

FROM CZARS TO COMMISSARS: CENTRALIZING POLICYMAKING POWER IN THE WHITE HOUSE

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INTRODUCTION

In the wake of the family separation crisis at the border in the summer of 2018, Senate Minority Leader Chuck Schumer tweeted a proposal: the Trump Administration should “appoint a Czar to break thru the bureaucracy & get these kids out of limbo & back in their parents arms.”¹ Seven years earlier, Senator John McCain used Twitter to complain President Obama had “more czars than the Romanovs,” a reference to the last Russian dynasty’s tyrannical emperors.² Despite his high number of czars, President Obama was hardly the first president to employ the use of policy czars as a management tool to centralize White House policymaking power. This centralization has carried into the Trump Administration through both the use of czars and a “shadow cabinet” built of agency “watchdogs” that monitor cabinet secretaries for loyalty.³

From czars to shadow cabinets, the increasing influence of the President over administrative action has led to great controversy amongst Congress, the media, and the public. The czar label’s tyrannical roots⁴ reflect the central concern of presidents going outside of the Senate “Advice and Consent” process required by Article II of the Constitution to appoint powerful advisors without any accountability to Congress or the public.⁵ Existing academic literature focuses on this seeming constitutional conflict, with some scholars advocating for the elimination of czars, while others argue that the lack of advice and consent leads to policymaking that occurs “outside of the ordinary, Administrative Procedure Act (APA)-delimited structure of agencies.”⁶ This paper does not seek to further any constitutional arguments regarding czars, agreeing with scholarship that accepts the constitutionality of these presidential advisors as either

¹ Chuck Schumer (@SenSchumer), TWITTER (June 24, 2018, 12:09 PM), <https://twitter.com/senschumer/status/1010917833423970304?lang=en>.

² See Toby Saul, *Death of a Dynasty: How the Romanovs Met Their End*, NATIONAL GEOGRAPHIC (July 20, 2018), <https://www.nationalgeographic.com/archaeology-and-history/magazine/2018/07-08/romanov-dynasty-assassination-russia-history> (describing how the Romanov dynasty, Russia’s last monarchy, ruled Russia as “tsars” for 300 years); John McCain (@SenJohnMcCain), TWITTER (May 30, 2009, 12:12 PM), <https://twitter.com/senjohnmccain/status/1972425520?lang=en>.

³ See Jerry Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. 549, 603 (2018) (describing President Trump’s installation of senior aides at federal agencies to monitor cabinet secretaries’ compliance with White House goals).

⁴ See *Czar*, MERRIAM-WEBSTER DICTIONARY (2018), <https://www.merriam-webster.com/dictionary/czar> (noting the term “czar” was used in imperial Russia to signify an emperor or ruler until the 1917 revolution).

⁵ See U.S. CONST. art. II, § 2 (The Appointments Clause states that the President “shall nominate, by and with the advice and consent of the Senate, shall appoint... officers of the United States.”).

⁶ Compare MITCHEL A. SOLLENBERGER & MARK J. ROZELL, *THE PRESIDENT’S CZARS: UNDERMINING CONGRESS AND THE CONSTITUTION* 7 (University Press of Kansas, 2012) (arguing that czars “offend the constitutionally based principles of separation of powers, checks and balances, and democratic accountability”) with Aaron J. Saiger, *Obama’s “Czars” for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577, 2582 (2011) (stating that President Obama’s “government of many czars... stimulated substantial interest immediately.”).

“inferior officers” or employees of the President.⁷ The constitutional issue presents a separate question from what this paper seeks to answer—how do these czars impact public administration?

This paper argues that the use of presidential czars increases White House policymaking power and impacts three key values in administrative law and public administration: expertise, efficacy, and accountability. As this centralization continues in the Trump Administration, this paper seeks to examine the use of such presidential tools by Presidents Obama and Trump in light of these normative values and proposes best practices moving forward. Part I defines “czars” and “shadow cabinets” and provides a history of the American czar to show that the use of czars reflects the increasing centralization of White House policymaking power. Part II develops a typology of the three main types of czars used by Presidents Obama and Trump—what I call “crisis czars,” “domestic agenda czars,” and “loyalty czars”—and evaluates how each category benefits and undermines expertise, efficacy, and accountability. In evaluating the tradeoffs among these values within the three types of czars, this paper argues that crisis czars best serve public administration by increasing efficacy during emergencies with an experienced leader. Domestic agenda czars present the next level of tradeoffs, as they can further expertise and efficacy when an experienced czar leads a particular domestic policy agenda. Loyalty czars pose the greatest threat to public administration by undermining the expertise and efficacy of agencies while lacking any form of accountability. Finally, Part III recommends best practices moving forward, including proposed czar timelines, legislation establishing standards for czars, and information collecting from the Congressional Research Service and watchdog groups. These proposals seek to balance the reality of centralization in White House policymaking with the need to increase expertise, efficacy, and accountability when using presidential czars.

I. THE USE OF CZARS IN PRESIDENTIAL POLICYMAKING

Since World War I, presidents have appointed czars to increase White House policymaking. Nonetheless, confusion continues regarding the definition of presidential czars. This section first describes the various definitions of presidential czars that have been offered and ultimately settles on a definition of czars as policy advisors appointed by the President to coordinate and oversee White House policy in a particular area. The shadow cabinet, defined as a group of senior aides assigned to various agencies to monitor the loyalty of cabinet secretaries, similarly reflects the centralization of White House policymaking. Next, this section examines the history of the American czar from President Woodrow Wilson to the two most recent presidents. Both recent presidencies reflect a continuation of a long-held practice for increasing White House power over domestic policy.

⁷ See U.S. CONST. art. II, § 2 (“but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone.”); *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2051 (2018) (finding an Administrative Law Judge (“ALJ”) was an inferior officer with “continuing and permanent” duties that “exercised significant authority” rather than an employee whose duties were “occasional or temporary.”); Saiger, *supra* note 6, at 2598 (arguing that a czar is not an “inferior officer” but an “at-will employee” of the President hired under “the congressional grant of power to the President to hire his own staff.”).

A. Defining “Czars” and “Shadow Cabinets”

Despite the vast media focus and controversies over czars during the Obama Administration, the term still does not have a definitive definition in American government.⁸ The *Merriam-Webster* dictionary defines a “czar” as an emperor or ruler of Russia until the 1917 revolution, with a secondary definition of “one having great power or authority.”⁹ President Trump’s use of a “shadow cabinet” similarly received a reference to a Russian “commissar,” a Soviet-era term for Communist party officials assigned to ensure the loyalty of military units.¹⁰ Broadly, presidential czars have emerged as a “means by which the White House can coordinate and control policy in areas of key concern to the President.”¹¹ This broad definition encompasses different types of White House agents that have held varying roles in different administrations, producing differing accounts of which presidential advisors actually qualify as czars.

Professor Aaron Saiger describes the conventional czar to reflect the appointment of a powerful and “somewhat autocratically-minded agent” with access to the President to accomplish an important agenda without interagency conflict or bureaucratic inaction.¹² In addition, presidents may appoint a czar as an exercise in public relations, sending the message of heroic effort without any substantive accomplishments.¹³ However, as Saiger notes, “czars’ portfolios little resemble one another, ranging as they do over vastly different policy domains, political equilibria, and policy agendas.”¹⁴ Adding to the confusion, in some instances presidents use the term themselves to describe the people they have appointed, while in others journalists loosely use the term to refer to members of a President’s administration in charge of a particular policy area.¹⁵

Other definitions for czars emphasize their apparent circumvention of the Senate confirmation process required by the Appointments Clause.¹⁶ The proposed Sunset All Czars Act

⁸ See Saiger, *supra* note 6, at 2579 (explaining “the controversies over czars yielded no definitive conclusions regarding what czars are supposed to do, how they are problematic, or whether they even constitute anything remarkable in the first instance.”).

⁹ See *Czar*, MERRIAM-WEBSTER DICTIONARY (2018), <https://www.merriam-webster.com/dictionary/czar>.

¹⁰ Lisa Rein & Juliet Eilperin, *White House Installs Political Aides at Cabinet Agencies to Be Trump’s Eyes and Ears*, WASH. POST (Mar. 19, 2017), https://www.washingtonpost.com/powerpost/white-house-installs-political-aides-at-cabinet-agencies-to-be-trumps-eyes-and-ears/2017/03/19/68419f0e-08da-11e7-93dc-00f9bdd74ed1_story.html?noredirect=on&utm_term=.78dcebba71b (describing how Pentagon staff reportedly referred to the aide assigned to supervise former Secretary of Defense James Mattis as “the commissar.”).

¹¹ Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1751-52 (2015).

¹² Saiger, *supra* note 6, at 2579-80. See also BARBARA L. SCHWEMLE ET. AL, CONG. RESEARCH SERV., R40856, THE DEBATE OVER SELECTED PRESIDENTIAL ASSISTANTS AND ADVISORS: APPOINTMENT, ACCOUNTABILITY, AND CONGRESSIONAL OVERSIGHT 1 (2014) (“When used in political science literature, the term generally refers to White House policy coordination or an intense focus by the appointee on an issue of great magnitude.”).

¹³ Saiger, *supra* note 6, at 2580.

¹⁴ *Id.*

¹⁵ See *Examining the History and Legality of Exec. Branch Czars: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 111th Cong. (2009) [hereinafter *Feingold Hearing*] (statement of Senator Russ Feingold); see also *Presidential Advice and Senate Consent: The Past, Present, and Future of Policy Czars: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 111th Cong. (2009) [hereinafter *Lieberman Hearing*] (statement of James P. Pfiffner).

¹⁶ See SOLLENBERGER & ROZELL, *supra* note 6, at 7 (defining a czar as an executive branch official “who is not confirmed by the Senate and is exercising final decision-making authority.”); Mashaw & Berke, *supra*

of 2011 emphasized this feature, defining czars as the “head of any task force, council, policy office within the Executive Office of the President, or similar office” appointed “without the advice and consent of the Senate” and serving functions which would typically be “performed or delegated by an individual in a position that the President appoints by and with the advice and consent of the Senate.”¹⁷ The Act, proposed by Republican Congressman Steve Scalise and co-sponsored by sixty Republicans, attempted to also prohibit the appropriation of funds to pay for any salaries and expenses associated with President Obama’s czars.¹⁸ While the bill failed, the Act’s definition frequently appears in scholarly articles regarding czars.¹⁹

Nonetheless, limiting the definition of czars to advisors lacking Senate confirmation would not capture the full discussion.²⁰ The “czar” title is frequently used—often by the media—to refer to Senate-confirmed presidential advisors. For example, the long famous “drug czar” serves as “Director of the Office of National Drug Control Policy” (ONDCP) as defined by statute, and is subject to Senate confirmation.²¹ While the text of the statute does not mention the phrase “czar,” reporters have continued to use the label, with one noting, “Director of the Office of National Drug Control Policy... doesn’t stand a chance against *drug czar*.”²²

As such, this paper defines czars as policy advisors appointed by the President to coordinate and oversee White House policy in a particular area, irrespective of Senate confirmation.²³ Given the media’s role in naming these officials, either the Administration or the press can assign the title of “czar.” As differentiating between Senate-confirmed and unconfirmed czars affects accountability, Part II will incorporate this distinction in examining domestic agenda czars. Ultimately, the coordinative role reflects the essential characteristic of presidential czars.²⁴

Alongside czars, this paper will also examine President Trump’s use of a shadow cabinet, defined by Professor Mashaw and Berke as a group of senior aides assigned to various agencies to monitor cabinet secretaries’ compliance with White House goals.²⁵ The aides were not subject to Senate confirmation or congressional oversight and played an early role in agency hiring, creating a foundation for Trump’s agenda before cabinet secretaries completed the Senate

note 3, at 592 (“And these “czars,” although presumably in charge of major policy areas, are not department heads requiring Senate confirmation of their appointments.”).

¹⁷ Sunset All Czars Act, H.R. 59, 112th Cong. (2011).

¹⁸ *Id.*

¹⁹ See, e.g., Mashaw & Berke, *supra* note 3, at 592; Saiger, *supra* note 6, at 2583.

²⁰ See JUSTIN S. VAUGHN & JOSE D. VILLALOBOS, CZARS IN THE WHITE HOUSE 13 (University of Michigan Press 2015) (rejecting previous attempts to create an operational definition for czars because “many of the individuals to whom presidents have referred publicly as czars would not qualify for the label” under the preceding approaches).

²¹ See 21 U.S.C. § 1702(b)(1) (2018); Saiger, *supra* note 6, at 2581. The drug czar developed from congressional efforts in the 1980s to institutionalize the national drug office in a manner that required Senate confirmation. See VAUGHN & VILLALOBOS, *supra* note 20, at 80.

²² See Randy James, *A Brief History of White House Czars*, TIME (Sept. 23, 2009), <http://time.com/3516927/history-of-white-house-czars/>.

²³ Accord Saiger, *supra* note 6, at 2583 (defining czars as officials “at work in the White House Office, tasked by the President to oversee policy in a particular substantive area, maintaining a high profile, and regardless whether they are assigned the monarchical moniker by the administration or the press”) with VAUGHN & VILLALOBOS, *supra* note 20, at 13 (“‘Czar’ is political shorthand for a special policy advisor who is appointed by the president, without congressional oversight, for the purposes of coordinating and centralizing the activities of various executive branch offices.”).

²⁴ VAUGHN & VILLALOBOS, *supra* note 20, at 13.

²⁵ See Mashaw & Berke, *supra* note 3, at 604.

confirmation process.²⁶ Their responsibilities mainly entailed reporting directly to senior White House policy advisors, keeping a “West Wing-infused attachment to the agencies.”²⁷ While Part II will also distinguish this shadow cabinet in its categories of czars, at a high level both managerial tools reflect the centralization of White House policymaking power.

B. *The History of the American Czar*

Although President Obama faced great criticism for his reliance on czars,²⁸ the use of czars dates back to World War I and continues into the current Administration. President Wilson appointed Bernard Baruch to head the War Industries Board as his “industry czar” in 1918, just one year after the final Russian czar, Nicholas II, was overthrown in the Russian Revolution.²⁹ While the term from imperial Russia served as a moniker for leaders with tyrannical tendencies, the American media began using the label for certain executive branch advisors.³⁰ President Franklin Roosevelt continued the use of czars during World War II, as the *Washington Post* reported on the sudden rush of “executive orders creating new czars to control various aspects of our wartime economy” in 1942.³¹

After a brief hiatus, the term reemerged when President Richard Nixon appointed the first “drug czar,” Jerome Jaffe, and a well-regarded “energy czar,” William E. Simon, to navigate the 1970s oil crisis.³² The drug czar—perhaps the best known of the czars—gained greater prominence under President George H. W. Bush, who appointed former Secretary of Education William Bennett to the role.³³ Moving into the twenty-first century, the use of czars increased under President George W. Bush, who heavily relied on czars post-9/11 for homeland security, national intelligence, and war, among other czars.³⁴ Thus, President Obama was not the first president to use czars to centralize policymaking power in the White House, and President Trump has only continued this practice with czars and a shadow cabinet.

C. *“More Czars than the Romanovs”: President Obama’s Use of Czars*

Following the 2008 presidential election, the battle over President Obama’s czar appointments erupted in the media and Congress. While the use of czars was not new, President Obama made nearly thirty appointments within the first year of his presidency and continued

²⁶ See Josh Dawsey & Nancy Cook, *Trump Assembles a Shadow Cabinet*, POLITICO (Jan. 24, 2017, 5:06 AM), <http://www.politico.com/story/2017/01/trumps-shadow-cabinet-234088>.

²⁷ Mashaw and Berke, *supra* note 3, at 604; *Id.*

²⁸ See, e.g., Mark J. Rozell & Mitchel A. Sollenberger, *Congress Should Deal with Unchecked Czars*, ROLL CALL (Jan. 31, 2011, 11:45 AM), <https://www.rollcall.com/news/-202978-1.html>.

²⁹ See James, *supra* note 22.

³⁰ See Kevin Sholette, *The American Czars*, 20 Cornell J.L. & Pub. Pol’y 219, 221 (2010); Ben Zimmer, *Czar Wars: How Did a Term for Russian Royalty Work Its Way into American Government?*, SLATE (Dec. 29, 2008, 11:24 AM), <https://slate.com/human-interest/2008/12/czar-how-a-term-for-russian-royalty-worked-its-way-into-american-government.html> (discussing how “kinder, gentler ‘czars’ made their way into American public life” as Communist leaders became the new dictatorial symbols).

³¹ Zimmer, *supra* note 30.

³² See *id.*; James, *supra* note 22.

³³ See James, *supra* note 22.

³⁴ See VAUGHN & VILLALOBOS, *supra* note 20, at 124.

deploying czars “far more pervasively than any previous administration.”³⁵ From Glenn Beck’s website to *Politico*, a range of media outlets maintained czar lists that even included Senate-confirmed officials.³⁶ Congressional activity perpetuated the frenzy over czars through public criticisms that Obama’s czars undermined the Constitution,³⁷ committee hearings examining the legality of czars,³⁸ and legislation such as the aforementioned Sunset All Czars Act seeking to cut the salaries of czars.³⁹ White House staff sought to diminish these controversies in various ways, including a public blog titled “The Truth About ‘Czars’” from Communications Director Anita Dunn that stated, “Just to be clear, the job title ‘czar’ doesn’t exist in the Obama Administration.”⁴⁰

Amidst the varying lists and criticisms of his czars, President Obama used czars in two key ways that stood out from his predecessors. First, he appointed more czars in the early years—even weeks—of his presidency than any past president.⁴¹ Within this high number of czars, President Obama created several new czar-led offices “designed to advance central elements of his campaign’s agenda.”⁴² In three notable cases—Carol Browner as the “climate czar,” Adolfo Carrion as the “urban affairs czar,” and Nancy-Anne DeParle as the “health czar,”—President Obama used executive orders to create a new policy office with a czar at the head.⁴³

President Obama’s other czars reflected three further notable qualities. First, several appointees included high-profile leaders known for significant expertise in their fields who often had greater experience than the secretaries for their related agencies. For example, Obama selected former Treasury Secretary Lawrence Summers to serve as the Director of the National Economic Council while Timothy Geithner, who had previously worked under Summers, served

³⁵ Saiger, *supra* note 6, at 2578; *President Obama’s “Czars,”* POLITICO (Sept. 4, 2009, 6:19 PM), <http://www.politico.com/news/stories/0909/26779.html>.

³⁶ See *Obama’s List of Czars*, THE GLENN BECK PROGRAM (Aug. 21, 2009), <https://www.glennbeck.com/content/articles/article/198/29391> (demanding the President explain if these officials were serving as a “shadow government.”); *President Obama’s “Czars,”* POLITICO (Sept. 4, 2009, 6:19 PM), <http://www.politico.com/news/stories/0909/26779.html>.

³⁷ See Anita Dunn, *The Truth About “Czars.”* WHITE HOUSE BLOG (Sept. 16, 2009, 3:21 PM), <https://obamawhitehouse.archives.gov/blog/2009/09/16/truth-about-czars> (citing remarks from Senator Lamar Alexander calling President Obama’s czars “an affront to the Constitution” and Representative Darrell Issa that czars undermine transparency and accountability).

³⁸ *Compare Feingold Hearing*, *supra* note 15 (a 2009 Senate Judiciary Committee examining the legality of executive branch czars), with *Lieberman Hearing*, *supra* note 15 (a 2011 Senate Homeland Security and Governmental Affairs Committee hearing on policy czars).

³⁹ See Sunset All Czars Act, H.R. 59, 112th Cong. (2011).

⁴⁰ Dunn, *supra* note 37. See also Letter from Gregory Craig to Senator Russell Feingold (Oct. 5, 2009), <http://theplumline.whorunsgov.com/wp-content/uploads/2009/10/feingoldletter.pdf> (a letter from the White House Counsel stating: “Neither the purpose nor the effect of these new positions is to supplant or replace existing federal agencies or departments, but rather to help coordinate their efforts and help devise comprehensive solutions to complex problems.”).

⁴¹ See *President Obama’s “Czars,”* POLITICO (Sept. 4, 2009, 6:19 PM), <http://www.politico.com/news/stories/0909/26779.html> (listing 29 presidential czars appointed by September 2009).

⁴² VAUGHN & VILLALOBOS, *supra* note 20, at 158.

⁴³ See Exec. Order No. 12835, 58 FR 6189 (1993), *reprinted as amended in* 74 FR 6979 (2009) (creating the position of Assistant to the President for Energy and Climate Change); Exec. Order No. 13503, 74 FR 8139 (2009) (establishing the White House Office of Urban Affairs); Exec. Order No. 13507, 74 FR 17071 (2009) (establishing the White House Office of Health Reform).

as the Treasury Secretary.⁴⁴ Next, Obama continued to receive legislative criticism for his appointments of the “drug czar,” the Director of the ONDCP, and the “regulatory czar,” the Administrator of the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB), even though the Senate had actually confirmed both appointees.⁴⁵ Finally, President Obama drew upon the past practice of using czars to address interagency coordination in a crisis, as seen in his appointment of lawyer and longtime political operative Ron Klain as “Ebola czar.”⁴⁶ In each of these ways, President Obama used czars to advance central parts of his domestic agenda and increase his policymaking power.

D. The Czars Continue: Czars and a Shadow Cabinet in the Trump Administration

From sustaining the use of presidential czars to establishing a shadow cabinet, President Trump has continued the centralization of presidential policymaking power in the White House. Whereas Obama spent his first year in office making an unprecedented number of czar appointees, Trump took action on Inauguration Day and started dispatching a shadow cabinet made up of Trump loyalists, serving as watchdogs as his eyes and ears over federal agencies.⁴⁷ Nonetheless, the White House began ending the use of the shadow cabinet by May 2017 due to growing tensions between the aides and Cabinet secretaries.⁴⁸

Alongside this shadow cabinet, President Trump appointed his campaign supporters and advisors as czars for two of his key domestic policy platforms: deregulation and trade. Prior to inauguration, the Trump transition team announced that billionaire investor Carl Icahn would serve as a special advisor on regulatory matters, a position that came to be known as “deregulatory czar.”⁴⁹ An early supporter of Trump’s presidential campaign, Icahn drew

⁴⁴ See Saiger, *supra* note 6, at 2577-78 (noting how this “striking and unusual style of appointment,” where the “more experienced and higher-profile policymaker” serves as czar, also characterized the selection of former Environmental Protection Agency (EPA) Administrator Browner as climate czar and her prior subordinate, Lisa Jackson, as EPA Administrator).

⁴⁵ See VAUGHN & VILLALOBOS, *supra* note 20, at 154 (stating that Representative Dan Boren (D-OK) cited Cass Sunstein as “personifying the problems with allowing unconfirmed advisers to hold powerful positions in government,” even though the regulatory czar did not fall into the category of an unconfirmed czar); BARBARA L. SCHWEMLE ET. AL, CONG. RESEARCH SERV., R40856, THE DEBATE OVER SELECTED PRESIDENTIAL ASSISTANTS AND ADVISORS: APPOINTMENT, ACCOUNTABILITY, AND CONGRESSIONAL OVERSIGHT 26 (2009) (explaining that the Paperwork Reduction Act of 1980 (PRA) established OIRA within OMB and an Administrator to head the office who is “appointed by the President, by and with the advice and consent of the Senate.”).

⁴⁶ See Mashaw & Berke, *supra* note 3, at 593 (stating that in the modern presidency, “presidential appointment of czars during the aftermath of a crisis has become increasingly commonplace.”); *All Things Considered: New “Ebola Czar” Has Political, Not Public Health, Background*, NPR (Oct. 17, 2014), <https://www.npr.org/2014/10/17/357004507/new-ebola-czar-has-political-not-public-health-background>.

⁴⁷ See Dawsey & Cook, *supra* note 26; Abigail Tracy, *Trump’s “Shadow Cabinet” Sinks into the Swamp*, VANITY FAIR (May 1, 2017, 11:11 AM), <https://www.vanityfair.com/news/2017/05/donald-trump-shadow-cabinet>.

⁴⁸ See Mashaw & Berke, *supra* note 3, at 606 (noting the shadow cabinet failed because it conflicted with the professional self-esteem of appointees); Michael Grunwald, Andrew Restuccia & Josh Dawsey, *Trump Starts Dismantling His Shadow Cabinet*, POLITICO (May 1, 2017, 5:09 AM), <https://www.politico.com/story/2017/05/01/trump-starts-dismantling-his-shadow-cabinet-237819>.

⁴⁹ See Reuters, *Donald Trump Chooses Carl Icahn as Special Adviser on Regulatory Reform*, TIME (Dec. 21, 2016), <http://time.com/4613477/donald-trump-carl-icahn-adviser>; Patrick Temple-West, *Icahn Cuts Official Ties with Trump Administration*, POLITICO (Aug. 18, 2017, 7:03 PM), <https://www.politico.com/story/2017/08/18/trump-icahn-quits-special-adviser-241804>.

immediate scrutiny due to his dual role as a regulatory advisor and a major investor in Texas oil refiner CVR Energy, and eventually resigned from the Administration in August 2017.⁵⁰ In addition, Trump appointed Peter Navarro to lead the newly formed “National Trade Council” as what came to be known as the “trade czar.”⁵¹ Navarro, an economics and public policy professor at the University of California, Irvine, worked closely with Commerce Secretary Wilbur Ross during the campaign to author Trump’s trade policies.⁵²

While President Trump’s remaining czars reflect similar titles as past czars, their quick cycles and controversies set them apart. First, while the “drug czar” label for the ONDCP director continues, four different individuals have formally and informally cycled through the position. Trump’s first nominee for the position, Representative Tom Marino, withdrew after news stories emerged regarding his efforts to pass a bill backed by the pharmaceutical industry to undercut opioid enforcement.⁵³ As the Administration continues its efforts to address the nation’s opioid crisis, the ONDCP’s reported leaders have included counselor to the President Kellyanne Conway as “opioid czar;” a twenty-four-year-old Trump campaign staffer; and former White House deputy chief of staff Jim Carroll, the current nominee who has yet to be confirmed by the Senate.⁵⁴ In addition to battling the opioid crisis, Trump channeled the crisis response of former presidents to employ and later eliminate the position of Cybersecurity Coordinator on the National Security Council, or the “cybersecurity czar.”⁵⁵ Beyond similarities and differences with the past, each of these positions holds important repercussions for how expertise, efficacy, and accountability play out in the current administrative system.

⁵⁰ See Eric Lipton, *Icahn Raises Ethics Flags with Dual Roles as Investor and Trump Adviser*, N.Y. TIMES (Mar. 26, 2017), <https://www.nytimes.com/2017/03/26/us/politics/carl-icahn-trump-adviser-red-flags-ethics.html>; Statement from Carl Icahn (Aug. 18, 2017), <https://carlicahn.com/carl-icahn-issues-statement/>.

⁵¹ See Megan Cassella, *Trump Taps China Trade Critic Navarro for New White House Post*, POLITICO (Dec. 21, 2016, 3:20 PM) <https://www.politico.com/blogs/donald-trump-administration/2016/12/peter-navarro-trade-council-232897>; David Dayen, *Trump Kicks Off the Return of the Czars*, THE NATION (Dec. 22, 2016), <https://www.thenation.com/article/trump-kicks-off-the-return-of-the-czars/>.

⁵² See Dayen, *supra* note 51.

⁵³ See Peter Baker, *Tom Marino, Drug Czar Nominee, Withdraws in Latest Setback for Trump’s Opioid Fight*, N.Y. TIMES (Oct. 17, 2017), <https://www.nytimes.com/2017/10/17/us/politics/trump-says-drug-czar-nominee-tom-marino-withdraws-from-consideration.html> (stating Marino’s withdrawal highlighted the Administration’s troubles in responding to the opioid epidemic, which Trump had promised to make one of his top priorities).

⁵⁴ See Editorial Board, *Kellyanne Conway Might as Well Be ‘Opioid Czar’*, N.Y. TIMES (Nov. 30, 2017), <https://www.nytimes.com/2017/11/30/opinion/kellyanne-conway-opioid-czar.html>; Robert O’Harrow Jr., *Meet the 24-year-old Trump Campaign Worker Appointed to Help Lead the Government’s Drug Policy Office*, WASH. POST (Jan. 14, 2018), https://www.washingtonpost.com/investigations/meet-the-24-year-old-trump-campaign-worker-appointed-to-help-lead-the-governments-drug-policy-office/2018/01/13/abdada34-f64e-11e7-91af-31ac729add94_story.html; Politico staff, *Trump to Nominate Jim Carroll for ‘Drug Czar’*, POLITICO (Feb. 9, 2018, 6:46 PM), <https://www.politico.com/story/2018/02/09/jim-carroll-drug-czar-trump-402080>.

⁵⁵ See Eric Walsh, *Trump Scraps Cyber Czar Post After First Appointee Leaves: White House*, REUTERS (May 15, 2018, 7:15 PM), <https://www.reuters.com/article/us-usa-cyber-whitehouse/trump-scraps-cyber-czar-post-after-first-appointee-leaves-white-house-idUSKCN1IG3GG>.

II. CONSIDERATIONS ON PRESIDENTIAL POLICYMAKING THROUGH CZARS AND SHADOW CABINETS

While the use of czars by Presidents Obama and Trump reflects an overall increase in centralizing White House policymaking, these advisors can be divided into three categories: crisis czars, domestic agenda czars, and loyalty czars. This section examines these types of czars through three of the normative values used to assess agencies in the structure of modern federal government: expertise, efficacy, and accountability.⁵⁶ As modern society faces increasingly complex problems, expertise and institutional competence allow leaders to integrate diverse policies and balance numerous goals.⁵⁷ In addition, efficacy remains an important administrative value to react quickly to changing circumstances and implement necessary policies, especially when gridlock prevents congressional action.⁵⁸ Finally, political accountability provides an important value to ensure unelected bureaucrats still represent the national constituency through the President and can be held accountable for unpopular decisions.⁵⁹

This section examines the three main types of czars to evaluate how each type benefits and undermines these normative values. First, crisis czars best serve public administration because they increase efficacy and expertise in resolving urgent problems with an experienced leader. Next, domestic agenda czars can further efficacy with an experienced leader coordinating a particular policy issue, but can undermine the role of agencies and accountability. Finally, loyalty czars undermine all of these values by diminishing the efficacy of experienced agency leaders without any form of accountability.

A. Crisis Czars

Crisis czars can best serve the administrative state because they promote efficacy in responding quickly to complex problems with an experienced leader who sends a message of presidential action to the public. A czar's background can either benefit or undermine expertise depending on the experience of the leader addressing the problem. As national crises such as Ebola and the opioid epidemic demonstrate how problems increasingly cut across different agencies, crisis czars provide an important efficacy tool for presidents to address agency coordination and policy implementation.⁶⁰ Finally, crisis czars can further accountability more than other types of czars by serving as "an exercise in public relations" in reacting to public concerns during a crisis.⁶¹ Recent crisis czars include President Obama's Ebola czar, President Trump's cybersecurity czar, and President Trump's various drug czars addressing the opioid crisis.

⁵⁶ See LISA S. BRESSMAN, EDWARD L. RUBIN & KEVIN M. STACK, *THE REGULATORY STATE* 9-11 (Aspen Publishers 2d ed. 2013).

⁵⁷ See *id.* at 9 (noting that agencies reflect expertise through "broad access to information, specialized knowledge, and trained staff.").

⁵⁸ See *id.* at 11.

⁵⁹ See *id.* at 10.

⁶⁰ See VAUGHN & VILLALOBOS, *supra* note 20, at 174.

⁶¹ Saiger, *supra* note 6, at 2580. *But see* Telephone Interview with Ron Klain, former United States Ebola Response Coordinator to President Obama (Oct. 31, 2018) [hereinafter Klain Interview] (stating "there are better ways to send a public message" than to use a czar).

i. *Expertise*

Crisis czars can either further or undermine expertise in the administrative state depending on the background of the leader tasked to lead the crisis. A crisis czar with the requisite institutional competence can use his or her expertise to implement and balance varying goals to solve complex issues. This expertise may come from specialized knowledge of the subject matter or institutional knowledge of public administration, both of which benefit the leader of a nation's response to a crisis. Nonetheless, a czar lacking either technical experience or knowledge of government institutions can hinder expertise in solving a crisis, thus diminishing a key value of the administrative state.

A crisis czar's subject matter experience and knowledge—or lack thereof—provides the first mechanism of assessing whether such a czar furthers or undermines expertise. In the highly-technical field of cybersecurity, Robert Joyce entered the position of cybersecurity czar in the Trump Administration as a widely respected career professional with thirty years of experience in the National Security Agency.⁶² Joyce used his cyber expertise to oversee the Administration's response to major cyber incidents and lead the overhaul of the government's plan for deciding when agencies should inform technology companies about cyber flaws they discover.⁶³ His specialized knowledge thus furthered expertise in forming and coordinating policies to address a growing threat.

Crisis czars can also further expertise by bringing a different form of specialized knowledge to coordinating a national crisis response—institutional competence in public administration. White House officials emphasized that Ron Klain, a lawyer and former chief of staff to two vice presidents, would take an administrative role and report to the National Security and Homeland Security Advisors to manage the government's Ebola response.⁶⁴ Klain kept his role to coordinating the response across a variety of agencies as a “behind-the-scenes fixer” and left specific legal actions to Senate-confirmed positions.⁶⁵ This balance indicates how a crisis czar with political knowledge can bring managerial expertise to a crisis filled with policy coordination challenges while leaving subject matter decisions to agency experts. Nonetheless, members of Congress still criticized Klain's lack of public health expertise, indicating a potential preference for crisis czars: individuals with *both* administrative and subject matter expertise.⁶⁶

⁶² See Eric Geller, *Bolton Pushing to Eliminate White House Cyber Job*, POLITICO (May 9, 2018, 6:14 PM), <https://www.politico.com/story/2018/05/09/bolton-white-house-cyber-czar-523430>.

⁶³ See *id.*

⁶⁴ See Juliet Eilperin & David Nakamura, *Obama Taps Ron Klain as Ebola Czar*, WASH. POST (Oct. 17, 2014), https://www.washingtonpost.com/news/post-politics/wp/2014/10/17/obama-taps-ron-klain-as-ebola-czar/?utm_term=.1a55da316124. See also *All Things Considered: New “Ebola Czar” Has Political, Not Public Health, Background*, NPR (Oct. 17, 2014), <https://www.npr.org/2014/10/17/357004507/new-ebola-czar-has-political-not-public-health-background> (explaining that White House press secretary Josh Earnest emphasized the administrative role Klain would hold as “Ebola Response Coordinator,” stating, “What we were looking for was not an Ebola expert, but rather an implementation expert.”).

⁶⁵ Russell Berman, *A Quiet Exit for a Forgotten Ebola Czar*, THE ATLANTIC (Dec. 8, 2014), <https://www.theatlantic.com/politics/archive/2014/12/ebola-czar-ron-klain-to-depart/383554/> (describing Klain as the “designated behind-the-scenes fixer” of a crisis). For example, when the agencies realized they needed health centers to treat people with dangerous infectious diseases, Klain oversaw the policy formation on how many hospitals were needed and worked with Congress to fund the plan. But when it came to deciding which hospitals would receive these centers, a Senate-confirmed HHS Assistant Secretary ran the application process and testified before Congress. See Klain Interview, *supra* note 61.

⁶⁶ See VAUGHN & VILLALOBOS, *supra* note 20, at 174.

Nonetheless, the turmoil surrounding the Trump Administration’s candidates for opioid crisis czars indicates how these czars can undermine the expertise of agency staff and lawmakers. While Conway’s role as “opioid czar” intended to streamline government efforts and coordination among the ONDCP and the Department of Health and Human Services (HHS), members of Congress and former White House staffers criticized how Conway’s team “systematically excluded” ONDCP from opioid strategy.⁶⁷ While Conway advertised her efforts as “policy-driven,” lawmakers working on opioid policy did not see any outreach from Conway or her cabinet to coordinate policies.⁶⁸ In this way, the opioid czar reflects how crisis czars can exclude skilled agency staff and lawmakers from addressing a problem and thus undermine expertise.

ii. *Efficacy*

The coordinative function of czars greatly serves efficacy during times of crisis when the president—and nation—need to coordinate across different agencies and quickly implement policies to address complex and urgent problems. A czar’s appointment can demonstrate a President determined to accomplish something “difficult, important, and substantive” that will not fall prey to “interagency squabbling” or “bureaucratic inertia.”⁶⁹ Particularly during times of congressional gridlock, quick presidential leadership through the appointment of a crisis czar can enhance efficacy in public administration as a single leader coordinates the President’s national response. As Professor Mashaw and Berke refer to the czar’s interagency coordinating function as “perhaps the best justification for the role,” such coordination may be most necessary during times of crisis.⁷⁰

Klain’s role as the Ebola czar reflects a key reason for the continuing reliance on czars, as policy issues are “increasingly interagency and complicated” and cut across different agencies.⁷¹ The Ebola crisis exemplified an issue that involved more than one agency, requiring leadership to manage coordination between the Departments of State, Homeland Security, Customs and Border Protection, and Transportation, as well as the coordination of troops in West Africa and foreign deployment from the Center for Disease Control.⁷² During times of crisis, there is a very thin line between policy *formation* and policy *implementation*. For example, in the case of Ebola, forming a policy that individuals arriving in the U.S. from West Africa must be quarantined for twenty-one days differs from actually implementing that policy across different agencies.⁷³ Thus, having someone serve as the focal point of policy formation and implementation during a crisis can ensure agencies are coordinating effectively and quickly to further efficacy.

Nonetheless, one must consider whether efficacy from a new leader best serves the nation during a crisis or instead slows down processes by diminishing the power of existing officials. Cybersecurity czar Rob Joyce left the position in May 2018 after National Security Advisor John

⁶⁷ Brianna Ehley & Sarah Karlin-Smith, *Kellyanne Conway’s ‘Opioid Cabinet’ Sidelines Drug Czar’s Experts*, POLITICO (Feb. 6, 2018, 5:18 AM), <https://www.politico.com/story/2018/02/06/kellyanne-conway-opioid-drug-czar-325457>.

⁶⁸ *See id.* (quoting Republican Senator Shelley Moore Capito, “I haven’t talked to Kellyanne at all and I’m from the worst state for this.”).

⁶⁹ Saiger, *supra* note 6, at 2579-80.

⁷⁰ Mashaw & Berke, *supra* note 3, at 594.

⁷¹ Klain Interview, *supra* note 61.

⁷² *See id.*

⁷³ *See id.*

Bolton reportedly led the push to abolish the role.⁷⁴ The Administration stated the removal would streamline management within the National Security Council to “improve efficiency and reduce bureaucracy.”⁷⁵ However, as the Administration struggled to address growing cybersecurity threats, cyber policy experts, legislators, and former officials urged President Trump to replace Joyce rather than abolish the position.⁷⁶ Before its abolishment, the cybersecurity czar’s role aimed at “harmonizing government policy on cybersecurity and digital warfare,” reflecting how crisis czars can further efficacy through interagency coordination in times of need.⁷⁷

iii. Accountability

Although key criticisms of czars reflect their lack of accountability to the public, crisis czars can serve accountability more than other types of czars when appointed in direct response to congressional and public concerns. Czars often lack the accountability structures that agencies would otherwise have, such as congressional oversight and access to public information.⁷⁸ However, crisis czars reflect greater accountability than other czars in two ways. First, presidents often respond to congressional calls for action by appointing a czar, reflecting presidential accountability to Congress—and thus, electoral accountability to the public. Furthermore, crisis czars send a message of presidential priorities to the public,⁷⁹ who can hold the president responsible for these policies at the polls through electoral accountability.⁸⁰

In the case of Ebola, both members of Congress and the public drove the call for presidential action as a response to growing public anxiety and congressional calls for executive action after an infected nurse traveled by commercial flight in the U.S..⁸¹ The Ebola czar reflected President Obama’s reaction to the presumption that he was directly responsible and in control of the government’s response to the public health crisis.⁸² As Professor Mashaw and Berke noted, “The more presidents take control, the more the public expects them to exercise it.”⁸³ Klain’s departure received significantly less media attention than his entry as public fear over the disease abated, while the White House gave him praise but no successor.⁸⁴ The President’s actions directly mirrored public perception and reflect how crisis czars can react to the public’s expectations to promote accountability.

Just as the appointment of a crisis czar can send a message of presidential priorities, eliminating or constantly changing a position sends a message of unimportance. Current and former ONDCP officials from Republican and Democratic administrations described the turmoil surrounding the drug czar as hindering efforts to “rally the government” during the nation’s

⁷⁴ See Geller, *supra* note 62.

⁷⁵ See Walsh, *supra* note 55.

⁷⁶ See *id.*

⁷⁷ *Id.*

⁷⁸ See Mashaw & Berke, *supra* note 3, at 594.

⁷⁹ *Contra* VAUGHN & VILLALOBOS, *supra* note 20, at 18 (citing Christopher Foreman to describe how some scholars view czars as “distracting decoys” rather than objective indicators of a President’s priorities).

⁸⁰ See BRESSMAN ET. AL., *supra* note 56, at 10 (explaining how the President can be held responsible at the polls for “unpopular agency decisions.”).

⁸¹ See Jack Healy, Sabrina Tavernise & Abby Goodnough, *Obama May Name ‘Czar’ to Oversee Ebola Response*, N.Y. TIMES (Oct. 16, 2014), <https://www.nytimes.com/2014/10/17/us/obama-may-name-ebola-czar-after-amber-joy-vinson-flight-causes-concern.html>.

⁸² See Mashaw & Berke, *supra* note 3, at 593.

⁸³ *Id.*

⁸⁴ Berman, *supra* note 65.

worst opioid crisis in its history.⁸⁵ President Obama’s former drug czar Gil Kerlikowske stated the elevation of a twenty-four-year-old campaign staffer to head ONDCP sent a “terrible message” that the U.S. was “not taking the drug issue seriously.”⁸⁶ The elimination of the cybersecurity czar prompted similar criticism for sending a message that “cybersecurity is not very important.”⁸⁷ These examples further demonstrate the increasing reliance on czars to address complex issues as members of Congress and the public expect presidential action.

Nonetheless, beyond public messages, the lack of transparency about the responsibilities and duties of crisis czars reflects how these aides can undermine accountability in the same ways as other czars. Klain’s day-to-day activities remained largely out of the public eye, and he did not testify before Congress per standards for presidential aides.⁸⁸ Ultimately, the tradeoff for the high efficacy of crisis czars may come with disadvantages for accountability as crisis czars operate without congressional oversight or public-facing transparency. However, the reactionary position of crisis czars can serve accountability more than other czars by responding to the concerns of Congress and the public.

B. Domestic Agenda Czars

Following crisis czars, domestic agenda czars present the next level of tradeoffs for public administration. As presidents must balance increasing public expectations on presidential leadership with congressional gridlock, they can further efficacy in their domestic agendas by appointing high-profile experts to “sidestep the bureaucracy” and effectuate policies.⁸⁹ From the experienced leaders running new czar-led offices to Senate-confirmed drug czars, domestic agenda czars can further expertise by focusing specialized knowledge and staff towards a particular domestic policy goal. Furthermore, placing a czar at the helm of an issue allows a President to efficiently implement domestic policy without the gridlock of Congress. However, outside of Senate-confirmed czars that are accountable to Congress, this increased expertise and efficacy comes with the tradeoff of undermining accountability, particularly when domestic agenda czars have overlapping roles with cabinet secretaries. President Obama’s health and economic czars exemplify these tradeoffs, as do the more recent trade and deregulatory czars of President Trump.

⁸⁵ O’Harrow Jr., *supra* note 54.

⁸⁶ *Id.*

⁸⁷ Nicole Perlroth & David E. Sanger, *White House Eliminates Cybersecurity Coordinator Role*, N.Y. TIMES (May 15, 2018), <https://www.nytimes.com/2018/05/15/technology/white-house-cybersecurity.html> (quoting Michael Daniel, President Obama’s cybersecurity coordinator, and Senator Mark Warner, the ranking Democrat on the Senate Intelligence Committee, who tweeted, “I don’t see how getting rid of the top cyber official in the White House does anything to make our country safer from cyber threats.”).

⁸⁸ See Klain Interview, *supra* note 61. *But see* LOUIS FISHER, CONG. RESEARCH SERV., RL30966, CONGRESSIONAL ACCESS TO EXECUTIVE BRANCH INFORMATION: LEGISLATIVE TOOLS 35-36 (2001) (explaining that although administrations frequently advise Congress that under “long-established” precedents the immediate staff of presidents do not appear before congressional committees to testify, they have in fact appeared in significant numbers given the “right political conditions.”).

⁸⁹ VAUGHN & VILLALOBOS, *supra* note 20, at 28, 157 (describing how President Obama addressed lofty public expectations and an inefficient bureaucracy by doing what past presidents had done—“sidestep[ing] the bureaucracy and the Senate” and appointing czars).

i. Expertise

As presidents seek to effectuate and centralize domestic policy, selecting domestic agenda czars with substantive skills and experience can greatly further expertise in public administration. Expertise regarding a czar's assigned policy area will give the czar the capacity to solve complex problems and develop a "systemic perspective" on issues while building credibility with key constituencies.⁹⁰ A "czar system" can provide a President with potentially more reliable substantive expertise in carrying out a domestic agenda than the expertise of line agencies or political advisors.⁹¹

In the case of new czar-led offices, domestic agenda czars can focus their expertise on a particular area of substantive policy that bureaucrats would otherwise have to balance alongside many goals. As Professor Saiger notes, President Obama's use of high-profile czars reflected his "particular instantiation of a policy, common to all modern Presidents, of seeking to magnify his control over agency action in domestic policy."⁹² Given the large role health care reform played in Obama's campaign and domestic agenda, the health czar provided a way to focus on this particular initiative with an expert. As a former member of the Clinton Administration, DeParle brought her health care background working on Medicare and Medicaid management to lead the federal government's effort to improve the health care system.⁹³

Similarly, domestic agenda czars can further expertise by bringing past cabinet-level experience to a particular policy area. For example, many of President Obama's domestic agenda czars had high-profile, substantive knowledge in their policy fields "usually unmatched in the White House staff," such as Lawrence Summers serving as the economic czar.⁹⁴ While presidents will surely appoint czars whose agendas match their own, ex-Cabinet officials like Summers can bring a unique level of expertise because they have developed their own ideologies and agendas that lead them to behave differently than pure political loyalists seeking to please the President.⁹⁵

In the case of Senate-confirmed czars, the advice and consent process presumably checks expertise to ensure leaders have the requisite experience. Although a nominee's ideology will likely mirror a President's, checks and balances from the legislative branch can help ensure appointees have relevant expertise to enhance agency legitimacy.⁹⁶ The Senate nearly unanimously approved previous drug czar Gil Kerlikowske, who brought his expertise as a law enforcement veteran in his promise to fight the war on drugs.⁹⁷ While acting ONDCP director Jim Carroll does not appear to have any public health experience, the White House has similarly emphasized how his prosecutorial experience with drug cases will allow him to combat the

⁹⁰ See BRESSMAN ET. AL., *supra* note 56, at 9 (describing how agencies further expertise because they can develop a "systemic perspective on regulatory issues."); *Id.* at 168 (explaining that lack of expertise can create perceptions of illegitimacy).

⁹¹ See Saiger, *supra* note 6, at 2593-95 (arguing that czars are less susceptible to "agency capture" from outside influences and have more substantive (rather than political) experience than political operatives).

⁹² *Id.* at 2583.

⁹³ See VAUGHN & VILLALOBOS, *supra* note 20, at 161.

⁹⁴ Saiger, *supra* note 6, at 2589.

⁹⁵ See *id.* at 2590.

⁹⁶ See Ronald J. Krotoszynski, Jr. et. al., *Partisan Balance Requirements in the Age of New Formalism*, 90 NOTRE DAME L. REV. 941, 980 (2015).

⁹⁷ See Seattle Times staff, *Kerlikowske Confirmed as U.S. Drug Czar*, SEATTLE TIMES (May 7, 2009), <https://www.seattletimes.com/seattle-news/kerlikowske-confirmed-as-us-drug-czar/>.

opioid crisis.⁹⁸ His pending Senate confirmation provides a mechanism to check his experience, enhancing expertise in a manner that most czars lack.

ii. Efficacy

Placing a central figure at the head of a domestic agenda can have many benefits for efficacy. Domestic agenda czars can focus on forming and implementing a particular policy without the inefficiencies of Congress or a bureaucracy tasked with balancing many different issues.⁹⁹ As presidents arrive in Washington with a “postelection urge” to transform domestic policy in the aftermath of victory, domestic agenda czars allow presidents to seize their “license to act” on a particular issue before their influence dissolves.¹⁰⁰ Just as President Obama’s new offices reflected key elements of his campaign platform, President Trump’s trade czar reflected his campaign’s focus on nationalist trade policies. The Obama Administration’s health czar and Trump Administration’s trade czar both exemplify how domestic agenda czars can increase efficacy in pursuing domestic priorities.

The health czar and the trade czar allowed presidents to “sidestep the bureaucracy” and pursue these domestic policy goals with greater flexibility and efficacy than the usual legislative process. DeParle increased efficacy in the push for health care reform by coordinating initiatives across executive departments and agencies while focusing on a key administration goal: persuading members of Congress to vote for the health care bill.¹⁰¹ When President Obama signed the Patient Protection and Affordable Care Act in 2010, he referred to DeParle as “an unsung hero of this effort... an extraordinary woman who led the reform effort from the White House.”¹⁰² In the current Administration, Navarro has emerged as one of the “most important generals in Trump’s trade war,” working closely with President Trump and Secretary Ross to effectuate aggressive trade policies against China.¹⁰³ While pursuing very different policies, these two examples reflect how a czar system working outside the standard bureaucratic norms for domestic policy can produce greater flexibility and efficacy.

Nonetheless, these two positions also reflect how a czar’s domestic goals can overlap with existing agency agendas to potentially diminish efficacy without clear distinctions between roles. A lack of clarity between the jurisdiction of the health czar and the HHS Secretary or the trade czar and the Secretary of Commerce could lead to decreased efficacy by adding an additional layer of involvement.¹⁰⁴ Different administration surrogates with overlapping jurisdictions can produce contradictory signals or a lack of consensus about how to best serve a

⁹⁸ See *Trump to Nominate Jim Carroll as Next Drug Czar*, U.S. NEWS (Feb. 9, 2018), <https://www.usnews.com/news/politics/articles/2018-02-09/trump-to-nominate-jim-carroll-as-next-drug-czar>.

⁹⁹ See VAUGHN & VILLALOBOS, *supra* note 20, at 34 (“Bureaucratic entities are less likely to neglect programs and policies if a central czar figure is charged with overseeing their development and implementation.”).

¹⁰⁰ MARTHA DERTHICK, *AGENCY UNDER STRESS*, 51-53 (The Brookings Institution 1990).

¹⁰¹ See VAUGHN & VILLALOBOS, *supra* note 20, at 162.

¹⁰² President Barack Obama, Remarks by the President and Vice President at Signing of the Health Insurance Reform Bill (Mar. 23, 2010), <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-and-vice-president-signing-health-insurance-reform-bill>.

¹⁰³ Annie Lowrey, *The ‘Madman’ Behind Trump’s Trade Theory*, THE ATLANTIC (Dec. 2018), <https://www.theatlantic.com/magazine/archive/2018/12/peter-navarro-trump-trade/573913/>.

¹⁰⁴ See *infra* p. 17.

domestic agenda.¹⁰⁵ While ambiguity and overlap may have greater implications for accountability, the clarity of a domestic agenda czar’s jurisdiction will also impact efficacy.

iii. Accountability

While domestic agenda czars can improve expertise and efficacy in policymaking, the greatest tradeoffs come in undermining accountability. First, with the exception of Senate-confirmed czars who appear before Congress, domestic agenda czars can pursue their policy agendas without the burden of justifying themselves or their actions to Congress or the public. Second, a lack of disclosure can lead to czars with conflicts of interests pursuing agendas for their personal benefit. Finally, overlapping jurisdictions can create confusion about which executive branch officials are responsible for decision-making and diminish the role of Senate-confirmed leaders who are accountable to Congress and the public.

Unconfirmed czars lack a significant number of accountability measures that would otherwise exist for presidential appointees developing domestic policy. Czars avoid justifying themselves to the Senate through the confirmation process, evade testifying before congressional committees regarding their actions, shield decision-making behind executive privilege, and exercise immunity to administrative discovery through the Freedom of Information Act (FOIA).¹⁰⁶ While these accountability issues generally exist with all czars, they arguably pose the greatest concern for domestic agenda czars because both the public and Congress cannot understand the sources of bureaucratic action in an administration’s domestic policymaking without these tools.¹⁰⁷ Czars like DeParle can work towards overhauling the health care system without sharing their decision-making, while Navarro can influence trade policy without testifying before Congress. Without this transparency, the public cannot hold governmental decision-makers accountable for decisions affecting their lives.¹⁰⁸

Furthermore, domestic agenda czars may present conflicts of interest that they pursue without disclosure, undermining their accountability to the public. While conflicts of interest can exist with any presidential advisors, the lack of any disclosure exacerbates accountability issues in czars. For example, the Trump team stated that Icahn would not serve as a federal employee, would not have specific duties, and would not take a salary.¹⁰⁹ This meant Icahn was not required to divest any of his holdings or disclose any potential conflicts of interest.¹¹⁰ Icahn’s “intimate involvement in the selection of Scott Pruitt” as EPA Administrator and his promotion of an

¹⁰⁵ See VAUGHN & VILLALOBOS, *supra* note 20, at 167 (explaining how ambiguity about a czar’s role can inhibit the czar’s ability to coordinate policy efforts and lead critics to question the czar’s authority). See also David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1126 (2008) (describing how adding layers of political management can distort communication and produce “administrative inertia.”).

¹⁰⁶ See Saiger, *supra* note 6, at 2594.

¹⁰⁷ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2332 (2001) (stating “the degree to which the public can understand the sources and levers of bureaucratic action” as a fundamental precondition of accountability in administration).

¹⁰⁸ See *id.* (arguing for the need for transparency in bureaucracy as an aid “to holding governmental decisionmakers to account.”).

¹⁰⁹ See Emily Stephenson & Svea Herbst-Bayliss, *Icahn Tapped as Trump’s Special Adviser on Regulatory Issues*, REUTERS (Dec. 21, 2016), <https://www.reuters.com/article/us-usa-trump-icahn/icahn-tapped-as-trumps-special-adviser-on-regulatory-issues-idUSKBN14A2C3>.

¹¹⁰ See Patrick Radden Keefe, *Carl Icahn’s Failed Raid on Washington*, THE NEW YORKER (Aug. 28, 2017), <https://www.newyorker.com/magazine/2017/08/28/carl-icahns-failed-raid-on-washington>.

ethanol rule that would save CVR Energy hundreds of millions of dollars drew immediate scrutiny as Icahn's decisions benefited his own investments.¹¹¹ Without disclosure of his financial interests, the deregulatory czar could pursue a domestic agenda in his favor rather than the public's, undermining accountability in White House policymaking.

Lastly, domestic agenda czars can undermine the role of officials who maintain accountability to Congress and the public by taking on responsibilities meant for confirmed officials. In both the Obama and Trump Administrations, the creation of new executive offices exacerbated confusion about where czars and offices stood in the executive branch hierarchy. For example, the Obama Administration often struggled to separate DeParle's jurisdiction over the Affordable Care Act proposal from that of HHS Secretary Kathleen Sebelius.¹¹² Under President Trump, the pre-inauguration appointment of Navarro and creation of a trade council signaled the dwindling role of the U.S. Trade Representative before the position was even filled.¹¹³ In both cases, a new office created uncertainty as to how these roles stood in the executive branch hierarchy against existing agencies, diminishing the role of leaders with existing accountability mechanisms in place.

C. Loyalty Czars

In the final category, loyalty czars pose the greatest threat to all three values in the administrative state. The selection of czars for their loyalty rather than their experience undermines expertise as aides without institutional competence exercise power over the decisions of experts. Loyalty czars also diminish efficacy by meddling in the roles of cabinet secretaries without any clear policymaking purpose, serving as commissar-like figures with a purpose of ensuring loyalty. Finally, loyalty czars undermine accountability because they greatly increase White House power without any transparency to the public or Congress regarding what they do or what purpose they serve, representing the culmination of reasons for opposing the rise of presidential czars. The Trump Administration's shadow cabinet exemplifies how loyalty czars undermine all three of these values in a different manner than past czars.

i. Expertise

Selecting czars for their loyalty rather than their institutional competence significantly undermines expertise in public administration. In the case of the shadow cabinet, many of these advisors lacked expertise in their agency's relevant area and were allegedly selected for their loyalty rather than their expertise, including "Trump campaign aides, former Republican National Committee staffers, conservative activists, lobbyists and entrepreneurs."¹¹⁴ White House officials stated it was important to gauge the loyalty of Cabinet heads because "Trump does not have long-standing relationships or close personal ties with most leaders in his Cabinet," prioritizing loyalty over agency expertise.¹¹⁵

¹¹¹ See Letter to Carl Icahn from Senator Sheldon Whitehouse et. al, (Mar. 27, 2017) (questioning Icahn's status in the Trump Administration and his "many conflicts of interest.").

¹¹² See VAUGHN & VILLALOBOS, *supra* note 20, at 162 (providing an example of Press Secretary Robert Gibbs "stumbling" to respond to a question regarding how the Administration would manage the health reform proposal through Congress given the "overlapping jurisdictions of Sebelius and DeParle.").

¹¹³ See Cassella, *supra* note 51.

¹¹⁴ Mashaw & Berke *supra* note 3, at 604; Rein & Eilperin, *supra* note 10.

¹¹⁵ Rein & Eilperin, *supra* note 10.

Regardless of experience, the purpose of loyalty czars also diminishes expertise in policymaking. It is worth stating that domestic agenda czars with expertise still reflect loyalty to the President, as presidents will pick their czars on the theory that their agendas mirror their own.¹¹⁶ However, this principle guides all Cabinet and agency appointments.¹¹⁷ A domestic agenda czar furthering a substantive policy agenda, whether health care reform or trade, purports to increase White House policymaking with expertise; a loyalty czar ensuring others act loyal to the president has a different effect—increasing White House power without a policymaking purpose. Thus, even if these advisors had some form of expertise, their purpose of monitoring loyalty prevents them from contributing their expertise to any form of policymaking. Trump’s shadow cabinet served less as a tool to effectuate a domestic policy agenda through experienced leaders but rather as watchdogs monitoring the loyalty of these unfamiliar agency heads, directly undermining the expertise of agency heads and prioritizing political loyalty over competence.¹¹⁸

ii. Efficacy

Similar to the additional bureaucracy created by domestic agenda czars, the “thickening of government” through loyalty czars can slow down policymaking by distorting communication and creating conflict.¹¹⁹ According to agency sources, tensions escalated as former Defense Secretary James Mattis and former Homeland Security Secretary John Kelly expressed frustration in the meddling from “so-called ‘senior White House advisers’” who were “mostly young Trump campaign aides with little experience in government.”¹²⁰ Pentagon staff reportedly referred to the aide assigned to supervise Mattis as “the commissar,” reflecting the escalating tensions added by another layer of bureaucracy without any substantive purpose.¹²¹

The conflicts between aides and Cabinet secretaries eventually prompted a meeting with then-chief of staff Reince Priebus and Trump’s son-in-law and advisor, Jared Kushner, leading to the end of the shadow cabinet to diminish frustration within agencies.¹²² Rather than increasing the efficacy of policymaking, the shadow cabinet represents how loyalty czars can increase conflict and slow down decision-making by agency leaders. Loyalty czars add another layer of bureaucracy that ultimately undermines the efficacy of existing agency structures.

iii. Accountability

Finally, and perhaps most importantly, loyalty czars undermine accountability by greatly increasing the White House’s power over agencies without any transparency to the public or Congress. Those familiar with Trump’s shadow cabinet noted a key difference between its members and past White House aides: the power of these advisors.¹²³ These loyalty czars would connect directly to senior officials like Kushner and Trump’s deputy chief of staff for policy,

¹¹⁶ See Saiger, *supra* note 6, at 2590 (noting that “Obama picks his czars, of course, on the theory that their agendas substantially track his own.”).

¹¹⁷ See *id.*

¹¹⁸ Rein & Eilperin, *supra* note 10.

¹¹⁹ Barron, *supra* note 105, at 1126.

¹²⁰ Grunwald et. al, *supra* note 48 (noting that Mattis reportedly “blew up” when his assigned advisor insisted on reviewing one of his briefings).

¹²¹ See Rein & Eilperin, *supra* note 10.

¹²² See Grunwald et. al, *supra* note 48.

¹²³ See Dawsey & Cook, *supra* note 26.

Rick Darborn.¹²⁴ Professor Mashaw and Berke noted the novelty of the high-level access of these “Trump liaisons,” both within the executive office of the President and the agencies they monitored.¹²⁵ Without Senate confirmation or congressional oversight, some of the most powerful figures in the White House could thus influence policymaking without any form of accountability or transparency to the public.

Proponents of loyalty czars may argue that they enhance electoral accountability, as the President selects advisors to ensure agencies pursue the policies that constituents voted for the President to effectuate. However, the President’s cabinet leaders already purport to serve this purpose and have accountability mechanisms such as congressional oversight and public transparency. Crisis czars and domestic agenda czars may lack accountability structures, but Congress and the public can at least determine their purposes and effects based on the particular policies they oversee and agencies they coordinate. In contrast, the public cannot determine the entire jurisdiction, purpose, or effects of a loyalty czar on agency decision-making. By undermining expertise, efficacy, and accountability, loyalty czars embody how czars can diminish democratic values in the administrative state.

III. RECOMMENDATIONS

The use of presidential czars continues to reflect the centralization of White House policymaking power and impact administrative law and public administration. Ultimately, those who disfavor a fully “unitary executive” will disfavor the use of any czar.¹²⁶ However, assuming the long-held practice of czars will continue, we must address how to use czars in ways that further expertise, efficacy, and accountability. In light of Part II’s discussion of how crisis czars can best serve public administration, followed by domestic agenda czars, the following recommendations propose best practices to enhance these values when using these czars. First, presidents can maintain efficacy and increase accountability with proposed czar timelines for handling a crisis or pursuing a domestic agenda. Second, Congress can propose legislation to establish a process for using czars that improves accountability through congressional oversight. Finally, public institutions such as the Congressional Research Service and watchdog groups can engage in information collecting to ensure czars are tied to expertise and held accountable to improve the use of crisis and domestic agenda czars while decreasing the use of loyalty czars.

A. *Proposed Timelines for Czars*

As crisis czars and domestic agenda czars provide important tools for presidents to quickly address a crisis or pursue a specific domestic agenda, presidents could propose timelines for the use of a czar to ensure efficacy while increasing accountability to the public. From crises that produce an urgent need to coordinate agencies to the post-election urge to act quickly on a campaign promise favored by voters, the executive office should have the ability to act quickly and “break through bureaucracy” when needed.¹²⁷ Proposed timelines for a czar’s service would

¹²⁴ *See id.*

¹²⁵ Mashaw & Berke, *supra* note 3, at 604.

¹²⁶ Kagan, *supra* note 107, at 2247 (defining the “unitary executive” as “a system in which all of what now counts as administrative activity is controllable by the President.”).

¹²⁷ *See* Chuck Schumer (@SenSchumer), TWITTER (June 24, 2018, 12:09 PM), <https://twitter.com/senschumer/status/1010917833423970304?lang=en> (calling on the Trump administration to appoint a czar to “break through the bureaucracy” in addressing the family separation crisis).

ensure that presidents actually use czars to pursue a particular agenda with efficacy while giving the public a mechanism for holding presidents accountable to their promises. In the example of the Ebola crisis, the Ebola czar's service was capped at 130 days under his role as a "special government employee" rather than a full-time staffer.¹²⁸ The executive office can propose timelines based upon reasonable estimates for how long a crisis may exist or a czar needs to pass a domestic agenda. In the case of uncertain timelines, extensions should allow presidents to continue the use of a czar in light of ongoing emergencies or domestic agenda issues, such as an uncooperative Congress.

This option may lead to arbitrary timelines formed without any basis and continuous extensions in light of ongoing issues such as congressional gridlock. Furthermore, presidents may increasingly refer to an issue as a "crisis" or a specific domestic agenda goal to bypass agency and congressional structures. Nonetheless, the Ebola czar shows how a crisis czar can pursue a specific agenda during a set amount of time and further efficacy in public administration. If Congress and the public know the proposed timeline for the use of a particular czar, they will have another method to measure the President's progress towards a goal and hold him or her accountable when a czar fails to achieve anything within a timeline.

B. Legislation Establishing Requirements for Czars

Given Congress' various attempts to oversee and regulate czars, the legislative branch could propose a bill that establishes requirements for the use of czars regarding timing, expertise, and jurisdiction. First, Congress could require proposed timelines as described above to ensure czars reflect efficacy. While requiring a unique proposed timeline for each czar would allow greater flexibility for czars with different purposes, Congress could consider a uniform timeline for all czars with set parameters for extensions. Second, a czar bill should establish requirements for expertise in either the substantive area the czar will oversee or in public administration and management. This would create some baseline of expertise to ensure presidents consider the experience of czars and avoid selecting them purely for loyalty. Finally, a czar bill could establish requirements for avoiding overlapping jurisdictions between czars and cabinet secretaries. Congress could mandate that czars do not take on any responsibilities or tasks of existing agency structures to avoid diminishing efficacy and the expertise of agency leaders.

Nonetheless, congressional action poses the least likely option to address best practices for the use of czars. Considering the heavily partisan rhetoric surrounding czars, bipartisan legislative action regarding this topic is unlikely. Moreover, a unified government with the same political party leading Congress and the White House would not have any incentive to pass such legislation, as the congressional majority would likely agree with the policies of czars with similar ideologies. While legislative reform could improve congressional accountability, the heavily partisan issues surrounding czars would likely prevent such reform.

C. Information Collecting from Public Institutions and Watchdog Organizations

As all types of czars present accountability issues, information collecting from public institutions and watchdog organizations can provide the most valuable improvements for the use of czars. First, Congress could direct the Congressional Research Service (CRS) to collect information to release an annual report regarding presidential advisors. Similar to a 2014 CRS

¹²⁸ Berman, *supra* note 65.

Report on Presidential Assistants and Advisors, CRS could collect and provide background information on the role of presidential czars, areas for concern regarding current presidential practices (such as the use of loyalty czars), and options for congressional consideration.¹²⁹ The organization’s reputation for “objective and non-partisan” analysis can ensure Congress receives information regarding the activities of such advisors and improve accountability to Congress and the public. Annual CRS reports may also enhance expertise by tracking qualifications of czars, recognizing both substantive and administrative experience. This option does present the risk of politicization of CRS reports by members of Congress and the media seeking to use the report in furtherance of partisanship, eroding the value of one of the few remaining non-partisan offices. Nonetheless, given the need for improving accountability in using czars, legitimate forms of information collecting may provide the best options.

Beyond CRS, external watchdog organizations can similarly provide regular data collection to improve accountability and the public-facing stance of czars. Joint reports from ideologically opposite organizations would help remove partisan objectives from this information. For example, the Center for American Progress (CAP) and the American Enterprise Institute (AEI), two organizations often on opposing sides of policy discussions, have collaborated on past projects to provide joint reports on policy issues.¹³⁰ A joint CAP-AEI report tracking czar information and qualifications could complement a CRS report to further engage and inform the public. In all forms of information collecting, organizations should strive to enhance expertise and efficacy in crisis and domestic agenda czars. Through this process, organizations should also continue to raise the identified concerns with loyalty czars in hopes of diminishing their use.

CONCLUSION

From President Wilson to President Trump, the use of czars reflects the increasing centralization of White House policymaking power that will only continue. The use of these presidential tools in the Obama and Trump Administrations presents three main types of czars that hold various tradeoffs for expertise, efficacy, and accountability. This paper proposes that crisis czars can best serve these values, followed by domestic agenda czars. In contrast, loyalty czars undermine all three values and represent the culmination of the concerns for czars. Underneath the various normative arguments, we must keep in mind whether one favors the political agenda of the current President or the rise of the unitary executive will heavily impact one’s views on czars. Nonetheless, various practices such as information collecting can help enhance the public’s understanding of these czars to promote accountability alongside expertise and efficacy. Collecting information will inevitably take great effort, particularly given the lack of information provided about czars. Nonetheless, given the reality that presidents will likely continue using czars, perhaps the best solution is for the public—Congress, watchdog

¹²⁹ See SCHWEMLE ET. AL, *supra* note 12.

¹³⁰ See, e.g., Dalibor Rohac, Liz Kennedy & Vikram Singh, *Drivers of Authoritarian Populism in the United States*, CAP-AEI Project on Defending Democracy and Underwriting the Transatlantic Partnership (May 10, 2018), <https://www.americanprogress.org/issues/democracy/reports/2018/05/10/450552/drivers-authoritarian-populism-united-states> (a joint report published by the Center for American Progress and the American Enterprise Institute examining the actors driving authoritarian populism in the United States).

organizations, and we the people—to seek information and increase accountability in our government systems.