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Subcommittee on the Constitution
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on

"Examining the History and Legality of Executive Branch 'Czars'"

Mister Chairman and Members of the Subcommittee:

My name is T.J. Halstead. I am the Deputy Assistant Director of the American Law Division of the Congressional Research Service at the Library of Congress, and I thank you for inviting me to testify today regarding the Committee's consideration of historical and constitutional issues pertaining to presidential advisers.

While there is a long history of presidential reliance on advisers, Congress has, over the last several months, become increasingly concerned with the current Administration's utilization of such personnel. In particular, concerns have been raised that the use of these advisers may circumvent the requirements of the Appointments Clause of the Constitution by allowing persons who have not been subjected to the Senate confirmation process to exert significant, if not determinative, influence over important policy issues.

At the outset, it should be noted that there are no apparent facial or structural Appointments Clause concerns that adhere to a President's utilization of advisers. Moreover, even assuming that a substantial constitutional argument could be forwarded against a President's expansive use of advisers, it is unlikely that efforts to curb this presidential practice by means of a judicial or legislative response will be availing. Accordingly, after briefly elaborating on these two points, my testimony today will focus on identifying the contours of an effective congressional response to the concerns raised by the apparent influence that is exerted by presidential advisers.

The Appointments Clause

The Appointments Clause states that:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[1]

Stated in practical terms, the Appointments Clause establishes that nomination by the President and confirmation by the Senate is the required protocol for the appointment of "principal officers" of the United States, but vests Congress with the discretionary authority to permit a limited class of federal officials to appoint "inferior officers" without confirmation. Given that presidential advisers serve without the advice and consent of the Senate, it seems unexceptional to conclude that these individuals are not principal officers of the United States, and may not validly exercise executive authority. Indeed, it does not appear that these individuals have been vested with any actual executive authority, precluding a categorical determination that they are constitutional officers in light of the Supreme Court's determination that the strictures of the Appointments Clause only apply to persons exercising "significant authority pursuant to the laws of the United States."[2] While it could be argued that the language of 3 U.S.C. § 105, the statute which authorizes the President to hire "administrative assistants," implies that these advisers may be characterized as inferior officers, such a line of reasoning would not seem to ameliorate the concerns voiced by some Members of Congress. This would appear to be the case due not only to the lack of confirmation of these advisers, but also to the cognitive dissonance (if not sheer constitutional impossibility) that would arise from an assertion that current congressional misgivings are belied by a dynamic whereby inferior officers in the Executive Office of the President are empowered to exert a greater degree of political influence than duly appointed and confirmed cabinet heads. Ultimately, it would appear that there is no substantial basis upon which it may be argued that the President's selection and employment of advisers constitutes a fundamental violation of the terms of the Appointments Clause.

Given that the aforementioned formalistic Appointments Clause argument is unpersuasive in light of long standing Supreme Court precedent, it seems evident that any substantive challenge to the practice at issue must rest on an inchoate, functional argument that presidential utilization of, and reliance upon, a cadre of high level personal advisers offends constitutional principles to such a degree as to be impermissible. Given that presidential advisers are widely regarded as exerting significant influence over actions taken at all levels of the Executive Branch, such an argument may have a certain intuitive appeal, particularly in light of the care with which Congress has structured the bureaucracy of the modern administrative state. However, under current jurisprudential principles, it is difficult to discern a basis upon which a reviewing court would conclude, as a legal matter, that the existence of these advisers is anathema to the nation's constitutional system. Moreover, even

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[1] U.S. Const. Art. II, § 2, cl. 2.

[2] Buckley v. Valeo, 424 U.S. 1, 125-126 (1976).

assuming that a substantive argument against the service of such advisers can be forwarded, the traditional reluctance of the judiciary to intervene in generalized conflicts between the Congress and the Executive would appear to pose a substantial barrier to a non-political resolution to the current controversy. A brief review of the judicial treatment of presidential review of agency rulemaking is instructive on this point.

In 1981, President Reagan issued Executive Order 12291, which effectively centralized presidential control over agency rulemaking efforts.[3] E.O. 12291 consolidated the review procedure for all agency regulations and delegated responsibility for this clearance requirement to the Office of Information and Regulatory Affairs (OIRA), which had recently been created within the Office of Management and Budget (OMB) as part of the Paperwork Reduction Act of 1980. The impact of E.O. 12291 on agency regulatory activities was immediate and substantial, generating controversy and criticism. Opponents of the order asserted that review thereunder was distinctly anti-regulatory and constituted an unconstitutional transfer of authority from the executive agencies.[4]

The order attempted to mitigate legal concerns regarding usurpation of agency decision making authority by mandating that none of its provisions were to "be construed as displacing the agencies' responsibilities delegated by law."[5] Additionally, the Department of Justice's Office of Legal Counsel (OLC) drafted an opinion shortly before the publication of E.O. 12291, supporting its constitutionality.[6] The OLC asserted that the provisions of the order were valid as an exercise of the President's power to "take care that the laws be faithfully executed," additionally relying upon its determination that "an inquiry into congressional intent in enacting statutes delegating rulemaking authority will usually support the legality of presidential supervision of rulemaking by executive agencies."[7] The opinion acknowledged, however, that "the President's exercise of supervisory powers must conform to legislation enacted by Congress," and went on to state that presidential "supervision is more readily justified when it does not purport to wholly displace, but only to guide and limit, discretion which Congress has allocated to a particular subordinate official."[8]

Despite these pronouncements in the OLC opinion and the order itself, allegations were made that OMB utilized E.O. 12291 to determinatively control agency rulemaking activities during the Reagan Administration. However, courts considering OMB involvement in agency rulemaking under the auspices of E.O. 12291 did not rule upon the constitutionality of such review. In *Public Citizen Health Research Group v. Tyson*, for instance, the court addressed the validity of a rule promulgated by OSHA governing ethylene oxide, including

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[3] Exec. Order 12291, 46 Fed. Reg. 13,193 (Feb. 17, 1981).

[4] For a thorough overview of the criticisms leveled at the Reagan orders, see Richard H. Pildes, Cass R. Sunstein, "Reinventing the Regulatory State," 62 U. Chi. L. Rev. 1, 4-6 (1995); Elena Kagan, "Presidential Administration," 114 Harv. L. Rev. 2245, 2279-80 (2001). *But see*, Frank B. Cross, "Executive Orders 12291 and 12498: A Test Case in Presidential Control of Executive Agencies," 4 J.L & Pol. 483 (1988) (supporting constitutionality and utility of review under these orders).

[5] E.O. 12291, § 3(f)(3).

[6] *See* "Proposed Executive Order Entitled 'Federal Regulation,'" Office of Legal Counsel, Department of Justice, 5 U.S. Op. Off. Legal Counsel 59 (Feb. 13, 1981).

[7] *Id.* at 61.

[8] *Id.* at 61.

a challenge based on the argument that a critical portion of the proposed rule had been deleted based on a command from OMB.[9] While stating that "OMB's participation in the rulemaking presents difficult constitutional questions concerning the executive's proper role in administrative proceedings and the appropriate scope of delegated power from Congress to certain executive agencies," the court nonetheless found that it had "no occasion to reach the difficult constitutional questions presented by OMB's participation" given its finding that the challenged deletion was not supported by the rulemaking record.[10]

The Reagan orders were retained during the George H.W. Bush Administration to similar effect and controversy, with Congress going so far as to refuse to confirm President George H.W. Bush's nominee for the position of Administrator at OIRA. In 1989, the Administration created the Council on Competitiveness, which was empowered to resolve disputes between OIRA and regulatory agencies covered under E.O. 12291.[11] The Council itself was likewise controversial, in one instance asserting its authority to uphold OMB's rejection of certain elements of a proposed Environmental Protection Agency rule. EPA acquiesced in the Council's decision, and excised the provisions from the final rule. When this deletion was challenged in court, the Court of Appeals for the District of Columbia did not address the propriety of the influence wielded by the Council, determining that the deletion was supported by the rulemaking record.[12] Touching upon the Council's involvement, the court declared that EPA's deletion of the provisions at issue "in light of the Council's advice...does not mean that EPA failed to exercise its own expertise in promulgating the final rules."[13] It is important to note that the court's treatment of the Council's involvement in the EPA rulemaking does not in any way indicate that the Council or OMB had actual legal authority to compel changes thereto. Instead, the court based its decision on a determination that there was a sufficient basis in the record to conclude that the EPA had exercised its independent expertise in promulgating a rule that was in accord with the Council's position.[14]

This approach by the judiciary is directly relevant to the current controversy. To the extent that the influence of any given presidential adviser is so great as to raise concern, a court is likely to employ a similar analytical approach to avoid the extremely difficult and portentous constitutional calculus that governs the question of how a President may constitutionally use, and rely upon, personal advisers. Stated alternatively, even in instances where there is direct evidence of a non-statutorily designated actor wielding determinative influence over a congressionally prescribed decision-making process, the courts will

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[9] 796 F.2d 1479 (D.C. Cir. 1986).

[10] *Id*. at 1507.

[11] *See* Caroline Dewitt, "The Council on Competitiveness: Undermining the Administrative Procedure Act with Regulatory Review," 6 Admin. L.J. Am. U. 759, 760 n.3 (1993).

[12] *See* New York v. Reilly, 969 F.2d 1147, 1153 (D.C. Cir. 1992).

[13] *Id*. at 1152.

[14] This regulatory review process has been retained, in modified form, by subsequent Administrations. However, the comparatively nuanced exercise of this asserted authority by these Administrations has largely diminished arguments against the constitutionality of presidential review. Accordingly, presidential review of agency rulemaking has become a widely used and increasingly accepted mechanism by which a President can exert significant and sometimes determinative authority over the agency rulemaking process.

generally seek to assign the responsibility for any final executive branch decision to the official who has specific, legally assigned, authority in that context. Given that presidential advisers have traditionally operated in a manner that makes it even more difficult to ascribe responsibility for substantive governmental action to them than is the case with OMB's regulatory review function, there is no reason to assume or expect that a reviewing court would rule upon their constitutional validity, lending credence to the proposition that it is "very difficult, if not impossible, for the judiciary to police displacement if the agency accepts it."[15] Given the low likelihood of sucess of any attempt to bring about a judicial resolution to the current controversy, it would appear that an appropriate safeguard against the exercise of undue influence by presidential advisers is for the Senate to engage in an advice and consent process that ensures, as effectively as is possible, that it confirms as principal officers of the United States only those individuals who will not succumb to such manipulations and who will fulfill their statutory responsibilities in a truly principled manner.

Different, yet conceptually similar, constraints adhere to bills that have been introduced to curb presidential reliance on advisers. To the extent that current legislative proposals focus on restricting a President's authority to retain, or consult with, advisers of his own choosing, they share a similar limitation with recent congressional attempts to restrain the issuance of signing statements by a President. In particular, such proposals, in either context, are not generally drafted in manner that explicitly prohibit a President from using the mechanism at issue. With regard to signing statements, salient legislative proposals purported to bar a President from using appropriated funds to produce, publish, or disseminate any statement contemporaneous to the signing of any bill or joint resolution presented for signing by the President.[16] Similarly, bills attempting to constrain presidential reliance upon advisers generally seek to bar the use of appropriated funds to pay for any salaries or expenses of any such position created by the President.[17] However, as with signing statements, it is not clear that a simple funding prohibition would have the intended substantive effect. While in the signing statement context such a limitation would not prevent a President from espousing his views on a particular piece of legislation through other means, in the current context it is not difficult to conceive of a dynamic whereby individuals whose counsel the President finds valuable would likewise find opportunities to express their viewpoints.[18] Moreover, just as a formalistic declaration that a congressional funding limitation may flatly prohibit a President from declaring his intention with regard to the interpretation or enforcement of legislation from Congress would be met with skepticism on First Amendment grounds, so would a legislative proposal that asserts to bar the Chief Executive from seeking the advice of trusted counsel. Additionally, while it would appear that properly crafted legislative proposals could generally impose categorical confirmation requirements on identifiable

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[15] Robert V. Percival, "Presidential Management of the Administrative State: The Not-So-Unitary Executive," 51 Duke L.J. 963, 994 (2001).

[16] *See, e.g.*, H.R. 264, 110th Cong., 1st sess. (2007).

[17] *See, e.g.*, H.R. 3226, 111th Cong., 1st Sess. (2009).

[18] For example, President Andrew Jackson, whose election and tenure in office occurred in an era marked by violent political controversy and party instability, utilized an informal group of advisers which came to be known as the Kitchen Cabinet. The members represented "rising social groups as yet denied the prestige to which they felt their power and energies entitled them"—newspapermen, the President's private secretary, campaign organizers and officials from prior administrations, and longtime personal friends. Arthur M. Schlesinger, Jr., *The Age of Jackson* (Boston, MA: Little, Brown, 1945), p. 67.

presidential advisers,[19] there does not appear to be a mechanism whereby Congress could validly prevent a President from relying upon confidants, irrespective of whether they are confirmed or receive a salary from the Treasury. Finally, from a practical perspective, just as legislative proposals aimed at halting the simple issuance of signing statements did not advance, it does not appear that current proposals aimed at prohibiting the retention or service of presidential advisers have a significant likelihood of being enacted into law. Accordingly, given the limitations inherent in any effort to resolve the current controversy through judicial or legislative recourse, it would appear that the most effective congressional response would be one based simply on the persistent and aggressive assertion of the oversight prerogatives of the House and Senate.

Congressional Oversight

While there is no definitive constitutional or statutory provision imbuing Congress with oversight authority, a long line of Supreme Court precedent establishes Congress' power to engage in oversight and investigation of any matter related to its legislative function.[20] Unless there is a countervailing constitutional privilege or a self-imposed statutory restriction upon its authority, Congress and its committees possess the essentially unfettered power to compel necessary information from executive agencies, private persons and organizations. Indeed, even though the Constitution does not contain any express provision authorizing Congress to conduct investigations and take testimony in support of its legislative functions, the Supreme Court has held conclusively that congressional investigatory power is so essential that it is implicit in the general vesting of legislative power in the Congress.[21]

In *Eastland v. United States Serviceman's Fund*, for instance, the Court stated that the "scope of its power of inquiry...is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[22] Also, in *Watkins v. United States,* the Court emphasized that the "power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."[23] The Court further stressed that Congress' power to investigate is at its peak when focusing on alleged waste, fraud, abuse, or maladministration within a government department. Specifically, the Court explained that the investigative power "comprehends probes into departments of the federal government to expose corruption, inefficiency, or waste."[24] The Court went on to note that the first Congresses held "inquiries dealing with suspected corruption or mismanagement

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[19] *See* Louis Fisher, The Politics of Shared Power, 98 (3d ed. 1993) (stating that the Necessary and Proper Clause vests Congress with "broad powers . . . to place restrictions on the president's powers of removal, appointment, organization, and reorganization").

[20] For a thorough analysis of legal principles governing congressional oversight, *See* Kaiser, *et al., Congressional Oversight Manual*, CRS Rep. No. RL30240 (2007).

[21] *E.g.,* McGrain v. Daugherty, 272 U.S. 135 (1927); Watkins v. United States, 354 U.S. 178 (1957); Barenblatt v. United States, 360 U.S. 109 (1959); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Nixon v. Administrator of General Services, 433 U.S. 425 (1977); See also, United States v. A.T.T., 551 F.2d 384 (D.C. Cir. 1976) and 567 F.2d 1212 (D.C. Cir. 1977).

[22] 421 U.S. at 504, n. 15 (quoting Barenblatt*, supra,* 360 U.S. at 111).

[23] 354 U.S. at 187.

[24] *Id.*

of government officials."[25] Given these factors, the Court recognized "the power of the Congress to inquire into and publicize corruption, maladministration, or inefficiencies in the agencies of Government."[26]

Accordingly, the rules of the House[27] and the Senate,[28] which confer both legislative and oversight authority, establish that committees may issue subpoenas in furtherance of an investigation within their subject matter jurisdiction, and subpoenas may be issued on the basis of either source of authority. It is important to note that an individual seeking to challenge the validity or sufficiency of a subpoena may only raise such objections in a limited fashion. The Supreme Court has held that courts may not enjoin the issuance of a congressional subpoena, declaring that the Speech or Debate Clause of the Constitution[29] provides "an absolute bar to judicial interference" with such compulsory process.[30] Consequently, the sole option in this context generally requires an individual to refuse to comply, risk being cited for contempt, and then raise objections as a defense in a contempt prosecution.

These constitutional maxims are fully applicable to the Subcommittee's efforts to examine the role of high level presidential advisers, particularly with regard to their influence on deliberations, decisions and actions that are statutorily vested in congressionally established departments and agencies. Indeed, the Subcommittee's oversight prerogatives are arguably at their peak in a context such as this, as the current inquiry would seem to be clearly related to determining whether the actions of such presidential advisers could result in, or contribute to, waste, fraud, abuse, or maladministration within executive departments or agencies.

Testimony of Presidential Advisers

It should also be noted that Congress' authority in the oversight context extends to the receipt of testimony from senior presidential advisers. While it is not uncommon for Presidents to assert that the separation of powers doctrine prevents Congress from receiving such testimony, ample historical precedent belies the assertion that the constitutional separation of powers serves as a structural impediment to the appearance of presidential advisers before congressional oversight committees. Research conducted by my colleagues Henry Hogue and Todd Tatelman, and their predecessors Harold Relyea and Jay Shampansky, has identified numerous instances since the closing years of World War II where presidential advisers have testified before a congressional committee or subcommittee.[31] This historical catalogue includes several instances where Thomas J. Ridge

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[25] *Id*. at 182.

[26] *Id.* at 200, n. 33.

[27] House Rule X, cl. 2.

[28] Senate Rule XXVI, cl. 8.

[29] U.S. Const., Art. I, sec. 6, cl. 1.

[30] Eastland, 421 U.S. at 503-507.

[31] *See* Henry B. Hogue & Todd B. Tatelman, *Presidential Advisers' Testimony Before Congressional Committees: An Overview*, CRS Rep. No. RL31351 (2008).

appeared before various committees of Congress while serving as Assistant to the President for Homeland Security.[32]

While these precedents establish that such advisers may appear before Congress, it remains a relatively rare event, ostensibly due to a tradition of comity between Congress and the White House, with presidential advisers primarily testifying in instances where the political climate renders it preferable to the President that such aides testify in order to diffuse congressional and public pressure.[33] While historical precedent appears to dispense with the argument that formal separation of powers principles prevent such testimony, executive privilege has also been invoked in the past as presenting a bar to the testimony of presidential advisers. While this issue has not been enjoined in the current controversy, it would not be surprising for the Obama Administration to follow the approach of its predecessors and to assert that the doctrine of executive privilege flatly precludes the testimony of presidential advisors. While it is conceivable that issues of executive privilege might be implicated by virtue of the functions served by high level presidential advisers, a brief overview of the privilege appears to indicate that it may not be successfully invoked as a complete and presumptive shield to congressional demands for information relating to their service to President Obama.

Executive Privilege

Just as the Constitution contains no provisions authorizing the investigatory and oversight functions of Congress, there is likewise no express grant of executive privilege. However, beginning with President Washington, the Executive Branch has claimed that the separation of powers doctrine implies that the President possesses the power to withhold confidential information in the face of legislative and judicial demands.[34]

Politically speaking, it is rare for interbranch disputes over contested information to reach the courts for a judicial determination on the merits. Consequently, the existence of a presidential confidentiality privilege was not judicially established until the Watergate era, when the courts recognized the presidential confidentiality privilege as an inherent aspect of presidential power.[35] In *United States v. Nixon*, the Supreme Court addressed a claim of executive privilege in response to a subpoena issued during a criminal trial to the President at the request of the Watergate Special Prosecutor. The Supreme Court found a constitutional basis for the doctrine of executive privilege, noting that "[w]hatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Article II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties."[36] The Court went on to explain that while it considered presidential communications to be "presumptively privileged," there was no

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[32] *Id*. at 15-16.

[33] *Id*. at 22-23.

[34] *See* Morton Rosenberg, *Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments*, Congressional Research Service, Rep. No. RL30319 (2008).

[35] United States v. Nixon, 418 U.S. 683 (1974); See also, Nixon v. Sirica, 487 F.2d 700 (D.C. Cir.1973); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974); Nixon v. Administrator of Gen. Services., 433 U.S. 425 (1977).

[36] United States v. Nixon, 418 U.S. at 705.

support for the contention that the privilege was absolute, precluding judicial review whenever asserted, as such a conclusion "would upset the constitutional balance of a 'workable government.'"[37] In particular, the Court explained that "when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent national security secrets we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production" of materials needed to enforce criminal statutes.[38]

Upon determining that a claim of privilege is not absolute, the Court weighed the President's interest in confidentiality against the judiciary's need for the materials in a criminal proceeding, stating that it was "necessary to resolve those competing interests in a manner that preserves the essential functions of each branch." Concluding this calculus, the Court held that the judicial need for the tapes, as established by a "demonstrated, specific need for evidence in a pending criminal trial," was of greater significance than the President's "generalized interest in confidentiality...."[39] It should be noted that the Court specifically limited the scope of its decision, stating that it was not concerned with "the balance between the President's generalized interest in confidentiality...and congressional demands for information."[40]

Coupled with related and subsequent decisions, the Court's decision in *Nixon* established the "contours of the presidential communications privilege."[41] Pursuant to the standards developed in these cases, the President may invoke the privilege "when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations and that the President believes should remain confidential."[42] As noted above, such an invocation renders the requested materials presumptively privileged, requiring an adequate showing of need to overcome the claim. This standard was further clarified in *In re Sealed Case* (hereinafter referred to as "*Espy*"), where the Court of Appeals for the District of Columbia Circuit addressed issues regarding the scope of the privilege, whether and to what extent the privilege extends to presidential advisers, whether the President must have seen or had knowledge of the material at issue, and the standard of need necessary to overcome a claim of privilege.[43]

Espy arose from an Office of Independent Counsel (OIC) investigation regarding allegations of impropriety by former Secretary of Agriculture Mike Espy. As part of the investigation, a grand jury issued a subpoena for all documents relating to a report prepared for the President by the White House Counsel's Office regarding the allegations. Regardless of the fact that the President had not viewed any of the documents underlying the report, he withheld 84 documents on the basis of "executive/deliberative privilege." The OIC moved

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[37] *Id*. at 707.

[38] *Id*. at 706.

[39] *Id*. at 685, 713.

[40] *Id*. at 712, n. 19.

[41] In re Sealed Case (Espy), 121 F.3d 729, 744 (D.C. Cir. 1997).

[42] *Id*.

[43] *Id*.

to compel production of the withheld documents. Subsequent to *in camera* review, the district court upheld the claims of privilege forwarded by the President. In its decision, the Court of Appeals agreed generally with the district court's determination that the documents in question were subject to the presidential communications privilege.[44] However, the court vacated and remanded in order to provide the OIC an opportunity to provide a sufficient justification for its need for certain items of evidence.[45]

At the outset of its opinion, the court distinguished between the presidential communications privilege and the deliberative process privilege, noting that while the former has a constitutional basis in the separation of powers doctrine, the latter is a common law privilege applicable to the decisionmaking of executive officials generally.[46] The court went on to explain that while both privileges are qualified, the deliberative process privilege "disappears altogether when there is any reason to believe government misconduct occurred," whereas "the presidential communications privilege is more difficult to surmount," requiring a "focused demonstration of need, even when there are allegations of misconduct by high level officials."[47]

Turning to the question of whether the subpoenaed documents could be claimed to be privileged even though the President had never viewed them, the court stated that "the public interest is best served by holding that communications made by presidential advisers in the course of preparing advice for the President come under the presidential communications privilege, even when these communications are not made directly to the President."[48] The court based this conclusion on what it characterized as "the President's dependence on presidential advisers and the inability of the deliberative process privilege to provide advisers with adequate freedom from the public spotlight," as well as "the need to provide sufficient elbow room for advisers to obtain information from all knowledgeable sources."[49] Further illuminating the scope of the privilege, the court stated that it "must apply both to communications which these advisers solicited and received from others as well as those they authored themselves. The privilege must also extend to communications authored or received in response to a solicitation by members of a presidential adviser's staff, since in many instances advisers must rely on their staff to investigate an issue and formulate the advice to be given to the President."[50]

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[44] *Id*. at 758.

[45] *Id*. at 761-762.

[46] *Id*. at 745-746.

[47] *Id*. at 746. The deliberative process privilege allows the government to withhold information that would reveal recommendations and deliberations pertaining to the formulation of governmental decisions and policies, and does not apply to documents that merely state or explain a decision made by the government, or material that is purely factual. *Id*. at 737.

[48] *Id*. at 752.

[49] *Id*. at 751-752.

[50] *Id*. at 752. Regarding the standard of need necessary to overcome a claim of privilege, the court determined that a party must demonstrate that the requested documents are relevant to the proceeding and cannot be obtained elsewhere with due diligence. *Id*. at 754-755.

Recognizing that a decision extending the presidential communications privilege to presidential advisers "could pose a significant risk of expanding to a large swath of the executive branch a privilege that is bottomed on a recognition of the unique role of the president," the court limited the privilege to White House advisers and staff that are in "operational proximity" to presidential decisionmaking. Specifically, the court stated that "the privilege should not extend to staff outside the White House in executive branch agencies. Instead the privilege should apply only to communications authored or solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given to the President on the particular matter to which the communications relate. Only communications at that level are close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisers."[51] The court went on to stress that the privilege was not applicable to information that does not "call ultimately for direct decisionmaking by the President."[52] Applying these factors to the case before it, the *Espy* court held that the independent counsel had "demonstrated sufficient need in order to overcome the presidential communications privilege," and ordered the disclosure of the disputed documents.[53]

The Court of Appeals for the District of Columbia Circuit reiterated the principles delineated in *Espy* in *Judicial Watch, Inc. v. Department of Justice*[54] In *Judicial Watch* the court was called upon to resolve a dispute between the DOJ and Judicial Watch, Inc. with regard to the latter's request for documents concerning pardon applications and pardon grants reviewed by the Office of the Pardon Attorney at DOJ as well as by the Deputy Attorney General for consideration by President Clinton.[55] The DOJ withheld roughly 4,300 documents on the grounds that they were protected by the presidential communications and deliberative process privileges. The district court had ruled that because the materials sought had been produced for the "'sole' function of advising the President on a 'quintessential and non-delegable Presidential power,' the extension of the presidential communications privilege to internal Justice Department documents was justified."[56] The D.C. Circuit reversed, noting that the documents at issue had not been solicited and received by the President or the Office of the President, thus necessitating the conclusion that "internal agency documents that are not solicited and received by the President or his Office are instead protected against disclosure, if at all, by the deliberative process privilege."[57]

Tracking the analysis employed in *Espy*, the court emphasized that the "solicited and received" limitation "is necessitated by the principles underlying the presidential

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[51] *Id*. at 752. "[I]t is 'operational proximity' to the President that matters in determining whether the '[t]he President's confidentiality interest' is implicated (quoting American Ass'n of Physicians and Surgeons, Inc. v. Clinton, 997 F.2d 898, 910 (D.C. Cir. 1993) (emphasis omitted)).

[52] *Id*. at 752.

[53] *Id*. at 762.

[54] 365 F.3d 1108 (D.C. Cir. 2004)

[55] The President has delegated the formal process of review and recommendation of his pardon authority to the Attorney General who in turn has delegated it to the Deputy Attorney General. The Deputy Attorney General oversees the work of the Office of the Pardon Attorney.

[56] 365 F.3d at 1111.

[57] *Id.* at 1112.

communications privilege, and a recognition of the dangers of expanding it too far."[58] The court went on to state that, under *Espy,* the privilege may be invoked only when presidential advisers in close proximity to the President, who have significant responsibility for advising him on non-delegable matters requiring direct presidential decision making have solicited and received such documents or communications, or the President has received them himself. In rejecting the Government's argument that the privilege should be applicable to all departmental and agency communications related to the Deputy Attorney General's pardon recommendations for the President, the panel majority held that:

> [S]uch a bright-line rule is inconsistent with the nature and principles of the presidential communications privilege, as well as the goal of serving the public interest. Communications never received by the President or his Office are unlikely to 'be revelatory of his deliberations.' Nor is there any reason to fear that the Deputy Attorney General's candor or the quality of the Deputy's pardon recommendations would be sacrificed if the presidential communications privilege did not apply to internal documents. Any pardon documents, reports or recommendations that the Deputy Attorney General submits to the Office of the President, and any direct communications the Deputy or the Pardon Attorney may have with the White House Counsel or other immediate Presidential advisers will remain protected....It is only those documents and recommendations of Department staff that are not submitted by the Deputy Attorney General for the President and are not otherwise received by the Office of the President, that do not fall under the presidential communications privilege.[59]

Indeed, the *Judicial Watch* panel makes it clear that the *Espy* rationale would preclude cabinet department heads from being treated as being part of the President's immediate personal staff or as some unit of the Office of the President:

> Extension of the presidential communications privilege to the Attorney General's delegatee, the Deputy Attorney General, and his staff, on down to the Pardon Attorney and his staff, with the attendant implication for expansion to other Cabinet officers and their staffs, would, as the court pointed out in *In re Sealed Case*, "pose a significant risk of expanding to a large swatch of the executive branch a privilege that is bottomed on a recognition of the unique role of the President."[60]

The court also elaborated upon how the decision in *Espy* and the case before it differed from the Nixon and post-Watergate cases. According to the court, "[u]ntil *In re Sealed Case*, the privilege had been tied specifically to direct communications of the President with his immediate White House advisors."[61] The *Espy* court, it explained, was for the first time confronted with the question whether communications that the President's closest advisers make in the course of preparing advice for the President and which the President never saw should also be covered by the presidential privilege. As such, and as noted by the court in *Judicial Watch,* the decision in *Espy* "espoused a 'limited extension' of the privilege 'down

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[58] *Id.* at 1114-15.

[59] *Id*. at 1117.

[60] *Id*. at 1121.

[61] *Id.* at 1116.

the chain of command' beyond the President to his immediate White House advisors only,"[62] "recogniz[ing] the need to ensure that the President would receive full and frank advice with regard to his non-delegable appointment and removal powers," while remaining "wary of undermining countervailing considerations such as openness in government."[63] The court then noted that the decision in *Espy* thus established that "while 'communications authored or solicited and received' by immediate White House advisors in the Office of the President could qualify under the privilege, communications of staff outside the White House in executive branch agencies that were not solicited and received by such White House advisors could not."[64]

The decision in *Judicial Watch* tested and affirmed the principles laid out in *Espy*. While the presidential decision involved was certainly a non-delegable, core presidential function, the operating officials involved (the Deputy Attorney General and the Pardon Attorney) were deemed to be too remote from the President and his senior White House advisers to be protected. The court conceded that functionally those officials were performing a task directly related to the pardon decision, but concluded that an organizational test was more appropriate for confining the potentially broad sweep that would result from a functional test; under the latter test, there would be no limit to the coverage of the presidential communications privilege. In such circumstances, the majority concluded, the lesser protections of the deliberative process privilege would have to suffice.[65] Accordingly, the appeals court reversed the district court's holding that the material in question was subject to the presidential communications privilege and remanded the case for its determination as to whether the DOJ's internal documents "not 'solicited and received' by the President or the Office of the President" were instead protected under the deliberative process privilege.[66]

It should be noted that the decisions in *Espy* and *Judicial Watch* stressed that the holdings therein were limited to the facts presented and were rendered in the context of judicial demands for information. Accordingly, these decisions do not necessarily extend to executive privilege issues that may arise during the course of a congressional investigation. However, the principles laid out in *Espy* and confirmed in *Judicial Watch* represent the most comprehensive consideration of the contours of executive privilege by the judicial branch, and it is not clear on what basis a reviewing court might apply a different analytical rubric in the congressional context. Thus, while there would almost certainly be documents or discussions covered by the presidential communications privilege implicated in any specific inquiry into the practical influence exerted by any given presidential adviser, it would not appear that the privilege may be invoked as a comprehensive structural bar to congressional inquiries regarding the role of such senior presidential advisers in the formulation and execution of Executive Branch policies.

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[62] *Id.* at 1115.

[63] *Id.* at 1116.

[64] *Id.* at 1116.

[65] *Id.* at 1118-24.

[66] *Id.* at 1110.

Conclusion

As noted at the beginning of this statement, presidential advisers have a substantial historical pedigree, and there does not appear to be any fundamental constitutional or legal basis upon which a President's reliance upon high level, political advisers may be questioned or prohibited. While the number of such advisers has grown substantially over the past few decades, that growth, even when coupled with the arguably concordant increase in their influence, does not render their service presumptively unconstitutional. Furthermore, while the service of these individuals carries significant implications, both practical and constitutional, for the traditional relationship between the Executive Branch and Congress, no conclusive showings have been made establishing that such advisers explicitly wield significant authority pursuant to the laws of the United States. Accordingly, it could be argued that the appropriate focus of congressional concern should center not on the service of such advisers as a practical matter, but on the broad implications that presidential reliance thereupon has for the effective operation of the administrative bureaucracy as established by Congress. Accordingly, a robust oversight regime focusing on specific, substantive executive action taken in areas over which such advisers reportedly have political influence would appear to be a potentially effective locus of congressional attention. As in the regulatory review and signing statement context, this approach would restrain congressional actors from spending scarce resources on judicial and legislative efforts that are likely to be unavailing, in turn assisting the Congress, as an institution, to more effectively assert its constitutional prerogatives and ensure compliance with its enactments.

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Mister Chairman, that concludes my prepared statement. I would be happy to answer any questions that you or other Members of the Subcommittee might have, and I look forward to working with all Members and staff of the Subcommittee on this issue in the future.