

Testimony of  
**Matthew Spalding**

October 6, 2009

Examining the History and Legality of Executive Branch Czars

Testimony before the

United State Senate  
Committee on the Judiciary

October 6, 2009

Matthew Spalding, Ph.D.  
Director, B. Kenneth Simon  
Center for American Studies  
The Heritage Foundation

?

Thank you. Let me begin by commending the Senate Judiciary Committee, and especially Senator Feingold, for calling this hearing and giving serious consideration to this issue. Who would have thought that over 200 years after the Declaration of Independence indicted George III for having "erected a multitude of New Offices, and sent hither swarms of Officers to harass our people and eat out their substance" we would be debating the number and proliferation of "czars" in the administration of American government?

The very word, of course, is itself a significant part of the problem. An endless source of humor, it is both confusing and revealing. It is a confusing term because no one officially holds the title; it is a short-hand popularization used by the media and commentators as well as individuals in government to describe certain individuals in the administration who seem to be coordinating national policy and particular policy issues across agencies and programs. We don't know how many there are, as there is no official list. Complicating the matter further is that, of those who have been dubbed "czars," some are in positions created by Congress and have been confirmed by the Senate while others are not in such positions and have not been confirmed.

Yet the term is also revealing. While it is a clever label meant to simplify the proliferation of long, formal job titles it clearly was meant as well to imply in certain positions a breadth of authority and level of status beyond the particulars of the formal title, and seemingly beyond the confines of the normal administrative process. Americans have always bristled at such claims of undefined authority, and calling it by a title historically associated with lawlessness and despotism only serves to underscore the problem.

The use of the term is not new, of course. Nixon seems to have had the first in the modern era, and there were a couple under both Ronald Reagan and George Herbert Walker Bush and President Clinton had a few more. But there seems to have been a proliferation of the title in the previous and the current administration. I say "seems" because there is significant information we do not know about these positions, their duties and responsibilities, and their line of authority. This is why Congress--and here I note the letters from Senator Feingold, as well as a letter from Representatives Issa and Smith--is absolutely correct in asking for more information about the activities and authority of several of the individual czars.

My guess is that there are actually many more individuals that could fairly be called "czars" in the administration. I say that because the problem is not in the title per se, or who made or didn't make the czar list, but with the activities associated with the particular position, and whether there is a general trend toward a centralization of czar power in White House. Congress, both in terms of preserving its own powers and checking those of the executive as well as encouraging open deliberation and responsibility in government, ought to be keenly interested in this question.

The issue is not whether the proliferation of "czars" amounts to a usurpation of power by the executive branch. Rather, the fundamental issue is how the rise of modern administrative government has put us in an unsolvable dilemma: whether policy should be made by technical experts, insulated from public accountability and control, or whether policy should be made by our elected representatives in Congress and the executive branch. The rise of government by bureaucrats - due to the delegation of power from Congress to administrative agencies, combined with the removal of those agencies from the President's control - has given rise to efforts by presidents from both parties to get the bureaucratic state under control through various mechanisms. The rise of "czars" in the current administration is just another manifestation - albeit, an unfortunate one - of this phenomenon.

To understand this argument, a quick synopsis of some background history is necessary. During the late nineteenth and early twentieth centuries (also known as the "Progressive Era"), leading intellectuals and politicians sought to transform American government, which they believed was set up to circumvent the public interest for the sake of narrow and parochial interests.

The problem, in their view, was that policy was being made politically - that is, by inexperienced officials chosen by the people, who were unfamiliar with the practicalities of modern society. The solution they devised was to transfer policymaking authority to administrative experts, removed from day-to-day politics and political control, who would be social scientists, educated at top universities and trained to apply cutting-edge scientific research to modern problems. As one leading Progressive, John Dewey, argued, "the question of method in formation and execution of policies is the central thing in liberalism. The method indicated is that of maximum reliance upon intelligence."

Technical intelligence, rather than the will of the people expressed through elected representatives, would be the basis for policymaking in the Progressives' new state. Authority to make policy would have to be transferred out of the elected branches of government and into newly-created administrative boards and commissions, who would be staffed with these experts and tasked with making policy appropriate for a modern society.

The result of this movement was to transfer the authority to make law from Congress, filled with inexpert politicians, to administrative experts housed in administrative agencies. But politics would still exert a pernicious influence on these agencies unless they were also insulated from the control of the President, who was also an elected official and tied to the political impulses of his constituency. Therefore, two things had to be achieved: the delegation of legislative power to agencies, and the removal of presidential control over these new institutions. Both were achieved before and during the New Deal, with the creation of "independent regulatory commissions" which were not located within the executive branch. Rather, they would be outside of the traditional branches of government and not directly accountable to any of those traditional branches.

In practice, this meant that the expansion of administrative agencies appeared to involve an expansion of executive power, but it actually resulted in a decline of executive control and responsibility for administrative policy. This led to the paradox of the expansion of administrative agencies, but the decline of presidential control over those agencies. Harry Truman famously predicted the difficulty that Dwight Eisenhower would have in setting policy priorities for the administration: "He will sit here and he will say, 'Do this!, Do that!' And nothing will happen. Poor Ike - it won't be a bit like the Army." It was President Truman who breathlessly complained, "I thought I was the President, but when it comes to these bureaucrats, I can't do a damn thing." The Progressive impulse to put technical experts in charge of national policy led to the unfortunate consequence of popularly-elected Presidents being unable to change national policy. The ideal of scientific policy had been elevated over the principle of the consent of the governed.

This created a fundamental dilemma: how can the bureaucratic state the Progressives created be organized and controlled? Is it destined to result in a collection of disconnected, uncoordinated independent agencies that each pursue a focused goal such as workplace safety or the regulation of communications? How will these bureaucrats be held accountable to the people, if they do not answer to the President?

From the perspective of the domestic policy agenda of the president, the story of the twentieth century is the history of attempts by individual presidents to regain control of agencies which are ostensibly executive and which are primarily staffed with officials that the President cannot remove.

Nearly every president, from both parties, has devised a plan for bringing the bureaucracy under the control of the chief executive. Congress has always had several tools for controlling administrative officials - most notably the powers to authorize and fund agencies. But without the power to remove administrative officials, how can the vast administrative state be controlled?

Presidents have tried many devices for bringing agencies under their supervision. Administrative re-organization was a prominent agenda, employed both by the FDR and Nixon Administrations. The President's control over the administration was expanded by Presidents Carter and Reagan, most notably in the latter's creation of a regulatory review process in the Office of Information and Regulatory Analysis (OIRA), which is now headed by the legal scholar Cass Sunstein, otherwise known as President Obama's "regulatory czar." (Incidentally, Sunstein's nomination was approved by the Senate, despite the "czar" moniker) Elena Kagan, the current Solicitor

General, wrote a famous law review article outlining the ways in which President Clinton had established a firmer grip on administrative agencies.

President Obama's attempt to centralize control over administrative agencies is therefore nothing new, nor is it peculiar to one of the two major parties in America. It is a symptom of a much more serious sickness - the fact that Congress has transferred a great deal of its authority to administrative agencies, and neglected to put anyone in charge of the whole structure. This entire framework is in tension with the original Constitution, but the Constitution nevertheless can give us some basic principles for thinking about the question of "czars" in the White House.

The United States Constitution does not create or require a cabinet under the executive branch, though it clearly anticipates the managerial structure and recognizes the significance of department heads to assist the president in overseeing the executive branch. From the very beginning, every president has used such a structure to manage the executive branch. The most recent example of strong cabinet government, revived after the failed executive models of the Nixon administration's heavy-handed centralization of White House authority as well as the Carter administration's small-minded micromanaging style, was the presidency of Ronald Reagan, who regularly turned to cabinet secretaries directly for advice and to carry out policy and created "cabinet councils" to coordinate the activities of the cabinet and respective departments. Presidents since, however, seem to be moving away from the cabinet structure and more in the direction of centralizing more authority directly in the Executive Office of the President.

The President has the authority to appoint his own staff and advisors to assist in the work of his office. It is perfectly legitimate for presidential staff to advance the president's policy objectives within the administration as a matter of course, and President's often appoint particular advisors to advance particular, high level policies. The executive has this authority as a separate and independent matter from officers created by the legislature to carry out the law, and Congress cannot infringe on that authority.

Nevertheless, through its legislative and oversight functions, and more specifically through the Senate's participation in the appointment of officers under Article II, Congress also has significant responsibilities over the general activities of the administration in carrying out the operations of the federal government. With this legislative power in mind, a number of senators have focused their attention on eighteen czar positions in the administration that may overstep Congress' express statutory assignment of responsibility and its oversight responsibilities.

Where can the line be drawn between executive privilege and legislative responsibility? If executive authority is being used as a subterfuge to thwart confirmation requirements and accountability, and so evade constitutional requirements for individuals performing operational and managerial functions normally the responsibility of cabinet secretaries and department and agency executives that require Senate confirmation, that would certainly violate the spirit and probably the letter of the Constitution. A possible example of this problem may be the Climate Czar Carol Browner who, according to reports, was the lead negotiator in establishing new automobile emissions standards, stemming from the Supreme Court's interpretation of the Clean Air Act. In addition to seeming to be beyond congressional legislative intent, it also seems to circumvent the authority of the EPA administrator.

As the number of czars expands, and the President's policy staff grows, and there are more and more individuals acting more and more as administrative heads rather than advisors, Congress should raise questions as to whether those individuals should be subject to executive privilege or can be compelled to testify before Congress. The President cannot have it both ways.

In addition to the constitutional questions, I would also like to note concerns about the administrative problems inherent in this new executive management paradigm. Having policy operations run out of the White House causes confusion of responsibility for one thing. Who is in charge of healthcare reform: Kathleen Sebelius, the Secretary of Health and Human Services, or Nancy DeParle, the Healthcare czar? In general, running operations out of the White House can become very problematic: recall again the Nixon Administration, and the activities of Mr. Halderman and Mr. Erlichman. More recently, the Tower Commission warned against White House staff acting outside of the regular structure of policy decision-making. There will always be a temptation to use White House authority--real or implied--to exercise political influence over normal departmental activities. As long as that influence is not accountable, and thus responsible---which seems to have been the case in recent stories concerning a conference call with the National Endowment for the Arts encouraging policy-oriented art or the issuance of curricula to accompany the president's recent speech to students--it is more likely than not to be inappropriate.

In all of these cases, congressional oversight would serve as an important and legitimate check on executive authority. But additional oversight, with the requirement for approval of and testimony from as many presidential staff as possible, will not solve the fundamental problem behind the current czar wars, which I think has more to do with the general nature of modern administrative government and a growing popular concern about the limits (or lack thereof) on its activities.

For some time now, Congress has developed the habit of delegating vast amounts of authority to the executive branch to address a problem and after the fact looks to manage the exercise of that authority, as opposed to writing clear and detailed laws to be executed by the President. The Troubled Asset Relief Program (TARP), meant to purchase assets and equity from financial institutions as a way to address the subprime mortgage crisis, is a perfect example. Unbounded delegations allowed the Secretary of the Treasury to spend up to \$700 billion at will to purchase "troubled" assets of any financial institution. Lo and behold, the United States is now majority owner of General Motors and there is a Car Czar. Setting aside the wisdom of the policy, can it fairly be said that this was the intention of Congress?

And in some cases the delegation of czar-like authority is even clearer. The healthcare legislation in the House of Representatives creates a "Health Choices Commissioner" at the head of a new Health Choices Administration. This duly created, and presumably Senate confirmed, Health Insurance Czar would exercise enormous control over the nation's insurance industry, an enormous concentration of power in one person.

The modern executive, on the other hand, increasingly attempts to get control of the vast bureaucracy under their authority and, in the most recent iteration of the battle, appoints uber-bureaucrats to shift that bureaucracy in the president's policy directions. This is partly a misconception of executive authority that seems to see cabinet officers as independent of that

authority, or at least an unwillingness to exert authority over executive branch policy through the cabinet. But it also seems to be a general attempt to circumvent congressional oversight (or interference, depending on how you look at it) in shaping policies within the discretion of the executive branch. An executive desire to do more and more things outside of legislative authority, and with vast sums of money appropriated by Congress to do more and more things, makes matters all the worse.

The combination of these two trends creates a situation where more and more laws - in the form of rulemaking, regulations and policy pronouncements - are made by administrative agents not only outside of the open and transparent requirements of responsible government, and without congressional approval and oversight, but generally beyond the principle that legitimate government arises out of the consent of the governed. And the more government regularly operates as a matter of course outside of popular consent, the more we become clients rather than rulers of a vast and distant government, the less we are self-governing, and the less we control our own fate. And that, as Alexis de Tocqueville warned in *Democracy in America*, is the recipe for a benign form of despotism that truly imperils our democratic experiment.

\*\*\*\*\*

The Heritage Foundation is a public policy, research, and educational organization operating under Section 501(C)(3). It is privately supported, and receives no funds from any government at any level, nor does it perform any government or other contract work.

The Heritage Foundation is the most broadly supported think tank in the United States. During 2007, it had nearly 330,000 individual, foundation, and corporate supporters representing every state in the U.S. Its 2007 income came from the following sources:

Individuals 46%  
Foundations 22%  
Corporations 3 %  
Investment Income 28%  
Publication Sales and Other 0%

The top five corporate givers provided The Heritage Foundation with 1.8% of its 2007 income. The Heritage Foundation's books are audited annually by the national accounting firm of McGladrey & Pullen. A list of major donors is available from The Heritage Foundation upon request.

Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed are their own, and do not reflect an institutional position for The Heritage Foundation or its board of trustees.