

Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
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Opening Statement of U.S. Senator Russ Feingold
Hearing On "Examining the History and Legality of Executive Branch 'Czars'"
Senate Judiciary Committee, Subcommittee on the Constitution

As Prepared for Delivery

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

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

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

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

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

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

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

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

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

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

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