Revolt Against the Czars: Why Barack Obama’s Staffing Critics Are (Mostly) Wrong

José D. Villalobos, University of Texas at El Paso
Justin S. Vaughn, Cleveland State University
From the Editor

This edition of the PRG Report finds presidency scholars exploring the world of unilateral (or nearly unilateral) presidential powers. We begin with two (count them!) articles from the firm of Pfiffner, Villalobos, and Vaughn dealing with staffing of the executive branch, specifically the supposed proliferation of “czars” in the Obama White House. Then, John Burke provides some useful historical context to understand President Obama’s nomination of Elena Kagan to the Supreme Court. Tobias Gibson, working with two of his students, questions the true strength of unilateral powers, using the promise to close the detention facility on Guantanamo Bay as an example. Finally, the Ruckmans provide some useful information and data sources for researching executive clemency. All five of these articles deal with presidential powers typically seen as close to absolute, with four of them focusing on the current administration. This is an excellent example of how the PRG Report can serve as a venue for the dissemination of data, analyses, and perspectives in a very timely fashion. I hope you find these articles, as well as the book and journal scans, interesting and informative.

This edition of the PRG Report also marks my valedictory effort. After two and a half years and five issues, my term as editor is coming to a close. I want to thank the members of the PRG Board of Directors for giving me the opportunity to serve as the editor, and the members of the PRG as a whole for supporting this publication with your articles and other contributions. It is my pleasure to announce that Mel Laracey has agreed to assume the role of PRG Report editor beginning in the fall of 2010. Mel is Associate Professor of Political Science at the University of Texas at San Antonio -- thus solidifying South Texas control over this publication. He is the author of Presidents and the People: The Partisan Story of Going Public. He received his PhD from the University of Michigan, as well as his J.D. with honors, and he has an M.P.A. from the Kennedy School of Government at Harvard University. Prior to joining academia, Mel worked as a lawyer and public administrator. Mel will be looking to all of us to continue supporting the Report with our articles, teaching spotlights, and other work. He can be reached at Melvin.Laracey@utsa.edu.

Thanks for your support.

David A. Crockett
PRG OFFICERS

President
Jeffrey E. Cohen
Fordham University
Department of Political Science
441 East Fordham Road
Bronx NY 10458
cohen@fordham.edu

Vice President & President Elect
Mary Stuckey
Department of Communication
Georgia State University
Box 4000
Atlanta, GA 30302-4000
joumes@langate.gsu.edu

Secretary/Treasurer
Stephen Weatherford
University of California, Santa Barbara
Department of Political Science
Mail Code 9420
Santa Barbara, CA 93106-9420
weatherford@polsci.ucsb.edu

2010 Program Chair
Richard Conley
University of Florida
Department of Political Science
309 Anderson Hall
Gainesville FL 32611
rconley@ufl.edu

Past President
Charles E. Walcott
Virginia Polytechnic Institute
Department of Political Science
528 Major Williams Hall - 0130
Blacksburg VA 24061
cwalcott@vt.edu

BOA R D OF d I R E C TO R S:

Randall Adkins (2008-2011), University of Nebraska, Omaha, radkins@unomaha.edu
Meena Bose (2009-2012), Hofstra University, meenekshi.bose@hofstra.edu
Lara Brown (2008-2011), Villanova University, lara.brown@villanova.edu
Lilly Goren (2007-2010), Carroll College, lgoren@carrollu.edu
Christopher Kelley (2009-2011), Miami University of Ohio, kevelleycs@muohio.edu
David Lewis (2009-2012), Vanderbilt University, david.e.lewis@vanderbilt.edu
Janet Martin (2009-2012), Bowdoin College, jmartin@bowdoin.edu
Ken Mayer (2007-2010), University of Wisconsin at Madison, kmayer@polisci.wisc.edu
Kevin McMahon (2007-2010), Trinity College, kevin.mcMahon.1@trincoll.edu
Jeffrey Peake (2007-2010), Bowling Green State University, jpeake@bgsu.edu
Steven Schier (2008-2011), Carleton College, sschier@carleton.edu
Wayne Steger (2008-2011), DePaul University, wsteger@depaul.edu
Justin Vaughn (2008-2011), Cleveland State University, js.vaughn@csuohio.edu
Jose Villalobos (graduate student, 2008-2011), Texas A&M University; 2009- UT El Paso, jdvillalobos2@utep.edu
Shirley Anne Warshaw (2007-2010), Gettysburg College, swarshaw@gettysburg.edu
David Yalof (2009-2012), University of Connecticut, david.yalof@uconn.edu
David Crockett (Ex Officio), Trinity University, dcrocket@trinity.edu
Martha Joynt Kumar (Ex Officio), Towson University, joyntkumar@aol.com

PRG REPORT

The PRG REPORT is published twice annually on behalf of the Presidency Research Section of the American Political Science Association.

The PRG REPORT serves the scholarly community in presidential and executive politics. The editor of the Report welcomes your submissions and ideas.

Editor:
David. A. Crockett
Department of Political Science
Trinity University
One Trinity Place
San Antonio, TX 78212
Phone: (210) 999-8344
Fax: (210) 999-8320
dcricket@trinity.edu
Editor Gary E. Bugh and colleagues consider questions concerning democratization of the presidential electoral system in *Electoral College Reform: Challenges and Possibilities* (Ashgate Publishers). The volume brings together new research on an array of issues related to electoral reform, including reasons for change, issues surrounding a constitutional amendment, effects of the Electoral College on political campaigns, and possibilities for extra-constitutional reform. The authors consider both the Federalists’ vision of balanced representation and a more democratic and equality-based ideal. These competing frameworks, perhaps more than any other factor, may account for centuries of indecision on this key issue. Below is the list of contributors and chapters:

George C. Edwards III – Foreword

Gary E. Bugh – Representation in Congressional Efforts to Amend the Presidential Election System

Michael T. Rogers – “A Mere Deception – A Mere Ignus Fatus on the People of America”: Lifting the Veil on the Electoral College

Michael J. Korzi – “If The Manner of It Be Not Perfect”: Thinking Through Electoral College Reform

Jeffrey M. Stonecash – The Electoral College and Democratic Responsiveness

Gary E. Bugh – The Challenge of Contemporary Electoral College Reform

Mark J. McKenzie – Systemic Biases Affecting Congressional Voting On Electoral College Reform

Brian J. Gaines – Compact Risk: Some Downsides to Establishing National Plurality Presidential Elections by Contingent Legislation

James P. Melcher – Exploring the Difficulties of Electoral College Reform at the State Level: Maine and Nebraska Lead the Way

Jody C. Baumgartner and Rhonda Evans Case – Comparative Presidential Selection: A Cautionary Tale

Robert M. Alexander – Lobbying the Electoral College: The Potential for Chaos

Brendan J. Doherty – Electoral College Incentives and Presidential Actions: A Case for Reform?

Robert W. Bennett – Current Electoral College Reform Efforts Among the States

Paul D. Schumaker – The Good, the Better, the Best: Improving on the ‘Acceptable’ Electoral College

Burdett A. Loomis – Pipe Dream or Possibility? Amending the US Constitution to Achieve Electoral Reform
The cornerstone of the public presidency is the ability of the White House to influence, shape, and even manipulate public opinion. Ultimately, although much has been written about presidential leadership of opinion, we are still left with many questions pertaining to the success of presidential opinion leadership efforts throughout the modern presidency. What is still missing is a systematic, sequential approach to describe empirical trends in presidential leadership of public opinion in order to expand on important scholarly queries, to resolve empirical disputes in the literature, and to check the accuracy of conventional political wisdom on how, when, and under what conditions presidents lead public opinion.

In *The Provisional Pulpit*, I develop a simple theory of presidential leadership, arguing that presidential messages are more likely to be received if there are fewer countervailing agents or messages to contradict the president’s message. Using a comprehensive data set spanning 1953 to 2001 and archival data at each presidential library, several strategic communication tactics through which the president might influence temporary opinion movement are examined. Among the many interesting findings, key revelations show that presidential use of nationally televised addresses is the most consistently effective strategy to enhance presidential leadership, but the effect is lessened for later serving presidents. Strategies involving domestic travel never positively affect leadership, while televised interactions with the media always negatively affect leadership success.

I conclude, based upon the findings presented in the book, that the “bully pulpit” is largely provisional for modern presidents. The cumulative results imply that presidents can momentarily lead public opinion with particular tactics and that the conditions enhancing leadership are partially in their control, suggesting presidential capability to strategically lead public opinion. The more the president can avoid the political echo chamber associated with partisan battles or communications, the better the chance the president has to lead public opinion.

*The Provisional Pulpit* adds an important layer of understanding to the issue of how and under what conditions presidents lead public opinion. All modern presidents clearly attempt to lead public opinion; often, due to factors outside their control, they fail. This book is an exploration into how and when they succeed.

Brandon Rottinghaus is an assistant professor of political science at the University of Houston. He received his PhD from Northwestern University.
Within several months of his inauguration, President Obama had appointed a number of “czars” to oversee policy development of his major priorities. The term “czar” is an informal term, favored by the press, used to indicate a member of an administration who is designated by the president to oversee an area of public policy. For instance, Carol Browner (head of EPA in the Clinton administration) was appointed to oversee administration agencies concerned with energy and climate change, including the White House Council on Environmental Quality, EPA, and the departments of Energy, Defense, and Interior. In announcing his choice of Browner, Obama described the role that he expected White House czars to play; she would provide “cooperation across the government” and ensure “my personal engagement as president” in environmental policy. He said that she would have authority to “demand integration among different agencies; cooperation between federal, state and local governments; and partnership with the private sector.”

Lawrence Summers (Treasury Secretary in the Clinton administration) was appointed to guide the administration’s economic policy team which included Treasury Secretary Timothy Geithner, OMB Director Peter Orszag, Council of Economic Advisers chair Christina Romer, and senior economic adviser Paul Volcker. Health care reform was a major administration priority, and during the transition when Obama asked former Senate leader Tom Daschle to be secretary of Health and Human Services, Daschle insisted that he also be designated as the White House czar of health care reform. His demand for this unique designation reflected Daschle’s understanding that the real action in policy making would take place in the White House rather than in cabinet departments. But when Daschle withdrew his nomination because of tax problems, Obama appointed Nancy-Ann DeParle to be White House health czar and former Governor of Kansas, Kathleen Sebelius, to head HHS.

In addition, there were czars for urban affairs, auto industry restructuring, financial bailouts, terrorism, drug control, and Native American affairs. By one count, Obama had even more “czars” than the Romanovs, the Russian royal family that dominated Russia from 1613 to 1918, which produced 18 monarchs. This proliferation of czars reflects the reality that many functions that used to be performed by Cabinet Secretaries have, over the past half century, been drawn into the White House. Obama, however, appointed more specific policy coordinators than previous presidents had.

In February 2009, Senator Robert Byrd even wrote a letter to President Obama, complaining that the designation of the many czars undermined accountability and the Constitution. “The rapid and easy accumulation of power by White House staff can threaten the Constitutional system of checks and balances. At the worst, White House staff have taken direction and control of programmatic areas that are the statutory responsibility of Senate confirmed officials.” But Byrd’s fears were not the main problem with the multiplying czars. The president is accountable for administration policy, and cabinet secretaries can testify about programs. Technically, White House staffers do not have authority for policy implementation, but merely advise the president. In reality, however, in so far as White House staffers are seen as speaking for the president, the czars carry a lot of weight.

The term “czar” has no generally accepted definition within the context of American government. It is a term loosely used by journalists to refer to members of a president’s administration who seem to be in charge of a particular policy area. For my purposes, the term “czar” refers to members of the White House staff who have been designated by the president to coordinate a specific policy that involves more than one department or agency in the executive branch; they do not hold Senate-confirmed positions, nor are they officers of the United States.

Article II Section 2 of the Constitution says that the president “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Officers of the United States.” The positions held by these officers (PAS – “Presidential Appointment with consent of the Senate”) are created in law and most of them exercise legal authority to commit the United States government to certain policies (within the law) and expend resources in doing so.

In contrast, members of the White House staff are appointed by the president without Senate confirmation (PA). They are legally authorized only to advise the president; they cannot make authoritative decisions for the government of the United States. There is a parallel between the concepts of “line” and “staff” in the U.S. military. Staff personnel can advise line officers, but only line officers can make authoritative decisions, such as hiring and firing personnel or committing budgetary resources.

For practical purposes, however, staff personnel may have considerable “power” or influence, as opposed to authority. But this power is derivative from the line officer for whom they work. Thus White House staffs may communicate orders from the president, but they cannot legally give those orders themselves. In the real world, of course, White House staffs often make important decisions and give orders, but the weight of their decisions depends entirely on the willingness of the president to back them up.

**Growth of the White House Staff**

Both the advantages and disadvantages of White House czars are illustrated by the significant growth of the White House staff in the Modern Presidency. Although presidents have always had advisers and confidants in the White House, the formal White House staff was established in 1939 when Congress gave Franklin Roosevelt authority to create the Executive Office of the President and hire six formal White House staffers. The expected
role of the White House staff was articulated by the classic statement of Franklin Roosevelt’s Brownlow Committee in 1937:

These aides would have no power to make decisions or issue instructions in their own right. They would not be interposed between the president and the heads of his departments. They would not be assistant presidents in any sense. . . . They would remain in the background, issue no orders, make no decisions, emit no public statements. . . . [T]hey would not attempt to exercise power on their own account. They should be possessed of high competence, great physical vigor, and a passion for anonymity.

Despite the fact that these precepts have gone by the wayside and the White House staff now includes hundreds of people, some of whom enjoy high public visibility and wield significant power, the norms established in the Brownlow Committee Report still define the ideal for White House aides.

Over the following decades, presidents initiated major changes in the size and scope of their staffs. Dwight Eisenhower created the position of chief of staff to the president and began to institutionalize the White House. John Kennedy, after the Bay of Pigs debacle, told McGeorge Bundy to put together “a little State Department” in the White House that would consider national security policy from his own perspective rather than through the narrower lenses of the Departments of State and Defense. The Assistant to the President for National Security Affairs (national security advisor) has played major roles in every presidential administration since then. It reached its zenith of power when Henry Kissinger held that position at the same time he was Secretary of State in the Nixon and Ford Administration.

When Richard Nixon came to office, his distrust of the executive branch bureaucracies led him to expand considerably the White House staff. In addition to increasing the number of White House staffers in the White House Office, he created the position of domestic policy adviser and designated John Ehrlichman to be its director. Subsequent presidents have continued to use these White House positions and to create new ones to meet their needs.

A certain amount of the centralization of policy control through expanding staff in the White House was inevitable and useful. Executive branch departments and cabinet secretaries necessarily and reasonably view national policy from their own perspective, and they often clash with other departments over the formulation and implementation of presidential policies. These conflicts and differing perspectives must be resolved and integrated by presidents, but someone short of the president must be able to narrow the range of alternatives for the president to consider. This coordination role is the most important role of the White House staff; and talented people are necessary to do the job. That being said, too much centralization and too many White House staffers can impair effective presidential leadership. White House staffers are ambitious people, and may try to use the president’s power as their own. Thus the White House staff must be carefully policed and kept on a short leash.

The Appropriate Role of Czars

This brings the focus back to White House czars. Presidents designate czars in order to coordinate policy making across different departments and agencies. They thus play essential roles and lift the burden of coordination from the president. They help reduce the range of options to the essentials necessary for presidential decision. But if the number of czars proliferates, they can clog and confuse the policy making process. In addition to coordinating policy among departments and agencies, someone then must coordinate the czars and their access to the president. Czars may also create layers of aides between the president and departmental secretaries. Too many czars can result in managerial overload.

From the president’s perspective, czars can symbolize presidential priorities and can provide a direct link to a specific policy. But a proliferation of czars can merely replicate the divisions already present in the departments and agencies of the executive branch. A large White House staff with many czars must be disciplined and coordinated by the president’s chief of staff, a position used by every president since the Nixon administration.

Perhaps the greatest challenge that the use of czars presents to coherent policy making is the question: who, short of the president, is in charge of any specific policy domain. Conflict will abound, and members of Congress as well as other national leaders may be confused as to the locus of authoritative decisions. When this happens in foreign policy, as it has at times in recent decades, foreign leaders do not know who speaks for the president: the national security adviser or the secretary of state. In addition, a too active czar can pull problems into the White House that could be settled at the cabinet level. Only those issues that are central to a president’s policy agenda should be brought directly into the White House; others should be delegated to the cabinet secretaries who have responsibility for their implementation.

From the czar’s perspective, the title can be a mixed blessing. The czar enjoys the prestige and perks of being on the White House staff. He or she gets national news coverage and has the opportunity to exercise leadership and sometimes power. On the other hand, czars are often frustrated because they are supposed to be in charge of policy, yet they do not have authority commensurate with their responsibilities. Although a czar may have the spotlight and the president’s ear in the short term, he or she cannot enforce decisions on departments and agencies. Unlike cabinet secretaries, czars control neither personnel appointments nor budgets. For these they must depend on cabinet secretaries, and if they disagree with the cabinet secretary, they are at a disadvantage. They might appeal to the president to back up their decisions, but presidents have limited time, and czars can go back to that well only so many times. Persons who have been designated the “drug czar,” the director of the Office of National Drug Control Policy, have thus had mixed success in their efforts to coordinate harmful substance policy across the executive branch. The Secretary of Homeland Security has more resources at her command than does the Assistant to the President for Homeland Security. The Director of National Intelligence, though not on the White House staff, has had similar disadvantages in dealing with the Department of Defense and the CIA.

From the perspective of the department secretary, the presence of White House czars is most often frustrating. Throughout the modern presidency White House staffs have been the natural enemy of cabinet secretaries. Each vies for the president’s ear, and each resents the other’s “interference.” White
House staffers enjoy proximity to the president, see the president often, and can drop everything else in order to focus on whatever policy the president is considering. Cabinet secretaries, in contrast, must worry about managing their departments and the many policies for which they are responsible. Absent a close relationship with the president, cabinet secretaries are often at a disadvantage in securing presidential attention, and they often resent a czar who seems to be interposed between them and the president.

Aside from policy czars, President Obama clearly wanted to keep policy development closely within the White House. When Attorney General Eric Holder used his delegated authority on detainee policy to decide to prosecute 9/11 suspects in Article III courts near New York City, he was quickly reined in by the White House staff. The administration’s health care policy, though it ceded early legislative drafting to Congress, was brought into the White House for the endgame. HHS Secretary Kathleen Sebelius admitted to Congress that she was not in charge of policy: “I am not a principal in the negotiations, nor is my staff.” But neither was health care “czar” Nancy-Ann DeParle in charge. Chief of Staff Rahm (Rahmbo) Emanuel directed administration policy for the president. National Security Adviser James Jones played a central role in administration policy, but he did not overshadow the secretaries of state and defense, as Henry Kissinger had done in previous administrations. Thus during the first year of the Obama administration, White House czars did not seem to use their influence in a heavy-handed manner. Nevertheless, cabinet secretaries sometimes chafed at Rahm Emanuel’s exercise of power in the president’s name.

Managing the Presidency

In the real world, presidents must balance their desire for centralized control with the managerial imperatives for delegation. No president can do an effective job without talented people on the White House staff. Yet if the president allows White House staffers to shut out cabinet secretaries, he or she will not be exposed to the crucial perspectives that cabinet secretaries provide: institutional memory, an operational point of view, and a broader political sensitivity than a single czar can provide. Thus the question of the best balance comes down to presidential judgment and managerial insight. Some czars, such as the National Security Advisor, are clearly necessary. And major presidential policy priorities must be coordinated from the White House. Secondary issues should be pushed down to the departmental level.

A czar, seen as a symbol of presidential priorities, can be useful for that purpose and not pose an impediment to clear lines of policy making. But a czar who is charged with policy coordination and who uses his or her influence to undercut cabinet secretaries can create confusion and undermine effective policy making. So the real question of the impact of czars must be judged by the roles they play and their approach to their responsibilities rather than merely counting their numbers.

Thus insofar as President Obama’s czars take active roles in policy making (as opposed to advising), attempt to shut out cabinet secretaries, and exercise power in their own name, they dilute authority and confuse the chain of command. But if they work closely with cabinet secretaries and help coordinate policy advice to the president, they can be very useful. So the effect of czars and their usefulness depends on their behavior. That said, the larger the White House staff and the more czars that the president designates, the more likely the White House will be difficult to manage, and relations between cabinet secretaries and White House staff will be strained.

James P. Pfiffner is University Professor of Public Policy at George Mason University. His most recent books are Power Play: The Bush Presidency and the Constitution (Brookings 2008) and Torture as Public Policy (Paradigm Publishers 2010). This article is drawn from his testimony before the Senate Committee on Homeland Security and Governmental Affairs in October 2009.

October 21, 2009 - Photo by Chip Somodevilla/Getty Images North America. JPEG.
REVOLT AGAINST THE CZARS: WHY BARACK OBAMA’S STAFFING CRITICS ARE (MOSTLY) WRONG
José D. Villalobos and Justin S. Vaughn

Not long after Barack Obama began the process of staffing his administration – an always daunting and unceasing task for a new president, but one particularly onerous given the incredible policy challenges the nation faced – critical voices began raising concerns about the degree to which he was delegating decision making authority. Opponents in the Republican Party apparatus and from both sides of the congressional aisle put forward questions of concern about unaccountable advisors, executive power, political transparency, and the subversion of congressional authority. The administration, largely unwilling to engage in the debate, allowed the opposition to define the issue. By the first summer, political columnists and television pundits had their newest target du jour: the proliferation of “czars” in Obama’s administration.

The service of “czars” is not, of course, a new phenomenon; the practice of employing these super-aides dates back to the administration of Franklin Delano Roosevelt. What is new is the increasing tendency for trusted staffers with large policy portfolios to be labeled “czars.” Importantly, it should be noted that the Obama Administration has not formally hired a single “czar” – as former White House Communications Director Anita Dunn (2009) noted, “Just to be clear, the job title ‘czar’ doesn’t exist in the Obama administration.” Instead, the label has been assigned informally and somewhat inconsistently, with the allegations featuring the largest number of alleged “czars” typically coming from the president’s staunchest political rivals.

What the Critics Are Saying

Complaints about the alleged prevalence of “czars” in the Obama administration boil down to a pair of separate arguments. The first of these is primarily rhetorical and entirely political; it concerns the actual usage of the word “czar.” In a delightfully absurd misapplication of history, many of the president’s critics attribute the alleged proliferation of “czars” in the new administration to his affinity for socialism, linking the administrative staffing practice with the history of the Soviet Union (though forgetting the fact that the revolution was against the czarist regime, not on its behalf). More historically savvy critics dodge this gaffe. For example, according to U.S. Senator Russ Feingold (2009), “I should note that while the term ‘czar’ has taken on a somewhat negative connotation in the media in the past few months, several presidents, including President Obama, have used the term themselves to describe the people they have appointed. I assume they have done so to show the seriousness of their effort to address a problem and their expectations of those they have asked to solve it. But historically, a czar is an autocrat, and it’s not surprising that some Americans feel uncomfortable about supposedly all-powerful officials taking over areas of the government.”

Although Feingold’s comments refer to the semantics of the issue, his larger concern is about executive authority and the constitutionally prescribed balance of powers. This broader and more substantive dimension forms the second argument opponents of Obama’s staffing actions make when they raise the “czar” charge. In particular, they are concerned that the president is accumulating undue power and establishing a “parallel government” that undermines the role of Congress, especially the U.S. Senate (Goler 2009). In reality, however, this is a debate over whether the president can delegate his constitutional authority to those who work beneath him. The extent to which a president chooses to delegate is within his own discretion, so long as it is within the limits put forward by the Constitution. So what are the constitutional issues applicable to the president’s appointment of—and delegation of authority to—such executive branch personnel?

The Appointments Clause and Congressional Oversight of “Czars”

The Appointments Clause of the U.S. Constitution governs the president’s appointment of officers. It notes that officers (i.e. “principal” or “superior” officers) of the United States are to be appointed with the advice and consent of the Senate, unless the Congress by law vests the appointment of inferior officers in the president alone (U.S. Constitution, Article 2, Section 2, Clause 2). Today, principal officers are often referred to as “PAS” (Presidential Appointments with Senate confirmation) personnel, some of which have also been referred to using the “czar” term and others not. In the case of President Obama, ten of his appointees referred to as “czars” have been confirmed by the Senate (Dunn 2009; see Table 1 below). Such positions with Senate confirmation are created by statute and have full legal authority to make policy decisions with the president’s consent.

With regards to “inferior” officers, there are two main categories. One category includes inferior officers who report to a Senate confirmed officer “who Congress has given the power to prescribe duties for underlings” and “are housed within parts of the government that are subject to open records laws like the Freedom of Information Act” (Feingold 2009; see also Edmond v. United States 1997). Presidents may appoint these officials in concert with a cabinet secretary or perhaps through executive order. A majority of Obama’s czar personnel fall into this category (as did most of George W. Bush’s czars) and are not constitutionally problematic so long as they refrain from usurping authority or making policy decisions that Congress has explicitly set aside for their respective Senate confirmed principal officers. Therein, such inferior officers lack full legal authority and should not engage in actions such as rule-making, issuing regulations, approving expenditures, or otherwise authoritatively interpreting laws. Although such officials at times volunteer to testify before Congress concerning their actions, general oversight of these
officials is indirect and holding such officials accountable for any wrongdoing may be difficult if the president invokes executive privilege to keep them from testifying. In theory, such concerns may be assuaged by the fact that such officials need only to act in concert with their superior officers. In practice, however, a lack of transparency and congressional oversight can be cause for concern.

The other category of inferior officers includes those housed within the White House that answer directly to the president and are appointed without the advice and consent of Congress. These personnel fall outside the purview of Congress yet merit particular scrutiny when it comes to the kind of authority they may seek to wield at the behest of the president’s political agenda. As former presidential aide David Gergen puts it, when Congress observes a noticeable spike of such personnel, “it naturally begins to worry that a lot of authority has been taken away and stripped of the Cabinet” (Hornick 2009). Barack Obama has anointed a small number of these personnel as “czars,” providing little information about their positions and the kind of authority they may hold (see Feingold 2009).

Despite a formal request made by Senator Russ Feingold in October 2009, the Obama administration refused to send a witness to testify before a congressional hearing to address constitutional concerns and answer questions regarding the kind of authority that has been delegated to such personnel. The administration’s refusal to participate on the panel highlights the reality that such executive branch personnel are exempt from any meaningful congressional oversight. Critics have subsequently decried this decision as a violation of Obama’s campaign promise to maintain transparency in his administration. Although increased transparency could be helpful in alleviating the concerns of critics and setting the record straight on the misperceptions concerning the “czar” label, the fact remains that unlike principals or inferior officers that fall under the guise of the Appointments Clause, other subordinate staff lie largely outside the purview of the other branches of government. Indeed, as former presidential aide Bradley H. Patterson (2009) puts it, “It would be unthinkable that the Law Clerks of the Supreme Court should be in any way accountable to the president or to the Congress; it would be unthinkable that the appointments of any of the personal legislative or committee staff here at the Capitol should be approved by the White House. And likewise vice versa.”

### Obama in Historical Context

In looking at Obama’s first year in office, it is apparent that the criticism surrounding the use of the “czar” label is, as we have said, primarily rhetorical and entirely political—it is not an official title for anyone, simply a label that is at times assigned informally. Historically speaking, a noticeable increase in the informal application of the label “czar” has been observed under the Bush administration and carried over to Obama’s term. Prior to Bush and Obama, only a handful or fewer personnel were

### Table 1: President Barack Obama’s Senate Confirmed “Czars”

<table>
<thead>
<tr>
<th>Name</th>
<th>Czar Title</th>
<th>Official Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>Herb Allison</td>
<td>“TARP Czar”</td>
<td>Treasury Assistant Secretary for Financial Stability</td>
</tr>
<tr>
<td>Adm. Dennis Blair</td>
<td>“Intelligence Czar”</td>
<td>Director of National Intelligence</td>
</tr>
<tr>
<td>Ashton Carter</td>
<td>“Weapons Czar”</td>
<td>Assistant Secretary of Defense for Acquisition, Technology, and Logistics</td>
</tr>
<tr>
<td>Aneesh Chopra</td>
<td>“Technology Czar”</td>
<td>OSTP Associate Director</td>
</tr>
<tr>
<td>David J. Hayes</td>
<td>“California Water Czar”</td>
<td>Deputy Interior Secretary</td>
</tr>
<tr>
<td>John Holdren</td>
<td>“Science Czar”</td>
<td>Assistant to the President for Science and Technology and OSTP Director</td>
</tr>
<tr>
<td>Gil Kerlikowske</td>
<td>“Drug Czar”</td>
<td>Director of National Drug Control Policy</td>
</tr>
<tr>
<td>Douglas Lute</td>
<td>“War Czar”</td>
<td>Assistant to the President/Deputy National Security Advisor for Iraq and Afghanistan</td>
</tr>
<tr>
<td>Cass Sunstein</td>
<td>“Regulatory Czar”</td>
<td>OMB Administrator of the Office of Information and Regulatory Affairs</td>
</tr>
<tr>
<td>Jeff Zients</td>
<td>“Performance Czar”</td>
<td>OMB Deputy Director</td>
</tr>
</tbody>
</table>

*Holdover from George W. Bush’s administration
typically referred to as “czars” within a given administration; Nixon had an energy czar, G.H.W. Bush had the first drug czar, etc. George W. Bush’s administration (perhaps out of Bush’s affinity for the use of nicknames) applied the term to about three dozen of his aides. Obama has followed suit in informally applying the term to a similar number of his own personnel, as well as to a few holdovers from the Bush years. Thus, rather than Barack Obama’s staffing actions amounting to a unique and potentially revolutionary practice, it is more a continuation of previous practices.

Labels aside, one may consider more seriously the criticism concerning how best to insure that inferior officers (or otherwise “employees”) serving under the president—czars or not—be held accountable for their actions under the law. Critics may have a point that Obama’s administration could benefit in some ways (e.g. in alleviating public concerns) by being more transparent on the issue, particularly concerning the amount of influence being delegated to inferior officers. However, barring hard evidence of wrongdoing and without any concrete intervention coming from Congress or the courts, the administration maintains the right to executive privilege in overseeing such personnel without additional inter-branch supervision and oversight.

Conclusion

Rather than view the alleged proliferation of “czars” in recent presidential administrations as a threat to the constitutional order, we consider it part of an ongoing reorganization of the presidential branch designed to maximize leadership capacity as presidents continue to take more responsibility for policy development and implementation, a phenomenon driven as much by congressional abdication as presidential zeal for power. The real debate lies over whether the president can delegate his constitutional authority to those who work beneath him. We posit that presidents may choose to delegate within their own discretion, so long as it is within the limits put forward by the Constitution.

References


José D. Villalobos is Assistant Professor of Political Science at the University of Texas at El Paso. Justin S. Vaughn is Assistant Professor of Political Science at Cleveland State University.
Elena Kagan’s nomination to the Supreme Court raises an interesting question: what are the “proper” qualifications for a member of that esteemed body? She has been a law professor at the University of Chicago and at Harvard (the latter also as dean of its law school, as we know). She served in the White House legal counsel’s office: the chief advisory unit to the president on legal, constitutional, and ethical issues. She was a White House deputy domestic policy advisor (both of the latter under President Clinton). She was nominated to serve on the D.C. court of appeals (although her appointment was blocked by Senate Republicans).

Impressive? Yes. But is it enough given that she has never served on the federal bench? Nor indeed has she served in any judicial capacity (save as solicitor general, if one wishes to count that as the “tenth justice,” as some have noted). Is bench experience necessary for a justice of the Supreme Court? All of the current members of the Court have served at the federal appellate level, and the last nominees without any judicial experience were Lewis Powell and William Rehnquist, almost four decades ago. Still, at least 38 of the 111 members of the Court through history have lacked prior judicial experience – whether federal, state, or local – including 21 nominated since 1900 plus 8 of all 17 chief justices.¹

FindLaw lists 40 members of the Court without judicial experience: http://supreme.lp.findlaw.com/supreme_court/jus-tices/nopriorexp.html (accessed May 15, 2010). Henry Abraham puts the total at 38 (Henry J. Abraham, Justices, Presidents, and Senators: A History of Supreme Court Appointments from Wash-ington to Bush II, 5th ed., (Lanham, MD: Rowman & Littlefield, 2008) 40, 42-43). FindLaw includes John Jay, John Rutledge, John Marshall, and Samuel Freeman Miller in its list, while Abraham lists them as having some judicial experience; Abraham, however, lists James Wilson and Morrison Waite as lacking prior judicial experience, while FindLaw does not. Abraham appears correct on Rutledge (he served on the South Carolina Court of Chancery and later as Chief Justice of its Court of Common Pleas and Sessions) and Jay (he served as Chief Justice of the New York Supreme Court of Judicature, 1777-1778), while Wilson and Waite were apparently both without prior experience (although Wilson was Avocat Général for maritime and commercial causes, appointed by French government, 1779-1783 and Waite had been U.S. “representative” to a Geneva international arbitration court on Civil War claims). Others are less clear: Samuel Freeman Miller was a justice of the peace and apparently served on a Kentucky county court, while Marshall served as “recorder” of the Richmond City Common Hall and Hustings Court (which handled minor civil and criminal cases) from 1785-1788, a position that may have enabled him to sit as a “magistrate” on the court. Also, Abraham notes that only 33 members (now 34 with Sonia Sotomayor) had prior service in lower federal courts (Abra-ham, 49).

Let’s set the bar high: this is, after all, the Supreme Court. What background makes not just for an “adequate,” or a “good,” but for a “great” member of the Court? I won’t offer my own assessment – determining “greatness” is, after all, a subjective enterprise – but I will rely instead on four studies. The first is a 1970 survey of experts conducted by Albert P. Blaustein and Roy M. Mersky.² They found twelve greats: John Marshall, Joseph Story, Roger B. Taney, John Harlan the elder, Oliver Wendell Holmes, Charles Evans Hughes, Louis Brandeis, Harlan Fiske Stone, Benjamin Cardozo, Hugo Black, Felix Frankfurter, and Earl Warren.


Finally, in a 2009 piece in American History magazine, legal scholar Jonathan Turley offers nine “greats”: Marshall, Hughes, Warren, Brandeis, Brennan, Holmes, Harlan the elder, Black, and Story.¹ All told, this is a dance, surely, of the jurisprudentially distinguished.

So what might we conclude? First, we have five “great” Supreme Court justices agreed upon by all four: Marshall, Holmes, Brandeis, Black, and Warren. Interestingly, none were federal appeals court judges or had prior federal judicial experience at any level. To be fair, however, we should perhaps give Chief Justice Marshall a break. For almost all of the 19th Century, no nominee to the Supreme Court could claim federal appeals court experience: that level of the federal court system did not exist until 1891.\(^5\) As for the rest, Warren was a county prosecutor, then California’s attorney general and ultimately governor, plus the GOP nominee for vice president in 1948. Brandeis was a private attorney and litigator for progressive causes. Hugo Black was a sitting member of the U.S. Senate. He could claim at best a brief tenure as a local police court judge. He would turn out as one of the Court’s great civil libertarians, despite his earlier flirtation with the Ku Klux Klan. Only Holmes previously had been on the bench, having served on the Massachusetts Supreme Judicial Court.

Let’s lower the bar a bit. How about those who make it among three out of the four lists of the ranked greats? Again, no federal experience is present. Frankfurter was a professor at Harvard Law, but not dean of the law school there, much less solicitor general. Joseph Story predates the creation of the appeals court; although much distinguished, he too had no judicial experience before joining the Court in 1811 (he would serve until 1845). John Harlan the elder had briefly served as an elected county judge, but very early in his career. Charles Evans Hughes was a former governor of New York before he joined the Court. In 1916, he resigned from the bench in his effort to challenge Wilson for the presidency. Hughes lost in California by 3773 votes, by the way; had he won, he would have had an Electoral College majority. For Hughes, however, the Court would loom in his future: he served as President Harding’s secretary of state, then as Chief Justice from 1930 until 1941. Only Brennan and Cardozo really had careers on the bench, but, like Holmes, in state supreme courts (New Jersey and New York, respectively).

So who are we left with among the greats? Five remain. Chief Justice Roger Taney, the first Catholic on the Court, had been Andrew Jackson’s Attorney General, but lacked prior judicial experience. Harlan Fiske Stone was Attorney General under Coolidge when nominated to the Court; he was subsequently elevated from associate to Chief Justice under FDR (an interesting mix there, by the way). William O. Douglas was chair of the Securities and Exchange Commission under FDR; he is the longest serving justice to date. Chief Justice William Rehnquist was an assistant attorney general before he joined the Court as an associate justice; only later was he elevated to Chief Justice. Only Sandra Day O’Connor – a former GOP leader of the Arizona state senate – had extensive judicial experience prior to appointment.

But, again, O’Connor’s bench-time was just at the state level (she was a county judge, then a state appeals court justice – but not on the Arizona supreme court, however). None served in the federal judiciary. Other Supreme Court notables also never served on any bench: Robert Jackson (we shall undoubtedly hear of his concurring opinion in the Youngstown steel-mill seizure case in Kagan’s confirmation hearings) and Lewis Powell (the Bakke affirmative action case).

For the whole lot: you judge the judicial results. Is prior federal judicial experience necessary? Greatness – at least by the above measures and to date – suggests not. Remarkably, federal judicial experience is quite missing; indeed judicial service of any sort is, at best, quite limited. As for former solicitors general (a position created in 1870), there have been four on the Supreme Court: William Howard Taft (under Benjamin Harrison), Stanley Reed and Robert Jackson (both under FDR), and Thurgood Marshall (under LBJ). I will leave it you to judge their qualifications – and subsequent records – as members of the Supreme Court.

---

\(^5\) Prior to the Judiciary Act of 1869, the federal appeals level – below the Supreme Court – consisted of a federal district court judge plus members of the Supreme Court “riding circuit.” The 1869 act created circuit-level judgeships (which had also briefly existed under the Judiciary Act of 1801, quickly repealed, and a single circuit judgeship established for California from 1855-1863). The Judiciary Act of 1891 created the modern circuit court of appeals system.

---

John P. Burke is professor of political science at the University of Vermont. He is the co-author of Advising Ike: The Memoirs of Attorney General Herbert Brownell, among other books.

---

\(^6\) Warren, by the way, had agreed to be nominated as solicitor general by Eisenhower in July 1953 and then take the next available seat on the Court; the subsequent death of Chief Justice Fred Vinson opened that position for him (and Ike honored his pledge of appointing Warren to the next available seat, whether at the associate or Chief Justice level). I must add that, contrary to conventional wisdom, there was no “deal” for this arrangement at the 1952 GOP convention in order to secure Eisenhower’s nomination. Warren did not release his delegates and Eisenhower secured the nomination without them (Gov. Harold Stassen’s delegates put Ike over the top; his convention floor leader was a young Minnesota attorney – and future Chief Justice – Warren Burger). My sense is that Eisenhower recognized that Warren wanted to move on from Sacramento – and that Ike wanted him as part of his “team” – but that Herbert Brownell’s appointment as Attorney General precluded a logical spot. Nor was Warren much interested in serving as secretary of the interior (another position considered for him), hence the solicitor general offer and pledge of a subsequent Supreme Court appointment. In addition, Chief Justice John Roberts served as deputy solicitor general and Justice Samuel Alito served as assistant to the solicitor general. Only Stanley Reed and Thurgood Marshall moved directly to the Court from the solicitor general post.
Rethinking Unilateral Powers in the Obama Administration
Alexandra D. Johnson, Meredith Gibbons, and Tobias T. Gibson

Perhaps the most famous definition in presidential studies is Richard Neustadt’s definition of (presidential) power as the “power to persuade” (Neustadt 1990). New lines of presidential scholarship have stepped away from this notion, however, and begun research on the unilateral powers of the president. Book length works look to deepen the understanding of the presidential veto (Cameron 2000), executive orders (Mayer 2001; Howell 2003) and proclamations, directives, and signing statements (Cooper 2002). These works, and several others (Black, et al. 2007), are built on the assumption that unilateral powers allow the president without the assistance of others to complete a task (see the title of Howell’s book Power Without Persuasion).

Importantly, there has been a line of research in recent years that has questioned the impact of unilateral actions on the part of the president as “power.” Dickinson (2008) reasserts the importance of Neustadt’s central claim that presidential powers (constitutional or statutory tools of the president, such as the veto, pardon, or executive orders) and presidential power (the ability of the president to influence action) be considered as separate, albeit related, entities. According to Dickinson, presidential scholars often overstate the impact of unilateral powers, due to the “misconstruction” of Neustadt’s central thesis (297).

Likewise, former Assistant Attorney General, Office of Legal Counsel Jack Goldsmith cautions against presidents taking action without regard to the coordinate branches. In his influential book The Terror Presidency (2007), Goldsmith uses the George W. Bush presidency’s view of the unitary president as a cautionary tale against the president seeking to “go it alone.” According to Goldsmith, had Bush, and those within his administration, sought congressional approval in many actions taken in the War on Terror, the presidency would have been strengthened, which was a major goal of Bush and Vice President Dick Cheney. However, the presidency was largely left weakened by the end of the Bush administration, due to the efforts of Congress and the Supreme Court to reassert their authority over the president.

This essay is an attempt to lend contemporary support to those who question the wisdom of equating the unilateral powers of the president to an increasingly powerful executive, devoid of any checks by coordinate branches, and levels, of government. As such, we take this opportunity to offer a timeline of sorts of President Barack Obama’s attempt to close the enemy combatant holdings at Guantanamo Bay, Cuba. We believe that this effort is an example of what Dickinson was describing when he wrote:

the phrase ‘unilateral action’ is somewhat misleading in the context in which scholars touting its effectiveness often employ it. The words imply that when utilizing administrative directives, the president enacts policy unilaterally, in contrast to the legislative process in which policy is made collectively by working through Congress. However, there is extensive evidence demonstrating that policymaking via administrative action is no less subject to bargaining and compromise than is policymaking through the legislative process (296).

The bargaining necessary for policy enactment can take place within the executive branch (see Gibson 2006 for one example), as well as attracting the attention of those parties required for implementation: bureaucrats, interest groups, the public (Dickinson, 296).

In the next section, we see that despite President Obama taking unilateral action by issuing an executive order to close detention centers at Guantanamo Bay, Cuba on January 22, 2009, within a year, the actual process of moving toward closing has been anything but unilateral.

Obama Struggles to Close Gitmo

On President Obama’s first day in office he issued an executive order to close Guantanamo Bay by January 22, 2010. This action would include releasing and transferring detainees. At the time the closing was announced, the camp had roughly 245 detainees. Sixty of them, if freed, could not return to their home country (“U.S. general sees difficulties in closing Guantanamo,” USA Today).

Lawmakers are nervous about the fallout of this executive order because known murderers could be released by civilian courts due to tainted evidence and other abuses (Page 2009). The Senate vowed to block all funding to shut down the prison due to their resistance to the closure (Parsons and Barnes 2009). Keeping to its word, on May 19, 2009, the Senate voted 90-6 to refuse the financing, to the tune $80 million, to move the prisoners until a satisfactory plan was given to the Senate on what would happen with the detainees (“Senators Reject Closing Gitmo Without Plan,” USA Today).

As a result of the congressional spending limit, President Obama began looking in Illinois, Michigan, and Kansas as potential sites for housing the detainees (Parsons 2009). Federal officials surveyed a Standish, Michigan high security prison and a military penitentiary in Fort Leavenworth, Kansas to assess both locations as possible sites for housing the detainees currently in Guantanamo Bay. Local opinion favored sending the detainees to Standish if it would keep the area prison open. However, there is concern that the area would become a terrorist target (“Officials assess Michigan Prison,” Topeka Capital Journal).

In contrast, elected officials from Kansas do not appear to be interested in allowing the detainees to be shifted to their state. Kansas Congresswoman Lynn Jenkins declared that “Kansans do not support bringing terrorist detainees to Fort Leavenworth” (“Jenkins: Don’t close Gitmo,” Topeka Capital Journal). Senator Sam Brownback invited the president to visit Fort Leavenworth to show him that detainees should not be moved to Kansas (“Brownback invites Obama for tour,” Topeka Capital Journal). Brownback took the additional step of introducing legislation that would require President Obama to initiate a study of the safety of moving the detainees to Kansas. According
to the senator, such a study “would reveal that Fort Leavenworth is not an appropriate location for housing terrorist detainees. Housing detainees at Fort Leavenworth is unwise and unsafe” (Brownback, January 21, 2009). Republican representatives, from three of four Kansas congressional districts, are not in favor of the closure and will vote for an amendment that would block the use of federal funding to close Guantanamo Bay (“Jenkins: Don’t close Gitmo,” Topeka Capital Journal).

Because other states are not welcoming his proposed relocation of suspected terrorists from Cuba, President Obama is interested in moving Guantanamo detainees to Thomson Correctional Center in Thomson Village, Illinois. The center would be used to house a limited number of detainees. Thomson Village has been suffering in the poor economy and would benefit from the purchase of the correctional center. The operation of the prison would create an estimated 3,800 jobs. Although Illinois Governor Pat Quinn and U.S. Senator Richard Durbin, both Democrats, are “major promoters” of the Guantanamo detainees being moved to Illinois (Parsons and Long, December 15, 2009), the move is not necessarily forthcoming.

While President Obama is certainly interested in the Thomson Correctional Center as the site to move Guantanamo detainees, the Saint Louis Post-Dispatch reported on March 19, 2010, (two months after President Obama’s projected closure of the Guantanamo Bay terrorist holding facility) that the Obama administration had set its sights on purchasing the Thomson prison facility “with or without detainees” (Parsons 2010). Moreover, according to Parsons, “Unless Congress changes the current law, Guantanamo inmates couldn’t be transferred to the U.S. for any purpose other than trial” (our emphasis; see also Skiba and Nicholas 2009).

Additionally, other constraints may bind the president’s ability to close the Guantanamo Bay detention center and shift the detainees to the United States mainland, regardless of location. The Obama administration requested, during an “informal conversation,” funding from the House Appropriations Committee to purchase the Thomson facility. The committee “ balked” at the request, leading to a shift in White House tactics. The administration said that it would seek the funding through more formal methods in the upcoming budgetary process (Skiba and Nicholas).

Conclusion

This short treatment is meant to serve as a starting point for conversation among presidential scholars. Our contention is that scholars who focus on the unilateral powers of the presidency often fail to properly address other actors in the political system. The president does not issue an executive order in a vacuum, and this case study offers evidence that executive orders are not self-executing.

The study of the president’s unilateral powers is an important topic to understanding the American presidency. However, by largely ignoring the fact the president exists within a system of checks and balances and separated powers, scholars of the presidency who do not give the co-equal branches of the federal government their due look past important aspects of the American experiment.

References


This essay is born from discussions in the American Presidency course at Westminster College, taught in the Fall semester of 2009. As such, the student contributors, those who provided the catalyst for this discussion, are listed first. Without them, this essay would never have been written. Tobias T. Gibson is Assistant Professor of Political Science at Westminster College.
Article II, Section 2 of the U.S. Constitution gives the president the power to grant “Reprieves and Pardons” for offenses against the United States. As such, the pardon power has allowed presidents to “check” the decision making of both the legislative and judicial branches of government. Presidents have granted more than 28,000 individual acts of clemency and many thousands more have benefitted from general pardons, or “amnesties.” If anything, the significance of the power has increased in recent years as a result of a booming prison population, disproportionate sentences resulting from mandatory minimum statutes and three strikes laws, the fact that federal parole was abolished in 1984, and because the United States remains among those nations that utilize the death penalty.

Even the most casual student of American history and politics can also recognize that pardons have been related to – if not a critical feature of – many major events. When one reads about the Whiskey Rebellion, Fries’s Rebellion, the Battle of New Orleans, the Alien-Sedition Acts, the Lincoln assassination, the Civil War and Reconstruction, one cannot help but also read about the pardon power. When one reads about major political scandals, like the Aaron Burr conspiracy trial, the Oregon land frauds, the Whiskey Ring scandal, Tea Pot Dome, the Sugar Trust frauds, and the Truman tax scandals, one also reads about pardons. It is thus quite curious that a generation of political scientists which has lived through Ford’s pardon of Richard Nixon, the Vietnam amnesty debate, Watergate pardons, Iran-Contra pardons, Whitewater, FALN, Marc Rich, and Scooter Libby has given so little attention to systematic analysis of the pardon power.

A 1939 report by the U.S. Attorney General notes:

In this country there has never been an adequate treatment of the subject of pardon. There cannot even be found a comprehensive history of pardon, notwithstanding the important role this institution has played in the development of our legal ideas. Lack of penetrating study has led to misinterpretation, obscurity and contradiction in the law itself. All in all, the law of pardon has been a neglected orphan, allowed to grow without the benefit of careful grooming which has been accorded other branches of law.

Two years later, political scientist W. H. Humbert responded to the call with what remains, to this day, the standard work, The Pardoning Power of the Presidency (American Council on Public Affairs). Unfortunately, there followed almost seven decades of general neglect in the discipline. To be sure, Gerald Ford’s pardon of Richard Nixon produced a handful of essays in less prestigious journals, but a steady stream of controversies related to federal executive clemency failed to prompt anything remotely similar to Humbert’s great effort.

Last year’s appearance of The Presidential Pardon Power (Jeffrey Crouch, University of Kansas Press) was significant, not only because it is only the second book ever written on the pardon power by a political scientist (and only the third written on the topic by anybody), but also because it amplifies recent and significant changes in the landscape of clemency studies, especially those which are more empirical in nature. In this article, we will discuss some of the primary sources for researching federal executive clemency. We will also provide information on the availability of secondary data sets and inform readers of recent developments at the PardonPower blog which should be of interest to presidency scholars.

Clemency Warrants

When presidents grant individual acts of clemency (as opposed to group pardons or amnesties), several “warrants” are created. For most of our nation’s history, two were created for each individual exercise of the pardon power. The first warrant was sent to the clemency recipient and the second (a copy) was retained in the State Department (and, later, the Department of Justice). Beginning with the Eisenhower administration, at third document – called a “master warrant” – preceded the original pair. Presidents started signing “master warrants” featuring a mere list of the names of clemency recipients. The U.S. Attorney General, or some other “representative” of the President, then signed the associated individual warrants.

One can find copies of individual clemency warrants signed from 1789-1893 in the six rolls of National Archives Microfilm Set T967, formally entitled “Pardons and Remissions.” The warrants stretch from the administration of George Washington to the first term of Grover Cleveland, but the set also includes warrants of arrest and extradition, death notices, official announcements, and some correspondence. In many instances, the handwriting is quite difficult to read and, on occasion, one is even forced to make intelligent guesses. On top of that, the materials are not always in the best of order. While T967 is “public domain,” to the best of our knowledge no one has ever taken the effort to summarize its contents, or even any significant portion of the data therein. The National Archives’ Textual Reference Branch reports no one has ever created a “descriptive pamphlet” for the set.

In 1994, P.S. Ruckman, Jr. completed a summary of the contents of T967 by creating separate spreadsheets for each administration. Each spreadsheet contains the date each clemency warrant was issued, the year of the president’s term, the name of the recipient(s), the state from which the case originated, the violation(s) involved, and the form of clemency that was extended. The effort took a little over two years as there were more than 6,500 warrants in the microfilm. Professor Ruckman has willingly shared these data with researchers and they have also

1 Clemency can take a variety of forms including: pardons, conditional pardons, commutations of sentence, conditional commutations of sentence, respites, reprieves, remissions of fines and forfeitures and amnesties (or group pardons).
been featured in *USA Today*, *Congressional Quarterly*, and on the popular PBS television show *History Detectives*.

In 1995, Ruckman gathered data on an additional 10,000 clemency warrants, signed between 1894 and 1933, from the *Annual Report* of the U.S. Attorney General. The *Report* is printed by the government printing office, hard bound, and, of course, significantly less burdensome to work with than early, handwritten warrants. While Professor Humbert’s classic work mines aspects of the *Report*, most of his effort focuses on aggregate data and makes no distinctions between administrations. Ruckman created spreadsheets which record the date of each warrant, the year of the president’s term, the name of the recipient(s), the state from which the case originated, the violation(s) involved, and the form of clemency that was extended.

The *Annual Report* discontinued the reporting of individual warrants after 1933 and, since then, has provided only aggregate statistics. However, the Office of the Pardon Attorney, in the Department of Justice, retained bound copies of the individual warrants that were issued from 1934-1995. In the early months of 2001, the U.S. Pardon Attorney released a set of CDs which contained images of over 10,000 individual warrants signed from 1934 forward.

A research team at the University of Chicago, headed by the Honorable Richard A. Posner and William M. Landes, began to summarize the newly released warrants with a spreadsheet format very similar to Professor Ruckman’s. In 2002, the Chicago group traded data sets with Professor Ruckman and, to the best of our knowledge, Posner, Landes, and Ruckman are the only three individuals with a comprehensive, researchable data set of individual acts of clemency from 1789 to present.

The comprehensive data set has already been a rich source of information and has provided a solid empirical basis for original research. We now know, for example, that most presidents have granted the highest number of pardons in the fourth and last year of the term. On the other hand, the last-minute clemency bonanza of the Clinton administration was fairly freakish. Only four or five presidents have engaged in a relative flurry of pardons so near the end of the term, and none of them did so as dramatically as Clinton. We also know that most presidents have granted their first pardon well within one hundred days of taking office. The slowest presidents have been George Washington, John Adams, Bill Clinton, George W. Bush, and Barack Obama.

In the 1800s, the largest number of pardons was granted in the month of July. Since the 1930s, and especially since the 1960s, the largest number of pardons has been granted in the month of December. Indeed, over the last forty years, one out of every two presidential pardons or commutations of sentence has been granted in the month of December.

**The PardonPower “Report”**

In January of 2008, the PardonPower Blog at (http://PardonPower.com) began highlighting media coverage of the exercise of clemency at both the state and federal levels. A secondary goal of the blog has been to direct members of the national news media to political scientists for commentary on pardons and to provide any and all potential commentators with quality historical data on the exercise of clemency. Such data are provided in the form of charts, graphs, research papers, and blog entries.

As the administration of George W. Bush came to an end, it occurred to the Editor of the PardonPower Blog and the authors of this overview that there was a great opportunity to both increase our understanding of the exercise of clemency in that administration and further encourage interest in empirical research on the pardon power. Our general idea was to summarize Bush’s use of the clemency power, once again, in spreadsheet form. The Bush spreadsheet would, however, make use of clemency warrants and the Department of Justice’s “public affairs notices” in order to provide additional information related to the impact/significance of acts of clemency and legal representation and party capability.

More specifically, the Bush spreadsheet will provide more specific information on sentences: whether or not prison time was involved and, if so, how long, whether or not some form of supervised release was involved and, if so, how long, and whether or not fines and/or restitution were involved and, if so, how much. An additional column will calculate the length of time between sentencing and clemency.

The spreadsheet will also provide information on whether or not clemency recipients were represented by legal counsel, the name(s) of their lawyer(s), and/or the name of each law firm. We will also note whether or not legal council was located in the Washington D.C. area or in one of the states. We may also be able to distinguish between lawyers who are solo practitioners and those who are in a firm setting.

As our plan has it, we will finish a “Final Report” on the Bush administration sometime in July of 2010. It will be based on the individual data in the spreadsheet we have described above and aggregate data that can be found in the Attorney General’s Annual Report. We will then make both the “Report” and the associated data sets available to any and all interested persons. After we have had time to review our effort and have given

---

2 U.S. Court of Appeals for the 7th Circuit, Senior Lecturer in Law, University of Chicago.
3 Clifton R. Musser Professor of Law and Economics, Emeritus, and Senior Lecturer in Law, University of Chicago.
6 http://PardonPower.com/charts/FirstPardon.mht
8 http://PardonPower.com/charts/month69.htm
9 To date, the blog has had over 160,000 visitors and averages around 9,000 visits per month. Media demand for the blog is quite evident. Despite its relative youth, the PardonPower blog has been referenced by the Washington Post, Slate, Time/CNN, the Chicago Tribune, FOX News, San Francisco Chronicle, and MSNBC’s Rachel Maddow Show.
interested researchers the opportunity to look the data over and make their own suggestions, we would begin the process of creating additional “Reports” for each administration back to that of Jimmy Carter.

We have every reason to believe that members of the news media will benefit greatly from the information provided in PardonPower “Reports.” It is our hope, however, that political science instructors will consider using the data in both graduate and undergraduate classroom settings and that those with general interest in the presidency will look them over as well. In any event, we welcome all comments and suggestions.

P.S. Ruckman, Jr. is Associate Professor of Political Science at Rock Valley College. Heidi E. Ruckman is an attorney with Heyl, Royster, Volker and Allen. They can be reached at PSRuckman@aol.com and HRuckman@heylroyster.com, respectively.

10 We already have several ideas concerning legal representation that we will add to the spreadsheets of future administrations (size of firm, experience with clemency cases, etc.).


<table>
<thead>
<tr>
<th>Title</th>
<th>Author</th>
<th>Publisher</th>
<th>Pages</th>
<th>Price</th>
<th>ISBN</th>
</tr>
</thead>
<tbody>
<tr>
<td>Franklin Pierce</td>
<td>Holt, Michael F.</td>
<td>Time Books</td>
<td>176</td>
<td>$23.00</td>
<td>978-0805087192</td>
</tr>
<tr>
<td>Ohio’s Kingmaker: Mark Hanna, Man and Myth</td>
<td>Horner, William T.</td>
<td>Ohio University Press</td>
<td>360</td>
<td>$29.95</td>
<td>978-0821418949</td>
</tr>
<tr>
<td>FDR’s Funeral Train: A Betrayed Widow, a Soviet Spy, and a Presidency in the Balance</td>
<td>Klara, Robert</td>
<td>Palgrave Macmillan</td>
<td>272</td>
<td>$27.00</td>
<td>978-0230619142</td>
</tr>
<tr>
<td>A Presidency in Peril: The Inside Story of Obama’s Promise, Wall Street’s Power, and the Struggle to Control Our Economic Future</td>
<td>Kuttner, Robert</td>
<td>Chelsea Green Publishing</td>
<td>300</td>
<td>$25.00</td>
<td>978-1603582704</td>
</tr>
<tr>
<td>All But Forgotten: Thomas Jefferson and the Development of Public Administration</td>
<td>Newbold, Stephanie P.</td>
<td>State University of New York Press</td>
<td>131</td>
<td>$65.00</td>
<td>978-1438430737</td>
</tr>
<tr>
<td>Selling War in a Media Age: The Presidency and Public Opinion in the American Century</td>
<td>Osgood, Kenneth and Andrew K. Frank</td>
<td>University Press of Florida</td>
<td>342</td>
<td>$44.95</td>
<td>978-0813034669</td>
</tr>
<tr>
<td>The International Relations between the USA and the EU: George W. Bush Presidency and Iraqi Crisis in 2003</td>
<td>Przybysz, Filip</td>
<td>Lambert Academic Publishing</td>
<td>68</td>
<td>$67.00</td>
<td>978-3838344545</td>
</tr>
<tr>
<td>US Foreign Policy in Context: National Ideology from the Founders to the Bush Doctrine</td>
<td>Quinn, Adam</td>
<td>Routledge</td>
<td>240</td>
<td>$125.00</td>
<td>978-0415549653</td>
</tr>
<tr>
<td>Wanting War: Why the Bush Administration Invaded Iraq</td>
<td>Record, Jeffrey</td>
<td>Potomac Books</td>
<td>226</td>
<td>$24.95</td>
<td>978-1597974370</td>
</tr>
<tr>
<td>Bridging the Constitutional Divide: Inside the White House Office of Legislative Affairs</td>
<td>Riley, Russell L.</td>
<td>Texas A&amp;M University Press</td>
<td>224</td>
<td>$37.50</td>
<td>978-1603441490</td>
</tr>
<tr>
<td>The Provisional Pulpit: Modern Presidential Leadership of Public Opinion</td>
<td>Rottinghaus, Brandon</td>
<td>Texas A&amp;M University Press</td>
<td>328</td>
<td>$55.00</td>
<td>978-1603441872</td>
</tr>
<tr>
<td>Courage and Consequence: My Life as a Conservative in the Fight</td>
<td>Rove, Karl.</td>
<td>Threshold Editions</td>
<td>608</td>
<td>$30.00</td>
<td>978-1439191057</td>
</tr>
<tr>
<td>Executive Privilege: Presidential Power, Secrecy, and Accountability</td>
<td>Rozell, Mark J.</td>
<td>University Press of Kansas</td>
<td>259</td>
<td>$24.95</td>
<td>978-0700617135</td>
</tr>
<tr>
<td>Presidents and Political Thought</td>
<td>Siemers, David J.</td>
<td>University of Missouri Press</td>
<td>240</td>
<td>$24.95</td>
<td>978-0826218780</td>
</tr>
<tr>
<td>Kennedy vs. Carter: The 1980 Battle for the Democratic Party’s Soul</td>
<td>Stanley, Timothy</td>
<td>University Press of Kansas</td>
<td>298</td>
<td>$34.95</td>
<td>978-0700617029</td>
</tr>
<tr>
<td>Overcoming the Bush Legacy in Iraq and Afghanistan</td>
<td>Tripathy, Deepak</td>
<td>Potomac Books</td>
<td>200</td>
<td>$24.95</td>
<td>978-1597975032</td>
</tr>
<tr>
<td>Centrist Rhetoric: The Production of Political Transcendence in the Clinton Presidency</td>
<td>Velasco, Antonio de.</td>
<td>Lexington Books</td>
<td>208</td>
<td>$60.00</td>
<td>978-0739139806</td>
</tr>
</tbody>
</table>


Friedman, Jason. “Gerald Ford, the Mayaguez Incident, and the Post-Imperial Presidency.” *Congress and the Presidency*, 37 (Spring 2010): 22-44.


