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December 29, 2016

Hon. Lindsey O. Graham  
Chairman, Subcommittee on Crime and Terrorism  
Committee on the Judiciary  
U.S. Senate

Hon. Sheldon Whitehouse  
Ranking Member, Subcommittee on Crime and Terrorism  
Committee on the Judiciary  
U.S. Senate

Hon. Amy Klobuchar  
Member, Committee on the Judiciary  
U.S. Senate

**Re: Response to Questions for the Record: Sen. Judiciary Comm., Subcomm. on Crime & Terrorism, *Ensuring Independence: Are Additional Firewalls Needed to Protect Congressional Oversight Staff from Retaliatory Criminal Referrals?* (Dec. 6, 2016)**

Dear Chairman Graham, Ranking Member Whitehouse, and Senator Klobuchar:

Thank you for inviting me to submit responses to certain questions for the record. The questions, and my responses, are set forth below.

**Question No. 1. In your written testimony, you each set forth a number of potential measures that could help to address the issues that arise in connection with the oversight of executive branch agencies by congressional committees. In your view, what are the most important steps for Congress to take in this area?**

In my testimony, I suggested five steps for congressional consideration: (1) mandating that investigations and prosecutions of Legislative Branch officials, for official conduct, be undertaken by an independent counsel, pursuant to procedures modeled on those approved by the Supreme Court in *Morrison v. Olson*, 487 U.S. 654 (1988); (2) mandating certain internal

review, approval, certification, and reporting requirements for any Executive Branch investigation or prosecution of Legislative Branch officials, for official conduct; (3) permitting Legislative Branch officials to accept pro bono legal representation in connection with investigations or prosecutions of those officials for official conduct; (4) providing indemnification of legal expenses, including attorneys' fees, for Legislative Branch officials facing investigation or prosecution for official conduct; and (5) removing from Executive Branch control the grant and renewal of security clearances for Legislative Branch officials. Following the December 6, 2016 hearing, I remain convinced that each merits consideration.

I also have reviewed the testimony submitted by the other witnesses at the December 6, 2016 hearing (Jeffrey H. Smith and Scott Horton), and I likewise support consideration of many of the suggestions made in that testimony. Those suggestions included Mr. Smith's suggestion that Executive Branch agency referrals to the Department of Justice be approved by, at a minimum, the agency's General Counsel, and Mr. Horton's suggestions that at least certain of the protections of the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1, be codified in the hopes that the Executive Branch might then better respect them, and that the statute of limitations be shortened as to charges against Legislative Branch officials engaged in official conduct.

In reflecting on each of those suggestions, the most fundamental, and most important, is access to counsel. Accordingly, I encourage the Subcommittee, Committee, Senate, and Legislative Branch particularly to consider improving the access of Legislative Branch officials to competent counsel in facing scrutiny for their official conduct.

As I discussed in my written testimony, Legislative Branch staff are particularly vulnerable to being caught in the cross-fire of inter-branch disputes. The circumstances in which those disputes might arise are myriad, and thus difficult to regulate. In each such situation, however, the staff would benefit from competent counsel. Currently, however, most staff lack such access: Legislative Branch staff typically have limited financial (and other) resources, and gift rule considerations presently may bar them from obtaining even reduced-price or free legal counsel.

*First*, staff facing investigation or prosecution for official conduct should be permitted to accept reduced-price or free legal services. While this may implicate current gift-rule restrictions, it seems unlikely that the prospect of receipt of such a gift would adversely influence a Legislative Branch staffer. Any concerns might be addressed by requiring that staffers receiving such pro bono assistance be barred from working on matters in which the pro bono lawyer or law firm is assisting another client.

*Second*, and more fundamentally, all staff should have access to competent counsel for investigations and prosecutions as to their official conduct. This is in the interest not only of the staff, but of the Legislative Branch itself. This access should not depend on whether the staff can obtain pro bono legal assistance. In some instances, they may, but often that will not be available. (After all, any cachet to a law firm of advertising its representation of a Senator or Representative is substantially reduced in the circumstances of staff).

Providing such indemnification is not a radical idea. It is standard in the context of corporate officers and directors, as I mentioned in my written testimony. *See, e.g.*, 8 Del. Code § 145. It also is provided for, at least in part, by U.S. Department of Justice regulations. *See* 28 C.F.R. Part 50.15 & 50.16. Those regulations, for example, allow indemnification for government officials facing civil lawsuits, criminal investigations, and even congressional scrutiny in connection with their official activities—but only where the Department of Justice deems such indemnified representation “in the interest of the United States.” The Senate and the House should develop their own regulations providing for indemnified representation of their officials.

In sum, access to competent counsel is the most important protection that the Legislative Branch can, and should, provide its staff.

**Question No. 2. In your testimony, you state that Congress’ oversight responsibility is “one of the fundamental functions of this branch.” The Supreme Court has spoken on this matter as well, finding in *Watkins v. United States* that Congress’ power to conduct investigations is “broad” and “inherent in the legislative process.” At the same time, carrying out effective oversight is often difficult, at least in part because oversight inquiries from Congress can be unwelcome by executive branch agencies.**

- **Based on your experience in the Office of General Counsel for the U.S. House of Representatives, can you elaborate on the many challenges involved in conducting effective congressional oversight?**

Effective congressional oversight is difficult. The most fundamental challenge is the limited time available for Legislative Branch investigations. Each Congress lasts only two years. In that period, Committees must organize, including by obtaining leadership, Members, staff, and rules. Priorities must be developed and investigations launched. And those investigations generally must conclude, with time to act on their results, before the close of the relevant Congress.

The Executive Branch is keenly aware of these limitations, and routinely takes advantage by delaying cooperation. While the Legislative Branch can respond with subpoenas and litigation to enforce compliance, such litigation itself may be time-consuming.

The Legislative Branch of course has important powers of its own, and thus an ability at least partially to counteract Executive Branch delay. Those powers include (for the Senate) the power to confirm, or not confirm, administration nominees, and (for the Senate and House, in cooperation) to shrink or reorganize the Executive Branch. But it takes great organization and discipline effectively to exercise those powers in a body where power is as diffuse as the Legislative Branch.

Accordingly, the Legislative Branch’s best guard against Executive Branch obfuscation likely lies in the combination of strong leadership and the cultivation of a professional, experienced staff. Strong leadership can provide the organization and discipline necessary to hold the Executive Branch accountable for less than full and prompt cooperation with Legislative

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Branch oversight. Experienced staff can assist by keeping investigations focused, targeted on obtainable objectives, compliant with committee and Senate (or House) rules, removed from political landmines that can distract from the task at hand, defensible in court if need be, and, likely most important, defensible in the court of public opinion.

\* \* \*

Thank you again for the opportunity to submit these responses in support of the work of the Subcommittee.

Sincerely,

A handwritten signature in black ink, appearing to read "William Pittard". The signature is fluid and cursive, with the first name "William" being more prominent than the last name "Pittard".

William Pittard