

## IV: COMPLIANCE WITH CONGRESSIONAL INVESTI- GATIONS

*“But now that I am the secretary and I am responsible to you and the Congress, I can promise you that if you’re not getting something that you have evidence of or you think you ought to be getting, we’ll work with you. And I will appoint somebody to work directly with you starting tomorrow... To have a review of anything you don’t think you [have] gotten that you’re supposed to get. Let’s get this done with, folks.”*

Secretary of State John F. Kerry (April 2013—one year before the creation of the Select Committee on complying with congressional questions about the Benghazi attacks.)

*“This is the most transparent administration in history.”*

President Barack Obama (February 2013)

*“Four Americans lost their lives in Benghazi, and this White House has gone to extraordinary lengths to mislead, obstruct, and obscure what actually took place.”*

Speaker John A. Boehner (May 2014—after the White House failed to produce Benjamin J. Rhodes' memo to Congress.)

*“I want the public to see my email.”*

Secretary Hillary R. Clinton (March 2015—after published reports her emails and other public records were returned to the State Department 18 months after she left office.)

## COMPLIANCE WITH CONGRESSIONAL OVERSIGHT

### Introduction

Congress's authority to oversee and investigate the Executive Branch is a necessary component of legislative powers and to maintain the constitutional balance of powers between the branches. As the Supreme Court held in 1927: "[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."<sup>1</sup> Similarly, the Supreme Court held: "The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."<sup>2</sup>

When needed information cannot easily be obtained—or if government agencies resist—Congress has legitimate cause to compel responses:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change, and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete, so some means of compulsion are essential to obtain what is needed.<sup>3</sup>

These principles of congressional oversight have been severely tested during the Committee's investigation. The administration's frequently stated pledge to comply with "all legitimate oversight requests" is often a hollow prelude followed by delay or refusal to respond to legitimate inquiries. Other congressional committees have reported similar delay and obstruction.<sup>4</sup> The administration's resistance to this Committee has been especially troubling. The families of the four Americans murdered in Benghazi and the American public deserve to hear the whole truth in a

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<sup>1</sup> *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

<sup>2</sup> *Watkins v. United States*, 354 U.S. 178, 187 (1957).

<sup>3</sup> *McGrain*, 273 U.S. at 175.

<sup>4</sup> <http://www.usatoday.com/story/opinion/2016/02/09/obama-administration-least-transparent-epa-state-doj-clinton-benghazi-column/80050428/>

timely fashion. The same government that asked J. Christopher Stevens, Sean P. Smith, Glen A. Doherty and Tyrone S. Woods to serve selflessly and sacrificially delayed and obstructed an investigation into what happened in Benghazi before, during, and after their deaths.

The discussion below details the Select Committee's two-year battle to obtain documents and access to witnesses necessary to understand what happened in Benghazi. The administration's intentional failure to cooperate with this and other congressional investigations warrants changes in congressional rules and amendments to law in order to ensure the Executive Branch cooperates with congressional investigations and the American people know what their government does on their behalf and with their money.

The House of Representatives established the Committee in large part *because* of this administration's delay and obstruction of prior congressional investigations.<sup>5</sup> The House specifically directed the Committee to examine "executive branch activities and efforts to comply with Congressional inquiries" into the Benghazi terrorist attacks and to recommend ways to improve Executive Branch compliance with congressional oversight.<sup>6</sup> The detailed nature of this section is intended to reflect the breadth of the Committee's investigation and the lengths to which the administration went to delay and obstruct the investigation. It also provides a factual record so readers can judge for themselves the responsiveness of Executive Branch agencies and how this lack of responsiveness not only thwarted efforts to find facts but also contributed to the time it took to acquire those facts ultimately uncovered.

### **Building the Committee's Record**

The discovery and production of all relevant, material documents—and other tangible evidentiary items—is an essential foundation for substantive hearings, public and private, as well as constructive witness interviews. Examining witnesses without knowledge of and access to all relevant information is unproductive, time consuming, and inefficient. The logical chronology of serious investigations is to gather physical evi-

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<sup>5</sup> Eli Lake, *Clinton Can Thank Obama for Her Benghazi Headache*, Bloomberg (Oct. 6, 2015), <http://www.bloombergview.com/articles/2015-10-06/clinton-can-thank-obama-for-her-benghazi-headache>.

<sup>6</sup> See H. Res. 567, 113th Cong., § 3(a)(6) and (7) (2014).

dence and documents prior to questioning witnesses. Not only do the documents serve as a source and foundation for the subsequent interview, they also provide witnesses with the information needed to refresh recollections or put testimony in perspective. Serious investigators understand the logical chronology of access and interview. Regrettably, so do those seeking to undermine investigations.

#### REVIEW OF EXISTING DOCUMENTS

When established in May 2014, the Committee—consistent with the directive in H. Res. 567—sought to obtain all relevant documents from the five House committees previously investigating the terrorist attacks on U.S. facilities in Benghazi.<sup>7</sup>

While previous committees of Congress did investigate certain aspects of Benghazi, no committee investigated all aspects of Benghazi. The House Armed Services Committee focused on Defense Department matters and relied almost exclusively on briefings and public hearings. The Armed Services Committee did not investigate State Department issues, intelligence community issues or White House involvement in the drafting and editing of the public responses after the attacks. The House Permanent Intelligence Committee focused on intelligence issues and did not investigate Defense or State Department issues. Additionally, the Intelligence Committee interviewed some witnesses in groups, which is generally disfavored as an investigatory tool.

The Accountability Review Board [ARB] was a State Department investigative entity which did not have jurisdiction over the Defense Department, the Central Intelligence Agency [CIA], or the White House. In addition, there is no transcript from any interview conducted by the ARB, making it impossible to know which questions were asked, of whom, and what the precise responses were. The absence of transcripts requires the reader to simply take the word of those drafting the report.

The failure to honor congressional requests for information and the silo effect of committees being confined to certain jurisdictional lanes is what

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<sup>7</sup> *See id.* § 5(a) (“Any committee of the House of Representatives having custody of records in any form relating to the matters described in section 3 shall transfer such records to the Select Committee within 14 days of the adoption of this resolution. Such records shall become the records of the Select Committee.”).

prompted John A. Boehner, Speaker of the House, and ultimately the House of Representatives, to form a select committee with broad investigatory authority across all jurisdictions and across all facets of what happened in Benghazi before, during and after the deadly attacks.

The Select Committee's broader jurisdiction is reflected in the fact this Committee interviewed 107 witnesses, 81 of whom had not been questioned previously by any committee of Congress. These witnesses came from all parts of government, including the White House, the CIA and Defense and State Departments. It is reflected in the more than 75,000 pages of new documents to which no other committee of Congress had access. In addition, the Committee's investigation discovered emails not previously uncovered from senior government officials including the emails of Stevens and of Hillary R. Clinton, the Secretary of State, and her senior staff.

When the Committee came into existence in May 2014, it accessed approximately 50,000 pages of reports, interview transcripts, depositions, hearing transcripts, memoranda, classified and unclassified documents, and other information not cited or used by the standing committees in their investigations.<sup>8</sup> The Committee reviewed and evaluated the documents page by page.<sup>9</sup> This review took place from July 2014 to October 2014.

Among these materials—many of which were duplicates—were 25,000 pages so heavily redacted as to be useless to investigators.<sup>10</sup> This prompted the Committee to ask the State Department to reproduce the material in less-redacted form.<sup>11</sup> The resulting document productions

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<sup>8</sup> Chairman Trey Gowdy, *Interim Progress Update*, H. SELECT COMM. ON BENGHAZI 3 (May 8, 2015), <http://benghazi.house.gov/sites/republicans.benghazi.house.gov/files/Interim%20Progress%20Update%2005-08-15.pdf>. [hereinafter *Interim Progress Update*].

<sup>9</sup> *Id.*

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

<sup>11</sup> See Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to Julia E. Frifield, Assistant Sec'y of State for Legis. Affairs, U.S. Dep't of State, (Sept. 30, 2014) (on file with the Committee).

were delivered in two installments—November 24, 2014, and December 9, 2014.<sup>12</sup>

#### INITIAL DOCUMENT REQUESTS TO EXECUTIVE BRANCH AGENCIES

The Committee also sought information through the pending document requests of previous committees. The State Department had yet to comply with two outstanding congressional subpoenas issued in 2013—one subpoena dealt specifically with ARB documents.<sup>13</sup> The other subpoena dealt with documents previously reviewed by congressional investigators but possession of the documents remained with the State Department limiting full and useful access to the information.<sup>14</sup> These subpoenas were and remained legally binding on the State Department and did not need to be reissued at that time.<sup>15</sup> Since those existing subpoenas remained valid, the Committee gave them priority.<sup>16</sup> The State Department produced 15,000 pages of new documents to the Committee on August 11, 2014.<sup>17</sup>

A review of these 15,000 pages of emails and documents, coupled with the 25,000 pages of less-redacted material, revealed significant gaps in the information needed to determine what happened in Libya before, during and after the attacks that led to the murder of four Americans. For instance, this production contained few emails between and among the

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<sup>12</sup> Letter from Julia E. Frifield, Assistant Sec'y of State for Legis. Affairs, U.S. Dep't of State, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (Nov. 24, 2014) (on file with the Committee); Letter from Julia E. Frifield, Assistant Sec'y of State for Legis. Affairs, U.S. Dep't of State, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (Dec. 9, 2014) (on file with the Committee).

<sup>13</sup> Subpoena issued by H. Comm. on Oversight & Gov't Reform to John F. Kerry, Sec'y of State, U.S. Dep't of State (Aug. 1, 2013) [hereinafter OGR Document subpoena] (seeking approximately 25,000 pages of documents referenced in Assistant Sec'y Thomas Gibbons' March 29, 2013 letter).

<sup>14</sup> Subpoena issued by H. Comm. on Oversight & Gov't Reform to John F. Kerry, Sec'y of State, U.S. Dep't of State (Aug. 1, 2013) [hereinafter OGR ARB Subpoena] (seeking documents related to State Dep't's ARB findings regarding the facts and circumstances surrounding the attacks in Benghazi).

<sup>15</sup> Interim Progress Update, *supra* note 8, at 4.

<sup>16</sup> *Id.*

<sup>17</sup> Letter from Julia E. Frifield, Assistant Sec'y of State for Legis. Affairs, U.S. Dep't of State, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (Aug. 11, 2014) (on file with the Committee).

State Department's senior staff. The email traffic did not reflect roles played in the decision-making process as it related to the U.S.'s intervention into Libya in 2011, the Special Mission to Benghazi in April 2011, the extension of the Benghazi Mission into 2012, the night and early morning hours of September 11-12, 2012, and the post-attack period. Moreover, there were significant gaps in information that could be filled only by interviewing eyewitnesses and other individuals on the ground in Benghazi as well as witnesses who were in Washington DC in the days and months leading up to the attacks on September 11-12, 2012.

On November 18, 2014, the Committee sought specific documents and communications relating to Benghazi and Libya for 11 top State Department officials, including the Secretary and her senior staff.<sup>18</sup> The Committee also requested to interview more than 20 State Department witnesses, all of whom spent time on the ground in Benghazi, including four diplomatic security agents who survived the September 11-12 attacks.<sup>19</sup>

The Committee sent information requests in the fall of 2014 to the CIA, the National Security Agency, the Defense Intelligence Agency, and the Office of the Director of National Intelligence.<sup>20</sup> In December 2014, the Committee sent information requests to the Federal Bureau of Investigation [FBI] and the White House.<sup>21</sup>

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<sup>18</sup> Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to John F. Kerry, Sec'y of State, U.S. Dep't of State, (Nov. 18, 2014) (on file with Committee).

<sup>19</sup> See Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to John F. Kerry, Sec'y of State, U.S. Dep't of State (Dec. 4, 2014) (on file with the Committee) (The first of two similarly cited letters requesting interviews of four agents serving in Benghazi the night of the attacks); see also Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to John F. Kerry, Sec'y of State, U.S. Dep't of State (Dec. 4, 2014) (on file with the Committee) (The second of two similarly cited letters requesting interviews of eighteen agents and principal officers who served in Benghazi).

<sup>20</sup> See Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to John O. Brennan, Dir., Cent. Intel. Agency (Nov. 19, 2014) (on file with the Committee); Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to Michael S. Rogers, Dir., Nat'l Sec. Agency (Nov. 19, 2014) (on file with the Committee); Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to David R. Shedd, *acting* Dir., Def. Intel. Agency (Nov. 19, 2014) (on file with the Committee); Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to James R. Clapper, Dir., Nat'l Intel. (Nov. 19, 2014) (on file with the Committee).

<sup>21</sup> See Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to James B. Comey, Jr., Dir., Fed. Bureau of Investigation (Dec. 4, 2014) (on file with the Commit-

The Committee issued three additional subpoenas to the State Department (detailed below) and made nine individual document requests.<sup>22</sup>

Committee document requests resulted in approximately 75,420 pages of new material:

- The State Department produced approximately 71,640 pages of documents not previously provided to Congress.
- The CIA produced 300 pages of new intelligence analyses.
- The White House produced 1,450 pages of emails.
- Sidney S. Blumenthal produced 179 pages of emails.
- The FBI produced 200 pages of documents.
- The Defense Department produced 900 pages of documents.
- The National Security Agency produced 750 pages of documents.

It is important to rebut a frequent talking point. The number of documents produced is in isolation meaningless without knowing the relevance of the documents actually produced and the number of relevant documents not produced. An agency that compliments itself on the number of pages provided to investigators when it alone knows the number of relevant pages withheld is engaged in propaganda, not transparency.

#### MEETINGS, BRIEFINGS, AND PUBLIC HEARINGS

The Committee's first priority was to hear from the families of the four murdered Americans in the Benghazi attacks.<sup>23</sup> These meetings offered the families an opportunity to be heard, to pose questions and concerns to the Committee, and to provide their insights. The Chairman also request-

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tee); Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to Denis R. McDonough, White House Chief of Staff (Dec. 29, 2014) (on file with the Committee).

<sup>22</sup> See Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to John F. Kerry, Sec'y of State, U.S. Dep't of State (July 31, 2015) (on file with Committee).

<sup>23</sup> Interim Progress Update, *supra* note 8, at 3.



ed briefings from agencies to discuss survivorship benefits to ensure the families received the benefits to which they were entitled.<sup>24</sup>

The Committee held more than two dozen classified and unclassified briefings with Executive Branch agencies.<sup>25</sup> For example, the Committee met with the State Department to evaluate the events prior to and during the September 11-12, 2012, attacks, including viewing video footage of the attacks.<sup>26</sup> The Committee also met with the Justice Department and the FBI on the capture of Ahmed Abu Khatalla and to view additional footage of the attacks.<sup>27</sup>

The Committee held only four public hearings.<sup>28</sup> The first and second public hearings—on September 17, 2014, and December 1, 2014—examined the State Department’s efforts to protect U.S. facilities and personnel currently serving abroad.<sup>29</sup> Immediately following a significant event resulting in serious injury or loss of life, the State Department is required by law to convene an ARB to investigate and make findings and recommendations to protect against similar occurrences in the future.<sup>30</sup> Consequently, the Committee’s first hearing focused on the State Department’s implementation of the ARB’s recommendations as well as those recommendations issued by the Independent Panel on Best Practices. The Independent Panel consisted of independent experts who were asked to evaluate the State Department’s security platforms in high-risk, high-threat posts.<sup>31</sup>

The Committee’s second public hearing also allowed the Committee to examine the shortcomings identified by the State Department’s Office of the Inspector General [OIG] and the Department’s efforts to remedy

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<sup>24</sup> Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, and Elijah E. Cummings, Ranking Member, H. Select Comm. on Benghazi to John F. Kerry, Sec’y of State, U.S. Dep’t of State and John O. Brennan, Dir., Cent. Intel. Agency (October 8, 2014) (on file with the Committee).

<sup>25</sup> *Id.*

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

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

<sup>28</sup> H. SELECT COMM. ON BENGHAZI, <https://benghazi.house.gov/hearings> (last visited May 10, 2016).

<sup>29</sup> *Hearing 1 Before the H. Select Comm. on Benghazi*, 113<sup>th</sup> Congress (2014), *Hearing 2 Before the H. Select Comm. on Benghazi*, 113<sup>th</sup> Congress (2014).

<sup>30</sup> See 22 U.S.C. § 4831 (2005).

<sup>31</sup> INDEPENDENT PANEL ON BEST PRACTICES, DEP’T OF STATE, 1 (AUG. 29, 2013).

these deficiencies.<sup>32</sup> The OIG’s first report, issued in September 2013, contained 20 formal and eight informal recommendations.<sup>33</sup> The OIG conducted a compliance follow-up review from January 15 through March 18, 2015,<sup>34</sup> and in August 2015 reissued one recommendation to the Bureau of Diplomatic Security and the Overseas Buildings Operations.<sup>35</sup> The OIG called on the State Department to “develop minimum security standards that must be met prior to occupying facilities located in designated high risk, high threat locations and include these minimum standards for occupancy in the Foreign Affairs Handbook.”<sup>36</sup>

The third public hearing on January 27, 2015, was necessary because of continuing compliance problems with Executive Branch entities.<sup>37</sup> The Committee’s authorizing resolution directed it to:

“[c]onduct a full and complete investigation and study and issue a final report of its findings to the House regarding:

- executive branch activities and efforts to comply with Congressional inquiries into the attacks...<sup>38</sup> [and]
- recommendations for improving executive branch cooperation and compliance with congressional oversight and investigations ...”<sup>39</sup>

The administration attempted to narrow the Committee’s investigation and repeatedly asked it to prioritize discovery requests.<sup>40</sup> While the

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

<sup>33</sup> See Office of Inspector Gen., U.S. Dep’t of State, *Special Review of the Accountability Review Board Process: Report No. ISP-I-13-44A*, 39-42 (Sept. 2013), <https://oig.state.gov/system/files/214907.pdf>.

<sup>34</sup> See Office of Inspector Gen., U.S. Dep’t of State, *Compliance Followup Review of the Special Review of the Accountability Review Board Process: Report No. ISP-C-15-33*, 39-42 (Aug. 2015), <https://oig.state.gov/system/files/isp-c-15-33.pdf>.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See *Hearing 3 Before the H. Select Comm. on Benghazi*, 114<sup>th</sup> Congress, (2015).

<sup>38</sup> H. Res. 567, 113<sup>th</sup> Cong., § 3(a)(6) (2014).

<sup>39</sup> *Id.* § 3(a)(7).

<sup>40</sup> Meeting between H. Select Comm. on Benghazi staff and U.S. Dep’t of State representatives (February 27, 2015). See also, email from Philip G. Kiko, Staff Director and Gen. Counsel, H. Select Comm. on Benghazi, to Julia Frifield, Ass’t Sec’y of State, Leg-

Committee refused to narrow its investigation—the scope of which was mandated by the House of Representatives—the Committee did accommodate the administration’s requests to prioritize. This accommodation resulted in the administration disregarding discovery requests that were not prioritized and accusing the Committee of being preoccupied with the witnesses and documents that were prioritized.

The Committee’s fourth public hearing was held on October 22, 2015, to receive testimony of the Secretary, a necessary fact witness who oversaw the State Department before, during, and after the Benghazi terrorist attacks.<sup>41</sup> The Secretary had yet to be examined by any investigative panel or congressional committee with access to her emails and other relevant information.<sup>42</sup>

The Committee’s preference for private interviews over public hearings has been questioned. Interviews are a more efficient and effective means of discovery. Interviews allow witnesses to be questioned in depth by a highly prepared member or staff person. In a hearing, every member of a committee is recognized—usually for five minutes—a procedure which precludes in-depth focused questioning. Interviews also allow the Committee to safeguard the privacy of witnesses who may fear retaliation for cooperating or whose work requires anonymity, such as intelligence community operatives.

Both witnesses and members of Congress conduct themselves differently in interviews than when in the public glare of a hearing. Neither have an incentive to play to the cameras. Witnesses have no incentive to run out the clock as long-winded evasive answers merely extend the length of the interview. Likewise, Members have no need to interrupt witnesses to try to ask all their questions in five minutes. Perhaps more importantly, political posturing, self-serving speeches, and theatrics serve no purpose

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islative Affairs, U.S. Dep’t of State (March 23, 2015, 6:50 PM) (on file with the Committee).

<sup>41</sup> *Hearing 4 Before the H. Select Comm. on Benghazi*, 114<sup>th</sup> Congress (2015).

<sup>42</sup> Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to David E. Kendall, Of Counsel, Williams & Connolly LLP (Mar. 19, 2015) (on file with the Committee). It is important to note that the Committee offered to take Secretary Clinton’s testimony in an interview setting. The former Secretary elected to provide her testimony to the Committee in a public setting. *See* Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi to David E. Kendall, Of Counsel, Williams & Connolly LLP (Mar. 31, 2015) (on file with the Committee).

in a closed interview and, as a result, the questioning in interviews tends to be far more effective at discovering information than at public hearings. For these reasons, nearly all Executive Branch investigations are conducted in private and without arbitrary time constraints. This is no less true in a Legislative Branch investigation, yet the manner in which the media portrays these investigations is starkly different.

No witness interviewed by the Committee complained of poor treatment or a lack of professionalism during these interviews. In fact, witnesses who had no incentive to compliment the Committee did just that, such as Cheryl D. Mills, Chief of Staff and Counselor, State Department, and Huma M. Abedin, Deputy Chief of Staff, State Department.<sup>43</sup>

### **The Department of State**

Notwithstanding the productions eventually made, the State Department's compliance posture toward the Committee was poor. The Department failed to comply in full with the nine document requests and three subpoenas.<sup>44</sup> Instead, Department officials deflected and delayed their responses, engaged in a pattern of obstruction, and furnished productions and witness interviews slowly—significantly impeding the Committee's investigation and development of a complete record.

#### **RESPONSE TO SUBPOENAS FOR DOCUMENTS RELATING TO THE ACCOUNTABILITY REVIEW BOARD**

As described earlier, two subpoenas issued by Congress to the State Department in 2013 had yet to be satisfied when the Select Committee was formed.<sup>45</sup> One of these subpoenas dealt specifically with documents pertaining to the ARB.<sup>46</sup> Though Congress had been asking for the documents for almost two years, the State Department failed to produce a single document. The Committee emphasized the importance of these documents by reissuing a new subpoena for the 114<sup>th</sup> Congress. Immediately

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<sup>43</sup> Michael S. Schmidt, *Cheryl Mills, Advisor to Hillary Clinton, Testifies on Benghazi and Email Practices*, NY Times (September 3, 2015), [http://www.nytimes.com/2015/09/04/us/hillary-clinton-email-benghazi.html?\\_r=0](http://www.nytimes.com/2015/09/04/us/hillary-clinton-email-benghazi.html?_r=0).

<sup>44</sup> Letter to John F. Kerry, Sec'y of State, U.S. Dep't of State, to Trey Gowdy, Chmn., H. Select Comm. On Benghazi (July 31, 2015) (on file with the Committee).

<sup>45</sup> Interim Progress Update, *supra* note 8, at 4.

<sup>46</sup> OGR ARB Subpoena, *supra* note 14.

following the January 27, 2015 compliance hearing, the Committee issued a new subpoena for documents reviewed by the ARB.<sup>47</sup>

The State Department's first production to the Committee consisted of a four-page interview summary for a witness who was scheduled to appear before the Committee the following day.<sup>48</sup> The State Department maintained this posture over the next several weeks with one or two ARB summaries, totaling 38 pages, provided less than a week before the Committee's interviews.<sup>49</sup> It was not until April 15, 2015, the State Department produced approximately 1,700 pages of documents.<sup>50</sup> On April 24, 2015, the Department produced another approximately 2,600 pages of documents.<sup>51</sup>

It remains unclear whether production for the January 28, 2015 subpoena is complete. Notwithstanding the more than 4,300 pages produced to the Committee, previous statements made by the State Department to Congress revealed the ARB reviewed "approximately 7,000 State Department documents, numbering thousands of pages."<sup>52</sup> Moreover, the State Department withheld a number of documents from the Committee based on "executive branch confidentiality interests," an administration-constructed privilege not recognized by the Constitution.<sup>53</sup>

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<sup>47</sup> Subpoena issued by H. Select Comm. on Benghazi, to John F. Kerry, Sec'y of State, U.S. Dep't of State (Jan. 29, 2015).

<sup>48</sup> See Letter from Julia E. Frifield, Assistant Sec'y of State for Legis. Affairs, U.S. Dep't of State, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (Feb. 13, 2015) (on file with the Committee).

<sup>49</sup> See Comm. Internal Memorandum on State Dep't Records Production.

<sup>50</sup> See Letter from Julia E. Frifield, Assistant Sec'y of State for Legis. Affairs, U.S. Dep't of State, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (Apr. 15, 2015) (on file with the Committee).

<sup>51</sup> See Letter from Julia E. Frifield, Assistant Sec'y of State for Legis. Affairs, U.S. Dep't of State, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (Apr. 24, 2015) (on file with the Committee).

<sup>52</sup> See Letter from the Thomas B. Gibbons, *acting* Assistant Sec'y of Legis. Affairs, U.S. Dep't of State, to Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform (Aug. 23, 2013) (on file with H. Select Comm. on Benghazi).

<sup>53</sup> See Letter from Julia E. Frifield, Assistant Sec'y of State for Legis. Affairs, U.S. Dep't of State, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (Apr. 24, 2015).

REQUESTS FOR DOCUMENTS OF THE SECRETARY  
AND OTHER SENIOR STATE DEPARTMENT OFFICIALS

While the State Department produced 15,000 pages of new documents to the Committee on August 11, 2014, there were significant and material omissions. This production contained few emails sent to or received by the State Department's senior staff. In fact, the production included only eight emails sent or received by the Secretary from two email addresses: "HDR22@clintonemail.com" and "H." This was the first time the State Department produced emails from the Secretary. It was also the first time the Committee became aware the Secretary used a private email account to conduct State Department business during her tenure. The Committee was not informed at the time, or at any time until immediately before media reporting, of the extent to which the Secretary relied on private email and a private server to conduct State Department business, or the ongoing discussion between the State Department and the Secretary and her representatives regarding the return of records.

For example, at the time the State Department produced these 15,000 pages of documents, which included these eight emails and pledged a "new relationship with the Committee," it was known within the State Department that the Secretary's email records were not on site.<sup>54</sup> The Chief Records Officer testified:

Q: One of the things that we wanted to talk with you about was when you first became knowledgeable or aware that all or part of Secretary Clinton's records were not on premises with the State Department. And can you tell us when that was?

A: The end of July 2014.

Q: And how did you become aware that some of her records were not on premises?

A: I was getting ready to enter my new position and one of my colleagues mentioned that in FOIA [Freedom of Information

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<sup>54</sup> Testimony of William Fischer, Chief Records Officer, U.S. Dep't of State, Tr. at 66 (June 30, 2015) [hereinafter Fischer Testimony] (on file with the Committee).

Act] litigation the issue had come up, but I had no idea about the full circumstances.<sup>55</sup>

Unknown to the Committee and the public, the State Department and the Secretary were taking remedial action to recover her emails from her private server because of the Committee's investigation.<sup>56</sup> According to the State Department's own Inspector General:

[i]n May 2014, the Department undertook efforts to recover potential Federal records from Secretary Clinton. Thereafter, in July 2014, senior officials met with former members of Secretary Clinton's immediate staff, who were then acting as Secretary Clinton's representatives. At the meeting, her representative indicated that her practice of using a personal account was based on Secretary Powell's similar use, but Department staff instructed Clinton's representatives to provide the Department with any Federal records transmitted through her personal system. On August 22, 2014, Secretary Clinton's former Chief of Staff and then-representative advised Department leadership that hard copies of Secretary Clinton emails containing responsive information would be provided but that, given the volume of emails, it would take some time to produce.<sup>57</sup>

In July 2014, Mills contacted Platte River Networks, the company contracted to maintain the Secretary's server, to request the Secretary's emails be pulled and sent to her overnight.<sup>58</sup>

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<sup>55</sup> *Id.*

<sup>56</sup> July 2, 2014 meeting between Comm. Staff Director Philip G. Kiko and State Dep't Chief of Staff David E. Wade.

<sup>57</sup> Office of the Inspector General, "Office of the Sec'y: Evaluation of Email Records Management and Cybersecurity Requirements," at 17-18, footnote 75, (May 26, 2016) (on file with the Committee).

<sup>58</sup> Carol D. Leonning and Rosalind S. Helderman, *State Department's Account of email requirements differs from Clinton's*, Washington Post (September 22, 2015), [https://www.washingtonpost.com/politics/state-departments-account-of-e-mail-request-differs-from-clintons/2015/09/22/54cd66bc-5ed9-11e5-8e9e-dce8a2a2a679\\_story.html](https://www.washingtonpost.com/politics/state-departments-account-of-e-mail-request-differs-from-clintons/2015/09/22/54cd66bc-5ed9-11e5-8e9e-dce8a2a2a679_story.html) ("He [Senator Johnson] cited a July 23, 2014, email in which employees at Platte River Networks, the private company that was then maintaining her server, discussed sending copies of Clinton's emails overnight to Cheryl Mills, a long-time Clinton advisor.").

The Committee did not publicize the existence of the eight emails identified from the Secretary's private email account, for myriad reasons. The Committee believed these eight emails might represent the beginning of a full production. There also existed the possibility of an explanation other than what was eventually learned. These eight emails could have reflected the Secretary's episodic use of personal email, as other administration officials had done,<sup>59</sup> and a more complete production of state.gov emails could be forthcoming. Of course, while the Committee did not have access to all salient facts in the summer of 2014, the State Department did. The State Department knew then it did not have possession of her public records as these records were not turned over at the end of the Secretary's tenure. The State Department knew then it was in no position to comply with congressional inquiries or FOIA requests related to the Secretary's emails because it did not have custody or access to the full public record. According to a recent report by the State Department's own Inspector General:

In early June 2013, Department staff participating in the review of potential material for production to congressional committees examining the September 2012 Benghazi attack discovered emails sent by the former Policy Planning Director via his Department email account to a personal email address associated with Secretary Clinton. In ensuing weeks, partly as a result of the staff's discovery, Department senior officials discussed the Department's obligations under the Federal Records Act in the context of personal email accounts. As discussed earlier in this report, laws and regulations did not prohibit employees from using their personal email accounts for the conduct of official Department business. However, email messages regarding official business sent to or from a personal email account fell within the scope of the Federal Records Act if their contents met the Act's definition of a record. OIG found that the Department took no action to notify NARA [National Archives and Records Administration] of a potential loss of records at any point in time.<sup>60</sup>

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<sup>59</sup> See, e.g., Letter from Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to Hillary R. Clinton, Sec'y of State, U.S. Dep't of State (Dec. 13, 2012) (on file with the Committee).

<sup>60</sup> "Office of the Sec'y: Evaluation of Email Records Management and Cybersecurity Requirements," *supra* note 69 at 17-18.



At the time the Committee was formed in May 2014, the State Department was already actively seeking the return of the former Secretary's emails.<sup>61</sup>

The Committee moved forward by issuing its November 18, 2014 document request to the State Department to obtain a clearer understanding of the role the Secretary and her senior staff played prior to, during, and after the terrorist attacks.<sup>62</sup> The Committee made clear the Secretary and her senior staff's documents and emails were necessary to facilitate her testimony before the Committee.<sup>63</sup> The decision to focus on obtaining these documents was the direct result of the Committee Minority's repeated request to move up the Secretary's appearance.

Very senior officials are traditionally interviewed last rather than first so the questions can be informed by as much information as possible. This is standard operating procedure in Executive Branch investigations. The Committee Minority expressly asked that the Secretary's appearance be moved up in the order of witness interviews and pledged in the process to help secure all relevant emails and documents in order to make that a reality. If there is any evidence Minority Committee members attempted to secure access to relevant documents or facilitate the production of documents, the Committee is not aware of it. Instead, the Committee Minority enjoyed the best of all worlds: complain about the Secretary not being interviewed while relying on the State Department to delay, obstruct, and withhold production of the very documents needed to facilitate the interview.

The State Department did not disclose the fact that it did not have possession of the Secretary's emails, nor that it had been working with the Secretary for the previous seven months to secure their return. The Committee also asked the Secretary for documents and emails. On December 2, 2014, the Committee wrote David E. Kendall, the Secretary's attorney, requesting all of the Secretary's emails related to Benghazi and

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<sup>61</sup> *Id.*

<sup>62</sup> *See* Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to John F. Kerry, Sec'y of State, U.S. Dep't of State (Nov. 18, 2014) (on file with the Committee). It is also important to note that this letter was accompanied by instructions typically found in subpoenas describing in greater detail the documents and communications sought and the definitions to be applied to the instructions. *See id.*

<sup>63</sup> *See id.*

Libya from her private email account.<sup>64</sup> Knowing the actions already taken by his law firm and Mills to identify and return the former Secretary's emails to the State Department, Kendall did not respond until December 29, at which time he referred the Committee back to the State Department.<sup>65</sup> Kendall stated "[the State Department] is in a position to produce any responsive emails."<sup>66</sup> This "who's on first" routine orchestrated between the Secretary's private counsel and the State Department, which is ostensibly an apolitical governmental diplomatic entity, is shameful. It was not merely Congress and the people it represents who were misled and manipulated, the State Department and the Secretary's email arrangement undoubtedly delayed access to information on what happened to four brave Americans in Benghazi and the government's response before, during and after the attacks. The manner in which the Secretary communicated during her tenure, the manner in which those records were housed during and after her tenure and the manner in which the public record was self-scrutinized and self-selected makes it impossible to ever represent to the families of those killed in Benghazi that the record is whole.

Notwithstanding the Committee's December 2, 2014 request to Kendall, Mills informed the State Department within a matter of days that she was producing 55,000 pages of the Secretary's emails from her personal account.<sup>67</sup> On December 5, 2014, Mills wrote the State Department that the emails were being produced to help the Department "meet its requirements under the Federal Records Act."<sup>68</sup> Mills' letter did not disclose that all of the Secretary's work was conducted on a private email account and server. The letter did not disclose the form in which the 55,000 pages of emails were being produced. It did not disclose how the emails were being delivered to the State Department. The Committee would later learn that, on the same day Mills sent her letter to the State Department, a State Department records official was directed by his supervisor to pick

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<sup>64</sup> Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to David E. Kendall, Of Counsel, Williams & Connolly LLP (Dec. 2, 2014) (on file with the Committee).

<sup>65</sup> Letter from David E. Kendall, Of Counsel, Williams & Connolly LLP to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (Dec. 29, 2014) (on file with the Committee).

<sup>66</sup> *Id.*

<sup>67</sup> See Letter from Cheryl D. Mills, Chief of Staff to the Sec'y of State, U.S. Dep't of State, to Patrick F. Kennedy, Under Sec'y of State for Mgmt., U.S. Dep't of State (Dec. 5, 2014) (on file with the Committee).

<sup>68</sup> *See Id.*

up and transport hard copies of the Secretary's emails from Kendall's law firm, Williams and Connolly in Washington DC, back to the State Department.<sup>69</sup>

Despite receiving the Secretary's emails on December 5, 2014, the State Department failed to produce any document to the Committee until February 13, 2015.<sup>70</sup> The Department also resisted scheduling witness interviews in December 2014 and January 2015. The Department's compliance posture resulted in the Committee's third public hearing, held on January 27, 2015. The State Department did not, however, produce a witness of sufficient seniority to make commitments on behalf of the Department.<sup>71</sup>

In fact, the State Department did not respond to the Committee's November 18, 2014 document request until February 13, 2015. At the time, the State Department produced approximately 847 pages of the Secretary's emails in paper copies. The State Department still refused to disclose important, relevant facts such as: the Secretary's emails were not on the State Department's network; the Secretary did not provide electronic copies of her emails; and the Secretary's attorneys—not the State Department—determined which emails would be returned to the Department.

It was not until February 27, 2015, the State Department disclosed to the Committee these facts, days before *The New York Times* would disclose the circumstances.<sup>72</sup> Even then, the State Department failed to disclose the fact that the Secretary used a private server. The Committee learned this fact through subsequent press reports.

Once the Committee learned the State Department had been complicit in the non-production of the Secretary's emails, it issued two preservation

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* See also, Letter from Julia Frifield, Ass't Secretary of State, Legislative Affairs, U.S. Dep't of State, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi, (February 13, 2015) (on file with the Committee).

<sup>71</sup> See *Hearing 3 Before the H. Select Comm. on Benghazi*, 114<sup>th</sup> Congress (2015).

<sup>72</sup> Michael S. Schmidt, *Hillary Clinton Used Personal Email Account at State Dept., Possibly Breaking Rules*, N.Y. TIMES (Mar. 2, 2015), [http://www.nytimes.com/2015/03/03/us/politics/hillary-clintons-use-of-private-email-at-state-department-raises-flags.html?\\_r=0](http://www.nytimes.com/2015/03/03/us/politics/hillary-clintons-use-of-private-email-at-state-department-raises-flags.html?_r=0).

letters; one was issued to the Secretary<sup>73</sup> and the other to Web.com,<sup>74</sup> the registrar of the domain name Clinton@clintonemail.com. This was necessary to ensure relevant information in the parties' possession was preserved. The letters requested the Secretary and Web.com:

1. Preserve all email, electronic documents and data ("electronic records") created since January 1, 2009, that can be reasonably anticipated to be the subject to a request for production by the Committee. For the purpose of this request, "preserve" means taking reasonable steps to prevent the partial or full destruction, alteration, testing, deletion, shredding, incineration, wiping, relocation, migration, theft or mutation of electronic records, as well as negligent or intentional handling that would make such records incomplete or inaccessible;
2. Exercise reasonable efforts to identify and notify former employees and contractors who may have access to such electronic records that they are to be preserved; and
3. If it is the routine practice of any employee or contractor to destroy or otherwise alter such electronic records, either: halt such practices or arrange for the preservation of complete and accurate duplicates or copies of such records, suitable for production if requested.<sup>75</sup>

#### THE SECRETARY IS SUBPOENAED

On March 4, 2015, a day after the Committee issued two preservation letters, the Committee issued two additional subpoenas. The first compelled production from the Secretary of any documents and communications responsive to the November 18, 2014 letter still in her possession.<sup>76</sup> The Secretary, through her attorney, Kendall, responded to the Commit-

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<sup>73</sup> See Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to David E. Kendall, Of Counsel, Williams & Connolly LLP (Mar. 3, 2015) (on file with the Committee).

<sup>74</sup> See Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to Dan Brown, Chairman and Chief Exec. Officer, Web.com (Mar. 3, 2015) (on file with the Committee).

<sup>75</sup> See Chairman Gowdy's letters, *supra* notes 73 and 74.

<sup>76</sup> Subpoena issued by H. Select Comm. on Benghazi, to Hillary R. Clinton, former Sec'y of State, U.S. Dep't of State (Mar. 4, 2015).

tee's subpoena on March 27, 2015. In his letter, Kendall informed the Committee:

With respect to any emails from Secretary Clinton's 'hdr22@clintonemail.com' account, I respond by stating that, for the reasons set forth below, the Department of State—which has already produced approximately 300 documents in response to an earlier request seeking documents on essentially the same subject matters—is uniquely positioned to make available any documents responsive to your requests.<sup>77</sup>

Kendall further told the Committee:

Secretary Clinton is not in a position to produce any of those emails to the Committee in response to the subpoena without approval from the State Department, which could come only following a review process. On March 23, 2015, I received a letter from Under Secretary of State for Management (attached hereto) confirming direction from the National Archives and Records Administration that while Secretary Clinton and her counsel are permitted to retain a copy of her work-related emails, those emails should not be released to any third parties without authorization by the State Department.... Thus, while the Secretary has maintained and preserved copies of the emails provided to the State Department, she is not in a position to make any production that may be called for by the subpoena.<sup>78</sup>

The State Department was unmoved by the location of public records during the Secretary's tenure or for nearly two years thereafter until the Committee insisted on their production. The State Department then orchestrated a sophomoric scheme of letters to have these records returned to the State Department. Once this was accomplished, the State Department, previously uninterested in the location, security or fullness of this public record, jealously guarded—indeed prevented—the production of the Secretary's records to Congress.

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<sup>77</sup> Letter from David E. Kendall, Of Counsel, Williams & Connolly LLP to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (Mar. 27, 2015) (on file with the Committee).

<sup>78</sup> *Id.*

The State Department made two productions subsequent to February 13, 2015. The Committee received 105 email exchanges from the State Department on June 25, 2015. This production is significant because it was made only after a non-government witness provided 179 additional pages of email exchanges with the Secretary on June 12, 2015. 59 of the emails produced by the non-government witness had never been provided by the State Department to the Committee despite the fact these emails were clearly responsive to previous requests and fully within the jurisdiction of the Committee. Moreover, the State Department did not have in its possession, in full or in part, 15 email exchanges produced by the non-government witness—calling into question the completeness of their records from the Secretary.<sup>79</sup> This means that not only was the State Department refusing to produce emails from the Secretary that were unquestionably relevant to this Committee's investigation, it also laid bare the Secretary's assurance that all public records had been returned to the State Department. Neither of those assertions was true.

The State Department made its third production to the Committee—1,899 pages of the Secretary's emails—on September 25, 2015. In its letter accompanying the emails, the State Department noted “it had re-reviewed Secretary Clinton's 2011-2012 emails and today is providing materials in advance of the Secretary's appearance before the Committee on October 22, 2015.”<sup>80</sup>

The Committee's interest in the Secretary's emails is limited to their relevance in the investigation of the Benghazi attacks. Her exclusive use of non-official email and a private server for all official communications may raise concerns beyond the scope of this Committee's purview related to Federal records and transparency laws and national security concerns, but jurisdiction for those matters lies either with the Inspector General, the courts, other committees of Congress, or the Federal Bureau of Investigation and the Justice Department.

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<sup>79</sup> Letter from Julia Frifield, Ass't Sec'y of State, Legislative Affairs, U.S. Dep't of State, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (June 25, 2015) (“In a limited number of circumstances, we did not locate in the tens of thousands of pages of email provided by Secretary Clinton the content of a handful of communications that Mr. Blumenthal produced.”)

<sup>80</sup> See Letter from Julia Frifield, Assistant Sec'y of State for Legis. Affairs, U.S. Dep't of State, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (Sept. 25, 2015) (on record with the Committee).

Simply put, the Committee has an obligation to seek and acquire all relevant information consistent with its jurisdiction. Part of securing that relevant information involved accessing public records, regardless of where and by whom those records were held.

On January 8, 2016, the Department notified the Committee of yet more responsive documents located in the Office of the Secretary.<sup>81</sup> These documents had been "overlooked" by the State Department.<sup>82</sup> On February 26, 2016—20 months after the Committee was formed—the State Department produced approximately 1,650 additional responsive documents.<sup>83</sup>

The odyssey that became the Secretary's email arrangement was fully the result of decisions she made in concert with others at the State Department. Had she used state.gov or employed a method of preserving public records other than simply hiring private legal counsel to store, vet, and disclose these public records, this would never have become an issue for the Committee. The Committee knew in the summer 2014 the Secretary used private email to conduct at least some official business and never disclosed this fact publicly. The Committee's interest was in accessing the relevant and responsive material needed to accomplish the job it was assigned to do. Moreover, of the more than 100 witnesses the Committee interviewed only one was exclusively connected with her method of producing and preserving emails—Bryan Pagliano, a Special Advisor to the State Department. Pagliano's interview was short when he invoked his Fifth Amendment privilege against self-incrimination. Pagilano was an important witness who could have spoken to the fullness of the Committee's record. The Secretary's server was reportedly down during two key time periods identified during the Committee's investigation—August 2011 and October 2012.

On April 8, 2016, the Committee received another production of approximately 1,150 pages of emails from Sean Smith's email account as well as emails sent to and from senior leaders stored in the Office of the Secretary. On May 5, 2016, the Committee received yet again another pro-

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<sup>81</sup> Email from Eric Schneider, U.S. Dep't of State, to Dana Chipman, Chief Counsel, Sel. Comm. on Benghazi (January 8, 2016,) (on file with the Committee).

<sup>82</sup> *Id.*

<sup>83</sup> *See* Letter from Julia Frifield, Assistant Sec'y of State for Legis. Affairs, U.S. Dep't of State, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (Feb. 26, 2016).

duction from the State Department of approximately 405 pages of documents from the Office of the Secretary.

SUBPOENA FOR 7TH FLOOR PRINCIPALS'  
DOCUMENTS AND COMMUNICATIONS

The second subpoena issued in the aftermath of the disclosure of the Secretary's email arrangement was issued on March 4, 2015, and sought documents and communications from the remaining ten senior staff officials identified in the Committee's November 18, 2014 letter. More than three months after the Committee first issued its request for these documents, the State Department had yet to produce a single document.<sup>84</sup> A day after issuing this subpoena, the Committee learned the State Department did not start archiving emails of its senior officials until February 2015.<sup>85</sup> The Committee later learned Patrick F. Kennedy, Under Secretary for Management, State Department, wrote to several senior officials identified in the Committee's March 4, 2015 subpoena seeking the return of all work related emails conducted on private accounts.<sup>86</sup> The State Department also kept this second Kennedy letter a secret.<sup>87</sup>

Notwithstanding the specificity and clarity of the documents and communications sought by the March 4, 2015 subpoena, the State Department protested the breadth of the Committee's request.<sup>88</sup> To help set priorities, the Committee offered guidance to State Department officials, at their request. For example, on March 23, 2015, the Committee identified

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<sup>84</sup> Subpoena issued by H. Select Comm. on Benghazi to John F. Kerry, Sec'y of State, U.S. Dep't of State (Mar. 4, 2015).

<sup>85</sup> See Lauren French, *Gowdy: Not backing off subpoena of Clinton emails*, POLITICO (Mar. 5, 2015), <http://www.politico.com/story/2015/03/house-committee-benghazi-clinton-email-subpoena-115795>.

<sup>86</sup> See Letters from Patrick F. Kennedy, Under Sec'y of State for Mgmt., U.S. Dep't of State, to Huma Abedin, William J. Burns, Jeffrey D. Feltman, Cheryl Mills, Thomas Nides, Philippe Reines, Susan E. Rice, Jacob J. Sullivan (March 11, 2015).

<sup>87</sup> Subpoena issued by H. Select Comm. on Benghazi to John F. Kerry, Sec'y of State, U.S. Dep't of State (Aug. 5, 2015).

<sup>88</sup> Email from Philip Kiko, Staff Director, H. Select Comm. on Benghazi, to Julia Frifield, Ass't Sec'y of State for Legislative Affairs, U.S. Dep't of State (March 23, 2015, 6:50 PM) ("let me reiterate that the subpoena is clear as to what communications and documents the Committee is seeking").



four individuals and four discrete timeframes to which the Department could focus its initial efforts.<sup>89</sup>

On April 22, 2015, the Committee again provided guidance outlining a production plan complete with specific individuals and discrete timeframes for the State Department.<sup>90</sup> No documents were produced.

It is worth reiterating that what may appear, at first blush, to be a lack of competence on behalf of the State Department now appears fully intentional and coordinated. Delaying the production of documents sought by letter, informal request, or subpoena has decided political advantages for those opposing the investigation and those in control of the necessary documents and witness access. Asking the Committee for “priorities” or date and time restrictions is calculated to reduce the scope of the investigation—the very thing Committee Minority members asked for in the fall of 2014—and causes the investigation to be drawn out needlessly.

This is an overtly political calculation and has become the typical playbook for an administration that once praised itself for its “transparency.”

In an effort to speed the production of documents, the Committee worked to advance the State Department’s \$2.4 million reprogramming request made to the Committees on Appropriations of both the House and the Senate to create a ‘document review unit’ to help facilitate the production of documents relevant to the Committee’s investigation.<sup>91</sup> The Committee was informed 12 full-time employees would be assigned to the ‘document review unit,’ as well as new technology, to respond to congressional requests. The Committee was told its requests would be the ‘document review unit’s’ highest priority.<sup>92</sup> To the contrary, after the House and Senate Committees on Appropriations approved the Department’s reprogramming request, State Department staff did nothing to

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<sup>89</sup> *Id.*

<sup>90</sup> Email from Philip Kiko, Staff Director, to Julia Frifield, Ass’t Sec’y of State for Legislative Affairs (April 22, 2015, 1:03 PM)

<sup>91</sup> James Rosen, *Documents show State Dep’t missed target date for special Benghazi unit*, Fox News, May 6, 2016, <http://www.foxnews.com/politics/2016/05/06/documents-show-state-department-missed-target-date-for-special-benghazi-unit.html>.

<sup>92</sup> Phone call between Philip Kiko, Staff Director, H. Select Comm. on Benghazi, and Julia Frifield, Ass’t Sec’y of State, U.S. Dep’t of State (May 2015).

expedite Committee requests for documents.<sup>93</sup> State Department officials would not disclose how the reprogramming request was being implemented, how many employees were assigned to the unit, or whether these individuals were also assigned to respond to FOIA requests. Nor would the officials describe how document requests would be produced with the new technology.<sup>94</sup>

#### IMPASSE WITH THE STATE DEPARTMENT

On May 22, 2015, more than two months after the March 4, 2015 subpoena, the State Department finally produced approximately 1,200 pages of emails to and from Mills. The documents in this production, however, covered less than a quarter of the timeframes sought and contained less than one-tenth of the contents sought in the subpoena. Furthermore, the State Department withheld documents, telling the Committee “a small number of documents implicate important Executive Branch institutional interests and are therefore not included in this production.”<sup>95</sup> The State Department’s continued refusal to produce relevant documents delayed the Committee’s interview schedule.

Like other investigations, the Committee planned to interview senior level officials within the State Department before interviewing the Secretary. Consequently, delaying document productions for these senior officials in turn delayed the interviews of the same senior officials, which in turn delayed the interview of the Secretary. It is readily apparent this was by design and presented the Committee with a ‘Catch-22’: either interview senior State Department officials, including the Secretary, without the benefit of the documents needed for a constructive conversation, or postpone those interviews pending document production and be criticized for taking too long.

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<sup>93</sup> Memorandum from Philip G. Kiko, Staff Dir. and Gen. Counsel, H. Select Comm. on Benghazi, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (June 2, 2014) [hereinafter June 2 Staff Memo] (on file with the Committee) (summarizing the members meeting with State Dep’t Chief of Staff Jon Finer).

<sup>94</sup> *Id.*

<sup>95</sup> Letter from Julia Frifield, Assistant Sec’y of State for Leg. Affairs, U.S. Dep’t of State, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (May 22, 2015) (on file with the Committee).

Recognizing neither public reproach nor the Committee’s support for the State Department’s reprogramming request would compel the Department to action, the Committee had few alternatives—other than contempt of Congress (dependent on Executive Branch enforcement) or time-consuming litigation. On June 2, 2015, the Committee met with Jonathan Finer, Chief of Staff and Director of Policy Planning, State Department, to discuss the impasse.<sup>96</sup>

With Finer, the Committee made it clear it was necessary to review documents prior to moving forward with interviews.<sup>97</sup> The Committee members personally emphasized to Finer the emails from a number of former senior State Department officials were necessary to have constructive conversations with witnesses.<sup>98</sup> The delays in producing documents thus delayed interviews.<sup>99</sup> While Finer would not agree to a production schedule, he did agree the State Department would make a substantial production within 30 days.<sup>100</sup> The meeting and agreement were memorialized in a subsequent communication sent to Finer.<sup>101</sup> In its letter, the Committee defined “substantial” as “producing,” within 30 days, “all documents and emails ... described in phase one in our April 22, 2015 communication.”<sup>102</sup>

The “substantial production” of documents never materialized, further delaying the interview schedule. Instead, on June 30, 2015, the State Department produced 3,600 pages of emails, more than 2,000 pages of which were press clippings available chiefly on the internet.<sup>103</sup> The production also focused almost exclusively on two individuals for one month *after* the terrorist attacks, with a scattering of documents from

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<sup>96</sup> See June 2 Staff Memo, *supra* note 93.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> See *id.*

<sup>101</sup> Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to Jonathan Finer, Chief of Staff & Dir. of Policy Planning, U.S. Dep’t of State (June 4, 2015) (on file with the Committee).

<sup>102</sup> *Id.*

<sup>103</sup> Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to John F. Kerry, Sec’y of State, U.S. Dep’t of State (July 10, 2015) (on file with the Committee) (“While the meeting may have motivated the Dep’t to produce roughly 3,600 pages of documents on June 30, 2015, more than 2,000 of those pages—representing nearly 57 percent were nothing more than basic press clippings . . .”).

other timeframes.<sup>104</sup> Moreover, the State Department continued its pattern of withholding documents based on what it described as “Executive Branch institutional interests.”<sup>105</sup> No other productions arrived for almost another month. On July 29, 2015, the State Department produced approximately 8,000 pages of documents, many of which were press clippings or duplicate emails.

#### OTHER DOCUMENT REQUESTS MADE TO THE STATE DEPARTMENT

In addition to seeking enforcement of the March 4, 2015 subpoena, the Committee issued a number of additional requests for information from the State Department. On June 12, 2015, the Committee sought the remaining ARB documents.<sup>106</sup> The Committee requested a list of all documents being withheld and the justification for withholding.<sup>107</sup> The Committee also sought 11 discrete items referenced in the ARB documents.<sup>108</sup> The Committee requested a response by July 8, 2015. Roughly seven months later, on February 25, 2016, the Committee received a four-page document responsive to the June 12, 2015 request.<sup>109</sup>

On July 6, 2015, the Committee wrote the State Department seeking an update on compliance with the March 4, 2015 subpoena. No response was received.

On July 10, 2015, the Committee wrote the Department again expressing concern with the anemic productions made and the Department’s lack of candor with regard to the private email use of former senior officials.<sup>110</sup>

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<sup>104</sup> *Id.*

<sup>105</sup> Letter from Julia Frifield, Ass’t Sec’y for Leg. Affairs, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (June 30, 2015) (on file with the Committee) (“In addition, a small number of documents implicate important Executive Branch institutional interests and therefore are not included in this production.”).

<sup>106</sup> Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to John F. Kerry, Sec’y of State, U.S. Dep’t of State (June 12, 2015) (on file with the Committee).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Interview with [Agent 17], Accountability Review Bd. (Oct. 30, 2012) (on file with the committee State-SCB0098607).

<sup>110</sup> Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to John F. Kerry, Sec’y of State, U.S. Dep’t of State (July 10, 2015) (on file with the Committee) (one of two similarly cited letters).

The Committee followed this letter with an email highlighting the State Department's inaction in five areas:

1. scheduling of interviews;
2. producing private emails relating to the Committee's jurisdiction sent or received by former senior officials;
3. an accounting of the missing documents, including those withheld for executive branch confidentiality interests;
4. producing the remaining aspects of phase one of the March 4, 2015 subpoena; and
5. failing to acknowledge the receipt of the previous letters.<sup>111</sup>

#### JULY 31, 2015 DEMAND LETTER

The State Department's untenable posture, coupled with an abject lack of meaningful response to the Committee's outstanding subpoenas and requests, led to a demand letter on July 31, 2015.<sup>112</sup> The letter was a precursor to contempt of Congress action, and reflected the Committee's serious belief the State Department was intentionally impeding the investigation's progress.<sup>113</sup>

The Committee outlined the pattern of concealment and delay employed by the State Department.<sup>114</sup> The Committee noted the State Department's actions with regard to the Committee's questions about production of the Secretary's emails.<sup>115</sup>

The Committee eventually received, in several tranches, document productions subsequent to the July 31, 2015 demand letter. Documents responsive to the March 4 subpoena were produced on August 21 and Au-

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<sup>111</sup> See Email from Philip G. Kiko, Staff Dir. and Gen. Counsel, H. Select Comm. on Benghazi, to Julia Frifield, Catherine Duval, and Austin Evers, (July 14, 2015) (on file with the Committee) (Regarding compliance and requests).

<sup>112</sup> Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to John F. Kerry, Sec'y of State, U.S. Dep't of State (July 31, 2015) (on file with Committee).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

gust 28, 2015; September 18, 2015; October 5, 9, and 15, 2015; November 6 and 24, 2015; December 31, 2015; January 21, 2016; February 26, 2016; April 8, 2016; and May 5, 2016. In addition, the Committee received throughout the fall of 2015 and the early winter of 2016 approximately 9,000 pages of emails from Stevens' email never before produced.<sup>116</sup>

The Committee never received full productions of emails from the accounts of Under Secretary Wendy R. Sherman, Deputy Secretary William J. Burns, or Assistant Secretary Jeffrey D. Feltman—all of whom were listed in the November 18, 2014 document request and the March 4, 2015 subpoena. The State Department never produced all relevant documents reviewed by the Accountability Review Board.<sup>117</sup> Finally, the State Department still has not fully complied with the August 5, 2015 subpoena.

The State Department also withheld documents citing “important Executive Branch institutional interests” or “important Executive Branch confidentiality interests” on four separate occasions.<sup>118</sup> The Committee repeatedly sought additional information on the withheld documents, including the nature and number of documents withheld and the basis in law for withholding them. On June 12, 2015, July 8, 2015, and July 31, 2015, the Committee wrote the State Department seeking additional information. The Committee also met with State Department representatives to discuss the status of the June 12, 2015, July 8, 2015, and July 31, 2015 requests multiple times, including as late as June 2016. To date, the State Department has yet to account for the withheld documents. The State Department's refusal to provide the Committee with information by which to make reasonable judgements regarding the Department's decisions to withhold documents from Congress and, ultimately, from the

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<sup>116</sup> See *infra* Appendix J for a complete listing of requests and subpoenas for documents as well as productions received pursuant to request or subpoena.

<sup>117</sup> Letter from the Thomas B. Gibbons, *acting* Assistant Sec'y of Legis. Affairs, U.S. Dep't of State, to Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform (Aug. 23, 2013) (on file with the Committee) (stating the ARB reviewed approximately 7,000 documents totaling thousands of pages).

<sup>118</sup> See letters from Julia Frifield, Ass't Sec'y of State for Legislative Affairs, U.S. Dep't of State, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (February 13, 2015, April 24, 2015, May 22, 2015, and June 30, 2015) (on file with the Committee).

American people is yet another example of the Department's pattern of concealment.

#### WITNESSES

The Committee interviewed 57 witnesses from the State Department, 50 who had never been interviewed by Congress, including four senior leaders, three Ambassadors, 19 Diplomatic Security agents, four principal officers, and 20 State Department personnel.

On December 4, 2014, the Committee requested the State Department make available for transcribed interviews the eyewitnesses to the attack: the Diplomatic Security agents deployed to Benghazi and the Principal Officers responsible for political reporting. The State Department resisted scheduling interviews for nearly two months. It was not until January 27, 2015 and the threat of subpoenas the State Department began to contact the individuals sought by the Committee.

The Committee sought the testimony of senior State Department officials including those who were not interviewed by the ARB. This included Mills, Jacob J. Sullivan, Deputy Chief of Staff and Director of Policy Planning, and Huma Abedin, Deputy Chief of Staff for Operations. While the Committee sought to schedule these interviews in May 2015, the State Department's failure to produce relevant documents delayed these interviews until early September 2015. The delay in scheduling these interviews in turn necessarily delayed the Secretary's testimony.

The Committee interviewed senior leaders within the Bureau of Diplomatic Security and the regional Bureau of Near Eastern Affairs—the two bureaus with oversight responsibility for security, personnel and policy in Benghazi. The Committee interviewed Kennedy who oversees the Bureau of Diplomatic Security, in addition to the Deputy Assistant Secretaries for Countermeasures and International Programs, Gentry O. Smith and Charlene R. Lamb. The Committee interviewed Jeffrey D. Feltman, Assistant Secretary for Near East Affairs, State Department; Gene A. Cretz, Ambassador to Libya; and Gregory N. Hicks, Deputy Chief of Mission, U.S. Embassy in Tripoli.

Finally, the Committee interviewed those individuals who served as Libya desk officers and were responsible for addressing the day-to-day needs of the Benghazi Mission, including physical security, policy decisions, and logistics relating to Benghazi, Libya.

### The Department of Defense

The Defense Department was initially cooperative but this cooperation dissipated during the course of the Committee's investigation culminating in a factually deficient letter from a political appointee deliberately mischaracterizing efforts to obtain access to witnesses.

The witnesses produced by the Defense Department, both active duty and retired, were cooperative and provided significant new material to the Committee. Identifying those witnesses, locating those witnesses, scheduling their appearances before the Committee and responding to subsequent Committee requests generated by these documents and witness interviews became mired in coordinated partisan responses from a Defense Department political appointee.<sup>119</sup>

### DOCUMENTS

As required by the resolution creating the Select Committee, the House Armed Services Committee provided records in July 2014. Following a review of the information provided by the Armed Services Committee, the Select Committee submitted requests to the Defense Department on April 8, 2015 seeking documents and records not previously provided to the Armed Services Committee.<sup>120</sup> The Select Committee's document request consisted of 12 categories, including a copy of the video of the attack in Benghazi, un-redacted copies of documents provided pursuant to a court order in litigation under FOIA, and copies of the force laydown for U.S. Africa, Europe, and Central combatant commands on September 10, 11, and 12, 2012.<sup>121</sup> The Select Committee also requested assistance

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<sup>119</sup> Letter from Stephen C. Hedger, Assistant Sec'y of Def. for Legis. Affairs, U.S. Dep't of Def., to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (April 28, 2016) (on file with the Committee).

<sup>120</sup> Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to Ashton B. Carter, Sec'y of Def., U.S. Dep't of Def. (Apr. 8, 2015) (on file with the Committee) (first of three similarly cited letters); Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to Ashton B. Carter, Sec'y of Def., U.S. Dep't of Def. (Apr. 8, 2015) (on file with the Committee) (second of three similarly cited letters); Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to Ashton B. Carter, Sec'y of Def., U.S. Dep't of Def. (Apr. 8, 2015) (on file with the Committee) (third of three similarly cited letters).

<sup>121</sup> Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to Ashton B. Carter, Sec'y of Def., U.S. Dep't of Def. (Apr. 8, 2015) (on file with the Committee) (one of three similarly cited letters).



in answering 27 questions regarding actions taken by the Defense Department immediately prior to, during, and immediately after the attacks.<sup>122</sup>

On April 27, 2015, the Defense Department responded to the Committee's request providing copies of the force laydown from the respective combatant commands and indicating it would provide "responsive documents not previously provided on a rolling basis" to the Committee.<sup>123</sup> On May 21, 2015, the Defense Department provided 175 pages of classified documents, as well as 551 pages of un-redacted documents provided pursuant to a court order under FOIA litigation.<sup>124</sup> The Defense Department declined to provide 36 pages that "contain[ed] intelligence community or potential target information."<sup>125</sup> It also declined to provide one page "due to confidentiality concerns associated with executive branch deliberations."<sup>126</sup> At the time of the Defense Department's letter, Committee staff had received briefings on and reviewed the drone footage on two occasions.<sup>127</sup> The Defense Department did not indicate whether it would provide a copy of that footage to the Committee. As to five of the Committee's requests, it indicated its review was ongoing.

On July 28, 2015, the Committee received the Defense Department's classified response to the Committee's 27 questions.<sup>128</sup> Over the following months, the Defense Department provided briefings to the Committee and made witnesses available. It did not, however, furnish any additional documents.

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<sup>122</sup> *Id.*

<sup>123</sup> Letter from Michael J. Stella, *acting* Assistant Sec'y of Def., U.S. Dep't of Def., to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (Apr. 24, 2015) (on file with the Committee).

<sup>124</sup> Letter from Stephen C. Hedger, Assistant Sec'y of Def. for Legis. Affairs, U.S. Dep't of Def., to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (May 21, 2015) (on file with the Committee).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *See* Letter from Ashton B. Carter, Sec'y of Def., U.S. Dep't of Def., to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (July 28, 2015) (on file with the Committee).

On February 5, 2016, Committee staff met with Defense Department staff regarding the outstanding document requests.<sup>129</sup> During this meeting the Committee requested an updated list of all air assets situated in the Africa and Europe combatant commands' areas of responsibility, and whether any assets had not been disclosed due to special access programs. The Committee also requested documents referring or relating to communications the Defense Department may have had with any foreign militaries concerning coordination or assistance in response to the attacks and any photographs taken by Defense Department personnel during a trip to Benghazi in October 2012.<sup>130</sup> The Committee also renewed its request for a copy of the video feed from the night of the attack.<sup>131</sup> The Defense Department failed to respond to the Committee's request.

In total, the Defense Department provided nearly 900 pages of additional documents not previously provided to Congress.

#### WITNESSES

The Committee interviewed 24 witnesses from the Defense Department. Of these witnesses, 17 had never been interviewed by Congress regarding the attacks in Benghazi.

Initially, the Defense Department identified and scheduled witnesses at the Committee's request. For example on July 22, 2015, the Committee requested the Defense Department make available the Commander of the Commander's In-Extremis Force [CIF] on September 11, 2012.<sup>132</sup> The Committee had been unable to identify this individual and four other individuals by name, but provided details of their position during the relevant time-frame.<sup>133</sup> The Defense Department identified the five individuals and scheduled their interviews.

After the initial five witnesses were interviewed and the Committee reviewed the documents provided by Defense Department, the Committee

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<sup>129</sup> See Email from Philip G. Kiko, Staff Dir. and Gen. Counsel, H. Select Comm. on Benghazi, to William Hudson, Dir. of Cong. Investigations, Dep't of Def. (Feb. 5, 2016, 17:19 EST) (on file with the Committee).

<sup>130</sup> See *id.*

<sup>131</sup> *Id.*

<sup>132</sup> Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to Ashton B. Carter, Sec'y of Def., U.S. Dep't of Def. (July 22, 2015) (on file with the Committee).

<sup>133</sup> *Id.*

requested an additional eight witnesses on February 5, 2016. The Committee also requested an interview with the individual who served as the pilot for the aircraft that transported the CIF.<sup>134</sup> On February 26, 2016, the Committee requested the Defense Department make the individuals who piloted the drone on September 11-12, 2012 that flew over Benghazi and Tripoli available for interviews.<sup>135</sup>

The Committee reiterated both of these requests on March 9, 2016 and March 24, 2016.<sup>136</sup> The Defense Department indicated it was experiencing difficulty in tracking down records which could identify the individuals who piloted the aircraft and had not made progress in meeting the Committee's requests. Consequently, on March 31, 2016, the Committee met with Elizabeth L. George, Deputy General Counsel, Legislation, Defense Legal Services Agency, Defense Department, regarding the outstanding requests. The Defense Department was informed the Committee would issue subpoenas should the Defense Department not provide the names of the pilots immediately.<sup>137</sup>

For the next several weeks, Committee staff sought continued cooperation from the Defense Department. However, on April 28, 2016, Stephen Hedger, the Assistant Secretary of Defense for Legislative Affairs sent an inaccurate and misleading letter to the Chairman regarding the Committee's requests.<sup>138</sup> Not surprisingly, that letter was leaked to the press the following day and was on the Committee Minority's website. Among many of the inaccuracies, the letter stated the Defense Department had

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<sup>134</sup> Email from Mac Tolar, Senior Counsel, H. Select Comm. on Benghazi, to William Hudson, Dir. of Cong. Investigations, U.S. Dep't of Def. (Feb. 9, 2016, 1:32 PM) (on file with the Committee).

<sup>135</sup> Email from Mac Tolar, Senior Counsel, H. Select Comm. on Benghazi, to William Hudson, Dir. of Cong. Investigations, U.S. Dep't of Def. (Feb. 26, 2016, 17:00 EST) (on file with the Committee).

<sup>136</sup> See Email from Mac. Tolar, Senior Counsel, H. Select Comm. on Benghazi, to William Hudson, Dir. of Cong. Investigations, U.S. Dep't of Def. (Mar. 9, 2016, 12:23 EST) (on file with the Committee) (reiterating interview request); See also Email from Mac Tolar, Senior Counsel to Mr. Hudson (Mar. 24, 2016, 16:56) (on file with the Committee) (reiterating interview request).

<sup>137</sup> Email from Philip G. Kiko, Staff Dir. and Gen. Counsel, H. Select Comm. on Benghazi, to Stephen Hedger, Assistant Sec'y of Def. for Legis. Affairs (Mar. 25, 2016, 11:37 AM) (on file with the Committee).

<sup>138</sup> Letter from Stephen C. Hedger, Assistant Sec'y of Def. for Legis. Affairs, U.S. Dep't of Def., to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (April 28, 2016) (on file with the Committee).

expended “significant resources” to locate an individual the Committee had requested to interview who was identified as “John from Iowa” and who had called in to *The Sean Hannity Show* radio program in May 2013. During the call, the individual identified himself as one of the sensor operators of a drone that flew over Benghazi during the attacks. The Committee requested to interview this person during the meeting on March 31. As of the date of Hedger’s letter, the Defense Department had failed to provide the names of all the pilots and sensor operators, including “John from Iowa” that had operated the drone on the September 11 and September 12, 2012. Finally, almost a month after Hedger’s letter, the Defense Department provided all names of both the pilots and the sensor operators.<sup>139</sup> The Committee benefited from hearing the testimony of the witnesses. These individuals were able to provide the Committee first-hand accounts of their mission that night, the capabilities of the drone, what information was being relayed up the chain of command, and the information they were focused on gathering. The video feed from those drones provided one point of reference for the Committee during its investigation. The witnesses provided another.

Despite Hedger’s complaint that the Department had expended “significant resources” to identify “John from Iowa” to “no avail,” the Department had actually identified “John from Iowa” within hours of his call in 2013, and had reprimanded him for his actions.<sup>140</sup> Because of Hedger’s representation that “significant resources” had been used to find this witness, the Committee issued a subpoena to Hedger to explain what resources had actually been used, and why the Defense Department was unable to respond to a Congressional request in a timely manner.<sup>141</sup>

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<sup>139</sup> See Email from Mac Tolar, Senior Counsel, H. Select Comm. on Benghazi, to Philip G. Kiko, Staff Dir. and Gen. Counsel, H. Select Comm. on Benghazi (May 20, 2016, 11:47 EST) (on file with the Committee) (indicating receipt of all relevant names).

<sup>140</sup> Testimony of Sensor Operator 1, Tr. at 16-17, June 9, 2016 [hereinafter Sensor Operator 1 Transcript] (on file with the Committee). *See also*, Letter from Stephen C. Hedger, Assistant Sec’y of Def. for Legis. Affairs, U.S. Dep’t of Def., to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (April 28, 2016) (on file with the Committee).

<sup>141</sup> Subpoena to Stephen C. Hedger, Assistant Sec’y of Def. for Legis. Affairs, U.S. Dep’t of Def., H. Select Comm. on Benghazi (June 15, 2016) (on file with the Committee).

### The Central Intelligence Agency

The Central Intelligence Agency [CIA] ultimately provided a significant volume of material and witnesses to the Committee, including SameTime messages not previously or generally made available to Congress. Nevertheless, the Committee's work was unnecessarily delayed with respect to documents, witnesses, and other basic requests.

#### READ-AND-RETURN DOCUMENTS

When the House of Representatives passed the resolution creating the Committee, it required that “[a]ny committee of the House of Representatives having custody of records in any form relating to [the Benghazi attacks] shall transfer such records to the Select Committee within 14 days of the adoption of this resolution. Such records shall become the records of the Select Committee.”<sup>142</sup>

As a result of the resolution, the Chairman of the Intelligence Committee wrote to John O. Brennan, Director, CIA, noting the Intelligence Committee had possession but not custody of records provided by the CIA on a read-and-return basis. Therefore, the Chairman of the Intel. Comm. believed he did not have the authority to transfer these records to the Committee as otherwise required by the resolution. The Chairman, nonetheless, asked the CIA to make these records available to the Select Committee.<sup>143</sup>

This transmittal is intended to facilitate the CIA's ability to respond to any future requests for these materials from the new Select Committee. I expect you will maintain these materials at CIA Headquarters in a manner such that they could be easily and promptly provided to the Select Committee.<sup>144</sup>

In July of 2014, the Intelligence Committee provided its records to this Committee, including more than 400 pieces of intelligence relating to Benghazi and Libya from 2012, and other reports and correspondence. After acquiring the requisite security clearances and reviewing these

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<sup>142</sup> H. Res. 567, 113th Cong., § 5(a) (2014).

<sup>143</sup> Letter from Mike Rogers, Chairman, H. Perm. Select Comm. on Intel., to John O. Brennan, Dir., Cent. Intel. Agency (May 8, 2014) (on file with the Committee).

<sup>144</sup> *Id.*

documents, on November 19, 2014 the Committee asked that it be able to review the read-and-return records the Intelligence Committee had given back to the CIA.<sup>145</sup> The CIA responded, noting it was “working to try to set up a time next week when we could make the materials available.”<sup>146</sup> The CIA did not make the materials available the following week.

On December 8, 2014, the Committee reiterated its request.<sup>147</sup> The CIA responded: “we are in the process of organizing and page numbering the documents so that they are ready for your team to review. I’ll check in with the folks who are working on that to see if we can make it all available next week.”<sup>148</sup> This hardly squared with what the Intelligence Committee Chairman requested of the CIA.<sup>149</sup>

The Committee made a third request, on December 11, 2014, to review these documents.<sup>150</sup> The CIA’s Office of Congressional Affairs responded on December 15, 2014, noting they would “reach out” to the Committee staff that would be reviewing the documents.<sup>151</sup> The CIA never contacted the Committee.

The Committee made a fourth request on January 8, 2015.<sup>152</sup> On January 12, 2015, the CIA responded noting they “have this request as a priority

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<sup>145</sup> See Email from Mary K. E. Maples, Office of Cong. Affairs, Cent. Intel. Agency, to Christopher Donesa, Deputy Staff Dir., H. Select Comm. on Benghazi (Nov. 19, 2014, 14:23 EST) (on file with the Committee).

<sup>146</sup> *Id.*

<sup>147</sup> Email from Christopher Donesa, Deputy Staff Dir., H. Select Comm. on Benghazi, to Mary K. E. Maples, Office of Cong. Affairs, Cent. Intel. Agency (Dec. 8, 2014, 13:57 EST) (on file with the Committee).

<sup>148</sup> Email from Mary K. E. Maples, Office of Cong. Affairs, Cent. Intel. Agency, to Christopher Donesa, Deputy Staff Dir., H. Select Comm. on Benghazi (Dec. 8, 2014, 15:10 EST) (on file with the Committee).

<sup>149</sup> Letter from Mike Rogers, Chairman, H. Perm. Select Comm. on Intel., to John O. Brennan, Dir., Cent. Intel. Agency (May 8, 2014) (on file with the Committee).

<sup>150</sup> Email from Christopher Donesa, Deputy Staff Dir., H. Select Comm. on Benghazi to Mary K. E. Maples, Office of Cong. Affairs, Cent. Intel. Agency (Dec. 11, 2014, 10:47 EST) (on file with the Committee).

<sup>151</sup> Email from Mary K. E. Maples, Office of Cong. Affairs, Cent. Intel. Agency to Christopher Donesa, Deputy Staff Dir., H. Select Comm. on Benghazi (Dec. 15, 2014, 10:33 EST) (on file with the Committee).

<sup>152</sup> Email from Christopher Donesa, Deputy Staff Dir., H. Select Comm. on Benghazi, to Mary K. E. Maples, Office of Cong. Affairs, Cent. Intel. Agency (Jan. 8, 2015, 11:19 EST) (on file with the Committee).

action. We are currently processing the documents.... We hope to have them ready for you in a couple of weeks.”<sup>153</sup>

It was not until the Committee’s January 27, 2015 public compliance hearing with Neil L. Higgins, Director of Congressional Affairs, CIA, that the CIA finally granted the Committee access to these documents.<sup>154</sup> This was nearly three months after the Committee first requested access to these documents—documents the CIA had already produced to the Intelligence Committee and had been set aside specifically for this Committee’s access.<sup>155</sup> Having to schedule and conduct public hearings on matters of compliance with requests for clearly relevant documents is a waste of time and resources.

In finally gaining access to these documents, the Committee discovered the records consisted of more than 4,000 pages of emails.<sup>156</sup> The CIA had never indicated they were withholding such a large volume of material from the Committee. Reviewing this material necessitated the redirection of Committee time. The CIA, however, would only allow four Committee staff to review these records during normal business hours at CIA Headquarters in McLean, Virginia. These restrictions unnecessarily limited the Committee’s access to the materials and significantly and unnecessarily increased the time needed to review the documents.

In addition, the CIA would not allow Committee staff to retain notes made while reviewing these documents, or even take notes back to Committee offices to discuss with Committee members.<sup>157</sup> The CIA required Committee staff to keep their notes locked in a safe at CIA headquarters.<sup>158</sup> The CIA eventually offered to allow Committee staff to take their notes back to Committee offices—but only if CIA staff first reviewed those notes and applied various redactions to them.<sup>159</sup> This de-

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<sup>153</sup> Email from Mary K. E. Maples, Office of Cong. Affairs, Cent. Intel. Agency, to Christopher Doneso, Deputy Staff Dir., H. Select Comm. on Benghazi (Jan. 12, 2015, 15:55 EST) (on file with the Committee).

<sup>154</sup> Interim Progress Update, *supra* note 8, at 5.

<sup>155</sup> *Id.* at 9.

<sup>156</sup> *Id.*

<sup>157</sup> Email from Mary K. E. Maples, Office of Cong. Affairs, Cent. Intel. Agency, to Dana K. Chipman, Chief Counsel, H. Select Comm. on Benghazi et al. (Apr. 17, 2015, 9:16 EST) (on file with the Committee).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

mand raised serious separation of powers concerns and would have compromised the investigation to allow the subject of an investigation to review and redact the notes of its investigator.

The CIA placed none of these onerous and punitive restrictions on the Intelligence Committee's access to these same materials, which the CIA provided to it to keep in its own offices at the Capitol.

#### NEW DOCUMENT REQUESTS

After a review of the more than 4,000 pages of 'read and return' documents at the CIA, the Committee issued a new document request to the CIA on April 28, 2015.<sup>160</sup> This request was for 26 specific categories of information to help the Committee better understand the CIA's activities in Benghazi, its response to the attacks, and the analytic processes undertaken in the wake of the attacks.<sup>161</sup> This document request included SameTime messages, emails, operational cables, and intelligence reports.<sup>162</sup>

The CIA resisted this request. In a May 15, 2015 telephone call with the Committee Chairman, David S. Cohen, the Deputy Director of the CIA, expressed concern "with both the breadth and some of the types of documents requested," and claimed "fulfilling the request could take many months of work."<sup>163</sup> Additional meetings between the Committee and the CIA took place to discuss the request, and it was not until July 8, 2015, two-and-a-half months after the Committee's document request, that the CIA produced additional documents pursuant to this request.<sup>164</sup>

The results of the document production were underwhelming. The CIA delivered only a smattering of material from four general categories. One of the documents was a critical email the CIA had previously withheld from the Committee even though it had been shared with the Intelligence

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<sup>160</sup> Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to John O. Brennan, Dir., Cent. Intel. Agency (Apr. 28, 2015) (on file with the Committee).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> See Email from Neal L. Higgins, Dir. of Cong. Affairs, Cent. Intel. Agency, to Dana K. Chipman, Chief Counsel, H. Select Comm. on Benghazi (May 15, 2015, 10:23 EST) (on file with the Committee).

<sup>164</sup> Memorandum from Dir., Office of Cong. Affairs, Cent. Intel. Agency, to Chief Counsel and Deputy Staff Dir., H. Select Comm. on Benghazi, July 8, 2016 (on file with Cent. Intel. Agency, REQUEST 15-001 to REQUEST 15-0004).



Committee.<sup>165</sup> This document changed the Committee’s understanding of what information was shared with Washington from Tripoli in the wake of the attacks—crucial for understanding how the CIA created its post attack analysis. The document production also consisted of cables shared with the Intelligence Committee but not given to this Committee.

Because of this insufficient document production and the withholding of clearly relevant information, on August 7, 2015, the Committee issued a subpoena to the CIA.<sup>166</sup> This subpoena was straightforward and asked for six specific sets of documents. These documents included specific intelligence assessments written by CIA analysts in the wake of the attacks.<sup>167</sup> The subpoena demanded the production of “supporting material” for these assessments.<sup>168</sup> Up to that point the CIA had refused to produce that material, in addition to refusing to produce the assessments with accompanying footnotes. It therefore was impossible for the Committee to understand what material the analysts used to form the basis for their subsequent assessments.

The subpoena also demanded production of additional documents relating to the unclassified talking points requested by the Intelligence Committee on September 14, 2012.<sup>169</sup> Previously, the CIA had refused to produce any additional documents relating to the talking points not already in the public domain, claiming it was the responsibility of the Office of Director for National Intelligence to produce documents, even though the documents in question were all internal to the CIA.

The subpoena also demanded production of SameTime messages from individuals within certain offices in the CIA.<sup>170</sup> Prior witness testimony revealed CIA employees relied heavily on SameTime messages the night of the attacks and in the immediate aftermath, as these were more efficient than typing emails.<sup>171</sup> Simply reviewing the emails previously pro-

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<sup>165</sup> Email from employee, Cent. Intel. Agency, to Cent. Intel. Agency (Sept. 14, 2012 4:05 PM) (on file with the Committee, REQUEST 15-0005).

<sup>166</sup> Subpoena issued by H. Select Comm. on Benghazi to John O. Brennan, Dir., Cent. Intel. Agency, (Aug. 7, 2015).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *See, e.g.*, Testimony of employee, Cent. Intel. Agency, Tr. 97-100 (July, 16, 2015) (on file with the Committee).

duced by the CIA, therefore, would not tell the full story of what happened the night and early morning hours of the attacks.

On August 28, 2015, the CIA responded to the subpoena.<sup>172</sup> The CIA produced in full the specific intelligence assessments with supporting material.<sup>173</sup> The CIA also produced additional material relating to the Intelligence Committee talking points, but objected to producing SameTime messages, arguing that the CIA “does not produce SameTime messages to Congress because doing so would have serious negative consequences on CIA’s work.”<sup>174</sup> This is a striking assertion. To suggest the entity that both created and funds the CIA and must provide oversight for myriad reasons cannot have access at some level to the work done by the CIA is staggeringly arrogant. In reality these SameTime messages were both highly relevant and highly probative and fundamentally changed the Committee's understanding of information previously provided to the Committee. This is precisely why Congress must be able to access this information and precisely why the CIA was so resistant to providing it.

A review of the documents ultimately produced by the CIA and subsequent witness interviews necessitated additional document requests to the CIA. The Committee first attempted to request these documents informally. The CIA did not produce them. As a result, on January 13, 2016, the Committee sent a letter to the CIA formally requesting additional documents.<sup>175</sup> This request included two specific operational cables referenced repeatedly during witness interviews, an additional piece of intelligence analysis from after the attacks, and information regarding intelligence given to senior policymakers<sup>176</sup>—the subject of a previous formal request from the Committee to the CIA.<sup>177</sup>

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<sup>172</sup> Letter from Rachel Carlson Lieber, Deputy Gen. Counsel, Cent. Intel. Agency, to Dana K. Chipman, Chief Counsel, H. Select Comm. on Benghazi (Aug. 28, 2015) (on file with the Committee).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to John O. Brennan, Dir., Cent. Intel. Agency (Jan. 13, 2016) (on file with Committee).

<sup>176</sup> *Id.*

<sup>177</sup> Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to John O. Brennan, Dir., Cent. Intel. Agency (Nov. 4, 2015) (on file with the Committee).

The CIA ignored this request. As a result, the Committee issued a second subpoena on January 20, 2016.<sup>178</sup> This subpoena demanded the production of the two specific operational cables in addition to information regarding intelligence given to senior policymakers.<sup>179</sup>

On February 9, 2016—after months of the Committee applying pressure to produce documents and the possibility John O. Brennan, Director, CIA could be held in contempt of Congress for withholding documents—the CIA finally relented.<sup>180</sup> The CIA agreed to produce SameTime messages to the Committee and came to an agreement on access to the two specific operational cables.<sup>181</sup>

While the CIA claimed the SameTime messages would not change the Committee’s understanding of the facts of Benghazi, some of the contents of these messages were quite valuable. As a result of the delays—the Agency took more than nine months to fulfill the Committee’s request—the Committee lost an opportunity to question some witnesses specifically about these messages. In addition, some of the messages implicated agencies outside the CIA and did in fact change the Committee’s understanding of certain facts—something the CIA, with its stove-piped view of the Benghazi landscape, likely would not have known.

#### WITNESSES

The Committee interviewed 19 CIA witnesses during the course of its investigation. The Committee understood these witnesses needed flexibility and, in some cases, anonymity. The Committee delayed important interviews to ensure personnel would not take time away from mission-critical duties overseas. On one occasion, the Committee participated in a secure video teleconference with a witness overseas, and on another occasion the Committee waited until a witness was between tours of duty so the interview would not interfere with intelligence activities. The Committee also provided copies of interview transcripts to the CIA so

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<sup>178</sup> Subpoena issued by H. Select Comm. on Benghazi to John O. Brennan, Dir., Cent. Intel. Agency, (Aug. 7, 2015).

<sup>179</sup> *Id.*

<sup>180</sup> Letter from John O. Brennan, Dir., Cent. Intel. Agency, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (Feb. 9, 2016) (on file with the Committee).

<sup>181</sup> *Id.*

they could have them in their offices rather than reviewing them in the Committee offices.

Although the Committee never issued subpoenas to any CIA witnesses, and all appeared voluntarily, the CIA initially refused to produce some witnesses—including the manager of the analysts. Instead, the CIA produced the former head of the Office of Terrorism Analysis, who was unable to answer granular questions about how the analytic assessments were drafted and what specific intelligence the analysts relied on.<sup>182</sup> Outstanding questions remained after that interview, and it was apparent the Committee needed to speak to the first-line manager of the analysts. The CIA refused to produce this witness, dubbing the individual a “junior analyst” despite a decade of experience at the CIA.<sup>183</sup> Only after the Committee proposed issuing a subpoena for the witness’s deposition did the CIA agree to produce the person voluntarily for an interview.<sup>184</sup> This witness proved highly probative, which regrettably, may be why the CIA was reluctant to allow the interview in the first instance.

A similar situation occurred involving a senior employee in Benghazi. The CIA initially refused to produce this individual, who, given his portfolio in Benghazi, was the only person who could speak to a number of different topics and allegations. After the CIA agreed to produce him for an interview, the CIA kept pushing the date of the interview further into the future. Not until the Chairman issued a subpoena and was preparing to serve it did the CIA set a date for this individual’s interview. This witness also provided highly probative testimony calling into question previous conclusions drawn by other committees of Congress and fundamentally reshaping the Committee’s understanding of critical factors.

The Committee is also aware of concerns regarding the accuracy of certain specific witness testimony before the House Intelligence Committee. The Committee carefully reviewed relevant testimony and information

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<sup>182</sup> See Testimony of employee, Cent. Intel. Agency, Tr. 43, 46 (Nov. 13, 2015)] (on file with the Committee).

<sup>183</sup> Email from Rachel Carlson Lieber, Deputy Gen. Counsel, Cent. Intel. Agency, to H. Select Comm. on Benghazi (Jan. 7, 2016, 10:23 EST) (on file with the Committee).

<sup>184</sup> See Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to John O. Brennan, Dir., Cent. Intel. Agency (Jan. 13, 2016) (on file with Committee) (on file with the Committee).

and questioned witnesses about this testimony, but was unable to definitively resolve the issue.

#### DISPARATE TREATMENT

While the Committee spent months trying to acquire new documents from the CIA, the Committee Minority members had no such difficulty. One day before the Committee's first interview with a CIA witness, the CIA emailed the Committee alerting it that "[i]n response to a request for specific cables from the minority, we have added three documents" to the documents at the CIA available for review.<sup>185</sup> Neither Committee Minority members nor the CIA informed the Committee such a request had been made until the CIA obligingly fulfilled it. In contrast, the CIA refused to produce two specific cables requested by the Committee until a subpoena was issued.<sup>186</sup>

Again on October 17, 2015—just five days before the Committee's hearing with the Secretary—an email was sent on behalf of Committee Minority members to Higgins seeking information regarding a classification issue.<sup>187</sup> The CIA responded 42 minutes later—on a Saturday night.<sup>188</sup>

Two days later Committee Minority members asked the CIA to review seven transcript excerpts from two witness interviews for classification

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<sup>185</sup> Email from Mary K. E. Maple, Office of Cong. Affairs, Cent. Intel. Agency, to Heather Sawyer, Minority Chief Counsel, H. Select Comm. on Benghazi et al (April 22, 2015, 9:19 EST) (on file with the Committee).

<sup>186</sup> See Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to John O. Brennan, Dir., Cent. Intel. Agency (Jan. 13, 2016); Email from Rachel Carlson Lieber, Deputy General Counsel, Cent. Intel. Agency, to H. Select Comm. on Benghazi (Jan. 18, 2016), and Subpoena to John O. Brennan, Dir., Cent. Intel. Agency, H. Select Comm. on Benghazi, (Jan. 20, 2016) (on file with the Committee).

<sup>187</sup> Email from Susanne Sachsman Grooms, Minority Staff Dir., H. Select Comm. on Benghazi, to Neal L. Higgins, Dir. of Cong. Affairs, Cent. Intel. Agency (Oct. 17, 2015, 19:02 EST) (on file with the Committee).

<sup>188</sup> Email from Neal L. Higgins, Dir. of Cong. Affairs, Cent. Intel. Agency, to Susanne Sachsman Grooms, Minority Staff Dir., H. Select Comm. on Benghazi (Oct. 17, 2015, 19:44 EST) (on file with the Committee).

review.<sup>189</sup> The CIA completed these reviews and returned the transcripts in just 40 hours.<sup>190</sup>

When the Committee asked the CIA to conduct a classification review of witness transcripts, however, the CIA refused. As the Chairman noted in a letter to Brennan on January 13, 2016:

The Agency has indicated it will not conduct a classification review of transcripts of previous Committee interviews but has provided no reason why it is unable to perform this review, which must be performed by the Executive Branch. The refusal to conduct this review threatens to significantly impact both the timelines and constitutional independence of the Committee’s final report, as well as the ability of the American people to review transcripts of unclassified interviews. This matter must be resolved promptly to enable the Committee to undertake the process of preparing its final report<sup>191</sup>

The CIA responded to this letter on March 22, 2016—more than two months later—following a meeting on the topic between the Committee and the CIA. In its response, the CIA said a classification review of the transcripts would be “lengthy and laborious.”<sup>192</sup> The CIA also reiterated its view the Committee should share its report in advance with the CIA, something the CIA noted was “critically important.”<sup>193</sup> This delayed the Committee’s final report because the Committee cannot release information without having it cleared for classification purposes and the Executive Branch solely conducts this review.

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<sup>189</sup> Email from Heather Sawyer, Minority Chief Counsel, H. Select Comm. on Benghazi, to Neal L. Higgins, Dir. of Cong. Affairs, Cent. Intel. Agency (Oct. 19, 2015, 20:47 EST) (on file with the Committee).

<sup>190</sup> Email from Neal L. Higgins, Dir. of Cong. Affairs, Cent. Intel. Agency, to Susanne Sachsman Grooms, Minority Staff Dir., H. Select Comm. on Benghazi (Oct. 17, 2015, 19:44 EST) (on file with the Committee).

<sup>191</sup> Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to John O. Brennan, Dir., Cent. Intel. Agency (Jan. 13, 2016) (on file with Committee).

<sup>192</sup> Email from Neal L. Higgins, Dir. of Cong. Affairs, Cent. Intel. Agency, to Philip G. Kiko, Staff Dir. and Gen. Counsel, H. Select Comm. on Benghazi (Mar. 22, 2016) (on file with the Committee).

<sup>193</sup> *Id.* The CIA acknowledged in a March 4, 2016 meeting that it had simply “assumed” the Committee would do this, without ever once asking with the Committee. This mistaken assumption perhaps contributed to the CIA’s hardened posture in refusing to review witness transcripts for classification and sensitivity purposes.

## The White House

### DOCUMENTS

The Committee sent a document request to the White House on December 29, 2014.<sup>194</sup> While this was not the first time Congress had asked the White House for information regarding Benghazi,<sup>195</sup> it did mark the first time Congress asked the White House for documents. The request consisted of 12 categories, including documents regarding the U.S.’s continued presence in Libya, the response to the attacks, the YouTube video, the Intelligence Committee talking points, and the administration’s explanation of the attacks.<sup>196</sup>

On January 23, 2015, the White House objected to some Committee requests, but did commit to “be in a position to begin sharing documents by the end of February.”<sup>197</sup>

On February 27, 2015, White House staff met with Committee staff to discuss the requests. At the meeting the White House produced 266 pages of emails to and from White House staff related to Benghazi—the first emails and documents produced to Congress by the White House about Benghazi.<sup>198</sup> These emails, however, were heavily redacted. As a result, the White House and Committee reached an agreement regarding redactions, and on March 16, 2015, the White House produced these documents with the redactions removed.<sup>199</sup>

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<sup>194</sup> Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to Denis R. McDonough, White House Chief of Staff (Dec. 29, 2014) (on file with the Committee).

<sup>195</sup> *See, e.g.*, Letter from Buck McKeon, Chairman, H. Armed Servs. Comm., et al., to the President (Oct. 19, 2012) (on file with the Committee); *and* Letter from Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, and Jason Chaffetz, Chairman, H. Subcomm. on Nat’l Sec., to the President (Oct. 19, 2012) (on file with the Committee).

<sup>196</sup> Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to Denis R. McDonough, White House Chief of Staff (Dec. 29, 2014) (on file with the Committee).

<sup>197</sup> Letter from W. Neil Eggleston, White House Counsel, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (Jan. 23, 2015) (on file with the Committee).

<sup>198</sup> Letter from Jennifer O’Connor, Deputy White House Counsel, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (Feb. 27, 2015) (on file with the Committee).

<sup>199</sup> Letter from Jennifer O’Connor, Deputy White House Counsel, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (Mar. 16, 2015) (on file with the Committee).

On April 23, 2015, the Committee Chairman wrote to the White House again,<sup>200</sup> giving priority to specific categories of documents from the Committee's December 29, 2014 request.<sup>201</sup> As a result, the White House made additional document productions on May 11, 2015;<sup>202</sup> June 19, 2015;<sup>203</sup> and July 17, 2015.<sup>204</sup>

On August 7, 2015, the Chairman wrote a third time to the White House<sup>205</sup> addressing documents responsive to the Committee's December 29, 2014 request which were being withheld by the White House.<sup>206</sup> Subsequently, the White House produced additional documents on August 28, 2015.<sup>207</sup>

On September 9, 2015, White House staff met with Committee staff and made progress on satisfying the Committee's requests for information.<sup>208</sup> The White House briefed the Committee on a specific request, and a path forward was set to identify remaining documents addressing specific categories of information important to the Committee. Additional meetings were held in a classified setting, on October 5, 2015;<sup>209</sup> October 27, 2015;<sup>210</sup> and November 12, 2015.<sup>211</sup> Each meeting was accompanied by a document production from the White House.

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<sup>200</sup> Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to W. Neil Eggleston, White House Counsel (Apr. 23, 2015) (on file with the Committee).

<sup>201</sup> *Id.*

<sup>202</sup> See Letter from Jennifer O'Connor, Deputy White House Counsel, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (May 11, 2015) (on file with the Committee).

<sup>203</sup> See Letter from Jennifer O'Connor, Deputy White House Counsel, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (June 19, 2015) (on file with the Committee).

<sup>204</sup> See Letter from Jennifer O'Connor, Deputy White House Counsel, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (July 17, 2015) (on file with the Committee).

<sup>205</sup> Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to W. Neil Eggleston, White House Counsel (Aug. 7, 2015) (on file with the Committee).

<sup>206</sup> *Id.*

<sup>207</sup> See Letter from Jennifer O'Connor, Deputy White House Counsel, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (Aug. 28, 2015) (on file with the Committee).

<sup>208</sup> See Email from Jennifer O'Connor, Deputy Counsel, White House Office of the Chief Counsel, to Dana K. Chipman, Chief Counsel, H. Select Comm. on Benghazi et al (Sept. 10, 2015, 14:53 EST) (on file with the Committee).

<sup>209</sup> Letter from Jennifer O'Connor, Deputy White House Counsel, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (Oct. 5, 2015) (on file with the Committee).

<sup>210</sup> Letter from Jennifer O'Connor, Deputy White House Counsel, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (Oct. 27, 2015) (on file with the Committee).



In total, the White House made nine productions of documents to the Committee. To be clear the White House did not provide all of the information the Committee requested but the Committee was granted access to information no other congressional committee accessed.

#### WITNESSES

The Committee interviewed four witnesses from the White House. On January 21, 2016, three senior White House officials, W. Neil Eggleston, Counsel to the President; Nicholas L. McQuaid, Deputy Counsel to the President; and Donald C. Sisson, Special Assistant to the President; flew to Charlotte, North Carolina, to meet with the Chairman and discuss details regarding these witness interviews.<sup>212</sup> The White House and the Committee honored the confidentiality of the meeting and the discussions.

Susan E. Rice, National Security Advisor, and Benjamin J. Rhodes, Deputy National Security Advisor for Strategic Communications, then testified before the Committee.<sup>213</sup>

#### ACCESS TO COMPARTMENTED PROGRAMS

Over the course of nearly a dozen interviews with the State Department, the Defense Department, and CIA personnel, witnesses consistently refused to answer questions related to certain allegations with respect to U.S. activities in Libya even though the House specifically gave the Committee access to materials relating to intelligence sources and methods.<sup>214</sup> Most of these questions related in some way to allegations regard-

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<sup>211</sup> Letter from Jennifer O'Connor, Deputy White House Counsel, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (Nov. 12, 2015) (on file with the Committee).

<sup>212</sup> Press Briefing by Press Sec'y Josh Earnest, Office of the Press Sec'y, The White House (Mar. 18, 2016), <https://www.whitehouse.gov/the-press-office/2016/03/21/press-briefing-press-secretary-josh-earnest-3182016>.

<sup>213</sup> See Testimony of Susan E. Rice, former U.S. Ambassador to the U.N., Tr. (Feb. 2, 2016) (on file with the Committee); Testimony of Benjamin J. Rhodes, Deputy Nat'l Security Advisor for Strategic Communications, Nat'l Security Council, Tr. at 50-51 (Feb. 2, 2016) (on file with the Committee).

<sup>214</sup> H. Res. 567, 113th Cong., § 4(a) (2014).

ing weapons.<sup>215</sup> These refusals meant significant questions raised in public relating to Benghazi could not be answered.

At the meeting between the Chairman and the White House in Charlotte, N.C., in January 2016, the Chairman told Eggleston the Committee would need to review any and all relevant special access programs that might relate to U.S. government activities in Libya. On March 16, 2016, the Committee formalized its request for this access in a letter to Eggleston:

With this letter, I am also including a classified attachment detailing specific testimony received by the Committee establishing the need to further clarify what specific activities the U.S. government may have conducted, and/or authorized, in Libya in 2011 and 2012. ... You are in a unique position to help us make sure the record is complete. In order to accomplish this, however, the Committee requires your assistance. I therefore write to formally request access to all special access programs regarding U.S. activities in Libya in 2011-2012.<sup>216</sup>

The letter contained a classified attachment detailing specific testimony from senior and line personnel from the State Department, CIA, and the Defense Department, all of whom did not respond fully to questions from the Committee during their interviews due to access issues. Some of the testimony provided raised substantial further questions in light of the record available to the Committee. The administration ultimately did not provide the requested access.<sup>217</sup>

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<sup>215</sup> Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to W. Neil Eggleston, White House Counsel (Mar. 16, 2016) (on file with the Committee).

<sup>216</sup> *Id.*

<sup>217</sup> Letter from Neal L. Higgins, Dir. of Cong. Affairs, Cent. Intel. Agency, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (April 28, 2016) (on file with the Committee).

## COMPLIANCE WITH RECORD-KEEPING LAWS AND REGULATIONS

### The Federal Records Act

The Federal Records Act [FRA] “governs the collection, retention, preservation, and possible destruction of federal agency records” by Federal agencies.<sup>218</sup> Federal records include:

[A]ll books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by a federal agency under federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, proceedings, operations or other activities of the government or because of informational value of the date within them.<sup>219</sup>

The FRA requires each agency head to “make and preserve records.”<sup>220</sup> Each agency head must “establish and maintain an active, continuing program for the economical and efficient management of the records of the agency” including “effective controls over the creation and over the

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<sup>218</sup> WENDY GINSBERG, CONG. RESEARCH SERV., R43072, COMMON QUESTIONS ABOUT FEDERAL RECORDS AND RELATED AGENCY REQUIREMENTS 2 (2015), <https://www.fas.org/sgp/crs/secrecy/R43072.pdf> (citing 44 U.S.C., Chapters 21, 29, 31, and 33).

<sup>219</sup> 44 U.S.C. § 3301 (2012). Conversely, non-record materials are broken down into three categories: (1) library and museum material (2) extra copies of documents; and (3) stocks of publications and processed documents—such as catalogs, trade journals, and other publications that are received from other government agencies, commercial firms, or private institutions. 36 C.F.R. § 1222.14 (2009). The FRA was most recently amended in 2014 to address:

“[T]he rapid migration over the last several decades toward electronic communication and recordkeeping, federal recordkeeping laws are still focused on the media in which a record is preserved, not the information that constitutes the record itself. To correct this flaw, this legislation will shift the onus of recordkeeping onto the record and not the media it is contained in as a way to better enable NARA, and other agencies, to handle growing amounts of electronic communication.”

H. REP. NO. 113-127, at 5 (2013). That amendment was introduced by Ranking Member Cummings (D-MD). H.R. 1233, 113th Cong. (2013).

<sup>220</sup> 44 U.S.C. § 3101 (2012).

maintenance and use of records in the conduct of current business.”<sup>221</sup> Additionally, each agency head “shall establish safeguards against the removal or loss of records.”<sup>222</sup>

The details of implementing an agency’s record management program are set out in Federal regulations. Agencies must maintain “adequate documentation of agency business” that “[m]ake possible a proper scrutiny by Congress.”<sup>223</sup> The regulations require “[a]gencies that allow employees to send and receive official electronic mail messages using a system not operated by the agency must ensure that federal records sent or received on such systems are preserved in the appropriate agency record-keeping system.”<sup>224</sup>

The State Department’s own records management policies reinforce the statutory and regulatory requirements. According to the Foreign Affairs Manual: “[T]he Secretary is required to establish a Records and Information Life Cycle Management Program in accordance with the Federal Records Act.”<sup>225</sup> Objectives of the program include fulfilling official requests from Congress,<sup>226</sup> as well as ensuring “[t]he recording of activities of officials of the Department should be complete to the extent necessary to . . . [m]ake possible a proper scrutiny by Congress and duly authorized agencies of the Government of the manner in which the functions of the Department have been discharged.”<sup>227</sup>

### **The State Department’s Record Keeping**

The Committee first became aware of the Secretary’s use of a non-official email account for at least some official business on August 11, 2014, when the State Department produced to the Committee eight emails to or from the Secretary.<sup>228</sup> These emails indicated the Secretary

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<sup>221</sup> 44 U.S.C. § 3102 (2012).

<sup>222</sup> 44 U.S.C. § 3105 (2012).

<sup>223</sup> 36 C.F.R. § 1222.22 (c) (2015).

<sup>224</sup> 36 C.F.R. § 1236.22 (b) (2015).

<sup>225</sup> 5 FAM 414.1 (2015).

<sup>226</sup> 5 FAM 414.3-1(8) (2015).

<sup>227</sup> 5 FAM 422.2(3) (2015) (emphasis added); *see also* 5 FAM 443.1 (establishing principles governing email communications) *and* 5 FAM 754(h) (requiring users to review 5 FAM 443 for responsibilities for handling email correspondence).

<sup>228</sup> *See* August 11, 2014 document production from the State Dep’t which included eight emails sent to or received by the Secretary.

used a private email account to communicate about official government business.<sup>229</sup> Well before the State Department made this production of eight emails, it was abundantly clear the State Department knew the complete universe of responsive documents and emails was not housed or situated on State Department servers.<sup>230</sup>

The State Department was aware—as early as June 2013—of the Secretary’s use of personal email for official business and the detrimental effect on responses to Congress and obligations under the Federal Records Act, yet the Department said nothing.<sup>231</sup> The State Department was actively retrieving the Secretary’s official emails in May 2014—the same time the Committee was formed—still the Department said nothing.

Seventeen days after producing eight of the Secretary’s emails, the State Department, through Kennedy, issued a memorandum to State Department principals reiterating the obligation that departing senior staff have to ensure the timely return of records, including email.<sup>232</sup> Specifically, Kennedy’s memorandum referenced a “policy in place since 2009 ... to capture electronically email accounts of the senior officials listed in Tab 1 as they depart their positions.”<sup>233</sup> The memorandum attached the relevant Foreign Affairs Manual provisions including those related to email records.<sup>234</sup> During questioning by the Chairman, Kennedy testified about the memorandum:

Q: On August the 28th, you issued a memo to a whole host of people, subject: “Senior Officials' Records Management Responsibilities.” I want to make sure he gets a copy of that so he's looking at the same thing I'm looking at. And we can mark it as

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<sup>229</sup> *See id.* Some of the emails were identified by the address with domain name “@clintonemail.com.” Other emails were designated simply as “H.”

<sup>230</sup> *See* Fischer Testimony at 66, in relevant part:

Q: Okay. One of the things that we wanted to talk with you about was when you first became knowledgeable or aware that all or part of Secretary Clinton's records were not on premises with the State Dep't. And can you tell us when that was?

A: The end of July 2014.

<sup>231</sup> “Office of the Sec’y: Evaluation of Email Records Management and Cybersecurity Requirements,” *supra* note 69 at 17-18.

<sup>232</sup> *See* Memorandum from “M – Patrick F. Kennedy” to 7<sup>th</sup> Floor Principals 1 (Aug. 28, 2014) (on file with the Committee).

<sup>233</sup> *See id.* at 3.

<sup>234</sup> *See id.*

committee exhibit 13 here. Does that look familiar? I'm not going to go through the whole thing with you. I just want to....

A: Yes, sir, this is familiar. This is something that we did in response to a NARA program that we call journaling but NARA's official name is Capstone.

Q: And what prompted you to promulgate this memo?

A: NARA's program.

Q: I thought you and I had established that NARA rule had taken place the fall of 2013.

Q: The journaling effort, Mr. Chairman, I cannot remember the exact date and how my people had worked this through. But the request to journal these records is something that I'm just reading this now to see if anything else reminds me. Chairman, if I am slow, I am slow. But I have

Q: Having spent the day with you, you will never convince me that you are slow. You will never convince me of that. If you would look at page 3 for me, kind of in the middle, it's a bullet that starts, "As a general matter."

A: Yes.

Q: "As a general matter." I'll let you read the rest of that. You can read it for the record whenever you feel comfortable.

A: Yes, sir, I am ready.

Q: Will you read that for us, for the court reporter?

A: "As a general matter, to ensure a complete record of their activities, senior officials should not use their private email accounts for (e.g., Gmail) for official businesses. If a senior official uses his or her private email account for the conduct of official business, she or he must ensure that records pertaining to official business that are sent from or received on such email account are

captured and maintained. The best way to ensure this is to forward incoming e mails received on a private account to the senior official's State account and copy ongoing messages to their State account.”<sup>235</sup>

Less than six weeks later, Kennedy sent another State Department announcement restating the obligations of employees to preserve records.<sup>236</sup> Less than 10 days later, on October 28, 2014, Kennedy sent a letter to four former Secretaries of State. That letter sought the return of Federal records, “such as an email sent or received on a personal email account while serving as Secretary.”<sup>237</sup> The letter emphasized that “diverse Department records are subject to various disposition schedules with most Secretary of State records retained permanently,” a fact that was confirmed in the Committee's interview with William Fischer, Chief Records Officer, State Department.<sup>238</sup> Because of a typographical error, the State Department did not send the letter to Mills until November 12, 2014.<sup>239</sup>

In response to a Committee member, Kennedy told the Committee:

A: Yes, sir. This was in response to a National Archives and Records Administration new policy that they had put out.

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<sup>235</sup> Testimony of Patrick F. Kennedy, Under Sec'y of State for Mgmt., U.S. Dep't of State, Tr. at 259-61 (Feb. 3, 2016) [hereinafter Kennedy Testimony] (on file with the Committee).

<sup>236</sup> See Patrick F. Kennedy, Under Sec'y of State for Mgmt., *Dep't Notice 2014\_10\_115: A Message from Under Sec'y for Management Patrick F. Kennedy regarding State Dep't Records Responsibilities and Policy*, U.S. DEP'T OF STATE (Oct. 17, 2014), <https://www.archives.gov/press/press-releases/2015/pdf/attachment2-department-notice.pdf>; Patrick F. Kennedy, Under Sec'y of State for Mgmt., *Cable to Field: State Dep't Records Responsibilities and Policy*, U.S. DEP'T OF STATE (Oct. 30, 2014), <https://www.archives.gov/press/press-releases/2015/pdf/attachment3-cable-to-the-field.pdf>.

<sup>237</sup> See Letter from Patrick F. Kennedy, Under Sec'y of State for Mgmt., U.S. Dep't of State, to former Sec'ys Madeline Albright, Colin Powell, Condoleezza Rice, and Hillary Clinton. (Oct. 28, 2014) (on file with the Committee). It's important to note that because of a drafting error, Cheryl D. Mills letter was sent on November 12, 2014. See Letter from Patrick F. Kennedy, Under Sec'y of State for Mgmt., U.S. Dep't of State, to Cheryl D. Mills. (Nov. 12, 2014) (on file with the Committee).

<sup>238</sup> See Fischer Testimony, *supra* note 54, at 32-33.

<sup>239</sup> See Letter from Patrick F. Kennedy, Under Sec'y of State for Mgmt., U.S. Dep't of State to Cheryl D. Mills. (Nov. 12, 2014) (on file with the Committee).

Q: Uh-huh. And the letter came from you?

A: The letter came from me, yes, sir.

Q: And

A: It went to the representatives of I believe it was four previous Secretaries of State.

Q: Why did it go to the representatives?

A: That was just a decision that we would write the representatives because it would more likely get the kind of attention, immediate attention, if we sent it to the representatives. And I personally knew all the representatives of Secretary Powell on forward. And so I would write them because I would make sure that they would take it would not get lost, potentially, in the junk mail category.

Q: Okay. And just give me in your words, so I don't have to re-read and go through this letter in your words, what were you trying to accomplish exactly with this letter? What were you concerned about?

A: We wanted to make sure that we had in our possession any Federal record that had been created during their tenure that we might not have in our possession.

Q: Uh-huh.

Q: And what prompted you to write the letter when you wrote it?

A: It was basically the NARA, the NARA.

Q: Rule?

A: The NARA rule.

Q: And when was the NARA rule promulgated, do you recall?

A: I believe that it was in late 2013.

Q: If it was late 2013, why did you wait until late 2014 to write the letter?



A: Because this is when I received it, sir.

Q: When you received what?

A: When my staff called this to my attention.

Q: Can you see how the timeline might appear to have been influenced by other factors? Are you at least open to the optics of a congressional committee continuing to ask for her emails, and none are forthcoming, and the State Department says not one word about not having her record?

And I will say again for the record, for the court reporter, because this may be a new court reporter. The person that's currently assigned to aid Congress in collection of records, Mr. Snyder, could not be more professional and easy to work with and fair. And if it's no, it's no, and if it's yes, it's yes, but at least we have an answer. Previous to Mr. Snyder, it was not that way.

So we ask, and we hear crickets. And then we see these letters from you to all the way back to John Jay and Alexander Hamilton saying, can you please produce records. And the rule was promulgated a year before you sent the letter, Ambassador.

A: Mr. Chairman, I absolutely understand your concerns and absolutely agree that your request for records rang some bells in the State Department. Absolutely.

Q: That's what I'm getting at.

A: But, you know, if we wanted to hide something, I would have never sent this letter.

Q: Well, there are two ways to look at that. You sent the letter to more than just the Secretary, which was a very good way to deflect attention onto other Secretaries of State, even though the ones that you [sic] some of the ones you dealt with in the past never sent you an email. Now, the letter does say records and not just emails, I will grant you that.

A: That is correct, sir.

Q: But it is curious why you would wait years and years and years to make sure the public record is complete. Meanwhile,

you're getting FOIA requests and congressional inquiries and a host of other things. And yet you wait until our committee is in the throes of asking for her emails for this letter to be sent.

Can you see how that would look suspicious?

A: I can see how it looks suspicious, but, Mr. Chairman, I acted after discussion with my colleagues. You know, you called something to our attention, and we thought, "We could have a problem here." We are now in the email era at the State Department. And the email era of the State Department, access to the Internet, et cetera, et cetera, essentially goes back only to let's see goes back to about late 19—

Q: Whenever Al Gore invented it. All right. I'm going to turn it back over to Jim.

A: So that we went back to the period of time before Secretaries of State who were, in the opinion of myself and others in the State Department, in the Internet email era. And so we went to those four Secretaries of State—

Q: I'm with you.

A: —to make sure that we had your concerns. We also had the NARA concerns. And it seemed to be a rational decision to reach out across the board, because it was only going back

Q: But you would concede you had been getting FOIA requests and you had gotten other congressional inquiries, none of which prompted you to write this letter.

A: This is the first time it had been brought to my attention.

Q: And you've said 'brought to your attention.' Who specifically brought this to your attention?

A: I don't remember. I think it was some combination of our records officers and the Bureau of Legislative Affairs.

Q: All right. You wrote Ms. Mills, among others.

A: Yes.

Q: Did you have any conversations, correspondence, emails, face to face meetings with Ms. Mills prior to sending this letter?

A: Not on this subject.

Q: So, out of the cold blue air, you sent Ms. Mills a letter saying, essentially, 'Send Secretary Clinton's emails back to the State Department,' no warning?

A: I also sent Peggy Sefarino, who was going I wrote who I regarded to be the senior staff officers for four

Q: And you're saying Ms. Mills had no notice that this letter was coming.

A: I did not call her and tell her it was coming, sir. And I am unaware of anyone else who may have called her.

Q: Did you meet with her and tell her it was coming?

A: No, sir, I did not.

Q: The other three designees for the three previous Secretaries of State, did you communicate with them in any fashion prior to them receiving the letter on behalf of the Secretary of State?

A: No, sir, I did not.

Q: And just to be clear, with your question from Chairman Gowdy, you said you did have conversations with Cheryl Mills prior to this letter being sent?

A: Not about this topic, sir. Every once in a while, I would see Cheryl Mills at a social function. I think I even had lunch with her once, discussing old business not related to Secretary I had worked with Cheryl Mills for 4 years.<sup>240</sup>

Less than five weeks after receipt of Kennedy's letter, Mills wrote back to the State Department indicating she was making 55,000 pages of

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<sup>240</sup> Kennedy Testimony at 252-57.

emails sent or received on the Secretary's private email account available to the State Department.<sup>241</sup> The emails were not enclosed with the letter. The Committee would learn later State Department officials were sent to pick up the emails at the law firm of the Secretary's attorney, Williams and Connolly.<sup>242</sup>

In her December 5, 2014 letter to Kennedy, Mills stated:

Like Secretaries of State before her, Secretary Clinton at times used her own electronic mail account when engaging with other officials. On matters pertaining to the conduct of government business, it was her practice to use the officials' government electronic mail accounts. Accordingly, to the extent the Department retains records of government electronic mail accounts, it already has records of her electronic mail during her tenure preserved within the Department's record keeping systems.<sup>243</sup>

Notably, this was the first time the phrase "it was her practice to use the officials' government electronic emails accounts" was used.<sup>244</sup> Mills further explained in her letter "to the extent the Department retains records of government electronic mail accounts, it already has records of her electronic mail during her tenure preserved within the Department's record keeping systems."<sup>245</sup> Mills letter did not address how emails sent both to and from a personal email account would be captured for federal records purposes.<sup>246</sup> In fact it would be difficult to provide to such an explanation since the Committee's investigation uncovered work-related emails that were sent to and from personal email accounts that were never produced to the State Department.<sup>247</sup>

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<sup>241</sup> Letter from Cheryl D. Mills to Patrick F. Kennedy, Under Sec'y of State for Mgmt., U.S. Dep't of State (Dec. 5, 2014) (on file with the Committee).

<sup>242</sup> See Fischer Testimony, *supra* note 54, at 85.

<sup>243</sup> Letter from Cheryl D. Mills to Patrick F. Kennedy, Under Sec'y of State for Mgmt., U.S. Dep't of State (Dec. 5, 2014) (on file with the Committee).

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> Letter from Julia Frifield, Ass't Sec'y of State for Leg. Affairs, State Dep't, to Trey Gowdy, Chmn., H. Select Comm. on Benghazi (June 25, 2015) (on file with the Committee) ("In a limited number of circumstances, we did not locate in the tens of thousands of pages of emails provided by Secretary Clinton the content of a handful of communica-

Collectively, the statements above served as an attempt to shift the burden of the Secretary's recordkeeping responsibilities to other government officials and the State Department.<sup>248</sup> This was apparent in further statements consistently made by the Secretary speculating that "the State Department had between 90-95 percent of all the ones that were work related. They were already on the system."<sup>249</sup> Not only could the State Department not confirm the percentage provided by the Secretary it did not know where the percentage she used originated.<sup>250</sup>

On March 9, 2015, the Secretary revealed her attorneys deleted emails they deemed "personal" before turning over her "work-related" emails.<sup>251</sup> Neither the State Department nor the Committee could verify no work-related emails were deleted by the Secretary's attorneys or that all of her emails related to Benghazi and Libya were actually produced to the Committee. Concerned about the completeness of the record, the Chairman requested, on March 19, 2015 and again on March 31, 2015, that the Secretary make the email server available to a neutral third party for inspection and review.<sup>252</sup> The requests were rejected.<sup>253</sup> The Committee's concern was confirmed on June 12, 2015 when a non-government witness produced approximately 150 emails and memos sent to or received

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tions that Mr. Blumenthal provided. Those communications ... are documents Bates-numbered in Blumenthal products ....")

<sup>248</sup> *See id.*

<sup>249</sup> Testimony of Hillary R. Clinton, Sec'y of State, U.S. Dep't of State, Tr. at 280 (Oct. 22, 2015) (on file with the Committee).

<sup>250</sup> *See id.* at 323 where Chairman Gowdy states "when I asked the State Department about ten days ago, what is the source of that figure, they shrugged their shoulders."

<sup>251</sup> Zeke J. Miller, *Transcript: Everything Hillary Clinton Said on the Email Controversy*, TIME (Mar. 10, 2015), <http://time.com/3739541/transcript-hillary-clinton-email-press-conference/>.

<sup>252</sup> *See* Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to David E. Kendall, Of Counsel, Williams & Connolly (Mar. 19, 2015) (on file with the Committee) ("[F]ormally requesting Secretary Clinton make her server available to a neutral, detached and independent third party for immediate inspection and review."); *see also* Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to David E. Kendall, Of Counsel, Williams & Connolly (Mar. 31, 2015) ("[W]e ... urge the Secretary to reconsider her position and allow a neutral, detached, and independent arbiter ensure the public record is complete and all materials relevant to the Committee's work have been provided to the Committee.").

<sup>253</sup> *See* Letter from David E. Kendall, Of Counsel, Williams & Connolly, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (Mar. 27, 2015) (on file with the Committee).

by the Secretary.<sup>254</sup> Approximately 89 of these emails had never been produced to the Committee. The State Department could not locate 15 of them either in full or part.<sup>255</sup> This is significant for at least two reasons. First, it confirms suspicions the State Department failed to produce relevant, probative information to the Committee until confronted with the reality the Committee had accessed the information through separate channels. In other words, the State Department denied until they were caught. Secondly, this undermines the argument of the Secretary that all of her work-related emails were produced to the State Department. Clearly, these 15 emails are work related and equally clearly they were not produced to the State Department. What remains unknown is whether these emails were lost while housed on the Secretary's private server or whether the Secretary's attorneys screened these emails out when they self-selected which records would be deemed official and which would be deemed personal. Regardless, relevant and probative information the public was entitled to review as public records was withheld.

The fact the Secretary used and maintained a private email account and server for all of her work-related emails prevented the State Department from executing its responsibilities under the FRA and the implementing regulations and policies.

The use of private email for official business was not confined to the Secretary. As noted previously, the Committee also discovered that Mills, Abedin, and Sullivan all made use of private email for official business. Compounding the problem of recovering these records, the State Department did not archive emails sent to or from senior staff in the Secretary's office during the Secretary's tenure.<sup>256</sup>

Beginning in early March 2015, the Committee sought additional information on the Department's records management activities. The Com-

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<sup>254</sup> See Letter from James M. Cole, Partner, Sidley Austin, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (June 12, 2015) (enclosing production of documents related to Mr. Cole's client, Sidney S. Blumenthal).

<sup>255</sup> See Letter from Julia E. Frifield, Assistant Sec'y of State for Legis. Affairs, U.S. Dep't of State, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (June 25, 2015) (on file with the Committee).

<sup>256</sup> See Lauren French, *Gowdy: Not backing off subpoena of Clinton emails*, POLITICO (Mar. 5, 2015), <http://www.politico.com/story/2015/03/house-committee-benghazi-clinton-email-subpoena-115795>.

mittee requested briefings on the State Department's record keeping activities as it related to both the Secretary and her senior staff. On March 17, 2015, the Committee met with representatives from the National Archives and Records Administration to better understand their role in the State Department's record keeping practices. On April 10, 2015, the Committee met with Katie Stana, Deputy Director of the Executive Secretariat, State Department, to understand the recordkeeping apparatus in place for the Office of the Secretary.<sup>257</sup> In addition, the Committee interviewed John Bentel, Director of the Office of Information Resource Management for the Executive Secretariat, to understand the technology and systems the Secretary and other senior officials used. When asked about the Secretary's exclusive use of private email and server, the Director testified he became aware when it came out in the papers.<sup>258</sup> He further testified he did not know whether the State Department's general counsel was consulted.<sup>259</sup>

The Committee sought to better understand the State Department's record keeping practices, including additional information on compliance with existing Federal regulations and State Department policy on April 18, 2015.<sup>260</sup> In particular, the Committee requested the State Department respond to 27 questions raised regarding the Secretary's email usage. The Committee emphasized the importance in getting answers to the questions by including them as part of the July 31, 2015 demand letter to Kerry.<sup>261</sup> When asked about the status of a State Department response, the State Department indicated the OIG would respond to the questions.<sup>262</sup> In a January 14, 2016 meeting, the OIG revealed it had not seen the questions until the week of January 5, 2016, contrary to the assertions made by State Department officials. In fact, the OIG suggested at the meeting the Committee would be best served by asking the State Department to respond to the questions.

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<sup>257</sup> April 10, 2015 meeting between State Dep't officials and Comm. staff.

<sup>258</sup> Testimony of John Bentel, Director, Executive Secretariat, U.S. Dep't of State, Tr. at 37 (June 30, 2015)(on file with the Comm.).

<sup>259</sup> Bentel Testimony at 51.

<sup>260</sup> Email from Philip G. Kiko, Staff Dir. and Gen. Counsel, H. Select Comm. on Benghazi, to Julia Frifield, Assistant Sec'y for Legis. Affairs, U.S. Dep't of State (Apr. 18, 2015, 3:39 PM).

<sup>261</sup> Letter from Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to John F. Kerry, Sec'y of State, U.S. Dep't of State (July 31, 2015) (on file with Comm.).

<sup>262</sup> See conversations between State Dep't personnel and Comm. staff.

The questions were subsequently posed to Kennedy on February 3, 2016, who was surprised by the questions. Kennedy testified, when asked about the volume of emails produced to the State Department: “[a]gain, I don’t remember when I learned for [sic] it, and that is not, as I said, this is not a subject I prepared for, for this interview.”<sup>263</sup>

The Committee’s experiences with the State Department’s records management and retention practices are consistent with findings by the OIG. It should be noted the position of Inspector General [IG] was vacant during the Secretary’s entire tenure forcing the OIG to operate without a permanent IG and often without an acting IG.<sup>264</sup> A permanent IG may have had the independence and standing to intervene on these records issues sooner. In September 2012, the OIG found that State Department’s Office of Information Program Services, the office responsible for records management practices: “do[es] not meet statutory and regulatory requirements.”<sup>265</sup> Although the office develops policy and issues guidance, it does not ensure proper implementation, monitor performance or enforce compliance.”<sup>266</sup>

Despite an upgrade in 2009 to spur the preservation of emails as official records, the OIG found in March 2015:

State Department employees have not received adequate training or guidance on their responsibilities for using the system to preserve ‘record emails.’ In 2011, employees created 61,156 record emails out of more than a billion emails sent. Employees created 41,749 in 2013.... Some employees do not create record emails because they do not want to make the email available in searches....<sup>267</sup>

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<sup>263</sup> Kennedy Testimony at 211.

<sup>264</sup> Byron Tau & Peter Nicholas, *State Dep’t Lacked Top Watchdog During Hillary Clinton Tenure*, WALL ST. J. (Mar. 24, 2015), <http://www.wsj.com/articles/state-department-lacked-top-watchdog-during-hillary-clinton-tenure-1427239813>.

<sup>265</sup> Office of Inspector Gen., U.S. Dep’t of State, *Inspection of Bureau of Administration, Global Information Services, Office of Information Programs and Services: Report No. ISP-I-12-54*, 1 (Sept. 2012), <https://oig.state.gov/system/files/199774.pdf>.

<sup>266</sup> *Id.*

<sup>267</sup> See Office of Inspector Gen., U.S. Dep’t of State, *Review of State Messaging and Archive Retrieval Toolset and Record Email: Report No. ISP-I-15-15*, 1 (Mar. 2015), <https://oig.state.gov/system/files/isp-i-15-15.pdf>.



In its May 2016 report, the OIG found:

The Federal Records Act requires appropriate management and preservation of Federal Government records, regardless of physical form or characteristics, that document the organization, functions, policies, decisions, procedures, and essential transactions of an agency. For the last two decades, both Department of State (Department) policy and Federal regulations have explicitly stated that emails may qualify as Federal records.

As is the case throughout the Federal Government, management weaknesses at the Department have contributed to the loss or removal of email records, particularly records created by the Office of the Secretary. These weaknesses include a limited ability to retrieve email records, inaccessibility of electronic files, failure to comply with requirements for departing employees, and a general lack of oversight.

OIG's ability to evaluate the Office of the Secretary's compliance with policies regarding records preservation and use of non-Departmental communications systems was, at times, hampered by these weaknesses. However, based on its review of records, questionnaires, and interviews, OIG determined that email usage and preservation practices varied across the tenures of the five most recent Secretaries and that, accordingly, compliance with statutory, regulatory, and internal requirements varied as well.

OIG also examined Department cybersecurity regulations and policies that apply to the use of non-Departmental systems to conduct official business. Although there were few such requirements 20 years ago, over time the Department has implemented numerous policies directing the use of authorized systems for day-to-day operations. In assessing these policies, OIG examined the facts and circumstances surrounding three cases where individuals exclusively used non-Departmental systems to conduct official business.<sup>268</sup>

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<sup>268</sup> "Office of the Sec'y: Evaluation of Email Records Management and Cybersecurity Requirements," *supra* note 69 at Introduction.

## ANALYSIS AND RECOMMENDATIONS

The necessity and importance of Congress's oversight authority is obvious. Given the administration's lack of responsiveness in most regards and slow and uneven responsiveness in all regards, the Committee makes the recommendations below.

### Restoring the Congressional Contempt Power

#### RECOMMENDATIONS

- House and Senate rules should be amended to provide for mandatory reductions in appropriations to the salaries of federal officials held in contempt of Congress.
- The criminal contempt statute should be amended to require the appointment of a special counsel to handle criminal contempt proceedings upon the certification of a contempt citation against an Executive Branch official by the House or Senate.
- Expedited procedures for the civil enforcement of congressional subpoenas should be enacted to provide timely judicial resolution of disputes.

#### ANALYSIS

As the Chairman noted in the May 8, 2015 Interim Progress Update:

Compelling compliance with subpoenas requires either the cooperation of the Executive Branch—particularly the United States Attorney—the very entity from which we seek the information and an unlikely ally, or pursuing document production from the Executive Branch via civil contempt, a laborious, slow process and counterproductive to the goal of an expeditious investigation.<sup>269</sup>

This remark concisely describes the dilemma all congressional committees face when demanding information from the Executive Branch. This state of affairs also results, in part, from Congress's failure to adapt the

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<sup>269</sup> Interim Progress Update, *supra* note 8, at iii.

law and its own internal rules to changed circumstances. The recommendations above would restore to Congress an effective and useful ability to compel compliance from the Executive Branch.

Contempt of Congress has long been recognized as a necessary and inherent component of the legislative power.<sup>270</sup> Without the power to find individuals in contempt, Congress would have no means by which to command compliance with its subpoenas and punish obstruction.<sup>271</sup> For much of our history, Congress wielded the power to enforce a finding of contempt by imprisoning noncompliant individuals—often referred to as the "inherent" contempt power.<sup>272</sup> Congress last used this power in 1935.<sup>273</sup> It has been called “unseemly” and few would advocate a return to the practice in the current hyper-partisan political environment where even the issuing of subpoenas draws howls of protest.<sup>274</sup>

Congress first enacted criminal contempt procedures in 1857 as an alternative to its inherent power to imprison.<sup>275</sup> Under the criminal contempt statute, the House or Senate may cite an individual for contempt of Congress and certify the citation to the U.S. Attorney for the District of Columbia whose “duty” it is to present the contempt citation to a grand jury.<sup>276</sup> Criminal contempt is punishable by a fine of up to \$1,000 and up to one year in prison.<sup>277</sup>

The criminal contempt statute was, in practice, the sole enforcement mechanism for Congress after 1935 and was used or threatened with some frequency against senior Executive Branch officials beginning in 1975.<sup>278</sup> Invoking the criminal contempt statute generally resulted in full or substantial compliance with subpoenas.<sup>279</sup>

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<sup>270</sup> *E.g.*, *Anderson v. Dunn*, 19 U.S. 204, 228-29 (1821) (holding that the House has the inherent power to punish a private citizen for contempt).

<sup>271</sup> *Id.*

<sup>272</sup> *See id.*

<sup>273</sup> *See* *Jurney v. MacCracken*, 294 U.S. 125 (1935).

<sup>274</sup> *See* Comm. on the *Judiciary v. Miers*, 558 F. Supp. 2d 53, 78 (D.D.C. 2008).

<sup>275</sup> 2 U.S.C. §§ 192, 194.

<sup>276</sup> 2 U.S.C. §194.

<sup>277</sup> 2 U.S.C. §192.

<sup>278</sup> Morton Rosenberg, *When Congress Comes Calling: A Primer on the Principles, Practices, and Pragmatics of Legislative Inquiry*, THE CONST. PROJECT 16 (2009),

During recent administrations, the threat of criminal contempt has been insufficient to compel Executive Branch compliance. A recent opinion by the Office of Legal Counsel within the Justice Department likely ended any remaining usefulness the criminal contempt statute had in compelling compliance by Executive Branch officials. In June 2014, the Office of Legal Counsel advised the U.S. Attorney for D.C. that the U.S. Attorney retains prosecutorial discretion not to present a criminal contempt citation to a grand jury despite a statutory “duty” to present.<sup>280</sup> In other words, U.S. Attorneys must substitute their judgment for the judgment of the House or Senate of the United States.<sup>281</sup> While the merits of the Office of Legal Counsel opinion are open to debate, as a practical political matter it is unlikely future administrations would reverse an opinion so obviously favorable to their interests. As a result, an Executive Branch official appointed by the President has discretion whether to hold another Executive Branch official—likely appointed by the same President—accountable for failing to comply with a congressional subpoena.<sup>282</sup> The conflict is obvious and impossible to avoid. Regardless of the merits of a U.S. Attorney’s decision not to present a congressional contempt citation to a grand jury, the decision will be colored by that conflict of interest.

Because of the deficiencies of the inherent power and criminal enforcement of contempt, Congress has turned to civil enforcement of its subpoenas with mixed success. While civil enforcement has led to the testimony of officials<sup>283</sup> and the production of a privilege log and substantial numbers of previously withheld documents,<sup>284</sup> Congress must accept very lengthy delays in order to pursue this enforcement option. In its investigation of ‘Operation Fast and Furious,’ the House Oversight and Government Reform Committee Chairman filed a civil action against the

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<http://www.constitutionproject.org/wp-content/uploads/2009/07/WhenCongressComesCalling.pdf>

<sup>279</sup> *Id.*

<sup>280</sup> Letter from Karl R. Thompson, Acting Ass’t Attorney Gen., Office of Legal Counsel, Dep’t of Justice, to Ronald C. Machen, Jr., U.S. Attorney for D.C. (June 16, 2014).

<sup>281</sup> *See id.*

<sup>282</sup> *See id.*

<sup>283</sup> *See Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 108 (D.D.C. 2008) (ordering Miers to testify before and produce requested materials to Congress).

<sup>284</sup> *See Comm. on Oversight and Gov’t Reform v. Lynch*, No. 12-1332 (ABJ), 2016 WL 225675, at \*16 (D.D.C. Jan. 19, 2016) (granting the Comm.’s motion to compel the Justice Dep’t to produce documents).

Justice Department in August 2012 to compel the production of documents.<sup>285</sup> Three and a half years later, in January 2016, a Federal district court judge ordered the Justice Department to produce withheld documents,<sup>286</sup> and in April 2016, the Justice Department finally produced the documents to Congress.<sup>287</sup> An enforcement tool requiring three and a half years simply to get a district court order is unacceptable.

While Congress retains its constitutional authority to hold recalcitrant witnesses in contempt of Congress, this authority no longer compels prompt, if any, compliance. All three enforcement mechanisms— inherent powers, criminal charges and civil enforcement—have questionable usefulness today and are largely dependent upon other branches of government agreeing with or pursuing the cause and remedy. The administration’s obstruction of congressional oversight is the inevitable and predictable result. The three recommendations above would restore Congress’s ability to enforce its subpoenas through its inherent constitutional authority, through criminal law and through civil enforcement.

Restoring Congress’s inherent powers to enforce its subpoena must be the first priority. It is the only mechanism solely within Congress’s discretion. The inherent power can be restored through simple rules changes in the House. The House should change its rules to allow a point of order against any appropriations measure, including conference reports, and continuing resolutions, that would fund the salary of a Federal official held in contempt of Congress.<sup>288</sup> The House should establish a high bar for waiving the point of order.

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<sup>285</sup> Press Release, H. Comm. on Oversight & Gov’t Reform, House Asks Federal Court to Rule Against Attorney General’s Stonewalling in Fast and Furious (Aug. 13, 2012), <https://oversight.house.gov/release/house-asks-federal-court-to-rule-against-attorney-generals-stonewalling-in-fast-and-furious/>.

<sup>286</sup> *Lynch*, 2016 WL 225675, at 16.

<sup>287</sup> Press Release, H. Comm. on Oversight & Gov’t Reform, Chaffetz Statement on Fast and Furious (Apr. 8, 2016), <https://oversight.house.gov/release/chaffetz-statement-fast-furious-documents/>.

<sup>288</sup> For example, House Rules prohibit the inclusion of provisions changing existing law in a general appropriations bill and such provisions may be objected to and ruled out of order. See Rules of the H. of Representatives, Rule XXI, cl. 2(b) (114th Cong.). A similar rule could be applied to any provision appropriating funds that would go to the salary of a Federal official held in contempt.

Congress could provide for nearly automatic sanctions against officials held in contempt of Congress, if it included triggering language in an appropriations statute. Under section 713 of the Financial Services and General Government Appropriations Act of 2012, no appropriation in any bill is available to pay the salary of a Federal official who prevents another Federal official from communicating directly with Congress.<sup>289</sup> This rider, which is continued every year, was the subject of a recent ruling by the Government Accountability Office holding that two officials of the Housing and Urban Development Department violated section 713 and that these officials should be required to pay back wages earned while they were in violation.<sup>290</sup>

A rider similar to section 713 could be included in annual appropriations disallowing the use of any appropriation to pay the salary of a Federal official held in contempt of Congress. Such an approach would trigger immediate and automatic sanctions when an official was held in contempt by Congress.

Because the inherent power can be exercised at Congress's sole discretion, the House should establish procedures to ensure the legitimacy of actions pursuant to the power. These procedures should provide for the transparent consideration of timely objections to congressional subpoenas, should require the production of a privilege log, and should require the appearance of the responsible Federal official at a hearing held to consider objections to the subpoena.

As noted above, criminal contempt proceedings against Executive Branch officials are subject to the discretion of the U.S. Attorney for D.C., and raise significant conflict of interest concerns. The Justice Department already has regulations in place for appointing a special counsel in situations presenting a conflict of interest.<sup>291</sup> The criminal contempt statute should be amended to require the appointment of special counsel pursuant to the Justice Department's own regulations whenever the House or Senate presents a criminal contempt citation against an Executive Branch official. This amendment would provide Congress some as-

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<sup>289</sup> Pub. L. No. 112-74, §713, 125 Stat. 928, 931 (2012).

<sup>290</sup> Dep't of Housing and Urban Dev. – Application of Section 713 of the Fin. Servs. and Gen. Gov't Appropriations Act, 2012 (Reconsideration), B-325124.2, 2016 WL 1319698 (Comp. Gen. Apr. 5, 2016).

<sup>291</sup> See 28 C.F.R. § 600 (2015) (establishing grounds for appointing a special counsel).

surance prosecutorial discretion in contempt matters would be exercised without the appearance of a conflict of interest and should put recalcitrant Federal officials on notice they cannot assume a political ally will ignore a criminal contempt citation.

Finally, the House has increasingly resorted to civil enforcement of its subpoenas. While this mechanism has resulted in substantial compliance, it has also resulted in lengthy delays. This delay is often an unacceptable tradeoff. To increase the usefulness of civil enforcement, the House should consider a bill to require a three-judge panel in civil enforcement actions related to congressional subpoenas with direct appeal to the Supreme Court from the three-judge panel. This would ensure more timely resolution of these actions. An investigation delayed by years of legal deliberations does not allow Congress to make timely legislative decisions.

These three recommendations each have limitations and drawbacks, but together they would provide Congress with a far more robust ability to compel cooperation than it has today. It is not acceptable for Congress to simply acquiesce to Executive Branch obstruction. It is Congress' constitutional responsibility to create, fund, and oversee Executive Branch agencies. Congress cannot effectively uphold its responsibilities under the Constitution without the power to ensure compliance with requests for information and witnesses.

### **Classification Determinations**

#### RECOMMENDATION

- Agencies should make express classification determinations with respect to documents and materials provided to congressional oversight committees in accordance with relevant laws and Executive Orders.

#### ANALYSIS

The Committee encountered significant practical delays and obstacles to its work arising from the need to quickly develop institutional capabilities to properly handle, work with, and protect classified information. While these difficulties to some degree are inherent in the rapid establishment of a new Committee with jurisdiction for national security matters, the Executive Branch exacerbated these challenges with its repeated efforts to declare certain material should be “treated as classified” even

though it had not actually made any administrative determination the material in question met the standards necessary to designate it as classified or followed the process set out and required by Executive Order and relevant regulation to actually designate the material as classified.<sup>292</sup>

The Legislative Branch recognizes the role of the Executive Branch, in accordance with authorities provided under the Constitution and by Congress itself, to determine whether and how national security information should be classified and follows such determinations. Absent an express determination by the Executive Branch or other indication or awareness material is derived from properly classified information, Congress must treat information as unclassified to further the goal of congressional oversight and the responsibilities of the House to the public.<sup>293</sup>

During the course of this investigation, Executive Branch agencies regularly acted in a manner inconsistent with both principles by providing information (both documents and interviews) to the Committee with the request the Committee treat it as classified,<sup>294</sup> even though it had not made any actual determination with respect to the classification of any of the material under the relevant authorities and procedures.<sup>295</sup> Although such requests may be considered in the context of efforts to facilitate Committee access to the material, there is no legal, administrative, or procedural foundation for such a request. National security information

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<sup>292</sup> See Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009).

<sup>293</sup> See, e.g., Letter from Julia Frifield, Assistant Sec’y of State for Legis. Affairs, Dep’t of State, to Trey Gowdy, Chairman, H. Select Comm. on Benghazi (Sept. 25, 2015) [hereinafter Frifield Transmittal Letter] (on file with the Comm.). Use of the “Sensitive but Unclassified” designation differs from the broader phenomenon described here—which is not even founded in administrative practice—but strongly illustrates the nature of the problem.

<sup>294</sup> As one example, in a September 25, 2015 letter to the Comm. transmitting emails from the Sec’y, the Dep’t stated “these documents should be handled differently from prior productions” even though they had not actually been determined to be classified and review was ongoing. It requested informally for other documents—which had not been properly classified—to be treated as classified. *Id.* Similarly, the Department asked for certain interviews to be conducted in a classified environment even though the anticipated subject matter had previously been unclassified.

<sup>295</sup> Exec. Order No. 13526, for example, expressly provides: “Information may be originally classified under the terms of this order only if all of the following conditions are met.” The stated conditions include specific procedures for identifying and marking classified information “in a manner that is immediately apparent.”



should either be properly classified in accordance with clearly stated procedures or treated as unclassified. There is no cognizable middle ground.

Sensitive information can be protected without resort to such arbitrary treatment, as it has been under the Committee’s voluntary agreement with the State Department to protect certain types of personal and operational information. The unfounded efforts of the Executive Branch to create new categories of information control posed significant obstacles to the Committee’s work—both in handling and using the material and in presenting it to the American people. It is important to note the question here is not alleged “over-classification,” but rather failure of the Executive Branch to properly classify the information in question at all. The former is a subjective assessment of whether material should be classified and how. The latter represents attempts by the Executive Branch to control information without following the relevant law or procedure to classify it or, even worse, to control information that doesn’t fit within its lawful classification authorities at all. Further, Executive Order 13526 clearly provides material cannot be classified to “conceal violations of law, inefficiency, or administrative error” or “prevent embarrassment to a person, organization, or agency”.<sup>296</sup>

### **Improving Oversight and Investigations within the House**

#### RECOMMENDATIONS

- The House should amend its rules to authorize all committees to take depositions.
- The House should amend its rules to require committees to establish oversight subcommittees.

#### ANALYSIS

Congressional depositions allow Members and staff, as authorized by a committee, to interview witnesses under oath and, if necessary compel interview testimony by subpoena.<sup>297</sup> The ability to interview witnesses in

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<sup>296</sup> Exec. Order No. 13526, 75 Fed. Reg. 707, §§ 1.7(1), (2).

<sup>297</sup> Morton Rosenberg, *When Congress Comes Calling: A Primer on the Principles, Practices, and Pragmatics of Legislative Inquiry*, THE CONST. PROJECT 11 (2009),

private allows committees to gather information confidentially and in more depth than is possible under the five-minute rule governing committee hearings.<sup>298</sup> This ability is often critical to conducting an effective and thorough investigation.<sup>299</sup> Committees rely on voluntary interviews to gather information and conduct investigations. If a witness refuses to be interviewed or if the witness's employer—often the Executive Branch—refuses to allow the interview, however, most House committees have no recourse.

At the beginning of the 110<sup>th</sup> Congress, the Majority, the House, controlled by a Democratic majority, amended its rules to authorize the taking of depositions by members and staff of the Committee on Oversight and Government Reform.<sup>300</sup> Prior to the 110<sup>th</sup> Congress, depositions had been authorized by the House only for specific investigations.<sup>301</sup> This standing deposition authority applied only to the Committee on Oversight and Government Reform. In the current Congress, the House authorized the taking of depositions by four additional committees.<sup>302</sup> The authority was initially limited to 2015 but was extended to 2016 after its successful implementation in 2015.<sup>303</sup> Lamar S. Smith, Chairman, Committee on Science, Space and Technology, noted:

During this session there are numerous instances of the Committee obtaining documents and voluntary interviews because of its deposition authority. In fact, as the following examples show, many key interviews and documents would likely not have been

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<http://www.constitutionproject.org/wp-content/uploads/2009/07/WhenCongressComesCalling.pdf>

<sup>298</sup> *Id.*

<sup>299</sup> *E.g.* This committee conducted 107 interviews in the course of its investigation. Interviews frequently lasted over three hours. This number of witnesses and depth of questioning would be nearly impossible in a hearing setting.

<sup>300</sup> H. Res. 6, 110<sup>th</sup> Congress § 502 (2007).

<sup>301</sup> Rosenberg, *supra* note 299, at 11, 82. *See, e.g.*, H. Res. 507, 105<sup>th</sup> Congress (1998) (Providing deposition authority to the Comm. on Education and Workforce for an investigation relating to the International Brotherhood of the Teamsters).

<sup>302</sup> H. Res. 5, 114<sup>th</sup> Congress § 3 (b) (2015) (The Comms. on Energy and Commerce, Financial Services, Science, Space and Technology, and Ways and Means).

<sup>303</sup> H. Res. 579, 114<sup>th</sup> Congress (2016).

obtained without the Committee's ability to compel on-the-record interviews in a private setting.<sup>304</sup>

Jeb Hensarling, Chairman, Committee on Financial Services, similarly noted:

Deposition authority continues to be critical to the Committee's oversight of an Administration that has been markedly indifferent to the Committee's subpoenas and voluntary information requests.<sup>305</sup>

Given the successful implementation of deposition authority in the 114<sup>th</sup> Congress to four additional committees, the House should amend its rules to extend the authority to all of its committees.

The small size of committee staffs in comparison to the Federal agencies they oversee necessarily limits the ability of committees to oversee the agencies within their jurisdictions. In addition, committees are already busy wrestling with major reauthorizations and reform plans. As a result, committees sometimes struggle to devote sufficient resources to oversight.

House Rule X, clause 2(b)(2) requires standing authorizing committees with more than 20 members to either establish an oversight subcommittee or to require its subcommittees to conduct oversight.<sup>306</sup> As all House subcommittees have an obligation to conduct oversight within their assigned jurisdictions, this rule is little more than an exhortation to establish an oversight subcommittee. Of the 15 committees to which the rule applies, six did not establish oversight subcommittees in the 114<sup>th</sup> Congress.<sup>307</sup>

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<sup>304</sup> 162 CONG. REC. H41 (daily ed. Jan. 6, 2016) (letter submitted for the record Rep. Smith)

<sup>305</sup> 162 CONG. REC. H39 (daily ed. Jan. 6, 2016) (letter submitted for the record Rep. Hensarling)

<sup>306</sup> Rules of the H. of Representatives, Rule X, cl. 2(b)(2) (114th Cong.).

<sup>307</sup> H. Comm. on Agric., H. Comm. on Educ. & Workforce, H. Comm. on Foreign Affairs, H. Comm. on Judiciary, H. Comm. on Small Bus., and H. Comm. on Transp. & Infrastructure.

While some committees, such as the Committee on Energy and Commerce, have a decades-long record of active oversight,<sup>308</sup> not every committee in the House has acted accordingly. An oversight subcommittee ensures that at least one subcommittee chair and the staff of that subcommittee will be singularly focused on oversight of the agencies and programs within the full committee's jurisdiction.

### Reforming Record-Keeping Laws

#### RECOMMENDATION

- Congress should consider strengthening enforcement authorities and penalties under the Federal Records Act related to the use of non-official email accounts and non-official file-hosting services for official purposes.

#### ANALYSIS

The State Department's failure to adhere to Federal law and its own policies governing record management significantly impeded the committee's investigation.<sup>309</sup> Even more important, these failures delayed the flow of information to the families and loved ones of those killed and injured in Libya and delayed that information being made available to the public.

These failures are not indigenous to this Committee and will be familiar to congressional investigators of the Centers for Medicare and Medicaid Services,<sup>310</sup> the Environmental Protection Agency,<sup>311</sup> the Internal Revenue Service<sup>312</sup> and the Energy Department.<sup>313</sup> The destruction of records,

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<sup>308</sup> See, e.g., Joel A. Mintz, *Agencies, Congress and Regulatory Enforcement: A Review of EPA's Hazardous Waste Enforcement*, 18 ENVTL. L. 683, 706 n. 57 (1988).

<sup>309</sup> See *supra* discussions regarding State Department's record-keeping at 54-66.

<sup>310</sup> Majority Staff of H. Comm. on Oversight & Gov't Reform, *Behind the Curtain of the Healthcare.gov Rollout*, 113<sup>TH</sup> CONG. 1, 17 (Sept. 17, 2014), <https://oversight.house.gov/wp-content/uploads/2014/09/Healthcare-gov-Report-Final-9-17-14.pdf>.

<sup>311</sup> Letter from the members of H. Comm. on Science, Space, and Tech. to Lisa Jackson, Adm'r, Env'tl. Prot. Agency (Jan. 23, 2013), <https://science.house.gov/news/letters/committee-letter-epa-administrator-jackson-re-alias-emails-january-23-2013>.

<sup>312</sup> See Letter from members of H. Comm. on Oversight & Gov't Reform to President Barack Obama (July 27, 2015), <https://oversight.house.gov/wp->

use of private email and email aliases, and failure to retain records has impeded multiple congressional investigations over the years. These concerns reach back to prior administrations as well. This is not a political issue; it is a legal, constitutional, and branch equity issue. In 2007, the Secretary—then Senator—denounced “secret White House email accounts” after senior White House officials were found to have conducted some official business over political email accounts.<sup>314</sup> In this Committee’s investigation, the Secretary’s unusual email arrangement, her senior staff’s use of non-official email accounts, and the State Department’s own lack of fidelity to the record maintenance rules, all delayed and in some instances prevented the Committee from accessing official records necessary to conduct a thorough investigation.

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content/uploads/2015/07/2015-07-27-UPDATED-JC-to-Obama-WH-Koskinen-Resignation.compressed.pdf.

<sup>313</sup> Press Release, H. Comm. on Oversight & Gov’t Reform, Oversight Comm. Presses Energy Sec’y on False Denials, Improper Use of Non-official Email Accounts in Solyndra Loan Program (Aug. 15, 2012), <https://oversight.house.gov/release/oversight-committee-presses-energy-secretary-on-false-denials-improper-use-of-non-official-email-accounts-in-solyndra-loan-program/>.

<sup>314</sup> Blake Neff, *VIDEO: In 2007, Hillary Said Secret Emails ‘Shredded’ the Constitution*, DAILY CALLER (Mar. 4, 2015), <http://dailycaller.com/2015/03/04/video-in-2007-hillary-said-secret-emails-shredded-the-constitution/>.