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

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TUESDAY, DECEMBER 6, 2016

United States Senate,  
Subcommittee on Crime and Terrorism,  
Committee on the Judiciary,  
Washington, D.C.

The Committee met, pursuant to notice, at 2:33 p.m., in  
room SD-226, Dirksen Senate Office Building, Hon. Lindsey  
Graham, Chairman of the Subcommittee, presiding.

Present: Senators Graham, and Whitehouse.

1           OPENING STATEMENT OF HON. LINDSEY GRAHAM, A U.S.  
2           SENATOR FROM THE STATE OF SOUTH CAROLINA, CHAIRMAN OF  
3           THE SUBCOMMITTEE

4

5           Senator Graham.       Thank you.  I apologize for being  
6           late.

7           I am not going to swear the witnesses.  I am sure you  
8           will tell us the truth, the whole truth, and nothing but the  
9           truth -- as you see it, any way.

10          [Laughter]

11          Senator Graham.       The purpose of this hearing is to  
12          deal with a very sensitive, but very real world problem.  As  
13          Congress, we write checks and we are responsible for  
14          overseeing the Executive Branch.  Some of the people we  
15          oversee have a lot of power, like the FBI, the CIA, and the  
16          other agencies, the Department of Defense with national  
17          security and legal power.

18          There is a natural tension between the Executive Branch  
19          being able to do their job and Congressional oversight.

20          What we are worried about and what we are trying to get  
21          to the bottom of is how do we make sure that we can do our  
22          job.  When I say "we," our staffs.  We are going to ask hard  
23          questions of powerful people to make sure that they are  
24          accountable and in the process of asking questions, that our  
25          people are not subject to reprisal in a way that would chill

1 oversight.

2           So small crowd, important topic. I will introduce the  
3 witnesses in a moment. Well, let us go ahead and do that.

4           Mr. Scott Horton is adjunct professor at Columbia Law  
5 School and author of *Lords of Secrecy* -- I need to read  
6 that. I will wait until they make a movie out of it -- *The*  
7 *National Security Elite and America's Stealth Warfare*.

8           Mr. Jeff Smith is a partner at Arnold & Porter, and  
9 former General Counsel of the CIA. That ought to be  
10 interesting.

11           Mr. Bill Pittard is partner, Kaiser Dillon, and former  
12 Acting General Counsel for the House of Representatives.

13           So a very august group. I am looking forward to any  
14 advice you can give this subcommittee.

15           Before I turn it over to Senator Whitehouse, he has  
16 been dogged in this pursuit of trying to find answers to  
17 this question and making sure that those who are charged  
18 with oversight, particularly the staff members, that they  
19 can do their job without fear.

20           So Senator Whitehouse?

21           Senator Whitehouse. Thank you, Chairman. First, let  
22 me thank you for holding this hearing. As you said, it has  
23 been a long and winding road to this day. But I do think it  
24 is a very important subject as we go about our oversight  
25 duties as Members of the United States Congress.

1 I would like to ask, first, unanimous consent that  
2 Ranking Member Patrick Leahy's statement be added to the  
3 record.

4 Senator Graham. Without objection.

5 Senator Whitehouse. Thank you.

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1           OPENING STATEMENT OF HON. SHELDON WHITEHOUSE, A U.S.  
2           SENATOR FROM THE STATE OF RHODE ISLAND

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4           Senator Whitehouse.    And then for my opening  
5 statement, I would begin by pointing out that one of the  
6 legends of the Senate, Robert Byrd of West Virginia, was a  
7 staunch defender of Congressional independence.  And he was  
8 a vocal critic when actions by the Executive Branch violated  
9 the separation of powers' principles that undergird our  
10 democracy.

11           Too often in the partisan battles we are engaged in now  
12 in Washington, that underlying contest for power which the  
13 Founding Fathers baked into our Constitution gets  
14 overlooked.

15           Well, Senator Byrd did not hesitate to call out  
16 colleagues who countenanced invasions of Congressional  
17 authority, saying on one occasion, "It was the separation of  
18 powers upon which the framers placed their hopes for the  
19 preservation of the people's liberties.  Despite this  
20 heritage, the Congress has been in too many cases more than  
21 willing to walk away from its constitutional powers."

22           One of the fundamental powers vested in the Congress by  
23 the Constitution is our authority and obligation to conduct  
24 oversight of the Executive Branch.  In the words of Woodrow  
25 Wilson, "Quite as important as legislation is vigilant

1 oversight of administration. It is the proper duty of a  
2 representative body to look diligently into every affair of  
3 government and to talk much about what it sees. It is meant  
4 to be the eyes and the voice, and to embody the wisdom and  
5 will of its constituents. The informing function of  
6 Congress should be preferred even to its legislative  
7 function."

8 Today's hearing will explore the important separation  
9 of powers concerns that arise when Congressional staff  
10 engaged in oversight of the Executive Branch are threatened  
11 with criminal prosecution by that branch. This issue  
12 presented itself front and center during my time on the  
13 Senate Select Committee on Intelligence and in the years  
14 that followed.

15 Starting in 2009, Committee staff undertook a  
16 comprehensive review of the CIA's intention and  
17 interrogation program, referred to colloquially, often, as  
18 the "torture program." The facts of that Congressional  
19 review necessary to understand the issue of this hearing are  
20 these: during the course of the Committee investigation  
21 conducted within the agency's premises and using a network  
22 search tool provided by the CIA, Committee staff located  
23 documents that the CIA, apparently, had not intended to make  
24 available for review.

25 These documents contained an internal CIA assessment of

1 the interrogation program known as the "Panetta Review," an  
2 assessment that was at odds with many of the CIA's  
3 statements to Congress and to the public about the scope and  
4 brutality of the program, and whose inadvertent release to  
5 Committee investigators caused considerable alarm within the  
6 CIA.

7 In response to learning Senate investigators had access  
8 to the Panetta Review that CIA personnel and CIA contractors  
9 accessed -- without Senate authorization -- the Senate  
10 computer network that was set up exclusively for the  
11 Committee's use -- they searched the network and reviewed  
12 the email of Senate staff.

13 The CIA's Inspector General then got involved,  
14 conducted an investigation of the CIA's conduct, and made a  
15 criminal referral to the Department of Justice based on the  
16 IG's judgment that the CIA search of the Senate's computer  
17 network was a potential crime.

18 In February of 2014, the Acting General Counsel of the  
19 CIA, a person whose name appeared more than 1,600 times in  
20 that Senate Report, submitted to the Justice Department his  
21 own criminal referral, alleging that Committee staff  
22 violated the Federal Hacking Statute by accessing those  
23 Panetta Review documents. The merits of this referral were  
24 not reviewed by the Director of National Intelligence, the  
25 White House, or anyone else outside of the CIA.

1           On the floor of the Senate in March of 2014,  
2 Intelligence Committee Chairman Feinstein called the CIA  
3 referral unfounded and described it as a "potential effort  
4 to intimidate staff."

5           It took the Department of Justice more than five months  
6 to clear the Committee staff and announce that no  
7 investigation would be opened.

8           Mr. Chairman, at this point I ask unanimous consent to  
9 enter into the record a complete timeline of events  
10 surrounding that 2014 criminal referral that has been shared  
11 with your office and prepared based on publically available  
12 information.

13           Senator Graham.    Without objection.

14           [The information appears in the appendix.]

15           / COMMITTEE INSERT

16           Senator Whitehouse.   This sequence of events raises  
17 several separation of powers questions.   First, the CIA's  
18 criminal referral had a significant effect on the Committee  
19 staff, and on their ability to perform legislative duties,  
20 even though it was ultimately determined to be without  
21 merit.

22           We will hear from one witness about what legislative  
23 employees go through when they are faced with such  
24 circumstances, and how it affects the performance of their  
25 duties.

1           Second, the prior referral that had been made against  
2 CIA personnel by the CIA Inspector General raises the  
3 question of retaliation by the CIA in making its subsequent  
4 referral against Committee staffers, even just to create an  
5 offsetting penalties situation -- raising the question, what  
6 safeguards protect against such retaliation.

7           Third, the involvement as a prominent subject of the  
8 Senate Report of the CIA official who launched the criminal  
9 referral against the staff who are drafting the report in  
10 which he was implicated, raises an obvious conflict of  
11 interest. And again, the question, where are the safeguards  
12 that protect Committee staff against such conflicts of  
13 interest.

14           The purpose of this hearing is not to relitigate either  
15 of those referrals. They simply set the stage for the  
16 constitutional question of this hearing. What safeguard  
17 should there be to protect ongoing Congressional  
18 investigations against executive interference by abuse of  
19 the criminal referral process?

20           One could imagine a scenario in which an executive  
21 official who is the subject of a tough Committee  
22 investigation launches a criminal referral against a  
23 Committee staff. A friendly Attorney General then sits on  
24 it, or slow walks it to protect his colleague and the  
25 administration from embarrassing disclosures. That appears

1 to be a scenario against which we have no adequate present  
2 safeguards.

3 I look forward to hearing from the panel today. We  
4 have assembled a distinguished group of witnesses that will  
5 present a range of views on how to protect the independence  
6 of Congressional staff engaged in oversight activity. I  
7 think this discussion is vital, and timely, and highly  
8 relevant to the eternal contest between executive and  
9 legislative branches.

10 Again, Mr. Chairman, I thank you for holding this  
11 hearing.

12 Senator Graham. Thank you.

13 Professor Horton, would you like -- all of you make a  
14 brief opening statement?

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1 STATEMENT OF PROFESSOR SCOTT HORTON, ADJUNCT PROFESSOR,  
2 COLUMBIA LAW SCHOOL, AUTHOR, *LORDS OF SECRECY: THE NATIONAL*  
3 *SECURITY ELITE AND AMERICA'S STEALTH WARFARE*, PELHAM, NY

4

5 Professor Horton. Thank you, Senator Graham and  
6 Senator Whitehouse. I am delighted to have the opportunity  
7 to speak with you today.

8 The Debate Clause of the U.S. Constitution is designed  
9 to shield both members of Congress and working staff, under  
10 the supervision of Members, from retaliation by the  
11 executive using the criminal justice system. That much has  
12 always been clear, even though there have always been some  
13 ambiguities about the full scope of the protections that  
14 have been granted

15 The more immediate question today, I think, is the one  
16 that both of you have focused on. That is the simple fact  
17 that an investigation was opened and was left pending for a  
18 protracted period of time, notwithstanding the obvious  
19 constitutional bar to any prosecution.

20 Attorney General Robert Jackson noted that federal  
21 prosecutors may wreak havoc on the lives of others simply by  
22 pursuing an investigation. They need to tread lightly, he  
23 said, when there is a risk that the investigation may appear  
24 to be politically motivated. This is almost invariably the  
25 case when the probe relates to the disclosure or mishandling

1 of classified information within Congress

2 The existence of the investigation itself may make it  
3 impossible for the subject to find employment, particularly  
4 in any area in which handling classified information is  
5 important. And in this case, just as the Attorney General  
6 noted, it metes out a punishment without affording the  
7 victim any due process.

8 So it seems to me that there are three particular  
9 measures that could be considered by the Senate and by  
10 Congress to address this. One, more immediately by the  
11 executive. I will take that on first.

12 That goes to the 1995 Memorandum of Understanding on  
13 referrals. The MOU details procedures that were to be  
14 followed, the court's special roles to the relevant  
15 Inspectors General and to the Agency General Counsel, and it  
16 notes that the referral should go to the Assistant Attorney  
17 General of the Criminal Division, or a Deputy Assistant  
18 Attorney General with copies to some other persons.

19 That MOU divides the entire world, it seems, into  
20 employees of the agencies involved and non-employees. So it  
21 really makes no effort to distinguish organs of  
22 constitutional oversight, such as Congressional Committees  
23 and their staff.

24 Now, you may think that that is because of the author's  
25 of the Memorandum -- and I think we have one witness who was

1 involved in its preparation -- believe that they were not  
2 proper subjects of referral in the first place. That would  
3 be a very reasonable conclusion based on the considerations  
4 of the Debate Clause.

5 Since there now seems to have arisen some sort of  
6 confusion about that, it seems to me that the first approach  
7 to amending the MOU would be to make clear that neither  
8 Members of Congress, nor persons acting under their  
9 instruction, and within the scope of their Congressional  
10 duties are proper subjects of a criminal reference.

11 If that cannot be agreed, it seems to me that there is  
12 a second point which is the point to which the referral  
13 should occur, because by historical practice within the  
14 Department of Justice, issues that impinged upon questions  
15 of privilege or prerogative of Congress and Members of  
16 Congress have always gone directly to the Attorney General,  
17 not any Assistant Attorney General.

18 So it seems to me that that should be made explicit in  
19 this Memorandum. If such issues come up, they would go to  
20 the Attorney General, or at his reference to a Deputy  
21 Attorney General.

22 The second idea I put forward is the notion of  
23 codifying an affirmative defense based on the Debate Clause.  
24 I might just say right up front, it should not be necessary.  
25 It is an immunity, after all. Prosecutors should recognize

1 it as such.

2 Since it seems to take so long for them to do so,  
3 however, one approach would be to codify this as an  
4 affirmative defense that could be pleaded. The affirmative  
5 defense would be simply establishing the facts that bring  
6 the Debate Clause into play -- that the staffer involved was  
7 acting under the instructions of Congress that did relate to  
8 activity that is clearly within the protected ambit of  
9 Congressional duties that has been defined by the Supreme  
10 Court.

11 Third, would be to limit the statute of limitations to  
12 force an accelerated review by the Department of Justice.  
13 We have a residual five-year statute of limitations. My  
14 view is that reducing the period for questions involving  
15 Debate Clause issues to six months would force an  
16 accelerated review by the Department of Justice, and make it  
17 easier for the prosecutor handling the case to issue a  
18 declination letter or some similar act.

19 Thank you.

20 Senator Graham. Thank you.

21 [The prepared statement of Professor Horton follows:]

22 / COMMITTEE INSERT

23 Senator Graham. Mr. Smith?

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1 STATEMENT OF JEFF SMITH, PARTNER, ARNOLD & PORTER, LLP,  
2 WASHINGTON, DC

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4 Mr. Smith. Mr. Chairman, Senator Whitehouse, thank  
5 you --

6 Senator Whitehouse. I think your microphone needs to  
7 go on.

8 Mr. Smith. I beg your pardon. Thank you very much  
9 for inviting me and asking me about these issues.

10 I want to begin by saying I appreciate your effort to  
11 take care of Congressional staff. I served as General  
12 Counsel of the Armed Services Committee under Sam Nunn for a  
13 number of years. I was his designee to the SSCI and to the  
14 Iran-Contra Committee. So I have seen this from both ends  
15 of Pennsylvania Avenue, and you have put your finger on a  
16 really significant issue.

17 The Founding Fathers, wisely, created checks and  
18 balances. It is especially important in the enforcement of  
19 criminal law because they knew firsthand the consequences of  
20 locking up your political opponents for no reason.

21 On the issue of crimes reports, which is the subject of  
22 this hearing, I have no firsthand knowledge of the episodes  
23 that led to this. So I cannot really talk about them. But  
24 I do have some experience with the underlying statutes and  
25 the Memorandum of Understanding that my colleague just spoke

1 about.

2 I have detailed the history of the original statute on  
3 reporting of crimes. The Amendment in 1994, Section 811  
4 that requires reporting on activities. And finally, the  
5 Memorandum of Understanding in 1995 that was signed when I  
6 was General Counsel of the CIA.

7 The reporting of crimes to the Justice is a  
8 responsibility that, in my experience, General Counsels take  
9 very seriously. They understand the importance of enforcing  
10 the criminal laws, but also understand that a referral to  
11 the Department of Justice sets in motion the process that  
12 could have severe consequences for a person wrongly  
13 suspected of criminal acts, as Senator Whitehouse wisely  
14 pointed out.

15 From the Department of Justice's perspective, they do  
16 not want to be deluged with frivolous or duplicative  
17 reports. They want to enforce the law fairly, but they want  
18 some judgment exercised on the part of agencies before they  
19 just refer things willy-nilly down to the Department.

20 There is a tendency in bureaucracies to respond to the  
21 latest scandal by overreacting. When I was General Counsel  
22 of the CIA in 1995, that is what happened. It was right  
23 after the Ames case. It was not long after the BCCI case  
24 where the CIA had not informed Justice about criminal  
25 activity.

1           So we routinely sent down a great amount of  
2 information. The Justice Department called us up and said,  
3 you are sending too much. Exercise a little more  
4 discretion. At which we promptly did.

5           I think that is the way it works. There should be  
6 consultation between the agencies and the Justice Department  
7 when these kinds of issues arrive.

8           In preparing for this testimony, I went back through  
9 the statutes and looked, again, at the 1995 Memorandum of  
10 Understanding. I agree with Professor Horton that it does  
11 need to be modified. I have a couple of suggestions in my  
12 prepared statement.

13           I disagree with him, however, that I do not believe the  
14 regulations should say that either Members of Congress or  
15 staff are exempt from the requirement to report crimes. One  
16 could imagine learning through intelligent sources that a  
17 Member of Congress or staff had committed a major crime, or  
18 frankly, was engaged improperly with a foreign government.

19           That is the sort of thing that ought to go to the  
20 Department of Justice. I agree with him that it ought to  
21 probably go to the Attorney General, but the career people  
22 at Justice also need to be involved because they are the  
23 ones that will handle it. So finding the right balance  
24 between making sure it is dealt with at the highest levels,  
25 and at the same time involving career people, I think, would

1 be key.

2 Also as he points out, the Speech or Debate Clause was  
3 not mentioned in the 1995 MOU. Frankly, we did not think  
4 about it. I have no recollection of it coming up at the  
5 time, except we were aware that from time-to-time in  
6 intelligence reports, you did get reports on the activities  
7 of staff and Members of Congress, but we all knew that was  
8 going to be handled very delicately. But we did not  
9 specifically provide for it, and perhaps we should have.

10 Before I finish, Mr. Chairman, this referral goes both  
11 ways. When I was General Counsel of the CIA, a House  
12 Committee Counsel called up and we were having a problem  
13 with that committee, which had no responsibility for the  
14 agency, and it was very tense. And she threatened to hold  
15 me in contempt and refer me to prosecution because we were  
16 refusing to turn over documents she felt she needed.

17 I told her we would be happy to cooperate, but largely  
18 through HPSCI. I did not appreciate that. It was  
19 unpleasant. It went on for some period of time. Eventually  
20 we worked it out, but I understand from both ends of the  
21 avenue what it is like to face those accusations.

22 [The prepared statement of Jeff Smith follows:]

23 / COMMITTEE INSERT

24 Senator Graham. Mr. Pittard?

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1 STATEMENT OF BILL PITTARD, PARTNER, KAISER DILLION, PLLC,  
2 WASHINGTON, DC

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4 Mr. Pittard. Thank you, Mr. Chairman, Ranking Member  
5 Whitehouse. I appreciate the invitation to be here and the  
6 opportunity to speak before the subcommittee this afternoon.

7 The subcommittee is rightly concerned about the  
8 chilling effect on legislative branch oversight staff of an  
9 Executive Branch criminal referral, investigation, and  
10 potential prosecution of those staff for oversight  
11 activities.

12 The oversight function is one of the fundamental  
13 responsibilities of this branch. Its importance is  
14 paramount. The Founding Fathers vested this branch with  
15 that authority, and that responsibility in order to guard  
16 against and overreaching executive. Our history has shown  
17 that that was an appropriate and necessary precaution.

18 In the written submission I made, I referenced  
19 Alexander Hamilton, James Madison, and a number of Supreme  
20 Court cases in support of those principles. But I would  
21 underline just one if I could this afternoon. That is the  
22 Supreme Court quoting Woodrow Wilson, another aspect of what  
23 later President Wilson would say.

24 "Unless Congress have and use every means of  
25 acquainting itself with the acts and the disposition of the

1 administrative agents of the government, the country must be  
2 helpless to learn how it is being served; and unless  
3 Congress both scrutinize these things and sift them by every  
4 form of discussion, the country must remain in embarrassing,  
5 crippling ignorance of the very affairs which it is most  
6 important that it should understand and direct. The only  
7 really self-governing people is that people which discusses  
8 and interrogates its administration."

9         And yet the fundamental oversight duty is not an easy  
10 one. People and entities subject to oversight rarely  
11 welcome it. The Executive Branch, of course, benefits from  
12 great powers of its own, and a centralization of authority  
13 that allows it to focus those powers on folks that are not  
14 in favor with whatever the current administration might be.

15         That includes Members of the House, and it includes  
16 Members of this body, and it certainly includes their staff.  
17 Staff that the Supreme Court has recognized are so critical  
18 to the Members' performance of their duties that they must  
19 be treated as the Members' alter-egos.

20         I am proud to have represented many legislative branch  
21 officials, both Members and staff. I did that, in part,  
22 while serving in the Office of General Counsel for the  
23 House. That is a non-partisan entity similar to this body,  
24 Senate Legal Counsel.

25         There, I saw firsthand what I suspect that each of you

1 has seen as well, which is the inherent vulnerability of  
2 legislative branch staff. They often make moderate to  
3 minimum incomes. They are often relatively early in their  
4 careers, so they do not have great assets to draw from.

5 They often do not have extensive reputations or  
6 networks to fall back on. They often hold or aspire to  
7 security clearances, either for their current jobs or for  
8 future employment. Those security clearances, of course,  
9 being under present law administered and renewed only by the  
10 Executive Branch.

11 And they, generally, work for bosses who necessarily  
12 are keenly aware of and responsive to public opinion. So  
13 even the hint of an investigation can endanger their  
14 careers.

15 Would the Executive Branch actually investigate, or  
16 threaten to investigate, or forego investigating based on  
17 political ideology or score settling? We do not have to  
18 delve into current controversies to answer that question,  
19 unfortunately, in the affirmative. In the testimony I  
20 submitted, I note a number of examples of the Executive  
21 Branch, and particularly the Department of Justice, having  
22 done just that, historically.

23 So what should be done? I would encourage the  
24 subcommittee to consider five particular proposals. I have  
25 submitted those in my testimony. I will only briefly

1 outline those right now, if I could.

2 First, would be for the subcommittee to consider a  
3 statutory requirement that investigations of legislative  
4 branch officials for official conduct be conducted not by  
5 the Executive Branch's Department of Justice, but instead by  
6 an independent counsel along the lines of that approved by  
7 the Supreme court in Morrison v. Olson.

8 Second, I would invite the subcommittee's consideration  
9 -- if it is to be the Department of Justice that continues  
10 to investigate and prosecute these matters, that certain  
11 internal controls be put in place that would require DOJ to  
12 use methods like my colleagues have mentioned of running  
13 approvals up the chain of command. These could require  
14 certain approvals, review, certifications, and reporting to  
15 help check investigations to be sure they are undertaken for  
16 the proper reasons.

17 Third, I would encourage the subcommittee to consider a  
18 resolution that would allow Senate staff to accept pro bono  
19 representation when they do face investigations of this  
20 sort. I am not sure they will always be able to obtain free  
21 representation, but certainly where it is available, it  
22 seems to me appropriate that they be able to take advantage  
23 of that.

24 Fourth, I would suggest that legislative branch  
25 officials be provided indemnification for legal expenses

1 when they are investigated or prosecuted for official  
2 activities. This would be inline with what corporate law  
3 often requires for corporate officers and directors. This  
4 would be similar to what the Department of Justice has in  
5 place through regulations for officials facing criminal  
6 investigations, facing civil law suits, or even  
7 Congressional scrutiny based on official activities.

8       Finally, I would suggest this subcommittee's  
9 consideration of modified procedures for legislative branch  
10 receiving security clearances, and the renewal of those  
11 clearances. That could be done by this branch setting up  
12 procedures to undertake that review, or by creating an  
13 independent body that handles all security clearance matters  
14 for the federal government.

15       Some of these recommendations are intentioned with each  
16 other. They would all need to be fleshed out, but I  
17 encourage the subcommittee to look at those as possible  
18 solutions.

19       Thank you for the opportunity to testify.

20       Senator Graham. Thank you.

21       [The prepared statement of Bill Pittard follows:]

22       / COMMITTEE INSERT

23       Senator Graham. It is good to have witnesses who try  
24 to help solve the problem.

25       So the bottom line -- let us see if we can find some

1 consensus here. No one is suggesting that a Member of  
2 Congress or a Congressional Aide be allowed to act outside  
3 the law. So there is oversight and there is criminal  
4 misconduct.

5 Mr. Smith, you are suggesting that if a Member of  
6 Congress -- you should report the fact that a Member of  
7 Congress is doing something with a foreign government or a  
8 staff Member. You agree with that, Professor Horton; right?

9 Professor Horton. Absolutely. In fact, I would say  
10 we do not disagree. We agree on that point.

11 Senator Graham. I thought so.

12 Professor Horton. My point went only to the Debate  
13 Clause, things that are covered by the Debate Clause.

14 Senator Graham. Right. So Let us look at it this  
15 way. The Debate Clause probably never envisioned  
16 Congressional oversight. The Debate Clause envisioned  
17 getting on the floor of the Senate-House and saying really  
18 bad things about people, which we do routinely, which I  
19 enjoy that. That is one of the big benefits of the job.  
20 You can say it without being prosecuted.

21 [Laughter]

22 Senator Graham. I think the Memorandum of  
23 Understanding was, sort of, a stab at this. So what I want  
24 to suggest is that we look at the MOU, revisit the structure  
25 and whether or not to codify this -- defenses, pro bono, all

1 of that makes perfect sense to me.

2 The bottom line here is that the natural tension of  
3 oversight -- eventually, somebody has got to do their job.  
4 If the Attorney General is a political hack, that creates a  
5 problem. If the Congress is asking for things, they clearly  
6 are not within jurisdiction, had not really thought about  
7 that. We are going to have to make sure that we -- as  
8 Members of Congress, we do not haul in everybody we do not  
9 like for contempt charges. So I do not know how you limit  
10 our ability to use reprisal against somebody who is not  
11 giving us something that we want, but maybe we are not  
12 entitled to.

13 So what I want to do is collect this information and do  
14 two things: suggest to the incoming administration we renew  
15 the MOU, and rely on your expertise with our staff to see if  
16 we can conduct -- negotiate a better MOU. When it comes to  
17 statutory changes to protect Congressional staff, count me  
18 in to make sure that they are -- they do not make a lot of  
19 money, most of them, in terms of being exposed to a long,  
20 drawn out legal proceeding.

21 But this tension, I do not know how you completely  
22 resolve it. But the episode that Senator Whitehouse  
23 described, kind of, brought it to a head.

24 So I just appreciate the input, and working with  
25 Senator Whitehouse, maybe next year, we can come up with

1 some proposals for a new MOU. Do you not think it is time  
2 to do a new one?

3 Professor Horton. Yes.

4 Mr. Smith. Yes.

5 Mr. Pittard. Yes.

6 Senator Graham. All of you agree with that. Do you  
7 not think our statutes need to be revisited?

8 Professor Horton. Yes.

9 Mr. Smith. Yes.

10 Mr. Pittard. Yes.

11 Senator Graham. All right. Thank you.

12 Senator Whitehouse. Thank you, Chairman.

13 As I understand it, if an Executive Branch official is  
14 threatened with a contempt of Congress, there are fairly  
15 robust defenses available in terms of legal representation  
16 and understanding that this is done in the course of this  
17 individual's duties, and therefore, it is an action brought  
18 in their official capacity, rather than in their individual  
19 capacity, and they report to higher's up, usually. So my  
20 impression is that there are more resources and defenses  
21 available to an Executive official on the receiving end of  
22 an improper threat of Congressional contempt, than there are  
23 the other way around?

24 My understanding of where a Congressional staffer is is  
25 that they are particularly exposed. We do not have a means

1 for the Committee to defend the staff, necessarily.  
2 Particularly, on a criminal referral. We do not have legal  
3 insurance or anything like that as part of the benefits for  
4 staff, so whatever their costs are of having to respond to a  
5 criminal referral are on them.

6 We actually have a specific rule or statute -- I am not  
7 sure which -- Mr. Pittard, I am sure you will know -- that  
8 actually bans and forbids a Congressional staffer from  
9 receiving pro bono representation because that might be  
10 viewed as creating a conflict.

11 So based on all of that, Mr. Pittard, do you see a  
12 difference in vulnerability between Executive and  
13 Congressional staff with respect to reciprocal exchanges of  
14 unmerited referrals or threats of contempt?

15 Mr. Pittard. I do, Senator. I think there is a  
16 substantial imbalance right now.

17 To pick up on the points that you just made, certainly  
18 in recent history, Executive Branch officials who have been  
19 threatened with contempt, or even held in contempt by the  
20 House or Senate -- while there is a statute on the books  
21 that requires -- says "shall" -- "DOJ shall present those  
22 issues to a grand jury," the Department of Justice, in  
23 recent years, has declined to do that.

24 Of course, it is DOJ that presents those things to the  
25 grand jury. So, ultimately, they have the protection of

1 being the one who is required to do it. But if they do not  
2 do it, there is no one else that is going to do it.

3 Senator Whitehouse. On the other hand, a criminal  
4 referral to DOJ is to the entity that would be bringing  
5 criminal charges against you?

6 Mr. Pittard. That is right.

7 Senator Whitehouse. Let us talk for a minute about a  
8 hypothetical moment between when an unmerited criminal  
9 referral has been made, and the criminal referral is  
10 disposed of by the Department of Justice with a  
11 determination to take no action. During that period, there  
12 are consequences for the Congressional employee,  
13 particularly, under the Garrity decision and others, in  
14 terms of what they can and cannot do in their Committee  
15 position.

16 There are personal concerns in terms of having to get  
17 your own criminal representation. Perhaps, not being able  
18 to afford it.

19 Describe some of the ways that a client -- step into  
20 one of your client's shoes and tell us what are the things  
21 that harm them professionally, and what are the things that  
22 harm them personally in that window of time between when a  
23 fallacious or improper referral is made and when it is,  
24 ultimately, finally disposed of.

25 Mr. Pittard. Well, there is tremendous pressure on

1 such a staffer. Certainly on a personal level, there is the  
2 financial pressure. They will often need to retain counsel.  
3 As you noted, right now pro bono counsel is generally not  
4 permitted by the gift rule. It is considered a gift, and  
5 therefore, not allowed.

6 Staff often do not have tremendous resources. So that  
7 financial pressure is a very significant one. These are  
8 sophisticated matters that often require sophisticated  
9 counsel.

10 These matters often hang out there for a very long  
11 time. As you know --

12 Senator Whitehouse. And in terms of the relationship  
13 between a staffer and a Congressional Committee, there are  
14 questions that the Committee cannot ask, and there are  
15 questions that the staffer cannot answer without interfering  
16 with the referral; correct?

17 Mr. Pittard. There may be, and certainly the  
18 Committee staffer's ability to gather information and to do  
19 his or her duties may be compromised. Folks are going to  
20 be, I suspect, a lot more reticent in dealing with that  
21 staffer than they otherwise would once that staffer's name  
22 is flashed across the newspapers.

23 Senator Whitehouse. My time is --

24 Senator Graham. Keep going.

25 Senator Whitehouse. All right.

1           The other points that I wanted to respond to were from  
2 Professor Horton and Mr. Smith.

3           If we were to focus on this Memorandum of  
4 Understanding, that could be rewritten unilaterally between  
5 the CIA, the DNI, and the Department of Justice. Could it  
6 not? We would not need to pass a law.

7           Professor Horton. It could be, yes.

8           Senator Whitehouse. All right. And it seems to me  
9 that the point that the Chairman raised, that one could  
10 distinguish between an action undertaken by a Committee  
11 staffer in the proper performance of his or her duties,  
12 verses treasonist acts, criminal acts, hitting somebody, all  
13 of the different things that somebody might be culpable of  
14 that do not relate to the proper performance of their  
15 duties.

16           Do you think that there would be a way to make a  
17 sensible distinction between those two? I think, Professor  
18 Horton, you probably believed that the scope of the Speech  
19 and Debate Clause actually defines that line. Do you think  
20 it is capable of definition in an MOU?

21           Professor Horton. Yes, I think it can be. I think  
22 drawing on the Supreme Court precedence that it set out, the  
23 full scope of the Speech and Debate Clause. You could set  
24 it out.

25           Then I think the factual inquiry becomes a fairly

1 simply factual inquiry with respect to staffer. Is the  
2 staffer actually acting under instruction of a Member, and  
3 is it within the scope of the protected duties as defined by  
4 the Supreme Court?

5 That is not a very complex inquiry.

6 Senator Whitehouse. Now, here is the problem, though.  
7 Who should make that? Because what happened in this case,  
8 and what could happen again is that an individual who is the  
9 subject of Congressional investigation could decide, okay, I  
10 am tired of this. I am going to blow it up by making a  
11 criminal referral, an unfounded one, against a Committee  
12 staff. And if I can convince my friend, the Attorney  
13 General, not to make a decision on it for years, there is  
14 the staffer hanging out there unable to do his or her job  
15 for the Committee, running up bills that he may or may not  
16 be able to afford to pay, and very, very exposed.

17 So you have disabled the Committee's ability going  
18 forward. Particularly if the staffer is experienced and has  
19 been working at it for a while. You have to go back to  
20 square one at that point.

21 It strikes me as a problem when a motivated referrer is  
22 allowed to be the last voice on a criminal referral within  
23 the Executive Branch. So how might you put an intermediate  
24 step somewhere in so that if somebody, in fact, has a  
25 conflict of interest -- if they are, in fact, or their

1 agency is, in fact, the subject of that investigation,  
2 somebody else, some grownup in the room who does not labor  
3 under that conflict of interest has to sign off on it before  
4 it gets out and over to the department.

5 Professor Horton. Well, I would start by just noting  
6 the language of the Debate Clause itself says, "shall not be  
7 questioned in any other place." So there is an assumption  
8 that the Congress, which is to say each House for itself  
9 would resolve these questions.

10 So one answer would be that the Senate would make an  
11 inquiry into the matter, and make a determination as to  
12 whether the Debate Clause protections exist with respect to  
13 that staffer. So that would take it outside the Executive,  
14 itself.

15 And then within the Executive, the thrust of my  
16 proposal -- which I think Mr. Smith agrees with -- is that  
17 it should be escalated to the highest level. It should go  
18 within the Justice Department, always to the Attorney  
19 General, himself, for initial review and decision.

20 Senator Whitehouse. That is on the receiving end of  
21 the referral, Mr. Smith. How about on the delivering end of  
22 the referral? Should there be some check on who is allowed  
23 to make a criminal referral where there are conflicts of  
24 interest involved?

25 Mr. Smith. Yes. I think so. There is something

1 uncomfortable about having someone who is in the middle of a  
2 particular dispute being the one who decides to refer.

3 I am not quite sure how one puts all of this in a  
4 regulation. You have to have people with good judgment and  
5 integrity running the agencies. But I am certainly not  
6 opposed to principle.

7 Senator Whitehouse. You could make a requirement of  
8 the referral that the referring officer of government has to  
9 swear and aver in the referral that he or she is operating  
10 under no conflict of interest with respect to the referral  
11 in any matter related to the investigative activity that is  
12 being undertaken.

13 Mr. Smith. One could do that. I would like to think  
14 -- and I know you may disagree with this. One would like to  
15 think that if you require the General Counsel or the head of  
16 the department or agency to make the referral, and as I have  
17 suggested, to do so after preliminary informal consultations  
18 with the Department of Justice, then we would not have to  
19 require them at the same time to sign to say they do not  
20 have a conflict of interest.

21 I mean, if I were the General Counsel, frankly, I would  
22 be slightly offended that I was having to do that. I am not  
23 opposed to it, but I would like to find some way to conclude  
24 it was not necessary.

25 Senator Whitehouse. But when you look at the price

1 that was paid by individual staffers in this circumstance,  
2 when you look at the price that was paid in terms of  
3 disabling the Committee investigative process during this  
4 period, the idea that a person who has a very distinct and  
5 apparent conflict of interest should have some check before  
6 a referral goes to the Department of Justice is something  
7 that you would agree would be reasonable to explore?

8 Mr. Smith. Yes, it is certainly reasonable to  
9 explore. It is the sort of thing about learning the wrong  
10 lesson from something that went very bad. We have to make  
11 sure we learn the right lesson, and not over regulate these  
12 things.

13 When I went back and looked at the MOU, I was surprised  
14 at the level of detail that was in it. I had forgotten a  
15 lot of that. It is a 15-page very dense MOU. We could  
16 certainly do more with that.

17 I am not opposed to your suggestion. It is certainly a  
18 good idea. But, again, one would hope that the head of the  
19 department would have enough sense that he or she would not  
20 do something like that, especially if they --

21 Senator Whitehouse. If men were angels.

22 Mr. Smith. Pardon me -- well, I agree. But we also  
23 cannot legislate morality, as we all know.

24 Senator Whitehouse. Thank you, Mr. Smith.

25 Senator Graham. This has been very helpful. So I

1 think what we will do next year is try to create some parity  
2 between the Congressional staffer and the Executive Branch  
3 in terms -- if you find yourself in one of these  
4 circumstances that we are taking better care of our people.

5 When it comes to who should decide these things, I had  
6 not really thought that much about it until now, the actual  
7 process of referral.

8 Mr. Smith, Mr. Horton, you can take somebody you do not  
9 like out of the game pretty quickly. Whether they did  
10 anything bad or not, just the investigation, itself, can  
11 knock them out of the game.

12 So one of the things I want to make sure of is that the  
13 people being investigated cannot knock out the MVP of the  
14 investigating team. Does that make sense to you?

15 Professor Horton. That is absolutely, I think, the  
16 major purpose for this hearing.

17 Senator Graham. Yes, it is just like -- So, Mr.  
18 Smith, what would you -- the current system seems like you  
19 would knock them out of the game pretty quick.

20 Mr. Smith. Well, I completely agree. I think the  
21 consequences to the individual, whether it be, frankly, in  
22 the Executive Branch or the Legislative Branch of a referral  
23 to Justice, a government employee, can be devastating,  
24 extremely costly, as my colleagues have said. Leaks to the  
25 press, there lives are ruined.

1           So it has to be done very carefully and very  
2   responsively.

3           Senator Graham.   Let me end on this question.   Could  
4   it be an absolute defense that if the Congress, the Senate,  
5   the House issued a statement, this person is acting within  
6   the scope of their employment, that completely ends the  
7   inquiry.   Is it that simple?

8           Professor Horton.   Yes, I think it is that simple.   I  
9   think the intention here is that the House should resolve  
10   the question for itself.

11          Senator Graham.   Does that neuter the Department of  
12   Justice's ability to move forward on all fronts?

13          Professor Horton.   It could conduct an investigation,  
14   but I think there are very severe limitations of what it  
15   could do with that investigation in terms of issuing  
16   subpoenas --

17          Senator Graham.   Basically, a partner, I suppose.  
18   What do you think, Mr. Smith?

19          Mr. Smith.   Mr. Chairman, this is the first time I  
20   have thought about.   So I could be completely --

21          Senator Graham.   Me too.   So we have got a lot in  
22   common.

23          [Laughter].

24          Mr. Smith.   Instinctively, the question of who  
25   determines the scope of the Speech or Debate --

1           Senator Graham.   Well, would not that be absolute  
2 protection for the body?

3           Mr. Smith.    It would be absolute protection, but it  
4 may not be wise.

5           Senator Graham.   That is what I am saying.   Yes, I  
6 agree with that.

7           Mr. Smith.    One could imagine a body up here getting  
8 -- I am a fierce defender of the Senate -- getting out of  
9 hand.   And who makes the decision for the Senate?   That  
10 could become extraordinarily political.

11          Senator Graham.   The only reason I raise this, there  
12 is a difference between the Speech and Debate Clause and  
13 oversight.   There is, sort of, an absolute defense in the  
14 Speech and Debate Clause once you meet whatever the tests  
15 are.

16          This is, sort of, no man's land.   So if you want an  
17 absolute defense, it probably should be in the Constitution.

18          Professor Horton.   I would just say, Senator, the  
19 absolute defense would have to be connected with a  
20 disciplinary process within the House.   It would assume that  
21 and it would mete out the punishment if it believed  
22 something improper occurred.

23          Senator Graham.    So you would replace the Department  
24 of Justice with internal discipline?

25          Professor Horton.   An independent counsel, as was

1 recommended, I think. In fact, there are several  
2 parliaments around the world that have used a process  
3 similar to that.

4 Senator Whitehouse. And somebody to defend the  
5 employee in all of this without violating -- I think  
6 everybody agrees that the gift rule ban on having anybody  
7 defend the employee involved in this is not a useful  
8 situation. Agreed?

9 Professor Horton. Yes.

10 Mr. Smith. Yes.

11 Mr. Pittard. Yes.

12 Senator Whitehouse. All right.

13 Senator Graham. We will end it on this. So maybe a  
14 bridge too far would be having just a statement by the body  
15 who is doing the investigating that this person or this  
16 group of people is acting within the scope of their  
17 employment -- that might be just too far?

18 Mr. Smith. That is where I am as I sit here today.  
19 Yes, Mr. Chairman.

20 Senator Graham. All right. How about you, Mr. --

21 Senator Whitehouse. We will continue to consult with  
22 all of you as we try to work together. I cannot tell you  
23 how much I appreciate the willingness of the Chairman to  
24 address these questions.

25 Senator Graham. To be continued. Thank you all.

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[Whereupon, at 3:18 p.m., the Committee was adjourned.]

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