Or does it include a larger group of public officials—statutorily authorized or not, confirmed by the Senate or not, working out of the White House, or not? Finally I cannot resist saying with all respect to the aforementioned Nicholas II and his esteemed predecessors, I will ask our witnesses if there isn't some more American title that we can use instead of "czar" to describe these government employees. The term "czar" seems to me not only ethnically inappropriate, but the federal officials to whom it has been applied have far less autocratic power than the Russian czars did, which may explain why, though some of the current crop of White House czars have been subjected to harsh media criticism, their time in office is unlikely to end as violently as that of Nicholas II.

I'm 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'm going to try and do my best not to use the word "czar" in this regard again. I'm going 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. Regardless of what one calls them, the proliferation of these positions really does raise serious questions that go right to the heart of the allocation of power in our constitution between the president and congress. The authority and responsibility of congress to oversee the expenditure of the money we appropriate to the executive and of course the right of the executive to executive privilege, which is inherent in the presidency. We have an excellent panel of witnesses with us this morning who can help us answer these questions, and then ultimately help us decide whether we wish to propose a corrective legislation.

Statement of
Senator Susan M. Collins

"Presidential Advice and Senate Consent: The Past, Present, and Future of Policy Czars"

Committee on Homeland Security and Governmental Affairs
October 22, 2009

★ ★ ★

When the Founding Fathers put down their quills in Philadelphia on September 17, 1787, they had crafted a Constitution - the framework for our representative democracy. Their work established a system of government with three separate branches . . . a government whose leaders were to be accountable to the People through a carefully constructed system of checks and balances.

The responsibility of Congress to oversee the Executive branch is fundamental to our Constitutional system. That responsibility is on display whenever the Senate performs its explicit Constitutional "advice and consent" role or whenever Congress holds hearings on particular policy matters. This oversight ensures the accountability and transparency our Founding Fathers envisioned. And it is that oversight obligation which brings us here today.

The proliferation of "czars" diminishes the ability of Congress to conduct its oversight responsibilities and to hold officials accountable for their actions. These "czars" can create confusion about which officials are responsible for various policy decisions. They can duplicate or dilute the statutory authority and responsibilities that Congress has conferred on Cabinet officers and other senior Executive branch officials.

And, they can circumvent the Constitutionally mandated process of "advice and consent." Czars can exercise considerable power and influence over major policy issues, and yet, they are not required to clear the rigorous Senate confirmation process. Czars bypass this important Constitutional protection through a unilateral grant of authority from the President.

Some, including the White House, have sought to diminish the significance of this debate by declaring that the use of "czars" does not violate the Appointments clause. But even if the appointment of all of the "czars" were "consistent" with the Appointments clause - and frankly, I believe the jury is still out on that question - the proliferation of "czars" in

the Executive branch encroaches on the more fundamental Constitutional principle of checks and balances.

We all recognize that Presidents are entitled to rely on senior advisers such as his chief of staff and legal counsel, who are his personal staff. And, to be clear, not every position identified in various reports as a "czar" is problematic. Positions subject to Senate confirmation or otherwise recognized by our laws, such as the Director of National Intelligence, the National Security Advisor, and the Chairman of the Recovery Accountability and Transparency Board, do not raise the same concerns about accountability, transparency, and oversight.

Czars are also not new to the American political landscape, but this is not merely a question of past usage. The recent proliferation of "czars" is a cause for real concern because they oversee a growing number of critical policy areas that are already under the purview of other top managers.

Indeed, this Administration has appointed at least 18 new "czars." None of these officials was vetted through the Senate confirmation process. Their authorities and duties remain unclear. Their future plans have received little public airing. Their relationship with Cabinet-level officials is undefined. They rarely, if ever, testify before Congressional committees.

In short, this bumper crop of czars has left the public and the Congress with many worrisome, bottom-line questions:

Who is in charge?

Who is responsible for what?

Who is directing policy - the czar or the Cabinet official?

And most important, who can Congress and the American people hold accountable for government decisions that affect their lives?

This is not an academic exercise. Czars - not Cabinet secretaries - are negotiating with members of Congress on key policy issues. Where is the Cabinet official in these talks?

As I have stated before, this is not a partisan issue; this is not a political issue. It is an issue of institutional imperative and Constitutional prerogative.

It is also a question of effective management. The proliferation of czars has created two separate tracks of top management within our federal government.

On one track, we have Cabinet-level leaders with defined roles and assigned duties.

On the second track, we have "czars" with fuzzy roles and loosely defined functions.

These separate tracks of management authority can create duplication of effort, dilution of responsibilities and focus, and management dysfunction.

I look forward to hearing from our expert witnesses, especially former Secretary Ridge, whose broad experience in service to his country will greatly aid our examination. Secretary Ridge has served as the chief executive of a state, as a member of Congress, as a senior White House aide, and as a Cabinet-level officer. These experiences inform every aspect of the debate over the use of "czars."

Until the Administration answers important questions about the role of its czars and makes all of them available to testify before Congress, it will not have fulfilled the promises President Obama made to the American people: that the government should be more transparent and accountable, not less.

Post-Hearing Statement for the Record
Submitted by Senator Roland W. Burris

"Presidential Advice and Senate Consent: The Past, Present, and Future of Policy Czars"
October 22, 2009

I am interested in the matter we are here today to discuss—this Administration's use of so-called presidential "czars" and the concerns being raised by the media, my colleagues, and the public.

In preparation for this hearing, I saw many numbers and accusations about these so-called czars. It is hard to get a factual count of the czars because there is no solid definition of the word in this context—it is not a formal title bestowed upon any of these advisors.

More importantly, objections to these czars based on numbers does not lead to a valid argument against this Administration; after all, this is not the first time we have had executive branch czars, and according to some accounts the previous Administration had more czars than the current one.

I am eager to learn more about the background of czars and their use throughout history. When did this phenomenon start, and how has the use of czars evolved? We are here today to evaluate the constitutional implications of czars, as well as related management and policy issues, but I hope that we share the common goal of providing useful oversight. It is our job in Congress to ensure that the government is functioning properly and transparently.

A practical concern for all of us here today, with regards to these so-called czars and every other aspect of our government, is ensuring that we know where the ultimate decision-making authority and accountability rests.

I look forward to the testimony and will have a few questions for our distinguished witnesses.

Statement of Senator Robert C. Byrd

Mr. Chairman,

I commend the Senate Homeland Security and Governmental Affairs Committee for holding this hearing today. I am not a member of the Committee, and so I thank you for the courtesy of allowing me to submit a statement for the record.

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

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

President Obama is busily appointing even more of these presidential advisors, which some call "czars", to new, high-profile positions which exist to coordinate policy agendas all across the executive branch. In December 2008, the President announced the appointment of an Assistant to the President to coordinate energy and climate change policy. In February and April of this year, the President issued two executive orders creating White House Offices to coordinate urban affairs and health reform policy agendas. In May, the President announced the creation of a new White House Office to be led by a Cybersecurity Coordinator. In addition, the President has appointed three individuals to serve dual roles as White House advisors and executive

officers. He has named a Chief Performance Officer, a Chief Information Officer, and a Chief Technology Officer (who will also serve as an Assistant to the President), and he simultaneously nominated these individuals to serve in statutory positions at the Office of Management and Budget, and the White House Office of Science and Technology.

I am sympathetic to every President's need for confidential advice, and to help ensure that presidential decisions are correctly implemented by the various departments and agencies. However, I have also had the experience of struggling with presidential assistants in previous Administrations who directed policy decisions from the White House, while claiming exemption from the Constitutional system of checks and balances in the face of congressional requests for testimony or information. The notorious Iran-Contra scandal is an excellent example. In Republican and Democratic Administrations, White House aides have directed policy decisions, and then declared themselves exempt from Congressional oversight through claims of executive privilege. My study of the U.S. Constitution, combined with those real-life experiences, has led me to conclude that presidential assistants and advisors should not be placed in a position to control policy unless the president is willing to accommodate Congressional oversight requests.

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

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

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

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

Whether an executive official is confirmed by the full Senate, or appointed by the President alone to serve on his White House staff, that official holds the position by virtue of the authority that the Congress has granted to the President. Such White

House staffers receive a salary by virtue of the spending authority the Congress has granted to the Executive Branch. Even presidential assistants and advisors have a Constitutional obligation to answer questions before the Congress if it is necessary for the Congress to fulfill its constitutional oversight and investigative functions.

In addition, I note Title 31 of the United States Code, Section 1347 – known as the Russell Rule – which states: "An agency in existence for more than one year may not use amounts otherwise available for obligation to pay its expenses without a specific appropriation or specific authorization by law." The Congress wisely enacted this provision in 1944, and codified it again in 1982. Its sponsor Senator Richard B. Russell, stated that its purpose "is to retain in the Congress the power of legislating and creating bureaus and departments of the Government, and of giving to Congress the right to know what the bureaus and departments of the Government which have been created by Executive order are doing...regardless of what agencies might be affected, the purpose of this amendment is to require them all to come to Congress for their appropriations after they have been in existence for more than a year."

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

United States Senate
COMMITTEE ON APPROPRIATIONS
WASHINGTON, DC 20510-6025
http://appropriations.senate.gov

February 23, 2009

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

Dear Mr. President:

I am pleased to know about your commitment to an open and transparent government, and to increasing the flow of information to the American public. As you have rightly noted in a recent memorandum to the executive departments and agencies, "A democracy requires accountability, and accountability requires transparency."

I have been reading, with interest, press accounts about the creation of new White House Offices of Health Reform, Urban Affairs Policy, and Energy and Climate Change Policy, and also about the appointment of White House staff to coordinate executive branch efforts on technology and management performance policies. I am concerned about the relationship between these new White House positions and their executive branch counterparts. Too often, I have seen these lines of authority and responsibility become tangled and blurred, sometimes purposely, to shield information and to obscure the decision-making process.

In some administrations White House staff have had an unfortunate history of assuming too much power. In the Nixon White House, Henry Kissinger directed foreign policy through the National Security Council as an assistant to the president, and Peter Flanigan did the same for economic policy through the newly established Council on International Economic Policy. John Ehrlichman took responsibility for domestic policy through a new Domestic Council. OMB Director Roy Ash and Treasury Secretary George Shultz both held cabinet and White House positions simultaneously. After President Nixon's resignation, a House of Representatives subcommittee studied the issue of presidential staffing, and concluded:

> "Whatever their other duties and roles, each of these individuals, as White House personnel, held a high degree of political immunity from accounting for their activities before Congressional Committees. The shadow of executive privilege beclouded normal accountability arrangements."

In 2001, the Bush Administration revived the Nixon model when it created the White House Office of Homeland Security. President Bush appointed Tom Ridge as director, instructing him to develop a national homeland security strategy across Federal agencies. The President then prohibited the nation's homeland security director from testifying before the Congress, despite repeated requests. In 2007, President Bush appointed Lieutenant General Douglas Lute as Assistant to the President and Deputy National Security Adviser for Iraq and Afghanistan. General Lute was charged with coordinating the efforts of the executive branch to support our commanders and senior diplomats on the ground in Iraq and Afghanistan. Incredibly, this individual, who was coordinating two wars from the White House, was never permitted to testify before the Congress.

The rapid and easy accumulation of power by White House staff can threaten the Constitutional system of checks and balances. At the worst, White House staff have taken direction and control of programmatic areas that are the statutory responsibility of Senate-confirmed officials. They have even limited access to the president by his own cabinet members. As presidential assistants and advisers, these White House staffers are not accountable for their actions to the Congress, to cabinet officials, and to virtually anyone but the president. They rarely testify before congressional committees, and often shield the information and decision-making process behind the assertion of executive privilege. In too many instances, White House staff have been allowed to inhibit openness and transparency, and reduce accountability.

As you develop your White House organization, I hope you will favorably consider the following: that assertions of executive privilege will be made only by the President, or with the President's specific approval; that senior White House personnel will be limited from exercising authority over any person, any program, and any funding within the statutory responsibility of a Senate-confirmed department or agency head; that the President will be responsible for resolving any disagreement between a Senate-confirmed agency or department head and White House staff; and that the lines of authority and responsibility in the Administration will be transparent and open to the American public.

I appreciate the time and energy you are devoting to this very important subject, and look forward to hearing from you. Your continued devotion to ensuring that our nation remains strong, just, and free is admirable, and I thank you for your dedication in that regard.

With kind regards, I am

Sincerely yours,

Robert C. Byrd

THE WHITE HOUSE
WASHINGTON

May 19, 2009

VIA FIRST CLASS MAIL

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

Dear Senator Byrd:

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

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

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

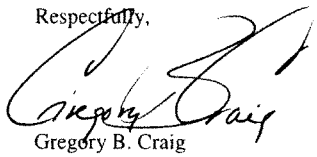
Your letter also raises the important issue of executive privilege, which is a well-established doctrine that protects confidential Executive Branch communications. We agree that assertions of executive privilege can be taken too far, and we will consider carefully the concerns you have identified. We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

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

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

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

Respectfully,



Gregory B. Craig
Counsel to the President

TESTIMONY OF THE HONORABLE THOMAS J. RIDGE
FIRST SECRETARY OF THE U.S. DEPARTMENT OF HOMELAND SECURITY
AND FORMER GOVERNOR OF PENNSYLVANIA
BEFORE THE UNITED STATES SENATE
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS COMMITTEE
OCTOBER 22, 2009 / WASHINGTON, DC

Mr. Chairman, Ranking Member Collins, Members of the Committee – thank you for inviting me to speak to you today.

As you know, I have been privileged to hold a number of public service positions – among them, Member of Congress, governor of Pennsylvania, Homeland Security Advisor and Cabinet Secretary.

As I was then, I am now – a citizen of a country that embraces its Constitution, its Bill of Rights, its values, the greatness of our victories, the lessons learned from our mistakes and a 230+ year desire to uphold the tenets of our Founders, who rejected monarchy, said yes to liberty and had faith that its country would long endure.

I take equal pride and awe in a government, that today, remains committed to a recurring review of its structure, its function and its fundamental tenets of checks and balances. It's another reminder of the genius of our Founding Fathers.

So I appreciate the discussion that Members of this Committee are having this morning. It seems to be one of those rare issues that overrides partisanship and media hype in favor of a serious willingness to consider all points of view.

It is with that understanding that I accepted the invitation to share in today's discussion.

First, I must tell you that, having sat where you do today – having been a congressman, having been a governor, having been a so-called "czar" and a Cabinet Secretary – I have an empathy for everyone involved in today's discussion.

The huge complexities associated with good governance are real and are to be respected. The good intentions of good people are not to be demeaned, rather clarified for all involved and assisted by ongoing communication and civil debate.

It is in that context that I hope sharing my own personal experiences will provide a perspective that will help members of this committee as it reviews the issue of policy czars.

Second, I am of the belief that President Obama, as is the case with many presidents before and after him, has the discretion and authority to appoint advisors who can assist him in the carrying out of his presidential obligations. So I leave it to the constitutional scholars to debate the issue of "advice and consent."

My interests, rather, lay in the issues of effective management, good governance, transparency and lines of authority.

1. Who's reporting to whom?
2. How specific is the job description?
3. Does the individual initiate, coordinate or execute policy?
4. To whom does the individual report?
5. Is it the same person to whom the individual is accountable?

My own experience, as many of you recall, is one that cannot be matched to all of the issues you're addressing today. But I hope a brief recounting of it will help demonstrate some distinctions and some similarities that might serve the examination of the role of White House czars.

As we all know too painfully, the events of September 11th, 2001, set in motion of series of events and actions – made by President Bush, his staff but also I would say, a united Congress and a united country. I will never forget the singing of "God Bless America" by Members of Congress on the steps of the Capitol. It was a statement to our attackers and to the world – that America was united, not divided.

My appointment came under those extraordinary times – under exceptional stress and grief and yet also, a singular purpose. The people and its government, at its best, joined together in full throttle to rebuild in those early days and to secure the country from another attack.

When I received the call from President Bush asking me to take on a new role, there was no job description. I asked for a month to wind up some matters in Pennsylvania; I was given two weeks. Presidential, Congressional and public urgency was ever present. And rightly so.

Two weeks later, on the same day of my swearing-in as Homeland Security Advisor, October 8, 2001, President Bush issued Executive Order 13228, establishing the Office of Homeland Security and defining with great specificity the responsibilities and authorities of this new White House Office and my role as its Director.

Again, my appointment came under extraordinary circumstances; it was both a new role and an Executive office. It took time for everyone to grasp this new role – amid, if you recall, a series of anthrax attacks that began just a couple of days before my arrival.

Understandably there were legitimate questions and concerns about what I was doing…and many of those concerns came from my former Congressional colleagues.

It was at the instruction of my President that I would not testify; typically and historically Assistants to the President did not do so…but many in Congress took exception to this.

I offered to speak to Congress members privately. However, on a couple of occasions, when I visited Senator Robert Byrd, in his gentlemanly manner, he would slip from his coat pocket a copy of the Constitution and wave it before me. If I could paraphrase your colleague, he would observe that the Congress has the exclusive authority over appropriations and broad oversight responsibility. "Private briefings are not a substitute for public hearings," he would say.

I might observe – those hearings are an important element of the transparency within our system of government.

My responsibilities were detailed out for everyone to see from day one, but I didn't wear my Executive Order pinned to my lapel. And understandably, regardless of an Executive Order, no matter how specific, Congress was legitimately concerned about my role, the extent of what I was doing and what influence I was having. Particularly given the uncertain times. Coordinating authority is one thing, but was I influencing budgets? I was certainly affecting policy. But where was the transparency? Who was I answering to and who was answering to me?

The unique distinction for me was that when I was appointed, no Cabinet agency existed. I was reporting to the President, not a Secretary. But my role was a broad one -- cutting across federal departments and state and local jurisdictions.

It was after discussions began between the White House and Congress about establishing a new department that President Bush decided I should testify about those plans. And I did.

After I went over to the new Department as its Secretary, I came to benefit from the work of my White House successors, Gen. John Gordon and later, Fran Townsend.

In both these principals, I had advocates who assisted in developing policy but not setting it. In both, I had good counsel who worked closely with me and Department officials to generate and coordinate measures that advanced the security of this nation.

This offers up a significant point. Some of today's White House czars have come to their positions with little public clarification of duty and already have a Department of subject authority, led by a Senate-approved Secretary.

Is that role as respected and beneficial to agency progress and management effectiveness as my successors' roles were to me?

Again, do they direct or develop policy? Are the accountable to the President or the Secretary or to both?

What are those lines of report and are those well understood by all stakeholders – the advisors, the Cabinet Secretary, the Congress and federal, White House Staff and department officials in and outside the policy czar's area of expertise?

To whom do private constituencies look to provide input, guidance or opinions?

My concern is that without a clear delineation of responsibilities and reporting authority, this creates both a potential management problem and the appearance of potential conflict.

This also would diminish the capacity of both advisor and Secretary to operate effectively in accordance with the Departmental missions, and cause confusion for those under the chain of command as well as outside the departmental purview.

Greater transparency and communication about role delineation and reporting structure will promote greater collaboration and management effectiveness, which will promote good governance.

Good governance is what the President and this country requires to address today's serious challenges. And good governance is what the American people deserve. And what I know Members of the Committee, by your civil, thoughtful consideration to this issue, want to ensure.

Again, I thank the members of the Committee for inviting me to join you today.

Thank you, Mr. Chairman. I look forward to the Committee's questions.

* * *

Presidential use of White House "Czars"

Testimony before the Senate Committee on Homeland Security and Governmental Affairs

James P. Pfiffner
October 22, 2009

The term "czar" has no generally accepted definition within the context of American government. It is a term loosely used by journalists to refer to members of a president's administration who seem to be in charge of a particular policy area. For my purposes, the term "czar" refers to 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.

Article II Section 2 of the Constitution says that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States." The positions held by these officers (PAS) are created in law and most of them exercise legal authority to commit the United States government to certain policies (within the law) and expend resources in doing so.

In contrast, members of the White House staff are appointed by the president without Senate confirmation (PA). They are legally authorized only to advise the president; they cannot make authoritative decisions for the government of the United States. There is a parallel between the concepts of "line" and "staff" in the U.S. military. Staff personnel can advise line officers, but only line officers can make authoritative decisions, such as hiring and firing personnel or committing budgetary resources.

For practical purposes, however, staff personnel may have considerable "power" or influence, as opposed to authority. But this power is derivative from the line officer for whom they work. Thus White House staffers may communicate orders from the president, but they cannot legally give those orders themselves. In the real world, of course, White House staffers often make important decisions, but the weight of their decisions depends entirely on the willingness of the president to back them up.

Growth of the White House Staff

Both the advantages and disadvantages of White House czars are illustrated by the significant growth of the White House staff in the Modern Presidency.

Although presidents have always had advisers and confidants in the White House, the formal White staff was established in 1939 when Congress gave Franklin Roosevelt authority to create the Executive Office of the President and hire six formal White House staffers. The expected role of the White House staff was articulated by the classic statement of Franklin Roosevelt's Brownlow Committee in 1937:

> These aides would have no power to make decisions or issue instructions in their own right. They would not be interposed between the president and the heads of his departments. They would not be assistant presidents in any sense. . . . They would remain in the background, issue no orders, make no decisions, emit no public statements. . . . [T]hey would not attempt to exercise power on their own account. They should be possessed of high competence, great physical vigor, and a passion for anonymity.

Despite the fact that these precepts have gone by the wayside and the White House staff now includes hundreds of people, some of whom enjoy high public visibility and wield significant power, the norms established in the Brownlow Committee Report still define the ideal for White House aides.

Over the following decades, presidents initiated major changes in the size and scope of their staffs. Dwight Eisenhower created the position of chief of staff to the president and began to institutionalize the White House. John Kennedy, after the Bay of Pigs debacle, told McGeorge Bundy to put together "a little State Department" in the White House that would consider national security policy from his own perspective rather than through the narrower lenses of the Departments of State and Defense. The Assistant to the President for National Security Affairs, (national security advisor) has played major roles in every presidential administration since then. It reached its zenith of power when Henry Kissinger held that position at the same time he was Secretary of State in the Nixon Administration.

When Richard Nixon came to office, his distrust of the executive branch bureaucracies led him to expand considerably the White House staff. In addition to increasing the number of White House staffers in the White House Office, he created the position of domestic policy adviser and designated John Ehrlichmann to be its director. Subsequent presidents have continued to use these the White House positions and to create new ones to meet their needs.

A certain amount of the centralization of policy control through expanding staff in the White House was inevitable and useful. Executive branch departments and cabinet secretaries necessarily and reasonably view national policy from their own perspective, and they often clash with other departments over the formulation and implementation of presidential policies. These conflicts and differing perspectives must be resolved and integrated by presidents, but someone short of the president must be able to narrow the range of alternatives for the president to consider. This coordination role is the most important role of the White House staff; and talented people are necessary to do the job. That being said, too much centralization and too many White House staffers can impair effective presidential leadership. White House staffers are ambitious people, and may try

to use the president's power as their own. Thus the White House staff must be carefully policed and kept on a short leash.

The Appropriate Role of Czars

This brings the focus back to White House czars. Presidents designate czars in order to coordinate policy making across different departments and agencies. They thus play essential roles and lift the burden of coordination from the president. They help reduce the range of options to the essentials necessary for presidential decision. But if the number of czars proliferates, they can clog and confuse the policy making process. In addition to coordinating policy among departments and agencies, someone then must coordinate the czars and their access to the president. Czars may also create layers of aides between the president and departmental secretaries. Too many czars can result in managerial overload.

From the president's perspective, a proliferation of czars replicates the divisions already present in the departments and agencies of the executive branch. A large White House staff with many czars must be disciplined and coordinated by the president's chief of staff, a position used by every president since the Nixon administration. Perhaps the greatest challenge that the use of czars presents to coherent policy making is the question: who is in charge of this policy area short of the president? Conflict will abound, and members of Congress as well as other national leaders may be confused as to the locus of authoritative decisions. When this happens in foreign policy, as it has at times in recent decades, foreign leaders do not know who speaks for the president. In addition, a too active czar can pull problems into the White House that could be settled at the cabinet level. Only those issues that are central to a president's policy agenda should be brought into the White House; others should be delegated to the cabinet secretaries who have responsibility for their implementation.

From the czar's perspective, the title can be a mixed blessing. The czar enjoys the prestige and perks of being on the White House staff. He or she gets national news coverage and has the opportunity to exercise leadership and sometimes power. On the other hand, czars are often frustrated because they are supposed to be in charge of policy, yet they do not have authority commensurate with their responsibilities. While a czar may have the spotlight and the president's ear in the short term, he or she cannot enforce decisions on departments and agencies. Unlike cabinet secretaries, czars control neither personnel appointments nor budgets. For these they must depend on cabinet secretaries, and if they disagree with the cabinet secretary, they are at a disadvantage. They might appeal to the president to back up their decisions, but presidents have limited time, and czars can go back to that well only so many times. Persons who have been designated the "drug czar," the director of the Office of National Drug Control Policy, have thus had mixed success in their efforts to coordinate harmful substances policy across the executive branch. The Secretary of Homeland Security has more resources at her command than does the Assistant to the President for Homeland Security.

From the perspective of the department secretary, the presence of White House czars is most often frustrating. Throughout the modern presidency White House staffers have been the natural enemy of cabinet secretaries. Each vies for the president's ear, and each resents the other's "interference." White house staffers enjoy proximity to the

president and can drop everything else in order to focus on whatever policy the president is considering. Cabinet secretaries, in contrast, must worry about managing their departments and the many policies for which they are responsible. Absent a close relationship with the president, cabinet secretaries are often at a disadvantage in securing presidential attention, and they often resent a czar who is interposed between them and the president.

Managing the Presidency

In the real world, presidents must balance their desire for centralized control with the managerial imperatives for delegation. No president can do an effective job without talented people on the White House staff. Yet if the president allows White House staffers to shut out cabinet secretaries, he or she will not be exposed to the crucial perspectives that cabinet secretaries provide: institutional memory, an operational point of view, and a broader political sensitivity than a single czar can provide. Thus the question of the best balance comes down to presidential judgment and managerial insight. Some czars, such as the National Security Advisor, are clearly necessary. And major presidential policy priorities must be coordinated out of the White House. Secondary issues should be pushed down to the departmental level.

A czar, seen as a symbol of presidential priorities, can be useful for that purpose and not pose an impediment to clear lines of policy making. But a czar who is charged with policy coordination and who uses his or her influence to undercut cabinet secretaries can create confusion and undermine effective policy making. So the real question of the impact of czars must be judged by the roles they play and their approach to their responsibilities rather than merely counting their numbers.

Thus insofar as President Obama's czars take active roles in policy making (as opposed to advising), attempt to shut out cabinet secretaries, and exercise power in their own right, they dilute authority and confuse the chain of command. But if they work closely with cabinet secretaries and help coordinate policy advice to the president, they can be very useful. So the effect of czars and their usefulness depends on their behavior. That said, the larger the White House staff and the more czars that the president designates, the more likely the White House will be difficult to manage, and relations between cabinet secretaries and white House staff will be strained.

Congressional oversight of executive branch policy

Members of Congress are sometimes frustrated in their attempts to oversee executive branch policies and chafe at presidential attempts to circumvent Congress in its legitimate policy making role and responsibilities for oversight of the executive branch. And it is possible that presidents may use their White House staffs to frustrate legitimate congressional participation. Presidents often resist requests for White House staff to testify before Congress and they use claims of executive privilege, sometimes legitimately, sometimes not. Thus Congress can be frustrated when it seems that the president is refusing to let it exercise legitimate oversight of executive branch policy and actions. But Congress is not without constitutional authority to oversee the executive branch.

The keys to congressional control of administration are its legislative powers to:

create agencies,
authorize programs,
appropriate money, and
oversee the faithful execution of the laws.

Congress has alternatives other than calling White House staffers to testify. Policy making in the executive branch is the responsibility of the President, who is accountable to Congress and the public. If Congress is concerned with policies or their implementation, it can call cabinet secretaries (or subordinate officers of the government) to testify about policy making and implementation. Congress can exercise its power of the purse and authorization power to curb or direct policy implementation. Executive branch departments and agencies exist and are authorized only in law, and Congress can change those laws. As a matter of comity, the president is entitled to the confidentiality of his or her staff, just as members of Congress are entitled to confidentiality of their staff and Supreme Court Justices are entitled to confidentiality of their clerks.

If Congress suspects that White House staffers are illegitimately interfering with policy making or implementation, it can call in cabinet secretaries to explain the policies or programs for which they are responsible. If White House staffers seem to be actually implementing policies, there is certainly cause for concern and Congress has a right to demand explanations. But the keys to congressional control are its authorization and appropriation powers.

In my judgment, there are much more significant threats to congressional constitutional authority than the existence of czars in the White House. The explosion of the use of **signing statements** to imply that the president may not faithfully execute the law, presents a fundamental threat to the constitutional role of Congress, which possesses "All legislative powers" granted in the Constitution.

If presidents create **secret programs** that effectively nullify or circumvent the laws, they are placing themselves above the law and claiming the authority to suspend the laws, which the Framers of the Constitution explicitly rejected.

If presidents use the **state secrets privilege** to avoid the disclosure of or accountability for their actions, the role of the courts can be undercut.

If presidents claim the right to suspend ***habeas corpus***, they are treading on Article I of the Constitution.

Although some presidents have abused their power by making extraordinary claims to constitutional authority, it is also the duty of Congress as a co-equal branch of government to assert its own constitutional prerogatives. Congress has all the authority it needs to ensure effective oversight of executive branch implementation of policy. The use of czars by presidents presents serious questions of policy making and management, but the constitutional prerogatives of Congress are more seriously undermined by the claims of presidents to have the right to set aside the laws in favor of their own policy priorities.

Written Statement

of

Lee A. Casey

Thank you Mr. Chairman and Members of the Committee,

Let me begin by thanking the Committee for the opportunity to appear today, and to emphasize that I am speaking here on my own behalf.

I will focus my remarks on the constitutional questions raised by the use of presidential advisers, commonly called "czars," to coordinate policymaking on particular issues, including whether this practice trenches upon the Senate's authority to consider and approve or disapprove high level government appointments. In brief, I believe that President Obama's utilization of such advisers to oversee and coordinate the formulation of his Administration's policy in certain designated areas is fully consistent with the Constitution. This is true even though these individuals may, because of their proximity to the President, exercise significant power and have not been appointed with the Senate's advice and consent.

There are actually three general categories of "czar" at issue. First, there is a category of officials, such as the Director of the Office of National Drug Control Policy ("Drug Czar") and the Director of National Intelligence ("Intelligence Czar"), who hold offices created by Congress and who are, in fact, appointed with the Senate's advice and consent. These appointments are obviously unobjectionable under the Constitution.

Second, there are a number of individuals who have been designated as policy czars who occupy offices, authorized or created by Congress in federal agencies, that are not necessarily vested by law with a policy development or coordination function. These include, by example, Ambassador Richard Holbrooke, Special Representative for Afghanistan and Pakistan (the "Afghanistan Czar") who holds his appointment in the Department of State, and the "Border Czar," who serves as Assistant Secretary for International Affairs and Special Representative for Border Affairs, in the Department of Homeland Security. Although they are not agency heads,

many of these individuals are subject to Senate confirmation because of the high-level positions in which they serve. Their exercise of a policy development/coordination function also is constitutionally unobjectionable – although issues could arise if such appointees were to purport, as part of their policy czar function, to exercise governmental authority not associated with their offices or otherwise properly delegated to them.

Finally, there is a category of White House policy czar, including by example the Energy and Environment Czar, the Domestic Violence Czar, and the Faith-Based Czar. These individuals are presidential assistants who are actually employed as part of the White House staff, or otherwise in the Executive Office of the President ("EOP"). Mr. Van Jones, the "Green Jobs Czar," whose resignation a few weeks ago ignited the present controversy over the use of policy czars, fell into this category. These individuals do not hold office in one of the Executive Branch departments, they are appointed by the President alone, and they are ultimately responsible only to him – although, on a regular basis, they may actually report to the President through other White House officials such as the Chief-of-Staff or Deputy Chief-of-Staff. Nevertheless, these individuals are among the President's closest advisers and it is the concentration of policy development/coordination functions in their hands that has raised the most concern.

I.

Separation-of-Powers Principles

Any analysis of whether the use of White House policy czars is constitutional must begin with the proposition that, as a matter of fundamental separation-of-powers principles, the President may seek advice and counsel as he thinks best and his closest advisers occupy a unique position in the policymaking process. These individuals are not generally subject to

congressional scrutiny in their appointment and performance, and Congress itself has affirmed their special status by exempting such presidential advisers from the recordkeeping and public disclosure requirements generally applicable to Executive Branch agencies. *See Armstrong v. Executive Office of the President*, 90 F.3d 553, 558, 565 (D.C. Cir. 1996) (proximity to the President found to be a important consideration in concluding that a White House establishment – the National Security Council ("NSC") – was exempt from the Freedom of Information Act ("FOIA") and the Federal Records Act ("FRA")). *See also Assoc. of Am. Physicians and Surgeons, Inc. v. Clinton*, 997 F.2d 898, 909 (D.C. Cir. 1993) (It is advisory task force's "operational *proximity* to the President, and not its exact function at any given moment, that implicates executive powers") (emphasis original). In addition, the nature and content of their assistance to the President is confidential.

Indeed, the right to keep such deliberative processes confidential has been asserted by Presidents since Washington,[1] and has consistently been recognized by the Supreme Court. As the Court explained in the leading executive privilege case:

> The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.

[1] *See generally*, History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress, Part II - Invocations of Executive Privilege by Executive Officials, 6 Op. O.L.C. 782 (1982).

United States v. Nixon, 418 U.S. 683, 708 (1974). The confidentiality of such presidential policymaking activities is a core Executive Branch interest which, as the *Nixon* Court made clear, can be overcome only by similarly weighty constitutional considerations – in that case the need for "evidence that is demonstrably relevant in a criminal trial [the withholding of which] would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts." *Id.* at 712. *See also Senate Select Comm. On Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (Senate committee cannot overcome a President's assertion of executive privilege unless it establishes that the material sought is "demonstrably critical to the responsible fulfillment of the Committee's functions"); Memorandum for the President by Solicitor General and Acting Attorney General Paul D. Clement, 2007 OLC LEXIS 11, *4-*5, *11-*12 (June 27, 2007) (President may lawfully assert executive privilege with respect to documents constituting both internal White House deliberations and communications between White House officials and individuals outside the Executive Branch regarding the dismissal of U.S. Attorneys); Memorandum for the President by Attorney General Janet Reno, 1996 OLC LEXIS 105, *4 (Sept. 20, 1996) (President may lawfully assert executive privilege with respect to documents reflecting diplomatic communications between the President, Vice President, National Security Adviser, or Deputy National Security Adviser, and President or Prime Minister of Haiti, and also documents constituting "deliberations of the NSC staff in connection with their advice and assistance to the President regarding his policy and activities in Haiti").

Moreover, "Article II not only gives the President the ability to consult with his advisers confidentially, but also, as a corollary, it gives him the flexibility to organize his advisers and seek advice from them as he wishes." *Assoc. of Am. Physicians and Surgeons*, 997 F.2d at 909

(canon of constitutional avoidance requires term "full-time officer or employee of the government," limiting application of the Federal Advisory Committee Act ("FACA"), to be interpreted to include President's spouse as head of advisory committee). This must especially be true with respect to the President's closest White House aides, who function as his "alter ego." *See* Memorandum for the President from Attorney General Janet Reno, 1999 OLC LEXIS 27, *11 (Sept. 16, 1999) ("[I]n many respects, a senior advisor to the President functions as the President's alter ego, assisting him on a daily basis in the formulation of executive policy and resolution of matters affecting the military, foreign affairs, and national security and other aspects of his discharge of his constitutional responsibilities."). And, of course, previous Presidents have exercised the authority both to establish advisory bodies, and to allocate policy coordination responsibility over important issues to other government officials and/or members of their White House staff. *See, e.g.,* Letter for the Deputy Counsel to the President from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, at 4-5 (Mar. 20, 2002) (emphasis original) ("Border Control Memorandum") (noting examples of Presidents creating policymaking apparatus informally and by executive order), *available at* www.usdoj.gov/olc/opinions.htm.

This does not mean, of course, that Congress has no authority to regulate White House operations, including those most closely associated with the President. It has, for example, imposed certain requirements – as part of the Presidential Records Act of 1978, 44 U.S.C. § 2201 *et seq.* – on presidential recordkeeping. In assessing whether any particular measure violates the Constitution's separation-of-powers principles, the Supreme Court has adopted a functional test "focus[ing] on the extent to which [the measure] prevents the Executive Branch from accomplishing its constitutionally assigned functions. [Citation omitted]. Only where the

potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977) (upholding the Presidential Recordings and Materials Preservation Act of 1974, applicable to President Nixon's White House documents, reasoning that there was only a limited intrusion on presidential autonomy since the documents were kept within the Executive Branch and opportunities were provided for the assertion of privilege claims). Accord, *Morrison v. Olson*, 487 U.S. 654, 695 (1988) (considering how much a measure may interfere with executive power by keeping the President "from accomplishing his constitutionally assigned functions").[2]

The President's right to oversee and coordinate policymaking through his advisers must weigh heavily on these scales, since it goes to the very heart of his ability to perform his constitutional functions. As explained by the United States Court of Appeals for the District of Columbia Circuit in *Assoc. of Am. Physicians and Surgeons, Inc. v. Clinton*, executive power would be impermissibly burdened by the application of congressionally mandated organizational requirements (under FACA) to the President's senior advisers operating at his instruction – in that instance to investigate and prepare the Administration's proposed health care reform legislation. Plaintiffs in that case claimed that the Presidential Task Force on National Health Care Reform was subject to FACA requirements because the First Lady (allegedly as a private citizen) served as its Chair. To avoid reaching the separation-of-powers question, and very probably having to invalidate the law as applied in this instance, the court invoked the doctrine of constitutional avoidance, instead interpreting the term "full-time officer or employee of the government" (which limits FACA's application) to include the President's spouse. *Assoc. of Am.*

[2] In addition, Congress has substantial authority with regard to various EOP entities, including for example the Office of Management and Budget, which are treated as "agencies" for many purposes.

Physicians and Surgeons, 997 F.2d at 910-11. *See also Public Citizen v. United States Department of Justice*, 491 U.S. 440, 466-67 (1989) (construing application of FACA narrowly to avoid "serious[] . . . constitutional challenge[]" involving separation-of-powers and President's use of advisers); *Center for Arms Control and Non-Proliferation v. Pray*, 531 F.3d 836, 842-43 (D.C. Cir. 2008) (construing FACA *exemption* broadly also to avoid separation-of-powers issue); *In re Cheney*, 406 F.3d 723, 727-28 (D.C. Cir. 2006) ("separation-of-powers considerations have an important bearing on the proper interpretation of the [FACA]").

An important distinction can be made here between the formulation/coordination of an Administration's policy – the beliefs, goals, proposals and plans that animate a President and his appointees during his term of office – and the processes by which those proposals, positions and plans become the policy of the United States. Although Administration policy and government policy generally exist on a continuum – representing different phases of the overall policymaking process – as a conceptual matter they are quite different. Administration policy, for example, is often formulated even before a President takes office – either during the presidential transition period or campaign. After Inauguration Day, Administration policy is usually made in the White House and/or by political appointees at federal agencies. Here, the President has a paramount interest in determining how policy is made and by who. Indeed, the President's control over this process is the chief means by which our Democracy is vindicated and elections are "given meaning."

Of course, more than a settled position on an issue is necessary before Administration policy becomes the policy of the United States Government – that set of rules and requirements to which both the federal bureaucracy and the citizenry-at-large look to determine what the Government can or should do in response to any particular situation on a daily basis.

Government policy is not found in White House policy papers or "statements of administration policy," but in the United States Code, the Code of Federal Regulations, the various compilations of treaties and international agreements to which the United States is a party, and in presidential Executive Orders.

Thus, the principal mechanisms through which an Administration's policy becomes government policy are: (1) legislation, a process in which Congress itself is chiefly involved; (2) rulemaking, either "formal" adjudicative rulemaking or "informal" notice-and-comment rulemaking, which requires action by particular officials which Congress has ordinarily designated by statute; (3) by treaty-making, a process in which the Senate is a key participant, and (4) by Executive Order, a process which requires direct action by the President himself. Once this phase of "policymaking" is reached, the President's interest in directing that process begins to give way to Congress' authority generally to regulate government operations by statute – as it has done through enactments such as the Administrative Procedure Act, 5 U.S.C. §§ 500-596.[3]

The Administration's reliance on policy czars does not, and cannot, upset this equilibrium. This is because, as a constitutional matter, actions that vest policy decisions with the force and effect of law must be taken by government officials who have been appointed pursuant to the Constitution's Appointments Clause (often only after Senate confirmation), and who *are* generally subject to the ordinary processes of congressional oversight.[4]

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[3] Significantly, the Executive Branch's interest in keeping presidential communications, as well as agency pre-decisional and deliberative materials, confidential continues throughout the entire policymaking process. *See In re: Sealed Case*, 121 F.3d 729, 737, 744-46 (D.C. Cir. 1997) (noting also that the presidential communication privilege extends to both pre-and post-decisional materials and that it "is more difficult to surmount" than the general, Executive Branch deliberative process privilege).

[4] There are, of course, many other ways in which federal policy is established, including orders and directives by agency heads regarding departmental administrative and management functions, the adoption of policy and "guidance" documents informing the public of how an agency will administer

II.

The Appointments Clause

It is well settled that federal officials who are vested with "significant authority" to implement or execute the laws of the United States must be appointed in conformity with the Constitution's Appointments Clause, Article II, sec. 2, cl. 2. This section provides that:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law. 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.

The Constitution's Framers clearly intended this provision as an important limitation on presidential power. As explained by Alexander Hamilton in *The Federalist Papers*, among other things, the Appointments Clause "would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." The Federalist No. 76 at 513 (Alexander Hamilton) (Jacob E. Cooke, ed. 1961).

Accordingly, the Supreme Court has made clear that the Appointments Clause does not merely establish the formalities of federal appointment – as a matter of "'etiquette or protocol'" – but that "it is among the significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997). As the Court explained in the leading case of *Buckley v. Valeo*, 424 U.S. 1 (1976), "[w]e think [the Appointments Clause's] fair import is

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particular programs, and a myriad of other actions, determinations and decisions regarding the interpretation and application of federal law and authority. In each case, however, a responsible federal officer – either confirmed by the Senate or ultimately accountable to an official that has been confirmed by the Senate, or to the President himself – must validate the action before it can have legal force and effect.

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." *Buckley*, 424 U.S. at 126.

In *Buckley*, the Court considered the constitutionality of the Federal Election Commission ("FEC") as established under the Federal Election Campaign Act Amendments of 1974. Although Congress granted the FEC "extensive" rulemaking, adjudicative and enforcement powers, the commissioners were not selected in a manner consistent with the Appointments Clause (*i.e.*, appointed by the President by and with the advice and consent of the Senate). The Court ruled that the FEC could not constitutionally exercise most of its statutory powers (with the notable exception of those "essentially of an investigative and informative nature"), because such authority could be wielded only by "Officers of the United States" appointed in a manner consistent with the Appointments Clause.

Although there are various definitions of an "Officer of the United States" under the Appointments clause, the irreducible minimum is an official who (1) is vested with some portion of the United States' sovereign authority (such as the power to bind the Government or to directly affect the citizenry's rights and responsibilities); and (2) holds a position that is "continuing" (that is, even if temporary, not transient or incidental). *See Memorandum for the General Counsels of the Executive Branch*, 2007 OLC LEXIS 3, *9-11 (Apr. 16, 2007) ("2007 General Counsels Memorandum"). Individuals who serve in advisory roles are not "officers" because they do not exercise "significant authority" pursuant to federal law. *See Buckley*, 424 U.S. at 138.[5]

[5] Of course, even if policy czars were "Officers of the United States," it does not follow that Senate confirmation must be a condition of their appointment. As a constitutional matter, only "principal" officers *must* be appointed with the Senate's advice and consent. Congress can vest the appointment of "inferior" officers in the President, department heads or federal courts. Although it is true that "[t]he line

This has been the settled position of the Department of Justice under both Democratic and Republican Presidents. *See e.g.*, Memorandum for the Acting Assistant Attorney General for the Office of Legislative Affairs, 2009 OLC LEXIS 5, *4-*9 & n.3 (Apr. 21, 2009) (raising constitutional concerns with H.R. 131, The Ronald Reagan Centennial Commission Act of 2009, because the Commission's authority would extend beyond "providing advice or recommendations to the Executive Branch" and its members would not be selected in accordance with the Appointments Clause); 2007 General Counsels Memorandum, 2007 OLC LEXIS at *66-67; The Constitutional Separation of Powers Between the President and Congress, 1996 OLC LEXIS 6 (May 7, 1996) ("this Office has concluded that the members of a commission that has purely advisory functions 'need not be officers of the United States' because they 'possess no enforcement authority or power to bind the Government.' Proposed Commission on Deregulation of International Ocean Shipping, 7 Op. O.L.C. 202, 202-03 (1983). For that reason, the creation by Congress of presidential advisory committees composed, in whole or in part, of congressional nominees or even of members of Congress does not raise Appointments Clause concerns.") ("1996 Separation of Powers Memorandum").[6]

Moreover, "advisory" functions extend beyond actual advice to the President, and may encompass a policy coordination and development role. An instructive authority here is *Armstrong v. Executive Office of the President*, 90 F.32d 553 (D.C. Cir. 1996). In that case, the

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between 'inferior' and 'principal' officers is one that is far from clear," *Morrison*, 487 U.S. at 671, the Court has articulated a number of the attributes of an inferior officer. These include: (1) subordination to higher ranking federal officials; (2) a limited authority both in terms of subject-matter and administrative power; and (3) an inability to "render a final decision on behalf of the United States unless permitted to do so by other executive officers." *Edmond*, 520 U.S. at 663. *See also Morrison*, 487 U.S. at 671-673.

[6] It should be noted that OLC has, under different Administrations, taken varying positions regarding whether the Appointments Clause prevents the delegation of significant federal authority to *non-federal* officials and/or entities. *See id.* at *64-*65. That issue is not, however, implicated by the question whether federal officials serving as policy czars must be appointed consistent with Appointments Clause requirements.

court considered whether the NSC was sufficiently independent of the President to constitute an "executive department . . . or other establishment in the executive branch" subject to FOIA and the FRA. It concluded "that neither the statutory Council nor the NSC staff performs significant non-advisory functions" and could not, as a consequence, be an "agency." In reaching this result the court considered the varying functions Presidents have over time delegated to the NSC and whether these tasks amounted to the exercise of "substantial independent authority." *Id.* at 560-564. The relevant assignments included coordinating policy among several agencies, communicating the President's instructions to federal officials, monitoring whether those instructions were implemented (here with regard to the treatment of classified information), and actually to prepare "policy and guidelines" on emergency preparedness which the departments and agencies were instructed by Executive Order to obey. None of these functions, the court concluded, were sufficient to establish that the NSC "exercise[s] any significant non-advisory function." *Id.* at 565.[7]

Although *Armstrong* was not an Appointments Clause case, its rationale strongly suggests that a policy czar's exercise of similar coordination functions does not require that he or she be an officer appointed in conformity with the Appointments Clause (including a requirement of Senate confirmation) because that individual remains in an advisory role. He or she could not, therefore, be said to exercise significant authority under the laws of the United

[7] Significantly, in reaching this conclusion, the court also noted that Congress had not delegated substantial authority to the NSC by statute. *Id. See also Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993) (President's Task Force on Regulatory Relief was not an "agency" because its sole function was to assist and advise the President); *Rushforth v. Council of Economic Advisers ("CEA")*, 762 F.2d 1038 (D.C. Cir. 1985) (CEA not an agency because it exercised only advisory functions); *Pacific Legal Foundation v. Council on Environmental Quality ("CEQ")*, 636 F.2d 1259 (D.C. Cir. 1980) (CEQ is an agency for FOIA purposes because, in addition to advising the President, it was independently authorized to evaluate federal programs and also exercised rulemaking authority pursuant to a presidential delegation); *Soucie v. David*, 448 F.2d 1067 (1971) (Office of Science and Technology subject to FOIA because it operated as a

States. Indeed, the previous Administration adopted a similar position, confirming that, even if the President grants to such individuals "substantial practical authority to develop and coordinate policy among federal agencies, and even formalize the arrangement in an executive order, so long as he does not purport to grant such advisers any '*legal* power' over an agency or otherwise 'disturb the statutory allocation of authorities,'" the Appointments Clause is satisfied. 2007 General Counsels Memorandum, 2007 OLC LEXIS at * 67-*68 (quoting Border Control Memorandum, *supra*, at 4-5 (emphasis original)).

This later point is also critical from a separation-of-powers perspective. It is true that Congress has little oversight authority over the President's White House staff, and particularly with respect to his most senior advisers. At the same time, although a President is free to organize his Administration's policymaking apparatus as best suits his own needs, he cannot alter or revise the processes by which *government* policy is actually made. He cannot, in other words, transfer to his advisers authority that Congress has expressly allocated elsewhere or establish a different policymaking process than that which Congress has prescribed.

The Department of Justice's Office of Legal Counsel ("OLC") under President George W. Bush – generally considered a zealous guardian of presidential authority – discussed this important limitation on the President's power in its 2002 Border Control Memorandum. On that occasion, the office considered whether the President could, in the wake of the September 11 attacks, centralize border control policy in the Attorney General – effectively creating a border control "czar" – even though this responsibility was at that time dispersed among several agencies, including the Departments of Justice, Treasury and Transportation. (These functions

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distinct entity within the EOP, not simply part of the President's staff, and exercised more than advisory functions).

were, in fact, later consolidated in the Department of Homeland Security by the Homeland Security Act of 2002).

OLC advised that, although the President could instruct the other responsible officials that the Attorney General "speaks for him with respect to such policies" – vesting the Attorney General with "substantial authority over Executive Branch officials" as a practical matter – "the Attorney General could not exercise any non-delegable, presidential *legal* power over such agencies. For example, an official of that agency would not be subject to removal by the Attorney General." Border Control Memorandum, *supra*, at 5 (emphasis original). OLC also noted several precedents involving Executive Orders designating officials to coordinate the implementation of particular policies, limited by the injunction that these orders "merely create informal arrangements through which presidential policies are developed; they do nothing to disturb the statutory allocation of authorities amongst different agencies." *Id.*

Thus, for example, although the White House Energy and Environment Czar, Ms. Carol Browner, can interact with agencies, coordinate the development of policy proposals for the President's consideration, and even speak on the President's behalf in the interagency process, she cannot herself initiate or complete the mechanisms whereby the results of her efforts may become government policy. She cannot propose legislation to Congress on behalf of the Executive Branch (pursuant to the President's constitutional authority to submit such proposals for consideration); she cannot adjudicate a dispute, authorize publication of a proposed rule, conduct public hearings, promulgate a final rule or issue agency guidance. She could, of course, have done all of these things during her service as Administrator of the Environmental Protection Agency (a Senate confirmed post) during the Clinton Administration. To the extent that she

purported to do any of these things in her current role as presidential adviser and policy czar, those actions on their face would have no legal effect.

Moreover, even to the extent that Ms. Browner is acting on the President's behalf and at his direction, she cannot discipline any other government officials for failing to comply with her requests. Only the relevant agency heads, or the President himself, may take such action – up to and including the removal of agency heads and other "principal" federal officers from office. It is, of course, the President's authority to remove an official from office that constitutes the ultimate tool in managing the Executive Branch, and it cannot be delegated to any other official.[8]

Thus, the Administration's reliance on a series of policy czars to coordinate and drive its policymaking processes is fully consistent with the Constitution's requirements, and does not violate the Senate's prerogative to give its advice and consent before the most senior federal officials are appointed. Moreover, although Congress has a highly limited oversight role with regard to the work of White House policy czars, it retains the ability to regulate (and oversee) the process by which any policy those individuals develop may be given legal effect and transformed into the policy of the United States. To the extent that Congress wishes to question any particular policy choice, it also remains fully able to require the responsible federal official, the "officer of the United States" who took the action necessary to give that policy legal effect, to defend his or her decision. In this manner, both the fundamental separation-of-powers interests of the Executive and Legislative Branches are vindicated.

I would be pleased to answer any questions the Committee may have.

[8] As a general rule, Congress has permitted the President to delegate the exercise of his statutory functions to the department heads, or to any other official in the relevant department who has been appointed with the Senate's consent. *See* 3 U.S.C. § 301 (President authorized "to designate and empower the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate, to perform without approval, ratification, or other action by the President . . . any function which is vested in the President by law"). There are, however, certain functions – vested by the Constitution in the President, either specifically or by implication, that he must exercise himself. The power to appoint and remove principal officers is one of these non-delegable functions. *See* Border Control Memorandum, *supra* at 3 (President may not delegate constitutional powers to appoint or remove or grant pardons); Assignment of Certain Functions Related to Military Appointments, 2005 OLC LEXIS 9, *8 (July 28, 2005) (President may delegate to the Secretary of Defense statutory authority to make certain lower ranking military appointments which Congress has vested in the President without the requirement of Senate confirmation).

STATEMENT BY HAROLD C. RELYEA
CONGRESSIONAL RESEARCH SERVICE (RET.)
BEFORE
SENATE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS
OCTOBER 22, 2009
PRESIDENTIAL ADVICE AND SENATE CONSENT:
THE PAST, PRESENT, AND FUTURE OF POLICY CZARS

Mr. Chairman, Senator Collins, and members of the Senate Committee on Homeland Security and Governmental Affairs, thank you for your invitation to appear here today to testify on the creation, role, and congressional accountability of so-called policy "czars." My statement reviews the historical antecedents of these presidential agents, the conditions contributing to their creation, their initial use during the period of World War II, their congressional accountability at that time, some later developments, and some considerations regarding their future relationships with Congress.

Introduction

Upon entering office, the initial Presidents were somewhat limited regarding official sources they might enlist for administrative assistance. The Constitution provided that they might "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices." On more general matters concerning the appointment of such officers and treaty-making, the Senate was constitutionally prescribed an advisory role, but President George Washington, upon presenting himself to the assembled Senators in August 1789 to consult on public business, quickly became aware of their unwillingness to engage in such discussions.[1] Around the same time, the House of Representatives made it clear that it did not welcome personal appearances by the heads of the executive departments on the floor of that chamber, and that reports and other information should be transmitted by those officials in writing and not in person.[2] In August 1793, the Supreme Court rebuffed Washington's request for legal advice regarding certain matters of international law, neutrality, and the construction of French and British treaties, and declined to express an opinion except in a case duly litigated before it.[3] The overall effect of these developments was to leave the President dependent upon those he made the heads of the executive departments for the provision of administrative assistance, including both management and advice. Out of this situation arose the Cabinet.

A Cabinet, it has been said, "originates in the universal need on the part of any single Chief Executive to consult with others and draw upon the advice of others in exercising his political power," including making members of the Cabinet agents of the Executive for such an

exercise. Although the Cabinet concept may be traced to "an inner circle of the King's advisers in England in 1622," the warning has been offered that the "American Cabinet was not a copied product," and that its "terminological affinity with the English institution should not be stretched to connote other similarities except the most general and, indeed, universal sense."[4]

Washington's Cabinet initially consisted of a Secretary of State, Secretary of War, Secretary of the Treasury, and Attorney General. The last of these did not head a department until 1870, but was a regular attendee at Cabinet meetings from 1792. Not so the Vice President, as the office was regarded as a legislative position, the primary duty being to preside over the deliberations of the Senate.[5] Both John Adams and Thomas Jefferson held this view, the former breaking 29 Senate voting deadlocks and the latter relying upon this stance as a basis to decline other assignments from the President, such as a diplomatic mission, and to protect his leadership of the opposition party.[6] It is not surprising, therefore, that the Vice President, for many years, was not included in Cabinet deliberations. John Adams apparently attended one Cabinet meeting, but the President was not present at this particular gathering.[7]

Over the next 30 years, factionalism — partisan, ideological, and geographic, among other considerations — would militate against the Cabinet concept. With the 1829 inauguration of Andrew Jackson, the presidential circle of advisers and agents — trusted political friends within and outside the government — became much more apparent. Jackson depended upon his Cabinet for very little. Some successors, however, notably John Tyler, James K. Polk, and Franklin Pierce, made considerable use of it. For the period leading up to the Civil War, the Cabinet was generally thought to have been important for policy and political management rather than administration.[8]

During the embattled presidency of Abraham Lincoln, the Cabinet was considered to have been of largely symbolic value, though the administrative skills of a couple of members — Secretary of State William H. Seward and Secretary of the Navy Gideon Wells — were appreciated. None other than former President William Howard Taft recounted the story of Lincoln's remarking that, after heated debated in the Cabinet on a particular matter, decision came in one unanimous vote — his own.[9] Within the past few years, historian Doris Kearns Goodwin has given us a more detailed account of this Cabinet experience.[10]

Jackson was a President primarily interested in politics and personality, not administration. His election and White House tenure occurred in an era marked by turbulent controversy and party instability, and comings and goings in his Cabinet somewhat reflected the unsettled state of affairs. For many reasons, political survival being not the least, Jackson utilized a special circle of loyal, intimate advisers who came to be known as the Kitchen Cabinet.[11] They represented "rising social groups as yet denied the prestige to which they felt their power and energies entitled them."[12] The phrase was revived by the press again when Tyler succeeded to the presidency in April 1841. Deserted by Whigs and Democrats alike, he resorted to a select circle of advisers composed of personal and political friends from his native Virginia.

Indicative of other such circles of informal advisers and confidants were subsequent press references, not always based on the most reliable evidence, to equivalents of the Kitchen Cabinets of Jackson and Tyler. Grover Cleveland was credited with having a "Fishing Cabinet"; some 30 athletic friends of Theodore Roosevelt was dubbed the "Tennis Cabinet"; for Warren G. Harding, there was the "Poker Cabinet"; and the "Medicine Ball Cabinet" was attributed to Herbert Hoover. Franklin D. Roosevelt brought to the White House a new group of advisers and agents — the Brains Trust — composed of intellectuals and other ideas people from the academic world.[13] Because there was an insufficient number of staff positions at the White House to accommodate them, these aides were placed elsewhere in the executive branch, but primarily served the President. This novel manner of governmental employment provides a small indication of the need that was subsequently met with the creation of the Executive Office of the President (EOP) and the White House Office (WHO) in 1939, providing enclaves for presidential agents and advisers who, in the view of some, would be regarded as "czars."

Institutional Haven

Shortly after the dawn of the twentieth century, the federal government entered a new phase — the rise of the administrative state. Among the forces contributing to this development was the Progressive Movement, which sought greater government intervention into, and regulation of, various sectors of American society. An autonomous Department of Labor was established in 1913, along with the Federal Reserve. The Federal Trade Commission was created the following year. With the entry of the United States into World War I in 1917, regulatory and other governmental activities expanded, and the number of administrative agencies increased. With the postwar era, government expansion momentarily slowed, but began again with the onset of the Great Depression and subsequent New Deal responses to the economic emergency.

As President, Franklin D. Roosevelt utilized a variety of coordinative arrangements. The first attempt in this regard was a 24-member Executive Council, chartered by E.O. 6202A on July 11, 1933, issued pursuant to the Federal Emergency Relief Act[14] and the National Industrial Recovery Act.[15] It included the entire Cabinet, the Director of the Bureau of the Budget (BOB), and the heads of the various economic recovery agencies. Chairing the panel, Roosevelt was assisted by a single executive secretary, Frank C. Walker, who performed "such duties as may be prescribed him by the President." As the Council's only professional staff member, Walker performed purely administrative duties — he was no "czar," even though, by one estimate, he was "the first of a long line of so-called assistant presidents."[16]

Finding the initial Council somewhat unwieldy, Roosevelt soon abandoned it for a National Emergency Council, established by E.O. 6433A on November 17, 1933, issued pursuant to the same statutes utilized for chartering the prior council, as well as the Agricultural Adjustment Act.[17] The new Council counted a lesser number of Cabinet and recovery agency heads as members, and had field directors in each of the states to coordinate federal relief efforts. Walker initially served as the panel's executive director, was briefly succeeded by Donald Richberg, then returned. The Council was also assisted by about a half dozen additional senior

professionals, along with the field directors.

A reconstituted National Emergency Council was established with E.O. 6889A of October 31, 1934. As a consolidation of the Executive Council, the first National Emergency Council, and a National Recovery Administration oversight panel called the Industrial Emergency Committee, it suffered from an abundance of members, but the authority of its executive director was expanded to make him a potentially strong presidential agent. Roosevelt, however, did not vest Richberg or Walker with this status. After the latter left government service in December 1935, the Council went into a decline, its last meeting occurring on April 28, 1936.[18]

The last of Roosevelt's coordinative schemes for depression-era programs was created for purposes of administering the Emergency Relief Appropriations Act.[19] Popularly dubbed "the five-ring circus," it consisted of a variety of interlocking clearance and coordination mechanisms, beginning with Walker at the National Emergency Council, then continuing with the Secretary of the Interior and Public Works Administrator, the head of the Works Progress Administration, and the Secretary of the Treasury, and concluding with the BOB Director.[20] Undoubtedly, the "five-ring circus" worked largely because of the personal political skill and energy of Roosevelt and the devotion of those within the "circus" to him. It also amply demonstrated, however, the President's growing dependence on assistants and agents other than Cabinet members. Furthermore, while it assured Congress, for the moment, that the President could create a coordinative and administrative superstructure to expend lump-sum appropriations for federal relief, it also caused Roosevelt to reconsider the need and ways to integrate the emergency agencies, no matter how temporary, into the existing executive branch framework.[21]

By the time he commenced his second term as President, Franklin D. Roosevelt had administrative reform on his agenda. He wanted to improve the President's ability to manage the executive branch, including the President's authority to reorganize the executive branch and to be assisted by his agents. Previous Presidents — Theodore Roosevelt, Woodrow Wilson, Warren Harding, and Herbert Hoover — sought ways to better manage the executive branch, including its reorganization. Congress had vested Wilson with temporary reorganization authority for the period of United States involvement in World War I;[22] Hoover also had lately been granted reorganization authority.[23] In 1929, Hoover had also convinced Congress to authorize his hiring of two additional presidential Secretaries and an Administrative Assistant.[24] This increased allotment of White House positions still was not adequate to accommodate the "Brains Trust" advisers Roosevelt brought with him from New York and who had to be located, physically and as employees, at the Department of Agriculture, Department of State, and Reconstruction Finance Corporation.

To assist him in his thinking about, and in developing his plans for, administrative reform, Roosevelt created a temporary study panel — the President's Committee on Administrative Management — on March 22, 1936.[25] The members included chairman Louis Brownlow, a former journalist who had pursued, in the spirit of the Progressive Movement, civic

leadership positions, including becoming a Commissioner of the District of Columbia Government, and eventually landing him in the role of the head of the Public Administration Clearinghouse in Chicago; Charles E. Merriam, a preeminent University of Chicago political scientist, who was a proponent of governmental planning; and Luther Gulick, a burgeoning figure in the new field of public administration, who was expert in organization and management matters.[26]

The Committee's report, which was released to Congress on January 12, 1937, proposed that all executive branch agencies be subsumed under one of the existing Cabinet departments. Contending that "the President needs help," it proffered that his immediate staff needs be increased with "a small number of executive assistants who would be his direct aides in dealing with the managerial agencies and administrative departments of the government." These aides, "probably not exceeding six in number," according to the report, "would have no power to make decisions or issue instructions in their own right." Whoever these agents were, or where located, "they would not be interposed between the President and the heads of his departments." In no regard would they be "assistant presidents in any sense," it said. Those chosen for these positions "should be possessed of high competence, great physical vigor, and a passion for anonymity."[27]

Complications ensued. Three weeks after submitting the Committee's report to Congress, Roosevelt announced he wanted to enlarge the membership of the Supreme Court. His "court-packing" plan not only fed congressional fears of a presidential power grab, but also so preoccupied Congress that the Committee's recommendations were ignored. Shortly thereafter, however, events, not the least of which were the 1938 election returns and both public and congressional response to Roosevelt's proposed $3 billion recovery and relief allocation, and his request that Congress examine the concentration of economic power in the United States. By July 1938, the President was again meeting with Brownlow, Merriam, and Gulick with a view to crafting some kind of reform legislation. The result was the Reorganization Act of 1939, which empowered the President to propose reorganization plans, subject to a veto by a majority vote of disapproval in both houses of Congress, and also to appoint six Administrative Assistants.[28]

Prior to the passage of the legislation, Roosevelt had set Brownlow, Merriam, and Gulick to work on preparing his initial reorganization plans.[29] The first of these, submitted to Congress on April 25, indicated that certain agencies were transferred to the Executive Office of the President (EOP), but offered no explanation of that entity.[30] Later, on September 8, the President issued E.O. 8248, formally organizing the EOP and, thereby, defining it in terms of its components.[31] Brownlow viewed the EOP as "the most revolutionary result" of the Reorganization Act, and regarded it as the means for "the effective coordination of the tremendously wide-spread federal machinery." He called the initial version "a little thing" compared to its later size. It grew under Roosevelt, and "it continued to expand and was further regularized by statute, by appropriation acts, and by more reorganization plans" during the succeeding years.[32]

The EOP organized by E.O. 8248 consisted of the White House Office (WHO), an institutionalization of the President's immediate staff; the Bureau of the Budget (BOB), relocated from the Department of the Treasury; the National Resources Planning Board, an upgrading of a planning board within the Department of the Interior; the Office of Government Reports, which had assumed the information responsibilities of the defunct National Emergency Council; the Liaison Office for Personnel Management, an attempt at realizing the single civil service administrator recommended by the President's Committee on Administrative Management in 1937; and, "in the event of a national emergency, such office for emergency management as the President shall determine." The Office for Emergency Management (OEM) was created by a presidential administrative order on May 25, 1940, and its functions were further specified in an administrative order of January 7, 1941.[33]

Thus, on the eve of the entry of the United States into World War II, the President had at least three havens for his agents, special assistants, and closest advisers. The EOP was a presidential enclave where agencies immediately assisting the President could be located. In late May 1940, when Roosevelt reactivated the Council of National Defense, largely to make use of its potential staff resources and an advisory structure to gather and influence the views of key industrial, business, scientific, and engineering leaders, he located it within the EOP. Moribund since mid-1921, the Council had been statutorily chartered in 1916 and functioned as a sub-Cabinet coordinating and planning committee.[34]

New agencies to help, initially, with preparations for the defense of the nation and, subsequently, with the prosecution of World War II — many of which were administratively created — were made subunits of OEM, which became something of a holding company for these entities. At the time of Roosevelt's death in 1944, the *United States Government Manual* indicated the existence of 16 major wartime agencies within the OEM fold, even though, by this time, its status as a major coordinating entity had declined.

Discretionary funds for defense preparations permitted the President greater liberty to also create and fill professional staff positions in the WHO. In addition to Secretaries and Administrative Assistants, other titles began to appear, but their significance was not always clear. There were no accompanying position descriptions; the authority of the individual newcomers derived from their proximity to the President, their particular mission, and their performance, though personality and friendships could not be ignored. A case in point was Harry L. Hopkins, a social worker who had served Roosevelt since 1930. Early in 1942, Hopkins, who had most recently been acting as Roosevelt's special emissary to Winston Churchill, was brought onto the WHO payroll as Special Assistant to the President, the first person to hold that title. His ability and delivery were well established. Moreover, he remained Roosevelt's "closest friend and most valued adviser," making him, by one estimate, "probably the most powerful presidential aide who ever lived."[35]

Another position created early in 1942 was Special Executive Assistant, which was immediately filled by Eugene Casey, recently a Deputy Governor of the Farm Credit

Administration. Two years later, Roosevelt installed his old friend Samuel I. Rosenman within the WHO as the first Special Counsel to the President. Rosenman had long assisted Roosevelt as a speechwriter. In October 1943, he had resigned his New York State judgship and subsequently joined the President's staff not as a legal adviser — the position would evolve into this role later — but to pursue his old speechwriting craft. By the end of the war, new titles were particularly vague, and there were, as well, various presidential agents who wielded far greater authority than the President's immediate WHO assistants.

War and the Coming of "Czars"

Roosevelt utilized his new administrative structures — the EOP, WHO, and OEM — with his own well developed management style. From his immediate assistants, he sought diverse ideas and outlooks. Thus, he selected aides having dissimilar backgrounds who might personally provide differing perspectives or, as a consequence of their contacts, could elicit a variety of advice from others. Moreover, he chose individuals of clashing temperaments and values who could be strong advocates of their viewpoints. He proceeded to produce and sharpen clashes among these persons by granting overlapping delegations of authority. To hold his official family together, Roosevelt demanded absolute centrality. Standing above the fray, he was the final decisionmaker; loyalty to him was the glue that held the family together and could be invoked to balm hostilities among the family members.[36] The reward for loyalty was access to the President. While this management style served Roosevelt quite well during his first two terms, when ideas for combating the Great Depression were needed, it did not produce effective mobilization during the war years. Strategic commitments and advanced planning were needed, not scattered ideas. In military affairs, he was largely willing to rely on his senior officers — General George C. Marshall and Admiral Ernest J. King — when making those decisions.[37] In the production and distribution of war material, including the setting of priorities and related economic considerations, he was initially less willing to depend upon a similarly limited number of chieftains.

In a series of lectures delivered at the University of Alabama during the latter part of November 1946, Luther Gulick, who had been a member of the President's Committee on Administrative Management and, thereafter, a close observer of, and participant in, Roosevelt's utilization of his new management structures, reviewed the experiences and lessons of World War II for public administration. "The Cabinet as an institution, if indeed it may be called that, continued its dismal course," by his estimate, and was not even "to be listed as an agency of war co-ordination." He then asked, by contrast, "Where would we have been in this war without the Executive Office of the President," and he single out some of its components — the WHO, BOB, and OEM — for special mention. Overall, he felt, "no one can question the extraordinary total effectiveness of the Presidency under the administrative system which we had through the war years."[38]

Gulick also recognized the President's use of what he called "czardoms." Borrowing from a categorization developed by political scientist James W. Fesler, another close observer

and participant in Roosevelt's wartime administration, Gulick considered the "czardoms," not always successful in every case, to be of three kinds: (1) "emergency agencies focusing attention entirely on a single commodity or industry, like the Petroleum Administration for War ...," (2) "emergency agencies with 'horizontal directive authority' over a major defense function — like the War Production Board ...," and (3) "super-co-ordinating agencies like the Office of War Mobilization, Office of Economic Stabilization, Office for Emergency Management, Bureau of the Budget, and White House [Office]."[39] Other candidates for "czardom" might be offered by other analysts. Summarizing the operating experience of the "czars," Gulick said:

> These single-purpose administrators had the great advantage of simplicity of mission. They, their staffs and the public knew exactly what 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.[40]

It was also crucial to have the support of the President, to the point that, the orders given and the actions taken were regarded as those of the President. This was what not only made the "czars" presidential agents, but also what, in the end, made them successful.

Not all attempts to install a "czar" were realized, and some were less than fully successful. Take the example of the Office of Production Management. One of the reasons Roosevelt had reactivated the dormant Council of National Defense in May 1940 was to use its resources and its seven-member Advisory Commission to assist in the defense mobilization effort by conducting investigation, research, and coordination of private sector industry, business, science, and engineering. Soon after being appointed, the Commission members, probably with the President's encouragement, moved beyond playing a purely advisory role and began to assume actual administrative responsibility. The panel, however, had very limited authority, contract clearance being perhaps its most important, and no real powers regarding production. Liaison with other federal agencies was difficult, in part because the activities and efforts of the Commission members was uncoordinated.[41] Responding to calls for a single administrator, Roosevelt issued E.O. 8629 of January 7, 1941, establishing the Office of Production Management (OPM) to increase production for national defense by mobilizing the "material resources and the industrial facilities of the Nation."[42] Located within the EOP, the new agency was vested with the mobilization responsibilities of the Advisory Commission, and two of that panel's top officials — William S. Knudsen, the president of General Motors, and Sidney Hillman, the president of the Amalgamated Clothing Workers — were named its Director General and Associate Director General, respectively, but were given joint authority in the direction of OPM's programs. In one considered view, however, "the President retained many powers which the codirectors needed in order to exert full jurisdiction over a mobilization." Indeed, so wary was he "of permitting OPM independence that he specified its internal organization in the executive order."[43] Roosevelt may have wanted a production "czar," but he was unwilling to make the necessary vestment of authority. Unhappy with his creation, Roosevelt placed OPM under the supervision of the newly established War Production Board (WPB) with the issuance of E.O. 9024 of January 16, 1942.[44] Very shortly thereafter, on January 24, the President issued E.O. 9040 abolishing OPM and transferring its functions and personnel

to WPB.[45]

As the successor to OPM, WPB might have realized a "czar" in its chairman, Sears, Roebuck executive vice president Donald Nelson. E.O. 9024, chartering the Board gave Nelson "authority to make final decisions on procurement and production and to head the entire armaments program," and was considered, as well, "Roosevelt's greatest delegation of power since 1933." Furthermore, Nelson "was given authority to determine all policies and procedures of all agencies in respect to war procurement and production 'including purchasing, contracting, specifications and construction; and including conversion, requisitioning, plant expansion, and the financing thereof; and issue such directives in respect thereto and he may deem necessary or appropriate'." In brief, "Nelson's executive order was broad enough to include virtually every aspect of the domestic war effort, except price control in which he could nevertheless exercise considerable influence."[46] For reasons best known only to him, however, Nelson allowed his authority to become diluted. Perhaps he did not want to fully contend with the stormy infighting over production priorities and output that occurred in 1942, or he did not realize how much of his job he was turning over to his deputy, but he gave away "many functions, allowed the creation of several coordinate agencies in essential fields over which he should have retained authority, and permitted many inroads on WPB's power to make final decisions."[47] Ironically, Nelson's actions resulted in the creation of "czars" for manpower and for rubber production. When the President sought to give closer attention to labor supply and realizing the best utilization of the nation's manpower in the war effort, he offered Nelson the opportunity to have a new manpower control agency located under WPB supervision. Nelson, to the bafflement of his associates, declined and the subsequent War Manpower Commission, established with E.O. 9139 of April 18, 1942, was placed in the EOP.[48] Moreover, when Roosevelt vetoed legislation by a distraught Congress to strip WPB of authority over the production of synthetic rubber, and then learned that immediate remedial action was required to prevent "both military and civilian collapse due to rubber scarcity," he established the Office of Rubber Director within WPB with E.O. 9246 of September 17, 1942.[49] Responding to this development, Nelson indicated that the Rubber Director, William M. Jeffers, the president of the Union Pacific Railroad, would exercise the WPB Chairman's authority over rubber production and would issue the necessary directives to other government agencies concerned with rubber.[50] Nelson remained with WPB in his leadership position, such as it was, until late 1944.

It might be noted that Roosevelt had earlier created a position somewhat similar to that of the Rubber Director. In a May 28, 1941, letter to Secretary of the Interior Harold L. Ickes, Roosevelt asked him to serve simultaneously as head of a new Office of the Petroleum Coordinator for National Defense. Ickes had been in such dual capacities in the past, leading, for instance, the Public Works Administration while continuing to be Secretary of the Interior during Roosevelt's first two terms. The duties of the Petroleum Coordinator were transferred to the Petroleum Administration for War, created by E.O. 9276 of December 2, 1942, and which Ickes directed for most of its existence until early 1946 while he remained Secretary of the Interior.[51] Gulick regarded Ickes' petroleum role to be that of a "czar," one held by an individual who was also a Cabinet officer.[52] Of related interest is E.O. 9334 of April 19, 1943, which provided that

another "czar" identified by Gulick, the War Food Administrator, together with the Secretary of Agriculture, "shall each have authority to exercise any and all of the powers vested in the other by statute or otherwise."[53]

Finding the War Mobilization "Czar"

Finally, as Donald Nelson allowed his authority as WPB Chairman to become diluted, Roosevelt found his war mobilization "czar" in the person of James F. Byrnes. Elected to the House of Representatives in 1911, where he remained until he was elected to the Senate in 1931, Byrnes became a trusted and skillful legislative agent and political adviser for Roosevelt, for which he was rewarded in 1941 with a lifetime appointment to the Supreme Court. The Pearl Harbor attack and United States entry into World War II, however, made him eager and ready to leave the Court and help the President with the prosecution of the war. He began, while still a member of the Court, by assisting with the drafting and passage of the vital First and Second War Powers Acts, and then urged the President to replace "the various and overlapping defense offices that Roosevelt had assembled in a haphazard manner since 1939 with one centralized authority."[54] Appearing to take this advice, Roosevelt created WPB. Donald Nelson, however, did not seem to appreciate the design. As the military prospects of the nation became brighter with each passing month of 1942, the need grew for the President "to appoint a largely independent administrator to direct the wages and prices of the U.S. domestic economy during wartime." Byrnes not only supported the idea, he also urged Roosevelt to threaten to use the Reorganization Act of 1939 and the War Powers Acts to create the needed regulatory office unless Congress legislated an economic stabilization program.[55] Congress responded with the Stabilization Act of 1942, which "directed the President to issue a general order stabilizing prices, wages, and salaries affecting the cost of living" and "authorized him to provide for ... subsequent adjustments in prices, salaries, and wages as might prove necessary for the effective prosecution of the war or the correction of gross inequities."[56] Enforcement of the President's order by the Director of an Office of Economic Stabilization (OES) was authorized, and the agency, located in OEM, was subsequently realized with the issuance of E.O. 9250 on October 3, 1942.[57] Asked by Roosevelt to become the OES Director, Byrnes quickly resigned from the Court and assumed his new duties on October 15. The powers delegated to Byrnes by E.O. 9250, by one estimate, "were sweeping and probably could not have been legally given up by any president to a nonelected official except under the exigencies of wartime."[58] Moreover, Byrnes located his office in the East Wing of the White House, which served as a reminder as to who he worked for and from where his authority derived. Interpreting his powers broadly, he would execute his duties decisively and with effectiveness, prompting many to regard him as the "economic czar."[59] By one account, "Byrnes oversaw the greatest change from civilian to military employment in the history of the United States since the Civil War, with none of the inflation or profiteering that had characterized that war or the First World War."[60]

Byrnes was ambitious and felt underutilized in his OES position. On May 14, 1943, he sent a letter to the President expressing his frustration, offering his resignation, and expressing his willingness to serve in some other position. At a lunch meeting with Roosevelt a few days

later, "Byrnes suggested the idea of his appointment to the post of a centralized war mobilizer," a role Donald Nelson apparently did not want and one which the President had come to realize he needed. Roosevelt told Byrnes to work with Samuel Rosenman and BOB in preparing a draft executive order creating such an office.[61] The result was the creation of the Office of War Mobilization (OWM) by E.O. 9347 of May 27, 1943; Jimmy Byrnes would direct it.[62]

The creation of an agency like OWM had been welcomed by the much respected and influential Senate Special Committee Investigating the National Defense Program, known as the Truman Committee in reference to Senator Harry S. Truman, who had prompted the creation of the panel and who chaired it from March 1941 until August 1944.[63] In a May 6, 1943, report on conflicting war programs, the committee had famously stated:

> The task of control and guidance is of utmost importance. Clear leadership in strong hands is required. The influence from above must be always towards unity. Where necessary, heads must be knocked together.[64]

Continuing, the report discussed the difficulties experienced with WPB — the failure to exercise its own powers and the dilution of its authority, particularly as a consequence of the creation of competing "czars" who were not empowered to determine the whole production program themselves. "Today," said the report, "discussion of the over-all legal authority of the War Production Board is mere pedantry. Although the authority may exist it has not been exercised."[65]

The OWM mandate was sweeping and general; it was empowered

> (a) To develop programs and to establish policies for the maximum use of the nation's natural and industrial resources for military and civilian needs, for the effective use of the national manpower not in the armed forces, for the maintenance and stabilization of the civilian economy, and for the adjustment of such economy to war needs and conditions;
>
> (b) To unify the activities of Federal agencies and departments engaged in or concerned with production, procurement, distribution, or transportation of military or civilian supplies, materials, and products and to resolve and determine controversies between such agencies or departments, except those to be resolved by the Director of Economic Stabilization under Section 3, Title IV of Executive Order 9250 [concerning agricultural prices]; and
>
> (c) To issue such directives on policy or operations to the Federal agencies and departments as may be necessary to carry out the programs developed, the policies established, and the decisions made under this Order. It shall be the duty of all such agencies and Departments to execute these directives, and to make to the Office of War Mobilization such progress reports as may be required.[66]

From his office in the East Wing of the White House, Byrnes "soon was regarded as

second only to the President on the home front," and with "his frequent exhibition of confidence in Byrnes, the President helped establish public and governmental understanding and recognition of his position." OWM operated with a small staff, which Byrnes "instructed not to constitute an isolating 'layer between the director and the heads of agencies [but] ... to facilitate the relations of the director with agency heads'." A small staff "prevented OWM from engaging in administrative activities and operations and from undertaking or interfering with the normal functions of other agencies." It was also "inadequate to perform the type of central planning function which many people considered OWM's most important duty." This, however, was not a limitation in Byrnes's view, for he "felt that most planning should be conducted at agency levels and that it was his job primarily to coordinate such plans."[67]

"Byrnes interpreted his new authority at the OWM as reaching practically every Washington administrator," it was observed, "and in this move he was encouraged by Roosevelt, who was happy to be relieved of the political and logistical responsibilities of the home front and to be able to devote more time to the strategic ends of the war."[68] As a consequence of congressional concern about the accountability of the OWM Director regarding his exercise of his vast discretionary powers, as well as a desire to begin planning for conversion to a peacetime economy, Congress enacted the War Mobilization and Reconversion Act of 1944, creating the Office of War Mobilization and Reconversion (OWMR) as an independent agency and making its presidentially-appointed Director subject to Senate confirmation with a two-year term.[69] This act, by one near-contemporary estimate, was "considered the broadest grant of power ever legislated by Congress, creating for the first time by statute a superdepartmental director over the whole range of home-front executive activities for war and reconversion — powers so great that some critics questioned the constitutionality of such a grant to anyone short of the President."[70]

Upon signing the legislation into law, Roosevelt issued E.O. 9488 transferring the functions and resources of OWM to OWMR.[71] Byrnes, who was named to head the new agency, continued to operate from the East Wing of the White House. He left OWMR in April 1945 and, three months later, was named Secretary of State. OWMR was dismantled at the end of 1946.[72]

A few years after the demise of OWMR, it was evaluated as "a notable, although improvised, attempt to equip the President with a strong staff arm for executive policy and program coordination, as distinguished from administrative management and fiscal control." The author of the study, a participant-observer who served on the OWM-OWMR staff for 16 months, regarded the agency to be a successful instrument of central control and coordination for the President.[73] Other such experiments would be tested in the years ahead.

War "Czars" and Congressional Accountability

By one estimate, for the period of World War II, Congress "gave the President all the power he needed to wage a victorious total war, but stubbornly refused to be shunted to the back of the stage by the leading man."[74] Legislating, however, was not the only role Congress chose for itself. "The proliferation of investigation committees was one of the singular characteristics

of the war Congress," it has been observed. "The emphasis on investigation, on the control of policy after the passage of an Act, was a spontaneous congressional reaction, as it were, to the increasing number of activities with which the administrative branch was concerned."[75] Did the executive branch cooperate when officials were asked to appear before congressional committees? Could sensitive wartime matters be discussed in these proceedings, including deficiencies and blunders?

While no generalized response to these questions can be offered, because there is not adequate historical research to permit such, something can be offered regarding the wartime "czars" discussed earlier. An examination of the initial hearings of the Truman Committee clearly reveals that such "czars" testified on several occasions before this panel.[76] For the period of April 1941 to April 1943, for instance, OPM Director General William S. Knudsen appeared once and OPM Associate Director Sidney Hillman appeared twice; WPB Chairman Donald Nelson appeared thrice; Petroleum Coordinator Harold L. Ickes appeared thrice and Deputy Petroleum Coordinator Ralph K. Davies appeared thrice; and Rubber Director William M. Jeffers appeared once. Interesting as well were the instances when lesser officials of the offices of the war production "czars" came before the Truman Committee to testify. Of these, OPM officials made 17 appearances, WPB officials 24, and Petroleum Coordinator officials 8.

This record would appear to suggest that the executive branch was willing to cooperate with the Truman Committee in its investigations of the national defense program. If the "czars" were accountable to this panel, it is likely that they were accountable to other committees as a consequence of overlapping interests among them. Outcomes, however, might differ, as the following observation suggests.

> This overlapping of interests resulted in some diversity among the committees themselves on the merits of any particular policy. The degree to which the administrators accepted criticism varied; not being bound by law to accept this advice, they had to make a prudent evaluation of the nature of the criticism and the strength of the political groups supporting it. An administrator might find himself in the ambivalent and somewhat embarrassing position of being supported by one committee and vilified by another. Although there were frequent duplications of effort, the committees spread their nets sufficiently wide to encompass most of the war activities. The actual influence of congressional investigations cannot be measured solely by their hearings and reports and by the immediate administrative reaction thereto. Every administrator knew that some day he might be asked to explain his action before a congressional committee.[77]

It might be added that, even those administrators purported to be "czars" knew that such an accounting could be sought from them.

Later Developments

The phenomenon of so-called "czars," which seemingly began during the World War II era, did not disappear with the return of world peace. Various presidential agents came to

denominated or regarded as "czars," although the criteria for designating them as such has not always been explained or discernable.[78] The realization of "czars" through special presidential designation and locating them somewhere in the EOP or WHO experienced a variation during the administration of Richard M. Nixon when senior presidential assistants appeared to assume czar-like roles. This development had been anticipated some years before, as the following comment suggests.

> Whether manifested by a benign lack of interests or by purposeful competition, departmentalism operated to reduce the potentialities of the Cabinet as a coordinating mechanism. Yet in view of the extent to which executive decisionmaking must now be conducted across departmental boundaries, it does not seem too much to say that the Chief Executive's primary managerial task is precisely this one of coordination. From the seminal recommendations of the President's Committee on Administrative Management in 1939 to the present day, the President's need for assistants in this area has been widely recognized. This, indeed, is the raison d'etre for the phenominal proliferation of those staff organs with interdepartmental planning, operating, and advisory functions which now comprise the Executive Office of the President. The expansion of this Office — of, for instance, the Budget Bureau, the National Security Council, the Office of Defense Mobilization, the Council of Economic Advisers, the White House Office — must be considered in part as an inevitable response to the new dimensions of government activity, but also in part as an adverse reflection on the ability of the Cabinet in coping with the difficult problems of coordination involved.[79]

The observation suggests that WHO and EOP satellites had come to better serve the President as coordinators of executive functions. Moreover, presidential agents within these entities had come to play policy roles, refining policy suggestions and even regulating the access of other policymakers to the Chief Executive. However, as former presidential assistant Theodore Sorensen has noted, such a role carries with it certain dangers.

> A White House adviser may see a departmental problem in a wider context than a Secretary, but he also has less contact with actual operations and pressures, with Congress and interested groups. If his own staff grows too large, his office may become only another department, another level of clearances and concurrencies instead of a personal instrument of the President. If his confidential relationship with the President causes either one to be too uncritical of the other's judgment, errors may go uncorrected. If he develops ... a confidence in his own competence which outruns the fact, his contribution may be more mischieveous than useful. If, on the other hand, he defers too readily to the authority of the renown experts and Cabinet powers, then the President is denied the skeptical, critical service his staff should be providing.[80]

As presidential assistants move toward the possibility of the equivalence of departmental authority, whether such power be measured in fiscal or political influence terms, the wrath of official department heads can, and often is, incurred. Sorensen has commented as follows:

> No doubt at times our roles were resented. Secretary [of Commerce Luther] Hodges, apparently disgruntled by his inability to see the President more often, arranged

> to have placed on the Cabinet agenda for June 15, 1961, an item entitled "A candid discussion with the President on relationships with the White House staff." Upon discovering this in the meeting, I passed the President a note asking "Shall I leave?" — but the President ignored both the note and the agenda.[81]

Such disputes within the presidential "family" can be viewed as merely matters of paternal favor. When these encroachments of power become enmeshed in relationships with other branches of the government — in particular, Congress — then constitutional issues ensue. In this regard, former White House Press Secretary George Reedy offered the following observation on the increasing authority of WHO staff and the significance of this development both in terms of information flow and accountability.

> At one time the White House staff was a relatively small group of people. They consisted of personal advisers to the President, and here you have the whole question of executive privilege which has been exercised, in my judgment, in an extremely legitimate form. I do not think that you should be able to pry loose from a President what he does not want to be pried loose. But, even if you should be allowed to do it, there is simply no way of getting at it. I do not care what law you write, or what you put through the Congress, or how many safeguards you set up, there is another branch of the Government, and to really try to pry loose from the President his thoughts, and his personal advice, I think, would even come close to participating in a constitutional crisis. But, because the authority lies within the White House, rather this ability lies within the White House, of exercising executive privilege, what has happened with the proliferation of White House staff members is that you are to the point where you are gradually getting a shift of the operating agencies into the White House itself.[82]

The concern reflected in Reedy's comment was that there was developing a phenomenon of elite WHO decisionmakers who were not accountable to Congress. The most controversial example of such a presidential policymaker at the time of Reedy's comment was Henry Kissinger and his National Security Council staff which usurped the field of American national security affairs during the initial years of the Nixon Administration. Not only did Kissinger and his retinue undermine the Department of State and the career foreign service, but also Congress could not compel him or any member of his staff to provide an account of any aspect of their activities.[83] Commenting on the situation, Senator J. William Fulbright, chairman of the Senate Committee on Foreign Relations, remarked: "Mr. Kissinger and his entire staff have taken the position of executive privilege."[84]

The situation was no different with regard to domestic policy. In a May 1971 speech in San Jose, California, Senator Ernest F. Hollings remarked:

> It used to be that if I had a problem with food stamps, I went to see the Secretary of Agriculture, whose Department had jurisdiction over that program. Not any more. Now, if I want to learn the policy, I must go to the White House and consult John Price.
>
> If I want the latest on textiles, I won't get it from the Secretary of Commerce,

> who has the authority and responsibility. No, I am forced to go to the White House and see Mr. Peter Flanigan. I shouldn't feel too badly. Secretary [Maurice] Stans has to do the same thing.[85]

At the time of these comments, Price was a Special Assistant to the President in the WHO; Flanigan was an Assistant to the President and later became simultaneously the Executive Director of the Council on International Economic Policy in the EOP. Maurice Stans was the incumbent Secretary of Commerce.

During the Nixon Administration, officials in the executive departments and agencies became distraught over the power exercised by the WHO staff and their usurpation of line department and agency functions. A top Department of Commerce official typically complained that "the business community pays no attention to this Department; if you have a policy problem, you go see Peter Flanigan — and he is available."

"Peter Flanigan," the official said with a sigh, "is to the Department of Commerce what Henry Kissinger is to the Department of State."[86]

In brief, the problem posed by such WHO staff usurpation of department and agency functions was twofold: an inappropriate and unjustified power grab and an unwillingness, for being an immediate presidential assistant, to be accountable to Congress. The immediate situation was resolved as a consequence of Nixon's resignation from office and the departure of his WHO assistants. Nonetheless, the prospects for the situation repeating itself, in less problematic, pervasive, and different ways remained — the "czars" might return.

"Czars" and Congress: Some Considerations for the Future

Since the beginning of the "czar" phenomenon during World War II, some developments have occurred which have significance for the accountability of such presidential agents to Congress. Chief among these is greater specificity on the part of Congress as to how appropriated funds are to be used. The following considerations seem relevant.

John F. Kennedy, Lyndon B. Johnson, and Richard M. Nixon all publicly subscribed to the practice that assertions of so-called executive privilege regarding the testimony of presidential assistants before committees of Congress would be exercised personally and exclusively by the President. Subsequent Presidents appear to have followed this precedent. Congress should accept nothing less: no lesser official, such as the President's Chief of Staff or White House Counsel, should be allowed to make this claim.

When a President does prohibit congressional committee testimony by a "czar" or presidential agent, efforts should be made to obtain the desired information on an informal basis. Responsive factual documents might be sought instead, or answers to interrogatories might be pursued. The presidential agent in question might be held accountable through a departmental or agency official heading the entity in which he or she is located, or this individual might be asked to brief congressional committee leaders or staff, as happened with Henry Kissinger and, more

recently, presidential homeland security adviser Tom Ridge.

In the closing days of World War II, Congress enacted legislation requiring that an agency in existence for more than one year may not use allocated funds to pay its expenses without a specific appropriation or specific authorization for such by law, which was subsequently codified.[87] As originally intended, the provision is a check on the presidential establishment of new agencies within the EOP. Its larger implications are twofold: new EOP agencies headed by a so-called "czar" — such as the Office of Homeland Security, established by E.O. 13228 of October 8, 2001 — must conform to this requirement, and all EOP agencies should be properly mandated and not made subsidiaries of other EOP entities.[88] In this latter regard, there are entities within the EOP which do not have an official charter. The Office of Policy Development, for example, has no administrative or statutory mandate, and otherwise consists of two administratively established presidential councils, according to recent *U. S. Government Manuals*. Similarly, since the 1972/1973 issue of this guide, the executive Office of the Vice President has been portrayed as an EOP unit, but there is no formal basis for this assertion. Moreover, entities were recently established statutorily within the EOP — such as the Homeland Security Council[89] and the Privacy and Civil Liberties Oversight Board[90] — and they have been regarded financially and, by implication, managerially, as subunits of the WHO. This modification is reflective of reorganization authority which is not available to the President. Congress should insist that the EOP agencies it mandates be treated as principal units of the EOP and not subsumed by some other EOP unit.

In 1978, Congress, after considerable effort, established personnel authorizations for WHO, two other EOP units, and the executive Office of the Vice President.[91] This authorization might be revisited with a view to the adequacy of its allotments, its reporting requirements, and scope. In this last regard, should other EOP units be included with regard to staff authorizations?

Mr. Chairman, thank you, again, for your invitation to appear here today before the committee. I welcome the questions of members.

Notes

1. See Stephen Horn, *The Cabinet and Congress* (New York: Columbia University Press, 1 960), pp. 16-18.

2. Ibid., pp. 10-13, 18-21.

3. See Charles Warren, *The Supreme Court in United States History*, Vol. 1 (Boston, MA: Little, Brown, 1932), pp. 105-111.

4. Richard F. Fenno, Jr., *The President's Cabinet* (New York: Vintage Books, originally p published 1959), pp. 9-10.

5. Traces of this view remain even today. A recently published study of the development and administration of the National Security Act, when discussing efforts by President Dwight D. Eisenhower to provide his Vice President with a key role in the national security policymaking process, noted that there were limits to these endeavors "since the vice president was not officially a member of the executive branch of government." Douglas T. Stuart, *Creating the National Security State* (Princeton, NJ: Princeton University Press, 2008), p. 248.

6. In a May 13, 1797, letter to Elbridge Gerry, for example, Jefferson wrote: "I consider my office as constitutionally confined to legislative functions, and that I could not take any part whatever in executive consultations." Andrew A. Lipscomb and Albert Ellery Bergh, eds., *The Writings of Thomas Jefferson*, Vol. 9 (Washington, DC: Thomas Jefferson Memorial Association, 1903), p. 382.

7. Fenno, *The President's Cabinet*, p. 19.

8. Leonard D. White, *The Jacksonians* (New York: Macmillan1954), pp. 92-93.

9. William Howard Taft, *Our Chief Magistrate and His Powers* (New York: Columbia University Press, 1916), p. 35; William Howard Taft, *The Presidency* (New York: Charles Scribner's Sons, 1916), p. 31.

10. Doris Kearns Goodwin, *Team of Rivals: The Political Genius of Abraham Lincoln* (New York: Simon and Schuster, 2005).

11. White, *The Jacksonians*, pp. 94-95.

12. Arthur M. Schlesinger, Jr., *The Age of Jackson* (Boston, MA: Little, Brown, 1945), p. 67.

13. See R. G. Tugwell, *The Brains Trust* (New York: Viking Press, 1968).

14. 48 Stat. 22.

15. 48 Stat. 195.

16. Louis Brownlow, *A Passion for Anonymity: The Autobiography of Louis Brownlow, Second Half* (Chicago, IL: University of Chicago Press, 1958), p. 319.

17. 48 Stat. 31.

18. A. J. Wann, *The President as Chief Administrator* (Washington, DC: Public Affairs Press, 1968), pp. 54-66; Lester G. Seligman and Elmer E. Cornwell, eds., *New Deal Mosaic: Roosevelt Confers with His National Emergency Council, 1933-1936* (Eugene, OR: University of Oregon Books, 1965), pp. xiv-xxix.

19. 49 Stat. 115.

20. See Brownlow, *A Passion for Anonymity*, pp. 323-324.

21. Barry Dean Karl, *Executive Reorganization and Reform in the New Deal* (Cambridge, MA: Harvard University Press, 1963), pp. 197-198.

22. 40 Stat. 556.

23. 47 Stat. 413 as amended at 47 Stat. 1515.

24. 45 Stat. 1230.

25. An October 1935 memorandum largely prepared by Charles E. Merriam, an eminent University of Chicago political scientist and subsequent member of the President's Committee on Administrative Management, offered an initial perspective on what would be the focus of the panel. One year later, another memorandum, prepared in November 1936 by Louis Brownlow, the Director of the Public Administration Clearinghouse and chair of the President's Committee, outlined the content of the panel's report, and his 1958 biography records the President's reaction to, and comments on, this memorandum. For all three items, see Brownlow, *A Passion for Anonymity*, pp. 327-328, 376-377, 378-382.

26. See Karl, *Executive Reorganization and Reform in the New Deal*, pp. 82-165.

27. U.S. President's Committee on Administrative Management, *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. 8, 75th Cong., 1st sess. (Washington, DC: GPO, 1937), p. 19.

28. 53 Stat. 561.

29. Richard Polenberg, *Reorganizing Roosevelt's Government* (Cambridge, MA: Harvard University Press, 1966), pp. 184-187.

30. 53 Stat. 1423.

31. 3 C.F.R. 1938-1943 Comp., pp. 576-579.

32. Brownlow, *A Passion for Anonymity*, pp. 313, 416.

33. 3 C.F.R. 1938-1943 Comp., pp. 1320-1321.

34. 39 Stat. 649; see Grosvenor B. Clarkson, *Industrial America in the World War* (Boston, MA: Houghton Mifflin, 1923).

35. Patrick Anderson, *The President's Men* (Garden City, NY: Doubleday Anchor Books, 1969), p. 79.

36. Richard Tanner Johnson, *Managing the White House* (New York: Harper and Row, 1974), pp. 5-6, 11; Patricia Dennis Witherspoon, *Within These Walls* (New York: Praeger, 1991), pp. 21-28.

37. See Eric Larabee, *Commander in Chief* (New York: Harper and Row, 1987); Andrew Roberts, *Masters and Commanders* (New York: Harper, 2009).

38. Luther Gulick, *Administrative Reflections from World War II* (University, AL: University of Alabama Press, 1948), pp. 76-77.

39. Ibid., p. 23.

40. Ibid., p. 100.

41. Herman Miles Somers, *Presidential Agency: OWMR, The Office of War Mobilization and Reconversion* (Cambridge,MA: Harvard University Press, 1950), pp. 11-13.

42. 3 C.F.R., 1938-1943 Comp., pp. 852-853.

43. Somers, *Presidential Agency: OWMR*, p. 15.

44. 3 C.F.R., 1938-1943 Comp., pp. 1079-1080.

45. Ibid., pp. 1082-1083.

46. Somers, *Presidential Agency: OWMR*, p. 24.

47. Ibid., p. 25.

48. 3 C.F.R., 1938-1943 Comp., pp. 1145-1147.

49. Somers, *Presidential Agency: OWMR*, pp. 27-28; 3 C.F.R., 1938-1943 Comp., pp. 1210-1211.

50. Somers, *Presidential Agency: OWMR*, p. 28.

51. 3 C.F.R., 1938-1943 Comp., pp. 1228-1231.

52. Gulick, *Administrative Reflections from World War II*, p. 22.

53. 3 C.F.R., 1938-1943 Comp., pp. 1273-1274.

54. David Robertson, *Sly and Able: A Political Biography of James F. Byrnes* (New York: W. W. Norton, 1994), pp. 311-312.

55. Ibid., pp. 316-318.

56. 56 Stat. 765.

57. 3 C.F.R., 1938-1943 Comp., pp. 1213-1216.

58. Robertson, *Sly and Able*, p. 319.

59. Ibid., p. 326.

60. Ibid., pp. 325-326.

61. Ibid., p. 326.

62. 3 C.F.R., 1938-1943 Comp., pp. 1281-1282.

63. See Donald H. Riddle, *The Truman Committee: A Study in Congressional Responsibility* (New Brunswick, NJ: Rutgers University Press, 1964); Harry Aubrey Toulmin, Jr., *Diary of Democracy: The Senate War Investigating Committee* (New York: Richard R. Smith, 1947).

64. U.S. Congress, Senate Special Committee Investigating the National Defense Program, *Investigation of the National Defense Program: Concerning Conflicting War Programs*, Rept. 10, Part 9, 78th Cong., 1st sess (Washington: GPO, 1943), p. 2.

65. Ibid., p. 5.

66. E.O. 9347, 3 C.F.R., 1938-1943 Comp., pp. 1281-1282.

67. Somers, *Presidential Agency: OWMR*, pp. 52, 55-56.

68. Robertson, *Sly and Able*, p. 327.

69. 58 Stat. 785.

70. Somers, *Presidential Agency: OWMR*, p. 1.

71. 3 C.F.R., 1943-1948 Comp., pp. 345-346.

72. See E.O. 9809, 3 C.F.R., 1943-1948 Comp., pp. 591-592.

73. Somers, *Presidential Agency: OWMR*, pp. 1-2.

74. Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton, NJ: Princeton University Press, 1948), p. 265.

75. Roland Young, *Congressional Politics in the Second World War* (New York: Columbia University Press, 1956), p. 19.

76. The initial review of Truman Committee hearings included those held between April 15, 1941, and April 3, 1943. This review is continuing. The Truman Committee held its last wartime hearing in December 1945, but continued operations until April 1948, and held its final hearings in November 1947. Senator Truman left the committee on August 4, 1944, after receiving the Democratic party nomination for the vice presidency. When the Senate abolished all special committees in 1948, many of the resources and investigative expertise of the Truman Committee were vested in a new permanent investigations subcommittee of the Senate Committee on Expenditures in the Executive Departments — now called the Committee on Homeland Security and Governmental Affairs — on the initiative of that panel's chairman, Senator George D. Aiken.

77. Young, *Congressional Politics in the Second World War*, pp. 19-20.

78. See Bradley H. Patterson, Jr., *The Ring of Power* (New York: Basic Books, 1988), pp. 271-279.

79. Fenno, *The President's Cabinet*, pp. 141-142.

80. Theodore C. Sorensen, *Decision-Making in the White House* (New York: Columbia University Press, 1963), pp. 71-72.

81. Theodore C. Sorensen, *Kennedy* (New York: Harper and Row, 1969), p. 259.

82. U.S. Congress, House Committee on Government Operations, *U.S. Government Information Policies and Practices -- Administration and Operation of the Freedom of Information Act*, hearings, 92nd Cong., 2nd sess. (Washington: GPO, 1972), p. 1013.

83. I. M. Destler, "Can One Man Do?," *Foreign Policy*, No. 5, Winter 1971-1972, pp. 28-40; John P. Leacacos, "Kissinger's Aparat," *Foreign Policy*, No. 5, Winter 1971-1972, pp. 3-27; George Sherman, "A Sickness at State," *Washington Evening Star*, March 7, 1972, pp. A1, A4.

84. U.S. Congress, Senate Committee on Foreign Relations, *War Powers Legislation*, hearings, 92nd Cong., 1st sess. (Washington: GPO, 1971), p. 453.

85. Dom Bonafede, "Ehrlichman Act as Policy Broker in Nixon's Formalized Domestic Council," *National Journal*, vol. 3, June 12, 1971, p. 1240.

86. *New York Times,* March 20, 1972.

87. 31 U.S.C. 1347.

88. 3 C.F.R., 2001 Comp., pp. 796-802.

89. 116 Stat. 2258; 6 U.S.C. 491.

90. 118 Stat. 3684; 5 U.S.C. 601 note.

91. 92 Stat. 2445; 3 U.S.C. 105-107.