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Potential Appointments Clause Issues Associated With Certain Types of "Czars"

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I have been asked to address the question of whether the President's use of "czars" violates the Appointments Clause. My written testimony is limited to the general appointments issue presented by the use of these positions. It explains the constitutional framework that the Senate should consider in addressing this question.

I. The appointment of officers

It is well established that the Appointments Clause controls the appointment of officers. Buckley v. Valeo, 424 U.S. 1, 127 (1976). There, however, are at least two ways to characterize the source of the President's power to appoint. A Madisonian view of executive power looks to the Appointments Clause itself as an enumerated constitutional grant of power to the President to appoint with Senate advice and consent, except under certain specified circumstances. By contrast, a Hamiltonian view of executive power might look to Article II, § 1, clause one, the executive vesting clause, as the unqualified grant of the appointment power. On this latter interpretation, the Appointments Clause is read as a limitation or a qualification of the previously vested appointment power, i.e. the President appoints officers only with the Senate's advice and consent, barring congressional action to opt out of the default appointment process (the Excepting Clause) or upon the conditions necessary for presidential recess appointments (the Recess Appointments Clause). The Hamiltonian account adds the potential insight that the President's constitutional power to appoint *non-officers* (as opposed to officers) derives from the executive vesting clause itself. Thus, under this approach, the President retains a reservoir of power to appoint non-officers. This modest observation does not resolve the question of "czars" as plainly constitutional. After all, if a czar is an "officer" the Appointments Clause (or the Excepting Clause) controls.

If a position is an "office," the President must appoint the officer consistently with the Appointments Clause. The Supreme Court has interpreted that Clause to distinguish between so-called "principal" officers[1] and "inferior" officers. A President must secure

[1] I say "so-called" because the Appointments Clause does not call the listed categories of officers "principal," U.S. Const. art. II, § 2, cl. 2, and it is unclear that ambassadors and U.S. consuls are more "principal" in their domain than U.S. attorneys in their domain, who are considered to be "inferior officers." During the Federal Convention debates,

the Senate's advice and consent to appoint principal officers (sometimes referred to as "PAS" appointments). This requirement is non-negotiable. On the other hand, "inferior" officers may be opted out of presidential nomination and Senate advice and consent. The choice to opt out or not is a congressional prerogative ("Congress *may…as they may think proper*"). There is a built in disincentive to opt out. When it exercises this option, Congress effectively eliminates itself from the formal appointments process. It, however, may opt back into the default arrangement of presidential appointment with Senate advice and consent. To opt out, Congress acts by statute ("by law") that vests the appointment authority in one of three groups of officers: the President alone, the Heads of (executive) Departments, or the Courts of Law.

One way to think of a "czar" is as an inferior officer whose appointment Congress vested in the President alone. The three questions to ask in making this determination are: (1) is the czar even an "officer" at all (see part II below); (2) if so, did Congress by statute vest the appointment power in "the President alone" if appointed by the President or in a "Head of an (executive) Department" if appointed by a department secretary or similar official appointed by Senate advice and consent; and (3) if so, is the officer "inferior" to the appointing authority. If all three conditions are met, the czar is an inferior officer whose appointment was vested by Congress outside the default process and is consistent with the Appointments Clause. Alternatively, if the czar is *not* an officer at all but a non-officer, then the President has the power to appoint the non-officer without regard to Senate advice and consent.

II. Determining the status of a czar

A. Officer/non-officer

First, as a threshold matter, it is necessary to draw the line between federal officer and non-officer in order to determine the constitutional status of a czar. If a czar is a non-officer, the Appointments Clause and its excepting provision simply do not apply. In such a case, there would be no Appointments Clause issue about the czar whatsoever. To this end, the Department of Justice's Office of Legal Counsel ("OLC") has issued an opinion synthesizing and harmonizing the Supreme Court's opinions on who is an officer for Appointments Clause purposes. *Officers of the United States Within the Meaning of the Appointments Clause* (April 16, 2007). An officer is one who holds an office that: (1) is "a position to which is delegated by legal authority a portion of the sovereign powers of the federal Government" (what the Court termed "significant authority" of the United States in Buckley v. Valeo, 424 U.S. at 126) and (2) that is "continuing."

As to the first requirement that a position be delegated sovereign authority, OLC defined such powers as primarily those

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Madison used the term "superior" as a synonym for "principal." 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 627 (rev. ed. 1966).

> binding the Government or third parties for the benefit of the public, such as by administering, executing, or authoritatively interpreting the laws. Delegated sovereign authority also includes other activities of the Executive Branch concerning the public that might not necessarily be described as the administration, execution, or authoritative interpretation of the laws but nevertheless have long been understood to be sovereign functions, particularly the authority to represent the United States to foreign nations or to command military force on behalf of the Government. *Id.* at 4.

OLC excludes as an office "any purely advisory position (one having no legal authority)," "typical contractor[s] (providing goods or services)," and those "possess[ing]…authority from a State." *Id.*

Powerful "purely advisory positions" still present a potential problem for Congress. After all, even if a czar's functions are purely advisory and limited to making recommendations to the President, proximity to the President means power and may mean that non-officers closely situated to the President are more influential than even Senate confirmed principal officers.[2] The difficulty is heightened by having individuals whose capacity is formally advisory but who become functionally final decisionmakers – an outcome almost foreordained given the modern presidency's overwhelming need to delegate and defer to minute policy expertise. The answer to this difficulty is not to classify those purely advisory positions as "officers" rather than "non-officers." Likely the solution to this potential problem lies outside the Appointments Clause: Congress can assert its budgetary powers and not fund influential non-officer "advisors." Alternatively, it could opt to create formal offices staffed by inferior officers accountable to Senate advice and consent (or opted out of it) who have not only the traditional advisory roles but who also have relevant powers such that they are officers.

As to the requirement that a position must be "continuing," OLC offered its view that "the position is permanent or that, even though temporary, it is not personal, 'transient,' or 'incidental.'" *Id.* It excluded "special diplomatic agents, short-term contractors, qui tam relators, and many others in positions that have authority on an ad hoc or temporary basis." *Id.* Past executive-congressional practice informed this condition of officerhood.

B. Vested by law

Second, for a czar appointed outside of advice and consent, Congress must have vested that appointment power in the President alone or in the Head of an Executive

[2] For example, then-Assistant Attorney General William Rehnquist concluded in 1969 that the Staff Assistant to the President did not hold office within the meaning of the Ineligibility Clause. *See* Memorandum for Lamar Alexander, Staff Assistant to the President, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel at 2 (Dec. 9, 1969).

Department by a statute. The executive branch has on occasion found there to be a vesting of appointment power absent explicit language.

C. "Inferior" officer

Finally, the office must be "inferior" in order to vest the appointment authority outside of advice and consent. Although the Supreme Court's precedent on what constitutes an inferior officer is internally inconsistent,[3] the better (and later) authority is that an inferior officer means an officer hierarchically subordinate to the congressionally chosen appointing authority. *See* Edmond v. United States.[4] Under this interpretation of inferior, a powerful officer may still be "inferior," provided the office is supervised and directed at some level by the appointing authority. Justice Scalia, writing for the Court in *Edmond*, appeared to equate being a subordinate as a sufficient condition to establish one is an "inferior" officer.[5]

D. Implications

If a "czar" is merely an inferior officer opted out of Senate advice and consent and appointed by "the President alone," there are three important implications. First, if indeed Congress by law vested the appointment authority over a czar in the President alone, then that czar is appointed consistent with the Excepting Clause. Second, if that czar is an inferior officer, Congress could always opt back in to Senate advice and consent by choosing to repeal the statute delegating the appointment power. Third, if a czar is an officer, those constitutional provisions applicable to offices apply. These include: (1) the requirement to be appointed consistent with the Appointments Clause (or its excepting provision or the recess provision); (2) the requirements of the Incompatability and Ineligibility Clauses; and (3) liability to impeachment consistent with the Impeachment Clauses.

If it were determined that a czar occupies an office, but was not appointed consistent with the Appointments Clause because not opted out of advice and consent or because not inferior, then the actions of that officer would be legally voidable. The Court has declined to use the de facto officer doctrine to save unconstitutional appointments

[3] For a discussion of why the cases are irreconcilable, see Tuan Samahon, *Are Bankruptcy Judges Unconstitutional? An Appointments Clause Challenge*, 60 HASTINGS L.J. 233, 258-66 (2008) (examining attempts to reconcile *Morrison v. Olson* and *Edmond v. United States*).

[4] Justice Scalia's opinion for the majority in *Edmond* "is too specific to the appointment at issue in Edmond. The President may appoint inferior officers if so vested, but of course the President is not appointed by advice and consent. U.S. Const. art. II, §1. The revised construction would provide that to be subordinate means to be supervised and directed at some level by the appointing authority." *Id.* at 287 n.431.

[5] This approach is a departure from Justice Scalia's earlier view in *Morrison v. Olson* that to be a subordinate was a necessary condition, but perhaps not sufficient, to being an inferior officer. *Id.* at 260 n.236.

from challenge. *See* Ryder v. United States, 515 U.S. 177, 180 (1995). This reality makes the constitutional status of czars all the more important.

This testimony on the Appointments Clause issue represents my own views and does not represent the views of any client or Villanova University School of Law.