THE WHITE HOUSE

WASHINGTON

February 25, 2019

The Honorable Elijah E. Cummings
Chairman
Committee on Oversight and Reform
United States House of Representatives
Washington, DC 20515

Dear Chairman Cummings:

I write in response to the Committee's letter of February 11, 2019 concerning the security clearance process for the White House. I also want to thank you for taking the time to discuss this request last Friday, February 15.

As addressed in my January 31, 2019 letter, the President's "authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily" from Article II's "constitutional investment of power in the President *and exists quite apart from any explicit congressional grant.*" *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988) (emphasis added). The President's authority on this subject is at its apex in the context of the Committee's inquiry, because the inquiry focuses on the security clearance process for the President's own senior staff—that is, the individuals upon whom the President directly relies for advice.

While bearing in mind the President's paramount authority in this arena, I remain committed to accommodating legitimate requests for information, consistent with the principle of separation of powers and the constitutional prerogatives of the President. I look forward to working with you to fulfill what you have characterized as our mutual "constitutional obligation to pursue through negotiation, a resolution that accommodates the legitimate institutional interests of both branches of government." Brief for Representatives Elijah E. Cummings, *et al.* as Amici Curiae in Support of Dismissal, *Comm. on Oversight & Gov't Ref. v. Holder*, 979 F. Supp. 2d 1 (D.D.C. 2013) (No. 12-cv-1332).

As we go forward with that process, however, we must keep in mind the scope of Congress's legitimate authority in this area, and in particular, the limits on Congress's ability to conduct oversight into particular decisions concerning whether or not to grant security clearances to employees within the Executive Office of the President (EOP). We believe that your February 11 letter overstates the Committee's jurisdiction over the White House security clearance process and the historical oversight practices in this area. As the Supreme Court explained in *Egan*, this remains an area where the President's authority derives directly from the Constitution and exists quite apart from any Act of Congress.

The President, Not Congress, Has the Power to Control National Security Information.

The Constitution vests the President with plenary authority over national security information. "The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief." *Egan*, 484 U.S. at 527; *see also Totten v. United States*, 92 U.S. 105, 106 (1876). Based on this authority as Commander in Chief, the President enjoys "exclusive power to make security clearance determinations." *S. 1358—The Federal Employee Protection of Disclosures Act: Hearing Before the S. Comm. on Governmental Affairs*, S. Hrg. 108-414 at 41 (2003) (statement of Peter Keisler, Assistant Attorney General, Civil Division, U.S. Department of Justice).

Inextricably intertwined with the President's control over national security information is the need for the President to exercise judgment in determining which advisers he credentials with access to classified information so that he may intelligently and reliably seek the advice of these advisers in carrying out his duties. The Constitution expressly contemplates the need for the President to seek the opinion of his advisers. *See* U.S. Const. art. II, § 2, cl. 1 (The President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments."). "Not surprisingly," the President must often ensure that his advisers "obtain[] the necessary security clearances," so that they can provide informed opinions. *Ctr. for Arms Control & Non-Proliferation v. Pray*, 531 F.3d 836, 842 (D.C. Cir. 2008). Moreover, "Article II . . . gives [the President] the flexibility to organize his advisers and seek advice from them as he wishes." *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 909 (D.C. Cir. 1993). This is particularly true when it comes to the Executive Office of the President.

Congress thus plays a limited role in this area. Your letter's reliance on Clause 14 of Article I, Section 8 of the Constitution is misplaced. That clause does not justify oversight of the President's exercise of his constitutional authority to control access to classified national security information. Instead, that clause, which authorizes Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces," is limited to Congress's authority "to govern and regulate the Armed Forces." *See, e.g.*, *Clinton v. Goldsmith*, 526 U.S. 529, 533 (1999) (Congress exercising power to regulate courts-martial). It does not give Congress the power to regulate civilians, including the EOP advisers the Committee has identified. *See Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 240-41 (1960) (civilians accused of capital offenses not subject to Congress's authority under Clause 14); *Reid v. Covert*, 354 U.S. 1, 19 (1957) ("[I]f the language of Clause 14 is given its natural meaning, the power granted [to Congress] does not extend to civilians[.]"); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14 (1955) (rejecting expansive reading of Clause 14 to encompass civilians).

The Supreme Court also has repeatedly rejected attempts to expand Congress's authority under Clause 14 by invoking the Necessary and Proper Clause. *See, e.g.*, *Kinsella*, 361 U.S. at 247 ("Nor do we believe that due process considerations bring about an expansion of Clause 14 through the operation of the Necessary and Proper Clause. If the exercise of the power is valid it is because it is granted in Clause 14, not because of the Necessary and Proper Clause."); *see also Proposed Legislation Providing Auth. for the Armed Forces to Recover Remains of Persons Deceased as A Result of Armed Forces Operations*, 11 O.L.C. 22, 23 (1987) ("[I]f Congress' power under Article I, § 8, cl. 14 extends only to members of the land and naval forces, then the Necessary and Proper Clause cannot be interpreted to give Congress the power to regulate

civilians as a means of regulating the armed forces."). As the Supreme Court recognized, we cannot allow for the expansion of Congress's power at the expense of a co-equal and independent branch of the government. *See Toth*, 350 U.S. at 14 (rejecting expansive reading of Clause 14 in conjunction with the Necessary and Proper Clause to encompass civilians because it necessarily encroaches on the jurisdiction of Article III federal courts). Therefore, Congress may not "in the disguise of 'rules for the government' of the Army impair the authority of the President as commander in chief." *Swaim v. United States*, 28 Ct. Cl. 173, 221 (1893), *aff'd* 165 U.S. 553 (1897).

The Committee's request for information to second-guess the wisdom of any specific grant or denial of a security clearance—a purely discretionary executive action—finds no support in the law. *See Egan*, 484 U.S. at 528 ("The grant of a clearance requires an affirmative act of discretion on the part of the granting official."); *Bennett v. Chertoff*, 425 F.3d 999, 1001 (D.C. Cir. 2005) ("[T]he authority to issue a security clearance is a discretionary function of the Executive Branch[.]"). The Supreme Court has consistently confirmed that it is for the Executive and "agency head[s]" to "have the final say in deciding whether to repose [their] trust in an employee who has access to [classified] information," *Cole v. Young*, 351 U.S. 536, 546 (1956).

House Rule X Does Not Supersede the Constitution.

The Committee's extensive reliance on the House Rules is unpersuasive and underscores the limitations on the Committee's oversight authority on this subject. House Rule X was not subject to bicameralism and presentment and therefore has no force of law. Even if Rule X were subject to bicameralism and presentment, it still could not curtail the President's powers and prerogatives under Article II of the Constitution. To be sure, Congress may "determine the rules of its proceedings" and bind itself to such rules. U.S. Const. art. I, § 5, cl. 2. However, "[i]t may not by its rules ignore constitutional restraints" to violate the separation of powers. *United States v. Ballin*, 144 U.S. 1, 5 (1892). Rules promulgated by Congress to govern *itself* have *no* bearing on the powers the Constitution vests in the President. *See INS v. Chadha*, 462 U.S. 919, 955 n.21 (1983) (Congress's power to "determin[e] specified internal matters," including under Article I, Section 5, is limited because the Constitution "only empowers Congress to bind itself[.]"). Accordingly, the House's internal administrative decision to task the Committee with oversight of the "Executive Office of the President" through Rule X does not broaden the oversight powers possessed by Congress or weaken the President's authority as Commander in Chief under the Constitution. *See Hutcheson v. United States*, 369 U.S. 599, 622 (1962) ("[T]he Constitution forbids the Congress to enter fields reserved to the Executive[.]").

The Prior Legislation Cited by the Committee Does Not Support A Claim of Oversight Authority.

The Committee's letter asserts "[t]he Committee has broad authority to . . . legislate on [] issues relating to both the security clearance process . . . throughout the executive branch generally and within the White House specifically." We find no support for this expansive proposition in the Committee's letter.

None of the statutes cited in the Committee's letter regulates (1) the *standards* for determining who should have access to classified information or (2) the *process* for deciding whether an individual meets such standards—particularly "within the White House," as your letter states. In terms of their relevance to the Committee's current inquiry, the statutes emphasize the importance of security clearances but then defer to the Executive Branch concerning the process through which security clearances are granted, transferred, or revoked. *See* Department of Homeland Security Data Framework Act of 2018, Pub. L. No. 115-331 (2018) (deferring to the Secretary of Homeland Security regarding which employees "have an appropriate clearance"); National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328 (2016) (deferring to an Executive Branch official to "supervise actions necessary to ensure timely completion of personnel security investigations and adjudications of security clearances"); Department of State Authorities Act, Fiscal Year 2017, Pub. L. No. 114-323 (2016) (providing that the Secretary of State may suspend a member of the Foreign Service when the member's security clearance is suspended by the Department); National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92 (2015) (imposing certain reporting obligations for revoked security clearances, but not purporting to impose standards for such revocations); Border Jobs for Veterans Act of 2015, Pub. L. 114-68 (2015) (deferring to the Secretary of Homeland Security to develop enhanced recruiting efforts, including "the streamlined interagency transfer of relevant background investigations and security clearances"); Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014, Pub. L. No. 113-254 (2014) (permitting the sharing of information with officials with necessary security clearances "as the Secretary determines appropriate"); Presidential and Federal Records Act Amendments of 2014, Pub. L. No. 113-187 (2014) (empowering the National Archivist to "prescribe internal procedures" to protect classified records and noting that "covered personnel" must have security clearances to access classified information); National Cybersecurity Protection Act of 2014, Pub. L. No. 113-282 (2014) (referring to the security clearance process set by a Presidential Executive Order); Intelligence Authorization Act for Fiscal Year 2014, Pub. L. No. 113-126 (2014) (deferring to the Director of National Intelligence, "subject to the direction of the President" (50 U.S.C. 3024(j)), regarding the standards for continuous evaluation of individuals with access to classified information); National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 (2013) (deferring to Executive Branch officials on developing a "strategy for modernizing personnel security"); Intelligence Authorization Act for Fiscal Year 2013, Pub. L. No. 112-277 (2013) (deferring to the President concerning the development of "a strategy and schedule" for security clearance reciprocity); Presidential Appointment Efficiency and Streamlining Act of 2011, Pub. L. No. 112-166 (2012) (establishing a "working group on streamlining paperwork for executive nominations" to report findings to the President and Congress). As such, they are consistent with the Constitution, which vests the President, not Congress, with the power to control national security information. *See Egan*, 484 U.S. at 527.

Moreover, the White House has provided to Congress the information requested under section 4 of the SECRET Act, "a report that explains the process for conducting and adjudicating security clearance investigations for personnel of the Executive Office of the President, including personnel of the White House Office." SECRET Act, Pub. L. No. 115-173, § 4 (2018). On February 16, 2018, the White House Chief of Staff issued a memorandum discussing the

clearance process for employees within EOP, as well as improvements to that process. My office then provided this memorandum to the Committee. This memorandum would satisfy any reporting obligations that may exist under section 4 of the SECRET Act.

The Oversight Precedents Cited by the Committee Do Not Support a Claim of Authority to Review Individual Security Clearance Decisions.

I appreciate your efforts to describe prior congressional inquiries that you believe support the Committee's request for documents and information regarding the security clearances for specific current and former White House officials. I disagree, however, that these prior precedents support the request. In fact, *none* of the instances identified entailed the Committee obtaining access to security clearance information about particular White House personnel.

In 2007, in connection with the matter concerning Valerie Plame that you referenced, the White House accommodated the Committee by allowing a White House security official to testify about "procedures for handling classified information . . . [and] unauthorized release of classified information," but not about "individual cases or investigations." *White House Procedures for Safeguarding Classified Information: Hearing Before the H. Comm. On Oversight & Gov't Reform*, Serial No. 110-28 at 44 (2007) (statement of Mr. James Knodell, Dir., Office of Sec., Exec. Office of the President, the White House). In fact, your predecessor, Chairman Henry Waxman, entered into an agreement with the White House to "not discuss specific investigations." *Id.* In addition, the Committee's reliance on its 2014 majority staff report on the Navy Yard shooting is misplaced, because that report did not concern White House information; instead, it relied on outside information concerning the perpetrator of the Navy Yard shooting who was not employed by the White House, and in fact was working as a civilian contractor at the time of the incident. Staff of Comm. on Oversight & Gov't Reform, *Slipping Through the Cracks: How the D.C. Navy Yard Shooting Exposes Flaws in the Federal Security Clearance Process*, Staff Rpt., 113th Cong. (Feb. 11, 2014).

In addition, the House of Representatives' investigation into the events surrounding the 2012 terrorist attack in Benghazi is markedly different from the Committee's request here. Then-Deputy National Security Advisor Ben Rhodes agreed to provide testimony to the Benghazi Committee to clarify the meaning of publicly-released statements and documents he had authored. Staff of Sel. Comm., *Events Surrounding the 2012 Terrorist Attach in Benghazi*, Final Report, 114th Cong., 158-59, 201-04, 250, 259 (Dec. 7, 2016). Then-National Security Advisor Susan Rice spoke to the Benghazi Committee about certain public statements she made in her *prior role* as the United States Ambassador to the United Nations. The final report also recounts interviews with intelligence community employees outside the White House regarding their deliberations about including particular information when preparing the Presidential Daily Brief, but does not include discussions about "what specific information was provided to any White House staff in any PDB." *Id.* at 581. None of this, of course, has anything to do with the determination of whether a particular individual should be granted a security clearance.

Although these prior requests are materially distinct from the Committee's current request, they are examples of extraordinary accommodations that were provided at the end of good-faith negotiations concerning carefully tailored congressional requests, often with particular restrictions on the use of the information. In fact, it would be an unprecedented

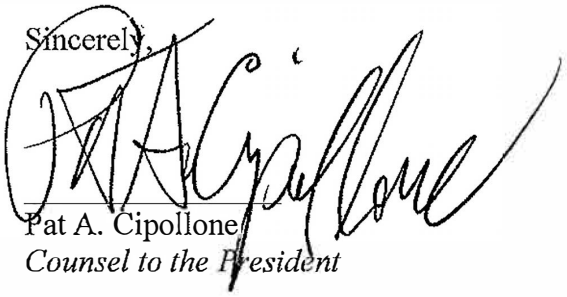
departure from Executive Branch practice for the White House to provide access to sensitive security information about specifically-named individuals. In light of this long-standing practice, we appreciate that during our February 15 phone call, you initially acknowledged that the Committee did not wish to view individual background investigation or security files.

Finally, as we try to accommodate the Committee, I reiterate my request that your staff not seek to circumvent the role of the Counsel to the President in connection with the Committee's requests for information. Unfortunately, the Committee staff have repeatedly ignored my January 31 request for prior consultation with my office before the Committee seeks information from any current or former White House officials.

In addition to the examples we discussed during our call, we have learned that the Committee's Chief Oversight Counsel has repeatedly made phone calls to former Chief of Staff General John Kelly's residence, seeking information about an Executive Branch decision. Once again, these actions disregard my earlier request to the Committee regarding contacts with former or current White House officials. It is vital that these contacts run through my office, so that we may protect the important confidentiality interests of the Executive. I am certain that you personally would not authorize contacts designed to avoid review by this office, which has the responsibility of protecting the prerogatives of the President. However, as a matter of basic courtesy and respect for a co-equal branch of our government, I reiterate my request that you direct your staff to work through my office to request information from current or former White House officials. Consulting with my office will ensure that the Committee efficiently obtains access to the information and individuals to which it is entitled and that any disclosure of privileged information to Congress is properly authorized.

Despite the overreaching that underpins many of the requests in the Committee's letter, as we stated in our January 31 letter and February 15 phone call, we are willing to make available for your review documents relating to our security clearance process. I renew my offer to meet with you again to further discuss mutually agreeable parameters for addressing your Committee's requests. I look forward to hearing from you.

Sincerely,



Pat A. Cipollone
Counsel to the President

cc: The Honorable Jim Jordan, Ranking Member