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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

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June 7, 2017

VIA ELECTRONIC TRANSMISSION

The Honorable Donald J. Trump
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. President:

In February, I wrote to you about the importance of empowering whistleblowers to help you “drain the swamp.”¹ Today, I write to urge you to encourage cooperation with congressional oversight as another key way to accomplish that goal and to alert you to a bureaucratic effort by the Office of Legal Counsel to insulate the Executive Branch from scrutiny by the elected representatives of the American people.

Our Constitutional system of separation of powers grants to Congress all legislative authority.² The Supreme Court has recognized time and again that the power of congressional inquiry is inherent in these vested legislative powers.³ That is because without access to information held by the Executive Branch, Congress cannot legislate effectively or help assure the American people that their hard-earned tax dollars are being spent wisely.

Every member of Congress is a Constitutional officer, duly elected to represent and cast votes in the interests of their constituents. This applies obviously regardless of whether they are in the majority or the minority at the moment and regardless of whether they are in a leadership position on a particular committee. Thus, *all* members need accurate information from the Executive Branch in order to carry out their Constitutional function to make informed decisions on all sorts of legislative issues covering a vast array of complex matters across our massive federal government.

¹ Letter from Charles E. Grassley, Chairman, U.S. Sen. Comm. on the Judiciary to Donald J. Trump, President of the United States (Feb. 8, 2017).

² U.S. CONST. art. I, § 1.

³ *McGrain v. Daugherty*, 273 U.S. 135, 177, 181-182 (1927).

Unfortunately, the May 1, 2017 Office of Legal Counsel (OLC) opinion authored by Acting Assistant Attorney General Curtis E. Gannon on this topic completely misses the mark. It erroneously rejects any notion that individual members of Congress who may not chair a relevant committee need to obtain information from the Executive Branch in order to carry out their Constitutional duties. It falsely asserts that only requests from committees or their chairs are “constitutionally authorized,”⁴ and relegates requests from non-Chairmen to the position of “non-oversight” inquiries—whatever that means.⁵

This is nonsense.

The Constitution does not mention committees or committee Chairmen at all. The committee structure in Congress is simply how the Legislative Branch has chosen to internally organize itself. It works through committees “[b]ecause of the high volume and complexity of its work,” not for the purpose of cutting off the flow of information to members who do not chair those committees.⁶ Unless Congress explicitly tells the Executive Branch to withhold information based on committee membership or leadership position, there is no legal or Constitutional basis for the Executive Branch to do so.

For OLC to so fundamentally misunderstand and misstate such a simple fact exposes its shocking lack of professionalism and objectivity. Indeed, OLC appears to have utterly failed to live up to its own standards. You are being ill-served and ill-advised. OLC’s best practice guidelines states:

[R]egardless of the Office’s ultimate legal conclusions, it should strive to ensure that it candidly and fairly addresses the *full range* of relevant legal sources and *significant arguments on all sides* of a question.

* * *

The Office must strive in our opinions for clear and concise analysis and a *balanced presentation of arguments on each side* of an issue.⁷

⁴ OLC opinion at 2 (citing Congressional Oversight Manual at 65); *id.* at 3 (noting that requests from individual members do not “trigger any obligation to accommodate congressional needs and is not legally enforceable through a subpoena or contempt proceedings”).

⁵ *Id.* at 3.

⁶ See Judy Schneider, Cong. Research Serv., RS20794, *The Committee System in the U.S. Congress* 1 (Oct. 14, 2009) (“Because of the high volume and complexity of its work, Congress divides its legislative, oversight, and internal administrative tasks among committees and subcommittees.”).

⁷ U.S. Department of Justice, Office of Legal Counsel, “Best Practices for OLC Legal Advice and Written Opinions” (Jul. 16, 2010) (emphasis added), at 1-2, 4; available at <http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf>.

The most recent OLC opinion is anything but balanced. For example, it fails to cite and analyze any authority that challenges its conclusion.

As a result, the opinion takes an unduly restrictive and unsupported view of the responsibilities of Members of Congress and the nature of congressional oversight. In so doing, the opinion equates requests from individual members to Freedom of Information Act (FOIA) requests from unelected members of the public. But the powers vested in the Congress—both explicitly and inherently by the Constitution—impose significant and far-reaching responsibilities on the people’s elected representatives. They include the authorization and appropriation of federal funds, the organization of federal departments, the enactment of laws executing the enumerated powers, the confirmation of nominees, the impeachment and removal of officers, and the investigation of the execution of the laws and of waste, fraud, and abuse in federal programs. These responsibilities are all forms of oversight, all mechanisms that support the legislative check and balance of the executive power.⁸ All members participate in deciding whether, when, and how Congress will exercise these authorities.

The United States Court of Appeals for the D.C. Circuit recognized in *Murphy v. Dep’t of the Army* that, “[a]ll Members [of Congress] have a constitutionally recognized status entitling them to share in general congressional powers and responsibilities, many of them requiring access to executive information.”⁹ Each member “participates in the law-making process; each has a voice and a vote in that process; and each is entitled to request such information from the executive agencies as will enable him to carry out the responsibilities of a legislator.”¹⁰ Yet, the OLC opinion ignores these points and authorities. It avoids good faith presentation of any significant arguments contrary to its conclusion. It utterly fails to acknowledge or respond to anything supporting the notion that a request from a Member of Congress might be entitled to greater weight than a FOIA request.

The OLC opinion also inexplicably asserts that this responsibility of congressional “oversight” is restricted to only certain inquiries made by Chairmen or full committees on the grounds that only those responses can be compelled. As the OLC opinion notes, the rules of the House and the Senate authorize its standing committees to conduct oversight. And that authority, as the Supreme Court has recognized time and again, is extremely broad.

It is true that through this process Congress can compel the production of witnesses and documents. However, the scope of information Members of Congress need from the Executive Branch in order to carry out their Constitutional duties is far

⁸ Elaine Halchin et al., Cong. Research Serv., RL30240, *Congressional Oversight Manual* 4-5 (Dec. 19, 2014).

⁹ 613 F.2d 1151, 1157 (D.C. Cir. 1979) (emphasis added).

¹⁰ *Id.*

broader than merely what is obtained through compulsory process. The vast majority of information Congress obtains, even through a Chairman's requests, is obtained voluntarily, not by compulsion. Yet, reading the OLC opinion, it would seem oversight is only "oversight" if it's mandatory.

Simply put, that's just not how it works.

First, by declaring that non-Chairman requests are not "authorized," OLC purports to speak for the Legislative Branch, an act which itself lacks any authority. It simply is not the province of another branch of government to say which information gathering activities by Members of Congress are "authorized" or not. Voluntary requests for information from the Executive Branch by members or groups of members without regard to committee chairmanship or membership have occurred and have been accommodated regularly since the beginning of the Republic.

As the court further recognized in *Murphy*:

It would be an inappropriate intrusion into the legislative sphere for the courts to decide without congressional direction that, for example, only the chairman of a committee shall be regarded as the official voice of the Congress *for purposes of receiving such information*, as distinguished from its ranking minority member, other committee members, or other members of the Congress.¹¹

It is just as inappropriate for the Executive Branch as it would be for the Courts. Receiving information in response to voluntary requests is completely different from compelling information, and Members of Congress need access to both in order to do their jobs effectively. But the OLC opinion unnecessarily conflates the two in order to reach its conclusions.

Second, as noted above, nothing in the committee structure or in our internal rules suggests that Congress meant to stifle the flow of information to non-Chairmen. In fact, the consideration of compulsory process generally requires the consent or other participation of non-Chairmen. That process almost always begins with voluntary requests and negotiations with the Executive Branch. Non-Chairmen need to, and often do, participate in receiving information voluntarily in the course of that process in order to determine whether, and when, compulsory process becomes necessary. And, the decision to enforce that process through contempt belongs to the whole body—a decision in which every Member participates.

Even a cursory review of House and Senate committee rules, which the OLC apparently did not perform, plainly shows that most committees' rules envision or

¹¹ 613 F.2d 1151, 1157 (D.C. Cir. 1979).

require the participation of the minority ranking member or even the full committee in the issuance of a subpoena.¹² Only a handful of committees have delegated the authority to a Chairman to unilaterally issue a subpoena without even consulting or notifying the Ranking Member. Thus, OLC's distinction between Chairmen as "authorized" to seek information because such oversight can be compelled by a Chairman acting alone is mostly false. The Executive Branch's so-called "longstanding" practice of responding only to Chairmen plainly does not, and cannot, depend on the voluntariness of such a response. The actual practice in almost every case, whether made to a Chairman or not, is that responses are fully voluntary.

The Executive Branch has in fact been *voluntarily* responding to requests from individual members for the entirety of its existence, whether or not those members did or had the power to unilaterally issue a subpoena. In most cases, congressional requests—even from Chairmen—never reach the compulsory stage precisely *because* of this process of voluntary accommodation. Traditionally, a subpoena has been used as a last resort, when the voluntary accommodation process has already failed. Thus that process begins, or at least ought to begin, well before a Chairman or a committee issues a subpoena or a house issues a contempt citation. OLC offers no authority indicating that courts expect the other two branches to cooperate with each other only when compelled to do so. Such a position would itself undermine the very purpose of comity and cooperation between the branches.

Moreover, in recent years, particularly under the Obama administration, the Executive Branch has sought to rely on increasingly tenuous claims of privilege and force congressional investigators to seek compulsory process and avoid scrutiny in the absence of a subpoena. The OLC opinion's refusal to recognize a voluntary request as a legitimate, constitutionally-grounded part of the each Member's participation in the legislative powers will only feed this unfortunate trend. It risks increased brinksmanship in Executive-Legislative relations and will result in less, not more, "dynamic . . . furthering [of] the constitutional scheme."¹³

Imagine if the Congress took a similar position and refused to voluntarily disclose any information to an Executive Branch official unless the official was capable of compelling an answer. Imagine Congressional legal opinion instructing Members and staff to withhold all information about bills, nominations, or appropriations from most Executive Branch officials on the grounds that Congress has "no constitutional obligation to accommodate information requests from the Deputy Undersecretary of Legislative Affairs." It's absurd. It would never happen, but that is analogous to what this OLC opinion says. Members of Congress simply do not treat Executive Branch officials with such contempt and they do not deserve such treatment in return. This is

¹² <http://gibsondunn.com/publications/Documents/HouseSenateCommitteeRulesChart-2015.pdf>.

¹³ OLC opinion at 3 (quoting *United States v. AT&T*, 567 F.2d 121, 130-31 (D.C. Cir. 1977)).

especially true given that, unlike virtually all Executive Branch officials, Members are elected to Constitutional positions. Instead, the Executive Branch should work to cooperate in good faith with all congressional requests to the fullest extent possible.

Finally, the practical implications of the policy that this opinion is reportedly designed to support are extremely troublesome for the effective and efficient functioning of our constitutional democracy. Notably, leaving aside the fact that the contrived distinction between “oversight” and “non-oversight” requests makes little sense, the opinion does *not* say that determinations whether to comply voluntarily with an individual request depend or should depend upon the party of the requester. Nonetheless, I know that bureaucrats in the Executive Branch sometimes choose to respond only to the party in power at the moment. I also encountered significant problems in gaining answers to my requests from the Obama administration, whether I was in the majority or the minority.

I know from experience that a partisan response to oversight only discourages bipartisanship, decreases transparency, and diminishes the crucial role of the American people’s elected representatives. Oversight brings transparency, and transparency brings accountability. And, the opposite is true. Shutting down oversight requests doesn’t *drain* the swamp, Mr. President. It *floods* the swamp.

I also know from long experience that, even in a highly charged political environment, most requests for information—by majority and minority members—are not “partisan” or at least not intended to be so. Many requests simply seek information to help inform Members as they perform their Constitutional duty to legislate and fix real problems for the American people. That is the kind of information Republicans *and* Democrats in Congress need to be able to do our jobs on behalf of the people we all represent.

Therefore, I respectfully request that the White House rescind this OLC opinion and any policy of ignoring oversight request from non-Chairmen. It harms not just the Members who happen to be in the minority party at the moment, but also, Members in the majority party who are not currently Chairmen. It obstructs what ought to be the natural flow of information between agencies and the committees, which frustrates the Constitutional function of legislating.

Sincerely,



Charles E. Grassley
Chairman

cc: The Honorable Dianne Feinstein
Ranking Member