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Committee on the Judiciary
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Legal Issues Associated With Executive Branch "Czars"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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