

Villanova University Charles Widger School of Law

From the Selected Works of Tuan Samahon

2011

The Czar's Place in Presidential Administration, and What the Excepting Clause Teaches Us about Delegation

Tuan Samahon, *Villanova University*



Available at: https://works.bepress.com/tuan_samahon/3/

The Czar's Place in Presidential Administration, and What the Excepting Clause Teaches Us About Delegation

Tuan Samahon[†]

INTRODUCTION

Most great American political controversies are, at their core, a dispute over who shall hold office, exercise its power, and ultimately, govern. Congressional anxiety, then, about the role that executive branch “czars” play in American governance and power is but a variation on this theme. The controversy arises when, for example, Senate-confirmed executive officers formally hold delegated authority but are displaced by White House czars acting with power-in-fact, not legal authority. Congress has raised several concerns about this use of czars, including a lack of transparency and accountability in their alleged exercise of executive power and the inadequacy of congressional checks-and-balances in their appointment, removal, and oversight.¹ These White House staffers,² not appointed with the Senate’s confirmation counterweight, have the capacity to become presidential

[†] Professor of Law, Villanova University School of Law. The Author participated as a witness at an October 2009 Senate Judiciary Committee hearing on the subject of czars. This article represents my evolved thinking on the subject. I thank Todd Aagaard, Harold Bruff, Robert Nagel and Chaim Saiman for early feedback about the ideas in this paper and J.J. Williamson for his research assistance.

¹ See, for example, Federal Rulemaking and the Regulatory Process, Hearing Before the Subcommittee on Courts, Commercial and Administrative Law of the House Committee on the Judiciary, 111th Cong, 2d Sess 4 (2010) (accusing OIRA of “ceding power to White House czars”); Presidential Advice and Senate Consent: The Past, Present, and Future of Policy Czars, Hearing Before Senate Committee on Homeland Security and Governmental Affairs, 111th Cong, 1st Sess 1 (2009) (suggesting diminished congressional appointive authority and oversight); Examining the History and Legality of Executive Branch Czars, Hearing Before the Committee on the Judiciary, 111th Cong, 1st Sess 3 (2009) (“Examining Czars” hereinafter) (expressing concern that “individuals in the White House are exercising legal authority or binding the executive branch without having been given that power by Congress”).

² Like former Senator Feingold, this Article is unconcerned with those “czars” who are appointed with Senate confirmation or those who have been opted out of Senate confirmation pursuant to the Excepting Clause. Examining Czars, 111th Cong, 1st Sess at 2–3 (cited in note 1) (statement of Senator Russell Feingold).

“super-loyalists.”³ During Senate hearings on the subject of czars, the Obama Administration predictably downplayed their significance and claimed that “[t]heir one and only role is to advise the President.”⁴ Thus, according to the White House, the czars merely exercise advisory political clout.

One theme repeatedly heard in the Administration’s defense is that the use of executive branch czars has been a standing practice from prior administrations to the next. A new czar phenomenon, however, may be afoot that represents a departure from past practice. Recent presidencies have developed new mechanisms to centralize the White House’s control of the executive branch, or what Elena Kagan has termed “presidential administration.”⁵ This move toward centralization means that agency heads, congressionally approved and tasked with certain statutory duties, may find themselves increasingly shepherded, at least in certain policy fields, by executive branch shepherders located in the White House. Increasingly, these czars are experienced policy hands with specialized and mature professional expertise, not generalist policy staffers.⁶ They are assigned portfolios that overlap with Senate-confirmed cabinet officials, who may be less experienced and seasoned than the czars. These czars represent a new development in the challenge to transparency and accountability in the exercise of executive power, as it may be difficult to ascertain when they are (1) simply advising the president with political clout, (2) acting pursuant to presidential delegation of functions with legal authority to bind in a bid to more tightly integrate executive agencies into presidential administration, or (3) freelancing with ostensible authority to make binding decisions but without any delegated authority or presidential approval.

To better illuminate and cabin this new czar phenomenon, Part I traces a typical czar’s path to power by way of a spatial roadmap: “over, up, down, and around.” First, Congress delegates rulemaking authority horizontally “over” to the executive branch pursuant to a high-level intelligible principle. From Congress’s perspective, this delegation is conditioned on its ability

³ Bruce Ackerman, *Obama, Warren and the Imperial Presidency*, Wall St J A21 (Sept 22, 2010).

⁴ Letter from Gregory B. Craig, Counsel to the President, to Senator Russell D. Feingold, at 3 (Oct 5, 2009), in *Examining Czars*, 111th Cong, 1st Sess at 96–98 (cited in note 1).

⁵ Elena Kagan, *Presidential Administration*, 114 Harv L Rev 2245, 2246 (2001).

⁶ See Aaron J. Saiger, *Obama’s “Czars” for Domestic Policy and the Law of the White House Staff*, 79 Fordham L Rev (forthcoming 2011).

both to specify statutorily which office within the executive hierarchy shall receive that power and also to exercise subsequent oversight, including a role in approving appointees to office. Second, the president, through a process of presidential administration or presidentialization, asserts ownership over the statutory authority delegated to an executive agency and its principal officer. This step involves a constitutional or a pragmatic assertion of presidential directory control that transfers the delegated power "up" to the Executive Office of the President and consequently away from the agency. Third, the president, as both the busy head of state and head of government, must subdelegate the performance of his functions "down" pursuant to a vertical intelligible principle to others, including (controversially) non-Senate confirmed personnel such as White House staff. Finally, the delegation of legal authority to act and bind the sovereign requires that the president evade or get "around" the Appointments Clause, which governs the appointment of officers. He attempts this objective by invoking a fiction that these personnel are "purely advisory" employees not governed by the Appointments Clause.⁷

Part II addresses the root of the problem with czars, namely, the failure of Congress to adequately do its job when it legislates and delegates. To shed new light on congressional delegation of rulemaking authority, this Article examines the Appointments Clause's excepting provision, which is the sole instance where the Constitution explicitly authorizes delegation. The Clause evidences that the delegates to the Philadelphia Convention both contemplated and authorized congressional delegation of power but only on a limited and cabined basis. Barring a return to first principles and the resurrection of the nondelegation doctrine, the Excepting Clause remains instructive for its recognition that there is both a vertical as well as a horizontal dimension to delegation.

Part III briefly discusses two potential responses to the transparency and accountability problems presented by the use of czars in presidential administration. First, Congress may use its spending power to curtail presidential use of paid advisors. Second, Congress may require its own approval of detailed regulations promulgated by agencies, as was proposed in recent legislation. This back-end approval would be subject to the normal requirements of bicameralism and presentment. This process

⁷ US Const Art II, § 2, cl 2.

provides Congress with an opportunity to approve or disapprove of major agency rulemakings that czars have directed, acting under a regime of presidential administration and delegation, as consistent (or not) with its initial delegation.

I. WHERE AND HOW CZARS GET THEIR AUTHORITY: *OVER, UP, DOWN, AND AROUND*

A. Congressional Delegation (*Over*)

Since at least 1944, the Supreme Court's delegation doctrine has permitted Congress to delegate to executive branch agencies the House's and the Senate's policymaking authority at a very high level of generality.⁸ Delegation, accomplished by way of an ordinary legislative act subject to bicameralism and presentment, frequently grants "something approaching blank-check legislative rulemaking authority,"⁹ usually to the executive branch, but occasionally also to the judiciary.¹⁰ This power permits agencies to issue regulations or rules that may bind society.¹¹ As a policy matter, regulation by agency delegation is frequently justified by resort to pragmatic rationales.¹²

No constitutional provision, however, expressly authorizes delegation of lawmaking authority or guides Congress, the president, and the courts as to what standards govern their delegations. Indeed, there has long been a persistent doubt about the legal foundations for delegation.¹³ At the same time, while the Court allows delegation, it paradoxically (if not contradictorily) observes that the Constitution provides "[a]ll legislative powers herein granted shall be vested in a Congress of the United

⁸ See *Yakus v United States*, 321 US 414, 426 (1944) ("Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose. . . .").

⁹ Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 Colum L Rev 2097, 2099 (2004).

¹⁰ See generally *Mistretta v United States*, 488 US 361 (1989) (delegating authority to promulgate sentencing guidelines to the US Sentencing Commission located within judicial branch). The Supreme Court has never interpreted the delegation doctrine to permit the president or the courts to delegate their respective powers to other branches of the federal government.

¹¹ Larry Alexander and Saikrishna Prakash, *Delegation Really Running Riot*, 93 Va L Rev 1035, 1037 n 7 (2007).

¹² See, for example, Mark Tushnet, *A Political Perspective on the Theory of the Unitary Executive*, 12 U Pa J Const L 313, 320 (2010) (stating that politically legislative process would never produce detailed regulations in the absence of delegation).

¹³ Merrill, 104 Colum L Rev at 2100–01 (cited in note 9).

States, which shall consist of a Senate and House of Representatives.”¹⁴ Explaining why delegations to agencies do not offend the Legislative Vesting Clause requires an act of jurisprudential sleight of hand. According to the Court’s doctrine, Congress may incant in its delegating legislation a high-level “intelligible principle to which the person or body authorized to [act] is directed to conform.”¹⁵ Such direction means that Congress, not the agency, has legislated, even though Congress has only articulated very high-level policy choices that leave many details, and much discretion, to the agency.¹⁶

The Court’s doctrine sets a low bar for a congressional enactment to survive a delegation challenge. Accordingly, nearly all delegations have survived intact. The justices, who have “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law,” deferentially review such delegating statutes.¹⁷ In fact, the Court has overturned a congressional delegation on separation-of-powers grounds in only two instances, both of which related to the same statute and occurred in the same year.¹⁸ The Court, generally unwilling to police these grants of power, has effectively left it to the political process to police this aspect of the horizontal division of powers. Congress consequently is able to delegate broad policymaking power to the executive largely unimpeded.

From its perspective, Congress delegates to particular statutorily designated executive offices. Ideally for Congress, delegated powers will fall to an occupant of the office whose appointment is subject to Senate advice and consent, subsequent congressional oversight, budgetary control, and statutory transpar-

¹⁴ US Const Art I, § 1 (emphasis added).

¹⁵ *J. W. Hampton, Jr. & Co v United States*, 276 US 394, 409 (1928).

¹⁶ Professors Larry Alexander and Saikrishna Prakash describe this “Doctrinal Account” as “the intelligible principle fig leaf.” Alexander and Prakash, 93 Va L Rev at 1041 (cited in note 11). Their article offers three other accounts of what Congress is doing when it delegates. *Id.* at 1041–42.

¹⁷ *Whitman v American Trucking Associations, Inc.*, 531 US 457, 474–75 (2001), quoting *Mistretta*, 488 US at 416 (Scalia dissenting).

¹⁸ See *A.L.A. Schechter Poultry Corp v United States*, 295 US 495, 541–42 (1935) (invalidating § 3 of the National Industrial Recovery Act (NIRA)); *Panama Refining Co v Ryan*, 293 US 388, 414–15 (1935) (invalidating NIRA § 9(c)). The Court has struck down legislative delegations for violating *other* constitutional guarantees. See, for example, *Carter v Carter Coal Co*, 298 US 238, 311–12 (1936) (citing *Schechter Poultry* and invalidating § 4, part 3(g) of the Bituminous Coal Conservation Act of 1935 as a “legislative delegation in its most obnoxious form” that “undertakes an intolerable and unconstitutional interference with personal liberty and private property” in violation of the *Due Process Clause*).

ency measures, including requests under the Freedom of Information Act (FOIA). Congress hopes that such officers will exercise a measure of republican deliberative independence from the President by virtue of these checks. Indeed, senators often employ confirmation “to obtain assurances from prospective agency heads that they will implement the authorities entrusted to them with some degree of independence from the president’s political preferences.”¹⁹ That objective extends not just to independent agencies but also to the traditional executive agencies.²⁰ Indeed, “when there is divided government . . . Congress delegates relatively more frequently to actors with greater insulation from the President’s control.”²¹

B. Presidentialization and Presidential Administration (*Up*)

Political scientists and legal scholars have observed the trend toward duplication and consolidation of administrative authority within the Executive Office of the President, or “presidential administration.” This consolidation, which demands the active participation of presidential staff, reflects successive administrations’ attempts to ensure that agency policies reflect their agenda.²² This approach, however, displaces the traditional understanding of the president-agency relationship. The traditional view of the president-agency relationship disallowed, or at least strongly disfavored, head executive superintendence over executive agencies.²³ Where Congress grants regulatory authority under a statute to an agency head, rather than the president, the president cannot “assume that his or her own will is necessarily controlling” and “cannot simply command or direct an agency head to issue a regulation.”²⁴ President Clinton and his successors bucked this traditional understanding by asserting owner-

¹⁹ Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 Duke L.J. 963, 1005 (2001).

²⁰ See, for example, *Yakus*, 321 US at 423 (upholding the Emergency Price Control Act of 1942 and specifically naming Price Administrator, Office of Price Administration, as authorized recipient of power to promulgate regulations setting commodity prices).

²¹ Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 Colum L Rev 263, 290 (2006).

²² See, for example, Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate Over Law or Politics?*, 12 U Pa J Const L 637, 638–39 (2010) (noting so for Obama’s administration).

²³ See Kagan, 114 Harv L Rev at 2276 (cited in note 5).

²⁴ Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 Admin L Rev 1, 7 (2007).

ship over agency regulatory processes and claiming the power to direct agency regulation.²⁵

This directory control, or presidential assertion of power to direct agency rulemaking, requires that the president retrieve authority delegated by statute to a named executive agency and its principal officer. That retrieval, or "presidentialization," involves the president asserting directory authority to be able to personally execute the laws.²⁶ Justice Elena Kagan's pre-confirmation academic writing on the subject defended on pragmatic grounds the claim that the president should have "directive authority over administration" to take in-house regulatory initiatives that administrative agencies would otherwise handle.²⁷ She argued that the pragmatic considerations of enhanced accountability due to greater transparency and an "electoral link between the public and the bureaucracy," as well as greater regulatory effectiveness, justified the President's interpretation of statutes to permit presidential administration.²⁸

Although Kagan preferred to ground her position in pragmatic rather than formal considerations, there is also a defense of a related position based on the theory of a unitary executive.²⁹

²⁵ Kagan, 114 Harv L Rev at 2246, 2250 (cited in note 5).

²⁶ Id at 2252, 2376, 2383.

²⁷ Id at 2319.

²⁸ Id at 2331–32.

²⁹ Professor Mark Tushnet contrasts Kagan's presidential administration with the unitary executive. "The theory of the unitary executive asserts that the White House is to control the bureaucracy. In presidential administration, in contrast, the White House *displaces* the bureaucracy. Rather than controlling the processes of policy-making as they occur outside the White House, presidential administration brings policy-making over exactly the same domains into the White House." Tushnet, 12 U Pa J Const L at 325–26 (cited in note 12). Presidential control of the executive branch (through appointment and removal) is central to the theory of the unitary executive, but not necessarily presidentialization of statutory powers. For example, in the Bush administration's Office of Legal Counsel, Deputy Assistant Attorney General John C. Yoo *rejected* presidentialization of statutory powers granted to other executive officers. "Congress may prescribe that a particular executive function may be performed only by a designated official within the Executive Branch, *and not by the President.*" Office of Legal Counsel, Centralizing Border Control Policy Under the Supervision of the Attorney General, 2002 WL 34191507, *2 (Mar 20, 2002) (emphasis added). Yoo stated that, although "[t]he executive power confers upon the President the authority to supervise and control that official in the performance of those duties, [] *the President is not constitutionally entitled to perform those tasks himself.*" Id (emphasis added). To be sure, some interpretations of what the unitary executive requires might justify presidentialization, see, for example, Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U Ill L Rev 701, 717 (2003) (defending the view that, "whenever a statute requires that an executive decision or action be taken by any officer, the chief executive officer may decide or act himself. Given the Executive Power Clause, personal presidential execution is always a constitutional option"), but really, "[t]he chief point of distinction" between Kagan and unitary executives "involves the constitutionality of independent regulatory agencies." Sargentich, 59 Admin L Rev at

The president stakes his claim to control the executive bureaucracy by virtue of the Executive Vesting and Take Care Clauses.³⁰ These clauses vest the executive power in “a President,” not in other executive branch subordinates, and task the president with the obligation to see that his subordinates faithfully execute the laws.³¹ On that account, statutes that purport to assign tasks to named offices below the president are “merely identify[ing] whom the president may have assist him in the exercise of his executive power.”³² On this approach, Congress can statutorily assign tasks as an initial matter to another executive branch officer as a matter of convenience but cannot fix, anchor, or otherwise isolate those delegations of power within the executive branch because the president always has the option of executing the laws himself.³³ Were it not so, congressional delegations to subordinates would threaten to isolate the exercise of executive power and shatter the executive’s unity of control.³⁴

Defenders of the traditional view of the president-agency relationship hotly contest the claims of directory authority over executive agencies. They make several arguments. First, as an interpretive matter, Congress knows how to draft statutes that grant joint authority to the president and agency heads, and it has occasionally done so. The existence of statutes explicitly drafted as “mixed agency-President delegations” belies any claim that the White House may presidentialize grants of power that by their terms delegate only to agency heads.³⁵ Statutes that do not explicitly name the president, against the background practice of statutes that do explicitly name the president *and* other officers, should not be read to impliedly include him as a recipient of delegated power.³⁶

15 (cited in note 24). Where Kagan would accept them, unitary executives reject their constitutionality. *Id.*

³⁰ US Const Art II, §§ 1, 3.

³¹ US Const Art II, § 1.

³² Prakash, 2003 U Ill L Rev at 717 n 66 (cited in note 29).

³³ Saikrishna B. Prakash, *Fragmented Features of the Constitution’s Unitary Executive*, 45 Willamette L Rev 701, 701 (2009). In contrast, critics see the assertion of directory authority as presidential usurpation of mandatory congressional assignments of power. See Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 NC L Rev 397, 427 n 166 (2006) (“The President cannot ignore congressional decisions to place political power in the hands of specific cabinet officers.”).

³⁴ See *Morrison v Olson*, 487 US 654, 697–734 (1988) (Scalia dissenting) (critiquing the creation of an office of independent counsel).

³⁵ Stack, 106 Colum L Rev at 268 (cited in note 21).

³⁶ *Id.* at 267.

Second, claims of directory authority “undermine the value of the Senate’s constitutional function in providing advice and consent” to the president’s nominees to head agencies.³⁷ A senatorial say in who exercises delegated authority represents a key consideration in the congressional choice to delegate. Although the president may remove most subordinate executive branch appointees and this power thereby facilitates his control, there is a “practical difference” from inferring a further statutory power to direct.³⁸ “[P]erceived legal allocations” may influence how independently or submissively a department or agency head may respond to presidential intervention in the agency’s regulatory processes.³⁹ “[T]he initial assignment of entitlement to make a decision has an impact on bargaining power.”⁴⁰

Finally, critics have questioned the purported pragmatic policy benefits of presidential administration. For example, presidentialists claim that the president, by virtue of his national constituency, will be less susceptible to “local or special interests.”⁴¹ But presidents do not direct the executive branch themselves; they are aided by their unelected staffers—occasionally subdelegates in fact—who may hold their positions without the benefit of Senate advice and consent. Their interests do not necessarily reflect those of a national constituency, and their role in presidential administration is largely unaddressed in Kagan’s account.⁴² The traditional account of president-agency relationships therefore may “be of greatest importance not in situations involving the President directly, but rather in negotiations with the White House staff.”⁴³ These controllers operating largely outside the scrutiny of Congress raise significant questions concerning the scope of presidential power to subdelegate.

³⁷ Percival, 51 Duke L.J. at 1005 (cited in note 19).

³⁸ Stack, 106 Colum. L. Rev. at 296 (cited in note 21).

³⁹ *Id.*

⁴⁰ Percival, 51 Duke L.J. at 1005 (cited in note 19).

⁴¹ Sargentich, 59 Admin. L. Rev. at 27 (cited in note 24).

⁴² Save for a source title with the word “czar,” Kagan makes no mention of the popular term to describe the high-level advisors and operatives aiding the President. Kagan, 114 Harv. L. Rev. at 2318 n. 286 (cited in note 5). She does make some reference to the role of White House staff. *Id.* at 2296–98, 2302.

⁴³ Sargentich, 59 Admin. L. Rev. at 9 (cited in note 24).

C. Presidential Subdelegation (*Down*)

1. The need for the head of state and government to delegate.

Unlike countries that separate the symbolic head of state from the head of government, the US political system expects the “American President” to serve ably in both capacities.⁴⁴ The highly-visible traditional head of state functions—for example, reading to school children, participating in Veteran’s Day observances, attending a foreign leader’s funeral, and “pardoning” turkeys at Thanksgiving—demand the president’s personal presence and attention. Accordingly, they carry a high opportunity cost for the president’s head of government functions, even if the head of state mantle may benefit the president politically. These functions are largely non-delegable, except as might appropriately be fulfilled by a first family member or a vice president.

Moreover, even if no head of state function competed for the president’s attention, an overabundance of head of government functions does. The head-of-government functions involve directing and coordinating multiple executive agencies in the exercise of executive authority, directing the armed forces as their civilian commander-in-chief, conducting American foreign policy, vetting and nominating individuals for executive and judicial office, managing governmental measures aimed at macroeconomic recovery, delivering a report on the state of the union, preparing and proposing a legislative agenda and budget, and occasionally pardoning a “turkey” or two, among the head executive’s many, many other governmental duties.

It is thus axiomatic that by necessity the president must delegate and oversee the execution of the laws by his subordinates.⁴⁵ An undertheorized law of presidential subdelegation, which can be conceived of as a vertical aspect of the delegation doctrine, generally permits broad berth to the president to subdelegate to his choice of executive branch agents, including (more recently) White House personnel such as employee czars not subject to Senate advice and consent. The president subdelegates functions encompassing statutory and, more rarely, constitution-

⁴⁴ Sanford Levinson and Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 Minn L Rev 1789, 1855 (2010).

⁴⁵ In addition, the same considerations that drive presidential subdelegation to other officers—too much to do, too little time, lack of expertise, etc.—would seem to justify sub-subdelegation. This Article does not address this further question.

al tasks, pursuant to statutory and constitutional authority, available upon different terms. Below in Parts I.C.2 and 3, this Article examines the bases for presidential subdelegation and the scope of delegable authority. It suggests that the president's capacity to subdelegate, especially to White House personnel unaccountable to the Senate, has never been broader.

2. The constitutional authority to subdelegate.

Presidents have claimed a constitutional power to subdelegate separate from any congressional authorization.⁴⁶ As a formal matter, the Executive Vesting Clause, together with the Take Care Clause and the Commissions Clause, anticipate the president's need to delegate the performance of functions and yet maintain control. Although the executive power is "vested in a President of the United States" and it is the president's duty and power to "take Care that the Laws be faithfully executed,"⁴⁷ the Clause's use of the passive voice ("be . . . executed") anticipates that the president will not personally execute the laws, but will superintend others' efforts. That these others must be subordinate is implied by the command that the president be able to see to it that the laws are executed not just in any manner, but "faithfully." That the Take Care Clause warrants this superintendence is driven home all the more forcefully by the clause following it. The president has the power and obligation to "Commission all the Officers of the United States," including those officers serving as executive branch subordinates.⁴⁸ Such an approach to presidential subdelegation is consistent with the Supreme Court's strongly pro-executive pronouncements on subdelegation.⁴⁹

Although the Constitution's Excepting Clause may be interpreted to imply a limitation on what functions may be subdele-

⁴⁶ Congress has also recognized this power. The Subdelegation Act, 3 USC §§ 301-03, provides a statutory canon of construction that Sections 301 through 303 "shall not be deemed to limit or derogate from any existing or inherent right of the President to delegate the performance of functions vested in him by law." 3 USC § 302 (1951). Thus, the statute does not govern presidential subdelegations (colorably) claimed pursuant to inherent constitutional authority to subdelegate. Constitutional authority may permit the President to subdelegate functions beyond the Act's scope and to individuals not confirmed by advice and consent.

⁴⁷ US Const Art II, §§ 1, 3.

⁴⁸ US Const Art II, § 3.

⁴⁹ See, for example, *Myers v United States*, 272 US 52, 117 (1926) ("[T]he President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates."); *McElrath v United States*, 102 US 426, 436 (1880) (observing the necessity of delegation).

gated, even here the prevailing interpretation has favored subdelegation. The Excepting Clause permits vesting of the appointment power in the “President *alone*.”⁵⁰ Although “alone” could be read to suggest that the power to appoint in the opt-out context is nondelegable, a plausible alternative reading is that the word “alone” does not preclude subdelegation; rather, it simply contrasts the opt-out process with the usual advice and consent process where the president appoints with the Senate’s concurrence.⁵¹ Indeed, the Office of Legal Counsel (OLC) has advised that the president may even delegate his constitutional power to appoint inferior officers under the Excepting Clause to the head of an executive department.⁵²

To be sure, in 1855, Attorney General Caleb Cushing asserted “the general rule that the functions vested in the President by the Constitution are not delegable and must be performed by him,” which was later reaffirmed by the OLC early in the Reagan Administration.⁵³ But this general rule has been softened with exceptions under recent approaches. During the Clinton Administration, the OLC reiterated the accepted view that the president possessed “‘inherent’ authority to delegate,” but added further that this power to delegate was “not restricted to delegation of duties conferred by statute.”⁵⁴ It extends to delegation of certain constitutional duties. The OLC endorsed the view that the president may not delegate constitutional duties that require his “personal, individual judgment.”⁵⁵ This standard requires a case-by-case determination as to whether the function involves individual judgment. It allows for the possibility that additional

⁵⁰ US Const Art II, § 2 (emphasis added).

⁵¹ See, for example, Office of Legal Counsel, Assignment of Certain Functions Related to Military Appointments, 2005 WL 5079423, *1 (July 28, 2005) (interpreting “alone” to mean “without the need for Senate consent”).

⁵² *Id.* at *3.

⁵³ Office of Legal Counsel, Presidential Succession and Delegation in Case of Disability, 1981 WL 30883, *2 (Apr 3, 1981) (“Presidential Succession” hereinafter), citing 7 Op Atty Gen 453, 464–65 (Aug 31, 1855). The president may not delegate his constitutional powers to: appoint and remove principal officers, pardon, act as the Commander-in-Chief of the Army and Navy of the United States, approve and disapprove presented bills, veto, call Congress into special session or adjourn it, make treaties with Senate advice and consent, and issue executive orders. *Id.* at *3. The OLC has also “suggested that there may be greater limits on his delegation authority in the area of foreign affairs.” Office of Legal Counsel, Waiver of Claims for Damages Arising Out of Cooperative Space Activity, 1995 WL 917147, *11 (June 7, 1995) (“Waiver of Claims” hereinafter).

⁵⁴ *Waiver of Claims*, 1995 WL 917147 at *11 (cited in note 53).

⁵⁵ *Id.* The OLC adopted the same standard for *statutory* duties that might be delegated, but neglected the broad definition of delegable functions encompassed by 3 USC § 303. See *id.*

presidential constitutional powers might be identified as delegable.

By 2005, the Bush Administration OLC, subject to the traditional general rule, claimed in passing that "the President generally has *considerable discretion* to delegate power conferred on him by the Constitution" with nothing more than a bare cite to *Myers* and its discussion of the Take Care Clause.⁵⁶ The course of evolution over time has been to recognize a presidential power to subdelegate even constitutional functions, depending on the level of discretionary judgment required by the president.

3. The statutory authority to subdelegate.

As a matter of statutory authority, Congress has authorized our busy president to subdelegate functions to subordinates under the "[g]eneral authorization to delegate functions[,] publication of delegations,"⁵⁷ or what commentators and courts have termed "the Presidential Subdelegation Act."⁵⁸ The Necessary and Proper Clause authorizes the statute as a means for carrying into execution the laws that the president is to enforce.⁵⁹ The president is authorized, but not required,⁶⁰ to engage in delegation to the "head of any department or agency in the executive branch, or any official thereof *who is required to be appointed by and with the advice and consent of the Senate*."⁶¹ Under § 301, Congress willingly authorizes subdelegation but only to officers who are accountable to it during the initial appointments process and through subsequent oversight. This limited authorization precludes statutory delegation to persons whom the Senate has *not* confirmed by advice and consent, apparently including officers whose appointments were opted out of the default process pursuant to the Excepting Clause. Significantly, this statutory

⁵⁶ Office of Legal Counsel, *Whether the President May Sign a Bill by Directing That His Signature Be Affixed to It*, 2005 WL 4979074, *15 (July 7, 2005) ("Bill Signing Authority" hereinafter) (emphasis added).

⁵⁷ 3 USC §§ 301–303. Separate and more specific statutory authorizations may operate in lieu of the general provisions of the Subdelegation Act. See, for example, 42 USC § 9615 (authorizing the President to delegate and assign any duties or powers assigned to him under CERCLA). See also Superfund Implementation, 52 Fed Reg 2923, § 8 (Jan 23, 1987) (delegating CERCLA superfund implementation).

⁵⁸ *Crosby v Young*, 512 F Supp 1363, 1385 (ED Mich 1981).

⁵⁹ US Const Art I, § 8, cl 18.

⁶⁰ Verkuil, 84 NC L Rev at 426 (cited in note 33) (characterizing the Act as "permissive rather than restrictive").

⁶¹ 3 USC § 301 (emphasis added). Thus, not all officers of the United States may be subdelegated power under the Act, but rather only those appointed with Senate advice and consent.

authorization excludes non-officer employees, such as White House staff (some of whom are popularly styled “czars”), from receiving subdelegations.

This statutory limitation, however, does not foreclose the possibility of such delegations. There remains the possibility that the president may subdelegate to non-Senate confirmed personnel pursuant to his independent *constitutional* authority. Indeed, the Subdelegation Act would appear to accommodate a unitary theory of the executive rather than struggle against it. Professor Saikrishna Prakash has offered a unitary executive account of what is happening when a President “delegates”:

[T]he president merely permits the executive officer to act as the president’s agent and in subordination to the president’s wishes. If the president somehow could cede power to execute the law independently, then it might be fair to say that the president had delegated a portion of his executive power. Because the president probably cannot make such a delegation, *he does not delegate his executive power to others who execute the law, but instead merely permits others to execute the law on his behalf.*⁶²

Prakash’s theory is consistent with Congress’s drafting choices in the Subdelegation Act, and the Act suggests a constitutional basis for the president’s authority to delegate. Section 301 uses neither “delegate” nor “subdelegate.”⁶³ Instead, it refers to the president’s “designation and authorization” and his ability to “designate and empower” agents to “perform without approval, ratification, or other action by the President.”⁶⁴ Similarly, § 302 refers to “authority conferred by this chapter.”⁶⁵ Although § 302 speaks in terms of delegation, tellingly it is neither delegation *simpliciter* nor “delegation of power.” It uses “delegation of the performance” and “delegate the performance of functions.”⁶⁶ This fine semantic distinction between “delegation of power” on the one hand and “delegation of performance of function” on the other would appear to aim to preserve the conception that Article II vests the executive power in a president indefeasibly. It cannot be re-vested, whether by congressional or by presidential action,

⁶² Prakash, 2003 U Ill L Rev at 720 n 80 (cited in note 29) (emphasis added).

⁶³ See Glendon A. Schubert, Jr., *The Presidential Subdelegation Act of 1950*, 13 J Polit 649 (1951) (observing that the statute does not employ the word “subdelegation”).

⁶⁴ 3 USC § 301.

⁶⁵ 3 USC § 302.

⁶⁶ *Id* (emphasis added).

in anyone else—in the executive branch or elsewhere. It must reside in the unitary executive. Of course, if this theory is to be more than a meaningless semantic exercise, the president must have the capacity to control the agents deemed to be undertaking tasks for the President or else the formal distinction becomes an empty one.

If, however, the president acts pursuant to the Subdelegation Act, it mandates certain procedures, including the requirement that the presidential delegation be written *and* published in the Federal Register.⁶⁷ Publication encourages transparency and presumably reinforces presidential political accountability for the delegation.⁶⁸ All statutory functions vested in the president by law are delegable unless Congress affirmatively prohibits the delegation in a statute.⁶⁹ As for terminating presidential subdelegations of statutory functions, Congress authorizes the president to cancel them at any time.⁷⁰

Section 302 authorizes certain presidential subdelegations that will not comply with the procedures of § 301 but occur by other means. Nonexpress, that is, implied or implicit, authorization may suffice to sustain presidential subdelegations. “[N]othing [in §§ 301–303] shall be deemed to require express authorization in any case in which such an official would be presumed in law to have acted by authority or direction of the President.”⁷¹ By “presumed in law,” Congress references action pursuant to subdelegation that would have been judicially recognizable as a matter of agency principles. Thus, the president can forego express authorization and avoid the Federal Register publication procedure as long as agency principles would recognize the validity of acts undertaken pursuant to a subdelegation.

⁶⁷ 3 USC § 301. The style and form of the written delegation does not matter and may take the form of either a presidential memorandum or an executive order. Office of Legal Counsel, Legal Effectiveness of a Presidential Directive, As Compared to an Executive Order, 2000 WL 33155723, *1 n 1 (Jan 29, 2000).

⁶⁸ Section 301 tries to impress on the president his ultimate responsibility for how delegated functions are exercised: “[N]othing contained herein shall relieve the President of his responsibility in office for the acts of any such head or other official designated by him to perform such functions.” 3 USC § 301. Presumably, the President would have remained responsible absent this statutory admonition. Schubert, 13 J Polit at 662 (cited in note 63).

⁶⁹ This congressional presumption seems curious, at least under the assumption that Congress would be jealous of its initial assignments of delegated power.

⁷⁰ 3 USC § 301 (“Such designation and authorization . . . shall be revocable at any time by the President in whole or in part.”).

⁷¹ 3 USC § 302.

What statutory powers may the president subdelegate under this statutory authority? Pursuant to a delegation, a subordinate may take final action “without approval, ratification, or other action by the President.”⁷² Congress allows the president to subdelegate “functions” vested in the president *by statute*,⁷³ or those functions already *congressionally granted* to a subordinate but subject to presidential approval.⁷⁴ To be clear, § 301 does not by its terms limit the permissible delegation to only statutory functions as opposed to constitutional ones; instead, it provides only that a subordinate might perform “any function which is vested in the President *by law*.”⁷⁵ Both the Constitution and statutes constitute “law,” and both vest functions in the president. Nonetheless, the OLC has embraced an interpretation of § 301 that limits subdelegation under the Act to statutory powers.⁷⁶ It bases this interpretation on the legislative history of the statute’s prior iteration, which limited “the functions, as set out in this bill, [to] refer to those vested in the President by statutory authority, rather than those reposing in the President by virtue of his authority under the Constitution of the United States.”⁷⁷

⁷² 3 USC § 301.

⁷³ *Id.* Although some courts have narrowly construed the scope of allowable presidential subdelegation under § 301, they are almost certainly mistaken as a matter of statutory interpretation. For example, in *Utah Association of Counties v Bush*, Executive Order 10355, promulgated by President Truman in 1952, delegated to the Secretary of the Interior certain authority relating to the designation of national monuments. 316 F Supp 2d 1172, 1195 (D Utah 2004). The plaintiffs contended that President Clinton’s designation of the Grand Staircase Monument was invalid on the theory that Truman’s Executive Order 10355 remained unrevoked and had subdelegated the designation function to the Secretary of Interior. *Id.* The district judge rejected the argument. He concluded that, among other reasons, it was unclear whether the subdelegation was valid because the Antiquities Act of 1906 gave the President authority “in his discretion” to designate national monuments. *Id.* at 1197 (emphasis omitted). The court reasoned “that the President is the only individual who can exercise this authority because only [he] can exercise his own discretion. . . . It is illogical to believe that [he] can delegate his personal judgment and conscience to another.” *Id.* at 1197–98. The Subdelegation Act, however, specifically defined as “functions” delegable “any . . . discretion vested in the President.” 3 USC § 303. The court was apparently unaware of this definition as it had failed to cite or otherwise acknowledge the key operative statutory language. This oversight did not undermine the court’s other, independent grounds for its holding. Discretionary presidential decisions pursuant to statutory authority are fair game for subdelegation.

⁷⁴ This latter provision effectively authorizes a presidential waiver of a congressional requirement to seek presidential approval. 3 USC § 301(2). But see Presidential Succession, 1981 WL 30883 at *5 (cited in note 53) (failing to cite or to discuss § 301(2) and finding “an inference of nondelegability occurs when Congress gives authority to an agency but subjects that authority to a requirement of presidential approval”).

⁷⁵ 3 USC § 301(1) (emphasis added).

⁷⁶ Waiver of Claims, 1995 WL 917147 at *11 (cited in note 53).

⁷⁷ *Id.* at *11 n 30, quoting HR Rep No 1139, 81st Cong, 1st Sess 2 (1950).

Both the courts and the executive branch have restricted what is delegable under the Act by providing that some of the president's constitutional functions may not be subdelegated. For example, in the independent counsel grand jury investigation of former Secretary of Agriculture Michael Espy, the DC Circuit characterized the President's "exercise of his appointment and removal power" as "a quintessential and nondelegable Presidential power" such that presidential privilege fairly covered documents concerning Espy's removal.⁷⁸ The court said that only "the President himself must directly exercise the presidential power of appointment or removal."⁷⁹ That obligation reassured the panel that communication concerning that function would be "intimately connected to his presidential decisionmaking."⁸⁰ Whether the DC Circuit's conclusion of nondelegability represented an implicit judgment and endorsement of the view that the Subdelegation Act applies only to statutory, and not constitutional, functions is unclear. The DC Circuit made no mention of the Act and no mention of the OLC's view that the president's constitutional appointive authority under the Excepting Clause is delegable and that other powers may be too. Nonetheless, the DC Circuit's approach substantially coheres with the OLC's long-standing approach of finding some constitutional powers to be nondelegable.

To whom may the president subdelegate the performance of functions? It remains an unanswered question in the courts whether the president has inherent constitutional power to subdelegate functions—whether constitutional or statutory—to persons other than Senate confirmed personnel, such as the Subdelegation Act would prohibit.⁸¹ The executive branch, however, has attempted to answer this question several times. Consider four instances where the president and his counsel have staked out increasingly assertive and permissive positions about subdelegation to persons not subject to Senate advice and consent.

⁷⁸ *In re Sealed Case*, 121 F3d 729, 752 (DC Cir 1997). See also *Judicial Watch, Inc v Department of Justice*, 365 F3d 1108, 1119 (DC Cir 2004) (concluding that the presidential duty to nominate and appoint judges is "non-delegable").

⁷⁹ *Sealed Case*, 121 F3d at 753.

⁸⁰ *Id.*

⁸¹ Presidential Succession, 1981 WL 30883 at *4 (cited in note 53) (noting that this issue has not been resolved in court, but counseling against "testing the limits of this constitutional question, unless circumstances imperatively require delegation"); Office of Legal Counsel, Delegation of Authority to Approve Suspension of Securities Trading on a National Market, 1982 WL 170704, *1 n 2 (June 23, 1982) (bracketing the constitutional question).

First, in 1969, the OLC gingerly broached the potential implications of presidential subdelegations of seemingly ministerial tasks to staff. Assistant Attorney General William H. Rehnquist advised on subdelegation in an unpublished letter and memorandum to John Ehrlichman, of Watergate infamy, Counsel to President Nixon and Assistant to the President for Domestic Affairs.⁸² Ehrlichman sought advice on the permissibility of the “delegation of authority to members of the White House staff to physically sign documents.”⁸³ Rehnquist’s cover letter to the OLC’s memorandum intimated a concern that the White House staffer was seeking delegable decisionmaking authority, which the Subdelegation Act, § 301, by its terms did not authorize to a staffer. The opacity of delegable “signing authority” being exercised by staffers within the White House’s walls did not escape Rehnquist.

Perhaps concerned that apprentices might attempt to wield the presidential sorcerer’s wand, Rehnquist cautioned Ehrlichman that “it would not be proper for the President to delegate decision-making authority to members of the White House staff.”⁸⁴ He reiterated the White House office’s onus and responsibility with regard to the delegation’s scope. “Your office, rather than ours, has the information to decide whether *the delegation of only the act of signing* of particular types of documents would materially reduce the administrative burdens on the President, where he retains the *decision-making function* involved.”⁸⁵ Rehnquist distinguished firmly between staff authority merely to sign documents and the delegation of the president’s “decision-making function.”⁸⁶

To reaffirm the limited scope of his advice, Rehnquist offered to advise separately on delegation of “particular decision-making functions as well as the act of signing.”⁸⁷ Rehnquist’s advice was guarded. It possibly evidenced his concern that allowing the president to subdelegate to staff, even the ostensibly minor authority to “sign” documents, would be to release a subdelegation

⁸² This letter and accompanying memorandum were obtained pursuant to a successful administrative appeal following the OLC’s partial denial of my FOIA request.

⁸³ Letter from William H. Rehnquist to John D. Ehrlichman, *1 (unpublished cover letter Mar 20, 1969) (on file with author) (“Rehnquist Letter” hereinafter).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Rehnquist Letter at *2. In 2005, this delegable signing authority, but not decisionmaking authority, was later extended to bill signing. Bill Signing Authority, 2005 WL 4979074 at *1 (cited in note 56).

genie from a bottle. The White House is a black box to outside observers. Whether a president broadly delegated final decisional authority to his White House staff that was statutorily disallowed, perhaps based on a claim of inherent constitutional authority to do so, or whether his staff undertook to bind the United States without requisite presidential approval, would likely never be known unless subsequently disclosed by a staffer's tell-all post-tenure memoir.

Second, during the Carter Administration, the OLC advised the White House on an issue of presidential subdelegation raised by proposed Reorganization Plan No 1 of 1977. The White House plan called for the reorganization of the Executive Office of the President (EOP) through replacement of particular specialized units, such as the Office of Drug Abuse Policy.⁸⁸ Under that plan, the statutory functions of the eliminated EOP units would be transferred in some cases to the President for "redelegation" to ad hoc interagency planning groups "chaired by Presidential advisers or assistants on the White House staff."⁸⁹ This reorganization presented a potential oversight concern. It "restrict[ed] congressional access to the individuals primarily involved in the reorganized activities," as executive privilege would furnish the President with a basis for shielding them from testimonial compulsion.⁹⁰ In this context, the OLC addressed the issue of the "redelegation" to the advisors contemplated under the plan and expressed in the summary of the President's message transmitting it to Congress: "If by 'redelegation' it is meant that the President will delegate the statutory responsibilities transferred to or vested in him under the Reorganization Plan to others, such delegation should be accomplished in accordance with 3 U.S.C. § 301."⁹¹ The OLC advised "that the President may *not* redelegate any statutory responsibilities transferred to or vested in him pursuant to the Reorganization Act of 1977" to White House advisors who do not meet the requirements of the Subdelegation Act, "*i.e.*, an adviser who was not an advise and consent appointee."⁹²

⁸⁸ John M. Harmon, Assistant Attorney General, Office of Legal Counsel, Memorandum for Margaret McKenna, Deputy Counsel to the President, regarding Dual-Purpose Presidential Advisers, at 4-5 (Aug 11, 1977) (on file with U Chi Legal F).

⁸⁹ *Id.* at 1.

⁹⁰ *Id.*

⁹¹ *Id.* at 3-4.

⁹² John M. Harmon, Assistant Attorney General, Office of Legal Counsel, Memorandum for Margaret McKenna, Deputy Counsel to the President, regarding Dual-Purpose Presidential Advisers, at 4-5 (Aug 11, 1977) (on file with U Chi Legal F) (emphasis add-

The OLC responded cautiously to the White House's reorganization plan by advising against delegation to non-Senate advice and consent appointed White House personnel as at odds with the terms of § 301 of the Act. It did not at that time examine the possibility of any *inherent* presidential authority to delegate.⁹³ However, in January 1980, the OLC once more advised President Carter on presidential subdelegation of performance of functions, but this time, it was in the context of potential delegations to his Vice President Walter Mondale.⁹⁴ This proposal forced the OLC to confront the issue of an inherent presidential power to delegate. Under § 301, the Vice President, although next in the presidential line of succession, would qualify neither as a "head of any department or agency in the executive branch" nor as an officer "required to be appointed by and with the advice and consent of the Senate."⁹⁵ As such, the OLC memorandum's unstated premise for considering the President's inherent authority to delegate was his apparent inability to delegate to the Vice President pursuant to the terms of § 301.

Congress has acknowledged in the Subdelegation Act an "inherent right of the President to delegate the performance of functions vested in him by law" beyond § 301's terms.⁹⁶ The meaning and precise scope of this "inherent right," however, remained undefined in the statute and in its legislative history. The OLC ventured a broad reading of inherent executive authority:

Generally, it may be said that the inherent rights or implied powers of the President are all those vast powers which are reasonably necessary in executing the express powers granted to him under the Constitution and Laws of the United States for the proper and efficient administration of the executive branch of government.⁹⁷

Assistant Attorney General John Harmon's OLC justified this approach by making resort to, among other interpretive methods, comparative structural reasoning. The OLC noted "we

ed).

⁹³ In a footnote, the OLC considered the possibility that the President might have an inherent right to delegate, but concluded without further elaboration that "we believe that it would not be appropriate in this context to depart from the requirements set forth in 3 U.S.C. § 301." *Id.* at 4 n 2.

⁹⁴ See Memorandum, President's Authority to Delegate Functions (Jan 24, 1980) (on file with U Chi Legal F).

⁹⁵ *Id.* at 1.

⁹⁶ 3 USC § 302.

⁹⁷ Memorandum, President's Authority to Delegate Functions at 2 (cited in note 94).

do not have a parliamentary form of Government," but "a tripartite system which contemplates an executive fully exercising his independent powers."⁹⁸ The OLC also cited secondarily textual sources of inherent power, including the Executive Vesting Clause.⁹⁹ Finally, to support the claim of an inherent power to subdelegate, the OLC cited pragmatic justifications for it generally¹⁰⁰ and for subdelegation specifically to the Vice President.¹⁰¹

Third, *prior* to Rehnquist's tenure at the OLC and the Nixon Administration, the White House had crossed the subdelegation Rubicon by designating a mere staff member to exercise a statutory function, that is, legal authority. At least since 1968, from the Johnson Administration through the Reagan Administration, the president had subdelegated by regulation to the White House Counsel the power to make legally binding decisions, more specifically, the power to grant waivers for federal employees and officers from the obligation to comply with a federal conflict of interest statute.¹⁰² White House Counsel is merely an advisory staff member, not an officer, and certainly not appointed with Senate advice and consent. Accordingly, the White House Counsel would be ineligible under the Subdelegation Act to receive the waiver function.¹⁰³ It is unclear whether the Johnson Administration appreciated the novelty (as well as the implications) of what it had authorized—presidential subdelegation to a staff member at odds with the Subdelegation Act—or whether that step was inadvertent. Nonetheless, in 1983, the Reagan OLC retrospectively embraced the apparent subdelegation as pursuant to "the President's *inherent* power to delegate."¹⁰⁴ Thus, the OLC recognized an inherent presidential power to subdelegate that encompassed designation of non-officers, including White House staff, while noting cautiously that Congress had never to that point challenged it.¹⁰⁵ This development built on the Carter

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 3 (noting "the President obviously could not physically perform the various functions that are conferred on him by the Constitution").

¹⁰¹ Memorandum, President's Authority to Delegate Functions, at 6 (cited in note 94) (observing, *inter alia*, "the President has recognized the desirability of training the Vice President for any eventuality").

¹⁰² See Office of Legal Counsel, Waiver of the Application of Conflict of Interest Laws for Members of the President's Commission on Strategic Forces, 1983 WL 187350, *1-3 (Jan 19, 1983) ("Waiver of Conflict of Interest" hereinafter).

¹⁰³ 3 USC § 301.

¹⁰⁴ Waiver of Conflict of Interest, 1983 WL 187350 at *2 (cited in note 102) (emphasis added).

¹⁰⁵ *Id.*

Administration's prior recognition of an inherent authority to delegate to the vice president—who was at least an officer, albeit not one confirmed by the Senate—by extending the field of eligible recipients to non-officer White House staffers.

Finally, in March 2002, Deputy Assistant Attorney General John Yoo advised the Bush Administration on presidential sub-delegation in the context of centralizing border control policy granted to multiple agencies. His post-9/11 letter opinion, which predated the creation of the Department of Homeland Security, advised President Bush that he could *not* simply “transfer the statutory duties and functions of a bureau in one Cabinet department to another Cabinet department without an act of Congress.”¹⁰⁶ Yoo also rejected the White House's alternative proposal that the President subdelegate to a head of an executive department the power to supervise and control the actions of a subcabinet official in another department with the constitutional power to exercise removal authority.¹⁰⁷ He advised that, although “it is well settled that there exists in the President an inherent right of delegation” as to statutory duties, “acts performable by the President[] as prescribed by the Constitution are not susceptible of delegation.”¹⁰⁸ Delegation of the president's constitutional function to remove officers was thus disallowed as violating well-established OLC precedent.¹⁰⁹

Yoo, however, then proposed several methods for attaining the President's objectives using formal workarounds that were in tension with the facts-on-the-ground. One in particular that relied heavily on a distinction between legal authority to act and political clout is particularly relevant to the subject of presidential delegation of authority and czars. Yoo suggested that the President “formally and publicly designate certain Cabinet officers to assist him” in coordinating border control operations while wearing a second, advisory hat.¹¹⁰ These individuals would “carry no formal legal authority” as to the second portfolio, but Yoo not-

¹⁰⁶ Office of Legal Counsel, *Centralizing Border Control Policy Under the Supervision of the Attorney General*, 2002 WL 34191507, *2 (Mar 20, 2002) (“Centralizing Border Control” hereinafter).

¹⁰⁷ *Id.* at *2–3.

¹⁰⁸ *Id.* at *3, quoting Memorandum, *Delegation of Presidential Functions* (Sept 1, 1955) (emphasis omitted). Yoo did not cite OLC precedent for this point, but could have cited the supportive congressional language acknowledging such an “inherent right” in 3 USC § 302.

¹⁰⁹ See *id.* An early OLC memorandum attempted to set out an itemization of delegable and nondelegable presidential functions. Memorandum, *Delegation of Presidential Functions* (Sept 1, 1955) (on file with U Chi Legal F).

¹¹⁰ *Centralizing Border Control*, 2002 WL 34191507 at *4 (cited in note 106).

ed "in practice such advisers may exercise substantial authority over Executive Branch officials if *it is well understood that they speak on behalf of the President*."¹¹¹ Yoo further proposed "formalizing such informal arrangements through the issuance of an executive order."¹¹² The order would "make no explicit delegations of legal power, but instead implicitly announce allocations of authority by designating a particular Cabinet official as a presidential adviser or leader and coordinator of presidential policy."¹¹³ As no formal subdelegation occurred, Yoo reasoned the President could have his cake and eat it too: effective, functional control (and thereby coordination) *as if* by presidential subdelegation through political clout without the formal obligation to seek legal authority from Congress. Yoo's approach embraced the substance of the subdelegatory claims of the Carter and Reagan Administrations—that the president may subdelegate to individuals who are not Senate advice and consent confirmed—while also attempting to avoid provoking congressional ire by adopting formal, even if questionable, compliance with the strictures of the Act.

Nonetheless, there are two significant difficulties with Yoo's proposal. First, he admits candidly that the czar positions he proposes exercise "in practice . . . substantial authority . . . if it is well understood that they speak on behalf of the President."¹¹⁴ Ordinarily, the exercise of "*significant* authority pursuant to the laws of the United States" makes one an officer of the United States subject to the Appointments Clause.¹¹⁵ Yoo takes the position that, so long as one makes no "explicit delegations," "implicitly announce[d]" ones will do.¹¹⁶ This is not a claim that *no* presidential subdelegation of authority has actually taken place; rather, it is to be taken for granted as an implied, but actual, agency relationship between the president and his subdelegate.

Second, if the proposed workaround has not actually subdelegated, the president has effectively subdelegated under apparent authority agency principles. Section 302 recognizes subdelegation may occur outside the Act's provisions calling for express notice. These subdelegations occur, in accordance with common law agency principles, "in any case in which such an official

¹¹¹ *Id.* (emphasis added).

¹¹² *Id.* at *5.

¹¹³ *Id.*

¹¹⁴ *Id.* at *4.

¹¹⁵ *Buckley v. Valeo*, 424 US 1, 126 (1976) (emphasis added).

¹¹⁶ *Centralizing Border Control*, 2002 WL 34191507 at *5 (cited in note 106).

would be *presumed in law to have acted by authority or direction of the President*.¹¹⁷ These agency principles include the concept of apparent authority. In the context of the presidency, this means that a czar may affect the president's legal relationship with a department or agency head where a department or agency head "reasonably believes" the czar "has authority to act" on the president's behalf "and that belief is traceable" to the president's "manifestations."¹¹⁸ The rationale for apparent agency is equitable, as the president "allows a situation to exist" that would cause third parties, such as department and agency heads, "to be misled."¹¹⁹

These potentially misleading presidential "manifestations" may include "explicit statements" a president "makes directly" to a department or agency head "as well as statements made by others concerning [a czar's] authority that reach the [department or agency head] and are traceable to the [president]."¹²⁰ These "manifestations" include "directing that the [czar's] name and affiliation with the [president] be included in a listing of representatives that is provided to a [department or agency head] . . . [or] directing [a czar] to make statements to [a department or agency head] or directing or designating [a czar] to perform acts or conduct negotiations, placing [a czar] in a position within an organization, or placing [a czar] in charge of a transaction or situation."¹²¹ Under Yoo's workaround, the president would issue an executive order, published for all department and agency heads to read, that formalizes the czar's informal supervisory arrangement. The executive order leaves a strong impression that the czar acts with the president's personal imprimatur and proves key to the Yoo proposal. The manifestations that support this impression intentionally portray authority in a czar such that a reasonable department or agency head might believe that the czar was authorized to act pursuant to a presidential subdelegation, thereby creating an apparent agency relationship, complete with effectively subdelegated authority.

¹¹⁷ 3 USC § 302 (emphasis added).

¹¹⁸ Restatement (Third) of Agency § 2.03 (2006).

¹¹⁹ Harold Gill Reuschlein and William A. Gregory, *Agency and Partnership* 57–59, 162 (1979).

¹²⁰ Restatement (Third) of Agency § 2.03, comment c.

¹²¹ *Id.*

D. Appointments Clause Evasion (*Around*)

Presidential administration and its attendant subdelegation to preferred personnel follow presidentialization of statutory functions delegated by Congress to other executive branch officials. The Appointments Clause, however, may thwart this march toward consolidation if it governs the president's selection of preferred staff. Therefore, it becomes necessary for a president to find a way around, or to otherwise evade, the operation of the Appointments Clause.

Subject to only limited exceptions, the Appointments Clause divides the function of appointing "officers of the United States" between the president and the Senate. The Clause and its excepting and recess provisions provide, in relevant part, 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: 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.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.¹²²

As a threshold matter, the Clause governs only if the individual to be appointed is to become an "officer of the United States," that is, an individual who will occupy an office. It identifies in particular "ambassadors, other public ministers and consuls, and the judges of the Supreme Court" as officers within the Clause's scope. The Clause includes a catchall provision that extends its reach to govern the appointment of "all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."¹²³

¹²² US Const Art II, § 2, cl 2–3.

¹²³ US Const Art II, § 2, cl 2.

If an officer's appointment is at stake, the president must appoint the officer in a manner consistent with the Appointments Clause or its excepting and recess provisions. The default rule is that the president wields the power and responsibility to nominate, but only the power to appoint when the Senate concurs with its advice and consent. This congressional input into the president's nomination serves as a check on the powers of the executive and a way of balancing the powers of the executive and legislature. The Senate may deny the president's appointment, seek guarantees and promises from particular nominees, or force the president to moderate his ideal choice of personnel.

The Clause permits alternatives to the default appointment procedure in two circumstances. First, although a president must secure the Senate's advice and consent to appoint principal officers, Congress may elect to opt out of presidential nomination and Senate advice and consent for the appointment of particular "inferior officers." There, however, is a disincentive to opt out. When Congress opts out, it eliminates itself from the formal appointments process, but Congress may opt back into the default arrangement of presidential appointment with Senate advice and consent. To opt out, Congress acts by statute ("by law") that vests the appointment authority in one of three groups of officers: the president alone, the heads of (executive) departments, or the courts of law. Second, the president may act pursuant to the "recess" exception to "fill up all vacancies that may happen during the Recess of the Senate" without any Senate input. Under this stopgap provision, however, the commissions are only temporary. They expire at the end of the Senate's next session.

There is ample presidential motivation to evade formal senatorial input in the selection of personnel. First, it permits the president to maximize control over his agents by avoiding the need to moderate his picks from his ideal ideological points or to expend political capital in a confirmation fight. The Senate's most effective use of its advice and consent function often is its "silent operation" that forces the president to moderate his choices.¹²⁴ In the absence of such an influence, the president may choose agents who owe no fealty to a confirming Senate.¹²⁵ That these individuals are at-will political appointees who are not sub-

¹²⁴ Federalist 76 (Hamilton), in *The Federalist Papers* 509, 513 (Wesleyan 1961) (Jacob E. Cooke, ed).

¹²⁵ See Lanora C. Pettit, Note, *Cincinnatus or Caesar: American Czars and the Appointments Clause*, 26 J L & Pol 81, 95–96 (2010) (noting the motivations of reducing congressional influence and lowering agent-principal costs).

ject to Senate confirmation on the front end strengthens the president's removal control on the back end.¹²⁶ As removal in such a case would not occasion any need to seek Senate approval of a replacement, the president need not second-guess his exercise of removal authority.¹²⁷

Second, the president has an incentive to keep his appointees outside the reach of subsequent congressional oversight and review. To the extent his appointees are within the White House Office, they are shielded from the operation of the Freedom of Information Act (FOIA);¹²⁸ may enjoy protection from disclosure of their communications and subpoenas to testify, either through executive privilege or, more specifically, through presidential communication privilege;¹²⁹ and may potentially claim, depending on their functions, absolute immunity unavailable even to cabinet-level officers.¹³⁰

The president may attempt at least three different strategies to evade the Appointments Clause. First, the president wields a recess appointment power that allows him to make controversial appointments of individuals who would otherwise fail to garner a Senate majority without the necessity of Senate confirmation. He would avoid nominating someone with whom he less than wholly agreed simply to win confirmation. This approach's drawback (viz. the constitutional limitation that the commission lapses at the end of the Senate's next session) may make a recess appointment of limited utility for a judicial appointment. The tool,

¹²⁶ The statutory development of the Vacancies Reform Act makes the president's unfettered exercise of removal power more likely by "making it more palatable for the President to remove officers." Prakash, 45 Willamette L Rev at 708 n 26 (cited in note 33).

¹²⁷ Removal of a Senate-confirmed officer creates another occasion for the Senate to offer its advice and consent during the replacement process. Seth Barrett Tillman, *The Puzzle of Hamilton's Federalist No. 77*, 33 Harv J L & Pub Pol 149, 165 (2010) (explaining that Hamilton's claim that "consent of [the Senate] would be necessary to displace as well as to appoint" was a claim about replacement, not removal) (emphasis omitted).

¹²⁸ Although FOIA applies to "the Executive Office of the President," it excludes "the President's immediate personal staff" and those parts of the Executive Office of the President "whose sole function is to advise and assist the President." *Meyer v Bush*, 981 F2d 1288, 1291 n 1 (DC Cir 1993), quoting HR Rep No 1380, 93d Cong, 2d Sess 14 (1974).

¹²⁹ *Sealed Case*, 121 F3d at 751–52.

¹³⁰ Although commentators have erroneously characterized *Harlow v Fitzgerald*, 457 US 800 (1982), as having decided that White House presidential advisors receive only qualified, and not absolute, immunity, see Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 371 (4th ed 2011), the Court did not "foreclose the possibility that petitioners, on remand, could satisfy the standards properly applicable to their claims" of absolute immunity on an appropriately developed record. *Harlow*, 457 US at 813. The parties, however, settled before the district court had any chance to determine whether absolute immunity applied. See Stipulation of Dismissal with Prejudice, *Fitzgerald v Butterfield*, No 74-0178 (DDC Jan 13, 1983).

however, may suffice for an executive officer who is likely to serve only a short tenure. Moreover, presidents have been waging (and winning) an ongoing struggle with Congress over the terms under which recess appointments may occur. Recess appointments are now used to fill vacancies that *preceded* the Senate's recess but remained unfilled due to Senate inaction or rejection of prior nominees.¹³¹ Contrary to the original meaning, this approach broadens the power's limited scope to fill vacancies that "may happen *during* the Recess of the Senate" where confirmation would have been impossible.¹³² Moreover, what counts as a "recess" for purposes of the Clause's operation has expanded from only *intersession* recesses to include *intrasession* recesses.¹³³

Alternatively, the president may claim that Congress opted out of confirmation and vested the power to appoint in the president alone or (perhaps) in the head of an executive department. As with other congressional delegations, the president has strong incentives to read broadly any statutory authority granted to him by Congress, including, ostensibly, the power to appoint. For example, the OLC interpreted the Vacancies Reform Act, which "does not use the language of appointment," as authorizing the president alone to appoint an Office of Management and Budget (OMB) employee to act as Director of OMB without Senate confirmation.¹³⁴

Finally, the president may claim that an appointment does not concern an "officer of the United States," only a "purely advisory" employee, and therefore the Appointments Clause and its procedures do not control. As previously observed, the Clause by its terms regulates the appointment of three enumerated categories of named officials ("Ambassadors, other public Ministers and Consuls, and Judges of the supreme Court") and, through its

¹³¹ *Evans v Stephens*, 387 F3d 1220, 1226–27 (11th Cir 2004) (en banc).

¹³² Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L Rev 1487, 1502 (2005), quoting US Const Art II, § 2, cl 3 (emphasis added).

¹³³ *Id* at 1491.

¹³⁴ Office of Legal Counsel, Designation of Acting Director of the Office of Management and Budget, 2003 WL 24151770, *3 (June 12, 2003). To avoid this scenario, Congress might elect to establish and follow a "clear statement rule" with regard to opt out appointments: when Congress intends to vest appointment authority outside of advice and consent, it will parallel the Excepting Clause's constitutional language that Congress is "vesting" the appointment authority in a particular office. Where Congress has not used such language, the courts should not interpret the statutory language as authorizing the delegation of appointment authority. Examining Czars, 111th Cong, 1st Sess at 9–11 (cited in note 1) (testimony of Professor Tuan Samahon).

catchall, "all other Officers of the United States."¹³⁵ The Clause does not by its terms distinguish between "officers" and "employees." Interpretive practice has created the distinction, which is perhaps animated by the unstated pragmatic consideration that little else would be accomplished if every salaried position entailed presidential appointment upon Senate confirmation. In *Buckley v Valeo*,¹³⁶ Associate Justice Rehnquist penned the Court's contemporary line drawing standard that an officer governed by the Clause is one who exercises "*significant* authority pursuant to the laws of the United States."¹³⁷ The Court has subsequently reaffirmed that this standard separates "officers," whose appointments are governed by the Appointments Clause, from "employees," who may be appointed without regard to its procedures.¹³⁸

That officers act pursuant to legal authority—statutory authority, in *Buckley*'s particularized formulation—distinguishes them from non-officer employees and opens the door to the claim that so-called "czars" are employees not subject to the Appointments Clause. The OLC's most recent formulation of officerhood reduces it to two elements: an office is a position to which is (1) delegated "by legal authority a portion of the sovereign powers" of the United States, and (2) that is "continuing." Importantly, the first requirement excludes from officerhood "an individual who occupies a purely advisory position."¹³⁹ The president may

¹³⁵ US Const Art II, § 2, cl 2.

¹³⁶ 424 US 1 (1976).

¹³⁷ *Id* at 126 (emphasis added).

¹³⁸ See, for example, *Free Enterprise Fund v Public Co Accounting Oversight Board*, 130 S Ct 3138, 3160 n 9 (2010) (distinguishing between "agent or employee" and "officer").

¹³⁹ Office of Legal Counsel, Officers of the United States Within the Meaning of the Appointments Clause, 2007 WL 1405459, *3 (Apr 16, 2007). The OLC attributes the pedigree of the "purely advisory" exclusion to "the Executive Branch's historical and longstanding understanding of that phrase," as represented by an 1898 House Judiciary Committee report concerning the appointment of members of Congress to military and other offices. Office of Legal Counsel, Application of the Emoluments Clause to a Member of the President's Council on Bioethics, 2005 WL 2476992, *7 (Mar 9, 2005); Appointment of Members of Congress to Military and Other Offices: Report of the House Committee on the Judiciary, 55th Cong, 3d Sess 1 (1898). The OLC's modern publicly available opinions concerning the exclusion arose first in the context of the scope of the meaning of "officer" within the Incompatibility Clause. Office of Legal Counsel, Proposed Commission on Deregulation of International Ocean Shipping, 1983 WL 160510, *1–3 (Dec 21, 1983) ("Ocean Shipping" hereinafter). Eventually, the OLC applied the purely advisory exclusion to presidential advisory committees in the context of the Appointments Clause. Office of Legal Counsel, Constitutional Limitations on Federal Government Participation in Binding Arbitration, 1995 WL 917140, *8–9 (Sept 7, 1995). Following this approach, the OLC noted that members of a commission were purely advisory because they "possess[ed] no enforcement authority or power to bind the Government." Office of Legal Counsel, The Constitutional Separation of Powers Between the President and Congress, 1996 WL

claim that many of the “czar” positions resident in the Executive Office of the President fall into this category.

The premise of the Appointments Clause’s inapplicability—that the czars of concern in this Article occupy “purely advisory” positions—is unlikely to be true. The reality on the ground is that czars exercise *both* political clout of the sort that close presidential advisors may wield *and* presidentially subdelegated operational control associated with officers endowed with legal authority. Two structural explanations account for why these advisors behave as functionally final decisionmakers. First, the same pressures that require Congress to delegate to the executive branch—the need for specialized knowledge and expertise and limited time, for example—require the president to subdelegate to non-officer czars once he has undertaken presidential administration.¹⁴⁰ Second, just as congressional horizontal delegation to the executive branch occurs at a high level of generality by an “intelligible principle,” presidential subdelegation of authority to non-officer czars occurs in packets of discretion. In other words, this vertical delegation is necessarily accompanied by a vertical intelligible principle. The fiction of “purely advisory” is unsustainable where “pure advice” without more would require constant communication with a busy president to advise him as to evolving or changed circumstances. Instead, the president will seek advice, which the czar may broadly provide, and then delegate to his advisors to accomplish his broad objectives within certain parameters. This is the vertical intelligible principle.

But the vertical intelligible principle may prove problematic. An advisor who receives these delegations may boast authority to be the president’s alter ego in a particular area of policy endeavor but without always actually having the president’s imprimatur. Such advisors may act as mini-presidents, but without the benefit of being subject to an election like the president or being subject to Senate confirmation as an officer. Clothed with a functionally final authority to act, an advisor may act as a gatekeeper to presidential access, threatening to render confirmed officers mere department figureheads, at least in particular policy areas.¹⁴¹ These individuals—unelected, not subject to advice and

876050, *13 (May 7, 1996), quoting *Ocean Shipping*, 1983 WL 160510 at *1.

¹⁴⁰ See Percival, 51 Duke L.J. at 1006–07 (cited in note 19) (noting that the president “does not have the time to be personally involved in any more than a few of the myriad, complex regulatory issues with which agencies grapple on a daily basis”).

¹⁴¹ Id. at 1007, quoting Robert B. Reich, *Locked in the Cabinet* 109 (1997) (describing “young aides in the White House Office of Cabinet Affairs” as calling, bullying, and attempting to order Clinton Secretary of Labor Robert Reich to go to Cleveland).

consent, and likely not subject to congressional oversight—may boast authority to be the president's alter ego in a particular area of policy endeavor but without always possessing presidential approval.¹⁴² This presidential subdelegation of governance to advisors, which necessarily occurs during presidential administration, raises the specter of their diminished accountability as executive power is diffused but without the benefit of political transparency.

II. WHAT THE EXCEPTING CLAUSE CAN TEACH US ABOUT DELEGATION GENERALLY

In Part I, this Article explained that delegations from Congress to the executive branch do not guarantee that statutorily designated offices and their Senate-confirmed officers would actually be the ones to wield decision-making authority. Claims of presidential administration and subsequent subdelegation to preferred executive branch personnel mean that delegated power may move vertically once granted. That movement may defeat (perhaps unrealistic) congressional expectations about who will exercise that power and the availability of subsequent oversight. The difficulty for Congress presented by delegation is how to secure the vertical assignment of power once it has chosen to delegate certain authority.

The “excepting” provision of the Appointments Clause, or the “Excepting Clause,” provides a unique model of delegation at work in the Constitution. To begin, it is the sole instance where the Constitution explicitly authorizes Congress to vest—that is, grant by way of delegation—any authority in another branch of government. Tellingly, the Constitution uses the word “vest” in only five instances: in the three parallel vesting clauses that assign the trinity of powers from the People to the principals of the three branches;¹⁴³ in the Necessary and Proper Clause's grant of power to Congress to carry into execution the powers vested pursuant to the several vesting clauses;¹⁴⁴ and in the Excepting Clause.¹⁴⁵ None of these intratextual usages contemplate that legislative action may revest power granted to one branch in an-

¹⁴² See, for example, Kevin Sholette, Note, *The American Czars*, 20 Cornell J L & Pub Pol 219, 222–23 (2010) (providing examples of Nixon-era advisors Henry Kissinger directing foreign policy through the National Security Council and Peter Flanigan directing economic policy through the Council on International Economic Policy).

¹⁴³ US Const Art I, § 1; Art II, § 1; Art III, § 1.

¹⁴⁴ US Const Art I, § 8, cl 18.

¹⁴⁵ US Const Art II, § 2, cl 2.

other, save the Excepting Clause. It 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.”¹⁴⁶ As a policy choice, Congress may legislatively opt out of nomination and Senate confirmation and delegate to the judiciary and to the executive branch (the president alone or the heads of executive departments) the appointment of their “subordinate” officers.¹⁴⁷ Congress, however, cannot grant to itself appointment authority beyond the Senate’s confirmation power subsequent to a presidential nomination.¹⁴⁸ Its legislative act of delegation formally eliminates the Senate, and thereby Congress, from the appointments process.

The Excepting Clause shows that the delegates to the Philadelphia Convention not only contemplated congressional delegation of power but also authorized it on a limited basis. The absence of any parallel provision for delegating lawmaking, read in light of the canon *expressio unius est exclusio alterius*, strongly suggests that the now-commonplace broad delegations of legislative authority are without constitutional warrant. That stands to reason. After all, what is today restyled affirmatively as the “delegation doctrine” was once known prohibitively as the “*nondelegation*” doctrine. Likely, this inconvenient truth animates Justice Scalia’s and the Court’s attempt to reinterpretively gloss “delegation” as something other than vesting legislative power in another branch.¹⁴⁹

But barring a return to first principles and the resurrection of nondelegation, authorized delegation under the Excepting Clause holds relevance for discussions of delegation generally. First, the Clause’s parameters for delegation are more notable for their restrictiveness than for their permissiveness. The Clause limits and specifically cabins the scope of delegable power; it encompasses only appointment of “inferior officers” and no other policymaking choices.¹⁵⁰

¹⁴⁶ US Const Art II, § 2, cl 2 (emphasis added).

¹⁴⁷ *Edmond v United States*, 520 US 651, 662–63 (1997) (stating that to be an “inferior” officer is to be a “subordinate” officer); Tuan Samahon, *Are Bankruptcy Judges Unconstitutional? An Appointments Clause Challenge*, 60 Hastings L J 233, 264–66 (2008) (suggesting that *Edmond* overruled sub silentio *Morrison v Olson*’s interpretation of “inferior officer”).

¹⁴⁸ *Buckley*, 424 US at 127–28.

¹⁴⁹ See, for example, *Whitman*, 531 US at 472–73 (noting the legislative vesting clause “permits no delegation of those powers”).

¹⁵⁰ US Const Art II, § 2, cl 2.

Second, the recipients of that limited vested power are constitutionally restricted to the president alone, the courts of law, and the heads of (executive) departments.¹⁵¹ As required, Congress specifies the delegation's terms (that is, which offices are to be appointed and by whom) in a statute, or in other words, "by Law." This requirement reinforces congressional political accountability for its delegations. To the extent that Congress complies with the Clause, it avoids uncertainty about what Congress has done and assures that there is no mismatch in congressional and presidential expectations *ex ante* and *ex post* delegation. Similarly, the president is made politically accountable. For example, Congress may make a choice to grant appointment power to a head of an executive department rather than to the president alone, thereby fixing the hierarchical level of delegation within the executive branch. Any presidential attempt to exercise that delegated authority would violate the congressional terms of delegation, which the Excepting Clause makes authoritative and controlling, and thereby belie any claim that he may exercise that authority by virtue of his executive superintendence. Of course, the president may have influence in the exercise of delegated authority, but the power is not his to exercise.¹⁵²

Finally, delegation under the Excepting Clause eliminates Congress from the appointment process, except through repeal of the delegating law. Congress does not retain a role in the exercise of power delegated. If it ever becomes dissatisfied with the delegation, it must act legislatively to revoke it.

The Excepting Clause's operation contrasts with the comparative absence of parameters governing general congressional delegation of authority to the executive. First, general delegation occurs at a mile-high level of generality. The bare bones and highly deferential requirement that Congress articulate an "intelligible principle" provides very little safeguard against overly expansive and ambiguous delegation. It results in the accretion of power in the executive and pretension of a vast administrative discretion. In contrast, the Excepting Clause authorizes only the delegation of discrete and well-defined power, *viz.*, the discretion to appoint individuals to inferior offices. Second, and most significantly for this Article, there is no constitutional textual warrant for this type of delegation. That means constitutionally based claims for vertical movement of delegated power, that is, presi-

¹⁵¹ US Const Art II, § 2, cl 2.

¹⁵² Prakash, 45 Willamette L Rev at 701-02 (cited in note 33).

dential administration and subdelegation, such as unitary executives make on the basis of the Executive Vesting Clause and the Take Care Clause, have no clear and specific constitutional textual counterweight. No constitutional text restricts delegations to only a designated set of eligible recipients and makes a congressional statute's designation definitive.

The Excepting Clause succeeds in protecting congressional interests against a delegation run awry because its drafters comprehended that a delegation is a vector that can be decomposed into a "horizontal" and a "vertical" component. The horizontal component describes the interbranch movement of power from one coequal branch to another. The vertical component relates to the assignment of the power and duties to a particular office located somewhere along the executive hierarchy. Presidentialization and subsequent presidential subdelegation of governance to advisors raises the specter of their diminished accountability. The exercise of delegated power becomes diffused but without the benefit of political transparency. The power to secure or fix the delegated rulemaking authority to particular offices helps assure that Congress enjoys its part of the bargain in the delegation tradeoff.

III. HOW CONGRESS MIGHT RESPOND TO THE CZAR PHENOMENON

This Article's analysis does not imply that the judicial, rather than the political, process is the best tool for Congress to respond to the czar phenomenon and the skirting of congressional checks. Indeed, a variety of political tools are available to Congress to police what might often otherwise be a nonjusticiable dispute about what the Appointments Clause requires. This Article addresses only two of these tools.

First, Congress could use control of spending to insist on confirmation of, and oversight over, individuals otherwise designated as "purely advisory" non-officer employees. Congress authorizes several assistants to the president and vice president,¹⁵³ including an effectively blank check for up to \$1 million for the president to appropriate "in his discretion" to "unanticipated needs," which may be spent to cover the salaries of personnel,¹⁵⁴ including personnel said to be "purely advisory." Used restrictively rather than permissively, this power of the purse

¹⁵³ 3 USC §§ 105–107.

¹⁵⁴ 3 USC § 108.

could curtail presidential reliance on paid policy advisors who are not Senate confirmed.¹⁵⁵

Very recently, Congress attempted such a budgetary response to the czar phenomenon. Section 2262 of “the Department of Defense and Full-Year Continuing Appropriations Act of 2011” specified that no funding made available by the act “may be used to pay the salaries and expenses” for four designated “czar” advisory positions.¹⁵⁶ Unfortunately, it is difficult to assess the efficacy of this particular check because it was largely empty—but symbolic—congressional chest thumping. All four of the advisory positions were already vacant at § 2262’s enactment, due either to prior resignation or transfer to another post.¹⁵⁷ Thus, the exercise of the budgetary check eliminated no existing personnel. It did, however, prevent the president from prospectively filling the named posts. Section 2262 did not claim to prohibit the president from seeking advice on particular subjects; it eliminated only specifically named “czar” positions.

This faint-hearted use of the budgetary check elicited an assertive, if not ambiguous, presidential signing statement. Citing Article II authority, President Barack Obama signed § 2262 into law but insisted that he had a constitutional “prerogative to obtain advice that will assist him in carrying out his constitutional responsibilities, and do so not only from executive branch officials and employees outside the White House, but also from advisers within it.”¹⁵⁸ He further stated, “[l]egislative 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 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.”¹⁵⁹ Accordingly, the President, without further elaboration, purported to adopt a construction of § 2262 to avoid “abrogat[ing]

¹⁵⁵ My congressional testimony proposed such a course. See *Examining Czars*, 111th Cong, 1st Sess at 17 (cited in note 1) (testimony of Prof Tuan Samahon).

¹⁵⁶ Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub L No 112-10 (West 2011).

¹⁵⁷ Robin Bravender, *President Obama to Ignore ‘Czar’ Ban* (Apr 17, 2011), online at <http://www.politico.com/news/stories/0411/53342.html> (visited Sept 12, 2011). A prior House amendment had contemplated cutting five additional advisory posts. See H AMDT 89 to HR 1, 112th Cong (2011) (proposed by Rep Steve Scalise).

¹⁵⁸ Statement on Signing the Department of Defense and Full-Year Continuing Appropriations Act, 2011, 2011 DCPD No 00263, 1 (Apr 15, 2011).

¹⁵⁹ *Id.* at 2.

these Presidential prerogatives.”¹⁶⁰ Precisely what statutory interpretation the president adopted to avoid the alleged constitutional infirmity is unclear; his prepared statement offered none.¹⁶¹

Further, the signing statement failed to articulate a clear constitutional rationale for the President’s objection. Charitable interpretation of the signing statement would avoid viewing it, where possible, as implausibly asserting a presidential, constitutional prerogative to have executive advisors mandatorily funded by Congress, all by virtue of the President’s asserted need for advice on the faithful execution of the laws under the Take Care Clause.¹⁶² Such a wild-eyed claim would analogously imply a constitutional congressional obligation to fund armies and navies simply because Article II makes the President Commander-in-Chief of the Army and Navy. Instead, the President might be understood as anticipatorily and more modestly claiming that Congress could not prevent him from seeking particular advice from advisors who are *not* governmentally bankrolled.¹⁶³ Even still, this reading is strained where the President purported to now adopt a saving statutory construction (whatever that may have been), thereby suggesting that the present statute offended the President’s advisory prerogative. That claim, staking out a constitutional entitlement to *internal* White House personnel advisors, is at odds with the terms of the Opinions Clause. Although the President has a discretionary power to “require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices,” the scope of that power extends *only to principal officers who the Senate has confirmed* to provide their advice, that is, an “opinion.” This requirement may reflect a Senate concern that the President’s regular advisors be Senate vetted. Furthermore, the Constitution limits presidential authority to seek their advice for those subjects germane to the offices for which they were confirmed. Pending the executive branch’s elab-

¹⁶⁰ *Id.*

¹⁶¹ Perhaps the President intended to suggest that the congressional enactment did not prevent him from receiving advice on the subjects that were formerly within the bailiwick of the eliminated posts. On that account, the statute merely prevented the funding of the particularly styled posts from this particular funding source.

¹⁶² Roderick M. Hills, Jr., *What’s Really Wrong with President Obama’s “Czars” Signing Statement?* (PrawfsBlawg Apr 17, 2011), online at <http://prawfsblawg.blogs.com/prawfsblawg/2011/04/whats-really-wrong-with-president-obamas-czars-signing-statement.html> (visited Sept 12, 2011).

¹⁶³ *Id.*

oration of the Obama signing statement's rationale or disclosure of the justifying memorandum,¹⁶⁴ it will be difficult to assess the strength of the President's claim and, in its face, the constitutional efficacy of congressional budgetary measures.

Second, Congress could enact legislation to confront the problem of excessive delegation—the headwaters of the czar problem identified by this Article in Parts I.A and II. As previously argued, the czar problem originates with attempted congressional delegation of rulemaking authority to particular executive offices below the president. That vertical component of the delegation—specification of the hierarchical level within the executive branch where Congress contemplates the delegated power will be exercised—is insecure when set only by a statute. In contrast to Excepting Clause delegations, Congress legislates the vertical component without any constitutionally explicit authority backing its specification of an office “below” the president as the recipient. This insecurity becomes particularly acute when, as occurs during presidential administration, the president claims directory authority under Article II and then redelegates Congress's intelligible principle to his preferred White House agents, the “czars.”

On this account, Congress can lessen or eliminate the czar problem by tackling it at the initial source of delegation. Although it is unlikely that Congress would willingly embrace a nondelegation doctrine (such that it would commit itself to legislating in the first instance with greater particularity),¹⁶⁵ Congress could adopt a proposal similar to the recently proposed “Regulations from the Executive in Need of Scrutiny” (REINS) Act.¹⁶⁶ Sections 801 and 802 would require congressional and presidential approval of proposed “major” agency rules prior to the rules taking effect. This approach would provide Congress with a constitutionally permissible legislative veto of rulemaking, including (potentially) instances where the president's czars exercised directory authority over an agency. The REINS Act would not violate the bicameralism and presentment require-

¹⁶⁴ In response to the Author's FOIA request, the OLC withheld a responsive memorandum concerning § 2262 on the basis that it was subject to the deliberative process privilege, 5 USC § 552(b)(5). Letter from Paul P. Colborn to Tuan Samahon (unpublished letter July 25, 2011) (on file with U Chi Legal F).

¹⁶⁵ Douglas H. Ginsburg and Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U Pa J Const L 251, 252 (2010) (advocating return to nondelegation as “a necessary corollary of the unitary executive”).

¹⁶⁶ Regulations From the Executive in Need of Scrutiny Act of 2011, HR Rep 10, 112th Cong.

ments emphasized by the Court in *INS v Chadha*.¹⁶⁷ Instead, it would comply with the “single, finely wrought and exhaustively considered” lawmaking procedure,¹⁶⁸ helping “ensure[] transparency” and thereby political accountability while “prevent[ing] a Congressional review process from unduly delaying needed regulatory initiative[s].”¹⁶⁹ This legislative approval prior to major rules taking effect would allow Congress a back-end check to agency rulemaking possibly directed by advisors carrying out presidential administration.

Either of these two approaches (or their combination)—the power of the purse and forcing a congressional vote on rulemaking resulting from presidential administration—represents a viable strategy to address the accountability and oversight challenges czars present to Congress. The oversight challenges are unlikely to disappear over time. Indeed, they are likely to grow. Whether Congress elects to address them with these tools remains to be seen.

IV. CONCLUSION

The headwaters of a czar’s authority are Congress’s horizontal delegations of rulemaking authority from itself over to the executive branch pursuant to an intelligible principle. This delegated authority, which may have been statutorily designated for a particular executive agency and office as the intended recipient, does not remain anchored below the president in the executive hierarchy. Presidentialization of this statutory authority, or presidential administration, transfers the delegated power “up” to the Executive Office of the President. Pursuant to a vertical intelligible principle, the president may then redelegate “down” to his preferred agents, including, controversially, non-Senate-confirmed personnel such as White House staff also known as “czars.” Although the president invokes the fiction that these personnel are “purely advisory” employees not governed by the Appointments Clause, a czar’s functional finality belies that

¹⁶⁷ *INS v Chadha*, 462 US 919 (1983).

¹⁶⁸ *Id* at 951.

¹⁶⁹ The REINS Act – Promoting Jobs and Expanding Freedom by Reducing Needless Regulations: Hearing before the Subcommittee on Courts, Commercial and Administrative Law of House Committee on the Judiciary, 112th Cong, 1st Sess 83 (2011) (statement of Prof Jonathan Adler). Professor Adler, who testified in favor of the REINS Act, observed its close similarity to an earlier proposal of then-Harvard administrative law professor Stephen Breyer. *Id* at 83–84. See also Stephen Breyer, *The Legislative Veto After Chadha*, 72 Geo L J 785, 793–96 (1984).

claim. The president delegates authority to his agents pursuant to a vertical intelligible principle, and they may act under either implied or apparent authority.

The difficulties inherent in delegation of general lawmaking power are avoided by the Excepting Clause, which authorizes limited congressional delegation to the president alone or to departmental heads. It recognizes that delegation has a vertical as well as a horizontal component and permits Congress to specify, with a specific constitutional warrant, that certain executive branch officers shall receive the delegated authority, notwithstanding presidential pragmatic or constitutional pretenses to the contrary. This Excepting Clause power to assign appointive authority to executive agency heads secures Congress's interest in the delegatory tradeoff. Unfortunately for Congress, no parallel provision authorizes congressional delegation of rulemaking authority, or provides for pinpointed delegation to agency heads below the president.

Two congressional responses to the use of czars in presidential administration may compensate, in part, for the lack of any explicit constitutional authority to designate any agency office other than that of the president as a recipient of delegated power. The budgetary check and legislative back-end adoption of rulemaking (with presentment to the president) allow Congress to check the use of czars and the agency work product that may result from their place in presidential administration.

