

The Law

Prerogative Power and Executive Branch Czars: President Obama's Signing Statement

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In his April 15, 2011, signing statement President Barack Obama implied that, as president, he may suspend laws, or portions of laws, and that he is not controlled by statutory language that interferes with his ability to receive advice from White House aides or other executive branch officials. This article analyzes the claim that presidents have the prerogative to wall themselves and their aides off from statutory direction and controls, and concludes that there is no constitutional or legal basis for such an understanding of the executive power.

On April 15, 2011, President Barack Obama issued a controversial signing statement that effectively nullified a provision of a bill he had signed into law. Specifically, the president “abrogated” section 2262 of the budget compromise law, which prohibited using appropriations for the salaries and expenses of the czars of energy, health reform, auto recovery, and urban affairs (Obama 2011). The defunding provision was part of a larger effort by Congress to prevent the increased centralization and control of public policy by White House aides who are not confirmed by the Senate.

The moniker “czar” is the shorthand term used by the media, politicians, and scholars to describe certain officials who are appointed by the president to provide advice, coordinate policies among multiple departments and agencies, and even to make important personnel and spending decisions. Lacking senatorial confirmation and even prohibited many times from testifying, czars are a controversial feature of the executive branch. Given the substantial number of czars in the Obama White House,

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AUTHORS' NOTE: Portions of this article will appear in our forthcoming book, The President's Czars: Undermining Congress and the Constitution (University Press of Kansas).

Republican members of the House had been trying to pass similar anti-czar measures for nearly two years before successfully adding the anti-czar provision to the budget bill (Fabian 2009; O'Brien 2011; Zimmermann 2009). Senate Republicans had also sought information about 18 positions in the Obama administration that they considered czars and asked that the president "refrain from creating any new czar-type posts" (Lerer 2009).

Obama justified his plan to set aside the anti-czar provision by stating that the "President has well-established authority to supervise and oversee the executive branch, and to obtain advice in furtherance of this supervisory authority." Continuing, Obama noted that he has "the prerogative to obtain advice" in fulfilling his "constitutional responsibilities" from any official or employee within the executive branch or the White House. "Legislative efforts that significantly impede the President's ability to exercise his supervisory and coordinating authorities or to obtain the views of the appropriate senior advisers," he claimed, "violate the separation of powers by undermining the President's ability to exercise his constitutional responsibilities and take care that the laws be faithfully executed." The result being that Obama would "construe section 2262 not to abrogate these Presidential prerogatives" (Obama 2011).

Obama's signing statement set off a variety of criticisms, most notably from Representative Steve Scalise (R-LA), author of the anti-czars provision of the budget bill: "The President does not have the option of choosing which laws he will follow and which he will ignore." He continued: "The United States is not a kingdom run by a political dictator, and President Obama needs to quickly reverse course and abide by the law eliminating the czars that were part of the budget resolution agreed to be Speaker Boehner, Senator Reid, and President Obama himself" (Scalise 2011). Some Democratic lawmakers, however, countered by saying that section 2262 was "an intrusive micromanagement of the president's White House staff via appropriations" (Bravender 2011).

The controversy over the president's signing statement raises a significant constitutional question: is there a constitutional or any legal basis for presidents to claim that they have the authority to shield themselves and their aides from statutory direction and controls? President Obama believes so, and he went so far as to invoke the concept of prerogative power as a defense of his action to void a provision of a bill he had signed into law.

To answer the constitutional question raised by Obama's action, this article describes the concept of prerogative power and provides an assessment of whether presidents possess such authority. It poses the question of whether presidents have the ability to set aside laws after they have signed them. It further analyzes the claimed constitutional bases for presidents to unilaterally control the creation, modification, and continuation of offices within the White House, Executive Office of the President (EOP), and the executive branch more generally. To do so requires an overview and assessment of the current legal framework used to create and shape the offices and positions within the White House and EOP. The article ends with an evaluation of the extent and limits of Congress's authority to provide statutory direction and controls on White House structure and personnel.

Prerogative Power and the Presidency

The U.S. framers drew significantly from various British constitutional customs in developing a new governing structure. They were aware that under the British system the monarch had possessed the prerogative power—the right to act outside the law when he deemed it in the public interest to do so. That power was “inherent in the crown” and permitted the “king to do things which no one else could do, and his power to do them in a way in which no one else could do them” (Adams 1921, 78; Todd 1867, vol. 1, 244). The king could not only exercise authority established in law but even act against any legal restrictions to carry out the public good (Locke 1980). Among other things the prerogative power provided the English monarch with the authority to initiate wars, raise armies, make treaties, create offices, appropriate money, and set aside statutes (Adams 1921; Todd 1867). Even by the dawn of the American Revolution the prerogative power of the king remained strong. As William Blackstone wrote, “[b]y the word prerogative we usually understand that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity” (Blackstone 1765, vol. 1, 232).

Upon their declaration of independence from England, the American colonies rejected a model of the executive that would include prerogative power. Instead, the new nation established a central government without an independent executive. At the state level, the powers of governors were greatly limited with the overwhelming authority going to the legislative branch (Kruman 1997). Because of the failings of the Continental Congress to effectively manage the war without resorting to boards and eventually executive officers, the framers realized that they needed a different governing structure.

However, even during the Constitutional Convention the framers refused to go back to monarchical domination as they instead restricted and checked executive power. In matters of war, spending, and administration, all of the powers that once belonged to the English king alone were either taken from the executive or checked by the legislative branch. Delegate James Wilson, a proponent of a strong presidency, noted that he “did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c.” (Farrand 1966, vol. 1, 65-66). As a result, the framers placed any vestiges of a king’s prerogative power squarely within the Constitution. For example, Congress possesses the ability to declare war and only in matters of defensive action or cases of rebellion (a situation Abraham Lincoln faced at the beginning of the Civil War) could a president act alone. A regular functioning prerogative power that remains outside the Constitution is impossible to square with a republican government based on limited and balanced powers.

In his signing statement Obama implied that as president, he may suspend laws, or portions of laws, and that he is not controlled by statutory language that interferes with his ability to receive advice from White House aides or other executive branch officials. Obama is not the first president to either expressly claim or imply that he may dispense with a law by the way of a signing statement (Kelley 2006, 77). However, regardless of who or when the practice began, such a contention poses a serious breach of the system of balanced and checked powers. Professor Westel Woodbury Willoughby did well to

explain the extent of the problem with presidents claiming that they can unilaterally ignore law: “The President is an agent selected by the people, for the express purpose of seeing that the laws of the land are executed. If, upon his own judgment, he refuse to execute a law and thus nullifies it, he is arrogating to himself controlling legislative functions, and laws have but an advisory, recommendatory character, depending for power upon the good-will of the President” (1910, vol. 2, 1308).

Consider again the British precedents of which the U.S. founders were intensely aware. The British Parliament continually feared monarchs setting aside laws through the use of a part of their prerogative power (Fatovic 2009, 42; May 1994, 869-72). Eventually the Glorious Revolution produced the English Bill of Rights of 1689 that forbade the suspension of the laws without the consent of Parliament (Berman 2006, 226; May 1994, 872). By the time of the American Revolution, Blackstone could write, “It is true it was formerly held, that the king might in many cases dispense with penal statutes: but now by statute . . . it is declared, that the suspending or dispensing with laws by regal authority, without consent of parliament, is illegal” (Blackstone 1765, vol. 1, 178-79). The framers, being well aware of this history, chose to write into the Constitution a similar limitation on executive power: the president “shall take Care that the Laws be faithfully executed” (U.S. Constitution, art. I, sec. 3; May 1994, 872; see also Adler, 2006).

The federal courts have continually rejected claims that presidents may ignore laws. In 1806, a circuit court said, “The President of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids. If he could, it would render the executive of the laws dependent on his will and pleasure; which is a doctrine that has not been set up, and will not meet with any supporters in our government” (*United States v. Smith* 1806, 1230). The Supreme Court has, as well, placed a similar interpretation on the Take Care Clause. In 1838, the Court declared, “To contend that the obligation imposed on the President to see the laws faithfully executed, implied a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible” (*Kendall v. United States ex rel. Stokes* 1838, 613). In 1882, the Court reiterated, “No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it” (*United States v. Lee* 1882, 220). Finally, in 1952, the Court held, “In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute” (*Youngstown Sheet & Tube Co. v. Sawyer* 1952, 587).

The Presentment Clause provides additional textual support for the understanding that laws are only made by Congress passing a bill and the president signing it into law. The framers did not give to the president the power to unilaterally change a law after he provided his signature. As Professor Willoughby explained, “President might at his discretion use a veto, but this was the entire extent to which he was allowed to go in the exercise of a check upon the legislation. It was expressly provided that if, after his veto, two-thirds of the legislature should again demand that the measure become a law, it

should thus be, notwithstanding the objection of the Chief Executive. Surely there is here left no further constitutional right on the part of the President to hinder the operation of a law" (Willoughby 1910, vol. 2, 1308). Others have come to the same conclusion. "Once a bill has passed through all the constitutional forms of enactment and has become a law, perhaps even over a presidential veto grounded on constitutional objections," legal scholar Eugene Gressman noted "the President has no option under article II but to enforce the measure faithfully" (1986, 382). Similarly Christopher N. Mayer, author of a comprehensive study on the ability of presidents to ignore laws, stated, "The Constitution gives to Congress the power to suspend the laws; if a statute is to be abrogated, the same procedure must be followed that led to its enactment" (1994, 1011). No president can sign a bill into law and then subsequently suspend it. That type of prerogative power was not placed in the Constitution.

Obama also questions Congress's authority to eliminate offices that provide advice to the president. The implication of his view is that ultimately the chief executive is the source for an office's existence. That is, if Congress cannot do away with certain governmental structure, then the president takes command. Such a claim could certainly have been made by an English monarch. Under the British system, the king had the ability to create offices, appoint his special favorites, and even remove them for any reason (Burgess 1891, vol. 2, 2006). Alexander Hamilton explained, the "king of Great Britain is emphatically and truly styled the fountain of honor. He not only appoints to all offices, but can create offices" (Wright 2002, 449). The framers rejected that model and settled on a system that protects the power of the legislative branch to create offices of the executive branch. Article II of the Constitution provides that 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" (U.S. Constitution, art. II, sec. 2). In addressing the differences between the British monarch and the president, even a strong presidency advocate such as Hamilton noted that there "is evidently a great inferiority in the power of the President, in [creating offices], to that of the British king" (Wright 2002, 449).

Subsequent interpretations of legislative authority confirmed the framers' goal of ensuring that Congress can establish and guide the direction of government offices. Speaking during the First Congress, James Madison declared that the "Legislature creates the office, defines the powers, limits its duration, and annexes a compensation" (1 *Annals of Congress* 604 [June 22, 1789]). In 1819, Chief Justice John Marshall explained in *McCulloch v. Maryland* that Congress has the ability through the Necessary and Proper Clause to create government structures which "shall be necessary and proper for carrying into Execution" its express powers (1819, 316).

Four years later Marshall, sitting as a circuit court judge, again supported Congress's ability to create offices, but this time based its authority on the Appointments Clause. As he explained, the most proper interpretation of that clause, which "accords best with the general spirit of the constitution," places the creation of offices with Congress. Marshall said clear textual direction is provided by the second section of article II which "directs that all offices of the United States shall be established by law." That

language leaves no other interpretation than Congress, not the president, can create offices. Finally, he noted that “the practice of the government has been for the legislature” to organize a method for executing policy by authorizing the president “to employ such persons as he might think proper, for the performance of particular services” (*United States v. Maurice* 1823, 1214).

On at least three occasions, U.S. attorneys general have supported Marshall’s judgment. In 1849, Attorney General Reverdy Johnson issued an opinion instructing the Interior Secretary Thomas Ewing, Sr., that he did not have the authority to appoint a building superintendent because Congress acted to abolish the office. Johnson stated that President Zachary Taylor concurred in his assessment (5 Op. Att’y Gen. 88 [April 19, 1849]). Twelve years later Attorney General Edward Bates said that the president has no authority to create a bureau in the War Department without Congress’s approval. The president and Congress “may exercise the powers conferred by the Constitution in the appropriate sphere,” Bates reasoned, “but neither may assume the powers which belong to the other” (10 Op. Att’y Gen. 11, 15 [March 5, 1861]). Referencing Chief Justice Marshall’s own assessment, Attorney General Augustus Hill Garland said in an 1885 opinion that “An officer of the United States presupposes an office duly created by law; and the offices to which the President is authorized under the Constitution to appoint are only those established or recognized by the Constitution or by act of Congress.” He even declared that since “the president cannot create an office, I am of opinion he cannot appoint honorary commissioners” as well (18 Op. Att’y Gen. 171 [May 6, 1885]).

Even in an otherwise pro-presidential power decision of *Myers v. United States*, Chief Justice William Howard Taft, a former president himself, stated, “To Congress under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, and the fixing of the term for which they are to be appointed, and their compensation—all except as otherwise provided by the Constitution” (1926, 129). Constitutional scholar Edward S. Corwin reinforced Taft’s words when he reasoned that the “Constitution by the ‘necessary and proper’ clause assigns the power to *create offices* to Congress.” Any appointment, he argued, would therefore have to be “to an *existing* office, one that owes its existence to an act of Congress” (Corwin 1957, 70 [italics in original]).

More recently, President Ronald Reagan’s Office of Legal Counsel (OLC) within the Department of Justice issued a legal memorandum in 1985 that addressed whether a president could create new executive branch structures independent of Congress. The OLC concluded that “the President lacks constitutional and statutory authority to do so.” It said that the text of the Appointments Clause and “the historic practice of the Executive and Legislative Branches suggests strongly that offices of the United States must be created by Congress” (9 U.S. Op. Off. Legal Counsel 76). The traditional division of responsibilities, the OLC argued, has been for Congress to provide for the establishment of executive branch structure by statute and presidents or department and agency heads to select individuals to fill various positions (9 U.S. Op. Off. Legal Counsel, 77-78). The OLC highlighted that presidents have acquiesced to such practice by continually seeking “reorganization legislation in order to restructure or consolidate agencies within

the Executive Branch.” Finally, the OLC touched on the statutory language that provides that a president “shall designate” agency or department officers to administer a new program. It argued that unless Congress provides additional authority a president cannot create new offices in such cases. “On its face,” the OLC concluded, the “shall designate” language contemplates that the assistance will come from an existing department or agency (9 U.S. Op. Off. Legal Counsel, 78).

In appropriating funds for the salaries and resources of new government structures, has Congress thus provided its consent to presidents to create offices on their own? Constitutionally, that is a dubious position. Presidents have available to them discretionary accounts that add up to millions of dollars, and they have often used such funds to create new offices without seeking the approval of Congress. This evading of the legislative appropriations process is a direct assault on the duties and responsibilities of lawmakers. The House of Representatives and the Senate have established a two-step process for the creation and funding of new executive branch structures. Agencies are authorized by law and later funded by law. For example, Congress set up the Department of Homeland Security detailing its leadership personnel and functions along with its subunits and agencies in the Homeland Security Act of 2002 (116 Stat. 2135). The funding for the new department, however, came later through an independent appropriations law.

The rules of the House and Senate specifically require this two-step authorization-appropriations process with clear distinctions between each part (House Rule XXI, clause 2; House Rule XXII, clause 5; and Senate Rule XVI). During the U.S. war in Vietnam, Lyndon B. Johnson’s administration argued that Congress had authorized the military conflict by appropriating funds. In 1970, various academic experts challenged that theory in *Beck v. Laird*, a U.S. district court case in the Eastern District of New York, by reasoning that policy cannot be set through the legislative appropriations process (Fisher 1979, 83). The court concluded, however, that if Congress funded the war, then it had been legislatively authorized. Many federal judges backed away from the view that appropriations can mean legislative endorsement of war policy (Fisher 1979, 84). Later, through section eight of the War Powers Resolution (1973), Congress expressly stated that appropriations do not authorize a war unless there is language in a spending bill that clearly provides legislative approval for a president’s military actions (87 Stat. 555; Fisher 1979, 84). The assumption that Congress has somehow authorized unilateral executive action through appropriations is false.

The framers adopted a constitutional framework that rejected the continuation of the British monarch’s form of prerogative powers in the presidency. The authority to suspend laws or to create and control offices without statutory direction would not be vested in the president. Congress would be the primary lawmaking institution of the federal government which meant that it could create, modify, and eliminate executive branch—and even White House—structure. Thus, the president cannot properly make the claim of a special prerogative to wall himself off from statutory direction relating to the administration of the law. Making such a claim is an attempt to cut the president loose from constitutional and statutory restrictions. There exists no inherent presidential power to break the safeguards that promote government accountability.

White House Authorization Act of 1978

Having dispensed with the notion that presidents have a constitutional basis to ignore or otherwise unilaterally free themselves from statutory direction, we turn to the legal framework that controls the White House and EOP staff. Is there any presidential autonomy built into the existing advisory structure that would somehow prevent Congress from modifying it? The current statutory language that provides the basis for the White House and EOP structure and staff can be found in Title 3 of the U.S. Code. The title can trace its origins to the Reorganization Act of 1939 (53 Stat. 561) and has seen one major overhaul. Leading up to the 1939 Reorganization Act, the chair of the President's Committee on Administrative Management, Louis Brownlow, famously quipped that the "president needs help" (1937, 5). Franklin D. Roosevelt looked to Congress, not inward, to provide the administrative structure he required.

The only significant modification to Title 3 occurred in 1978 when Congress passed the White House Authorization Act in an attempt to limit the number of personnel in the White House Office, the Vice President's Office, the president's domestic policy staff, and the Office of Administration (92 Stat. 2445). The legislative history and debate over the White House Authorization Act date to the early 1970s when Representative John Dingell (D-MI) objected to the practice of the White House receiving appropriations for personnel that Congress had not authorized. Over the course of several Congresses, various pieces of legislation to resolve this issue failed (Hart 1995, 172-73). By 1977 Representative Patricia Schroeder (D-CO), Representative Herbert E. Harris II (D-VA), and Representative Morris Udall (D-AZ) finally secured passage of a bill to overhaul Title 3. In her introductory remarks on the bill in 1978, Representative Schroeder explained the concerns she had over an unaccountable White House:

The central issue before us, in this regard, is whether the Congress should acquiesce in, and by implication, approve of, having Presidents who are unaccountable for their funds and their close staff. To oppose placing limitations upon the President's staff, however, strongly we might wish to give him a blank check to get his jobs done, is to ignore the duty and power of Congress under article II, section 2, clause 2 of the Constitution to provide from time to time positions in the executive branch. This provision is one of the tensions which the Founders of our Nation put into the structure of the Federal Government. It must not be compromised by our inaction. It must be conscientiously exercised. (124 Cong. Rec. 8632)

Schroeder correctly stated the need of Congress to provide effective oversight and control over the executive branch. There is no separation of powers concern with lawmakers placing limitations on the president's staff, since Congress must authorize their creation in the first place.

Similarly, Representative Harris said that the "fundamental point here is to make sure power is in the hands of accountable people: the Cabinet." He argued that "executive advisers and special assistants to the President have their proper advisory role" and nothing more. Congress did not, Harris argued, "vest in them unlimited powers." What concerned him even more is the fact that White House aides are "unelected" and

sometimes made “inaccessible” to Congress presumably through executive privilege claims. “Quite simply,” Harris declared, “our Government should not be run by, and our President should not depend on a ‘palace guard.’” Finally, he warned that “centralized power in the hands of a few anonymous individuals is contrary to a democracy” (124 Cong. Rec. 8633-34).

Although both Schroeder and Harris provided a useful overview of the constitutional and governing concerns with White House aides, the final legislative product greatly increased the number of authorized personnel in the White House. There would be no limit to the size of the White House Office but instead the legislation only restricted the number of executive level II (25) and III (25) positions along with some of the supergrade staff (50 positions at a GS-18 and “such number of other employees as” the president “may determine . . . not to exceed the” GS-16 rate of pay). The bill even included a provision that authorized the president “to procure for the White House Office . . . temporary or intermittent services of experts and consultants” not to exceed the executive II pay level so even the initial limits on such positions were greatly weakened. The word “temporary” took on a subjective meaning under the bill as later on the provision reads: “temporary services of any expert or consultant . . . may be procured for a period in excess of one year if the President determines such procurement is necessary.” In addition, the bill authorized the staffing of the domestic policy and office of administration personnel within the White House Office: 11 employees not to exceed executive III pay; 23 employees not to exceed the GS-18 level; such “other employees as [the president] may determine to be appropriate” not to exceed the GS-16 level; and another section permitting the employment of “temporary or intermittent services and consultants” not to exceed the GS-18 level (124 Cong. Rec. 8629-30).

Aside from the personnel provisions, the bill included a section authorizing a million dollars for “unanticipated needs for the furtherance of the national interest, security, or defense, including personnel needs.” That section had a reporting requirement for each fiscal year and limited the individual pay provided to not exceed executive level II. Another section provided the president with the authority to detail executive department and agency employees to the White House. Finally, the bill required a general report on the number of executive branch employees detailed to the White House for more than 180 days along with the number of experts and consultants hired and the total number of days employed along with the costs for their services (aggregate and by office). Only later would a general reporting requirement for full-time White House staff be included in the legislation (124 Cong. Rec. 8630-31).

Despite the strong endorsement from Schroeder and Harris there was considerable opposition to the bill that centered on the open-ended authorization of presidential personnel along with the lack of true accountability and reporting requirements. Representative Benjamin Gilman (R-NY) sought to offer an amendment that would have required that presidents, one year after assuming office, submit to Congress a new authorization request for their staff. He argued that lawmakers were “making a serious mistake if we pass legislation that sets a precedent—for future measures containing similar authorizations that are not annual or biannual or even under some 5-year concept of economic planning but are in themselves self-sustaining.” Gilman wanted to offer a

second amendment that required a more detailed report from the president on White House personnel explaining that he sought “to insure the integrity of the oversight function” of Congress “by having available to us by law on a timely basis the information necessary to carry out our duty.” At that time neither measure could be acted upon as the Democratic House majority brought the bill up under a closed rule which prevented amendments from being offered (124 Cong. Rec. 8635).

Other concerns over the legislation from lawmakers such as Representative Henry Hyde (R-IL) centered on the expansion of presidential staff and increasing the funds available to presidents for “unanticipated needs.” Hyde declared that “the bill authorizes a number of unprecedented features which ought to concern those recent converts to the idea of executive accountability.” He specifically questioned the need for twice as many White House Office staff as Congress had previously authorized. In addition, Hyde decried the absence of checks on presidents who can “hire an unlimited number of consultants and ‘detailees’ from other agencies” under the legislation. Finally, Hyde wondered what was meant by the \$1 million appropriation for presidents to spend at their discretion “to meet unanticipated needs for the furtherance of the national interest, security or defense.” He asked is this “for petty cash” or “pocket money?” “We are talking about 1 million tax dollars,” he continued “and we deserve to know a few facts, at the very least” (124 Cong. Rec. 8636).

The House eventually voted on the motion to suspend the rules and pass the bill without amendment, but it failed to secure the two-thirds vote (124 Cong. Rec. 8647). This outcome resulted in Representative Gilman being able to offer his amendment requiring a stronger reporting measure, which stipulated that presidents provide the number of full-time White House staff in the aggregate and broken down by office. Representative James Pickle (D-TX) moved to strengthen Gilman’s amendment by adding a requirement that the president also report the names of each person working full-time or detailed to the White House, the amount appropriated for their salary, and general title along with a job description (124 Cong. Rec. 10121). The House agreed to both measures (124 Cong. Rec. 10122). Representative Gilman also offered a sunset amendment to provide for authorization “beginning October 1, 1978, and to each of the following 4 fiscal years” (124 Cong. Rec. 10122). Representative Schroeder rose in opposition but only because she argued that a sunset provision would also eliminate the strengthened reporting requirements, which would mean “we would go back prior to the law and be where we are now” (124 Cong. Rec. 10123). After several other lawmakers also spoke against the amendment the House voted to reject it by a 171 to 232 margin with 31 members not voting (124 Cong. Rec. 10124). The House went on to pass the bill by a 265 to 134 vote with 35 lawmakers not voting (124 Cong. Rec. 10126).

In the Senate, William V. Roth Jr. (R-DE) offered, and the chamber passed, a similar sunset amendment to Representative Gilman’s, but this one provided authorization until September 30, 1983 (124 Cong. Rec. 20904). During the conference committee that had been established to resolve disagreements over the bill, Roth’s amendment was stripped. In the conference report, the conferees justified their action by arguing that “a distinction should be made between general sunset provisions which require reauthorization of programs, and the ‘sunset’ provision in this amendment which

would require reenactment of budget authority for the President to hire staff" (U.S. Senate 1978, 4). That explanation alone is strange and confusing, as no additional comments were made as to why such a distinction should matter. Nothing in the Constitution or existing law prevents Congress from requiring presidents to request annual authorization for their staff. If lawmakers really wanted to hold the president accountable, they should have required the chief executive to justify White House personnel, or at least the addition of new aides, from time to time.

Even the House majority was not convinced that the law established substantial controls on the president. The House report on the bill stated that the proposed law "allows the Congress limited oversight" (U.S. House 1978, 8). Members of the Senate—both Democratic and Republican—agreed. Senator Harry F. Byrd (VA), an independent Democrat opposed to the bill, questioned Congress's actions for not setting a limit on White House expenditures. After much back and forth, Democratic Senator Lawton Chiles (FL), a supporter of the legislation, admitted that there "is no direct control here so far as a total figure is concerned" (124 Cong. Rec. 20898). Republican Senator Bob Dole (KS) read the bill's authorization provision which provides "such sums as may be necessary" and quipped: "Frankly, it does not sound like Congress is exerting much control" (124 Cong. Rec. 20901).

The conference committee stripped away even more checks from the bill. Aside from removing the sunset provision, the conferees eliminated the annual reporting requirement that mandated the president provide to Congress the name, job title, job description, and salary of every individual employed in the White House. The conferees explained that such a reporting requirement "is contrary to Government-wide rules, developed to conform with both the Freedom of Information Act and the Privacy Act, that are tailored to provide for protection of the privacy of individuals involved." In addition, the conferees modified another reporting requirement for federal workers detailed to the White House. Instead of requiring the number and names of all detailed federal workers the conferees exempted individuals who had worked at the White House for less than 30 days. Here the conferees said that they had "received assurance from the [Carter] administration that, as in the past, this information will be provided to the Congress upon request" (U.S. Senate 1978, 3).

There are several problems with the conferees' actions. Presidential aides are public officials and employees who should be subject to the same democratic controls as any other federal worker. Many states make available the salaries of their public employees, including college and university personnel. Executive office staff should receive the same level of scrutiny. At the very least, Congress could have excluded each employee's name but required the listing of job title, job description, and salary. In the end, it is Congress that has the constitutional responsibility to appropriate, and that authority includes specifying the salary of presidential aides. All appropriations, even those going to the president, should be subject to congressional oversight and scrutiny. Another issue centers on the number of aides presidents may appoint. Although lawmakers provided a set limit of 100 White House aides at various levels of pay, another provision in the law permitted a president to appoint "such number of other employees as he may determine to be appropriate" (92 Stat. 2445). This provision blew a hole in the idea that Congress

would actually succeed in holding presidents to account by placing limits or any kind of supervisory controls upon their staff. Finally, comity is always the best way to manage interbranch relations than by discord and turmoil. However, just because Congress receives assurances from one administration that it will freely disclose information does not mean all others will do the same.

In his assessment, scholar John Hart explained that the White House Authorization Act “has turned out to be little more than a congressional housekeeping measure that temporarily restored the importance of a low-prestige authorizing committee.” He added that the law “has had negligible effect on the organization, management, and accountability of the presidential staff” (Hart 1995, 182). Certainly it has been a rather ineffective law for providing vital information to Congress in carrying out any kind of meaningful and effective oversight of the White House.

Yet just because a law is ineffective does not mean that Congress somehow has chosen to provide the presidency complete autonomy in managing the White House. The fact is that Congress is free to again either amend or overhaul Title 3. Nothing in the Constitution creates a built-in autonomy for presidents in this area. Creating, changing, and eliminating government structure are core legislative functions. However, repeatedly presidents have argued they have the independent authority to control and reshape the White House and executive branch structure. What is the source of such authority? Not the Constitution. Congress has provided presidents with the power to reorganize the executive branch, including the White House, under statutory authority dating back to the early 1930s (47 Stat. 413 [1932]; 47 Stat. 14517 [1933]; 48 Stat. 16 [1933]). But such authority is based on a delegation of legislative power, not a constitutional function of the presidency. As a result, there can be no executive prerogative or separation of powers claim to autonomy regarding a function that is legislative in nature.

An ancillary issue in this debate over autonomy turns on an argument that presidents are better equipped to manage and organize government structure, not whether they have the constitutional or legal authority to do so. For instance, Lyndon B. Johnson’s task force on government reorganization claimed that the president “alone has the perspective to visualize the complex problems of Government organization, and to appreciate how greatly the success of his policies depends on the soundness of the administrative system by which they must be carried out” (Task Force 1964, 21).

Why does the president alone have such a perspective? There is little in U.S. history to validate this exalted view of what presidents are capable of achieving. As Peri E. Arnold notes in his book on the managerial presidency: the “plain fact is that no modern president has fully managed the executive branch.” He observes that “the managerial conception of the presidency is untenable.” Too many obligations and expectations have been placed on the performance of presidents, he warns (Arnold 1986, 361-62). In addition, modern presidents are in office at most eight years and many for just half that. Members of Congress often have much longer careers in national government and have more varied and rich perspectives for understanding the complexities of government. There is little evidence to support the contention that presidents, rather than members of Congress, somehow have greater perspective, knowledge, or ability to organize the federal government.

Conclusions

The framers established a democratic republic with structural protections. They did not elevate political or policy expediency above democratic controls. Instead, they rejected executive dominated government and believed that power should never be placed in the hands of an unrestrained person, no matter how bright or seemingly incorruptible. "Political idolatry of any stripe, including the divine right of kings or waiting for a Great Man, found no support among the framers," writes Louis Fisher. "They did not put their faith in a single person. Fearing concentrated power, they believed in process and structural checks" (Fisher 2010, 41-42). Congress, as the sole appropriator of federal funds, has a constitutional obligation to hold presidents accountable. Avoiding such a responsibility undermines the structural protections provided in the Constitution.

John Hart notes that "since the Executive Office of the President was established in 1939, Congress has shown a marked reluctance to enforce, let alone strengthen, its oversight of the presidential branch" (1995, 186). Instead, a preference for comity over vigorous checks has prevailed. But Hart warns that "comity, by definition, weakens the potential of Congress to oversee the organization and functions of the presidential branch in any effective way, and it would seem that if congressional oversight is to be strengthened, then comity must be weakened" (1995, 193). Hart is right. Presidents should not be allowed unfettered discretion and unlimited legislative support in managing the White House. For practical purposes, the White House became the focal point of executive branch governance, which is ultimately where the controversy over czars began.

Certainly Congress acted carelessly in crafting the White House Authorization Act. That law largely invited presidents to abuse the delegation of legislative power through the use of czars. Lawmakers were perhaps acting in good faith and out of a sense of comity, but now they must realize that good relations with the White House do not replace necessary and needed checks on the use of government offices, resources, and money by presidents. In the end, if public policy is not only being developed, but also implemented by presidential staff, then Congress must provide greater oversight of the White House.

Thus, to strengthen accountability and to know where all federal workers are serving at any given time, existing White House and EOP positions should be statutorily limited in number. In addition, each position occupied by a presidential aide should be named (that is, given an official title), duties described, and listed in Title 3 rather than spread throughout the U.S. Code or not mentioned at all. Further, the president should not be able to unilaterally create new positions and define their duties. Rather, a president should seek congressional authorization when he wants to expand White House staff or add new offices. The president also should not be able to transfer department staff to the White House without congressional approval, or at a minimum he should be required to report to Congress on who has been transferred and what duties they have performed. Moreover annual reporting of the name, job title, job description, and salary of every individual employed in the White House and the EOP should be required.

Since such reforms would be based on Congress's constitutional authority to create, modify, and even set limits on government structure, the president could not claim some prerogative power to isolate himself from their effects. Constitutional checks on the

presidency in the management of the federal government are not only allowed but necessary. It is true that the modern age has ushered in a governing system where the presidential staff has taken on greater responsibilities than have normally been carried out by departments and agencies. Yet if Congress believes that such concentrated authority in the White House is bad for a constitutional republic, then it has the power to make the needed structural changes. The question is whether lawmakers have the will to act. As Justice Robert Jackson explained in 1952: “We may say that power . . . belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers” (*Youngstown Sheet & Tube Co. v. Sawyer* 1952, 654).

In the case of Obama’s czars, Congress acted under its due constitutional authority only to be undermined by executive fiat. But Obama’s action should not be the last word on the matter, as lawmakers retains the right, and we would add even the duty, to challenge such a blatant violation of Congress’s constitutional powers. One such attempt after Obama’s action was a proposed Senate amendment to defund salaries for executive branch czars. The measure failed on a 47 to 51 vote on June 23, 2011, but, like the earlier House-led effort to defund czars, this surely will not be the last attempt by Congress to eliminate executive branch czars (Ryan, 2011).

Members of Congress too often have been passive in the face of presidential power grabs and have thus given cover to advocates of an unfettered executive power to make the case that legislative inaction constituted consent. Instead of continuing their ambivalence and abdicating responsibility, lawmakers should use the various constitutional based powers at their disposal—from amending Title 3 to legislative, confirmation, oversight, and investigation—to push back against the current practice of appointing executive branch czars.

References

- Adams, George Burton. 1921. *Constitutional History of England*. New York: Holt and Co.
- Adler, David Gray. 2006. “The President as King: The Usurpation of War and Foreign Affairs Powers in the Modern Age.” In *The Presidency and the Challenge of Democracy*, eds. Michael A. Genovese and Lori Cox Han. New York: Macmillan, 159-90.
- Arnold, Peri E. 1986. *Making the Managerial Presidency*. Princeton, NJ: Princeton University Press.
- Beck v. Laird*, 317 F. Supp. 715 (EDNY 1970).
- Berman, Harold J. 2006. *Law and Revolution, II: The Impact of the Protestant Reformations on the Western Legal Tradition*. Cambridge, MA: Harvard University Press.
- Blackstone, William. 1765. *Commentaries on the Laws of England*. 4 vols. Oxford, UK: Clarendon Press.
- Bravender, Robin. 2011. Senate Democrats: Save the Czars! *Politico*, March 4. <http://www.politico.com/news/stories/0311/50684.html> (accessed July 13, 2011).
- Brownlow, Louis. 1937. *U.S. President's Committee on Administrative Management: Report of the President's Committee*. Washington, DC: Government Printing Office.
- Burgess, John William. 1891. *Political Science and Comparative Constitutional Law*. 2 vols. Boston: Ginn & Co.
- Corwin, Edward S. 1957. *The President: Office and Powers, 1787-1957*. New York: New York University Press.
- Fabian, Jordan. 2009. Congressman Wants All “Czars” to Testify. *The Hill*, September 9. <http://thehill.com/blogs/blog-briefing-room/news/57849-house-goper-wants-obama-czars-to-testify-before-congress> (accessed July 13, 2011).

- Farrand, Max. 1966. *The Records of the Federal Convention of 1787*. 4 vols. New Haven, CT: Yale University Press.
- Fatovic, Clement. 2009. *Outside the Law: Emergency and Executive Power*. Baltimore: Johns Hopkins University Press.
- Fisher, Louis. 2010. *On Appreciating Congress: The People's Branch*. Boulder, CO: Paradigm.
- . 1979. "Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices." *Catholic University Law Review* 29 (Winter): 51-105.
- Gressman, Eugene. 1986. "Take Care, Mr. President." *North Carolina Law Review* 64 (January): 381-84.
- Hamilton, Alexander. 2002. *The Federalist* No. 69. In *The Federalist*, ed. Benjamin F. Wright. New York: MetroBooks.
- Hart, John. 1995. *The Presidential Branch: From Washington to Clinton*. Chatham, NJ: Chatham House Publishers.
- Kelley, Christopher S. 2006. "The Presidential Signing Statement." In *Executing the Constitution: Putting the President Back into the Constitution*, ed. Christopher S. Kelley. Albany, NY: State University of New York Press.
- Kendall v. United States ex rel. Stokes*, 37 U.S. 524 (1838).
- Kruman, Marc W. 1997. *Between Authority and Liberty: State Constitution Making in Revolutionary America*. Chapel Hill: University of North Carolina Press.
- Lerer, Lisa. 2009. GOP Senators Seek End to Czars. *Politico*, September 16. <http://www.politico.com/news/stories/0909/27214.html> (accessed July 13, 2011).
- Locke, John. 1980. *Second Treatise of Government*, ed. C.B. Macpherson. Indianapolis, IN: Hackett Publishing.
- May, Christopher N. 1994. Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative. *Hastings Constitutional Law Quarterly* 21 (Summer): 865-1011.
- McCulloch v. Maryland*, 17 U.S. 316 (1819).
- Myers v. United States*, 272 U.S. 52 (1926).
- Obama, Barack. 2011. Statement by the President on H.R. 1473, April 15. <http://www.whitehouse.gov/the-press-office/2011/04/15/statement-president-hr-1473> (accessed July 13, 2011).
- O'Brien, Michael. 2011. Republicans Introduce Bill to Eliminate Presidential "Czars." *The Hill*, January 1. <http://thehill.com/blogs/blog-briefing-room/news/136487-%3E%20republicans-introduce-bill-to-eliminate-presidential-czars> (accessed July 13, 2011).
- Ryan, Josiah. 2011. "Senate Kills Measure to Defund Policy 'Czars,'" *The Hill*, June 23. <http://thehill.com/homenews/senate/168119-senate-kills-amendment-to-end-czars-> (accessed July 13, 2011).
- Scalise, Steve. 2011. Obama Thwarts Law on Sacked Czars, April 16. http://scalise.house.gov/apps/list/press/la01_scalise/PR_041611.shtml (accessed July 13, 2011).
- Task Force. 1964. Report of the President's Task Force on Government Reorganization, November 6. Container 1. Task Force Reports. Lyndon Baines Johnson Library.
- Todd, Alpheus. 1867. *On Parliamentary Government in England: Its Origin, Development, and Practical Operation*. 2 vols. London: Longmans, Green, and Co.
- United States v. Lee*, 106 U.S. 196 (1882).
- United States v. Maurice*, 26 Fed. Cases 1211 (C.C.D. Va. 1823).
- United States v. Smith*, 27 Fed. Cases 1192 (CCNY 1806).
- U.S. House of Representatives. 1978. White House Personnel Authorization. Report No. 95-979. 95th Cong., 2nd sess., March 16.
- U.S. Senate. 1978. White House Personnel Authorization. Conference Report No. 95-1258. 95th Cong., 2nd sess., September 28.
- Willoughby, Westel Woodbury. 1910. *The Constitutional Law of the United States*. 2 vols. New York: Baker, Voorhis.
- Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
- Zimmermann, Eric. 2009. Legislation Introduced to Ban "Czars." *The Hill*, September 9. <http://thehill.com/blogs/blog-briefing-room/news/57855-legislation-introduced-to-ban-czars> (accessed July 13, 2011).