

NOTE

THE AMERICAN CZARS

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Over the last quarter-century presidents have appointed an increasing number of czars to try to maintain some control over the burgeoning administrative state. The increasing appointment of czars has inevitably led to congressional concerns about the constitutionality of the practice. Congressional indignation has been truly bipartisan, with both Democratic Senator Russ Feingold and Independent Senator Joe Lieberman holding hearings on the issue and numerous Republican senators publicly criticizing the practice. The nature of the term czar is loaded with historical connotations and emotive implications that have done a disservice to the academic analysis of the constitutional issues. Any meaningful analysis must cut through the political and popular confusion and focus on the Constitution and case law at the heart of the issue. As one of the most problematic czars, the “Pay Czar,” Kenneth Feinberg, provides a good case study for how to apply the appropriate analysis.

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INTRODUCTION

Late in the summer of 2009, a public uproar erupted over Anthony Van Jones, an Obama administration official whom the media dubbed Obama’s “Green Jobs Czar.”¹ The controversy arose over Van Jones’

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¹ Johanna Neuman, *Czar Wars: After Axing Van Jones, Conservatives Sharpen Knives in Hunt for More Obama Blood*, L.A. TIMES (Sept. 8, 2009, 11:26 AM), <http://latimes.com>

past advocacy for Marxist and Communist views and a YouTube video of him calling Republicans “assholes.”² Hardly the first politician to use vulgar language towards his political opponents,³ Van Jones stood out because of his radical political views.⁴ The final straw was the revelation that he signed a petition claiming that the September 11th terrorist attacks were an inside job perpetrated by the Bush Administration.⁵ He resigned in the face of a public outcry demanding that Congress examine the system that allowed the President to appoint him without any public vetting, background check, or congressional confirmation.⁶

Although the Van Jones incident was permeated by partisanship, it highlighted a greater, nonpartisan, constitutional issue of whether the growing presidential practice of appointing experts to influential positions within the executive branch without Senate confirmation violates Section II, Clause 2 of the of the United States Constitution, commonly known as the Appointments Clause.⁷ In addition, politicians, academics, and commentators have raised practical policy concerns about the wisdom of using czars by asking whether or not they obscure the lines of accountability and communication, threaten congressional oversight, and usurp or undermine the statutory grants of responsibility to officers confirmed by the United States Senate.⁸

Although many, if not most, of the so-called *czars* are clearly operating with constitutional authority,⁹ there are several whose roles create constitutional questions requiring further investigation and oversight by Congress.¹⁰ Without this congressional action it is difficult to fully understand the role that many of these individuals play in implementing executive branch policy. Part I of this Note explains the history behind the emergence of czars within the American political system. Part II discusses the policy reasons and concerns behind appointing czars. Part III lays out the framework for an appointments clause analysis, and Part IV demonstrates how these principles apply to evaluating the “Pay Czar”

blogs.latimes.com/washington/2009/09/czar-wars-after-axing-van-jones-conservatives-sharpen-knives-in-hunt-for-more-obama-blood.html.

² *Id.*

³ John Dickerson, *WTF Did Biden Just Say?: A Brief History of Bad Language in Washington*, SLATE (Mar. 23, 2010, 7:43 PM), <http://www.slate.com/id/2248689/>.

⁴ Neuman, *supra* note 1.

⁵ *Id.*

⁶ *Id.*

⁷ See U.S. CONST. art. II, § 2, cl. 2; see also Letters from Senators Lamar Alexander, Robert F. Bennett, Christopher S. Bond, Susan Collins, Mike Crapo, and Pat Roberts to President Barack Obama 1 (Sept. 14, 2009), available at http://bennett.senate.gov/public/?a=Files.Serve&File_id=84531273-d0f2-4582-a540-1820a9ba6fc0 (expressing concern over the number of czars appointed during the first year of the Obama Administration).

⁸ See *id.*

⁹ *Id.*

¹⁰ *Id.*

Kenneth Feinberg under the Appointments Clause Jurisprudence. The Note concludes by stating that, until courts forge clearer constitutional boundaries for czars, their presence will likely perpetuate tensions between the legislative and executive branches of government.

I. THE AMERICAN ADOPTION OF RUSSIAN MONARCHS

The title “czar” has long been identified with powerful autocratic rulers.¹¹ It is a Slavic derivation of the Roman title “Caesar,” and Eastern European rulers first used the term to mean “Emperor.”¹² The title has a long history in America as well,¹³ although its early use was pejorative. The term’s first documented use in American politics was in 1832 when supporters of President Andrew Jackson used the term to publicly deride Nicholas Biddle, the President of the Second Bank of the United States.¹⁴ One of those supporters was *Washington Globe* publisher Frank Blair, who called Biddle “Czar Nicholas” to incite comparisons with the tyrannical, contemporary Russian czar, Nicholas I.¹⁵ Similarly, during the 1890s Democrats used the term to decry the strong-armed political machinations of Republican Speaker of the House Thomas Brackett Reed, and his powerful political successor, Joe Cannon.¹⁶

However, after the fall of the Russian Monarchy in 1917, the title’s use evolved beyond its negative origins,¹⁷ and the media began to use the term as shorthand for certain executive branch appointees.¹⁸ For example, during World War I, President Woodrow Wilson named Bernard Baruch to the head of the War Industries Board as the “Industrial Czar.” Like President Wilson before him, President Franklin Roosevelt named several czars to aid his war effort.¹⁹ More recently, the term reemerged in the American vernacular with the prominent appointments of William E. Simon as “Energy Czar” by President Richard Nixon, and William Bennett as “Drug Czar” under President George H.W. Bush, a position

¹¹ Ben Zimmer, *Czar Wars: How Did a Term for Russian Royalty Work Its Way into American Government?*, SLATE (Dec. 29, 2008, 11:24 AM), <http://www.slate.com/id/2207055>.

¹² See *Tsar*, ENCYCLOPEDIA BRITANNICA, http://encyclopedia.jrank.org/TOO_TUM/Tsar_or_CZAR.html (last visited Sept. 19, 2010); *Tsar Definition*, ONLINE ETYMOLOGY DICTIONARY, <http://www.etymonline.com/index.php?search=Tsar&searchmode=None> (last visited Sept. 19, 2010).

¹³ See Zimmer, *supra* note 11.

¹⁴ See *id.*

¹⁵ See *id.* (discussing the use of the term “czar” in American government).

¹⁶ See Zimmer, *supra* note 11.

¹⁷ See *id.* (discussing the way in which “kinder, and gentler ‘czars’ made their way into American public life” after the fall of the last actual czar).

¹⁸ See *id.*

¹⁹ See Randy James, *A Brief History of White House Czars*, TIME, Sept. 23, 2009, <http://www.time.com/time/politics/article/0,8599,1925564,00.html> (last visited Sept. 3, 2010).

that exists to this day.²⁰ The appointment of czars grew during the George W. Bush Administration and has arguably further increased during the Obama Administration.²¹

Since Frank Blair first introduced the title of czar to American political discourse, the media has largely driven its use.²² Though the connotations associated with the word *czar* have evolved since the term's first use in American politics, the word has consistently conveyed the idea that the titleholder possesses nearly authoritarian control over his political domain.²³ Despite the historical transformation in the term's connotation from negative to positive, the term seems to have passed its apex of popular approval, and has crashed quite precipitously in the current political climate.²⁴

II. WHY CZARS?

Although the controversy over czars is inevitably tinged with partisan rhetoric, the concerns are truly bipartisan and better characterized as a struggle between the branches of the federal government rather than between political parties. For example, one of the first politicians to object to President Obama's appointments was the late Democratic Senator Robert Byrd.²⁵ Barely a month after Obama took office on February 23, 2009, Senator Byrd sent the President a letter expressing his concerns about the use of czars in the new administration.²⁶ In his letter, Senator Byrd expressed consternation 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."²⁷ Senator Byrd also relayed specific concerns about

²⁰ See *id.*; Zimmer, *supra* note 11. Neither Simon nor Bennett was actually the first to be appointed to their positions. Rather, they were the first prominently appointed figures in each position.

²¹ See *Examining the History and Legality of Executive Branch Czars: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 111th Cong. (2009) [hereinafter *Czar Hearings*] (testimony of Matthew Spalding, Director, B. Kenneth Simon Center for American Studies, The Heritage Foundation); see also *id.* at 3 (testimony of Bradley H. Patterson, Author, *TO SERVE THE PRESIDENT* (2008)) (noting that czars do not have any legal responsibility).

²² See *id.* (testimony of Bradley H. Patterson Jr.).

²³ See Zimmer, *supra* note 11.

²⁴ See, e.g., Eric Cantor, *Obama's 32 Czars*, WASH. POST, July 30, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/29/AR2009072902624.html>; Letter from Senator Robert C. Byrd to President Barack Obama (Feb. 23, 2009), available at http://www.eenews.net/public/25/9865/features/documents/2009/02/25/document_gw_02.pdf [hereinafter Byrd Letter].

²⁵ See Byrd Letter, *supra* note 28.

²⁶ See *id.* at 1.

²⁷ *Id.*

the probable risk that such appointments would obscure lines of communication, responsibility, and authority between the White House and the rest of the executive branch.²⁸ Two days later, on February 25, 2009, Senator Byrd's office publicized the letter via a press release and, thus, openly criticized the President's appointments and announced his concerns that the czars violate the Constitution.²⁹

Senator Byrd specifically cited appointments made by the Nixon and Bush Administrations that provide examples of the problems that czars caused.³⁰ He noted:

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.³¹

Byrd went on to complain about President Bush's appointment of Tom Ridge as Director of Homeland Security by citing the Bush Administration's refusal to make Ridge available to Congress for questioning.³² Another example the Senator offered was Bush's 2007 appointment of Lieutenant General Douglas Lute as Assistant to the President and Deputy National Security Advisor for Iraq and Afghanistan.³³ Byrd criticized Lute's unavailability for Congressional questioning despite his tremendous responsibility—coordinating two wars.³⁴ Byrd warned President Obama:

[T]he 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 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

²⁸ See *id.*

²⁹ Press Release, Senator Robert C. Byrd, Byrd Questions Obama Administration on Role of White House "Czar" Positions (Feb. 25, 2009), *available at* http://byrd.senate.gov/2009_02_25_pr.pdf [hereinafter Byrd Press Release].

³⁰ See Byrd Letter, *supra* note 24, at 1–2.

³¹ *Id.* at 1.

³² See *id.* at 2.

³³ See *id.*

³⁴ See *id.*

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.³⁵

Subsequently, in a letter to President Obama, six Republican senators echoed Byrd's objections.³⁶ These senators acknowledged that many of the czars circulating on media lists were not problematic, but they identified eighteen individuals that concerned them.³⁷ Soon after, Senator Kay Bailey Hutchison expressed similar concerns in an op-ed piece in the *Washington Post*.³⁸ In October of 2009, the same concerns led Democratic Senator Russ Feingold to hold a hearing on the constitutionality of the various czar appointments.³⁹ Independent Senator Joe Lieberman also held a hearing on the presidential appointment of czars.⁴⁰

Ironically, the twenty-first century proliferation of czars is likely the symptom of an executive branch struggling to cope with Congress's complex twentieth-century legislative legacy, rather than an actual attempt to increase executive branch power or obfuscate congressional oversight.⁴¹ The development of the progressive movement in the twentieth century ushered in an era of confidence in technical experts and aspirations for an independent scientific administration, theoretically independent from political influences.⁴² This faith in technocratic administration also led to diminished skepticism towards politically unaccountable bureaucrats regulating large segments of the American economy.⁴³ As a result, Congress placed an increasing amount of power

³⁵ *Id.*

³⁶ See Alexander et al., *supra* note 7, at 1.

³⁷ See *id.*

³⁸ Kay Bailey Hutchison, *Czarist Washington*, WASH. POST, Sept. 13, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/11/AR2009091103504.html> (last visited Aug. 20, 2010).

³⁹ See Kara Rowland, *Feingold Hits Obama's Use of "Czars,"* WASH. TIMES, Oct. 7, 2009, http://www.washingtontimes.com/news/2009/oct/07/feingold-hits-obamas-use-of-czars/?feat=Home_cube_position3.

⁴⁰ See *Presidential Advice and Senate Consent: The Past, Present, and Future of Policy Czars: Hearing Before the S. Comm. on Homeland Security & Governmental Affairs*, 111th Cong. (2009).

⁴¹ See Cody M. Brown & Jeffrey D. Ratner, *White House Czars: Is Congress to Blame?*, CHRISTIAN SCI. MONITOR, Oct. 19, 2009, <http://www.csmonitor.com/Commentary/Opinion/2009/1019/p09s04-coop.html>.

⁴² See *Czar Hearings*, *supra* note 21 (testimony of Matthey Spalding) (discussing the way the Progressive Era empowered intellectuals and politicians who sought to transfer policy decisions to scientific and technological experts).

⁴³ See *id.*

in independent administrative agencies, which simultaneously shielded the administrative state from political accountability.⁴⁴

In an attempt to manage the growth of the administrative state corresponding with the progressive movement, Congress passed an act in 1932 that allowed the President to consolidate executive branch functions and agencies in order to reduce expenditures, increase efficiency, and eliminate duplication of effort.⁴⁵ Over the next fifty years, presidents submitted over one hundred similar reorganization plans to Congress.⁴⁶ However, during the Reagan presidency, Congress failed to reauthorize the Act, and since then, the President has had few tools to manage the exponential growth of the federal government.⁴⁷

Czars give the President a method for reasserting control over the massive administrative state by appointing an adviser who could coordinate across different departments to spearhead the President's agenda regarding a particular policy issue.⁴⁸ For example, Carol Browner, the Energy and Climate Change Czar, is charged with coordinating the President's climate change agenda from the White House, even though the issue involves the EPA, Department of Energy, Department of Transportation, NASA, and the State Department.⁴⁹ Although Carol Browner technically has no legal authority, she has significant power due to her close proximity to the President.⁵⁰

Another benefit that czars provide to the President is the appearance of action.⁵¹ By appointing a czar, a President can send the message that he is working to resolve a problem.⁵² Czars have historically been touted as experts tirelessly dedicated to a singular function and capable of cutting through red tape or "knocking heads" together in order to achieve the desired results.⁵³ Consequently, czars can provide a good deal of

⁴⁴ See *id.*

⁴⁵ See Brown & Ratner, *supra* note 41.

⁴⁶ See *id.*

⁴⁷ See *id.* (discussing how absent a reorganization structure, the President has difficulty consolidating and coordinating agencies).

⁴⁸ See *id.*

⁴⁹ See BARBARA L. SCHWEMLE ET AL., CONG. RES. SERV., THE DEBATE OVER SELECTED PRESIDENTIAL ASSISTANTS AND ADVISORS: APPOINTMENT, ACCOUNTABILITY, AND CONGRESSIONAL OVERSIGHT 19–20 (2009), OPEN CRS, available at <http://fpc.state.gov/documents/organization/132252.pdf>.

⁵⁰ See *id.* at 19 (quoting Carol Browner's statement that "[t]here is a difference between being an assistant to the president and having a statutory responsibility as the Secretary of Energy or the administrator of EPA."); see also *Czar Hearings*, *supra* note 21 (Testimony of Bradley H. Patterson Jr.) (noting that czars do not have any legal responsibility).

⁵¹ See BRADLEY H. PATTERSON JR., THE WHITE HOUSE STAFF: INSIDE THE WEST WING AND BEYOND 264 (Brookings Inst. Press 2000).

⁵² See *id.*

⁵³ See *id.*

value to a president, which has resulted in czars substantially populating the executive branch of government.⁵⁴

III. WHAT MAKES AN AMERICAN CZAR?

A. *Constitutional Underpinnings and Popular Confusion*

As mentioned in Part I, the title of czar is an informal label frequently used by the media to describe high level executive branch appointees tasked with coordinating part of the President's agenda.⁵⁵ Presidents have also occasionally used the term because it is an easy way to convey that they were taking action to address problems.⁵⁶ As an informal title, the word itself is not constitutionally problematic, though it can be quite unhelpful to informed political discourse because it lacks a standardized definition and is often used emotively.⁵⁷ In fact, both the media and Presidents have largely confused the issue by using the term to describe a wide range of officials with very dissimilar responsibilities, statutory mandates, sources of authority, and methods of appointment.⁵⁸ Use of the title *czar* is more the result of convenience or political marketing rather than accurate legal nomenclature.⁵⁹ The term also appeals to journalists because it easily substitutes for much longer official titles and sounds catchy.⁶⁰

Due to the lack of precision, it is impossible to say for sure how many czars currently occupy Washington.⁶¹ Media lists attempting to count the czars in the current Administration fail to reach a consensus.⁶² The counts vary, but several lists suggest there are around thirty czars.⁶³ The different counts are likely due to the lack of agreement on the definition of a czar. Consequently, the media and political pundits have seem-

⁵⁴ See Rowland, *supra* note 39.

⁵⁵ See *Czar Hearings*, *supra* note 22, at 1–4 (testimony of Bradley H. Patterson Jr.) (discussing the history and legality of czars); see also Mike Dorning, *Barack Obama Administration's Czars: How Many Are There?* CHI. TRIB., June 14, 2009, <http://www.chicagotribune.com/news/nationworld/chi-talk-czarsjun14,0,5035131.story>.

⁵⁶ See BRADLEY H. PATTERSON JR., *THE RING OF POWER: THE WHITE HOUSE STAFF AND ITS EXPANDING ROLE IN GOVERNMENT* 272 (1988).

⁵⁷ See *Czar Hearings*, *supra* note 21, at 1–3 (testimony of Bradley H. Patterson Jr.).

⁵⁸ See *Czar Hearings*, *supra* note 21, at 1–2 (testimony of Bradley H. Patterson Jr.) (noting a disagreement with the media's use of an expansive definition of czars).

⁵⁹ See *id.* (distinguishing the dictionary definition of czar with the author's definition).

⁶⁰ See Posting of Ed to *Senators Take on Czar Wars*, N.Y. TIMES CAUCUS BLOG, (Oct. 7, 2009, 11:22 AM), <http://thecaucus.blogs.nytimes.com/2009/10/07/senators-take-on-the-czar-wars/>.

⁶¹ See *Czar Hearings*, *supra* note 21 (testimony of Matthew Spalding).

⁶² Rowland, *supra* note 39.

⁶³ See, e.g., Ed Hornick, *Jones' Resignation Puts Focus on Criticism of Obama's Czars*, CNNPOLITICS.COM (Sept. 7, 2009 6:25 PM), <http://www.cnn.com/2009/POLITICS/09/07/obama.czars/index.html>; *List of Obama's Czars*, *supra*, note 59; *President Obama's 'Czars,'* POLITICO (Sept. 8, 2009, 1:43 PM), <http://www.politico.com/news/stories/0909/26779.html>.

ingly indiscriminately applied the title to a wide range of officials.⁶⁴ Although critics can likely assert practical policy concerns regarding many of the czars, the true constitutional questions only apply to a small subset of the appointees.

The central constitutional concerns are whether the czars were properly appointed according to the Appointments Clause,⁶⁵ and conversely, whether the czars are acting beyond their constitutional authority, which is limited by their method of appointment. Constitutionally, only “officers” are allowed to wield significant legal authority, and all officers are subject to the Appointments Clause.⁶⁶ Thus, the key questions when evaluating czars are: (1) What is the definition of an “officer,” (2) do any of the so-called czars fit that definition, and (3) if so, were they constitutionally appointed?

Consequently, there are no constitutional issues when the President appoints mere employees (as opposed to officers) without senate confirmation, or when the president appoints officers “with the Advice and Consent of the Senate.”⁶⁷ If, however, the president appoints principal officers without Senate confirmation, or inferior officers without confirmation or legislative authorization, there are legitimate constitutional issues.⁶⁸ The converse occurs when either the president or the head of an executive branch department grants an employee authority that is constitutionally entrusted to Officers of the United States. Therefore, when courts decide whether an individual has been properly appointed, they must decide whether he occupies an Office of the United States or is simply an employee.

B. *Who is an Officer?*

Executive Branch appointments fall within two general categories: “officers” and “employees.”⁶⁹ The Supreme Court defined the distinction between these two groups almost thirty-five years ago: “‘Officers of the United States’ does not include all employees of the United States Employees are lesser functionaries subordinate to officers of the United States.”⁷⁰ Officers are those who occupy an “office” of the

⁶⁴ *See id.*

⁶⁵ *See* U.S. CONST. art. II, § 2, cl. 2; *Czar Hearings*, *supra* note 21 (statements by Sen. Cornyn and Sen. Feingold); Hutchison, *supra* note 38; Alexander et al., *supra* note 7, at 1; Byrd Letter, *supra* note 24, at 2; Byrd Press Release, *supra* note 29.

⁶⁶ *See* Buckley v. Valeo, 424 U.S. 1, 126 (1976).

⁶⁷ U.S. CONST. art. II, § 2, cl. 2.

⁶⁸ *See id.*

⁶⁹ *See* Buckley v. Valeo, 424 U.S. 1, 126 (1976).

⁷⁰ *See id.* at 126 n.162 (citing *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890); *United States v. Germaine*, 99 U.S. 508 (1879)); *Hall v. Wisconsin*, 103 U.S. 5, 7 (1880) (“In *United States v. Maurice*, Mr. Chief Justice Marshall said: ‘Although an office is an employment, it does not follow that every employment is an office. A man may certainly be employed under

United States.⁷¹ Officers are further categorized as either principal officers or inferior officers.⁷² The Appointments Clause governs the appointment of officers:

[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: but the 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.⁷³

Thus, the Appointments Clause gives the President the authority to appoint “Officers of the United States” to positions “*which shall be established by law . . . with the advice and consent of the Senate.*”⁷⁴ Therefore, not only do all officers require senate confirmation, but each new office not provided for in the Constitution must be created by statute.⁷⁵ However, within the Appointments Clause, the Excepting Clause, as it is commonly known, provides that “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.”⁷⁶ Therefore, the default appointment process for inferior officers requires Senate confirmation, although the framers provided a possible work-around for the sake of administrative convenience.⁷⁷ Inferior officers can only avoid Senate confirmation if Congress previously established their office and approved of their unilateral appointment.⁷⁸ The Appointments Clause does not, however, govern the hiring or appointment of mere employees. Title 3, § 105 of the United States Code authorizes and governs appointment of employees (non-officers) to the White House

a contract, express or implied, to perform a service without becoming an officer.” (citation omitted)).

⁷¹ See *Buckley*, 126 n.162.

⁷² See *id.* at 125 (“The Constitution for purposes of appointment very clearly divides all its officers into two classes. . . . That all persons who can be said to hold an office under the government . . . were intended to be included within one or the other of these modes of appointment there can be but little doubt.” (quoting *United States v. Germaine*, 99 U.S. 508, 508–09, (1879))); see also U.S. CONST., art. II, § 2, cl. 2.

⁷³ U.S. CONST. art. II, § 2, cl. 2.

⁷⁴ *Id.* (emphasis added).

⁷⁵ *Id.*; *Buckley*, 424 U.S. at 125–26.

⁷⁶ U.S. CONST. art. II, § 2, cl. 2.

⁷⁷ See *Edmond v. United States*, 520 U.S. 651, 660 (1997).

⁷⁸ See *Buckley*, 424 U.S. at 125–26.

staff.⁷⁹ Other statutes allow for the hiring of employees throughout the rest of the executive branch.⁸⁰

In 2007, the Office of Legal Counsel (OLC) issued a memorandum on the meaning of “officer” as used in the Appointments Clause.⁸¹ The OLC memo concluded that there are two necessary requirements for a federal position to qualify as an office of the United States: (1) a delegation of sovereign authority, and (2) continuing duties.⁸² The first requirement, and the historically defining characteristic of a public office, is the office holder’s legal responsibility to exercise sovereign authority, including “making, executing, or administering the laws.”⁸³ The OLC cited a leading nineteenth century treatise that defined an office as the “right, authority and duty, created and conferred by law,” to exercise “the sovereign functions of the government . . . for the benefit of the public.”⁸⁴ Citing numerous eighteenth and other nineteenth century legal authorities, the 2007 OLC Memo defined sovereign authority as the “power lawfully conferred by the Government to bind third parties, or the Government itself, for the public benefit.”⁸⁵ Sovereign authority also includes other traditional executive functions including, but not limited to, foreign negotiations,⁸⁶ the direction of military operations,⁸⁷ the handling and disbursement of public funds,⁸⁸ and the right to contract on behalf of the United States.⁸⁹ Sovereign authority, however, does not include the proprietary management of governmental property,⁹⁰ or “[p]urely ministerial and internal functions, such as building security, mail operations, and physical plant maintenance, which neither affect the

⁷⁹ 3 U.S.C. § 105(a)(1); *see also Czar Hearings, supra* note 21, at 2 (testimony of Bradley H. Patterson Jr.).

⁸⁰ *See, e.g.,* 5 U.S.C. § 3101 (2008).

⁸¹ Memorandum from Steven G. Bradbury, Acting Asst. Attorney General, Office of Legal Counsel, Officers of the United States Within the Meaning of the Appointments Clause, (Apr. 16, 2007), *available at* <http://www.justice.gov/olc/2007/appointmentsclausev10.pdf> [hereinafter Officers].

⁸² *Id.* at 1.

⁸³ *Id.* at 8–9 (citing Opinion of the Justices, 3 Me. 481, 482 (Me. 1822)).

⁸⁴ *Id.* at 10 (quoting FLOYD R. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS § 1 1–2 (1890)).

⁸⁵ Officers, *supra* note 81, at 12.

⁸⁶ *See id.* at 15 (citing THE FEDERALIST NO. 72, at 486–87 (Alexander Hamilton)); *see also* Logan Act, 1 Stat. 613, ch. 1 (1799), *codified as amended at* 18 U.S.C. § 953 (2000) (making it a crime, absent the authority of the United States, for citizens to communicate with foreign governments regarding international controversies or disputes).

⁸⁷ *See* Officers, *supra* note 81, at 15 (citing THE FEDERALIST NO. 72, at 486–87 (Alexander Hamilton)).

⁸⁸ *See* Shelby v. Alcorn, 36 Miss. 273, 277 (Miss. 1858); *In re Corliss*, 11 R.I. 638, 640, 642 (R.I. 1876); Officers, *supra* note 81, at 15.

⁸⁹ *See* United States v. Tingey, 30 U.S. 115, 126 (1831); United States v. Maurice, 26 F. Cas. 1211, 1217 (C.C. Va. 1823) (No. 15,747); Officers, *supra* note 81, at 13–14.

⁹⁰ *See* Opinion of the Justices, 3 Me. 481, 483 (Me. 1822).

legal rights of third parties outside the Government nor involve the exercise of significant policymaking authority.”⁹¹

The Supreme Court offered a slightly different definition of what constitutes an office in *Buckley v. Valeo*.⁹² In *Buckley*, the Court stated:

[T]he term ‘Officers of the United States’ as used in Art[icle] II . . . is a term intended to have substantive meaning. We think its fair import is 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.⁹³

Although the Supreme Court used the phrase “significant” rather than “sovereign” authority, it gave no other indication that it was abandoning the historical definition.⁹⁴ In fact, the Court discussed several nineteenth century cases in the decision and reinforced the idea that it did not intend to depart from the historical understanding of what constitutes a public office.⁹⁵ Consequently, the phrase “significant authority” is best understood as expressing the idea that exercising any “sovereign authority” is a significant duty, rather than a measure of importance or consequence. Importance alone, however, does not prevent an employee from being an officer. In *United States v. Hartwell*,⁹⁶ the Supreme Court determined that a clerk working within the Treasury Department was indeed an officer of the United States because a department head had appointed him to his position in accordance with the Appointments Clause of the Constitution.⁹⁷

According to the OLC, the second requirement that qualifies a position as a public office is that the position must have “continuing” duties.⁹⁸ This second requirement, like that of exercising sovereign authority, also has long historical roots. It is a requirement that dates back to the case of *U.S. v. Maurice*,⁹⁹ in which Chief Justice John Marshall, while riding circuit, wrote:

⁹¹ Officers, *supra* note 81, at 10–11 (citing Constitutional Limits on “Contracting Out” Department of Justice Functions under OMB Circular A-76, 14 Op. Off. Legal Counsel 94, 99 (1990)).

⁹² 424 U.S. 1, 125 (1976).

⁹³ *Id.* (italics in original).

⁹⁴ See Officers, *supra* note 81, at 10–11.

⁹⁵ See *Buckley*, 424 U.S. at 125 (citing *Auffmordt v. Hedden*, 137 U.S. 310 (1890), *United States v. Germaine*, 99 U.S. 508 (1879)); Officers, *supra* note 81, at 10–11.

⁹⁶ 73 U.S. 385 (1823).

⁹⁷ See *id.* at 393–94.

⁹⁸ See Officers, *supra* note 81, at 23.

⁹⁹ *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C. Va. 1823) (No. 15,747).

A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer. But if a *duty be a continuing one*, which is defined by rules prescribed by the government, and not by contract, . . . it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer.¹⁰⁰

The Supreme Court later embraced and expounded upon this language in *United States v. Germaine*.¹⁰¹ In *Germaine*, the Court stated that an office “embraces the ideas of tenure, duration, emolument, and duties, and that the latter [are] continuing and permanent, not occasional or temporary.”¹⁰²

Although the OLC concluded that the requirement of continuing duties was indispensable to holding office, the consensus on this condition is far from settled.¹⁰³ One school of thought argues that continuity is merely a factor to be weighed during analysis and that it is ultimately a dispensable condition.¹⁰⁴ This approach is evident in previous Attorney General Opinions,¹⁰⁵ as well as both state¹⁰⁶ and federal¹⁰⁷ precedent. Moreover, it is arguably the approach that the majority adopted in one of the most recent Supreme Court decisions regarding the Appointments Clause, *Morrison v. Olson*.¹⁰⁸ In *Morrison*, the acting Assistant Attorney General for the OLC, Theodore Olson,¹⁰⁹ challenged the constitutionality of the appointment powers set forth in the Ethics in Government Act of 1978. That Act allowed¹¹⁰ for the appointment of an “independent counsel” through the concerted action of the Attorney General and the Special Division (a special court), in order to investigate and prosecute certain

¹⁰⁰ *Id.*

¹⁰¹ 99 U.S. 508 (1879).

¹⁰² *Id.* at 511–12 (citing *United States v. Hartwell*, 73 U.S. 385, 393–94 (1867)).

¹⁰³ See *Officers*, *supra* note 98, at 30–31.

¹⁰⁴ See *id.*

¹⁰⁵ See *id.*

¹⁰⁶ See *id.* (citing *In re Corliss*, 11 R.I. 638, 640, 642 (R.I. 1876)).

¹⁰⁷ See *id.* (“[I]t was the uniform view of the federal courts in this period that a receiver of an insolvent national bank, appointed (ultimately) by the Secretary of the Treasury, was an officer for purposes of a statute authorizing certain suits in federal court by ‘the United States or any officer thereof.’” (citing *U.S. v. Weitzel*, 246 U.S. 533, 541 (1918); *Price v. Abbot*, 17 F. 506, 507–08 (C.C. D. Mass. 1883); *Frelinghuysen v. Baldwin*, 12 F. 395, 396–97 (D.N.J. 1882); *Stanton v. Wilkenson*, 22 F. Cas. 1074, 1075 (S.D.N.Y. 1876); *Platt v. Beach*, 19 F. Cas. 836, 840 (E.D.N.Y. 1868)).

¹⁰⁸ 487 U.S. 654 (1988).

¹⁰⁹ Theodore Olson later served as the 42nd Solicitor General under George W. Bush from 2001–2004.

¹¹⁰ Congress decided not to reauthorize the Independent Counsel Act, upon its expiration in 1999. See RONALD A. CASS ET AL., *ADMINISTRATIVE LAW: CASES AND MATERIALS* 89 (5th ed. 2006).

high-ranking government officials for violation of federal criminal laws.¹¹¹ The Act required the Attorney General to request that the Special Division appoint independent counsel if, after a preliminary review of information, the Attorney General has determined that there are “reasonable grounds to believe that further investigation or prosecution is warranted.”¹¹² In considering Olson’s constitutional challenge to the legitimacy of the Special Division’s appointment of independent counsel, Alexia Morrison, the Court held that the independent counsel position was an office of the United States, despite expressly acknowledging its temporary and case-specific nature:

Nonetheless, the office of independent counsel is “*temporary*” in the sense that an independent counsel is *appointed essentially to accomplish a single task*, and when that task is over the office is terminated, either by the counsel herself or by action of the Special Division. Unlike other prosecutors, appellant has *no ongoing responsibilities that extend beyond the accomplishment of the mission that she was appointed for* and authorized by the Special Division to undertake.¹¹³

Notably, the Court did not expressly consider the temporary and specific nature of the independent counsel’s duties as bearing on the question of whether the independent counsel position was a public office.¹¹⁴ Instead, the court treated the considerations as factors for deciding whether the office was “superior” or “inferior.” The Court held that “[the] factors relating to the ‘ideas of tenure, duration . . . and duties’ of the independent counsel, are sufficient to establish that appellant is an ‘inferior’ officer in the constitutional sense.”¹¹⁵ Consequently, the Court upheld the constitutionality of the appointment. Although *Morrison* did not explicitly address the requirement of continuing duties, the decision is difficult to reconcile with the OLC’s position that the requirement of continuing duties is an indispensable condition of office.

The OLC concedes that the independent counsel position in *Morrison* was temporary; however, it argues that the position still fulfills the requirement of continuing duties.¹¹⁶ According to the OLC, the independent counsel position included continuing duties for the following rea-

¹¹¹ See *Morrison*, 487 U.S. at 660.

¹¹² *Id.*

¹¹³ *Id.* at 672 (italics added); see also *id.* at 671 n.12 (“It is clear that appellant is an ‘officer’ of the United States, not an ‘employee.’” (citing *Buckley v. Valeo*, 424 U.S. 1, 126, 685 n.162 (1976))).

¹¹⁴ See *id.* at 671–73.

¹¹⁵ See *id.* at 672 (citing *United States v. Germaine*, 99 U.S. 508, 511 (1879)).

¹¹⁶ See *Officers*, *supra* note 81, at 34.

sons: it was non-personal, non-transient, and indefinite—it terminated only upon substantial completion of its duties. Notably, these duties were “ongoing” and “not incidental.”¹¹⁷ After the OLC’s attempt to reconcile the *Morrison* decision with earlier case law, the definition of continuing duties that emerges is very different than that which the Supreme Court established in *Germaine*.¹¹⁸ In *Germaine*, the Court defined continuing duties to be those that are “permanent, not occasional or temporary.”¹¹⁹ Synthesizing their definition from the *Germaine* and *Morrison* decisions, the OLC determined that an office will qualify as having continuing duties although the position is temporary, if it is not “personal, transient, or incidental.”¹²⁰ The OLC thus succeeds in its literal synthesis of the case law, but to do so it butchers the English language and clouds the issues. The OLC explanation of the continuing requirement, that an officer’s duties can be temporary so long as they are not “personal, transient, or incidental”¹²¹ swallows the continuing requirement. It is simpler to merely exclude individuals whose duties are personal, transient, or incidental, than to maintain a temporal requirement devoid of any meaning. It makes little sense to cling to temporal terminology when the Supreme Court implicitly disposed of any temporal conditions in *Morrison*.¹²² This is not to say that the Supreme Court abandoned the temporal language earlier courts had employed, but rather, that the concepts can be better expressed through other language.

The departure from using temporal language is justified upon closer inspection of the case law. A more careful look at *Maurice*¹²³—the seminal case that introduced temporal language into the definition of an office—reveals that Chief Justice Marshall was distinguishing between two competing sources of legal obligation rather than emphasizing the temporal duration of the duties.¹²⁴ The question was whether the duties were personal in nature and arising under private contract or were statutorily created public duties.¹²⁵ Stated alternatively, the primary issue was whether the duties continue regardless of who performs them, rather than a temporal question of how long the duties would continue.¹²⁶ A more thorough reading of *Maurice* reveals the merits of drawing this distinction:

¹¹⁷ *Id.*

¹¹⁸ *See Germaine*, 99 U.S. at 511–12 (citing *United States v. Hartwell*, 73 U.S. 385, 393–94 (1867)).

¹¹⁹ *Id.*

¹²⁰ *See Officers*, *supra* note 81, at 23.

¹²¹ *See id.*

¹²² *See id.*

¹²³ *United States v. Maurice*, 26 F. Cas. 1211 (C.C. Va. 1823) (No. 15,747).

¹²⁴ *See id.* at 1213.

¹²⁵ *See id.*

¹²⁶ *See id.* at 1213–15.

A man may certainly be employed under a contract . . . to do an act, or perform a service, without becoming an officer. But if a duty be a continuing one, which is defined by *rules prescribed by the government*, and *not by contract*, which an individual is appointed by government to perform, who enters on the duties appertaining to his station, without any contract defining them, *if those duties continue, though the person be changed*; it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer.¹²⁷

Looking at the passage in context of the dispute at issue reinforces this interpretation. The United States was suing James Maurice for failing to fulfill his duties as “agent for fortifications” of the United States.¹²⁸ The Court held that Maurice was liable for failing to fulfill his duties as an agent for fortifications, which were legally prescribed duties of a statutorily created office.¹²⁹

The distinction between duties arising under public law as opposed to those arising under private contract was also evident in *Hartwell*.¹³⁰ Yet the Court’s infusion of unnecessary temporal language clouded the issue:

An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties. The employment of the defendant was in the *public service* of the United States. He was *appointed pursuant to law*, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place.¹³¹ His duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe.

¹²⁷ *Id.* at 1215.

¹²⁸ *See id.* at 1214–15.

¹²⁹ *See id.* at 1216–17. The court found that Maurice was not an officer because he was unlawfully appointed by the Secretary of War, without Congressional authorization. *See id.* However, the court held that the position of agent of fortifications was a legally created office and Maurice was contractually obligated to perform the duties assigned to that office, even if he was not legally holding the office himself. *See id.*

¹³⁰ *See* United States v. Hartwell, 73 U.S. 385, 393 (1823).

¹³¹ *See id.* *Hartwell* also expounded on the idea that an office should not be personal. Although *Maurice* recognized that the existence of an office does not depend on the identity of the office holder. *See Maurice*, 26 F. Cas. at 1214. *Hartwell* extended this idea, stating that an officer occupies a position that will not be eliminated if his superior leaves office. *See Hartwell*, 73 U.S. at 393.

*A government office is different from a government contract. The latter from its nature is necessarily limited in its duration and specific in its objects.*¹³²

Hartwell was charged with embezzling money under a statute targeting public officers.¹³³ The Secretary of the Treasury had lawfully appointed Hartwell as a Clerk for the Treasury Department in Boston, a statutorily-created office.¹³⁴ This analysis alone was sufficient to dispense with the decision, and the court's use of temporal language was merely an attempt to differentiate a contractual obligation from a statutory obligation.

Similarly, in *United States v. Germaine*,¹³⁵ the Supreme Court used temporal language as a tool for differentiating between contractual duties and statutory duties. In *Germaine* the commissioner of pensions appointed the defendant under a statute that authorized the selection of surgeons to examine pensioners when legally necessary.¹³⁶ The Court concluded that the defendant surgeon did not occupy a federal office because his work was only "occasional and intermittent," given that the surgeons were hired and paid independently for each individual examination.¹³⁷ The nature of the position was far more that of an independent contractor than even an employee, and therefore any work done on behalf of the government was a result of the individual contract rather than any public duty.¹³⁸

After *Morrison*,¹³⁹ it is difficult to maintain that a federal office must be indefinite, or have some specific temporal duration. The better explanation of the temporal language in *Germaine*¹⁴⁰ is that the duration of the office is a factor that can aid in differentiating between duties that arise from contract as opposed to statutory obligations. Upon synthesizing the case law discussed above, the best definition for a federal "officer" is someone vested with the duty of exercising sovereign authority of the United States, for the benefit of the public, except where that duty is only contractual, personal, or only occasional and intermittent.

C. Examining the Czars

Applying these legal principles to the issue of czars, it is possible to separate them into four categories:

¹³² *Id.* (emphasis added).

¹³³ *See id.* at 392.

¹³⁴ *See id.* at 392–94.

¹³⁵ 99 U.S. 508 (1878).

¹³⁶ *See id.* at 508.

¹³⁷ *Id.* at 511–12.

¹³⁸ *See id.*

¹³⁹ 487 U.S. 654 (1988).

¹⁴⁰ 99 U.S. 508 (1878).

- 1) officers confirmed by the Senate,
- 2) properly appointed inferior officers occupying offices created by law,
- 3) employees operating as advisers to the president or his officers, and
- 4) any other executive branch appointments who fail to fit into the other three categories.

The first category includes appointees who have been confirmed by the United States Senate in accordance with the Appointments Clause of the U.S. Constitution.¹⁴¹ These officials clearly present no constitutional problems despite frequently being included on “lists” of czars. Their authority is accurately characterized as being constitutionally derived. Furthermore, they are subject to congressional oversight and, therefore, do not represent any of the policy concerns expressed by Senator Byrd and his congressional colleagues. As then-White House Communication Director Anita Dunn pointed out in defense of Obama’s appointments, nine of Glenn Beck’s thirty-two listed Czars have been confirmed by the Senate.¹⁴²

The second category of czars includes appointees the Constitution classifies as inferior officers, who also present no inherent constitutional problems.¹⁴³ Inferior officers are those who are appointed by the President, the judiciary, or the heads of Departments to offices statutorily created by Congress,¹⁴⁴ and they necessarily report to a principal officer for supervision.¹⁴⁵ Inferior officers, like principal officers, also possess constitutional authority. Inferior officers occupy offices created by congressional statute, are almost uniformly subject to congressional oversight, and Congress can compel inferior officers to testify before it.¹⁴⁶

The third category of czars includes those appointees who are neither inferior nor principal officers, but are most accurately categorized as employees.¹⁴⁷ They serve as special advisers to the President, or to principal or inferior officers.

The fourth category of czars includes those that may be serving unconstitutionally.¹⁴⁸ These are the appointees who do not fit into any of the previous three categories. Unfortunately, it is very difficult for the public to determine exactly which czars fit into which category because

¹⁴¹ See discussion *supra* note 86 and accompanying text.

¹⁴² See *id.*

¹⁴³ See discussion *supra* notes 87–91 and accompanying text.

¹⁴⁴ U.S. CONST. art. II, § 2, cl 2.

¹⁴⁵ See *Edmond v. United States*, 520 U.S. 651, 662–63 (1997).

¹⁴⁶ See SCHWEMLE ET AL., *supra* note 50, at 50–51.

¹⁴⁷ See *supra* Part III.

¹⁴⁸ See discussion *infra*.

of the nature of some of their appointments.¹⁴⁹ When appointees do not occupy statutory positions, are unconfirmed, and claim simply to be Presidential advisers, it is much more difficult to determine their precise job descriptions than it would be for someone occupying a position created by Congress. Whereas the duties, responsibilities, and authority of a statutorily created position are publicly available, it is not necessarily clear where one would even begin to look when trying to determine the responsibilities and authorities of a position that a president simply announced via press release.¹⁵⁰ This is especially true given that administrations often have failed to sufficiently explain the scope of responsibility given to so-called czars.

IV. THE PROBLEM WITH THE PAY CZAR

The czar who raises the clearest constitutional problems is Kenneth Feinberg, the Special Master for TARP Executive Compensation, informally known as the “Pay Czar.”¹⁵¹ Feinberg’s responsibilities involve interpreting the TARP regulations on executive compensation standards and reviewing and approving the pay for top executives at the largest institutions that the government provided with TARP funding.¹⁵² In October of 2009, he invoked this authority to slash compensation for executives at seven large financial firms by an average of fifty percent.¹⁵³

Michael W. McConnell, a Stanford Law Professor and former Judge for the U.S. Court of Appeals for the Tenth Circuit, recently penned an op-ed in the *Wall Street Journal* challenging the constitutionality of Feinberg’s appointment.¹⁵⁴ His article prompted a lively debate on the controversy, which was hosted by the Federalist Society’s website.¹⁵⁵ McConnell argues that the nature of Feinberg’s duties likely classifies

¹⁴⁹ See *supra* notes 62 and 63 and accompanying text.

¹⁵⁰ Compare 21 U.S.C. § 1703 (creating the office of and describing the duties of the Director of National Drug Control Policy, as well as, several deputy directors), with Press Release, U.S. Dep’t of Energy, President-Elect Obama Nominates Dr. Steven Chu as Energy Secretary (Dec. 17, 2008), available at http://apps1.eere.energy.gov/news/news_detail.cfm/news_id=12144 (announcing the appointment of Carol Browner as the “Assistant to the President for Energy and Climate Change”).

¹⁵¹ See Michael W. McConnell, *The Pay Czar Is Unconstitutional*, WALL ST. J., Oct. 29, 2009, <http://online.wsj.com/article/SB1000142405274870357460457449953992328762.html> [hereinafter McConnell, *Unconstitutional*]; SCHWEMLE ET AL., *supra* note 49, at 34–36. Perhaps not coincidentally, Feinberg is really the only czar whose duties the Administration has provided much detailed information about. Possibly this is because most so-called czars are really glorified aids with no significant authority to make public.

¹⁵² See TARP Standards for Compensation and Corporate Governance, 74 Fed. Reg. 28,394 (June 15, 2009) (to be codified at 31 C.F.R. pt. 30).

¹⁵³ McConnell, *Unconstitutional*, *supra* note 151.

¹⁵⁴ See *id.*

¹⁵⁵ See *The Pay Czar & the Appointments Clause—a Forum*, FEDERALIST SOC’Y ONLINE DEBATE SERIES (Nov. 19, 2009), <http://www.fed-soc.org/debates/dbtid.36/default.asp>.

him as an inferior officer, but that the Senate has not confirmed him.¹⁵⁶ Professor Steven Schwinn counters that because Feinberg is an inferior officer the Constitution allows for the head of a department, in this case Treasury Secretary Timothy Geithner, to appoint him.¹⁵⁷ McConnell responds that the Secretary must be authorized by statute to appoint an inferior officer without Senate confirmation, and although the TARP legislation vested the Treasury Secretary with the authority to regulate and set executive compensation for certain institutions, it did not authorize him to delegate that authority to anyone who was not confirmed by the Senate.¹⁵⁸ In rebuttal, Schwinn points to 31 U.S.C. § 321(b)(2), which states that “[t]he Secretary may . . . delegate duties and powers of the Secretary to another officer or employee of the Department of the Treasury.”¹⁵⁹ Schwinn also raises the possibility that because Feinberg’s position is theoretically temporary, he might merely be an employee.¹⁶⁰

Judge McConnell is likely right that Feinberg’s appointment is unconstitutional.¹⁶¹ However, because the judge did not exhaustively address Schwinn’s arguments, this Note will take the opportunity to expound on the author’s view on the proper appointment class analysis.

Given the case law it seems clear that Feinberg is exercising sovereign authority by setting executive compensation. According to the Treasury Department, the TARP legislation authorized Geithner to establish the office of Special Master and delegate quasi-judicial and executive powers to the office.¹⁶² As a result of this delegation, Feinberg is authorized to exercise quasi-judicial functions by deciding private individual rights, on a case-by-case basis, and he is also authorized to exercise executive functions by interpreting the statute and issuing advisory opinion letters.¹⁶³ Furthermore, Feinberg has been given independent discretion that is not directly subject to review by either the White House or the Treasury Secretary.¹⁶⁴

¹⁵⁶ See Posting of Michael McConnell to *The Pay Czar & the Appointments Clause—a Forum*, FEDERALIST SOC’Y ONLINE DEBATE SERIES (NOV. 19, 2009), <http://www.fed-soc.org/debates/dbtid.36/default.asp> [hereinafter McConnell, *Federalist Society Posting*].

¹⁵⁷ See Posting of Steven Schwinn to *The Pay Czar & the Appointments Clause—a Forum*, FEDERALIST SOC’Y ONLINE DEBATE SERIES (NOV. 19, 2009), <http://www.fed-soc.org/debates/dbtid.36/default.asp> [hereinafter Schwinn, *Federalist Society Posting*].

¹⁵⁸ See McConnell, *Federalist Society Posting*, *supra* note 157.

¹⁵⁹ See Schwinn *Federalist Society Posting*, *supra* note 163.

¹⁶⁰ See *id.*; Steven Schwinn, *Is the Pay Constitutional*, CONST. L. PROF BLOG (NOV. 20, 2009), <http://lawprofessors.typepad.com/conlaw/2009/week47/index.html> [hereinafter Schwinn, *Constitutional Pay*].

¹⁶¹ See discussion *infra* notes 168–82 and accompanying text.

¹⁶² See TARP Standards for Compensation and Corporate Governance, 74 Fed. Reg. 28,394 (June 15, 2009) (to be codified at 31 C.F.R. pt. 30).

¹⁶³ See *id.*

¹⁶⁴ See Eamon Javers, *Feinberg Touts His Special Mastery*, POLITICO, Oct. 23, 2009, <http://www.politico.com/news/stories/1009/28635.html>.

Because Feinberg is exercising this sovereign authority pursuant to statute, he is acting as an officer of the United States. Feinberg is clearly not operating as a mere employee because the authority he is exercising is significant, arises from statutory duty, and is not contractual, personal, occasional, or intermittent. Although Schwinn raised the possibility that the duties were temporary and therefore not continuing, this argument fails for two reasons. First, as detailed above, the Supreme Court's occasional use of temporal language is misleading.¹⁶⁵ Second, *Morrison* demonstrated that either the condition of continuing duties is dispensable, or that temporary¹⁶⁶ duties are consistent with the meaning of continuing.¹⁶⁷

If Feinberg is operating as an officer of the United States, his appointment is subject to the Appointments Clause. Under the Appointments Clause, officers must be confirmed by the Senate unless Congress has authorized the President, Courts of Law, or the Heads of Departments to appoint an officer without confirmation.¹⁶⁸ Professor Schwinn argues that a longstanding general-background organizational statute, 31 U.S.C.A. § 321, combined with the TARP legislation, authorizes the Treasury Secretary to appoint Feinberg and delegate all relevant TARP authority to him.¹⁶⁹ To further support his argument, Schwinn cites two circuit court decisions¹⁷⁰ that upheld the creation of boards and the appointment of inferior officers to them, under general statutory grants of authority similar to that at issue in the TARP "Pay Czar" case.¹⁷¹

However, Schwinn's argument is inconsistent with case law and the Constitution because it fails to distinguish between authorization to appoint an officer and authorization to create offices. As stated previously, arguments for the contrary position abound. The Supreme Court has ranked the Appointments Clause "among the significant structural safe-

¹⁶⁵ See discussion *supra* Part III.B.

¹⁶⁶ In *Morrison*, the office was "'temporary' in the sense that an independent counsel is appointed essentially to accomplish a single task, and when that task is over the office is terminated, either by the counsel herself or by action of the Special Division." *Morrison v. Olson*, 487 U.S. 654, 672 (1988). The court went on stating that "[u]nlike other prosecutors, appellant ha[d] no ongoing responsibilities that extend[ed] beyond the accomplishment of the mission that she was appointed for and authorized by the Special Division to undertake." *Id.* Similarly, the Office of Special Master is indefinite in tenure until all of the TARP money is paid back, at which time the office will cease. See TARP Standards for Compensation and Corporate Governance, 74 Fed. Reg. 28,394 (June 15, 2009) (to be codified at 31 C.F.R. pt. 30).

¹⁶⁷ See *id.*

¹⁶⁸ U.S. CONST. art. II, § 2, cl 2.

¹⁶⁹ See Schwinn, *Federalist Society Posting*, *supra* note 157.

¹⁷⁰ *Willy v. Admin. Review Bd.*, 423 F.3d 483 (5th Cir. 2005); *Pennsylvania v. U.S. Dep't of Health & Human Servs.*, 80 F.3d 796 (3d Cir. 1996).

¹⁷¹ See Schwinn, *Federalist Society Posting*, *supra* note 157.

guards of the constitutional scheme”¹⁷² because it protects the separation of powers.¹⁷³ The White House Office of Legal Counsel corroborates this view: “[T]hat the Constitution distinguishes between the *creation* of an office and appointment thereto for the generality of national offices has never been questioned.”¹⁷⁴ Furthermore, the Congressional Research Service has noted that “it is clear that the Framers intended to vest the task of creating the governmental structure in Congress alone. Thus, it seems evident that the President cannot establish executive offices.”¹⁷⁵ Finally, in *Maurice*, Chief Justice Marshall rejected the idea that the president could create offices, stating that “the general spirit of the constitution . . . seems to have arranged the *creation* of office among legislative powers.”¹⁷⁶

Given the nature of his duties, Feinberg is likely an inferior officer. However, he is occupying a position created by the Secretary, a function reserved for the legislature. Although Congress can vest the authority to appoint an officer without Senate confirmation in the heads of the departments, it cannot similarly delegate the *creation* of offices. As a purely legislative function, the creation of offices should be restricted to Congress under the non-delegation doctrine.

CONCLUSION

Over the past quarter-century, presidents have appointed an increasing number of czars to try to maintain some control over the burgeoning administrative state. The increasing appointment of czars has inevitably led to congressional concerns about the constitutionality of the practice. However, because of the very nature of the appointments, it is difficult to

¹⁷² *Edmond v. United States*, 520 U.S. 651, 659 (1997). Thus, the proper appointment of executive branch officials is no mere a formality. *See id.* at 659; *Buckley v. Valeo*, 424 U.S. 1, 124 (1976) (“The Appointments Clause could, of course, be read as merely dealing with etiquette or protocol in describing ‘Officers of the United States,’ but the drafters had a less frivolous purpose in mind.”). Consequently, in Appointments Clause challenges, the Supreme Court has chosen formalism over functionalism by rejecting the “*de facto* officer doctrine.” *See Ryder v. United States*, 515 U.S. 177, 183 (1995); *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) (saying that the *de facto* officer doctrine does not apply where the defect is based on important constitutional challenges). This doctrine validates acts conducted under the color of official authority, even if it is later proven that actor’s appointment or election to office was deficient. *Ryder*, 515 U.S. at 180. The Court’s unwillingness to apply the *de facto* officer doctrine to Appointments Clause challenges jeopardizes the validity of any actions or decisions made by improper appointees.

¹⁷³ *Buckley*, 424 U.S. at 124.

¹⁷⁴ Limitations on Presidential Power to Create a New Executive Branch Entity to Receive and Administer Funds Under Foreign Aid Legislation, 9 Op. O.L.C. 76, 77 (1985) (emphasis added).

¹⁷⁵ SCHWEMLE ET AL., *supra* note 49, at 40 (citing Saikrishna B. Prakash, *Fragmented Features of the Constitution’s Unitary Executive*, 45 Willamette L. Rev. 701, 719 (2009)).

¹⁷⁶ *United States v. Maurice*, 26 F. Cas 1211, 1213 (C.C. Va. 1823) (No. 15,747) (emphasis added).

really establish the true scope of a czar's authority and duties. The same vagueness of a czar's mandate that so angers Congress will also frustrate Congress' attempts at oversight. Until Congress makes a substantial attempt to overhaul the administrative state, czars will be a part of it, regardless of what name they go by.