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ENSURING INDEPENDENCE:
ARE ADDITIONAL FIREWALLS NEEDED TO PROTECT CONGRESSIONAL OVERSIGHT STAFF FROM RETALIATORY CRIMINAL REFERRALS?

Prepared Remarks of Scott Horton

BALANCE OF POWERS CONSIDERATIONS RELATING TO
CRIMINAL INVESTIGATIONS OF MEMBERS AND STAFF

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The Debate Clause of the U.S. Constitution[1] is designed to shield both members of Congress and staff working under the supervision of members from retaliation by the Executive using the criminal justice system. That much has always been clear, even though there are some ambiguities about the full scope of the protections that have been granted. The more immediate question today relates not to prosecution, but the simple fact that an investigation was opened and has been pending for a protracted period notwithstanding the obvious constitutional bar to any prosecution. Attorney General Robert H. Jackson noted[2] that federal prosecutors may wreak havoc on the lives of others simply by pursuing an investigation. They must tread lightly, he said, when there is a risk that the investigation may appear to be politically motivated. This is almost invariably the case when the probe relates to the disclosure or mishandling of classified information within Congress. The existence of the investigation itself may make it impossible for the subject to find employment, particularly in any area in which handling classified information is important. In this case, just as Jackson noted, it metes out a punishment without affording the victim any due process.

I will review below some basic considerations relating to the Debate Clause, will tie its use specifically to government secrecy and steps taken to uphold that secrecy against those who gain access to and use classified materials, and will then propose some specific steps which may be taken both by the Executive and by Congress to curtail potential Debate Clause conflict. I believe that three adjustments can help avoid the current problem. The *first* is an amendment to the 1995 MOU concerning intelligence community referrals to the Department of Justice that would take Debate Clause issues into account. The *second* is a statutory affirmative defense with respect to the Debate Clause. The *third* is to tighten the statute of

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[1] U.S. Const. art. I, § 6, ¶ 1 provides in part that "for any speech or debate in either House, [Senators and Representatives] shall not be questioned in any other place."

[2] Robert H. Jackson, "The Federal Prosecutor," Apr. 1, 1940: "The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole. While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst."

limitations to assumed offenses in which the Debate Clause is implicated that would require prosecutors to expedite the handling of such cases.

As a leading scholar of the Debate Clause points out,[3] this privilege grew as the power of parliament itself grew in the Anglo-American tradition, and its purpose has developed slowly as the powers and purposes of the Legislature as an institution have evolved and assumed a greater focus on interaction with and service to a constituency, or to the public generally. William Blackstone defined the privilege initially, distilling it largely from the bitter experiences of the English Civil War and the turbulent times that surrounded it.[4] Blackstone saw a privilege shielding the parliament from intrusion by the Crown and by the courts. He focused on the many cases in which the Stuart monarchs sought to punish members for speeches they delivered in parliament. At its outset the privilege was very much addressed to questions of criminal inquiry and prosecution and intended to blunt them. This is the tradition that was best known to and understood by the Founding Fathers when they fashioned the Debate Clause contained in the U.S. Constitution of 1789, and American courts have therefore understandably found seventeenth and eighteenth century English precedent and Blackstone's commentaries persuasive in its interpretation.

In the late eighteenth and nineteenth centuries, however, as the authority of parliament itself grew in the United Kingdom and that of the Crown became more of a hollow formality, the privilege was gradually understood more broadly, more in the tradition of John Stuart Mill: it was a tool to insure that parliament could carry out essential democratic functions—including interaction with constituents and the stimulation of informed public debate. Although the American constitutional model began to deviate from its British counterpart, becoming one in which the Legislature was an independent and coequal authority with the Executive, the later British conceptualization has nevertheless been influential.

Secrecy is a particularly difficult and also ancient field of contention between the Legislative and Executive branches that tends frequently to implicate the Debate Clause. Reduced to its essence, first the Crown and then, after 1789, the newly fashioned Executive asserted secrecy as a special prerogative. They claimed to "own" it and denied the Legislature any right to penetrate or change it, save with their acquiescence.[5] More to the immediate point, the criminal law was generally available to help safeguard secrets, and violation of secrets could even be labeled an act of treason or espionage, with the most severe penalties. The Debate Clause

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[3] J. CHAFETZ, DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS 4–8 (2007).

[4] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1:159–61 (1765).

[5] The idea that the Executive claims "ownership" of secrets and sometimes uses this authority capriciously, occasionally prosecuting leakers, but more frequently leaking information itself—all as suits its immediate political needs—lies at the heart of much of the current scholarship on secrecy. *See, e.g.*, Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information,* 127 HARV. L. REV. 512 (2013); Chafetz, *Whose Secrets?,* 127 HARV. L. REV. FORUM 86 (2013).

has consistently been used as a shield against such claims by the Executive, however—at least when the penetration of secrets was seen as a legitimate part of the Legislature's conduct.

There is a long line of precedents on this point and a quick review is necessary to discern patterns of congressional conduct. The catalogue would certainly start with one of the most turbulent political issues from the days of the early republic, the struggle over ratification of the Jay Treaty with Great Britain of 1794–96.[6] President Washington felt keenly that public knowledge of certain provisions of the treaty would preclude its passage; he also felt that the viability of the early republic depended on this treaty and the accommodation with Great Britain it promised. Certain members of Congress, and particularly what was then emerging as the Republican Party (the forerunner of the current Democratic Party), however, felt with equal fervor that the treaty should not be ratified without public airing of its essential provisions, including some which the president insisted be kept secret. Both Congress and the Executive stuck to their positions, a Republican senator leaked the text of the treaty, including the most secret provisions, to the press, and a vigorous debate ensued both in the public and in Congress.[7] From this point forward a tradition was born that effectively holds that, while Congress generally exhibits deference to the Executive's view of secrets, it is not itself necessarily bound by them, at least to the extent Congress is engaged in its own essential functions.

However, Congress has mapped out different positions on this field over time as its own composition and the spirit of the times have changed. Here are some of the noteworthy recent incidents involving both public and behind-the-scenes challenges to the Executive's view of secrecy by Congress: [8]

- In 1972, Senator Mike Gravel read 4,100 out of 7,800 top-secret pages of the so-called Pentagon Papers into the record (with some redactions), which led the Justice Department to open a grand jury investigation, and in turn produced perhaps the best known single Supreme Court decision in the Debate Clause jurisprudence.[9]

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[6] Treaty of Amity, Commerce and Navigation, Between His Britannic Majesty and the United States of America, signed Nov. 19, 1794, came into effect Feb. 29, 1796.

[7] A good discussion of the secrecy controversy surrounding the Jay Treaty can be found in TODD ESTES, THE JAY TREATY DEBATE, PUBLIC OPINION AND THE EVOLUTION OF EARLY AMERICAN POLITICAL CULTURE, especially 31–34 (2006). The Jay Treaty was the subject of the first major American leak of a classified document when the secret text was published in Benjamin Franklin Bache's *Aurora*, first in abstract on June 29, 1795 and then in full text on July 1. The leak was by Senator Stevens T. Mason.

[8] In preparing this, I have drawn heavily on the review done by Kathleen Clark, *Congress's Right to Counsel in Intelligence Oversight*, 2011 U. ILL. L. REV. 915, 941–51.

[9] *United States v. Gravel,* 408 U.S. 606 (1972). The statement of facts in the Supreme Court's decision is a good, neutral summary of the conduct of Senator Gravel, his assistant and the Department of Justice.

- A year later, Senator Gravel sought unanimous consent to publish excerpts from a classified 1969 memorandum from Henry Kissinger to President Richard Nixon concerning a plan to mine North Vietnamese ports, but he then read the excerpts on the floor of the senate before a decision was taken. The plan had, however, arguably ceased to be secret in the intervening day since President Nixon public announced it.[10]
- In 1974, Representative Michael Harrington released classified information concerning American involvement in the coup d'état against Chilean president Salvador Allende. The House Armed Services Committee reprimanded Harrington over this move and denied him further access to confidential information. Harrington was also referred to the House Ethics Committee, which concluded that no further action was necessary because the information in question had not been properly classified.[11]
- In 1975, the Pike and Church Committees disclosed the CIA's "crown jewels" to the public, over vehement protest by the agency. The Church committee voted to recommend publication of the report, but also decided to put the report before the Senate as a whole for review at a closed session. When the Senate took no further action at the end of the closed session, the report was released.[12]
- In 1985, Senator Jesse Helms leaked information surrounding the CIA's covert program of supporting Salvadoran President José Napoleón Duarte's election campaign.[13] It does not appear that any investigation or Ethics Committee action ensued.
- In 1987, Senator David Durenberger told two Jewish groups in Florida that the U.S. Government had recruited an Israeli officer to spy for it in the early eighties. Complaints were filed with the Ethics Committee, which issued a letter criticizing the senator in comments that fell short of a reprimand.[14]
- In 1988, House Speaker Jim Wright stated that "We have received clear testimony from CIA people that they have deliberately done things to provoke an overreaction on the part of the government of Nicaragua." Minority Leader Robert Michel and Representative Dick Cheney asked the House Ethics Committee to investigate

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[10] Representative Dick Cheney, in preparing a Minority Report (the "Cheney Report") for the Republicans to the Iran-Contra Report, chronicled this and many of the other leaks noted here in detail. Minority Report in REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. Rep. No. 100-433, S. Rep. No. 100-216, in this case, Cheney Report at 576–77.

[11] H.R. COMM. ON STANDARDS OF OFFICIAL CONDUCT, HISTORICAL SUMMARY OF CONDUCT CASES IN THE HOUSE OF REPRESENTATIVES 12 (2004).

[12] The work of the Pike and Church Committees has been chronicled in CECIL V. CRABB, JR. & PATT M. HOLT, INVITATION TO STRUGGLE: CONGRESS, THE PRESIDENT AND FOREIGN POLICY (1980) at 150ff.

[13] Schorr, *Cloak and Dagger Relics*, Wash. Post, Nov. 14, 1985, A23.

[14] Molotovsky, *Senate Ethics Panel Criticizes Durenberger on Talk,* N.Y. Times, Apr. 30, 1988, 32.

whether the speaker had improperly divulged classified information. The Ethics Committee took the matter up, but it ultimately took no action.[15]

- In 1992, Representative Henry B. Gonzalez read on the floor of the House from a series of classified documents establishing that the CIA had knowledge of an Atlanta-based bank's loans to the government of Iraq under Saddam Hussein. Representative Michel proposed a resolution urging the House Ethics Committee to investigate Gonzalez's disclosures, but the resolution was voted down.[16]
- In 1995, Representative Robert Torricelli received classified information concerning CIA involvement in a series of murders in Guatemala, including one American citizen and the husband of another citizen. Torricelli wrote President Clinton a letter about this matter and provided a copy to the *New York Times*, which published the information. The Intelligence Committee chair asked the Ethics Committee to investigate Torricelli's conduct. The Ethics Committee found that Torricelli had violated House rules but it made no recommendation of a sanction.[17]
- On September 11, 2001, Senator Oren Hatch disclosed that signals intelligence had an "intercept of… people associated with Osama bin Laden [that] acknowledged a couple of targets were hit."[18] It does not appear that an investigation of any sort was undertaken into this leak, whether by the Ethics Committee or the Executive.
- In 2002, Senator Richard Shelby provided information to two journalists concerning a signals intelligence intercept of an Arab language message from Afghanistan to Saudi Arabia on September 10, 2001 indicating that an attack would occur the next day, as well as the fact that the intercept had not been translated until September 12, 2001. Vice President Cheney complained to the Intelligence Committee chairs about the leak, who responded by asking the FBI to investigate it. After completing its investigation, the Department of Justice declined prosecution but referred its findings to the Ethics Committee, which took no further action.[19]
- In 2011, Senators Ron Wyden and Mark Udall made remarks on the floor of the Senate stating that the Justice Department had adopted a secret and, in their view, implausible, interpretation of the USA PATRIOT Act designed to authorize certain surveillance operations. The action of Wyden and Udall has been described as disclosure of the existence of a secret rather than disclosure of a secret itself, thus converting a "deep" secret—the existence of which is unknown—to a "shallow" secret,

[15] Phillips & Pichirallo, *Wright Denies Secrecy Breach*, Wash. Post, Sept. 23, 988, A1.
[16] Sciolino, *Congressman Avoids Inquiry into U.S.–Iraq Disclosures,* N.Y. Times, Sept. 20, 1992 at 11.
[17] Geraghty, *A Brief History of Classified Leaks*, National Review, Oct. 1, 2013.
[18] Gullo & Solomon, *Experts, U.S. Suspect Osama bin Laden, Accused Architect of World's Worst Terrorist Attacks*, S.F. Chronicle, Sept. 11, 2001 (quoting an unnamed "congressional source").
[19] Lengel & Priest, *Investigators Concluded Shelby Leaked Message; Justice Department Declined to Prosecute Case*, Wash. Post, Aug. 5, 2004 at A17.

whose broad outer parameters are known.[20] There is no public suggestion that this led to any Ethics Committee action.

- In 2012, Representative Darrell Issa published the contents of a sealed wiretap application in connection with the investigation into Operation Fast and Furious gun-smuggling operation. There is no public suggestion that this led to any Ethics Committee action.[21]
- In 2014, the Senate Select Committee on Intelligence issued a report on the CIA system of black sites and use of "enhanced interrogation techniques."

This list is far from exhaustive, indeed, Representative Henry Hyde has written that "an officially 'proven' source of leaks on the Hill… is extremely rare. Only a handful of leaks have ever been traced through investigation to the culpable individual."[22] Many of these cases, just like the Jay Treaty debate, involve a measure of legal ambiguity that is built into the Madisonian structure of the U.S. government. The Executive insisted that the materials were properly secret and should not have been disclosed; members of the Legislature felt either that the secrecy was inappropriate or that it was outweighed by other considerations that compelled public disclosure. The American constitutional system doesn't always provide simple answers about whether knowledge should be kept from the public when the Executive and Legislature disagree; it assumes that the Executive and members of the Legislature may well have different views both about what are legitimate secrets and proper policies, and that they may clash vigorously about those views from time to time. This is what James Madison meant when he said that the system of balanced powers assumes that "ambition must be made to counteract ambition,"[23] and indeed there are few better examples.

It merits noting, however, that the Debate Clause was never intended to furnish *complete immunity* from accountability for wrongful or unlawful conduct—only immunity from accountability by the Executive. To the contrary, the language, "in any *other* place," suggests that with respect to matters within the scope of the Debate Clause, it is the Congress—each house for itself—that must decide whether accountability is necessary and must mete it out when appropriate. Indeed, it may be argued that access to classified information and the survival of the Debate Clause privileges themselves depend on Congress taking the point of self-policing seriously. This is equally the case for members and staff. When staff act under the direction of a member, however, it is clearly the member who is generally accountable.

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[20] The distinction between "deep" and "shallow" secrecy, initially noted by sociologists, was developed in a legal policy context by David Pozen in *Deep Secrecy*, 62 STAN. L. REV. 257, especially 262–65 (2010).

[21] Strong & Becker, *Moving on from Contempt Vote or Not*, Roll Call, July 12, 2012.

[22] Hyde, *'Leaks' and Congressional Oversight*, 11 GEO. MASON L. REV. 145, 147 (1988).

[23] THE FEDERALIST No. 51.

When staff act faithlessly or in disregard of their instructions, staff punishment is also an appropriate function of the house.[24]

This notion of immunity to officeholders with respect to their official acts is in fact a pervasive aspect of the American legal culture, as shown by the statutes and common-law doctrines that rarely allow the holder of a public office to be held personally to account for acts undertaken under color of office.[25] A good example would be the lavish and often criticized immunity that the Department of Justice has accorded itself, and particularly its prosecutorial staff.[26] Nevertheless, the distinction between the two is clear: the congressional privilege is explicit and anchored in the Constitution itself, and it exists specifically to check the predatory conduct or overreach of the Executive. This necessarily makes it a privilege of greater gravity than the ones the Justice Department has fashioned for itself on the basis of the common law.

Review of the precedents suggest a number of different options[27] available to Congress in cases where the conflict arises:

- *accede* to the view of the Executive concerning classification—this seems by far the most common approach taken;
- *challenge* the view of the Executive, demand that the Executive undertake an internal review for the purpose of declassification and release of information;
- *disclose some information* about the secret, effectively converting a "deep secret" into a "shallow secret"—as noted, this is what Senators Wyden and Udall did in revealing that the Justice Department had fashioned a secret understanding of certain aspects of the law surrounding surveillance, without disclosing in any detail what, precisely, that understanding was, nor what specific kinds of surveillance it was permitting;
- *follow the procedures* set out in the Senate Select Committee on Intelligence Rules of Procedure (10, 14–16), allowing for a decision to release classified information by the Senate as a whole, or use another approach to solicit views of the house as a whole,

[24] For instance, in the course of the Church Committee's work, one committee staffer was fired after he was overheard in a restaurant discussing a classified report establishing that Senator Henry Jackson had supported plants to overthrow Chilean President Salvador Allende. FRANK J. SMIST, CONGRESS OVERSEES THE UNITED STATES INTELLIGENCE COMMUNITY 1947–1994, 49 (1994).

[25] For instance, the Federal Employees Liability Reform and Tort Compensation Act of 1988 (FELRTCA) extends absolute immunity for common law torts to all federal employees regardless of whether the conduct at issue was discretionary; the Federal Torts Claims Act of 1946 extends qualified immunity to government officials sued for constitutional torts.

[26] *Imbler v. Pachtman,* 424 U. S. 409 (1976)(prosecutors performing core prosecutorial functions are entitled to absolute immunity.)

[27] For this analysis, see Chafetz, *Whose Secrets?*, at 90.

whether formally or informally (as the Church Committee did before publishing its report);

- or a member may, at some peril, *spontaneously release information* or underlying documents resulting in broad publications of the claimed secrets, in which case his fate rests in the hands of the other members, who may request an Ethics Committee review, or, as is more frequently the case, do nothing.

The question at the core of the present hearing goes to the staffers and their loyalties. Congress cannot perform its work without them. Indeed, that is increasingly true as technologies become ever more complex and sophisticated and the expertise demanded to understand them and form valid judgments about their use presents a rising challenge. The Executive has at its command armies of experts and experienced personnel. Congress has staff that is by comparison extremely modest in size but dedicated. The imbalance is particularly daunting when we look at the national security and intelligence sectors where relevant experience and knowledge can rarely be gained outside of service to the Executive. In these circumstances, it is particularly important that congressional staff be loyal to and take direction from the members of Congress they serve. But if staffers get caught in the legal and political crossfire between the Executive and the Legislative branches over secrecy issues, the essential relationship of confidence between staff and the members they serve will inevitably be undermined.

This helps us understand why the Debate Clause protections have consistently been extended to congressional staff, provided that they are acting under the supervision of a member and their conduct is within the scope of appropriate congressional activities. There are three principal Supreme Court decisions to take into account on this point. The best known of these is *Gravel v. United States*, 408 U.S. 606, especially 616–17 (1972), a case arising from the Justice Department's attempts to hold Senator Gravel and one of his staffers accountable for disclosure of a large portion of the *Pentagon Papers*. In that case, the Court found that a staffer acting under the senator's instruction was his "alter ego" and therefore benefited from Debate Clause protection to the same extent the senator did.[28]

In *Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 507 (1975) the Court was dealing with an effort to quash a congressional subpoena and related investigation of whether the respondent was "potentially harmful to the morale of United States Armed Forces" and a Senate subcommittee's chief counsel was named. The Court concluded that the Senate sub-

[28] "[I]t is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos; and that if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary will inevitably be diminished and frustrated." 408 U.S. at 616.

poena and investigation were within the scope of proper congressional conduct and were thus shielded by the Debate Clause; the protection was deemed also to extend to the chief counsel.

Finally there is the case of *Hutchinson v. Proxmire,* 443 U.S. 111 (1979) dealing with Senator William Proxmire's "Golden Fleece" award to a scientist who responded with a defamation action against the senator and one of his legislative assistants involved in the award project. The Court found that to the extent Proxmire was protected from the defamation action by the Debate Clause, so was his assistant.

I note that in all three of these cases, the court limited the protection to conduct that is "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings."[29] This is a conservative interpretation of the scope of the Debate Clause, but it still seems to fall somewhere in the middle between the Blackstone and Mill traditions described above. It has been—correctly in my view—criticized as too narrow in that it fails to take account of the broader range of duties of a modern legislator, and particularly the legislator's proper focus on service to his constituency and to the public as a whole.[30] For instance, it has been construed to *exclude* publishing committee reports unless that is done by the house itself;[31] issuing press releases;[32] and interceding on behalf of a constituent with the Executive.[33] Each of these activities is no doubt beyond the scope of what an Anglo-American legislator did in the seventeenth or eighteenth centuries. Conversely, however, they would easily been seen as an essential part of the nineteenth, twentieth or twenty-first century responsibilities of a member of Congress. More to the point, while Congress should give some deference to the views expressed by the Court, as a co-equal branch and the dominant law-giver, it is free to take a view of the privilege that more precisely reflects its own duties as it sees and defines them.

This leads us to the question of the referrals and investigations into the conduct of Senate staff relating to the work of the Senate Select Committee on Intelligence that culminated in its 2014 report. While people may well have differing views about the report, its interpretation and the extent to which it should have been or should be disclosed, there does not appear to be any question of staff infidelity; that is to say, the staff were doing precisely what the members to whom they reported desired them to do. That being the case, the existence of criminal probes by agencies of the Executive branch that were not solicited or invited by the Legislative branch raises clear constitutional issues.

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[29] *Hutchison* at 126, *quoting Gravel* at 625.

[30] *See, e.g.,* CHAFETZ, DEMOCRACY'S PRIVILEGED FEW at 101–05 (criticizing Justice White's formulations for their "appalling lack of imagination.")

[31] *Doe v. McMillan*, 412 U.S. 315–17 (1973).

[32] *Hutchison v. Proxmire*, 443 U.S. 111, 126 (1979).

[33] *United States v. Helstoski*, 442 U.S. 477, 489–90 (1979).

I have not had access to the full inner dealings of the Justice Department in connection with the referral from the CIA acting general counsel, which are quite properly kept confidential, nor to the full breadth of inter-agency dealings. Still, it seems to me that prudential considerations *should* have led the Justice Department *not* to open an investigation on the basis of the referral that occurred because of constitutional concerns. Nevertheless, it does not appear to me that it is incorrect per se for the Justice Department to have initiated an investigation on the basis of the reference. To the contrary, constitutional issues notwithstanding, the Department would have a responsibility to establish facts surrounding a breach. That would be their responsibility to the Executive, effectively as an agency charged with upholding the Executive's position on classification issues and safeguarding its secrets. On the other hand, such an investigation could not proceed far in light of the Debate Clause limitations as construed by the Supreme Court. This may and perhaps did lead to a sort of stagnation that is unfair to the persons caught in the web of inquiry and harmful to good relations between the Legislative and Executive branches generally.

It seems to me that there are three steps that might be useful to insure the proper implementation of Debate Clause privileges.

First: Revise the 1995 MOU on Referrals.

In 1995 the Intelligence Community entered into a Memorandum of Understanding with the Department of Justice Concerning the Reporting of Information Concerning Federal Crimes (the "MOU"), more commonly called referrals. The MOU details the procedures that are to be followed, according special roles to the relevant inspectors general and to agency general counsel, and noting that referrals go to the Assistant Attorney General of the Criminal Division or a deputy assistant attorney general, with copies to various other persons. The MOU divides the world into "employees" of the agencies involved and "non-employees." It makes no effort to distinguish organs of constitutional oversight of the agencies, such as congressional committees and their staff. It might be reasonable to assume that this is because Congress and congressional staff, when acting within the scope of their official duties, were not to be the subject of referrals. Nevertheless, it appears that in making a reference, the agency has reached a different, and constitutionally perilous conclusion. I believe that there are two possible approaches to addressing the current issue with the MOU. The first, and preferred, approach, would be to make clear that neither members of Congress nor persons acting under their instruction and within the scope of their congressional duties are proper subjects of a criminal reference. If this cannot be agreed, a second and more limited approach would be to provide that any reference of a member of Congress or a staffer must, because of the constitutional issues implicated, be directed to the personal attention of the Attorney General (or, on his reference, the Deputy Attorney General) who alone would be entitled to make a preliminary determination whether an investigation should be initiated on

the basis of the referral. According to Deputy Attorney General Harold R. Tyler, who ran the Justice Department during the years of the Ford Administration, when many of the precedent-setting controversies I described occurred, this *was* the historical practice of the Department—criminal matters that implicated a direct conflict with Congress over constitutional privilege were always to be addressed first by the Attorney General or Deputy Attorney General, not by any other office. This is to assure that unnecessary constitutional collisions are avoided. That was a sound approach. It should be reinstated.

Second: Codify an affirmative defense based on the Debate Clause.

In any case in which a criminal investigation or prosecution is undertaken against a member of Congress or a congressional staffer, conduct which was undertaken as "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceeding" is privileged, and thus it may be pleaded and established by the subject as an affirmative defense.

A review of cases implicating the Debate Clause suggest this may be appropriate with respect to a number of different statutes, but certainly the Computer Fraud and Abuse Act of 1986, 18 U.S.C. § 1030, would be one, and the Espionage Act of 1917, 18 U.S.C. § 792, would be another. The notion that an organ of oversight could be charged with "hacking" into the computers of an entity it is overseeing is a particularly twisted form of pretzel logic that strikes at the foundations of our government, using property law concepts that are simply inapposite. Be that as it may, however, a Debate Clause privilege and a formalized defense would make it easier for a prosecutor to dispose of the investigation by concluding that an indictment could not be sought.

Third: Fix a statute of limitations of six months for offenses.

In my experience, the speed of criminal investigations is often driven by concerns about whether charges will be time-barred. When the limitations period is far out on the horizon, investigative and prosecutorial resources are more likely to be allocated to cases where the prescription period is approaching. Setting a tight limitations period would force prioritization of such cases, which, in light of the constitutional issues, is appropriate. A short period is also justified by the fact that the inquiry need only properly focus on whether the Debate Clause defense is present, a point which should be fairly easy to ascertain without much intrusive investigation.

The residual federal criminal statute of limitations is five years (18 U.S.C. § 3282)[34], but it is subject to numerous exceptions. The revision contemplated here would be to require that an information or indictment be brought within six months of the offense.

The effect of the first change would be to head off a criminal investigation by forcing a sober assessment over whether such an institutional confrontation is really desirable in the first instance.

The combined effect of the second and third changes would be to provide circumstances in which a prosecutor, exercising independent judgment following an investigation, could quickly terminate an investigation and, in appropriate cases, provide a declination letter or similar assurances that the probe has ended without a decision to bring charges.

I thank you for your time and attention.

[34] "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or information is instituted within five years next after such offense shall have been committed."