

Testimony of Jeffrey H. Smith
Subcommittee on Crime and Terrorism
Senate Judiciary Committee
December 6, 2016

Mr. Chairman, Senator Whitehouse, thank you very much for inviting me to testify before the Subcommittee this afternoon on an issue that touches several strands of the fabric of our democracy: the rule of law, national security, Congressional oversight and the separation of powers between Congress and the executive branch.

The Founding Fathers wisely created checks and balances to prevent the accumulation and abuse of power by one branch of government over another. These checks and balances are especially important in the enforcement of criminal law.. The power of the state to prosecute and imprison its citizens must be constrained by law and process. The framers knew, from first-hand experience, the consequences of tyrannical leadership that jails its political opponents without cause.

This division of power - Congress enacts criminal statutes, the executive branch enforces them and the judicial branch interprets and applies them - has served this nation exceptionally well. So, too, has the critical role of Congress - not only in enacting legislation but also in overseeing the execution of the law. The power of the executive branch to investigate and prosecute individuals should never be used for any purpose other than the fair and impartial administration of justice.

The development of an independent federal judiciary and a cadre of professional career prosecutors has also been critical in preventing criminal prosecutions for political purposes. But the temptation to use, or threaten to use, the criminal process - by either the executive or the legislative branches - is always present. Particularly so when passions run high and major interests are at stake.

It is therefore significant that the Subcommittee is focusing on this issue. I recognize that a recent incident - the referral by CIA to the Justice Department of the alleged unauthorized removal of classified documents from the premises of the Agency by a staffer of the Senate Select Committee on Intelligence - has triggered interest in the subject.

That incident, which generated much attention, squarely raised the issue of whether the executive branch was merely complying with its obligations to report information about a possible crime to the Department of Justice or whether it was doing so to impede a legitimate Congressional investigation by threatening the prosecution of a Congressional staff member.

I do not have any direct knowledge of the facts that led CIA to make the referral or of the decision by the Department of Justice to decline action. Therefore, I will not address the specifics of that matter.

However, I do have experience in the underlying statutes that require referrals of possible criminal activity to the Department of Justice and the implementation of those statutes. I am therefore happy to discuss my experience and give you my perspectives.

I believe it is helpful to begin by reviewing the history of the “crimes report” requirement.

As you know, the basic statute is 28 USC section 535, first enacted in 1966, which requires that “any information, allegation, matter or complaint witnessed, discovered or received in a department or agency of [the federal government] relating to violations of Federal Criminal law involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency.”

The first Executive Order on intelligence activities was signed by President Ford in 1976 and did not contain any provision requiring the reporting of crimes to the Attorney General.

In 1981 President Reagan replaced the Ford executive order with Executive Order 12333, which, with some amendments, remains in force today. It required, for the first time, that senior officials of the Intelligence Community report to the Attorney General “possible violations of federal criminal laws by employees and of specified federal criminal laws by any other person as provided in procedures agreed upon by the Attorney General” (E.O. 12333, Section 1.7 (a)).

In the early 1990s a story broke that the CIA possessed information relating to criminal activity of the Bank of Credit and Commerce International, or BCCI, that had not been reported to the Attorney General. BCCI was registered in Luxembourg, but headquartered in Karachi, Pakistan. It had rapidly expanded to over 400 branches and was reportedly the 7th largest bank in the world. But it also sought to avoid bank regulations and multiple investigations, including by

U.S. authorities, revealed significant money laundering and other criminal activities. The failure of the CIA to report fully to the Department of Justice led to Congressional hearings and a revised emphasis on the importance of crimes reports.

In this same time period, on February 21, 1994 CIA Officer Aldrich Ames was arrested on charges of espionage on behalf of the Soviet Union. As you know, Ames' treachery caused the death of several CIA assets in the Soviet Union and grave damage to CIA activities. In looking at how this could have happened, Congress concluded that there was poor cooperation between agencies and inadequate sharing of information on counterintelligence matters. Therefore, they enacted Section 811 of the Intelligence Authorization Act for FY 1995 (signed into law by President Clinton on October 14, 1994). Section 811(c) requires the head of each department or agency within the executive branch to advise the FBI "immediately of any information, regardless of its origin, which indicates that classified information is being, or may have been, disclosed in an unauthorized manner to a foreign power."

The failure of the CIA to report information on BCCI to the Justice Department and the enactment of Section 811 breathed new energy into public concern regarding the lack of cooperation between law enforcement and intelligence agencies and the importance of crimes reports. As a result, in August of 1995, the heads of the Intelligence Agencies and the Attorney General, signed a Memorandum of Understanding on "Reporting of Information Concerning Federal Crimes." It remains in force and spells out detailed procedures for reporting of possible criminal activity by federal employees and "non-employees." Section VII of the MOU lists the offenses by non-employees that must be reported.

The CIA's internal regulations implementing E.O. 12333, portions of which have been released to the public, state that all Agency employees "shall report to the General Counsel...facts or circumstances that appear to indicate the commission of a criminal offense." The regulation further notes that CIA is obligated to report, through the General Counsel, to the Attorney General possible violations of federal criminal laws by employees and of specified federal criminal laws by any other person. The 1995 MOU is an attachment to the regulations.

The issue of reporting crimes to Justice is a responsibility that - in my experience - General Counsels of federal departments and agencies take very seriously. They understand the importance of enforcing the criminal laws, but also understand that a referral to the Department of Justice sets in motion a process that could have severe consequences for a person wrongfully suspected of criminal acts. If the report concerns a government employee, he or she will be required to hire counsel. Few government employees have the resources to hire counsel for an extended investigation. The employee could be suspended from their job. If they have a security clearance, it could be revoked or suspended. They would likely be ostracized by their colleagues and, if the matter leaks to the press, humiliated in public. Such referrals can send shudders through a department or agency.

If the person is ultimately found guilty, the impact of the investigation is understandable and justified. But if not, the individual's life is altered forever. And not to the good.

Therefore, referrals should not be made lightly.

From the Department of Justice's perspective, they do not want to be deluged with frivolous or duplicative reports. They want to enforce the law fairly, but have a lot on their plate and need help from the reporting agencies in exercising judgment in what to report and what not to report.

Indeed, the 1995 MOU sets out guidelines to assure that the agencies do not make duplicative reports or report on matters that have already been reported to the Inspector General of their agencies or concerns military members subject to the UCMJ.

But there is also a tendency in bureaucracies to react to the latest scandal, which sometimes leads to overreaction. That was the case in 1995, when I was General Counsel of CIA. Our office was, quite frankly, filing too many crimes reports with the Department of Justice. This was done, of course, out of the best intentions - to comply fully with the new MOU and section 811. We may have been overly enthusiastic because the Department of Justice let it be known that they would prefer we reviewed matters more carefully and refer only those that truly should be reported. They had a lot on their plate and needed some help from us.

Needless to say, we made the necessary corrections and reviewed matters more carefully before reporting them to Justice.

And that is the way it should work. Agencies must comply with the law and regulations but they must also exercise good legal judgment in deciding what to report and what not to

report. In some instances, for example, my office would call Justice on a secure telephone to discuss information we had acquired to determine whether it was something in which Justice would be interested. I understand that is now common practice and makes much sense.

In preparing for this testimony, I reviewed these statutes and regulations, as well as my recollection. I could find no discussion of how information should be handled that related to the possible commission of a federal crime by a Member of Congress or staff. I was involved in the drafting of E.O. 11905 and E.O. 12333 and was General Counsel of CIA when the 1995 MOU was executed, and I can recall no discussion of this issue by those of us involved. That is not to say it wasn't considered, but merely that the issue is not addressed in the documents and I have no recollection of it being an issue.

As I said at the outset, the government's power to investigate and prosecute crimes is a vast power that must be exercised with great responsibility. This is particularly true when fundamental issues, such as separation of powers or Congressional oversight of the executive branch are at stake.

The Speech or Debate clause of the Constitution, Section 6, Article 1, provides that Members of Congress "shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during the Attendance of their respective House... and for any Speech or Debate in either House, they shall not be questioned in any other Place." The Supreme Court, in *Gravel v. U.S.*, 408 U.S. 607 (1972), extended the protection of the Speech or Debate clause to Congressional staff who are engaged in legitimate legislative activities. But this protection is

not without limits. For example, espionage on behalf of a foreign power or embezzlement of public funds would not be protected. Further, the Clause "does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts."

Special care must be taken when the executive branch has information about possible criminal violations by Member of Congress or staff. It is highly improper for the executive branch to use the crimes reporting process to intimidate a Members of Congress or staff or in an attempt to frustrate a legitimate exercise of Congressional oversight.

I believe the 1995 MOU should be reviewed to determine if revisions are necessary. One could imagine, for example, a provision requiring that any report about conduct by a Member of Congress or staff should be made personally by the department or agency General Counsel - and that this responsibility cannot be delegated. Requiring preliminary consultations with the Department of Justice prior to a referral might also be mandated. These revisions should be made in consultation with the Department of Justice, which has a well-established policy for dealing with reports of possible criminal action by a Member of Congress or staff. I suspect those policies would inform any revisions to the 1995 MOU.

If such provisions are adopted, it might be wise to include language that discusses the issues to be considered in making any report that raises questions of separation of powers or the Speech or Debate Clause.

As I'm sure this Subcommittee appreciates, Justice has prosecuted Members of Congress and staff over the years and has, in my view, done so with great professionalism and care. The decisions about how to handle these sensitive matters should be made by career professional prosecutors at Justice, in consultation with the Attorney General as appropriate. The career prosecutors know what they are doing and are not politically motivated.

Before concluding my remarks, I must remind the Subcommittee that misuse of the criminal process can occur on both ends of Pennsylvania Avenue. When I was General Counsel of CIA, a House Committee Counsel from a committee that had no oversight jurisdiction over the Agency angrily threatened me with contempt of Congress and a referral to the Justice Department for prosecution because we refused to provide her with documents she believed she needed. I told her we would be happy to work with the House Permanent Select Committee on Intelligence to find a way for Members of her committee to get what they needed, but we were not going to give it to her. We eventually worked this out and I didn't get held in contempt but it was not a pleasant experience. Threats of prosecution have no place in resolving disputes between the Congress and the executive branch.

Mr. Chairman, let me close by thanking the Subcommittee for examining this very important subject and I look forward to answering your questions.