

## Statement of The Constitution Project

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**Submitted to the Senate Judiciary Committee Subcommittee on Crime and Terrorism for the December 6, 2016 Hearing, “Ensuring Independence: Are Additional Firewalls Needed to Protect Congressional Oversight Staff from Retaliatory Criminal Referrals?”**

**December 6, 2016**

The Constitution Project submits this statement to urge Congress to ensure that the executive branch fully complies with the Speech or Debate Clause, including the documentary non-disclosure privilege that the U.S. Court of Appeals for the D.C. Circuit recognized in *United States v. Rayburn House Office Building* 497 F. 3d 654 (D.C. Cir. 2007). Forceful defense of that privilege is crucial for protecting Congressional staff from surveillance or retaliation by the agencies they oversee.

The Supreme Court recognized in 1972 that the Speech or Debate Clause of the U.S. Constitution must protect Congressional staff as well as members if it is to serve its purposes.<sup>2</sup> The Supreme Court has also made clear that committee investigations fall within the scope of the Speech or Debate Clause’s protections.<sup>3</sup>

Nonetheless, two years ago the CIA searched Senate intelligence committee computers without notice to the committee or authorization from any court. The CIA filed a crimes report against Senate staff with the Department of Justice, falsely alleging that staffers had “exploited” a vulnerability in an agency computer system to gain unauthorized access to classified

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<sup>2</sup> *Gravel v. United States*, 408 U.S. 606 (1972).

<sup>3</sup> *E.g. Eastland v. United States Servicemen’s Fund*, 421 U.S. 491 (1975).

documents, in violation of the Computer Fraud and Abuse Act.<sup>4</sup> In fact, staffers had simply used a CIA-provided search tool to search and read CIA documents relevant to a Congressional investigation—in other words, they conducted oversight.

The Justice Department declined to initiate a full investigation against Senate staff, and a CIA Office of the Inspector General (OIG) report found that CIA’s search and retaliatory criminal referral were improper.<sup>5</sup> The OIG report’s conclusions, however, were later overturned by a CIA “accountability board,”<sup>6</sup> and the CIA Director continues to defend the agency’s actions.

The episode illustrates the importance of the D.C. Circuit Court of Appeals’ 2007 decision in *United States v. Rayburn House Office Building*,<sup>7</sup> which held that the Speech or Debate Clause protects against the compelled disclosure of legislative documents. As the D.C. Circuit stated, executive branch access to legislative documents:

clearly tends to disrupt the legislative process: exchanges between a Members of Congress and the Member’s staff or among Members of Congress on legislative matters that may legitimately involve frank or embarrassing statements; the possibility of compelled disclosure may therefore chill the exchange of views with respect to legislative activity. The chill runs counter to the Clause’s purpose of protecting disruption of the legislative process.<sup>8</sup>

The court held that a search of a Congressional office was not itself illegal, but that Congress needed to be given “opportunity to identify or assert the privilege with respect to legislative

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<sup>4</sup> A copy of the crimes report is available at <https://www.scribd.com/document/254616271/Eatinger-Referral-of-Senate-Staff-to-DOJ>.

<sup>5</sup> CIA Office of Inspector General, *Report of Investigation: Agency Access to the SSCI Shared Drive on RDINet* (“CIA OIG Report”) (July 18, 2014), available at <https://www.cia.gov/library/reports/Redacted-July-2014-CIA-Office-of-Inspector-General-Report.pdf>.

<sup>6</sup> CIA, *Final Report of the Rendition, Detention and Interrogation Network Agency Accountability Board* (December 2014), available at <https://www.cia.gov/library/reports/Redacted-December-2014-Agency-Accountability-Board-Report.pdf>.

<sup>7</sup> 497 F. 3d 654 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1295 (2008).

<sup>8</sup> *Id.* at 661.

materials before their compelled disclosure to Executive agents.”<sup>9</sup> The court noted that this could be accomplished “in a manner that also protects the interest of the Executive in law enforcement”; for example, an office could be sealed to ensure the preservation of evidence while privilege issues were resolved.<sup>10</sup>

Unfortunately, two other U.S. Courts of Appeals have declined to recognize such a documentary privilege.<sup>11</sup> But the D.C. Circuit’s decision does protect Congressional offices in Washington D.C., where most legislative and oversight activity occurs. Congress should insist that executive branch agencies comply with *Rayburn* not only on the rare occasions when they execute a judicially-authorized search warrant in a House or Senate office building, but before any electronic search or surveillance of Representatives, Senators, or their staffs in the District of Columbia.<sup>12</sup>

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In March 2014, Senate Select Committee and Intelligence (SSCI) Chairman Dianne Feinstein gave a floor speech in which she accused the CIA of interfering with the committee’s study of the agency’s detention and interrogation program. Specifically, she said that the CIA had improperly searched a SSCI computer network to determine how Senate staff had accessed a document called the “Panetta Review,”<sup>13</sup> an action that “may well have violated the separation of

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<sup>9</sup> *Id.* at 661-62.

<sup>10</sup> *Id.*

<sup>11</sup> *United States v. Renzi*, 651 F. 3d 1012 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1097; *In re Fattah*, 802 F. 3d 516 (3d Cir. 2015).

<sup>12</sup> If Congress consents to conduct major investigative work off-site, as SSCI did with respect to its study of the CIA’s interrogation program, it should condition its consent on an executive agreement to fully comply with the *Rayburn* decision.

<sup>13</sup> The “Panetta Review” was a CIA examination of the documents that the agency provided to SSCI for the committee’s investigation. The CIA has characterized the review as “summaries of documents being provided to the [committee] ... highlighting the most noteworthy information contained in the millions of pages of documents being made available.” Senators and intelligence committee staff, however, have described it as a crucial narrative document, over 1000 pages long, in which the agency acknowledges flaws in the interrogation program it would later attempt to conceal. See Spencer Ackerman, ‘*A Constitutional Crisis*’: *The CIA Turns on the Senate*, *The Guardian*, Sept. 10, 2016, available at <https://www.theguardian.com/us-news/2016/sep/10/cia-senate-investigation->

powers principles embodied in the United States Constitution, including the Speech and Debate clause.”<sup>14</sup> Senator Feinstein stated that the CIA’s acting general counsel had filed an unfounded crimes report against committee staff with the Department of Justice:

there is no legitimate reason to allege to the Justice Department that Senate staff may have committed a crime. I view the acting general counsel’s referral as a potential effort to intimidate this staff—and I am not taking it lightly.<sup>15</sup>

An investigation by the CIA Office of Inspector General (OIG) confirmed most of Feinstein’s allegations, though it did not address the Speech or Debate Clause implications of the CIA search.

The CIA OIG found that in January 2014, CIA computer technicians, acting on instructions from attorneys in the CIA general counsel’s office, had improperly searched the computer network that staffers used to review documents for the interrogation study (known as RDINet).<sup>16</sup> CIA personnel had “set up a user profile on RDINet that was configured with the same privileges” as a Senate staffer.<sup>17</sup> They used this dummy account to “run Google queries with the same permissions as a SSCI staffer to see what they were able to view in their search results” and to open some of the documents.<sup>18</sup>

According to the OIG report, these initial searches were conducted after CIA Director John Brennan had authorized attorneys to determine how Senate staffers had gained access to the

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<sup>14</sup> See Senator Dianne Feinstein, Floor Statement on Intel Committee’s CIA Detention, Interrogation Report, Mar. 11, 2014, available at <http://www.feinstein.senate.gov/public/index.cfm/2014/3/feinstein-statement-on-intelligence-committee-s-cia-detention-interrogation-report>.

<sup>15</sup> *Id.* Feinstein noted that the attorney who filed the criminal referral, CIA Acting General Counsel Robert Eatinger, was a “lawyer in the CIA’s Counterterrorism Center—the unit within which the CIA managed and carried out [the detention and interrogation] program. From mid-2004 until the official termination of the detention and interrogation program in January 2009, he was the unit’s chief lawyer. He is mentioned by name more than 1,600 times in our study.”

<sup>16</sup> CIA OIG Report, *supra* note 4.

<sup>17</sup> *Id.* at 7.

<sup>18</sup> *Id.* at 7-8.

Panetta Review, but Brennan said he did not “direct anyone to review SSCI systems.”<sup>19</sup> Brennan later instructed CIA personnel to “stand down” on further searches until he spoke to the committee. A few days later, however, the CIA’s Office of Security conducted additional searches of RDINet that included a “keyword search of all and a review of some of the emails of SSCI Majority staff members.”<sup>20</sup>

According to a recent news report, Director Brennan told Chairman Feinstein and then-Vice Chairman Saxby Chambliss in mid-January 2014 that committee staffers needed to be “disciplined” for having compromised a CIA network to access the Panetta Review. The article stated that Daniel Jones, the staffer who led SSCI’s investigation into the detention and interrogation program, “understood Brennan’s statement to be a demand for the senators to fire him.”<sup>21</sup> The committee did not comply with Brennan’s request, and asked the CIA to cease searches of the network given the separation of powers issues at stake.<sup>22</sup>

On February 7, 2014, the CIA filed a crimes report with the Department of Justice, alleging that a SSCI staffer had violated the Computer Fraud and Abuse Act by “exploit[ing] a vulnerability” in the CIA’s computer networks “to retrieve a number of CIA documents ... to which he or she did not have authorized access.”<sup>23</sup> OIG found that “there was no factual basis for the allegations made in the CIA crimes report,” and that the “report was solely based on inaccurate information provided by” CIA attorneys.<sup>24</sup>

After receiving the inspector general’s report, Brennan apologized to Sens. Feinstein and

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<sup>19</sup> *Id.* at 10-11.

<sup>20</sup> CIA Office of Inspector General, Summary of Report, July 31, 2014, available at <https://www.fas.org/sgp/othergov/intel/ig-ssci.pdf>.

<sup>21</sup> Spencer Ackerman, ‘A Constitutional Crisis’: The CIA Turns on the Senate, The Guardian, Sept. 10, 2016, available at <https://www.theguardian.com/us-news/2016/sep/10/cia-senate-investigation-constitutional-crisis-daniel-jones>.

<sup>22</sup> *Id.*

<sup>23</sup> A copy of the criminal referral is available at <https://www.scribd.com/document/254616271/Eatinger-Referral-of-Senate-Staff-to-DOJ>.

<sup>24</sup> CIA OIG Report at 13.

Chambliss for the search and convened an “accountability board” to determine whether any CIA employees should be disciplined. The accountability board, however, rejected the OIG’s conclusions and recommended against any form of discipline for any CIA employee.<sup>25</sup> It found that the CIA’s actions had been “reasonable” attempts to balance the need “to ensure that a CIA system containing substantial sensitive material was secure” with the need “to safeguard the prerogatives of the Senate.”<sup>26</sup>

The accountability board report did not mention the Speech or Debate Clause as one of these prerogatives.<sup>27</sup> Similarly, the CIA attorney who ordered the search of Senate staff did not mention the clause in a memorandum justifying his actions.<sup>28</sup> It is unclear what role, if any, the clause played in DOJ’s consideration of the referral against Senate staff.

Senator Ron Wyden raised the incident with Brennan at a committee hearing in 2016, asking Brennan: “Would you agree that the CIA’s 2014 search of Senate files was improper?”<sup>29</sup>

Brennan replied:

Senator, as you well know, there were very unique circumstances associated with this whole affair ... When it became quite obvious to CIA personnel that Senate staffers had unauthorized access to an internal draft document of the CIA, it was an obligation on the part of CIA officers who had responsibility for the security of that network to investigate to see what might have been the reason for

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<sup>25</sup> CIA, *Final Report of the Rendition, Detention and Interrogation Network Agency Accountability Board* (December 2014), available at <https://www.cia.gov/library/reports/Redacted-December-2014-Agency-Accountability-Board-Report.pdf>. The CIA inspector general resigned the same month that the accountability board issued its conclusions, though an agency spokesman said the timing was coincidental.

<sup>26</sup> *Id.* at 30.

<sup>27</sup> *Id.*

<sup>28</sup> A copy of the CIA attorney’s justification for his actions is available at <https://www.scribd.com/document/254579984/CIA-Attorney-s-Memo>. See also Katherine Hawkins, *Torture and the CIA’s Unaccountability Boards*, Just Security, Feb. 5, 2015, available at <https://www.justsecurity.org/19724/torture-cias-unaccountability-boards/>; Jason Leopold, *The Google Search that Made the CIA Spy on the US Senate*, Vice News, Aug. 12, 2015, available at <https://news.vice.com/article/the-google-search-that-made-the-cia-spy-on-the-us-senate>.

<sup>29</sup> U.S. Senate, Select Committee on Intelligence, *Open Hearing: Worldwide Threats Hearing*, Hearing, February 9, 2016. A video of the quoted exchange is available at <https://www.wyden.senate.gov/news/press-releases/watch-wyden-questions-cia-director-on-searching-senate-files-director-of-national-intelligence-on-strong-encryption>.

that access that the Senate staffers had to that document.<sup>30</sup>

Brennan acknowledged that CIA officers had “inappropriate access ... to five e-mails or so of Senate staffers” during their investigation, but he characterized this as a “de minimis” error that was “taken as a part of a very reasonable investigative action. But do not say we spied on Senate computers or your files. We did not do that. We were fulfilling our responsibilities.”<sup>31</sup> Brennan also said that the staffers had acted “inappropriately” by accessing the Panetta Review.<sup>32</sup>

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This episode vividly demonstrates the potential chilling effect of executive branch access to documentary records of Congress’s oversight and legislative activities, even if no criminal charges are filed, the documents are not introduced in court and members of Congress and their staffs are not forced to testify. As Senator Wyden has stated, SSCI “can’t do vigorous oversight over the agency if the agency we’re supposed to be overseeing is in fact secretly searching our files.”<sup>33</sup>

Senator Wyden was correct. Congress as a whole should act more forcefully to prevent surveillance of or retaliation against their staffs, on a consistent, bipartisan basis. Congress should be particularly vigilant in protecting the communications of members and aides overseeing the CIA, FBI, NSA and other intelligence agencies. Those agencies’ technological capabilities; their access to data collected under the PATRIOT Act, the FISA Amendments Act, and Executive Order 12333; and their role in determining staff’s eligibility for security clearances combine to place oversight staffers in a potentially vulnerable position. Congress

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Julian Hattam, *Top Dem: CIA Officials Thought Spying on Senate “Was Flat Out Wrong,”* The Hill, May 25, 2016, available at <http://thehill.com/policy/national-security/281291-top-dem-cia-officials-thought-spying-on-senate-was-flat-out-wrong>.

should insist on assurances from agencies that they understand that the D.C. Circuit's holding in *Rayburn* prevents them from searching Senators, Representatives, and staffs' legislative documents and communications.

It is crucial that Congress act affirmatively to protect its communications from search and its staff from retaliation, rather than rely on safeguards that only apply in the context of a criminal prosecution. A criminal referral and investigation are extremely burdensome in themselves, particularly for Congressional staffers who typically receive modest salaries and cannot receive pro bono legal assistance under Senate gift rules. Safeguards that apply only after a prosecution begins also cannot protect staff from other forms of retaliation, such as administrative sanctions or leaks to the press.