Crowell, James (ODAG)

From:	Crowell, James (ODAG)
Sent:	Monday, March 20, 2017 11:41 AM
To:	Schools, Scott (ODAG)
Subject:	RE: Communications policy

Ugh. Thanks. If we need to talk, I'm here but watching hearing in my office.

From: Schools, Scott (ODAG)
Sent: Monday, March 20, 2017 11:40 AM
To: Crowell, James (ODAG) <jcrowell@jmd.usdoj.gov>
Subject: FW: Communications policy

FYI.

From: Katsas, Gregory G. EOP/WHO [mailto:Gregory.G.Katsas@who.eop.gov]
Sent: Monday, March 20, 2017 11:31 AM
To: Schools, Scott (ODAG) <Scott.Schools@usdoj.gov>
Subject: Re: Communications policy

Sorry. Will get back to you tonight or tomorrow. Tied up now.

Sent from my iPhone

On Mar 20, 2017, at 11:28 AM, Schools, Scott (ODAG) <Scott.Schools@usdoj.gov> wrote:

> Greg:
>
> Hope all is well. This is just a reminder that we are standing by for your comments re the below. Thanks, and sorry to be a pest.
>
> Scott
>
> ---
>
> **From:** Schools, Scott (ODAG)
> **Sent:** Sunday, March 12, 2017 4:28 PM
> **To:** 'Katsas, Gregory G. EOP/WHO' (b) (6) [redacted]
> **Subject:** RE: Communications policy
>
> Greg:
>
> Any thoughts about this? FWIW, I think (b) (5) [redacted] Thanks.
>
> SS
>
> ---
>
> **From:** Katsas, Gregory G. EOP/WHO (b) (6) [redacted]
> **Sent:** Monday, March 6, 2017 7:43 PM

To: Schools, Scott (ODAG) <Scott.Schools@usdoj.gov>
Subject: RE: Communications policy

We'll take a look and be in touch. Thanks.

From: Schools, Scott (ODAG) [mailto:Scott.Schools@usdoj.gov]
Sent: Monday, March 6, 2017 5:34 PM
To: Katsas, Gregory G. EOP/WHO (b) (6)
Cc: Crowell, James (ODAG) <James.Crowell@usdoj.gov>; Eisenberg, John A. EOP/WHO (b) (6)
Subject: RE: Communications policy

Greg and John:

(b) (5)

What say you to that? Thanks.

Scott

From: Katsas, Gregory G. EOP/WHO (b) (6)
Sent: Friday, February 24, 2017 12:31 PM
To: Schools, Scott (ODAG) <Scott.Schools@usdoj.gov>
Cc: Crowell, James (ODAG) <James.Crowell@usdoj.gov>; Eisenberg, John A. EOP/WHO (b) (6)
Subject: RE: Communications policy

Duplicate

Crowell, James (ODAG)

From:	Crowell, James (ODAG)
Sent:	Friday, February 24, 2017 6:05 PM
To:	Schools, Scott (ODAG)
Subject:	RE: Communications policy

Ok; thanks.

From: Schools, Scott (ODAG)
Sent: Friday, February 24, 2017 4:43 PM
To: Crowell, James (ODAG) <jcrowell@jmd.usdoj.gov>
Subject: FW: Communications policy

(b) (5) [redacted]

From: Katsas, Gregory G. EOP/WHO (b) (6) [redacted]
Sent: Friday, February 24, 2017 12:31 PM
To: Schools, Scott (ODAG) <Scott.Schools@usdoj.gov>
Cc: Crowell, James (ODAG) <James.Crowell@usdoj.gov>; Eisenberg, John A. EOP/WHO
(b) (6) [redacted]
Subject: RE: Communications policy

Duplicate [redacted]

Schools, Scott (ODAG)

From:	Schools, Scott (ODAG)
Sent:	Friday, February 24, 2017 4:41 PM
To:	Katsas, Gregory G. EOP/WHO; Schools, Scott (ODAG)
Cc:	Crowell, James (ODAG); Eisenberg, John A. EOP/WHO
Subject:	RE: Communications policy

Thanks much. (b) (5) [redacted]

From: Katsas, Gregory G. EOP/WHO (b) (6) [redacted]
Sent: Friday, February 24, 2017 12:31 PM
To: Schools, Scott (ODAG) <Scott.Schools@usdoj.gov>
Cc: Crowell, James (ODAG) <James.Crowell@usdoj.gov>; Eisenberg, John A. EOP/WHO
(b) (6) [redacted]
Subject: RE: Communications policy

Duplicate [redacted]

Crowell, James (ODAG)

From:	Crowell, James (ODAG)
Sent:	Friday, February 24, 2017 3:37 PM
To:	Gauhar, Tashina (ODAG) (JMD)
Subject:	FW: Communications policy

fysa

From: Katsas, Gregory G. EOP/WHO (b) (6)
Sent: Friday, February 24, 2017 12:31 PM
To: Schools, Scott (ODAG) <Scott.Schools@usdoj.gov>
Cc: Crowell, James (ODAG) <James.Crowell@usdoj.gov>; Eisenberg, John A. EOP/WHO
(b) (6)
Subject: RE: Communications policy

Scott, thanks. (b) (5)
[redacted]
Thanks. -Greg

(b) (5)
[redacted]

From: Schools, Scott (ODAG) [mailto:Scott.Schools@usdoj.gov]
Sent: Thursday, February 23, 2017 2:27 PM
To: Katsas, Gregory G. EOP/WHO (b) (6)
Cc: Crowell, James (ODAG) <James.Crowell@usdoj.gov>
Subject: Communications policy

Greg:

(b) (5)
[redacted]
Please let me know if you have any questions or comments. Thanks, and I hope all is well.

Scott

(b) (5)

[redacted]

-----Original Message-----
From: Tucker, Eric [mailto:etucker@ap.org]
Sent: Monday, February 20, 2017 7:45 AM
To: Peter.Carr@usdoj.gov
Subject: Contact between Stephen Miller and Capers?

Hi Peter,
Sorry to bother you on the long weekend but I was wondering if you guys are commenting on the report that Stephen Miller from the White House contacted Robert Capers at home about the refugee legal case? Are you confirming that?

Thanks,
Eric

Sent from my iPhone

Crowell, James (ODAG)

From:	Crowell, James (ODAG)
Sent:	Friday, May 26, 2017 2:03 PM
To:	Bolitho, Zachary (ODAG)
Subject:	RE: WHCO request re: posthumous pardons

You may provide the information to WH Counsel, but should cc me on any email communications with WH counsel per the Contacts memo. Thanks.

From: Bolitho, Zachary (ODAG)
Sent: Friday, May 26, 2017 1:23 PM
To: Crowell, James (ODAG) <jcrowell@jmd.usdoj.gov>
Subject: WHCO request re: posthumous pardons

Jim,

I received a call this morning from Chris Grieco with WHCO. He is working on the Administration's commutation and pardon policy, and he wanted to know (b) (5) [redacted] After speaking with Chris, I reached out to my contact, Will Taylor, in the Office of the Pardon Attorney and asked for information on that topic. Will has provided me with (b) (5) [redacted]. Will has also provided me with information on (b) (5) [redacted]. I wanted to check with you before sending that information along to WHCO. Please advise.

Thanks,
Zac

Zachary C. Bolitho
Counsel
Office of the Deputy Attorney General
Zachary.Bolitho@usdoj.gov
202-514-7473 (office)
(b) (6) [redacted] (mobile)

Delrahim, Makan EOP/WHO

From:	Delrahim, Makan EOP/WHO
Sent:	Friday, May 19, 2017 2:43 PM
To:	Hunt, Jody (OAG)
Subject:	Re: Jody, has a new Session memo

Thanks. All is good. I am doing my QFRs now. Hoping to be on agenda next week. Thanks for your help pushing the deputies through.

> On May 19, 2017, at 2:37 PM, Hunt, Jody (OAG) <Jody.Hunt@usdoj.gov> wrote:
>
> No, not yet.
>
> Hope all is well with you.
>
> -----Original Message-----
> From: Delrahim, Makan EOP/WHO (b) (6)
> Sent: Friday, May 19, 2017 1:53 PM
> To: Hunt, Jody (OAG) <johunt@jmd.usdoj.gov>
> Cc: Tyson, Jill C. (OLA) <jctyson@jmd.usdoj.gov>; Katsas, Gregory G. EOP/WHO
(b) (6)
> Subject: Jody, has a new Session memo
>
> Been issued to supersede Holder memo re communications w WH?
>
> Makan Delrahim
> Deputy Counsel to the President
> Office of the White House Counsel
>

Troester, Robert J. (ODAG)

From:	Troester, Robert J. (ODAG)
Sent:	Tuesday, May 16, 2017 10:08 PM
To:	Crowell, James (ODAG)
Cc:	Terwilliger, Zachary (ODAG)
Subject:	Re: WH Meeting/Call Protocol

Will do. Thanks

> On May 16, 2017, at 10:02 PM, Crowell, James (ODAG) <jcrowell@jmd.usdoj.gov> wrote:
>
> Please discuss with our resident expert on WH contacts - Scott Schools.
>
> Sent from my iPhone
>
>> On May 16, 2017, at 8:29 PM, Troester, Robert J. (ODAG) <rtroester@jmd.usdoj.gov> wrote:
>>
(b) (5)
[redacted]
>>
>> In an email, Jesse reminded his folks that "White House contacts and meetings need to be consistent with both the governing DOJ memo and McGahn memo."
>>
>> Question: Is there a protocol I don't know about (i.e. Governing DOJ memo and McGahn memo)?
>>
>> Thanks for your guidance.
>>
>> Bob

LaCour, Alice S. (OAG)

From:	LaCour, Alice S. (OAG)
Sent:	Friday, May 05, 2017 10:51 AM
To:	Terwilliger, Zachary (ODAG)
Cc:	Crowell, James (ODAG)
Subject:	RE: Memo to the WH (30 day look ahead)

Zach,

Got it. Hopefully we aren't including any info about ongoing case or investigative information since I'll focus on policy items. But to be sure, how about I send you a draft before sending it along to Jody? Sorry for the bumpy route--we are all trying to figure out how best to respond to the WH's request!

Best,
alice

From: Terwilliger, Zachary (ODAG)
Sent: Friday, May 5, 2017 10:49 AM
To: LaCour, Alice S. (OAG) <aslacour@jmd.usdoj.gov>
Cc: Crowell, James (ODAG) <jcrowell@jmd.usdoj.gov>
Subject: Re: Memo to the WH (30 day look ahead)

Alice,
I certainly don't want to be in a position to tell you what you can look at and when, but we do have strict rules based on the Holder Mukasey memos about communications with the White House. I can forward you the documents, but generally we do not share any ongoing case or investigative information.

Zach

Non-responsive Record

Hankey, Mary Blanche (OAG)

From:	Hankey, Mary Blanche (OAG)
Sent:	Thursday, April 13, 2017 4:34 PM
To:	Parker, Rachel (OASG)
Subject:	RE: ACA Cost Sharing Reductions

Got it. Thanks!

-----Original Message-----
From: Parker, Rachel (OASG)
Sent: Thursday, April 13, 2017 1:31 PM
To: Hankey, Mary Blanche (OAG) <mbhankey@jmd.usdoj.gov>
Subject: RE: ACA Cost Sharing Reductions

Hi there -

WH contacts should come to Jesse first, and then he can delegate if appropriate.

-----Original Message-----
From: Hankey, Mary Blanche (OAG)
Sent: Thursday, April 13, 2017 12:06 PM
To: Parker, Rachel (OASG) <racparker@jmd.usdoj.gov>
Subject: FW: ACA Cost Sharing Reductions

(b) (5) [redacted]

-----Original Message-----
From: Winfree, Paul L. EOP/WHO (b) (6) [redacted]
Sent: Thursday, April 13, 2017 9:39 AM
To: Hankey, Mary Blanche (OAG) <Mary.Blanche.Hankey@usdoj.gov>
Subject: ACA Cost Sharing Reductions

Hey Mary Blanche,

(b) (5) [redacted]

Thanks, Paul

Paul Winfree
Deputy Director of the Domestic Policy Council, and Director of Budget Policy THE WHITE HOUSE (b) (6) [redacted] (office) (b) (6) [redacted] (cell)

Hall, William A. (ODAG)

From:	Hall, William A. (ODAG)
Sent:	Wednesday, March 22, 2017 4:01 PM
To:	Crowell, James (ODAG)
Cc:	Terwilliger, Zachary (ODAG); Gauhar, Tashina (ODAG)
Subject:	WH contacts memo (other side)
Attachments:	2017_0127--WHCO Memo to Staff regaring Law Enfocement Contacts.pdf

Jim –

FYI, in case you hadn't seen, here is the current memorandum from White House General Counsel regarding contact with law enforcement entities. Thanks

Bill Hall
Associate Deputy Attorney General
Office of the Deputy Attorney General
(202) 305-0273

THE WHITE HOUSE

WASHINGTON

January 27, 2017

MEMORANDUM TO ALL WHITE HOUSE STAFF

FROM: Donald F. McGahn II Counsel to the President

SUBJECT: Communications Restrictions with Personnel at the Department of Justice

This Memorandum outlines important rules and procedures regarding communications between the White House (including all components of the Executive Office of the President) and the Department of Justice. These rules exist to ensure both efficient execution of the Administration's policies and the highest level of integrity with respect to civil or criminal enforcement proceedings handled by DOJ. *In order to ensure that DOJ exercises its investigatory and prosecutorial functions free from the fact or appearance of improper political influence, these rules must be strictly followed.*

A. *Limitations on discussing ongoing or contemplated cases or investigations*

DOJ currently advises the White House about contemplated or pending investigations or enforcement actions under specific guidelines issued by the Attorney General. As a general matter, only the President, Vice President, Counsel to the President, and designees of the Counsel to the President may be involved in such communications. These individuals may designate subordinates to engage in ongoing contacts about a particular matter with counterparts at DOJ similarly designated by DOJ. Any ongoing contacts pursuant to such a designation should be handled in conjunction with a representative of the Counsel's office.

The White House often coordinates more broadly with DOJ (including its Office of Legal Counsel, Office of the Solicitor General, and Civil Division) where the government is or may be a defendant in litigation. These communications must first be cleared by the Counsel's Office.

If DOJ requests the views of the White House on any litigation, you must consult with the Counsel's Office before responding, and any response must be made in consultation with the Counsel's Office. This ensures that the White House provides a coherent response that takes account of both the Counsel's Office legal views and the President's broader policy objectives.

Communications with DOJ about individual cases or investigations should be routed through the Attorney General, Deputy Attorney General, Associate Attorney General, or Solicitor General, unless the Counsel's Office approves different procedures for the specific case at issue. In their discretion, and as appropriate for the handling of individual cases, those DOJ officials may authorize additional DOJ attorneys to discuss individual cases or investigations with members of the Counsel's Office. The President, Vice President, Counsel to the President, and Deputy Counsel to the President are the only White House individuals who may initiate a conversation with DOJ about a specific case or investigation.

These rules recognize the President's constitutional obligation to take care that the laws of the United States are faithfully executed, while ensuring maximum public confidence that those laws are administered and applied impartially in individual investigations or cases.

B. *Limitations on discussing other matters*

The White House may communicate with DOJ about matters of policy, legislation, budgeting, political appointments, public affairs, intergovernmental relations, administrative matters, or other matters that do not relate to a particular contemplated or pending investigation or case. You must route these communications through the offices of the Attorney General, Deputy Attorney General, or Associate Attorney General unless you have received clearance from the Counsel's office to follow different procedures.

C. *Restrictions on soliciting an OLC opinion*

The White House often relies upon the Office of Legal Counsel to issue formal legal opinions. Requests for such opinions must be limited to specific legal questions impacting particular matters before the Executive Branch. Such requests must be authorized by the President, the Vice President, the Counsel to the President, or a Deputy Counsel to the President. These individuals may also designate others who may engage in ongoing contacts with OLC where a request for a formal legal opinion has been authorized. If this designation extends to individuals outside the Counsel's Office, it should be in writing, and the ongoing contacts should be handled in conjunction with a member of the Counsel's office. All requests for an OLC opinion shall be directed to the Attorney General, the Assistant Attorney General for OLC, or one of their designees.

D. *National Security Exceptions*

Frequent communications between the White House and DOJ will be necessary on matters of national security and intelligence, including counter-terrorism and counter-espionage issues. Accordingly, communications that relate to urgent and ongoing national-security matters may be handled by specifically designated individuals. This exception does not relate to a particular contemplated or pending investigation or case absent written authorization from the Counsel to the President. In emergencies for which application of these procedures would pose a serious threat to national security, White House personnel may receive from DOJ communications necessary to protect against such threats. The Counsel to the President shall be informed about any such contacts as promptly as is practicable.

E. *Consultation*

If you have any questions or do not believe that a potential contact with DOJ fits neatly into any of these categories, you must consult the Counsel's office for guidance. Moreover, unless you are certain that the particular contact is permissible, you must consult with the Counsel's Office before proceeding.

Crowell, James (ODAG)

From:	Crowell, James (ODAG)
Sent:	Wednesday, March 01, 2017 8:46 PM
To:	Terwilliger, Zachary (ODAG)
Subject:	Re: FYI- EOIR with DPC/DHS/ODAG

Good. Thanks.

On Mar 1, 2017, at 8:34 PM, Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov> wrote:

> Jim,
> Just as an FYI. Iris, Danielle, and I will be participating in a call with EOIR, White House DPC, and DHS on the EOIR border judge issue this Friday. This is all a policy discussion and within the confines of the Holder/Mukasey memo and involves no discussion of litigation or specific cases, but wanted to let you know for FYSA.
>
> Thanks,
> Zach
>
> Zachary Terwilliger
> Associate Deputy Attorney General
> Office of the Deputy Attorney General
> Zachary.Terwilliger2@usdoj.gov
> (202) 307-1045 (Desk)
> (b) (6) [redacted] (Mobile)

Terwilliger, Zachary (ODAG)

From:	Terwilliger, Zachary (ODAG)
Sent:	Sunday, February 26, 2017 12:21 PM
To:	Crowell, James (ODAG)
Subject:	Re: Introducing ourselves--White House Domestic Policy Council

Yup, absolutely.

On Feb 26, 2017, at 11:40 AM, Crowell, James (ODAG) <jcrowell@jmd.usdoj.gov> wrote:

> Fysa. I want to ensure that WH contacts are being done appropriately. Let's discuss Monday. Thanks.
>
> Begin forwarded message:
>
> **From:** <jcrowell@jmd.usdoj.gov>
> **Date:** February 25, 2017 at 9:09:33 PM EST
> **To:** <sschools@jmd.usdoj.gov>
> **Subject: Fwd: Introducing ourselves--White House Domestic Policy Council**
>
> Please see below. Would you be willing to talk at the noon staff meeting about WH contacts and best practices? I want be sure everyone not only understands the rules but is sensitive to the importance of not just responding to the WH when we get requests like this absent specific approval.
>
> Begin forwarded message:
>
> **From:** <jcrowell@jmd.usdoj.gov>
> **Date:** February 25, 2017 at 9:01:41 PM EST
> **To:** "Ohr, Bruce (ODAG)" <brohr@jmd.usdoj.gov>
> **Subject: Re: Introducing ourselves--White House Domestic Policy Council**
>
> Bruce: we need to (b) (5) [redacted]
>
> Thanks,
>
> Jim

Non-Responsive Record [redacted]

Wood, Jeffrey (ENRD)

From:	Wood, Jeffrey (ENRD)
Sent:	Wednesday, February 15, 2017 2:11 PM
To:	Panuccio, Jesse (OASG); Parker, Rachel (OASG)
Cc:	Terwilliger, Zachary (ODAG); Bachman, Bryson (ATR)
Subject:	RE: Stream Protection rule

Thank you

---Original Message---
From: Panuccio, Jesse (OASG)
Sent: Wednesday, February 15, 2017 1:02 PM
To: Wood, Jeffrey (ENRD) <JWood@ENRD.USDOJ.GOV>; Parker, Rachel (OASG) <racparker@jmd.usdoj.gov>
Cc: Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>; Bachman, Bryson (ATR) <Bryson.Bachman@ATR.USDOJ.GOV>
Subject: RE: Stream Protection rule

Approved, but please keep Bryson involved in communications and meetings.

Jesse Panuccio
Acting Associate Attorney General
United States Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
202-514-9500 (o)
(b) (6) (m)

---Original Message---
From: Wood, Jeffrey (ENRD)
Sent: Wednesday, February 15, 2017 9:17 AM
To: Panuccio, Jesse (OASG) <jpanuccio@jmd.usdoj.gov>; Parker, Rachel (OASG) <racparker@jmd.usdoj.gov>
Cc: Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>
Subject: FW: Stream Protection rule

Jesse and Rachel,
Andrew Bremberg (Director of White House Domestic Policy Council) has asked for bullet points about the Stream Protection Rule, which is the subject of a Congressional Review Act resolution of disapproval that the President is expected to sign tomorrow. Similar to last week's request related to the Paris Climate Accord (when the same office requested help), I believe Brandon Middleton (our new counsel in ENRD) would be able to provide the requested information. There is, however, a lawsuit pending with DOJ ENRD against this particular regulation, (b) (5) . My understanding is that the policy governing WH communications would allow for this assistance so long as its approved.

Please advise.
Thank you,
Jeff

-----Original Message-----
From: Bremberg, Andrew P. EOP/WHO (b) (6)
Sent: Wednesday, February 15, 2017 8:44 AM
To: Wood, Jeffrey (ENRD) <JWood@ENRD.USDOJ.GOV>
Subject: FW: Stream Protection rule

Can you or someone write me talking points for the CRA bill signing?

Not Responsive

Katsas, Gregory G. EOP/WHO

From:	Katsas, Gregory G. EOP/WHO
Sent:	Wednesday, February 15, 2017 12:51 PM
To:	Hunt, Jody (OAG)
Subject:	WH/DOJ contacts
Attachments:	Memo to Staff re DOJ Communications 1.27.2017.pdf

Jody, FYI, here is the memo that Don recently issued to address WH/DOJ contacts on our end. (b) (5) [redacted] We may re-issue this or at least send around a reminder. Let me know if you have any questions, comments, or concerns about it.

(b) (5) [redacted]

Happy to discuss further if you would like. Thanks.

Greg

Schools, Scott (ODAG)

From:	Schools, Scott (ODAG)
Sent:	Saturday, February 11, 2017 9:59 AM
To:	Panuccio, Jesse (OASG)
Cc:	Crowell, James (ODAG); Hunt, Jody (OAG); Terwilliger, Zachary (ODAG)
Subject:	Re: DOJ Contact w/ ENRD

I can talk by phone around noon today or any time tomorrow. Monday morning is also fine if this does not need to happen before then.

> On Feb 11, 2017, at 12:51 AM, Panuccio, Jesse (OASG) <jpanuccio@jmd.usdoj.gov> wrote:
>
> Yes, this issue is new to me so I'd appreciate some counsel, Scott. When might be a good time to chat?
>
> --Jesse
>
>> On Feb 10, 2017, at 11:49 PM, Crowell, James (ODAG) <jcrowell@jmd.usdoj.gov> wrote:
>>
>> Thanks Scott. Absolutely right. (b) (5) [redacted].
>>
>>> On Feb 10, 2017, at 11:14 PM, Schools, Scott (ODAG) <sschools@jmd.usdoj.gov> wrote:
>>>
>>> Jody:
>>>
>>> I would (b) (5) [redacted]
>>>
>>>> On Feb 10, 2017, at 10:58 PM, Crowell, James (ODAG) <jcrowell@jmd.usdoj.gov> wrote:
>>>>
>>>> The Mukasey and Holder memos remain in effect. I have asked that every new employee receive a copy of the responsive contacts memos which are attached. (b) (5) [redacted] Let me know your questions.

>>>>
>>>> Best,
>>>>
>>>>dim
>>>>
>>>> -----Original Message-----
>>>> From: Hunt, Jody (OAG)
>>>> Sent: Friday, February 10, 2017 9:18 PM
>>>> To: Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>; Panuccio, Jesse (OASG) <jpanuccio@jmd.usdoj.gov>
>>>> Cc: Crowell, James (ODAG) <jcrowell@jmd.usdoj.gov>
>>>> Subject: RE: DOJ Contact w/ ENRD
>>>>
>>>> I take it we have not yet issued DOJ Guidance on WH contacts? (b) (5) [redacted]
>>>>
>>>> -----Original Message-----
>>>> From: Katsas, Gregory G. EOP/WHO (b) (6) [redacted]
>>>> Sent: Friday, February 10, 2017 1:53 PM
>>>> To: Moran, John S. EOP/WHO (b) (6) [redacted]
>>>> Cc: Hunt, Jody (OAG) <Jody.Hunt@usdoj.gov>; Terwilliger, Zachary (ODAG) <Zachary.Terwilliger2@usdoj.gov>; Panuccio, Jesse (OASG) (b) (6) [redacted] >
>>>> Subject: RE: DOJ Contact w/ ENRD

Duplicate [redacted]

Katsas, Gregory G. EOP/WHO

From: Katsas, Gregory G. EOP/WHO
Sent: Thursday, January 26, 2017 1:01 PM
To: Crowell, James (ODAG)
Subject: Re: Current WH contacts memos

Great, thanks. I will let you know when it is issued.

Sent from my iPhone

On Jan 26, 2017, at 12:56 PM, Crowell, James (ODAG) <James.Crowell@usdoj.gov> wrote:

> Greg:
>
> (b) (5) [redacted]
>
> Let me know if you need anything.
>
> - Jim
>
> **From:** Katsas, Gregory G. EOP/(b) (6) [redacted]
> **Sent:** Thursday, January 26, 2017 11:37 AM
> **To:** Crowell, James (ODAG) <James.Crowell@usdoj.gov>
> **Subject:** RE: Current WH contacts memos

Duplicate [redacted]

Crowell, James (ODAG)

From:	Crowell, James (ODAG)
Sent:	Thursday, January 26, 2017 12:55 PM
To:	Schools, Scott (ODAG); Goldsmith, Andrew (ODAG)
Subject:	RE: Current WH contacts memos

Thank you!

From: Schools, Scott (ODAG)
Sent: Thursday, January 26, 2017 12:54 PM
To: Crowell, James (ODAG) <jcrowell@jmd.usdoj.gov>; Goldsmith, Andrew (ODAG) <AGoldsmith@jmd.usdoj.gov>
Subject: RE: Current WH contacts memos

(b) (5) [redacted]

From: Crowell, James (ODAG)
Sent: Thursday, January 26, 2017 11:44 AM
To: Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>; Goldsmith, Andrew (ODAG) <AGoldsmith@jmd.usdoj.gov>
Subject: FW: Current WH contacts memos

Please see from WH Counsel's Office. Given the timeframe, institutional concerns, and request from Greg, please get me any comments asap. Thank you!

From: Katsas, Gregory G. EOP/WHO (b) (6) [redacted]
Sent: Thursday, January 26, 2017 11:37 AM
To: Crowell, James (ODAG) <James.Crowell@usdoj.gov>
Subject: RE: Current WH contacts memos

Duplicate [redacted]

Crowell, James (ODAG)

From:	Crowell, James (ODAG)
Sent:	Thursday, January 26, 2017 11:41 AM
To:	Katsas, Gregory G. EOP/WHO; Crowell, James (ODAG)
Subject:	RE: Current WH contacts memos

Greg:

Many Thanks. Let me run this through our experts and I'll get you comments (if any) asap.

Best,

Jim

From: Katsas, Gregory G. EOP/WHO [(b) (6)]
Sent: Thursday, January 26, 2017 11:37 AM
To: Crowell, James (ODAG) <James.Crowell@usdoj.gov>
Subject: RE: Current WH contacts memos

Jim, attached is a draft memo to WH staff regarding contacts with DOJ. For reasons that I am sure you can appreciate, Don would like to send it around as soon as possible. It is not entirely final within WHCO, but close enough for you to review. We would like to have a seamless approach to this issue as between our Office and the DOJ leadership, so let me know if you have any questions, comments, or concerns. Thanks.

Greg

From: Crowell, James (ODAG) [mailto:James.Crowell@usdoj.gov]
Sent: Tuesday, January 24, 2017 9:48 AM
To: Katsas, Gregory G. EOP/WHO (b) (6)
Subject: Current WH contacts memos

Greg:

Good to talk to you last night. As requested, please find attached the Contacts Policy and Procedure for DOJ, which includes relevant Memoranda relating to DOJ contacts with White House/Congress/United Nations. The Holder Memo remains the most current and operative document with respect to communications with White House and Congress. I have also attached the Ashcroft, Gonzales, and Mukasey memos.

Please let me know if you need anything else.

Best,

Jim

Goldsmith, Andrew (ODAG)

From:	Goldsmith, Andrew (ODAG)
Sent:	Tuesday, January 24, 2017 9:26 AM
To:	Crowell, James (ODAG); Schools, Scott (ODAG)
Subject:	RE: Mukasey memo

FWIW, this recent article supports the proposition that the Holder memo is the last word on the subject.

http://www.politico.com/story/2017/01/jeff-sessions-attorney-general-justice-233382

From: Goldsmith, Andrew (ODAG)
Sent: Monday, January 23, 2017 8:47 PM
To: Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>
Cc: Crowell, James (ODAG) <jcrowell@jmd.usdoj.gov>
Subject: Re: Mukasey memo

I believe that the Ashcroft memo is the last three pages of the .pdf packet I sent earlier today.

On Jan 23, 2017, at 7:49 PM, Schools, Scott (ODAG) <sschools@jmd.usdoj.gov> wrote:

> Jim:
>
> I cannot find a newer iteration after the Holder memo. I was able to find the Gonzales memo from 2006, which preceded the Mukasey memo. It's attached (starting on page 2). I was unable to locate the Ashcroft memo that preceded the Gonzales memo. I don't know of anything else they might need.
>
> Scott
>
> ---
>
> **From:** Crowell, James (ODAG)
> **Sent:** Monday, January 23, 2017 7:09 PM
> **To:** Goldsmith, Andrew (ODAG) <AGoldsmith@jmd.usdoj.gov>; Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>
> **Subject:** Mukasey memo
>
> Scott/Andrew:
>
> White House Counsel's office is drafting its WH Contacts memo and is asking for the most current memos that apply to DOJ staff. They want to ensure their memos comport with ours. Can you send me the most current memos? Is there anything besides Mukasey and Holder memos that they should use as a reference point?
>
> Thanks,

Jim

<Communications with the Executive Office of the President (Gonzales).pdf>

March 8, 2017

MEMORANDUM TO: Antitrust Division
Civil Division
Civil Rights Division
Community Oriented Policing Service
Community Relations Service
Environment and Natural Resources Division
Executive Office for United States Trustees
Foreign Claims Settlement Commission
Office for Access to Justice
Office of Justice Programs
Office of Information Policy
Office of Tribal Justice
Office on Violence against Women
Tax Division

FROM: Jesse Panuccio
Acting Associate Attorney General
Principal Deputy Associate Attorney General

SUBJECT: Communications with the White House

This memorandum serves as a reminder of the guidelines governing communications between the Department of Justice and the White House or Congress. Such communications are currently governed by the Attorney General's Memorandum of May 11, 2009. That Memorandum is attached for your reference.

As noted in the Memorandum, "[i]nitial communications … concern[ing] a pending or contemplated civil investigation or case" must involve only the Attorney General, Deputy Attorney General, or Associate Attorney General. "If continuing contact … on a particular matter is required," subordinate officials may be designated to carry on such contact. The Memorandum contains additional, important guidelines, and I request that you review it to ensure compliance. It is expected that all attorneys in recipient Components will strictly adhere to these controlling guidelines.

Hankey, Mary Blanche (OAG)

From:	Hankey, Mary Blanche (OAG)
Sent:	Thursday, January 26, 2017 11:29 AM
To:	Rybicki, David (OAG)
Cc:	Tucker, Rachael (OAG)
Subject:	RE: Emailing - DOJ Contacts Memos.PDF

Sure.

From: Rybicki, David (O AG)
Sent: Thursday, January 26, 2017l11:13 AM
To: Hankey, Mary Blanche (O AG) <mbhankey@jmd.usdoj.gov>
Cc: Tucker, Rachael (OAG) <ratucker@jmd.usdoj.gov>
Subject: FW: Emailingl- DOJ Contacts Memos.PDF

Mary Blanche – Since you're more involved in the hiring decisions than I am can you ensure that all new joiners are provided these very important memos regarding contact with WH and Congress? Thanks

---

From: Crowell, James (ODAG)
Sent: Thursday, January 26, 2017l10:26 AM
To: Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>; Parker, Rachel (ASG) <racparker@jmd.usdoj.gov>; Tucker, Rachael (O AG) <ratucker@jmd.usdoj.gov>; Rybicki, David (O AG) <drybicki@jmd.usdoj.gov>
Subject: Emailing- DOJ Contacts Memos.PDF

Rachel/Rachel/David/Zach:

I think it's critically important that all new employees receive a copy of the attached memos related to contacts with WH/Congress. I know that we handed out copies of Mukasey memo to all of the folks who started last Friday and this Monday, but probably a good idea to get ensure any additional new folks that arrived thereafter and going forward to get a copy of the attached.

Let me know if you have any questions.

Best,

Jim

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 15-cv-646 (CKK)
v.	)	
	)	
U.S. DEPARTMENT OF STATE,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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STATUTUES AND RULES

By counsel, Plaintiff Judicial Watch, Inc. ("Judicial Watch") respectfully submits this memorandum in opposition to Defendant's motion for summary judgment and in support of Plaintiff's cross-motion for summary judgment. Plaintiff filed this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

INTRODUCTION

Plaintiff requests this Court to order the release of certain information Defendant has withheld under the deliberative process privilege because the "public's interest in honest, effective government" should prevail. *Texaco P.R., Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995); 5 U.S.C. § 552(b)(5). The deliberative process privilege extended under Exemption 5 is not absolute and is routinely denied "where the documents sought may shed light on alleged government malfeasance." *Id*. Because the information Defendant is withholding is likely to shed light on government misconduct the use of unauthorized electronic devices, such as iPads and BlackBerrys, for government business by former Secretary of State Hillary Clinton Plaintiff submits that the deliberative process redactions contained in the 13 documents identified below are subject to the government misconduct exception and the information must be released. At a minimum, the Court should order an *in camera* review of the withheld information so that the Court may determine the appropriateness of the privilege. Plaintiff also respectfully requests that the Court order Defendant to undertake a supplemental search of the recently recovered records that are pertinent to former Secretary Clinton's unofficial email server.

FACTUAL AND PROCEDURAL BACKGROUND

1. Plaintiff's FOIA Request

News of Secretary Clinton's exclusive use of an unofficial, "clintonemail.com" email account, hosted on a server stored in her residence, for all of her official, State Department, email communications was made public by the *New York Times* on March 2, 2015. Pl. Statement of Undisputed Material of Facts in Support of Cross-Motion for Summary Judgment ("SMF"), ¶ 1. At a March 10, 2015 press conference, Secretary Clinton acknowledged using the unofficial email account for all of her work-related communications and asserted that she had returned "approximately 30,000 emails" comprising "approximately 52,455 pages" of official government records to the State Department on or about December 5, 2014. *Id.*, Def. Motion for Summary Judgment ("Def. SJM") (ECF No. 25) at p. 6.

Plaintiff is a tax-exempt, not-for-profit, educational organization that seeks to promote transparency, accountability and integrity in government and fidelity to the rule of law. Pl. SMF at ¶ 2, RRC Decl., ¶ 2. Following the *New York Times* report, Plaintiff initiated an investigation into the former secretary's email practice for her official, State Department, business. *Id.* As part of its investigation, Plaintiff submitted a number of FOIA requests to Defendant pertaining to the former Secretary's email communications, and on March 10, 2015, it submitted the following request seeking access to:

A. Any and all records of requests by former Secretary of State Hillary Rodham Clinton or her staff to the State Department Office of Security Technology seeking approval for the use of an iPad or iPhone for official government business, and

B. Any and all communications within or between the Office of the Secretary of State, the Executive Secretariat, and the Office of the Secretary and the Office of Security Technology concerning, regarding, or related to the use of unauthorized electronic devices for official government business between January 1, 2009 and January 31, 2013.

Complt. at ¶¶ 3, 5; RRC Decl. at ¶ 3. Plaintiff filed suit on April 28, 2015 after Defendant failed to satisfy its obligations under FOIA. Pl. SMF at ¶ 3.

2. **FBI Investigation and Relevant Findings**

On July 6, 2015, the U.S. Intelligence Community Inspector General (ICIG) submitted a referral to the Federal Bureau of Investigation (FBI) in accordance with Section 811(c) of the Intelligence Authorization Act of 1995 to initiate an investigation into "the potential unauthorized transmission and storage of classified information on the personal e-mail server of former Secretary of State Hillary Clinton." Pl. SMF at ¶¶ 4-5; RRC Decl., Ex. 1 (FBI Rpt.), pp. 1-2). On July 10, 2015, the FBI initiated a full investigation ("Clinton investigation") based upon the referral. *Id.* Almost one year later, on July 5, 2016, FBI Director James B. Comey publically spoke about the investigation and its findings. Pl. SMF at ¶ 6, RRC Decl., Ex. 2 ("Comey Stmt.").

The following undisputed facts were uncovered through the FBI's investigation and records produced by Defendant. Secretary Clinton used an unofficial email address and BlackBerry (connected to her clintonemail.com email server) for her official business during her tenure at the State Department. Pl. SMF at ¶ 7; RRC Decl., Ex. 1 (FBI Rpt.) at p. 8. The FBI discovered that Secretary Clinton used eight (8) unofficial (non-government issued) BlackBerry mobile devices and five (5) iPads during her tenure at the State Department. Pl. SMF at ¶ 8; RRC Decl., Ex. 1 (FBI Rpt.) at pp. 8-9. In response to a request by Secretary Clinton to use a secure Blackberry, similar to that being used by President Obama, Eric Boswell, Assistant Secretary of State for Diplomatic Security (DS), denied the request and advised of "vulnerabilities and risks associated with the use of BlackBerrys in the Mahogany Row" (7th floor of the State Department that houses the Secretary's office). Pl. SMF at ¶ 9; RRC Decl., Ex.

4 and Ex. 1 (FBI Rpt.) at pp. 12-13; *see also* Def. *Vaughn* index at p. 1 (ECF No. 25-1). In that same memo, he further stressed "that any unclassified Blackberry is highly vulnerable in any setting to remotely and covertly monitoring conversations, retrieving e-mails, and exploiting calendars." *Id.* Clinton's executive staff also inquired about the possibility of Secretary Clinton using an iPad to receive communications in her office; however, this request was also denied due to potential security compromises. Pl. SMF at ¶ 10; RRC Decl., Ex. 1 (FBI Rpt.) at p. 13. Despite the denied requests and warnings about security vulnerabilities, Secretary Clinton continued to primarily use her unofficial BlackBerry and iPad for her official, State Department, email communications throughout her four-year term. Pl. SMF at ¶ 11; RRC Decl., Ex. 1 (FBI Rpt.) at p. 13.[1]

While the FBI "did not find clear evidence that Secretary Clinton or her colleagues intended to violate laws governing the handling of classified information," the FBI found "evidence that they were extremely careless in their handling of very sensitive, highly classified information." Pl. SMF at ¶¶ 12-13; RRC Decl., Ex. 2. "There is evidence to support a conclusion that any reasonable person in Secretary Clinton's position, or in the position of those government employees with whom she was corresponding about these matters, should have known that an unclassified system was no place for that conversation." *Id.* "None of these e-mails should have been on any kind of unclassified system, but their presence is especially concerning because all of these e-mails were housed on unclassified personal servers not even supported by full-time security staff, like those found at Departments and Agencies of the U.S.

[1] *See* e.g. email from Philippe Reines (Deputy Assistant Secretary of State for Strategic Communications and Senior Communications Advisor to Secretary of State) to Secretary Clinton dated August 5, 2010, in which he writes, "In your iPad email you will find attached memo." RRC Decl., ¶ 7, Ex. 3 (Doc. No. C06133874), *also available* on State Department's FOIA Virtual Reading Room at https://foia.state.gov/Search/Results.aspx?collection=Clinton Email (accessed Jan. 12, 2017). The attachments appear to be Foreign Press documents. *Id.*

Government or even with a commercial service like Gmail." *Id.* The FBI determined that classified information was transmitted over emails sent or received by Secretary Clinton, and given a combination of factors, including the nature of Secretary Clinton's email practice, it is possible that hostile actors gained access to the former secretary's email account. Finally, the FBI "also developed evidence that the security culture of the State Department in general, and with respect to use of unclassified e-mail systems in particular, was generally lacking in the kind of care for classified information found elsewhere in the government." *Id.* While the FBI ultimately concluded not to recommend prosecution, misconduct pertaining to Secretary Clinton's use of the unauthorized devices cannot be disputed, whether or not it rises to the level of criminal prosecution.

ARGUMENT

1. Summary Judgment Standard

In FOIA litigation, as in all litigation, summary judgment is appropriate only when the pleadings and declarations demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); Fed. R. Civ. P. 56(c). "In FOIA cases, agency decisions to withhold or disclose information under FOIA are reviewed *de novo*." *Judicial Watch, Inc. v. U.S. Postal Service*, 297 F. Supp. 2d 252, 256 (D.D.C. 2004). In reviewing a motion for summary judgment under FOIA, the court must view the facts "in the light most favorable to the [plaintiff]." *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

2. The Deliberative Process Privilege Does Not Justify Defendant's Withholdings

Plaintiff challenges Defendant's withholdings of information in the following responsive records under the deliberative process privilege extended by FOIA's Exemption 5: Defendant

document numbers C05838711, C05838715, C05838716, C05838718, C05838724, C05838732, C05891089, C05891096, C05891104, C05891119, C05891125, C05891126 and C05891139. 5 U.S.C. § 552(b)(5); Def. SJM at pp. 13-15 (ECF No. 25); Def. *Vaughn* Index (25-1); RRC Decl. at ¶ 4.[2]

FOIA generally requires complete disclosure unless a record or information in a record falls into one of FOIA's nine, clearly delineated exemptions. 5 U.S.C. § 552(b); *see Department of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976). The exemptions are construed narrowly to promote FOIA's goal of full disclosure. *United States Department of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989). "[T]he strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *United States Department of State v. Ray*, 502 U.S. 164, 173 (1991) (citation omitted). Plaintiff challenges only the Exemption 5 withholdings, all of which are based on the deliberative process privilege under FOIA.

The deliberative process privilege is properly invoked only when the withheld record or information would reveal "documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which government decisions and policies are formulated." *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (internal quotation and citation omitted). The privilege has traditionally been extended to provide reasonable security to the decision- making process within a government agency. *Id.* The privilege is intended "to enhance the quality of agency decisions by protecting open and frank discussions among those who make them within the Government." *United States Dep't of*

[2] Defendant withheld material from some of these documents pursuant to FOIA's Exemptions 1, 3, 6 and 7. Plaintiff does not challenge the withholding of material subject to those exemptions.

Interior v. Klamath Waters Users Protective Ass'n., 532 U.S. 1, 9 (2001) (internal quotation marks and citations omitted).

The deliberative process privilege, however, can be overcome by the government misconduct exception to the privilege "[w]here there is reason to believe the documents sought may shed light on government misconduct … on the grounds that shielding internal government deliberations in this context does not serve the public's interest in honest, effective government." *In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997); *Hall & Assocs. v. U.S. Envtl. Prot. Agency*, 14 F. Supp. 3d 1, 9 (D.D.C. 2015); *Convertino v. U.S. Dep't of Justice*, 674 F. Supp. 2d 9, 104 (D.D.C. 2009).

The government misconduct exception to the deliberative process privilege clearly applies in this case, albeit it is generally narrowly construed. The record is undisputed that Secretary Clinton was advised about the security vulnerabilities associated with use of unsecure BlackBerry and iPad mobile devices for official, State Department business, but she continued to use them regardless of the warnings.

There is also a clear nexus between the government misconduct and the records at issue. Simply by virtue of the subject matter discussed in the records the use of mobile devices for Secretary Clinton's official, State Department, email communications during her tenure at the State Department a connection exists and the exception to the privilege should apply. The misconduct consisted of use of unsecure and unauthorized mobile devices by Secretary Clinton for her email communications as the Secretary of State. The withheld information in the relevant records concern internal discussions and deliberations about Secretary Clinton's requests and inquiries into the use of such devices for her official, State Department business.

Further, a review of the nonredacted portions of these documents shows that release of the withheld portion is required under the law. On February 2, 2009, Assistant Secretary of State Eric Boswell emailed DS Official Donald Reid, "On the off chance that S staff continues to push for S or TS-capable PDAs,…I'll need a briefing on what we know…Pls schedule." Pl. SMF at ¶ 14; RRC Decl., Ex. 5 (Doc. No. C05838711). The ellipsis is a place holder for text Defendant redacted and the "S" refers to Secretary Clinton. *Id.* In another email dated March 11, 2009, in which the Blackberries Memo was referenced, one official relays his or her discussion with Mills on the subject. Pl. SMF at ¶ 15; RRC Decl., Ex. 6 (Doc. No. C05838724). The paragraph is mostly all redacted but it concludes with a note that Secretary Clinton expressed that she understood the [security] concerns raised in the memo. *Id.* The discussions continued at least midway through Secretary Clinton's term. "I wanted to share with you, back-channel, a little insight into the current thinking in the Secretary's inner circle on technology issues and request your help." Pl. SMF at ¶ 16; RRC Decl., Ex. 7 (C05838732 and C05891089). The email communication is dated February 9, 2011, and was sent to DS Officials Gentry Smith and Donald Reid. Again, Defendant heavily redacted the text under Exemption 5's deliberative process privilege. *Id.* Donald Reid responded, "Certainly, we need to verify or correct the urban myths Cheryl [Mills] believes re other agencies." *Id.*

Accordingly, the available text in the responsive records demonstrates there is a clear connection between the withheld material Plaintiff seeks access to and the Secretary's use of unsecure and unauthorized mobile devices for her official, State Department business. More plainly stated, the deliberations withheld surrounding the inquiries into possible use of BlackBerry, iPad, and perhaps other devices, by Secretary Clinton do not merit the protection normally afforded to the decision-making process in this case.

3. Plaintiff Requests a Supplemental Search of the Newly Recovered Records

While Plaintiff does not wish to duplicate efforts being undertaken in other litigations concerning the adequacy of the State Department's search in response to FOIA requests that implicate Secretary Clinton's emails, Plaintiff objects to the Defendant's refusal to search the records that were recently uncovered by the FBI. *Weisberg*, 705 F.2d at 1350-51. The adequacy of an agency's search for responsive records "is measured by the reasonableness of the effort in light of the specific request." *Larson v. Dep't of State*, 565 F.3d 857, 869 (D.C. Cir. 2009) (*quoting Meeropol v. Meese*, 790 F.2d 942 (D.C. Cir. 1986)). The search for records need not be exhaustive, *see Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990), but the scope and methodology of the search must be "reasonably calculated to uncover all relevant documents." *Weisberg*, 705 F.2d at 1351.

The State Department claims that its search of the records that were initially recovered and transferred from the FBI to the State Department on August 5, 2016 was "voluntary." Pl. SMF at ¶¶ 18-19; Def. SJM at p. 5, Stein Decl. II at ¶ 3. Obviously, Plaintiff disputes this claim. As was recently held, the purpose of FOIA is hardly served "[i]f a department head can deprive the citizens of their right to know what his department is up to by the simple expedient of maintaining his departmental emails on an account in another domain." *Competitive Enterprise Institute v. Office of Science and Technology*, Case No. 15-5128, slip op. at 9 (D.C. Cir. July 5, 2016).

Since Director Comey's announcement of the recovery of thousands of emails on July 5, 2016, it was released on October 28, 2016 that the FBI had recovered another trove of emails "pertinent to the investigation of former Secretary Clinton's personal email server." Pl. SMF at ¶¶ 20-21; RRC Decl., Ex. 8. On November 6, 2016, Director Comey announced the FBI had

completed its review of this additional set of records, including "all of the communications that were to or from Hillary Clinton while she was Secretary of State." *Id.* Since then, the State Department confirmed that the FBI advised it was transferring relevant records to the State Department. *Id.*; RRC Decl., Ex. 9. Plaintiff therefore, respectfully requests that the Court also order the State Department to search the newly-discovered records being returned to the State Department by the FBI in response to Plaintiff's FOIA request.

CONCLUSION

For all of the foregoing reasons, Plaintiff's cross-motion should be granted and Defendant's motion for summary judgment should be denied. The Court should order the release of the deliberative process withholdings in the 13 documents identified herein and order a supplemental search of the newly-recovered records by the FBI that pertain to the clintonemail.com email server.

Dated: January 13, 2017

Respectfully submitted,

JUDICIAL WATCH, INC.

/S/ *Ramona R. Cotca*

Ramona R. Cotca (D.C. Bar No. 501159)
JUDICIAL WATCH, INC.
425 Third Street SW, Suite 800
Washington, DC 20024
(202) 646-5172
rcotca@judicialwatch.org

Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 15-cv-646 (CKK)
v.	)	
	)	
U.S. DEPARTMENT OF STATE,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE AND PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff Judicial Watch, Inc., by counsel and pursuant to LCvR 7(h)(1), respectfully submits this response to Defendant's statement of material facts not in dispute and Plaintiff's statement of undisputed material facts in support of cross-motion for summary judgment:

I. Plaintiff's Response to Defendant's Statement of Material Facts Not in Dispute.

1. Undisputed.

2. Undisputed.

3. Undisputed.

4. Undisputed.

5. Undisputed.

6. Undisputed.

7. Undisputed.

8. Undisputed.

9. Undisputed.

10. Undisputed.

11. Plaintiff is unable to state whether it disputes or does not dispute the facts asserted by Defendant in this paragraph because Defendant's factual assertions concern the internal operations of Defendant or are otherwise uniquely known to Defendant. *See*, *e.g.*, *Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145-46 (D.C. Cir. 2006) (noting that the "asymmetrical distribution of knowledge" between the agency and the requestor in FOIA litigation "distorts the traditional adversary nature of our legal system's form of dispute resolution.").

12. Plaintiff is unable to state whether it disputes or does not dispute the facts asserted by Defendant in this paragraph because Defendant's factual assertions concern the internal operations of Defendant or are otherwise uniquely known to Defendant. *See*, *e.g.*, *Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145-46 (D.C. Cir. 2006) (noting that the "asymmetrical distribution of knowledge" between the agency and the requestor in FOIA litigation "distorts the traditional adversary nature of our legal system's form of dispute resolution.").

13. Plaintiff disputes that the search was "voluntary." Plaintiff further disputes Defendant's assertion that the records were not in State's possession and control at the time the FOIA request was made, as the assertion is a legal conclusion, not an issue of fact. *See Chambers v. U.S. Dep't of Interior*, 568 F.3d 998, 1004-06 (D.D. Cir. 2009); *Ryan v. U.S. Dep't of Justice*, 617 F.2d 781, 785 (D.C. Cir. 1980) ("A simple possession standard would permit agencies to insulate their activities from FOIA disclosure by farming out operations to outside contractors."); *Forsham v. Califano*, 587 F.2d 1128, 1136 n. 19 (D.C. Cir. 1978) ("We do not suggest that mere physical possession of records by a government agency is the sole criterion for determining whether they fall within the scope of FOIA. Obviously a government agency cannot

circumvent FOIA by transferring physical possession of its records to a warehouse or like bailee."), *aff'd*, *Fosham v. Harris*, 445 U.S. 169 (1980); *see also Federal Trade Commission v. Capital City Mortgage Corp*., 321 F. Supp. 2d 16, 19 (D.D.C. 2004) (applying constructive trust doctrine). Plaintiff does not dispute that Defendant searched the records referenced therein.

14. Plaintiff objects to Paragraph 14 because it is a legal conclusion, not an issue of fact.

15. Plaintiff is unable to state whether it disputes or does not dispute the facts asserted by Defendant in this paragraph because Defendant's factual assertions concern the internal operations of Defendant or are otherwise uniquely known to Defendant. *See*, *e.g.*, *Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145-46 (D.C. Cir. 2006) (noting that the "asymmetrical distribution of knowledge" between the agency and the requestor in FOIA litigation "distorts the traditional adversary nature of our legal system's form of dispute resolution.").

16. Plaintiff is unable to state whether it disputes or does not dispute the facts asserted by Defendant in this paragraph because Defendant's factual assertions concern the internal operations of Defendant or are otherwise uniquely known to Defendant. *See*, *e.g.*, *Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145-46 (D.C. Cir. 2006) (noting that the "asymmetrical distribution of knowledge" between the agency and the requestor in FOIA litigation "distorts the traditional adversary nature of our legal system's form of dispute resolution.").

17. Plaintiff is unable to state whether it disputes or does not dispute the facts asserted by Defendant in this paragraph because Defendant's factual assertions concern the internal operations of Defendant or are otherwise uniquely known to Defendant. *See*, *e.g.*, *Judicial*

Watch, Inc. v. Food and Drug Admin., 449 F.3d 141, 145-46 (D.C. Cir. 2006) (noting that the "asymmetrical distribution of knowledge" between the agency and the requestor in FOIA litigation "distorts the traditional adversary nature of our legal system's form of dispute resolution.").

18. Plaintiff is unable to state whether it disputes or does not dispute the facts asserted by Defendant in this paragraph because Defendant's factual assertions concern the internal operations of Defendant or are otherwise uniquely known to Defendant. *See*, *e.g.*, *Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145-46 (D.C. Cir. 2006) (noting that the "asymmetrical distribution of knowledge" between the agency and the requestor in FOIA litigation "distorts the traditional adversary nature of our legal system's form of dispute resolution.").

19. Plaintiff is unable to state whether it disputes or does not dispute the facts asserted by Defendant in this paragraph because Defendant's factual assertions concern the internal operations of Defendant or are otherwise uniquely known to Defendant. *See*, *e.g.*, *Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145-46 (D.C. Cir. 2006) (noting that the "asymmetrical distribution of knowledge" between the agency and the requestor in FOIA litigation "distorts the traditional adversary nature of our legal system's form of dispute resolution.").

20. Plaintiff is unable to state whether it disputes or does not dispute the facts asserted by Defendant in this paragraph because Defendant's factual assertions concern the internal operations of Defendant or are otherwise uniquely known to Defendant. *See*, *e.g.*, *Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145-46 (D.C. Cir. 2006) (noting that the "asymmetrical distribution of knowledge" between the agency and the requestor in FOIA

litigation "distorts the traditional adversary nature of our legal system's form of dispute resolution.").

21. Plaintiff disputes the number of records Defendant identifies it located as responsive to Plaintiff's FOIA request. By Plaintiff's count, the facts asserted in Paragraphs 3 through 8 in Defendant's statement of undisputed material facts convey that Defendant located 50 documents responsive to Plaintiff's FOIA request prior to the July 2016 search.

22. Plaintiff does not dispute that Defendant withheld information on the basis that it claims the information is subject to FOIA Exemptions 5, 6, and 7. Plaintiff specifically disputes the withholding of information subject to FOIA Exemption 5. To the extent Defendant implies that it withheld information subject to only those FOIA exemptions, the assertion is disputed. Defendant withheld responsive information under FOIA Exemptions 1 and 3 also, although Plaintiff does not dispute those withholdings.

23. Plaintiff objects to Defendant's assertions made in Paragraph 23 of its statement because it is a legal conclusion, not an issue of fact. To the extent a response is deemed necessary, the assertions are disputed.

24. Plaintiff objects to Defendant's assertions made in Paragraph 24 to the extent they call for a legal conclusion, not an issue of fact. Plaintiff does not dispute that Defendant withheld information on the claim that it is subject to FOIA Exemptions 6 and 7. Plaintiff also does not contest the withholding of information in this case subject to those exemptions.

25. Undisputed.

26. Plaintiff objects to Defendant's assertions made in Paragraph 26 of its statement to the extent they call for a legal conclusion, not an issue of fact. Plaintiff does not dispute that

Defendant withheld information subject to FOIA Exemption 7(E). Plaintiff also does not contest the withholding of information in this case subject to that exemption.

27. Plaintiff is unable to state whether it disputes or does not dispute the facts asserted by Defendant in this paragraph because Defendant's factual assertions concern the internal operations of Defendant or are otherwise uniquely known to Defendant. *See, e.g., Judicial Watch, Inc.*, 449 F.3d at 145-146. To the extent a response is deemed necessary, the assertions are disputed.

II. Plaintiff's Statement of Undisputed Material Facts in Support of Cross-Motion for Summary Judgment.

1. On March 2, 2015, the *New York Times* reported for the first time that Secretary Clinton exclusively used an unofficial email account, hosted on a "clintonemail.com" server, for all of her official email communications during her entire, four-year tenure at the State Department. *See* Michael S. Schmidt, "*Hillary Clinton Used Personal Email Account at State Dept., Possibly Breaking Rules*," NEW YORK TIMES, March 2, 2015, available at http://www.nytimes.com/2015/03/03/us/politics/hillary-clintons-use-of-private-email-at-state-department-raises-flags.html. [1]

2. Plaintiff, a tax-exempt, not-for-profit educational organization that seeks to promote transparency, integrity, and accountability in government and fidelity to the rule of law, initiated an investigation into Secretary Clinton's email practice for her official, State Department, business. Decl. of Ramona R. Cotca ("RRC Decl.") at ¶¶ 2-3. As part of its investigation, Plaintiff submitted numerous FOIA requests to the State Department pertaining to

[1] Plaintiff respectfully requests that the Court take judicial notice of the publication of the article, which was published by the NEW YORK TIMES, and published on the website provided above. As a result, the comments "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

email practices of Secretary Clinton and/or other executive officials at the Department of State during Secretary Clinton's term. Decl. of Ramona R. Cotca ("RRC Decl.") at ¶¶ 2-3. On March 10, 2015, Plaintiff submitted the following request seeking access to:

A. Any and all records of requests by former Secretary of State Hillary Rodham Clinton or her staff to the State Department Office of Security Technology seeking approval for the use of an iPad or iPhone for official government business, and

B. Any and all communications within or between the Office of the Secretary of State, the Executive Secretariat, and the Office of the Secretary and the Office of Security Technology concerning, regarding, or related to the use of unauthorized electronic devices for official government business between January 1, 2009 and January 31, 2013.

3. When the State Department failed to issue a determination on the request within the time period required by law, Plaintiff filed suit on April 28, 2015. Compl. (ECF No. 1) at ¶¶ 5-10; Answer (ECF No. 6) at ¶¶ 5-10. Defendant filed its answer on June 3, 2015. Answer (ECF No. 6).

4. Subsequent to Plaintiff's FOIA request, on July 6, 2015, the U.S. Intelligence Community Inspector General (ICIG) submitted a referral to the Federal Bureau of Investigation (FBI) in accordance with Section 811(c) of the Intelligence Authorization Act of 1995 to initiate an investigation into "the potential unauthorized transmission and storage of classified information on the personal e-mail server of former Secretary of State Hillary Clinton." *See* RRC Decl., ¶ 5, Ex. 1 (FBI Report on the "Clinton E-Mail Investigation, July 2016) at pp. 1-2, also available online at https://vault.fbi.gov/hillary-r.-clinton/hillary-r.-clinton-part-01-of-05/view (accessed Jan. 12, 2017). [2]

[2] Plaintiff respectfully requests that the Court take judicial notice of the representations made in the FBI report, which was released in redacted form by the FBI on the website provided above and attached as Exhibit 1 to the RRC Declaration. As a result, the statements "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

5. The FBI initiated a full investigation on July 5, 2016, based upon the ICIG referral. *Id.*

6. On July 5, 2016, FBI Director James B. Comey made a public statement about the investigation and its findings. *See* RRC Decl., ¶ 6, Ex. 2 (*"Statement by FBI Director James B. Comey on the Investigation of Secretary Hillary Clinton's Use of a Personal E-Mail System*," Remarks prepared for delivery at press briefing, published on July 5, 2016, and available on the FBI's government website at https://www.fbi.gov/news/pressrel/press-releases/statement-by-fbi-director-james-b-comey-on-the-investigation-of-secretary-hillary-clinton2019s-use-of-a-personal-e-mail-system (accessed on Jan. 12, 2017).[3]

7. During its investigation, Secretary Clinton stated she used a personal email address and BlackBerry for her official business during her tenure at the State Department. *See* RRC Decl., Ex. 1 (FBI Rpt.) at p. 8; *see* e.g. RRC Decl., ¶ 7, Ex. 3 (Email from Philippe Reines to H (Secretary Clinton), Aug. 5, 2010, with Subject "Memo," in which he writes, In your iPad email you will find attached memo.") (Doc. No. C06133874).

8. The FBI discovered that Secretary Clinton used eight (8) e-mail capable BlackBerry and five (5) iPad devices during her tenure at the State Department. RRC Decl., Ex. 1 (FBI Rpt.) at pp. 8-9.

9. In an information memo for Cheryl D. Mills with the subject line: "Use of Blackberries in Mahogany Row," Eric J. Boswell advised of "vulnerabilities and risks associated

[3] Plaintiff respectfully requests that the Court take judicial notice of the public remarks made by FBI Director Comey, and contained in the press release available on the website provided above and attached as Exhibit 2 to RRC Declaration. As a result, the statements "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

with the use of BlackBerrys in the Mahogany Row," and further wrote: "I cannot stress too strongly, however, that any unclassified Blackberry is highly vulnerable in any setting to remotely and covertly monitoring conversations, retrieving e-mails, and exploiting calendars." A copy of the memo was produced in redacted form by Defendant in response to Plaintiff's FOIA request at issue in this lawsuit ("Blackberries Memo"). RRC Decl. at ¶ 8, Ex. 4.

10. The FBI's report also reflects that Clinton's executive staff inquired about the possibility of Secretary Clinton using an iPad to receive communications in her office. However, this request was also denied due to restrictions associated with the Secretary's office being in a SCIF. RRC Decl., Ex. 1 (FBI Rpt.) at p. 13.

11. According to the FBI report, Secretary Clinton and Huma Abedin (Deputy Chief of staff) confirmed that Secretary Clinton primarily used her BlackBerry or iPad for checking emails. RRC Decl., Ex. 1 (FBI Rpt.) at p. 13.

12. As set out in Director Comey's public statement, while the FBI "did not find clear evidence that Secretary Clinton or her colleagues intended to violate laws governing the handling of classified information," the FBI found "evidence that they [Secretary Clinton and those she was corresponding with] were extremely careless in their handling of very sensitive, highly classified information." RRC Decl., Ex. 2. "There is evidence to support a conclusion that any reasonable person in Secretary Clinton's position, or in the position of those government employees with whom she was corresponding about these matters, should have known that an unclassified system was no place for that conversation." *Id.* "None of these e-mails should have been on any kind of unclassified system, but their presence is especially concerning because all of these e-mails were housed on unclassified personal servers not even supported by full-time

security staff, like those found at Departments and Agencies of the U.S. Government or even with a commercial service like Gmail." *Id.*

13. The FBI determined that classified information was transmitted over emails sent or received by Secretary Clinton, and, given a combination of factors, including the nature of Secretary Clinton's email practices, it is possible that hostile actors gained access to the former secretary's email account. RRC Decl., Ex. 2. Finally, the FBI "also developed evidence that the security culture of the State Department in general, and with respect to use of unclassified e-mail systems in particular, was generally lacking in the kind of care for classified information found elsewhere in the government." *Id.*

14. On February 2, 2009, Assistant Secretary of State Eric Boswell wrote to DS Official Donald Reid, "On the off chance that S staff continues to push for S or TS-capable PDAs,…I'll need a briefing on what we know…Pls schedule." RRC Decl. at ¶ 9, Ex. 5 (Doc. No. C05838711).

15. A March 11, 2009 email that discussed the BlackBerry Memo conveys that Secretary Clinton expressed that she understood the issues after reading the memo. RRC Decl. at ¶ 10, Ex. 6 (Doc. No. C05838724).

16. On February 9, 2011, one official wrote DS Officials Gentry Smith and Donald Reid, "I wanted to share with you, back-channel, a little insight into the current thinking in the Secretary's inner circle on technology issues and request your help." RRC Decl. at ¶ 11, Ex. 7 (Doc Nos. C05838732 and C05891089). Defendant withheld the remaining text in the paragraph under Exemption 5. Donald Reid responded, in part, "Certainly, we need to verify or correct the urban myths Cheryl [Mills] believes re other agencies." *Id.*

17. On Dec. 5, 2014, Secretary Clinton provided "approximately 30,000 emails" comprising "approximately 52,455 pages" of official government records to the State Department in response to a request by the department that, if she was aware or were to become aware of "a federal record, such as an email sent or received on a personal email account while serving as Secretary of State . . . a copy of this record be made available to the Department." Stein Decl. 1 (ECF No. 425-1) at ¶ 19, n. 8.

18. At the conclusion of its investigation in or about July 2016, Director Comey announced that the FBI "also discovered several thousand work-related e-mails that were not in the group of 30,000 that were returned by Secretary Clinton to State in 2014." RRC Decl., Ex. 2.

19. These several thousand work-related emails were searched by Defendant in response to Plaintiff's FOIA request. *See* Stein Decl. 2 (ECF No. 25-2) at ¶ 3.

20. On October 28, 2016, Director Comey informed members of the U.S. Congress by letter that the "FBI has learned of the existence of emails that appear to be pertinent to the investigation [of former Secretary Clinton's personal email server]." RRC Decl., ¶ 12, Ex. 8; *also available* at http://www.nytimes.com/interactive/2016/10/28/us/politics/fbi-letter.html? r=0 (accessed Jan. 12, 2017). On November 6, 2016 Director Comey informed members of the U.S. Congress by letter that the FBI "reviewed all of the communications that were to or from Hillary Clinton while she was Secretary of State." RRC Decl., ¶ 12, Ex. 8; *also available* at http://www.nytimes.com/interactive/2016/11/06/us/politics/fbi-letter-emails.html (accessed Jan. 12, 2017).[4]

[4] Plaintiff respectfully requests that the Court take judicial notice of the representations made by Director Comey in the October 28, 2016 and November 6, 2016 letters, which are attached to the aforementioned exhibit and available on the websites provided. The comments "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

21. Counsel on behalf of the State Department informed the Court in an unrelated FOIA lawsuit, captioned *Judicial Watch, Inc. v. U.S. Dep't of State* (Case No. 15-687) (D.D.C.) (JEB), in which the records referenced in paragraph 20 above were discussed, that the FBI "confirmed that they will be sending something to State….[t]hese are e-mail chains in which former Secretary Clinton was either a recipient or sender." RRC Decl., ¶ 13, Ex. 9, p. 3, lines 4-12.

Dated: January 13, 2017

Respectfully submitted,

JUDICIAL WATCH, INC.

/s/ *Ramona R. Cotca*
Ramona R. Cotca (D.C. Bar No. 501159)
Judicial Watch, Inc.
425 Third Street, SW, Suite 800
Washington, DC 20024
(202) 646-5172
rcotca@judicialwatch.org

Counsel for Plaintiff

Terwilliger, Zachary (ODAG)

From:	Terwilliger, Zachary (ODAG)
Sent:	Monday, February 27, 2017 12:48 PM
To:	Tyson, Jill C. (OLA)
Subject:	FW: Additional briefing materials needed
Attachments:	(b) (5) [redacted]

From: Mizelle, Chad (ODAG)
Sent: Monday, February 27, 2017 12:35 PM
To: Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>
Subject: RE: Additional briefing materials needed

Zach,

Apologies for the slight delay on this, (b) (5) [redacted]
(b) (5) [redacted]

Best,
Chad

From: Terwilliger, Zachary (ODAG)
Sent: Sunday, February 26, 2017 10:14 PM
To: Mizelle, Chad (ODAG) <cmizelle@jmd.usdoj.gov>; Hall, William A. (ODAG) <wahall@jmd.usdoj.gov>; Barnett, Gary (ODAG) <gbarnett@jmd.usdoj.gov>
Subject: Fwd: Additional briefing materials needed

Team ODAG,
OLA has put together materials for US Attorney Rosenstein's confirmation. They, however, need our help putting together a few hot topic papers and I volunteered us to do so. Can you each please put together a brief paper (sample attached) for the topic assigned below? It is an asap request. If at all possible a by noon tomorrow (Monday) deadline.

(b) (5) [redacted]

Can you all confirm receipt?

Thank you very much,

Zach

Begin forwarded message:

From: "Tyson, Jill C. (OLA)" <jctyson@jmd.usdoj.gov>
Date: February 26, te2017 at 10:00:36 PM EST
To: "Terwilliger, Zachary (ODAG)" <zterwilliger@jmd.usdoj.gov>
Cc: "Parker, Rachel (OASG)" <racparker@jmd.usdoj.gov>, "Ramer, Sam (OLA)" <sramer@jmd.usdoj.gov>, "Tyson, Jill C. (OLA)" <jctyson@jmd.usdoj.gov>
Subject: Additional briefing materials needed

Zach, Rachel:

Per our conference call yesterday, here is the list of additional "hot" topics for which you volunteered your offices to draft additional briefing papers. Sample paper attached so people can follow the tone, style, length, and formatting. Thank you. -JCT

(b) (5)

[redacted]

Jill C. Tyson
Office of Legislative Affairs
U.S. Department of Justice
202-305-7851

Schools, Scott (ODAG)

From:	Schools, Scott (ODAG)
Sent:	Wednesday, March 1, 2017 7:56 AM
To:	Plante, Jeanette (JMD)
Cc:	Barnett, Gary (ODAG)
Subject:	Responsive document
Attachments:	2016-11-06 Draft w SNS notes.pdf

Jennie:

I located one responsive document in my electronic files. It is responsive to question 6.f., and is attached. Could we have a call today about logistics of providing documents to the IG? My calendar is good today, so let me know what time works for you. Thanks.

Scott

Weinsheimer, Bradley (NSD)

From: Weinsheimer, Bradley (NSD)
Sent: Wednesday, March 1, 2017 1:13 PM
To: McCormick, Tracy D. (USAVAE)
Cc: (b) (6), (b) (7)(C) Schools, Scott (ODAG); Barnett, Gary (ODAG)
Subject: Re: OIG Clinton investigation

I would not be available, but (b) (6), (b) (7)(C) was at the meeting with me and OIG, so he is fully up to speed.

On Mar 1, 2017, at 12:49 PM, McCormick, Tracy D. (USAVAE) <Tracy.D.McCormick@usdoj.gov> wrote:

> That works for me.
>
> Tracy
>
> ---
>
> **From:** (b) (6), (b) (7)(C)
> **Sent:** Wednesday, March 01, 2017 12:49 PM
> **To:** Schools, Scott (ODAG) (JMD) <Scott.Schools@usdoj.gov>; Weinsheimer, Bradley (NSD) (JMD) (b) (6), (b) (7)(C) McCormick, Tracy D. (USAVAE) <TDMcCormick@usa.doj.gov>; Barnett, Gary (ODAG) (JMD) <Gary.Barnett2@usdoj.gov>
> **Subject:** RE: OIG Clinton investigation
>
> That works for me. Brad is out this week, so he is probably not going to be available.
>
> (b) (6), (b) (7)(C)
>
> ---
>
> **From:** Schools, Scott (ODAG)
> **Sent:** Wednesday, March 01, 2017 12:48 PM
> **To:** (b) (6), (b) (7)(C) Weinsheimer, Bradley (NSD) (b) (6), (b) (7)(C) ; McCormick, Tracy D. (USAVAE) <Tracy.D.McCormick@usdoj.gov>; Barnett, Gary (ODAG) <gbarnett@jmd.usdoj.gov>
> **Subject:** OIG Clinton investigation
>
> Could you all let me know whether you have some time this afternoon to touch base by phone re the OIG Clinton email matter? I will propose 4 pm for the call, but I can be available at other times. Thanks.

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

April 24, 2017

VIA ELECTRONIC TRANSMISSION

The Honorable Dana Boente
Acting Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

The Honorable James B. Comey, Jr.
Director
Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Washington, DC 20535

Dear Acting Deputy Attorney General Boente and Director Comey:

Over the weekend, the *New York Times* reported that during the investigation of Russian hacking against political organizations in the United States, the FBI saw batches of documents the Russians had taken.[1] In doing so, the FBI reportedly came across a document that had implications on the then-ongoing Clinton email investigation; namely, the FBI obtained an email memo written by a Democratic operative "who expressed confidence that Ms. Lynch would keep the Clinton investigation from going too far."[2] According to anonymous government officials cited in the report, the discovery of the document "complicated" the procedures as to how FBI and the Justice Department would interact in the investigation, because "[i]f Ms. Lynch announced that the case was closed, and Russia leaked the document, Mr. Comey believed it would raise doubts about the independence of the investigation."[3] That's an understatement.

Regardless of who announced that the Justice Department would not pursue charges against Secretary Clinton or her associates, the document raises questions about the independence of the investigation that cannot be ignored. I previously wrote to Director Comey during the investigation to express my concerns that the Justice Department appeared to be keeping the investigation improperly narrow and refused the FBI access to compulsory processes in such a way that several suspicious voluntary immunity arrangements had to be used with key suspects in order to obtain even the most

[1] Matt Apuzzo, Michael S. Schmidt, Adam Goldman, and Eric Lichtblau, *Comey Tried to Shield the F.B.I. From Politics. Then He Shaped an Election*, THE NEW YORK TIMES (Apr. 22, 2017).
[2] *Id.*, *see also* Nikita Vladimirov, *Mysterious Document Was at Center of FBI Clinton Decisions*, THE HILL (Apr. 22, 2017).
[3] *Id.*

basic, limited information. Indeed, the investigation appears to have willfully refused to look at information from relevant times when evidence of Secretary Clinton's intent in deleting the emails under Congressional subpoena could have been examined. For example, the FBI specifically failed to review and analyze recovered emails and emails among her senior staff from the periods: (1) immediately after the press publicly reported her use of the private server for official business, (2) after Congress and the FBI instructed Secretary Clinton to preserve the emails, and (3) surrounding the deletion of the email backups and use of "BleachBit" to thwart their forensic recovery.

Director Comey has also failed to explain adequately why, in light of then-Attorney General Lynch's multiple appearances of a conflict of interest in the case, there is no public record of him suggesting that she should be recused. A clear explanation is needed even more in light of the reporting that Director Comey had misgivings about Attorney General Lynch's ability to appear impartial if the Russians released the email memo suggesting that she would ensure the FBI's inquiry would not go "too far." It is especially troubling that the FBI failed to disclose this email memo to the Committee despite the Committee's repeated expressions of concern about the independence of the investigation and multiple requests for relevant documents.

In order for the Committee to assess the situation, please provide a copy of the email memo by no later than May 1, 2017. By May 8, 2017, please also provide: 1) all FBI documents that reference the email memo, including records in which FBI personnel discussed how to interact with the Justice Department in light of discovering the memo, and 2) a description of what investigative actions, if any, the FBI took in response to the email memo to determine whether Attorney General Lynch was improperly limiting the investigation.

I anticipate that your responses to these questions will be unclassified. Please send all unclassified material directly to the Committee. In keeping with the requirements of Executive Order 13526, if any of the responsive documents do contain classified information, please segregate all unclassified material within the classified documents, provide all unclassified information directly to the Committee, and provide a classified addendum to the Office of Senate Security. Although the Committee complies with all laws and regulations governing the handling of classified information, it is not bound, absent its prior agreement, by any handling restrictions or instructions on unclassified information unilaterally asserted by the Executive Branch.

Thank you for your prompt attention to this important issue. If you have any questions, please contact Patrick Davis of my Committee staff at (202) 224-5225.

Sincerely,

Charles E. Grassley
Chairman
Committee on the Judiciary

cc: The Honorable Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

July 20, 2017

VIA ELECTRONIC TRANSMISSION

The Honorable Rod J. Rosenstein
Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Mr. Rosenstein,

According to news reports, during the 2016 presidential election, "Ukrainian government officials tried to help Hillary Clinton and undermine Trump" and did so by "disseminat[ing] documents implicating a top Trump aide in corruption and suggested they were investigating the matter…"[1] Ukrainian officials also reportedly "helped Clinton's allies research damaging information on Trump and his advisers."[2] At the center of this plan was Alexandra Chalupa, described by reports as a Ukrainian-American operative "who was consulting for the Democratic National Committee" and reportedly met with Ukrainian officials during the presidential election for the express purpose of exposing alleged ties between then-candidate Donald Trump, Paul Manafort, and Russia.[3] *Politico* also reported on a Financial Times story that quoted a Ukrainian legislator, Serhiy Leschenko, saying that Trump's candidacy caused "Kiev's wider political leadership to do something they would never have attempted before: intervene, however indirectly, in a U.S. election."[4]

Reporting indicates that the Democratic National Committee encouraged Chalupa to interface with Ukrainian embassy staff to "arrange an interview in which Poroshenko [the president of Ukraine] might discuss Manafort's ties to Yanukovych."[5] Chalupa also met with Valeriy Chaly, Ukraine's ambassador to the U.S., and Oksana Shulyar, a top aid to the Ukrainian ambassador in March 2016 and shared her alleged concerns about Manafort. Reports state that the purpose of their initial meeting was to "organize a June reception at the embassy to promote Ukraine." However, another Ukrainian embassy official, Andrii Telizhenko, told *Politico* that Shulyar instructed him to assist Chalupa with research to connect Trump, Manafort, and the

[1] Kenneth P. Vogel & David Stern, *Ukrainian efforts to sabotage Trump backfire,* POLITICO (Jan. 11, 2017).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*

Russians. He reportedly said, "[t]hey were coordinating an investigation with the Hillary team on Paul Manafort with Alexandra Chalupa" and that "Oksana [Shulyar] was keeping it all quiet…the embassy worked very closely with" Chalupa.[6]

Chalupa's actions appear to show that she was simultaneously working on behalf of a foreign government, Ukraine, and on behalf of the DNC and Clinton campaign, in an effort to influence not only the U.S voting population but U.S. government officials. Indeed, Telizhenko recalled that Chalupa told him and Shulyar, "[i]f we can get enough information on Paul [Manafort] or Trump's involvement with Russia, she can get a hearing in Congress by September."[7] Later, Chalupa did reportedly meet with staff in the office of Democratic representative Marcy Kaptur to discuss a congressional investigation. Such a public investigation would not only benefit the Hillary Clinton campaign, but it would benefit the Ukrainian government, which, at the time, was working against the Trump campaign. When *Politico* attempted to ask Rep. Kaptur's office about the meeting, the office called it a "touchy subject."

Aside from the apparent evidence of collusion between the DNC, Clinton campaign, and Ukrainian government, Chalupa's actions implicate the Foreign Agents Registration Act (FARA). As you know, the Committee is planning a hearing on FARA enforcement. Given the public reporting of these activities in support of a foreign government, it is imperative that the Justice Department explain why she has not been required to register under FARA.

FARA requires individuals to register with the Justice Department if they act, even through an intermediary, "as an agent, representative, employee, or servant" or "in any other capacity" at the behest of a foreign principal, including a foreign political party, for purposes of engagement with a United States official.[8] The registration applies to anyone who attempts to influence a U.S. government official on behalf of a foreign principal in an effort to "formulat[e], adopt[], or chang[e] the domestic or foreign policies of the United States."[9] As such, the focus of FARA is to require registration for individuals engaged in political or quasi-political activity on behalf of a foreign government. Likewise, an individual whose activities are subject to registration under FARA and who sends informational material "for or in the interest of [a] foreign principal" with the intent or belief that such material will be circulated among at least two persons must transmit the material to the Attorney General no later than 48 hours after actual transmission.[10] Notably, an ongoing failure to register is an ongoing offense.[11]

According to documents provided to the Committee, the Justice Department required the Podesta Group and Mercury LLC to register under FARA for working on behalf of the Ukrainian government.[12] Their registration was required even though the client, the European Centre for

[6] *Id.*
[7] *Id.*
[8] 22 U.S.C. §§ 611(b) (c).
[9] 22 U.S.C. § 611(o).
[10] 22 U.S.C. § 614(a).
[11] 22 U.S.C. § 618(e).
[12] Letter from Samuel R. Ramer, Acting Assistant Attorney General, U.S. Dep't. of Justice to Senator Charles E. Grassley, Chairman, U.S. Senate Comm. on Judiciary (June 15, 2017).

the Modern Ukraine (ECFMU), wrote a letter saying it was not directly or indirectly controlled by the Ukrainian government. That did not matter to the Justice Department because their lobbying activity was not to "benefit commercial interests" of the ECFMU but instead to promote the "political or public interests of a foreign government or foreign political party." The Justice Department made clear that an individual acting in the political or public interests of a foreign government must register under FARA. As such, because Podesta and Mercury were effectively working on behalf of Ukrainian government interests, they were required to register.

Unlike that situation where the Podesta Group and Mercury LLC worked for the middleman (EFCMU) and not the Ukrainian government, here Chalupa reportedly worked directly with Ukrainian government officials to benefit Ukraine, lobbying Congress on behalf of Ukraine, and worked to undermine the Trump campaign on behalf of Ukraine and the Clinton campaign. Accordingly, these facts appear to be exactly the type of activity Congress intended to reach with FARA. Please answer the following:

1. What actions has the Justice Department taken to enforce FARA's requirements regarding Chalupa given the public reporting of her actions on behalf of the Ukrainian government?

2. Why has the Justice Department not required her to register under FARA?

3. Has the Justice Department sent a letter of inquiry to Chalupa? If so, please provide a copy. If not, why not?

4. Under 28 C.F.R. § 5.2, any present or prospective agent of a foreign entity may request an advisory opinion from the Justice Department regarding the need to register. Has Chalupa ever requested one in relation to her work on behalf of the Ukrainian government? If so, please provide a copy of the request and opinion.

5. Please differentiate the facts that required the Podesta Group and Mercury LLC to register with Chalupa's.

6. Are you investigating the Ukrainian government's intervention in the 2016 presidential election on behalf of the Clinton campaign? If not, why not?

7. Are you investigating links and coordination between the Ukrainian government and individuals associated with the campaign of Hillary Clinton or the Democratic National Committee? If not, why not?

I anticipate that your written response and the responsive documents will be unclassified. Please send all unclassified material directly to the Committee. In keeping with the requirements of Executive Order 13526, if any of the responsive documents do contain classified information, please segregate all unclassified material within the classified documents, provide all unclassified information directly to the Committee, and provide a classified addendum to the

Office of Senate Security. The Committee complies with all laws and regulations governing the handling of classified information. The Committee is not bound, absent its prior agreement, by any handling restrictions or instructions on unclassified information unilaterally asserted by the Executive Branch.

Thank you in advance for your cooperation with this request. Please respond no later than August 3, 2017. If you have questions, contact Josh Flynn-Brown of my Judiciary Committee staff at (202) 224-5225.

Sincerely,

Charles E. Grassley
Chairman
Senate Committee on the Judiciary

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General Washington, D.C. 20530

AUG 04 2017

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This responds to your letter to Deputy Attorney General Rod Rosenstein, dated July 20, 2017, regarding the applicability of the Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. § 611 *et seq.* ("FARA" or "the Act") to Alexandra Chalupa. The Department of Justice (the Department) appreciates your interest in FARA, and we assure you that FARA is an active, integral part of the Department's overall strategy to address threats to United States national security.

As we have previously indicated, although Department personnel review public reporting to help identify potential foreign agents, we do not draw legal conclusions based on that reporting. When questions regarding a possible obligation to register come to the attention of the FARA Unit of the Department's National Security Division, through public reporting or otherwise, a letter of inquiry is sent to the appropriate individual or entity. Through these letters of inquiry, the FARA Unit notifies the parties of the potential registration obligation, seeks additional information, and, based on any response to the inquiry, makes a determination as to whether a registration obligation exists.

Those letters of inquiry are considered investigative activity, and, consequently, and consistent with longstanding Department policy, unless and until the recipient of a letter registers under FARA, we neither confirm nor deny whether the Department sent it or took other investigative steps. To provide the public or Congress with information about non-public investigative activity could compromise the reputational or privacy rights of uncharged parties, undermine any ongoing investigations of those parties, and give the misimpression that the Department's investigative steps are susceptible to political influence.

Similarly, although 28 C.F.R. § 5.2 provides that any present or prospective agent of a foreign entity may request an advisory opinion from the Department regarding the need to register, unless or until the person or entity requesting the opinion registers under FARA, any written material submitted in connection with the request (and the opinion itself) is treated as confidential. *See* 28 C.F.R. § 5.2(m).

Your July 20, 2017, letter requests specific information concerning steps the Department has taken with respect to Ms. Chalupa, including whether the FARA Unit has sent her a letter of inquiry. Consistent with the foregoing, however, we can neither confirm nor deny the existence of non-public investigative activity or otherwise comment on Ms. Chalupa or the other persons and entities you mentioned in your July 20, 2017, letter.

We hope that this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

Samuel R. Ramer
Acting Assistant Attorney General

cc: The Honorable Dianne Feinstein
Ranking Member

Terwilliger, Zachary (ODAG)

From:	Terwilliger, Zachary (ODAG)
Sent:	Tuesday, September 26, 2017 5:44 PM
To:	Hur, Robert (ODAG)
Subject:	FW: Goodlatte & Judiciary Republicans Renew Call for Second Special Counsel to Address Issues Outside the Scope of Mueller's Investigation

From: Boyd, Stephen E. (OLA)
Sent: Tuesday, September 26, 2017 2:09 PM
To: Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>; Crowell, James (ODAG) <jcrowell@jmd.usdoj.gov>
Subject: FW: Goodlatte & Judiciary Republicans Renew Call for Second Special Counsel to Address Issues Outside the Scope of Mueller's Investigation

Will be a topic of conversation on Thursday AM. As we discussed, (b) (5) (b) (5) SB

Stephen E. Boyd
Assistant Attorney General
U.S. Department of Justice
Washington, D.C.

202-514-4828

From: Cutrona, Danielle (OAG)
Sent: Tuesday, September 26, 2017 2:08 PM
To: Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>
Subject: RE: Goodlatte & Judiciary Republicans Renew Call for Second Special Counsel to Address Issues Outside the Scope of Mueller's Investigation

OK

From: Boyd, Stephen E. (OLA)
Sent: Tuesday, September 26, 2017 2:06 PM
To: Cutrona, Danielle (OAG) <dcutrona@jmd.usdoj.gov>
Subject: RE: Goodlatte & Judiciary Republicans Renew Call for Second Special Counsel to Address Issues Outside the Scope of Mueller's Investigation

Yes, I have been expecting this. SB

Stephen E. Boyd
Assistant Attorney General
U.S. Department of Justice
Washington, D.C.

202-514-4828

From: Cutrona, Danielle (OAG)
Sent: Tuesday, September 26, 2017 2:02 PM
To: Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>
Subject: FW: Goodlatte & Judiciary Republicans Renew Call for Second Special Counsel to Address Issues Outside the Scope of Mueller's Investigation

From: House Judiciary Press [mailto:judiciarypress@jdrep.housecommunications.gov]
Sent: Tuesday, September 26, 2017 1:57 PM
To: Cutrona, Danielle (OAG) <dcutrona@jmd.usdoj.gov>
Subject: Goodlatte & Judiciary Republicans Renew Call for Second Special Counsel to Address Issues Outside the Scope of Mueller's Investigation

FOR IMMEDIATE RELEASE | House Judiciary Committee

FOR IMMEDIATE RELEASE
September 26, 2017
Permalink

CONTACT:
Kathryn Rexrode or Jessica Collins
(202) 225-3951

Goodlatte and Judiciary Republicans Renew Call for Second Special Counsel to Address Issues Outside the Scope of Mueller's Investigation

Washington, D.C. – House Judiciary Committee Chairman Bob Goodlatte (R-Va.) and Judiciary Committee Republicans today renewed the House Judiciary Committee's request for the appointment of a second special counsel to investigate unaddressed matters that appear to be outside the scope of Special Counsel Robert Mueller's investigation.

In July, Republican members of the House Judiciary Committee sent a letter to Attorney General Jeff Sessions and Deputy Attorney General Rod Rosenstein calling for the appointment of a second special counsel to investigate unaddressed matters, some connected to the 2016 election and others, including many actions taken by Obama Administration officials like former Attorney General Loretta Lynch, FBI Director James Comey, and Secretary of State Hillary Clinton.

Given the recent revelation that former FBI Director Comey had prepared a statement ending the investigation into former Secretary of State Hillary Clinton before interviewing at least 17 key witnesses, including the former Secretary herself, Chairman Goodlatte and Judiciary Republican Members today renewed the Committee's request for a second special counsel to address this matter and the others outlined in the previous letter.

Full text of today's letter is available here and below.

September 26, 2017

Dear Attorney General Sessions and Deputy Attorney General Rosenstein:

We write to renew this Committee's recent call for a second special counsel, to investigate matters which may be outside the scope of Special Counsel Robert Mueller's investigation. Such a step is even more critical given the recent revelation that former FBI Director James Comey had prepared a statement

ending the investigation into former Secretary of State Hillary Clinton, before interviewing at least 17 key witnesses, including the former Secretary herself. At least one former career FBI supervisor has characterized this action as "so far out of bounds it's not even in the stadium," and "clearly communicating to [FBI executive staff] where the investigation was going to go."

Among those witnesses the FBI failed to interview prior to the Director's preparation of his statement were Cheryl Mills and Heather Samuelson, both of whom were close Clinton aides with extensive knowledge of the facts surrounding the establishment of a private email server. Last year, this Committee inquired repeatedly of the Justice Department about the facts surrounding Ms. Mills' and Ms. Samuelson's involvement. Our inquiries were largely ignored. Recently, we wrote to you to request responses to those and other unanswered questions pertaining to the Clinton investigation. We have not received a response. However, as the most recent Comey revelations make clear, ignoring this problem will not make it go away.

As we pointed out at the time, both Ms. Mills and Ms. Samuelson received immunity for their cooperation in the Clinton investigation, but were nevertheless permitted to sit in on the interview of Secretary Clinton. That, coupled with the revelation that the Director had already drafted an exoneration statement, strongly suggests that the interview was a mere formality, and that the Director had already decided the case would be closed.

During our FBI Oversight hearing last year, Congressman John Ratcliffe questioned the Director about this very issue. In part, that exchange was as follows:

> Mr. RATCLIFFE. Director, did you make the decision not to recommend criminal charges relating to classified information before or after Hillary Clinton was interviewed by the FBI on July the 2nd?
>
> Mr. COMEY. After.
>
> Mr. RATCLIFFE. Okay. Then I am going to need your help in trying to understand how that is possible. I think there are a lot of prosecutors or former prosecutors that are shaking our heads at how that could be the case. Because if there was ever any real possibility that Hillary Clinton might be charged for something

that she admitted to on July the 2nd, why would two of the central witnesses in a potential prosecution against her be allowed to sit in the same room to hear the testimony?

Why, indeed. Perhaps it was because, just as the Comey revelation suggests, the decision had already been made – prior to the interview of Secretary Clinton, Ms. Mills, Ms. Samuelson, or any of the other 14 potential witnesses – that Secretary Clinton would not be charged with any crimes for her conduct. President Obama had indicated as much, by stating publicly at the time that although Secretary Clinton showed "carelessness" in conducting government business on a private server, she had no intent to endanger national security. Of course, Secretary Clinton's supposed lack of "intent to harm national security" is a red herring, since the law merely requires the government to show "gross negligence."

Moreover, we note that not only did the former Director end the investigation prematurely -- and potentially at the direction, tacit or otherwise, of President Obama -- but he did so while declining to record the interviews of former Secretary Clinton or any of her close associates, as provided for by DOJ policy. The policy states:

This policy establishes a presumption that the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), and the United States Marshals Service (USMS) will electronically record statements made by individuals in their custody.

This policy also encourages agents and prosecutors to consider electronic recording in investigative or other circumstances where the presumption does not apply. The policy encourages agents and prosecutors to consult with each other in such circumstances.

Despite this, the DOJ and FBI declined to exercise their discretion to record the interview of former Secretary Clinton. This is truly inexplicable, given that the case was of keen national interest and importance, and involved a former Secretary of State and candidate for President of the United States who was accused of violating the Espionage Act. It only reinforces the sense that our nation's top law enforcement officials conspired to sweep the Clinton "matter" under the rug, and that there is, truly, one system for the powerful and politically

well-connected, and another for everyone else.

In this case, it appears that Director Comey and other senior Justice Department and government officials may have pre-judged the "matter" before all the facts were known, thereby ensuring former Secretary Clinton would not be charged for her criminal activity. We implore you to name a second special counsel, to investigate this and other matters related to the 2016 election, including the conduct of the Justice Department regarding the investigation into Secretary Clinton's private email server.

Sincerely,

Bob Goodlatte
Louie Gohmert
Steve King
Lamar Smith
Raúl Labrador
Matt Gaetz
Doug Collins
Andy Biggs
Jim Jordan
Martha Roby
Mike Johnson
John Ratcliffe
Blake Farenthold
John Rutherford

###

Our mailing address:
House Judiciary Committee
2138 Rayburn House Office Bldg
Washington, DC 20515

Crowell, James (ODAG)

From:	Crowell, James (ODAG)
Sent:	Tuesday, October 24, 2017 1:06 PM
To:	Prior, Ian (OPA); Flores, Sarah Isgur (OPA); Boyd, Stephen E. (OLA)
Cc:	Whitaker, Matthew (OAG); Terwilliger, Zachary (ODAG)
Subject:	RE: APPROVAL: Statement on Congressional Investigation

Good by me

From: Prior, Ian (OPA)
Sent: Tuesday, October 24, 2017 12:53 PM
To: Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Crowell, James (ODAG) <jcrowell@jmd.usdoj.gov>
Cc: Whitaker, Matthew (OAG) <mwhitaker@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>
Subject: RE: APPROVAL: Statement on Congressional Investigation

Jim, you good with this:

(b) (5) [redacted]

Ian D. Prior
Principal Deputy Director of Public Affairs
Department of Justice
Office: 202.616.0911
Cell: (b) (6) [redacted]

For information on office hours, access to media events, and standard ground rules for interviews, please click here.

From: Flores, Sarah Isgur (OPA)
Sent: Tuesday, October 24, 2017 12:41 PM
To: Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Prior, Ian (OPA) <IPrior@jmd.usdoj.gov>; Crowell, James (ODAG) <jcrowell@jmd.usdoj.gov>
Cc: Whitaker, Matthew (OAG) <mwhitaker@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>
Subject: RE: APPROVAL: Statement on Congressional Investigation

I can live with that—(b) (5) [redacted]

(b) (5) [redacted]

(b) (5) [redacted]

xxx
Sarah Isgur Flores
Director of Public Affairs
202.305.5808

From: Boyd, Stephen E. (OLA)
Sent: Tuesday, October 24, 2017 12:37 PM
To: Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>; Prior, Ian (OPA) <IPrior@jmd.usdoj.gov>; Crowell, James (ODAG) <jcrowell@jmd.usdoj.gov>
Cc: Whitaker, Matthew (OAG) <mwhitaker@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>
Subject: RE: APPROVAL: Statement on Congressional Investigation

(b) (5) [redacted]

Stephen E. Boyd
Assistant Attorney General
U.S. Department of Justice
Washington, D.C.

202-514-4828

From: Flores, Sarah Isgur (OPA)
Sent: Tuesday, October 24, 2017 12:35 PM
To: Prior, Ian (OPA) <IPrior@jmd.usdoj.gov>; Crowell, James (ODAG) <jcrowell@jmd.usdoj.gov>
Cc: Whitaker, Matthew (OAG) <mwhitaker@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>
Subject: RE: APPROVAL: Statement on Congressional Investigation

No input from the cc folks? Bueller?

xxx
Sarah Isgur Flores
Director of Public Affairs
202.305.5808

From: Prior, Ian (OPA)
Sent: Tuesday, October 24, 2017 12:29 PM
To: Crowell, James (ODAG) <jcrowell@jmd.usdoj.gov>
Cc: Whitaker, Matthew (OAG) <mwhitaker@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>; Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov>
Subject: RE: APPROVAL: Statement on Congressional Investigation
Importance: High

Re-upping for input/approval

Re-upping for input/approval

Ian D. Prior
Principal Deputy Director of Public Affairs
Department of Justice
Office: 202.616.0911
Cell: (b) (6) [redacted]

For information on office hours, access to media events, and standard ground rules for interviews, please click here.

From: Prior, Ian (OPA)
Sent: Tuesday, October 24, 2017 12:07 PM
To: Crowell, James (ODAG) <jcrowell@jmd.usdoj.gov>
Cc: Whitaker, Matthew (OAG) <mwhitaker@jmd.usdoj.gov>; Boyd, Stephen E. (OLA) <seboyd@jmd.usdoj.gov>; Terwilliger, Zachary (ODAG) <zterwilliger@jmd.usdoj.gov>; sarah.isgur.flores@usdoj.gov
Subject: APPROVAL: Statement on Congressional Investigation
Importance: High

(b) (5) [redacted]

Ian D. Prior
Principal Deputy Director of Public Affairs
Department of Justice
Office: 202.616.0911
Cell: (b) (6) [redacted]

For information on office hours, access to media events, and standard ground rules for interviews, please click here.

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

October 12, 2017

VIA ELECTRONIC TRANSMISSION

The Honorable Jeff Sessions
Attorney General
United States Department of Justice
Washington, D.C. 20220

Dear Attorney General Sessions:

In June 2015, I wrote to several member agencies on the Committee on Foreign Investment in the United States (CFIUS) regarding the acquisition of Uranium One, an owner of U.S. based uranium assets, by Atomredmetzoloto (ARMZ), which is a subsidiary of Russia's state energy corporation, Rosatom.[1] The transaction raised a number of national security concerns because it effectively ceded twenty percent of U.S. uranium production capacity to the Russian government.[2]

In that letter, I raised additional concerns related to potential conflicts of interest between the State Department and the transacting parties. These concerns stemmed from the fact that during critical stages of the acquisition approval, interested parties, such as the Chairman of Uranium One, Ian Telfer, made large donations some in the millions of dollars to the Clinton Foundation while Hillary Clinton was Secretary of State.[3]

In response to my inquiry, the Obama administration wrote that in October 2010, CFIUS certified to Congress that "there [were] no unresolved national security concerns with the

---

[1] Letter from Senator Chuck Grassley, Chairman, Senate Comm. on the Judiciary to the Dep't of Justice, State, and Treasury (June 30, 2015).

[2] Wilson Andrews, "Donations to the Clinton Foundation, and a Russian Uranium Takeover," THE NEW YORK TIMES (April 22, 2015); Jo Becker and Mike McIntire, "Cash Flowed to Clinton Foundation Amid Russian Uranium Deal," THE NEW YORK TIMES (April 23, 2015). See also, Uranium One to Nuclear Regulatory Commission, January 29, 2013. Accessible at http://pbadupws.nrc.gov/docs/ML1304/ML13043A505.pdf

[3] In my June 30, 2015 letter, I noted the following: "Reports further indicate that between 2008 and 2010, Uranium One and Former UrAsia investors donated $8.65 million to the Clinton Foundation. During this period of time, Uranium One's legal hold on the Kazakhstan based uranium deposits was in doubt. Allegedly, Uranium One executives contacted U.S. Embassy officials in Kazakhstan to help ensure the validity of their mining licenses. According to *The New York Times*, the State Department cable explaining the circumstances was copied to Secretary Clinton, among other individuals. In 2009, when the validity of the mining licenses was at issue, the Chairman of Uranium One, Mr. Ian Telfer, donated $1 million to the Clinton Foundation via his family charity called the Fernwood Foundation. In the same year, ARMZ acquired a 17% state in Uranium One and the parties sought an initial CFIUS review. In June 2010, Rosatom, via ARMZ, sought majority ownership in Uranium One. According to news reports, Mr. Telfer donated $250,000 to the Clinton Foundation during this crucial time. In total, Mr. Telfer donated over $2 million through 2013." Wilson Andrews, *Donations to the Clinton Foundation, and a Russian Uranium Takeover,* The New York Times (April 22, 2015); Jo Becker and Mike McIntire, *Cash Flowed to Clinton Foundation Amid Russian Uranium Deal,* The New York Times (April 23, 2015).

transaction" and that the transaction had been approved.[4] Further, the U.S. Treasury's response noted that "[n]o CFIUS agency proposed mitigation or prohibition of the transaction."[5]

I am not convinced by these assurances. The sale of Uranium One resulted in a Russian government takeover of a significant portion of U.S. uranium mining capacity. In light of that fact, very serious questions remain about the basis for the finding that this transaction did not threaten to impair U.S. national security.

In addition, it has recently come to the Committee's attention that employees of Rosatom were involved in a criminal enterprise involving a conspiracy to commit extortion and money laundering during the time of the CFIUS transaction. According to court filings in the United States District Court for the District of Maryland, in 2009, the FBI began an investigation into corruption and extortion by senior managers of JSC Techsnabexport (Tenex), a subsidiary of Rosatom.[6] Tenex operated as the sole supplier and exporter of Russian Federation uranium and uranium enrichment services to nuclear power companies worldwide.[7] Tenex established a wholly-owned subsidiary company located in the United States called Tenam, which became Tenex's official representative in the United States. Tenex was run by Vadim Mikerin, a Russian national and Director of the Pan American Department of Tenex from 2004 to 2010. In 2010, Mikerin became the executive director of Tenam until 2014.[8] As director of Tenam, he oversaw the shipment of uranium from Russia for use in American power plants under the "Megatons to Megawatts" program.[9] It has been reported that at one point the program fueled ten percent of U.S. electricity.[10]

According to the facts set forth by the federal government, between 2004 and 2014, Mr. Mikerin was involved in a multimillion dollar conspiracy involving an extortion and money laundering scheme that awarded contracts to American companies to transport uranium in exchange for kick-backs.[11] In 2014, Mr. Mikerin pleaded guilty "to helping orchestrate more

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[4] CFIUS Certification to Congress, Case 10 40: Rosatom (Russian Federation)/Uranium One, Inc, (October 22, 2010). In November of 2015, the Department of Justice (DOJ), replied to my letter and said "The Department of Justice's National Security Division (NSD) reviewed this transaction in consultation with the Federal Bureau of Investigation (FBI) and CFIUS agencies. In accordance with standard procedure, NSD evaluated the factors listed in section 721 of the Defense Production Act of 1950, as amended, and ultimately communicated to CFIUS the Department's clearance of this transaction."

[5] Letter from Anne Wall, Assistant Secretary for Legislative Affairs, to Senator Chuck Grassley, Chairman, Senate Committee on the Judiciary (Sept. 3, 2015). The CFIUS review process begins with an informal review that consists of an unofficial CFIUS determination prior to a formal filing. From there, CFIUS engages in a 30 day review period where the Director of National Intelligence is required to carry out an analysis of any threat to the national security. If security risks or concerns are identified and cannot be resolved during the 30 day review, CFIUS proceeds to a 45 day national security investigation stage. At that point, CFIUS negotiates mitigation with the parties. At the end of the 45 day investigation, CFIUS will either determine that the transaction does not pose national security risks or refer the matter to the President for a determination. In addition, under 50 U.S.C. § 2170 (b)(1)(B), CFIUS is required to proceed to the 45 day investigation period if the transaction is considered a foreign government controlled transaction. According to Treasury's September 3, 2015, response the transaction at issue was considered as such. *See also* James Jackson, *The Committee on Foreign Investment in the United States (CFIUS),* CRS (June 13, 2017).

[6] Government's Response to Defendant's Motion to Dismiss for Pre Indictment Delay, United States v. Vadim Mikerin, Criminal No. TDC 14 0529 (D. MD) at 1.

[7] , Superseding Indictment, United States v. Vadim Mikerin, Criminal No. TDC 14 0529 (D. MD) at 1.

[8] *Id.*

[9] Joel Schectman, *U.S. sentences Russian nuclear official to four years for bribe scheme,* Reuters (Dec. 15, 2015). The "Megatons to Megawatts" program converted uranium from thousands of Russian nuclear warheads for civilian use in U.S. nuclear power plants.

[10] *Id.*

[11] Plea Agreement, U.S. v. Vadim Mikerin, Criminal No. TDC 14 0529 (D. MD) at 10 11.

than $2 million in bribe payments through a web of secret accounts in Cyprus, Latvia, and Switzerland."[12] His actions, according to the government, occurred "with the consent of higher level officials at Tenex and Rosatom…"[13] Indeed, based on news reports, the investigation began as an intelligence probe into Russian nuclear officials.[14] During the investigation, federal agents attempted to convince Mr. Mikerin to turn on his Russian colleagues by showing him evidence of relationships between "shell companies and other Russian energy officials, including President Vladimir Putin."[15] He refused to expose them and was subsequently arrested and charged. It is unclear whether these criminal actors and actions factored into CFIUS' review of the Rosatom transaction and, if so, whether it brought additional scrutiny.

The Committee has also learned additional details regarding a June 2010 speech in Moscow where former President Bill Clinton, and thereby Secretary Clinton,[16] received $500,000 from Renaissance Capital, a Russian investment bank whose senior officers include former FSB (Russian intelligence) personnel. Most of the banks in Russia are controlled in some manner by the Kremlin, and sources have described Renaissance Capital as an extension of the Russian government.[17] At the Committee's recent oversight hearing on the Foreign Agents Registration Act, a witness described Renaissance Bank in the following way:

> The Chairman was or I should say another senior official was a British citizen of Russian origin named Igor Sagiryan. On their staff at Renaissance Capital, they trumpeted the fact that they had a number of former FSB officers on their staff. I should point out that there is no such thing as a former FSB officer. It is a lifetime commitment. And in the Department of Justice investigation into Prevezon Holdings, they determined that $13 million from the crime that Sergei Magnitsky uncovered, exposed, and was killed over went to the bank accounts of Renaissance Capital in the United Kingdom.[18]

---

[12] Joel Schectman, *U.S. sentences Russian nuclear official to four years for bribe scheme,* Reuters (Dec. 15, 2015).
[13] Affidavit in support of an application under rule 41 for a Warrant to Search, U.S. v. Vadim Mikerin, Criminal No. TDC 14 0529 (D. MD).
[14] Joel Schectman, *U.S. sentences Russian nuclear official to four years for bribe scheme,* Reuters (Dec. 15, 2015).
[15] *Id.*
[16] As I have previously written with respect to the applicability of the foreign Emolument Clause to Secretary Clinton, she and former President Bill Clinton filed joint taxes, were a joint economic unit, and therefore any monies received by her husband are also hers. *See* U.S. Office of Government Ethics, *04x16 Disclosure of Assets of a Spouse and Dependents,* Nov. 16, 2004 where the Office of Government Ethics held that employees who prepare joint tax returns with their spouses would be considered to have derived financial or economic benefit from their spouses' assets and would also be charged with knowledge of their spouses' assets.
[17] According to the DOJ's Office of Legal Counsel, one of the factors used to determine whether an entity is an instrumentality of a foreign government is whether it is susceptible to becoming one. *See* Applicability of the Emoluments Clause to Non Government Members of ACUS, 17 Op. O.L.C. 121 (1993). Having multiple former FSB officers involved in running the bank weighs in favor of finding the entity to be an instrumentality. Of course, it's also common knowledge that there is no such thing as a "former" FSB officer.
[18] Senate Comm. on the Judiciary, *Oversight of the Foreign Agents Registration Act and Attempts to Influence U.S. Elections: Lessons Learned from Current and Prior Administrations,* Testimony from Mr. Bill Browder at 20 21 (July 27, 2017).

Notably, in the same month as the Clinton speech, Uranium One and Rosatom notified CFIUS of the Russian government's intent to acquire twenty percent of the United States' uranium assets. The next month, in July 2010, Renaissance Bank reportedly assigned Uranium One a "buy" rating, a move that would principally benefit its Russian investors.[19]

The donations raise concerns about potential conflicts of interest for Secretary Clinton and the Obama administration. The fact that Rosatom subsidiaries in the United States were under criminal investigation as a result of a U.S. intelligence operation apparently around the time CFIUS approved the Uranium One/Rosatom transaction raises questions about whether that information factored into CFIUS' decision to approve the transaction.

In order to assess the decisions concerning the sale of Uranium One, please answer the following questions:

1. According to the Treasury Department, CFIUS gathers on a weekly basis to discuss pending transactions. Please list the date of each meeting that involved a discussion of the Uranium One/Rosatom transaction, the list of attendees by agency, and provide all records related to each meeting to include all transcripts, memoranda, and other communications regarding the transaction.

2. When did the Obama Administration initiate its criminal investigation into senior managers of Tenex, Tenam, and Rosatom? What agencies were involved in the investigation?

3. In addition to Rosatom, Tenex, and Tenam, were additional Russian government owned entities implicated in this or any additional investigations? If so, which ones?

4. Did DOJ personnel inform the CFIUS agencies of the criminal and intelligence investigation into senior managers of Tenex, Tenam, and Rosatom? If so, when? If not, why not?

5. Were your agency's personnel assigned to the CFIUS transaction made aware of the ongoing criminal and intelligence investigation into senior managers of Tenex, Tenam, and Rosatom prior to CFIUS approval of the Uranium One transaction in October 2010? If so, please detail when they were made aware and what exactly they were made aware of. In addition, please provide all records relating to those communications. If not, why not?

6. Please provide a copy of all records related to the presentation provided by Uranium One/Rosatom to CFIUS staffers prior to filing a formal notice on August 4, 2010.

7. Please provide a copy of your agency's official confirmation to Treasury that the transaction did not raise any unresolved national security concerns.

---

[19] Jo Becker and Mike McIntire, "Cash Flowed to Clinton Foundation Amid Russian Uranium Deal," THE NEW YORK TIMES (April 23, 2015).

8. Please provide all records relating to your agency's determination that the Uranium One/Rosatom transaction did not raise any unresolved national security concerns.

9. Please provide all records relating to communications with respect to Secretary Clinton and donations to the Clinton Foundation by parties interested in the Uranium One/Rosatom transaction.

I anticipate that your written response and most responsive documents will be unclassified. Please send all unclassified material directly to the Committee. In keeping with the requirements of Executive Order 13526, if any of the responsive documents do contain classified information, please segregate all unclassified material within the classified documents, provide all unclassified information directly to the Committee, and provide a classified addendum to the Office of Senate Security. The Committee complies with all laws and regulations governing the handling of classified information. The Committee is not bound, absent its prior agreement, by any handling restrictions or instructions on unclassified information unilaterally asserted by the Executive Branch.

Thank you in advance for your cooperation with this request. Please respond no later than October 26, 2017. If you have questions, contact Josh Flynn-Brown of my Committee staff at (202) 224-5225.

Sincerely,

Charles E. Grassley
Chairman
Committee on the Judiciary

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

January 25, 2017

VIA ELECTRONIC TRANSMISSION

The Honorable Sally Q. Yates
Acting Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Acting Attorney General Yates:

I was disappointed to read the Department's May 2, 2016 response to my March 25, 2016 letter regarding the application of the Emoluments Clause of the U.S. Constitution to Secretary Clinton's receipt of foreign government money during her time at the Department of State. In that letter, I asked two very clear questions that the Department failed to adequately answer.[1] The answers to those questions are even more relevant now that there is significant interest in the application of the Emoluments Clause to President Trump.

The new concerns involve speculative future payments to organizations in which the President has ownership interests, although he has stated his intention to direct any such profits to the Treasury. In contrast to these speculative and indirect allegations, Secretary Clinton's apparent violations of the Emoluments Clause were well-documented and direct. She even reported in her tax returns and public financial statements joint income received directly from foreign governments or foreign controlled entities while she was Secretary of State. However, despite the public discussion with Attorney General Lynch of Secretary Clinton's apparent violations of the Clause during the course of a March 9, 2016 Justice Department oversight hearing, the issue has been virtually ignored. Democratic politicians and most of the media have instead focused exclusively on President Trump.

Indeed, on Monday a group filed a lawsuit in federal district court requesting the court find that President Trump's conduct violates the Clause and enjoin him from further violating it.[2] Noticeably absent from the complaint was any reference to Secretary Clinton, despite substantial evidence of her violations. That is unsurprising given that the plaintiff in the lawsuit is a liberal group known as Citizens for Responsibility and Ethics in Washington, which until recently was controlled by David Brock, a Democratic Party operative and fervent supporter of Hillary

[1] 1. What steps, if any, has the Department of Justice taken to determine whether any monies received by former President Clinton and Secretary Clinton were prohibited by the Emoluments Clause? If none, please explain why not. 2. What steps, if any, may the Department of Justice consider in order to remedy any Emoluments Clause violation? If there are none, please explain why not.

[2] Citizens for Responsibility and Ethics in Washington v. President Donald J. Trump, No. 1:17 cv 00458, (S.D.N.Y. filed Jan. 23, 2017).

Clinton's campaign. Mr. Brock stated that it was Secretary Clinton herself who advised him after the election to sign up litigators to do pro-bono work against the President as part of a plan to "use litigation as a way of tying up [President] Trump," reportedly part of a broader plan of "revenge" for the election.[3]

In the Department's May 2 response, it appeared to take the position that because no federal statute provides a criminal penalty or civil remedy for the receipt of unallowable emoluments, the DOJ is therefore unable to take any action to enforce the Constitutional provision. That is deeply troubling on many levels, regardless of who may have violated the Constitutional prohibition. Failure to enforce the Clause would make it a nullity, and any enforcement should treat everyone equally, regardless of power, privilege or party.

The Emoluments Clause of the U.S. Constitution states in pertinent part:

> [N]o person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.[4]

The Constitutional Convention of 1787 unanimously adopted the "Emoluments Clause" in order to "recognize the 'necessity of preserving foreign Ministers & other officers of the U.S. independent of external influence,' specifically, undue influence and corruption by foreign governments."[5] The DOJ Office of Legal Counsel (OLC) has noted that "[t]hose who hold offices under the United States must give the government their unclouded judgment and their uncompromised loyalty."[6] The Framers of our Constitution clearly intended to shield public officers from invasive foreign influence.

It is disturbing that the Department would argue that aspects of the Constitutional provision not addressed by federal statute essentially have no force. That position is contrary to its own OLC opinion:

> The Emoluments Clause of the Constitution prohibits government employees from accepting any sort of payment from a foreign government, except with the consent of Congress. Congress has consented to the receipt of minimal gifts from a foreign state, 5 U.S.C. § 7342, but has not consented to receipt of compensation for services rendered.[7]

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[3] Michael Scherer, "Liberals Plot Revenge as Donald Trump Assumes the Presidency," TIME (January 20, 2017). Available at http://time.com/4641901/trump_inauguration_david_brock/.
[4] U.S. Const. art. I, §9, cl. 8.
[5] *Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize*, 33 Op. O.L.C. 1, 3 (2009) (citing Notes of James Madison, United States Constitutional Convention, THE RECORDS OF THE FEDERAL CONVENTION 389 (Max Ferrand ed., Yale Univ. Press 1966) (1787))
[6] *Applicability of the Emoluments Clause to Non Government Members of ACUS*, 17 Op. O.L.C. 114, 122 (1993)
[7] *Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act,* 6 Op. O.L.C. 156 (1982).

Secretary Clinton clearly, and by her own admission in her financial disclosures, received emoluments. Specifically, she received and shared jointly in direct compensation from foreign government or foreign controlled entities for her husband's speeches.[8] As I noted in my previous letter, joint income in a spousal relationship is considered income for each individual. The Office of Government Ethics has held in its advisory opinions,

> [employees who prepare joint tax returns with their spouses] would be considered to have derived financial or economic benefit from their spouses' assets. They would also be charged with knowledge of their spouses' assets. Similarly, where an employee and his spouse share household expenses, it would be difficult to establish that the employee would not derive a financial benefit from his spouse's assets.[9]

Recently, former ethics officials have written about the application of the Clause to President-elect Trump but have ignored its application to Secretary Clinton despite her public financial filings. The authors have also noted, "the underlying purpose of the Clause strongly favors covering immediate family of a federal officeholder, lest formalism and paper walls eviscerate the Framers' design."[10] The authors later footnote an example of why the application of the Clause should extend to immediate family members noting, "[j]ust imagine if an officeholder's

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[8] Public Financial Disclosure Report (2009) (2010) (2011) (2012). *See* Alexander Marlow, *Chinese Government Paid Bill Clinton Lucrative Speaking Fee as Sec. State Hillary Made 'Asia Pivot,'* Breitbart (May 11, 2015), http://www.breitbart.com/national security/2015/05/11/chinese govt paid bill clinton lucrative speaking fee as sec state hillary made asia pivot/ (noting that funding for President Clinton's speech to the Silicon Valley Business Information Council in California came from a coalition of Chinese government entities and organizations*);* Public Financial Disclosure Report (2011) at 10; *see generally*, *President Clinton to Keynote at Major U.S./Mid East Business Conference*, Business Wire (Sept. 10, 2012), http://www.businesswire.com/news/home/20120910006060/en/President Clinton Keynote Major U.S.Mid East Business (noting that Premier Paula A. Cox, JP, MP on behalf of the country of Bermuda was co chairing the C3 Summit in New York); see also, C^3 Summit 2012, http://www.c3business2012.com/ (last visited Feb. 3, 2016) ("We would like to thank our sponsors and our affiliates Government of Bermuda [. . .]"); Public Financial Disclosure Report (2012) at 10. Public Financial Disclosure Report (2011) at 11 (listing the sponsor as the "Abu Dhabi Global Environmental Data Initiative (AGEDI)"); *see* James V. Grimaldi and Rebecca Ballhaus, *Speaking Fees Meet Politics for Clintons*, The Wall Street Journal (Dec. 30, 2015), http://www.wsj.com/articles/speaking fees meet politics for clintons 1451504098. According to the Wall Street Journal, "the invitation came from the Abu Dhabi Global Environmental Data Initiative (AGEDI), a group created by Sheikh Khalifa bin Zayed Al Nahyan, president of the United Arab Emirates and emir of Abu Dhabi, according to Mr. Clinton's request to the State Department." Notably, AGEDI was founded by the Environmental Agency Abu Dhabi, a governmental agency of the Emirate of Abu Dhabi. *See https://agedi.org/who we are/* listing "AGEDI Brochures" which states, "AGEDI works closely with its founders, the United Nations Environment Programme (UNEP) and Environment Agency Abu Dhabi (EAD) towards achieving sustainable development." *See also,* Law No. 16 of 2005 pertaining to the Reorganization of the Abu Dhabi Environmental Agency, https://www.ead.ae/Documents/PDF Files/Law No. 16 of 2005 Eng.pdf. Public Financial Disclosure Report (2011) at 5 (listing the source as the "Tanmiah Commercial Group"); *see also*, Memorandum from Terry Krinvic, Director of Scheduling and Advance for William Jefferson Clinton, to Jim Thessin, Designated Agency Ethics Official, U.S. Dep't of State (Jan. 7, 2011) (accessed at http://www.judicialwatch.org/wp content/uploads/2015/04/85 86 and 121 pgs..pdf) SAGIA is a governmental agency and the Tanmiah Commercial Group is owned by the Al Dabbagh Group, which was founded by a former Saudi minister and its current Chairman and CEO, His Excellency Amr Al Dabbagh, is a former Governor of SAGIA. Given the closeness of these relationships to the Saudi government, Tanmiah could be seen as making efforts on behalf of the Saudi government, and thus potentially becoming susceptible of becoming an agent of a foreign state a standard articulated by the OLC.

[9] U.S. Office of Government Ethics, *04x16 Disclosure of Assets of a Spouse and Dependents,* Nov. 16, 2004.

[10] Norman L. Eisen, Richard Painter, and Laurence H. Tribe, *The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump,* Governance Studies at Brookings at 21 (December 16, 2016).

spouse and children received large payments on a regular basis from Russia, constituting a much larger share of the family's income than the officeholder's salary; in that circumstance, divided loyalty appears virtually inevitable."[11] Yet, the authors made no mention, nor did any analysis of Secretary Clinton's joint receipt of extravagant levels of income from foreign governments or foreign controlled entities, such as Saudi Arabia, for her husband's speeches.

When an Emolument Clause violation takes place, executive agencies have imposed a remedy. It has required the recipient to disgorge the emolument to the federal government.[12] The Government Accountability Office has held with respect to the Clause:

> [i]n considering the language of the Constitutional provision, it seems clear that actions contrary to its mandate may not be ignored even though the Constitution itself does not provide for a specific sanction.[13]

The Department of Defense (DoD) does exactly that and prohibits military personnel from accepting emoluments from foreign states. Congress has consented to retired military personnel accepting foreign emoluments, subject to advance approval, but nevertheless applies a remedy when emoluments are received without such approval.[14]

According to DoD regulation, "if the compensation received from a foreign government without approval is considered received by the retired member for the United States, a debt in favor of the Federal Government is created which is to be collected by withholding from retired pay" in the amount of the emolument received.[15] There are multiple cases in which the Comptroller General ruled that otherwise eligible retired military members were to have their retirement pay suspended because they had not received approval for the emolument.[16]

If military personnel are required to comply with the Clause, so should Secretary Clinton.

Despite the lack of a statutory penalty for violations of the Emoluments Clause, the DOJ nevertheless has a responsibility to uphold the Constitution. If the DOJ determines that Secretary Clinton received foreign government money during her tenure as Secretary of State in violation of the Emoluments Clause, then any emoluments received created a debt in favor of the Federal government that should be required to be balanced.

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[11] *Id.* citing footnote 81.
[12] 65 Comp. Gen. 392 (March 10, 1986). The opinion holds that member of the military will have his or her retirement payments suspended while employed by a foreign government. A reasonable corollary to this analysis is that if the individual is not in receipt of retirement pay but otherwise violates the Clause, he or she must disgorge the funds received.
[13] GAO report, Department of Defense Military Pay and Allowance Committee Action No. 528 http://www.gao.gov/products/103808#mt=e report
[14] 37 U.S.C. § 908.
[15] *Application of the Emoluments Clause to DoD Civilian Employees and Military Personnel*, available at http://www.dod.mil/dodgc/defense ethics/resource library/emoluments clause applications.pdf.
[16] *Id.*

Accordingly, what steps is the Department taking to assess the apparent violations pointed out in my previous correspondence and seek a remedy? If none, please explain why the Department is failing to uphold this important Constitutional provision with regard to Secretary Clinton.

Thank you in advance for your cooperation with this request. Please respond no later than February 8, 2017 and if you have questions, please contact Josh Flynn-Brown of my Judiciary Committee staff at (202) 224-5225.

Sincerely,

Charles E. Grassley
Chairman
Committee on the Judiciary

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

MAY 0 2 2017

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Grassley:

This responds to your letter to the Acting Attorney General dated January 25, 2017, and to your letter to the Acting Deputy Attorney General dated March 27, 2017, which requested information about steps the Department of Justice (the Department) can take to identify and remedy alleged violations of the Emoluments Clause of the United States Constitution by former Secretary of State Hillary Clinton and retired Lt. Gen. Michael Flynn.

The Emoluments Clause provides, in relevant part, that "no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. art. I, § 9, cl. 8. As we explained in our letter of May 2, 2016, Congress has not given the Department a law enforcement role in identifying or remedying alleged violations of the Emoluments Clause. We are not aware of any criminal statutes that authorize us to enforce the Clause, and there is no federal criminal common law, *see United States v. Hudson & Goodwin*, 11 U.S. 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."). Thus, we are not authorized to prosecute violations of the Clause.

Similarly, with respect to civil enforcement, we believe that the only statute that provides a civil remedy for a violation of the Emoluments Clause is the Foreign Gifts and Decorations Act (FGDA), 5 U.S.C. § 7342. That Act provides congressional consent to the receipt of certain gifts of minimal value by federal employees, and it authorizes the Attorney General to bring a civil action in U.S. court to recover from federal employees the amount of any gifts (plus $5,000) that they have solicited or received from foreign governments in violation of the Act. However, the Act covers only gifts and decorations and does not apply to the receipt of compensation for services rendered. *See id.* § 7342(a)(3); *Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act*, 6 Op. O.L.C. 156, 157 (1982) (stating that the FGDA "addresses itself to gratuities, rather than compensation for services actually performed").

The FGDA separately authorizes individual employing agencies to take administrative actions for violations of the Act. *See* 5 U.S.C. § 7342(g)(2) (authorizing employing agencies to take "actions necessary to carry out the purpose of this [Act]"). The FGDA thus takes an approach that is consistent with longstanding Executive Branch practice regarding the Emoluments Clause. As a general matter, each Executive Branch agency exercises its own administrative authorities to ensure compliance by that agency's employees who are subject to the obligations of the Emoluments Clause. For example, as you mentioned in both your January and March letters, the Department of Defense has promulgated regulations promoting compliance with the Emoluments Clause by retired members of the military. *See* DoD Fin. Mgmt. Regulation 7000.14-R, vol. 7B, ch. 5. Enforcing regulations like these is the province of the promulgating agency rather than the Department.

We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

Samuel R. Ramer
Acting Assistant Attorney General

cc: The Honorable Dianne Feinstein
Ranking Member

Schools, Scott (ODAG)

From:	Schools, Scott (ODAG)
Sent:	Friday, February 3, 2017 10:12 AM
To:	Lofthus, Lee J (JMD); Allen, Michael (JMD DAAG)
Cc:	Barnett, Gary (ODAG)
Subject:	FW: E2017001- OIG Request for Production of Documents Concerning Department and FBI Actions in Advance of the 2016 Election
Attachments:	E2017001 2016 Pre-Election Review Document Request - DOJ.EDVA. NSD (02-02-2017).pdf

Lee:

(b) (5) [redacted] Does your office do that? Thanks, and let me know if you have any questions.

Scott

From: Hamilton, Brandy (OIG) [mailto:Brandy.Hamilton@usdoj.gov] **On Behalf Of** OIG, Oversight&Review (OIG)
Sent: Thursday, February 2, 2017 5:07 PM
To: Schools, Scott (ODAG) (JMD) <Scott.Schools@usdoj.gov>
Subject: E2017001 - OIG Request for Production of Documents Concerning Department and FBI Actions in Advance of the 2016 Election

The attached document is being sent to you on behalf of Daniel C. Beckhard, Assistant Inspector General.

Schools, Scott (ODAG)

Subject: Denise Cheung
Entry Type: Phone call

Start: Fri 2/3/2017 1:52 PM
End: Fri 2/3/2017 1:52 PM
Duration: 0 hours

Spoke with Denise re who in OAG may have been involved in matters raised by OIG re Clinton emails. She identified:

(b) (5)

[redacted]

Schools, Scott (ODAG)

From: Schools, Scott (ODAG)
Sent: Friday, February 3, 2017 2:27 PM
Subject: (b) (5)

(b) (5) Clinto (b) (5)

Schools, Scott (ODAG)

From:	Schools, Scott (ODAG)
Sent:	Monday, February 6, 2017 10:00 AM
To:	Weinsheimer, Bradley (NSD)
Cc:	McCormick, Tracy D. (USAVAE); Barnett, Gary (ODAG)
Subject:	OIG investigation re Clinton emails

Brad:

Mary id'd you as the person in NSD who will be coordinating for NSD the response to the IG request in the Clinton email investigation. Tracy McCormick, copied here, is serving in that role for EDVA. I was hoping that we could schedule a meeting/call for tomorrow afternoon once you have returned from Houston to coordinate efforts. Are you available at 2:30? Thanks.

Scott

Barnett, Gary (ODAG)

From: Barnett, Gary (ODAG)
Sent: Tuesday, February 7, 2017 8:35 AM
To: Schools, Scott (ODAG)
Subject: Re: This AM

Yes, I'm available.

On Feb 7, 2017, at 8:22 AM, Schools, Scott (ODAG) <sschools@jmd.usdoj.gov> wrote:

> Gary:
>
> I ran into Jennie Plante with JMD in the café this AM, and she is going to stop by at 9 to discuss the OIG's Clinton email investigation records search. Can you join? Thanks.
>
> SS

Mica Mosbacher

From: Mica Mosbacher
Sent: Friday, March 3, 2017 4:12 PM
To: Mary Blanche Hankey
Subject: Fwd: Trey Gowdy questions James Comey on Hillary Clinton's emails - YouTube

(b) (6) [redacted]

MICA MOSBACHER
(b) (6) [redacted]

Begin forwarded message:

From: (b) (6) [redacted]
Date: March 3, 2017 at 4:07:10 PM EST
To: Mica Mosbacher (b) (6) [redacted]
Subject: Re: Trey Gowdy questions James Comey on Hillary Clinton's emails - YouTube

As I listen to this exchange I can't help but think of the Clinton's knowledge and intent. They only have to think about their prior relationship with Sandy Berger for removing classified documents from National Archives. Obviously intent when you set up your own servers and do not tell the President or National Archives. The documents were five classified copies of a single report covering internal assessments of the Clinton Administration. An associate of Berger said Berger took one copy in September 2003 and four copies in October 2003, allegedly by stuffing the documents into his socks and pants.

In April 2005, Berger pleaded guilty to a misdemeanor charge of unauthorized removal and retention of classified material from the National Archives. How can two Yale Law School graduates, one a former President, not know the intent attached to this conduct. How can a couple who prides themselves as partners, not both know about the servers. How can these not be predicate crimes for a RICO investigation. I am sure co-conspirators would cooperate in a RICO investigation that would seize assets attached to the ongoing criminal enterprise, to possibly include the DNC. That would be a substantial seizure.

U. S. Department of Justice

Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

March 27, 2017

MEMORANDUM FOR DANIEL C. BECKHARD
ASSISTANT INSPECTOR GENERAL
OVERSIGHT AND REVIEW DIVISION

FROM: SCOTT SCHOOLS
ASSOCIATE DEPUTY ATTORNEY GENERAL
U.S. DEPARTMENT OF JUSTICE

SUBJECT: Response to Request for Production of Documents Concerning Department and FBI Actions in Advance of the 2016 Election

This memorandum constitutes the first response of the Office of the Deputy Attorney General (ODAG) to the above-referenced Office of the Inspector General (OIG) document request. Enclosed is a memorandum from the Office of Legislative Affairs (OLA) that addresses the Department's efforts to identify documents responsive to your request. You will note that in some instances, the responses may seem dated because Mr. Kadzik and his Principal Deputy Alicia O'Brien are no longer with the Department. We did not contact them to seek their assistance in identifying responsive documents. If, during the course of your investigation, you identify additional sources of documents that you would like us to examine, we will be glad to do that upon your request.

We also thought it would be useful to provide additional information about which we are aware concerning requests 1 and 2. On or about November 2, 2016, Wikileaks released *inter alia* an email from Mr. Kadzik's personal email address to John Podesta. *See e.g. Hacked email appears to show DOJ official tipping Clinton campaign about review*, http://www.cnn.com/2016/11/02/politics/peter-kadzik-john-podesta-wikileaks/. Subsequent to that release, I had conversations with then Principal Associate Deputy Attorney General Matthew Axelrod concerning whether Mr. Kadzik should be recused from further participation in Congressional responses pertaining to the former Secretary of State Hilary Clinton. My understanding was that Mr. Kadzik did recuse himself from those matters and that Ms. O'Brien communicated that recusal to the relevant persons within OLA. During the course of our preparing a response to your request, we searched for but could not locate an email reflecting the recusal. Ms. O'Brien may have communicated the recusal orally to relevant persons, but as noted, we did not question Ms. O'Brien in connection with our preparation of this response.

With respect to request 14, we have provided the gateway search that identifies only non-content information about emails into and out of the Department. We can try to locate any specific emails identified by the gateway and reflected on the spreadsheet if you identify specific emails that would be of interest to your investigation.

Once again, we appreciate your patience as we have identified the responsive records. As I noted, the breadth of your request along with it having been sent during a transition period when components remain less than fully staffed contributed to the delay, and we very much appreciate your understanding in that regard.

Please let us know what additional information you need.

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States

House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

2321 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6301

(202) 225–6371
www.science.house.gov

April 27, 2017

The Honorable Jefferson B. Sessions III
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Dear Mr. Attorney General:

The Committee on Science, Space, and Technology (Committee) has been conducting a comprehensive investigation into the security of former Secretary of State Hillary Clinton's private server and e-mail arrangement used during her tenure at the U.S. Department of State. Today, I write to refer Platte River Networks (PRN) Chief Executive Officer (CEO) Treve Suazo for prosecution pursuant to 2 U.S.C. § 192, 18 U.S.C § 1001, and 18 U.S.C. § 1505, for the following reasons: (a) failing to produce documents and information demanded in August 23, 2016, and September 16, 2016, subpoenas *duces tecum* issued by the Committee, (b) making false statements, regarding not having custody or control of responsive documents, and (c) for obstructing the Committee's investigation. As Chairman of the Committee, I am writing to refer Mr. Suazo since in his position as CEO of PRN, he has custody and control of all company documents and is liable for the company's conduct.[1] *See* Exhibit 1. PRN's counsel, Ken Eichner, represents both Mr. Suazo and PRN. Copies of all prior communications between the Committee and Mr. Eichner discussed herein are enclosed as exhibits.

To further the Committee's investigation, which began in January 2016, the Committee requested documents and information from PRN and other companies retained by former Secretary Clinton and her staff to manage her unique server arrangement. The Committee also requested transcribed interviews of PRN employees. PRN, according to media reports and Federal Bureau of Investigation (FBI) documents, performed certain services related to maintaining and securing former Secretary Clinton's private email server. The Committee

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[1] Through communications with the Committee, Mr. Ken Eichner, Principal of the Eichner Law Firm, confirmed he is counsel for Mr. Suazo and by extension PRN. At one point during the Committee's investigation, Mr. Eichner rebuked the Committee for having conversations with his client, in reference to Mr. Suazo. Following the Committee's issuance of subpoenas to Mr. Suazo, Mr. Eichner provided responses to the Committee. *See* E-mail from Ken Eichner, Principal, Eichner Law Firm, to H. Comm. on Science, Space, & Tech. Staff (Jan. 19, 2016, 5:10 p.m.). [Exhibit 1].

sought the documents, information, and testimony pursuant to the rules of the House of Representatives, which are adopted pursuant to the Rulemaking Clause of the U.S. Constitution.[2] To date, Mr. Suazo, on behalf of PRN and through his attorney, has refused to produce documents, as directed by congressional subpoenas *duces tecum* and refused to allow his employees to provide testimony to the Committee.

The following sections explain the Committee's authority to conduct oversight as well as the facts giving rise to the need for this referral. As part of this referral, the Committee is providing relevant exhibits discussed throughout the letter. The Committee's production is voluntary, and it does not constitute a waiver of Congress' Speech and Debate privilege.[3]

I. The Committee's Jurisdictional Authority to Conduct Oversight

Pursuant to House Rule X, the Committee on Science, Space, and Technology is delegated legislative, authorizing, and oversight jurisdiction over the National Institute of Standards and Technology (NIST), the agency charged with promulgating guidelines related to cybersecurity.[4] Rule IX of the Committee's rules governs the issuance of subpoenas, as provided under clause 2(m)(3)(A)(i) of House Rule XI. House Rule XI specifically authorizes the Committee to "require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of books, records, correspondence, memoranda, papers, and documents as it considers necessary."[5] The rule further provides that the "power to authorize and issue subpoenas" may be delegated to the Committee Chairman.[6]

In addition to the Committee's jurisdiction based upon the Rules of the House, the Committee's investigation is compliant with case law in this area. The Committee's subpoenas to PRN's CEO, Mr. Suazo, are valid exercises of the House's constitutional oversight authority. First, this oversight is authorized by the House Rules and second, this oversight satisfies the test laid out by the Supreme Court in the 1961 case, *Wilkinson v. United States*.[7] *Wilkinson* requires that the Committee's investigation be authorized by Congress;[8] that the Committee have a "valid legislative purpose" for conducting its investigation;[9] and that the subpoena be pertinent to the subject matter authorized by Congress.[10]

Under the first prong of the *Wilkinson* test, the Committee's investigation must be authorized. As previously noted, House Rule X grants each standing committee of the House

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2 U.S. CONST., art I. § 5, clause 2. Pursuant to House Rule X, the Committee on Science, Space, and Technology is charged with legislative, authorizing, and oversight jurisdiction over the National Institutes of Standards and Technology (NIST). *See* H. Rule X, clause 1(p).
3 U.S. CONST., art I. § 6, clause 1.
4 *See* H. Rule X, clause 1(p)(7).
5 House Rule XI, clause (2)(m)(1)(B).
6 House Rule XI, clause (2)(m)(3)(A)(1).
7 365 U.S. 399, 408-09 (1961).
8 *Id.*
9 *Id.* at 409.
10 *Id.*

legislative "jurisdiction and related functions" such as oversight authority.[11] In the case of the Science Committee, Rule X grants the Committee legislative and "general oversight responsibilities" over NIST "to assist the House in its analysis, appraisal, and evaluation of ... Federal laws ... enactment of changes in Federal laws, and of such additional legislation as may be necessary or appropriate."[12] NIST is the federal agency responsible for updating and promulgating standards and requirements used to safeguard federal information systems.[13] NIST's responsibility for setting cybersecurity standards for federal information systems is codified in the Federal Information Security Management Act of 2002.[14] The Federal Information Security Modernization Act of 2014 (FISMA), which provided a significant update to the 2002 law, reaffirmed NIST's role in setting standards and guidelines for federal information systems.[15] Specifically, the 2014 law provided that the Director of the Office of Management and Budget shall promulgate cybersecurity standards based on those developed by NIST for federal information systems.[16] The 2014 law also provided that while the Secretary of the Department of Homeland Security is responsible for coordinating government-wide efforts on information security policies and practices, it shall do so in consultation with NIST.[17] Pursuant to FISMA, NIST developed the "Framework for Improving Critical Infrastructure Cybersecurity" ("Framework"), which aims to ensure "the national and economic security of the United States" by managing cybersecurity risk through a series of standards and best practices.[18] Currently, it is optional for the private sector to follow the Framework guidance.

The Committee's investigation also has a "valid legislative purpose." Indeed, the Committee can take numerous legislative options that readily satisfy the second prong of the *Wilkinson* test. For example, in the past the Committee has reported legislation amending FISMA, and could find facts through its investigation that commend similar action here. Specifically, the Committee could amend FISMA to cover government officials choosing to use networks other than federal government networks. Another possible legislative solution would be for the Committee to require NIST to account for scenarios such as former Secretary Clinton's unique server arrangement by amending the Framework to cover senior Cabinet level officials and their communications, both official and non-official. The Committee could also require NIST to provide a Framework to cover contractors providing information technology services to high-ranking government officials both in their official and unofficial capacity.

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11 *See* H. Rule X, clause 1(p)(7).
12 House Rule X, clause 2(b)(1)-(2).
13 *Id.*; Federal Information Security Management Act of 2002, H.R. 2458-48, 107th Cong. § 1131(f) (2002).
14 Federal Information Security Management Act of 2002, H.R. 2458-48, 107th Cong. § 1131(f) (2002); Nat'l Institute of Standards & Tech., Computer Security Division, Computer Security Research Center, Federal Information Security Management Act (FISMA) Implementation Project, http://csrc.nist.gov/groups/SMA/fisma/.
15 Federal Information Security Modernization Act of 2014, Pub. L. No. 113-283, 44 U.S.C. § 3553(a); *see also* 40 U.S.C. § 11331(b)(1)(A).
16 Federal Information Security Modernization Act of 2014, Pub. L. No. 113-283, 44 U.S.C. § 3553(a).
17 *Id.* at § 3553 (b)(5).
18 Nat'l Inst. of Standards & Tech., *Framework for Improving Critical Infrastructure Cybersecurity* (Feb. 12, 2015), *available at* https://www.nist.gov/sites/default/files/documents/cyberframework/cybersecurity-framework-021214.pdf.

Over the course of prior congresses, the Committee has conducted rigorous oversight and passed legislation utilizing this important cybersecurity jurisdiction as it relates to Executive Branch departments and agencies' cybersecurity posture. During the 114th Congress, the Committee conducted robust oversight of the Federal Deposit Insurance Corporation's cybersecurity posture, holding hearings on the topic on May 12, 2016, and July 14, 2016.[19] Additionally, as part of the Committee's legislative authority over portions of FISMA, on September 21, 2016, the Committee marked up and ordered reported to the House H.R. 6066, the Cybersecurity Responsibility and Accountability Act of 2016.[20]

Legislative options necessarily depend upon findings of fact in this case. The questions asked and information compelled in this investigation are pertinent to uncovering the appropriate legislative solution here. Currently, implementation of cybersecurity standards and guidelines such as NIST's Framework are optional for non-governmental entities.[21] Because former Secretary Hillary Clinton chose to forego using the Department of State's official government computer systems, which are governed by strict FISMA compliant federal cybersecurity guidelines, the Committee launched an investigation to determine whether the level of security of her private server and email account was comparable to the cybersecurity standards prescribed by NIST and FISMA. As a result of PRN's central role in managing material stored on former Secretary Clinton's private server, it is important for the Committee to understand whether PRN employed standards and guidelines prescribed in NIST's cybersecurity Framework or another set of standards used in the private sector. The information demanded in the Committee's subpoenas to PRN directly relate to these concerns and is therefore pertinent as required by the third prong of *Wilkinson*. Depending upon the findings of this current investigation, information in documents sought by the Committee's subpoenas to PRN, and testimony requested of PRN employees, the Science Committee may determine that legislation as discussed above is necessary as it relates to NIST's role in setting cybersecurity standards.

II. Background Giving Rise to the Committee's Investigation

A. Timeline of the Committee's Attempts to Obtain Documents

Despite the legitimacy of the Committee's investigation of PRN, conducted with a focus on whether additional legislation is necessary to bolster cybersecurity standards, PRN and its CEO, through counsel, Ken Eichner, have obstructed the Committee's investigation at every turn. Since January 2016, Mr. Suazo and his counsel repeatedly refused to comply with requests for documents. Furthermore, Mr. Suazo refuses to comply with lawfully issued subpoenas, making no valid legal arguments for its refusal to comply.

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19 H. Comm. on Science, Space, & Tech., *Hearing on FDIC Data Breaches: Can Americans Trust that Their Private Banking Information Is Secure?*, 114th Cong. (May 12, 2016); H. Comm. on Science, Space, & Tech., *Hearing on Evaluating FDIC's Response to Major Data Breaches: Is the FDIC Safeguarding Consumers' Banking Information?*, 114th Cong. (Jul. 14, 2016).

20 Cybersecurity Responsibility and Accountability Act of 2016, H.R. 6066, 114th Cong. (2016).

21 *See e.g.*, Nat'l Institute of Standards and Technology, Security & Privacy Controls for Federal Information Systems & Organizations, 800-53, Revision 4, at ii, *available at* http://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-53r4.pdf.

On January 8, 2016, the Committee held a hearing entitled "Cybersecurity: What the Federal Government Can Learn from the Private Sector," where private sector cybersecurity experts testified on industry approaches and best practices for safeguarding against cybersecurity threats.[22] At that hearing, industry experts raised concerns regarding the precautions taken to secure the Clinton private server and legality of such an email arrangement.[23] On January 14, 2016, following this testimony, the Committee wrote PRN, Datto, and SECNAP, all companies that played a role in securing data stored on Secretary Clinton's private server.[24] *See* Exhibit 2. Among other items, the Committee requested their assistance in understanding work each company performed to secure the server, and whether it was performed in accordance with NIST's Framework.[25] *See* Exhibit 2. As part of my January 14, 2016, letter, the Committee requested, from PRN's CEO, Mr. Suazo, all documents and communications related to the cybersecurity measures taken to secure former Secretary Clinton's private email server.[26] *See* Exhibit 2. PRN responded through its counsel, Mr. Eichner, on February 3, 2016, stating that the company did not have any responsive documents in its possession.[27] *See* Exhibit 3.

On July 12, 2016, Chairman Ron Johnson of the Senate Homeland Security and Governmental Affairs Committee and the Science Committee, together, wrote to PRN's CEO reiterating the Science Committee's January 14, 2016, request for documents, and additionally requested transcribed interviews of seven PRN employees.[28] This letter also placed PRN on notice that the Committee would "consider use of the compulsory process" to obtain documents.[29] *See* Exhibit 4. On July 21, 2016, Mr. Suazo's counsel responded to the Committees' letter.[30] *See* Exhibit 5. Mr. Suazo's counsel declined the request for interviews of PRN employees and declined to address the second request for voluntary production of documents, citing the then-completed investigation by the FBI.[31] *See* Exhibit 5.

Following PRN's July 21, 2016, response, between July 25, 2016 and August 6, 2016, Science Committee staff attempted to reach out to PRN and its counsel through telephone calls, voicemails, and emails in an effort to glean whether PRN intended to respond to the Committee by voluntarily providing responsive documents and making PRN employees available for the

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22 H. Comm. on Science, Space, & Tech., *Hearing on Cybersecurity: What the Federal Gov't Can Learn from the Private Sector*, 114th Cong. (Jan. 8, 2016).
23 *Id.* (question and answer by Chairman Lamar Smith).
24 Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech., to Mr. Treve Suazo, CEO, Platte River Networks (Jan. 14, 2016). [Exhibit 2].
25 *Id.* [Exhibit 2].
26 *Id.* [Exhibit 2].
27 Letter from Ken Eichner, Principal, Eichner Law Firm, to Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. (Feb. 3, 2016). [Exhibit 3].
28 Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech., & Hon. Ron Johnson, Chairman, S. Comm. on Homeland Security & Governmental Affairs, to Mr. Treve Suazo, CEO, Platte River Networks (Jul. 12, 2016) [hereinafter Jul. 12, 2016 Letter]. [Exhibit 4].
29 *Id.* [Exhibit 4].
30 Letter from Ken Eichner, Principal, Eichner Law Firm, to Hon. Lamar Smith, Chairman. H. Comm. on Science, Space, and Tech. & Hon. Ron Johnson, Chairman, S. Comm. on Homeland Security & Governmental Affairs (Jul. 21, 2016). [Exhibit 5].
31 *Id.* [Exhibit 5].

requested transcribed interviews. PRN's counsel rebuffed these attempts and in fact, these overtures were met with derogatory statements to and about staff; PRN's counsel criticized the efforts to reach him via telephone, and demanded that the Committee communicate with him only in writing.[32] *See* Exhibits 6, 7, and 8. Then, when asked, via email, to have a telephone conversation regarding PRN's response to Chairman Johnson and my July 12, 2016, letter, PRN's counsel refused to respond, citing his travels in Europe.[33] *See* Exhibit 9.

More than a month after the July 12, 2016, letter containing requests for documents and transcribed interviews of PRN employees, and after multiple attempts by Committee staff to communicate with PRN's counsel, the company finally responded to Committee staff. On August 19, 2016, PRN's counsel unequivocally refused on behalf of PRN to accept electronic service of a Committee subpoena, stating in the subject line of an e-mail, "Platte River Networks REJECTS electronic service," and providing no explanation.[34] *See* Exhibit 10.

Because Mr. Suazo and by extension PRN, through counsel, never produced any documents to the Committee and refused to cooperate with the investigation, including refusals to accept electronic service, I was forced to direct the U.S. Marshals to serve an August 23, 2016, subpoena *duces tecum* on PRN's CEO, Mr. Suazo, compelling the production of documents.[35] *See* Exhibits 11 and 12. The August 23, 2016, subpoena required PRN's CEO to produce all documents and communications referring or relating to the following: private servers or networks used by Secretary Clinton for official purposes, the methods used to store and maintain data on private servers or networks used by Secretary Clinton for official purposes, any data security breaches to private servers or networks used by Secretary Clinton for official purposes, and any documents related to the NIST Framework or FISMA.[36] *See* Exhibit 11. Because any work performed by PRN during or after Secretary Clinton served as Secretary of State is pertinent to the Committee's investigation, the subpoena required the production of *all* such documents, and not just documents relating to work carried out while Secretary Clinton served as Secretary of State.

On September 8, 2016, Mr. Suazo and PRN's counsel, responded in writing to the August 23, 2016, subpoena.[37] *See* Exhibit 13. In its response, the company categorically misinterpreted the language of the Committee's subpoena in a manner to absolve the company, in its view, from

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[32] E-mail from Ken Eichner, Principal, Eichner Law Firm, to Committee Staff (Aug. 6, 2016, 4:46 p.m.). [Exhibit 6]; E-mail from Ken Eichner, Principal, Eichner Law Firm, to H. Comm. on Science, Space, & Tech. Staff (Sept. 2, 2016, 11:42 a.m.) [Exhibit 7]; E-mail from Ken Eichner, Principal, Eichner Law Firm, to H. Comm. on Science, Space, & Tech. Staff (Nov. 16, 2016, 3:59 p.m.). [Exhibit 8].

[33] E-mail from Ken Eichner, Principal, Eichner Law Firm, to Committee Staff (Aug. 18, 2016, 3:28 p.m.). [Exhibit 9].

[34] E-mail from Ken Eichner, Principal, Eichner Law Firm, to Committee Staff (Aug. 19, 2016, 10:34 p.m.). [Exhibit 10].

[35] Subpoena from H. Comm. on Science, Space, and Tech., to Mr. Treve Suazo, CEO, Platte River Networks (Aug. 23, 2016) [hereinafter Aug. 23, 2016 Subpoena] [Exhibit 11]; *See, e.g.*, E-mail from Ken Eichner, Principal, Eichner Law Firm, to H. Comm. on Science, Space, & Tech. Staff (Aug. 8, 2016, 2:28 p.m.). [Exhibit 12].

[36] Aug. 23, 2016 Subpoena, *supra* note 32. [Exhibit 11].

[37] Letter from Ken Eichner, Principal, Eichner Law Firm, to Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. (Sept. 8, 2016) [hereinafter Sept. 8, 2016 Letter]. [Exhibit 13].

searching for and identifying responsive documents by restricting the plain language of the subpoena as relating solely to work carried out by PRN when Secretary Clinton served as Secretary of State, from January 21, 2009, to February 1, 2013.[38] *See* Exhibit 13. Specifically, in his letter, PRN's counsel stated that the company "has nothing to produce that is responsive to your subpoena," and asserted that the company "had no relationship with former Secretary Clinton during her time in office."[39] *See* Exhibit 13. Along with these assertions, the company stated in its letter that it was therefore "unable to produce any materials relating thereto."[40] *See* Exhibit 13.

Following this deliberate misinterpretation of the August 23, 2016, subpoena, the Committee began receiving responsive materials from Datto, showing that Datto and PRN employees communicated regularly regarding the status of backups of the Clinton server.[41] *See* Exhibits 14, 15, and 16. These communications show that PRN purposefully withheld documents and materials responsive to the August 23, 2016, subpoena. This demonstrates that PRN restricted the plain language of the subpoena as relating solely to any work carried out by PRN when Secretary Clinton served as Secretary of State, from January 1, 2009, to February 1, 2013, despite the fact that the subpoena called for "*all* documents and communications" for the time period beyond Secretary Clinton's time in office.[42] *See* Exhibit 11. More specifically, the schedule called for documents related to Secretary Clinton's private server or network, any breaches of the server or network, and methods used to store and maintain data on Secretary Clinton's private server.[43] *See* Exhibit 11.

Based on Mr. Suazo's refusal to provide materials and independent confirmation that PRN had custody of responsive documents, on September 12, 2016, Committee staff attempted to electronically serve Mr. Suazo, through counsel, with another subpoena. Service was not perfected.[44] *See* Exhibit 17. Then, on September 16, 2016, I directed the U.S. Marshals to serve a second subpoena *duces tecum* on Mr. Suazo.[45] *See* Exhibit 18. This second subpoena *duces tecum* required the production of more focused categories of documents.[46] *See* Exhibit 18. Specifically, the September 16, 2016, subpoena included requests for documents and materials regarding PRN's work related to maintaining former Secretary Clinton's private server, as well

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[38] *Id.* [Exhibit 13].
[39] *Id.* [Exhibit 13].
[40] *Id.* [Exhibit 13].
[41] *See, e.g.*, E-mail from Paul Combetta, Platte River Networks, to Leif McKinley, Datto, Inc. (Aug. 21, 2015, 12:27 a.m.) [Exhibit 14]; E-mail from Leif McKinley, Datto, Inc., to Paul Combetta, Platte River Networks (Aug. 6, 2015, 3:24 p.m.) [Exhibit 15]; E-mail from Treve Suazo, CEO, Platte River Networks, to Leif McKinley, Datto, Inc. (Aug. 6, 2015, 5:41 p.m.). [Exhibit 16].
[42] Aug. 23, 2016 Subpoena, *supra* note 35. [Exhibit 11] [emphasis added].
[43] *Id.* [Exhibit 11].
[44] On September 12, 2016, Committee staff attempted to serve Mr. Suazo electronically. *See* E-mail from H. Comm. on Science, Space, & Tech. Staff, to Ken Eichner, Principal, Eichner Law Firm (Sept. 12, 2016, 1:55 p.m.). [Exhibit 17].
[45] Subpoena from H. Comm. on Science, Space, and Tech., to Mr. Treve Suazo, CEO, Platte River Networks (Sept. 16, 2016) [hereinafter Sept. 16, 2016 Subpoena]. [Exhibit 18].
[46] Sept. 16, 2016 Subpoena, *supra* note 41. [Exhibit 18].

as documents the company provided to the FBI during the course of the FBI's investigation.[47] *See* Exhibit 18.

Despite the Committee's second subpoena, which was more narrowly tailored, Mr. Suazo, through counsel, refused to work in good faith with the Committee to comply with the September 16, 2016, subpoena. After PRN's CEO received the second subpoena, Mr. Suazo, through counsel, sent a September 23, 2016, letter stating that "[a]ll PRN employees will be ceasing voluntary cooperation with your committee pursuant to their rights under the Fourth and Fifth Amendments."[48] *See* Exhibit 19. This response made little sense since Mr. Suazo and PRN had never cooperated with the Committee in the first place. Despite multiple attempts made by the Committee to find a reasonable and suitable date for the requested transcribed interviews, the September 23, 2016, letter from Mr. Suazo's counsel did not address the Committee's pending requests for transcribed interviews or the September 16, 2016, subpoena.[49] *See* Exhibits 19, 20, 21, 22, 23, and 24. In the same letter, Mr. Suazo, through counsel, wrongfully attempted to attribute to the Science Committee the conduct of a separate body (e.g. the Senate) and separate House Committee as a basis to defy the Committee's subpoena.[50] *See* Exhibits 19 and 25. Finally, in the same letter, PRN's counsel threatened to file baseless ethics complaints against Committee staff.[51] *See* Exhibit 19.

Not having received any subpoenaed materials from Mr. Suazo, on September 28, 2016, the Committee wrote to Mr. Eichner, counsel to Mr. Suazo, reiterating the Committee's demand for documents subpoenaed on September 16, 2016. This letter also explained in greater detail the Committee's jurisdictional interests and placed Mr. Suazo on notice of the Committee's intentions to consider finding PRN and its CEO, Mr. Suazo, in contempt of Congress, if the company continued its pattern of obstruction.[52] *See* Exhibit 26. Additionally, the Committee's September 28, 2016, letter, requested that Mr. Suazo's counsel provide a final answer, by October 4, 2016, regarding whether Mr. Suazo and PRN would comply with the September 16, 2016, subpoena *duces tecum*.[53] *See* Exhibit 26. On October 3, 2016, Mr. Eichner requested additional time to respond, citing religious holiday celebrations.[54] *See* Exhibit 27. The Committee granted a one-week extension in hopes of gaining compliance. On October 11, 2016,

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47 *Id.* [Exhibit 18].
48 Letter from Ken Eichner, Principal, Eichner Law Firm, to Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. (Sept. 23, 2016) [hereinafter Sept. 23, 2016 Letter]. [Exhibit 19].
49 *Id.* [Exhibit 19]; E-mail from H. Comm. on Science, Space, & Tech. Staff, to Ken Eichner, Principal, Eichner Law Firm (Sept. 21, 2016, 8:37 a.m.) [Exhibit 20]; E-mail from H. Comm. on Science, Space, & Tech. Staff, to Ken Eichner, Principal, Eichner Law Firm (Sept. 9, 2016, 12:36 p.m.) [Exhibit 21]; E-mail from H. Comm. on Science, Space, & Tech. Staff, to Ken Eichner, Principal, Eichner Law Firm (Sept. 9, 2016, 9:53 a.m.) [Exhibit 22]; E-mail from H. Comm. on Science, Space, & Tech. Staff, to Ken Eichner, Principal, Eichner Law Firm (Sept. 6, 2016, 2:59 p.m.) [Exhibit 23]; E-mail from H. Comm. on Science, Space, & Tech. Staff, to Ken Eichner, Principal, Eichner Law Firm (Sept. 2, 2016, 12:59 p.m.). [Exhibit 24].
50 Sept. 23, 2016 Letter, *supra* note 45. [Exhibit 19]; E-mail from Ken Eichner, Principal, Eichner Law Firm, to H. Comm. on Science, Space, & Tech. Staff (Aug. 22, 2016, 11:02 a.m.). [Exhibit 25].
51 Sept. 23, 2016 Letter, *supra* note 45. [Exhibit 19].
52 Letter from from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech., to Mr. Ken Eichner, Principal, Eichner Law (Sept. 28, 2016). [Exhibit 26].
53 *Id.* [Exhibit 26].
54 Email from Ken Eichner, Principal, Eichner Law Firm to Committee Staff (Oct. 3, 2016, 1:19 p.m.). [Exhibit 27].

Mr. Suazo's counsel responded with a two-sentence letter, stating: "I am in receipt of your letter dated September 28, 2016. Neither I nor any personnel at Platte River Networks have anything further to add beyond that contained in my correspondence dated September 23, 2016."[55] *See* Exhibit 28.

As CEO for PRN, Mr. Suazo is responsible for all company documents not simply those in his possession. Mr. Suazo's failure to comply with valid congressional subpoenas, as described in the preceding paragraphs, are a violation of 2 U.S.C. § 192. Mr. Suazo's counsel failed to articulate a legal basis for shielding the company's work performed for former Secretary Clinton from congressional and public scrutiny. The refusal to provide witnesses for transcribed interviews without a valid assertion of privilege(s) prevented the Committee from completing its investigation. Further, PRN's false statements to the Committee concerning a lack of responsive documents (belied by Datto's production to the Committee) and complete failure to respond to the Committee's lawfully issued subpoenas, amount to obstruction under 18 U.S.C. § 1505, as well as a violation of 18 U.S.C. § 1001 for false statements made to the Committee. Although the Committee provided multiple accommodations to Mr. Suazo allowing for additional time to respond to the Committee throughout the investigation, despite multiple missed deadlines, these accommodations did not yield production of any responsive materials or witnesses for transcribed interviews.[56] *See* Exhibits 29, 30, 31, and 9.

Public releases of information obtained during the nearly year-long investigation undertaken by the FBI confirmed that PRN played a principal role in maintaining data storage for former Secretary Clinton's personal server, including the storage of classified national security information. PRN's employees undoubtedly have information related to the security of former Secretary Clinton's private server arrangement as discussed in Section IV below. Additionally, documents subpoenaed by the Committee from two other companies retained by Secretary Clinton to perform work related to backing up and securing her private server, Datto and SECNAP, definitively show that PRN has responsive, subpoenaed materials that it has intentionally withheld from the Committee.

III. Relevant Authority

This letter focuses on the respective actions of Treve Suazo, CEO of PRN. The statutes set forth in this section are discussed below as applied to the actions of Mr. Suazo.

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[55] Letter from Ken Eichner, Principal, Eichner Law Firm, to Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. (Oct. 11, 2016). [Exhibit 28].

[56] E-mail from Ken Eichner, Principal, Eichner Law Firm, to H. Comm. on Science, Space, & Tech. Staff (Oct. 3, 2016, 1:19 p.m.) [Exhibit 29]; E-mail from Ken Eichner, Principal, Eichner Law Firm, to H. Comm. on Science, Space, & Tech. Staff (Sept. 18, 2016, 11:20 a.m.) [Exhibit 30]; E-mail from Ken Eichner, Principal, Eichner Law Firm, to H. Comm. on Science, Space, & Tech. (Sept. 19, 2016, 10:19 a.m.) [Exhibit 31]; E-mail from Ken Eichner, Principal, Eichner Law Firm, to H. Comm. on Science, Space, & Tech. Staff (Aug. 18, 2016, 3:28 p.m.). [Exhibit 9].

Mr. Suazo, through his counsel, refused to produce subpoenaed documents to Congress, a crime under 2 U.S.C. § 192. Section 192 states:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 not less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.[57]

Mr. Suazo, through counsel, obstructed the Committee's investigation at every turn, not only through his refusal to provide subpoenaed documents, but also through his purposeful false statements to the Committee concerning a lack of any responsive documents, a crime under 18 U.S.C. § 1001. Section 1001 states, in pertinent part:

> [W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statement or representation; or makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry shall be fined under this title, imprisoned not more than 5 years . . . or both.[58]

In addition to making false statements about having custody of responsive documents, Mr. Suazo obstructed the Committee's investigation. Specifically, his refusal to turn over subpoenaed documents thwarted the Committee's understanding of any cybersecurity measures employed by PRN employees. Productions provided to the Committee by Datto and SECNAP confirm that Mr. Suazo and through extension PRN are in possession of responsive documents. This pattern of obstruction is further evidenced by Mr. Suazo's refusal to allow the Committee to interview PRN employees as part of its investigation.

Mr. Suazo's obstruction of the Committee's investigation is a crime under 18 U.S.C. § 1505, which prohibits the obstruction of proceedings before departments, agencies, and Congressional committees. The statute states, in pertinent part:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under

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[57] 2 U.S.C. § 192
[58] 18 U.S.C. § 1001.

> which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—
>
> Shall be fined under this title, imprisoned not more than 5 years . . . or both.[59]

Mr. Suazo, through his attorney, refused to produce documents, made misrepresentations about having custody of responsive documents, and refused to allow PRN employees to be interviewed by the Committee. Moreover, Mr. Suazo's conduct through his counsel frustrated the Committee's investigation as evidenced by counsel's refusal to speak with Committee staff over the phone, refusal to accept electronic service, and threats of baseless ethics complaints. These actions, coupled with the clear violations of 2 U.S.C. § 192 and 18 U.S.C. § 1001, amount to obstruction.

IV. Key Revelations Surrounding the Committee's Investigation

A. The FBI Confirms Platte River Networks and its Employees Played a Critical Role in Securing and Maintaining Secretary Clinton's Private Server

Following a nearly year-long investigation into former Secretary Clinton's use of a personal email system and server, on July 5, 2016, FBI Director James Comey announced that the Bureau would not recommend charges in the case against former Secretary Clinton.[60] In his public statement, Director Comey provided insight into and confirmation of the nature of information stored on Secretary Clinton's private server.[61] Director Comey confirmed that Secretary Clinton exchanged official government information using her private email server, including classified national security information.[62] Shortly thereafter, and following numerous calls upon the FBI to release information obtained during its investigation,[63] the FBI made several public releases of its investigative materials.[64] Included in these materials were a

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[59] 18 U.S.C. § 1505.

[60] Federal Bureau of Investigation, Press Release, *Statement by FBI Director James B. Comey on the Investigation of Sec'y Hillary Clinton's Use of a Personal Email System* (Jul. 5, 2016), *available at* https://www.fbi.gov/news/pressrel/press-releases/statement-by-fbi-director-james-b-comey-on-the-investigation-of-secretary-hillary-clinton2019s-use-of-a-personal-e-mail-system.

[61] *Id.*

[62] *Id.*

[63] *See, e.g.*, Harper Neidig, *Clinton Camp Wants FBI Interview Files Released to the Public*, THE HILL, Aug. 16, 2016, *available at* http://thehill.com/blogs/ballot-box/presidential-races/291646-clinton-campaign-calls-for-fbi-interview-notes-to-be; Reena Flores, *FBI Releases Documents from Hillary Clinton Email Investigation*, CBS NEWS, Sept. 2, 2016, *available at* http://www.cbsnews.com/news/fbi-releases-documents-from-hillary-clinton-email-investigation/.

[64] Federal Bureau of Investigation, The Vault: Hillary R. Clinton, *available at* https://vault.fbi.gov/hillary-r.-clinton [hereinafter FBI: The Vault].

summary of Secretary Clinton's July 2, 2016, interview with the FBI; a summary of the investigation; and FBI agent notes from interviews with key individuals, including PRN employees.[65]

The FBI's public releases, although heavily redacted, confirmed that PRN played a principal role in maintaining data storage for former Secretary Clinton's personal server, including the storage of classified national security information. Interviews summarized by the FBI indicate that a PRN employee, at the behest of Mrs. Clinton's top adviser, Cheryl Mills, apparently carried out mass deletions of information contained on Secretary Clinton's email server, using software called BleachBit, after the *New York Times* uncovered the existence of her private server in March 2015.[66] During an interview with the FBI, the PRN employee explained that he forgot to delete emails as instructed and stated he had an "ohrs***" moment when he remembered that he had been directed to delete the files back in December 2014.[67] This anecdote demonstrates that PRN employees have direct knowledge and materials that answer key questions the Committee has related to the level of cybersecurity of former Secretary Clinton's server and network, and that PRN was keenly aware that it had responsive information to the Committee's investigation. The Committee required documents and requested on-the-record testimony from these key PRN employees who are uniquely positioned to understand and elaborate on what steps the company took to prevent unlawful breaches and whether the systems used were FISMA compliant.

The FBI's release of information raised additional concerns for the Committees about how PRN and its employees handled the highly sensitive nature of materials stored on Secretary Clinton's server. Following the conclusion of the FBI's initial investigation and in light of information learned from the FBI's public releases, the Committee began pressing PRN to provide materials related to its maintenance and management of Secretary Clinton's private server, eventually issuing subpoenas to obtain the requested information. The documents, information, and witness testimony are necessary for the Committee to assess the extent of any records retention problems associated with the private servers, any national security concerns related to cybersecurity weaknesses, and whether legislation is necessary, related to NIST cybersecurity standards, to address such issues.

B. The Science Committee's Subpoenas to Datto, Inc. and SECNAP, Inc. Definitively Show that Platte River Networks Purposefully Withheld Subpoenaed Materials and Misled the Committee

Documents subpoenaed by the Committee from two other information technology companies, Datto and SECNAP, definitively show that PRN has responsive materials demanded by the September 16, 2016 subpoena. To date, PRN is continuing to withhold these materials

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[65] *Id.*
[66] *Id.* at 17–19 (Pt. 01 of 02); Michael Schmidt, *Clinton Used Personal Email Account at State Dept., Possibly Breaking Rules*, NY TIMES, Mar. 2, 2016, *available at* http://www.nytimes.com/2015/03/03/us/politics/hillary-clintons-use-of-private-email-at-state-department-raises-flags.html?_r=0.
[67] FBI: The Vault, *supra* note 55, at 19 (Pt. 01 of 02).

from the Committee. These documents, which include conversations among counsel to the parties, show a willful refusal by PRN to comply with the Committee's subpoenas. Documents received from Datto and SECNAP also show that PRN and its CEO, through counsel, willfully misled the Committee on multiple occasions through statements that it does not have materials responsive to the subpoenas.[68] *See* Exhibit 13.

The Committee obtained from Datto email exchanges between Datto and PRN's employees, regarding the status of backups of material stored on Secretary Clinton's private server and security measures to reduce the vulnerability of the information.[69] *See* Exhibits 14, 15, and 16. In fact, the Committee has received from Datto several formal letters from Datto's attorneys addressed to PRN's counsel, as well as to the FBI, raising significant concerns about the security of information stored on the server due to the lack of encryption on Datto's cloud backup device.[70] *See* Exhibits 32, 33, and 34. Datto's information technology experts raised concerns of potential vulnerabilities to the server, starting as early as August 2015, the same timeframe the FBI began its investigation into the security of Secretary Clinton's private server.[71] *See* Exhibits 32, 33, and 34. These documents are pertinent to the Committee's FISMA related inquiries and are certainly covered by the September 16, 2016, subpoena, expressly demonstrating that Mr. Suazo and by extension PRN, through counsel, obstructed the Committee's investigation when it had documents in its possession responsive to the Committee's request that it failed to produce. Further, correspondence between Datto and PRN's employees obtained by the Committee shows that Mr. Suazo and by extension, PRN, through counsel, made false statements to the Committee when stating that Mr. Suazo nor PRN had anything responsive to produce in response to the Committee's initial subpoena.

Additional subpoenaed documents produced to the Committee by SECNAP highlight significant vulnerabilities that existed on former Secretary Clinton's private server and also raise concerns about whether PRN employees sufficiently acted on known vulnerabilities to prevent intrusions into Secretary Clinton's network. Materials obtained by the Committee conclusively show that there were numerous attempted intrusions from hackers around the world, originating in China, Germany, Korea, France, and the United States.[72] *See* Exhibit 35 and 36. In fact, Paul Combetta, the PRN employee who acted as the conduit between PRN and former Secretary Clinton's top aides, received each of these alerts.[73] *See* Exhibit 37. Alarmingly, the documents

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[68] *See, e.g.*, Sept. 8, 2016 Letter, *supra* note 34. [Exhibit 13].

[69] *See, e.g.*, E-mail from Paul Combetta, Platte River Networks, to Leif McKinley, Datto, Inc. (Aug. 21, 2015, 12:27 a.m.) [Exhibit 14]; E-mail from Leif McKinley, Datto, Inc., to Paul Combetta, Platte River Networks (Aug. 6, 2015, 3:24 p.m.) [Exhibit 15]; E-mail from Treve Suazo, CEO, Platte River Networks, to Leif McKinley, Datto, Inc. (Aug. 6, 2015, 5:41 p.m.). [Exhibit 16].

[70] *See, e.g.*, Letter from Michael Fass, General Counsel, Datto, Inc., to Kim L. Ritter, Esq., Minor & Brown, P.C. & Former Attorney for Platte River Networks (Aug. 13, 2015) [Exhibit 32]; Letter from Stanley A. Twardy, Jr., Attorney at Law, Day Pitney, LLP, to Kim L. Ritter, Esq., Minor & Brown, P.C. & Former Attorney for Platte River Networks (Sept. 14, 2015) [Exhibit 33]; Letter from Stanley A. Twardy, Jr., Attorney at Law, Day Pitney, LLP, to Agent, Federal Bureau of Investigation (Oct. 23, 2015). [Exhibit 34].

[71] *Id.* [Exhibit 32] [Exhibit 33] [Exhibit 34].

[72] *See, e.g.*, SECNAP Security Incident Report, Ticket #1420061 (Jul. 14, 2014) [Exhibit 35]; SECNAP Security Incident Report, Ticket #1418549 (Jun. 19, 2014). [Exhibit 36].

[73] *See, e.g.*, SECNAP, Security Incident Report, Ticket #1418274 (Jun. 15, 2014). [Exhibit 37].

indicate that Mr. Combetta was largely annoyed with the constant alerts, instructing a SECNAP employee at one point to "disregard" an alert regarding outdated software on the server.[74] *See* Exhibit 38. Public statements of FBI Director Comey confirm these cybersecurity threats. Only Mr. Suazo, PRN, and their employees can provide the Committee, via subpoena documents and requested testimony, with the full picture of what steps were taken to secure former Secretary Clinton's server and network.

In total, materials received in response to the subpoenas to Datto and SECNAP show that PRN played a crucial role in managing former Secretary Clinton's private server, determining when and whether to apply security measures to the server. These materials show that despite repeated urging from cybersecurity experts to bolster the private server's security, the buck ultimately stopped with PRN when shaping the server's cybersecurity posture. While these documents solidify concerns that Secretary Clinton's private server was not subject to even basic cybersecurity protocols, such as encryption measures, they also provide evidence of Mr. Suazo's and PRN's willful refusal to produce materials demanded in the September 16, 2016, subpoena. It also reflects that Mr. Suazo and PRN purposefully misled the Committee when it stated that it had no responsive documents, to the initial voluntary request for documents or the Committee's first subpoena. Likewise, third party productions confirm that Mr. Suazo and PRN are withholding subpoenaed materials from the Committee in violation of statute. Without documents, information, and testimony from PRN employees the Committee's investigation is incomplete and obstructed. The Committee is unable to fulfill their legislative purpose and evaluate whether FISMA, the relevant statute, should be amended.

V. Conclusion

There is no legal basis for Mr. Suazo's refusal to cooperate and comply fully with the Committee's subpoenas. Instead of cooperation, the Committee was met with obstruction and refusal to comply with subpoenas and requests for transcribed interviews. These actions, taken together, as well as Mr. Suazo's false statements to the Committee, made through counsel, support the pattern of obstruction. If left unaddressed, Mr. Suazo's conduct in ignoring lawful congressional subpoenas, misleading the Committee through false statements, and bald refusal to respond to reasonable requests could gravely impair Congress's ability to exercise its core constitutional authorities of oversight and legislation. In light of Mr. Suazo's conduct in willfully refusing to produce subpoenaed documents to the Committee, the Department should bring the matter before a grand jury for its action or file an information charging Mr. Suazo with violating 2 U.S.C. § 192, 18 U.S.C. § 1001, and 18 U.S.C § 1505.

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[74] *See* SECNAP Security Incident Report, Ticket #14111151 (Jan. 24, 2014). [Exhibit 38].

Thank you for your prompt attention to this important matter.

Sincerely,

Lamar Smith
Chairman
House Committee on Science, Space, & Technology

cc: The Honorable Paul D. Ryan, Speaker of the House of Representatives

The Honorable Eddie Bernice Johnson, Ranking Member, House Committee on Science, Space, and Technology

The Honorable James B. Comey, Director, Federal Bureau of Investigation

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May 26, 2017

The Honorable Jeff Sessions
Attorney General of the United States
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Mr. Attorney General

We the people cannot live with nor accept only the non-powerful being charged with crimes and jailed. The Sailor who took pictures of his sub to show to his family is in jail. Hillary Clinton is not charged when the evidence is real, it is right in front of you and overwhelming.

You cannot continue to allow the non-prosecution of the powerful. We the people, all are aware that Hillary and now Obama are guilty of criminal conduct. You must investigate and prosecute where called for.

We/you must do what your job, your position charges you with doing. Please do not let our Country go to pot. You can start the movement to restore our faith in our government.

What a wonderful thing that would be.

Sincerely,

V. Louis Mogas
Founder and Chairman
MOGAS Industries, Inc.
lmogas@mogas.com

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

June 28, 2017

VIA ELECTRONIC TRANSMISSION

The Honorable Rod J. Rosenstein
Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Rosenstein,

On May 2, 2017, I wrote to you regarding Acting Director McCabe's apparent conflicts in ongoing FBI investigations due to, among other things, his relationship with Gov. Terry McAuliffe and asked what steps you have taken to address the appearance of political bias at the FBI. It now appears that Acting Director McCabe is the subject of three separate pending investigations.

First, the Department of Justice Office of Inspector General is examining his failure to recuse himself from the Clinton investigation due to his political relationship with McAuliffe. Second, the Office of Special Counsel (OSC) is investigating allegations that he violated the Hatch Act by engaging in political campaign activities.[1] Third, he is also reportedly the subject of a pending Equal Employment Opportunity (EEO) complaint by a female FBI agent for sex discrimination, who alleges she was targeted for retaliation because of her complaint.[2] According to new press reports, Lt. Gen. Michael Flynn provided a letter of support for the complainant in that case, which raises serious questions about why Mr. McCabe also failed to recuse himself from investigations involving Mr. Flynn.[3] In addition, a recent press report states that three FBI employees, "personally witnessed McCabe make disparaging remarks about Flynn before and during the time the retired Army general emerged as a figure in the Russia case."[4] That evidence and the failure to recuse calls into question whether Mr. McCabe handled the Flynn investigation fairly and objectively, or whether he had any retaliatory motive against Flynn for being an adverse witness to him in a pending proceeding.

In the May 2 letter, I noted the FBI's failure to respond to the Committee's previous questions. However, to date, you have failed to respond. On December 14, 2016, the FBI provided the ethical and recusal protocol applied to Mr. McCabe regarding his potential conflicts

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[1] John Solomon and Sara A. Carter, "The face of FBI politics: Bureau boss McCabe under Hatch Act investigation," Circa (June 27, 2017). http://circa.com/politics/accountability/fbi chief mccabe key figure in russia probe under investigation for possible hatch act v. OSC is the permanent, independent investigative agency for personnel matters, not Robert Mueller's temporary prosecutorial office within the Justice Department.

[2] Carrie Johnson, *Former FBI Agent Speaks Out: 'I Was Not Protected,'* NPR (April 15, 2015) http://www.npr.org/2015/04/15/399853577/former fbi agent speaks out i was not protected

[3] John Solomon and Sara Carter, *Did the FBi retaliate against Michael Flynn by launching Russia probe?* Circa (June 26, 2017) http://circa.com/politics/accountability/did the fbi retaliate against michael flynn by launching russia probe

[4] *Id.*

of interest in ongoing and future FBI investigations. Oddly, Mr. McCabe was the approval authority for his own recusal memo. That document contains a number of redactions. The Committee requires unredacted copies of the document for its inquiry.

Accordingly, please provide an unredacted copy of the attached document no later than July 12, 2017. In addition, please provide a written explanation of the steps you intend to take as Mr. McCabe's supervisor to address the appearance of political and other conflicts of interest outlined above.

I anticipate that your written reply and any responsive documents will be unclassified. Please send all unclassified material directly to the Committee. In keeping with the requirements of Executive Order 13526, if any of the responsive documents do contain classified information, please segregate all unclassified material within the classified documents, provide all unclassified information directly to the Committee, and provide a classified addendum to the Office of Senate Security. Although the Committee complies with all laws and regulations governing the handling of classified information, it is not bound, absent its prior agreement, by any handling restrictions or instructions on unclassified information unilaterally asserted by the Executive Branch.

Thank you in advance for your cooperation with this request. If you have questions, contact Josh Flynn-Brown of my Judiciary Committee staff at (202) 224-5225.

Sincerely,

Charles E. Grassley
Chairman
Senate Committee on the Judiciary

The New York Times | https://nyti.ms/2ejwgcM

Sorting Through the Clinton Email Case and What the F.B.I.'s Options Are

By ADAM GOLDMAN and MICHAEL S. SCHMIDT NOV. 3, 2016

WASHINGTON — A week ago, the F.B.I. director, James B. Comey, jolted the presidential race by sending a letter to Congress saying the bureau had discovered new emails that might be relevant to Hillary Clinton's use of a private server. The disclosure set off widespread criticism of Mr. Comey and unleashed a hurricane of news about Mrs. Clinton's family foundation, Russia and F.B.I. infighting. Let's sort it all out.

What exactly is the F.B.I. investigating?

The F.B.I. obtained a search warrant this weekend to begin analyzing emails from one of Mrs. Clinton's closest aides, Huma Abedin. Agents seized a laptop belonging to Ms. Abedin's estranged husband, Anthony D. Weiner, on Oct. 3 as part of an investigation into whether he exchanged illicit text messages with a 15-year-old girl. Investigators want to know if Ms. Abedin's emails will change the conclusion Mr. Comey announced in July: No one in Mrs. Clinton's inner circle should be prosecuted for mishandling classified information.

Agents and analysts have loaded Ms. Abedin's emails into a computer program that allows them to identify those they have already read and whether any they have not seen before might contain sensitive national security information.

Law enforcement officials say finding new classified information would not by itself change the outcome. Prosecutors would still need to prove that Mrs. Clinton or her aides intentionally mishandled classified information. In July, Mr. Comey said that although Mrs. Clinton and her aides were "extremely careless," there was no evidence of intentional mishandling.

When will Mr. Comey announce what the F.B.I. has found?

Predicting what Mr. Comey will do is difficult. Never before has the F.B.I. been so publicly entangled in presidential politics and his decisions thus far — holding a news conference in July and making this latest development public last week — have taken the F.B.I. into unchartered territory.

If Mr. Comey announces that agents have found nothing incriminating on the laptop, he is likely to be criticized for unnecessarily rattling an election and harming Mrs. Clinton. If he announces that agents have found incriminating evidence, it will appear that he is putting his thumb on the scale during a presidential race. Saying nothing before Election Day allows speculation to fester.

Mr. Comey felt obligated to keep the public and Congress up-to-date on the case because he testified about closing the inquiry and had pledged to be as transparent as possible about it.

Mr. Comey has provided no updates on the case since last week, and senior F.B.I. officials refuse to discuss details. Officials say it will be difficult to complete the review by Tuesday's election as there are hundreds of thousands of emails on the laptop, although only a small fraction may be related to the Clinton investigation.

Why did it take Mr. Comey so long to tell Congress about this?

The F.B.I. has not explained why three weeks passed between the time the bureau obtained the laptop and when Mr. Comey told Congress about it. After an F.B.I. computer analysis response team in New York copied the laptop's hard drive, bureau employees began examining the information on the computer.

That is when agents realized that Ms. Abedin's emails were on the laptop, but they did not have the authority to view them without a warrant.

The F.B.I. needed custom software to allow them to read Mr. Weiner's emails without viewing hers. But building that program took two weeks, causing the delay. The program ultimately showed that there were thousands of Ms. Abedin's emails on the laptop.

Mr. Comey was not briefed in full on a plan to read the emails until last Thursday, Oct. 27. He informed Congress the next day. F.B.I. lawyers then had to obtain a second warrant to look at Ms. Abedin's emails, which happened last weekend.

What does the Clinton Foundation have to do with the email inquiry?

Not much. The F.B.I. opened a preliminary investigation into the Clinton Foundation in 2015 after the publication of the book "Clinton Cash" by Peter Schweizer, a former fellow at the conservative Hoover Institution. The book asserted that some foreign entities gave money to former President Bill Clinton and the Clinton Foundation in return for State Department favors when Mrs. Clinton was secretary of state. Mrs. Clinton has denied those claims.

During the investigation into the foundation, F.B.I. agents in New York wanted to take more overt steps, like conducting interviews and obtaining subpoenas. Agents had also developed two informants who they hoped could lead to additional information about the foundation's dealings.

But senior F.B.I. and Justice Department officials were wary of agents making any waves that could affect the election. Although the bar for opening a preliminary investigation is low — it can done on the basis of a public allegation — senior Justice

and F.B.I. officials said there was not enough evidence to move the investigation forward. F.B.I. agents working on the case countered that they could not learn if a law was broken if they were not able to exhaust all investigative steps. Senior officials stood firm.

The investigation remains open but essentially dormant. Officials have told agents they can revisit the case after the election.

What's the mood like at the F.B.I.?

Bad. The F.B.I. is not used to being in the middle of a political maelstrom. Democrats and Republicans have ripped into Mr. Comey over his handling of the new emails, and President Obama faulted him on Wednesday. Mr. Comey's onetime boss, former Attorney General Eric H. Holder Jr., said the director was a good man who had made a terrible decision.

Agents say they will weather the political storm, but they wonder if the F.B.I.'s reputation for impartiality has been damaged. They are also wondering if Mr. Comey, who is widely admired by agents, will survive the crisis.

What do Mr. Comey's defenders say?

They say a lot, but there are not many of them. The few people who have come forward to defend Mr. Comey have argued that, by telling Congress that the investigation was completed, he was obligated to come back with any new information.

Find out what you need to know about the 2016 presidential race today, and get politics news updates via Facebook, Twitter and the First Draft newsletter.

A version of this article appears in print on November 4, 2016, on Page A18 of the New York edition with the headline: Sorting Through the Emails and What the F.B.I. May Do Next.

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

June 22, 2017

VIA ELECTRONIC TRANSMISSION

The Honorable Loretta E. Lynch
(b) (6)
[redacted]

Dear Ms. Lynch,

On April 22, 2017, *The New York Times* reported that during the investigation of Russian hacking against political organizations in the United States, the FBI "received a batch of hacked documents" from U.S. intelligence agencies that had access to stolen materials stored on Russian networks.[1] One of the documents provided to the FBI reportedly appeared to have implications on the then-ongoing Clinton email investigation. Specifically, the FBI is reported to have obtained an email or memo "written by a Democratic operative who expressed confidence that Ms. Lynch would keep the Clinton investigation from going too far."[2] According to anonymous government officials cited in the report, the discovery of the document "complicated" how FBI and the Justice Department would interact in the investigation because "[i]f Ms. Lynch announced that the case was closed, and Russia leaked the document, Mr. Comey believed it would raise doubts about the independence of the investigation."[3] Similar concerns were raised by Director Comey during this Committee's May 3, 2017 oversight hearing:

> The normal way to do it would be have the Department of Justice announce it, and I struggled, as we got closer to the end of it, with **-- a number things had gone on, some of which I cannot talk about yet, that made me worry that the Department leadership could not credibly complete the investigation and decline prosecution without grievous damage to the American people's confidence in the justice system.**
>
> And then the capper was -- and I am not picking on the Attorney General, Loretta Lynch, who I like very much. But her meeting with President Clinton on that airplane was the capper for me. **And I**

[1] Matt Apuzzo, Michael S. Schmidt, Adam Goldman, and Eric Lichtblau, *Comey Tried to Shield the F.B.I. From Politics. Then He Shaped an Election*, THE NEW YORK TIMES (Apr. 22, 2017).
[2] *Id.*
[3] *Id.*

then said, you know what? The Department cannot by itself credibly end this.

On May 24, 2017, *The Washington Post* reported that in early March 2016 the FBI had received "what was described as a Russian intelligence document" that "cited a supposed email describing how then-Attorney General Loretta E. Lynch had privately assured someone in the Clinton campaign that the email investigation would not push too deeply into the matter."[4] More specifically, the Russian intelligence document reportedly "referred to an email supposedly written by the then-chair of the Democratic National Committee, Rep. Debbie Wasserman Schultz, and sent to Leonard Benardo, an official with the Open Society Foundations."[5] According to the article: "[i]n the supposed email, Wasserman Schultz claimed Lynch had been in private communication with a senior Clinton campaign staffer named Amanda Renteria during the campaign. The document indicated Lynch had told Renteria that she would not let the FBI investigation into Clinton go too far . . . ."[6]

In order for the Committee to assess the situation, please respond to the following questions and provide the relevant documents by July 6, 2017:

1. Did anyone from the FBI ever discuss or otherwise mention to you emails, memos, or reports such as those described in these media reports?

2. Are you aware of the existence of any email, memo, or report such as those described in the cited media reports? If so, when and how did you become aware of the document's existence? Did you have any reason to doubt the authenticity of this document?

3. To the best of your knowledge, have you ever communicated with Amanda Renteria? If so, when and did you discuss the Clinton investigation? If so, please describe the communications and provide all records relating to them.

4. To the best of your knowledge, did any of your Justice Department staff or your other associates communicate with Amanda Renteria? If so, who, what did they discuss, and when did the communications occur?

5. During your time in the Justice Department, did you ever have communications with Rep. Wasserman Schultz, her staff, her associates, or any other current or former DNC officials about the Clinton email investigation? If so, please describe the communications and provide all records relating to them.

6. To the best of your knowledge, did any of your Justice Department staff or your other associates communicate with Rep. Wasserman Schultz, her staff, her associates, or any

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[4] Karoun Demirjian and Devlin Barrett, *How a Dubious Russian Document Influenced the FBI's Handling of the Clinton Probe*, THE WASHINGTON POST (May 24, 2017).
[5] *Id.*
[6] *Id.*

other current or former DNC officials about the Clinton email investigation? If so, please describe the communications and provide all records relating to them.

Thank you for your prompt attention to this important matter. If you have any questions, please contact Patrick Davis of Chairman Grassley's staff at (202) 224-5225, Heather Sawyer of Ranking Member Feinstein's staff at (202) 224-7703, Lee Holmes of Chairman Graham's staff at (202) 224-5972, or Lara Quint of Ranking Member Whitehouse's staff at (202) 224-2921.

Sincerely,

Charles E. Grassley
Chairman
Committee on the Judiciary

Dianne Feinstein
Ranking Member
Committee on the Judiciary

Lindsey O. Graham
Chairman
Subcommittee on Crime and Terrorism
Committee on the Judiciary

Sheldon Whitehouse
Ranking Member
Subcommittee on Crime and Terrorism
Committee on the Judiciary

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., **Plaintiff,** **v.** **REX W. TIILLERSON, in his official capacity as U.S. Secretary of State,** **Defendant.**	**Civil Action No. 15-785 (JEB)**
CAUSE OF ACTION INSTITUTE, **Plaintiff,** **v.** **REX W. TILLERSON, in his official capacity as U.S. Secretary of State, and** **DAVID S. FERRIERO, in his official capacity as U.S. Archivist,** **Defendants.**	**Civil Action No. 15-1068 (JEB)**

MEMORANDUM OPINION

The 2016 presidential election may have come and gone, but Plaintiffs Judicial Watch and Cause of Action Institute's quest for Hillary Clinton's emails lives on. As most readers will remember, Clinton used private email accounts during her tenure as Secretary of State, embroiling the government in myriad Freedom of Information Act suits. In this case, however, Plaintiffs have taken a different tack, alleging a violation of the Federal Records Act. That is, they claim Defendants State Department and the National Archives and Records Administration failed to maintain records of Clinton's emails and must now seek the Department of Justice's

assistance in their recovery. Most broadly characterized, Plaintiffs' suit pertains to tens of thousands of communications. At this stage, however, the parties have largely zeroed in on a sliver of that trove to wit, emails sent by Clinton on two Blackberry accounts during her first weeks in office.

The present controversy is narrower still. To establish its good-faith recovery efforts, the Government has submitted a declaration describing grand-jury subpoenas issued to Clinton's service providers. The catch? It offers the full version for *in camera* and *ex parte* review only. Plaintiffs have responded with a Motion to Produce, arguing that to the extent this Court might rely on the declaration, they must have unfiltered access. After reviewing the document *in camera*, the Court concludes that it largely rehashes information already made public, thus obviating any need for secrecy. The Court will therefore grant Plaintiffs' Motion in large part and, subject to a very limited exception, order that Defendants resubmit an unredacted version of the declaration.

I. Background

Plaintiffs are two non-profit organizations, which describe themselves as dedicated to promoting "transparency, accountability, and integrity in government." JW Compl., ¶ 3; COA Compl., ¶ 21. In the wake of reporting that former Secretary Clinton had used a personal email account and server to "conduct official government business," both organizations became concerned that federal records had been unlawfully removed from the State Department. See JW Compl., ¶ 5. Judicial Watch therefore filed suit on May 2015, and Cause of Action joined the mix two months later. Both alleged violations of the Federal Records Act, 44 U.S.C. §§ 2101 *et seq.*, 2901 *et seq.*, 3101 *et seq.*, 3301 *et seq.*, "a collection of statutes governing the creation, management, and disposal of records by federal agencies." Public Citizen v. Carlin, 184 F.3d

900, 902 (D.C. Cir. 1999). Plaintiffs claimed principally that the State Department had failed to retain and search agency records, such that the current Secretary of State must "initiate[] action through the attorney general to recover the Clinton emails." JW Compl., ¶¶ 7, 29; COA Compl., ¶¶ 16-17, 68.

This Court dismissed the suit as moot. See Judicial Watch, Inc. v. Kerry, 156 F. Supp. 3d 69, 73 (D.D.C. 2016). To proceed, it reasoned, Plaintiffs must allege an ongoing injury under the FRA, but both NARA and State had already taken substantial steps to recover more than 55,000 pages of Clinton's emails. Id. 76-78. The Court of Appeals reversed. See Judicial Watch, Inc. v. Kerry, 844 F.3d 952, 953 (D.C. Cir. 2016). It allowed that "actions taken by the Department and the FBI might have mooted appellants' claims by securing custody of all emails that the Attorney General could have recovered in an enforcement action." Id. at 955 (emphasis added). But although the tag-team efforts "bore some fruit," the Court of Appeals believed that "shaking the tree harder . . . might [] bear more still." Id. Specifically, it highlighted that Clinton had used a Blackberry account during her first weeks in office from January 21, 2009, to March 18, 2009 and the record showed no effort by State or the FBI to recover those emails. Id. at 955-56. The Court of Appeals then held that the case was not moot "[a]bsent a showing that the requested enforcement action could not shake loose a few more emails." Id. at 955. It noted, however, that Defendants might once again raise mootness on remand. Id. at 956-57.

Now back for round two, Defendants have accepted the invitation and renew their Motion to Dismiss on mootness grounds. See ECF No. 33. To that end, they have explained their efforts to track down the remaining Clinton emails, including those recovered by the FBI during its investigations. See, e.g., id., Exhs. 1-4. Before the parties finish briefing, however, the Court

must pause to resolve a narrower controversy: whether Defendants can submit one document the Second Declaration of FBI Special Agent E.W. Priestap *in camera* and *ex parte* in support of their Motion. Priestap previously submitted an unredacted declaration (his "First Declaration") and there tipped off Plaintiffs that the FBI had issued grand-jury subpoenas to third-party providers. See Def. MTD, Exh. 1 (Declaration of E.W. Priestap), ¶ 4. Defendants then followed up with Preiestap's Second Declaration, but this time redacted large portions of the public version. See Def. Opp. to Mot. to Produce at 4 n.1; see also ECF 43-3, Exh. 3. The Court discusses the disputed Second Declaration in more detail below, but for now, suffice it to say that it offers (a few) more specifics about the grand-jury subpoenas.

II. Legal Standard

Federal Rule of Criminal Procedure 6(e) bars the disclosure of matters occurring before a grand jury. See Fed. R. Crim. P. 6(e)(2)(B). This is not to say, however, that Rule 6(e) draws "a veil of secrecy . . . over all matters occurring in the world that happen to be investigated by a grand jury." SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1382 (D.C. Cir. 1980) (*en banc*). On the contrary, "[t]here is no *per se* rule against disclosure of any and all information which has reached the grand jury chambers." Senate of Puerto Rico v. DOJ, 823 F.2d 574, 582 (D.C. Cir. 1987). Indeed, Rule 6(e) includes a carve-out, which allows a court to authorize disclosure of "a grand jury matter . . . in connection with a judicial proceeding" "at a time, in a manner, and subject to any conditions that it directs." Fed. R. Crim. P. 6(e)(3)(E)(i).

To trigger that provision, a party must show that the sought-after information "[1] is needed to avoid a possible injustice in another judicial proceeding, [2] that the need for disclosure is greater than the need for continued secrecy, and [3] that their request is structured to cover only material so needed." Douglas Oil Co. of Cal. v. Petrol Stops Nw., 441 U.S. 211, 222

(1979). This standard is "a highly flexible one . . . and sensitive to the fact that the requirements of secrecy are greater in some situations than in others." United States v. Sells Eng'g, 463 U.S. 418, 445 (1983). Although the party seeking disclosure must show "with particularity" why it needs the information, see United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958), it will face a "lesser burden" as "the considerations justifying secrecy become less relevant." Douglas Oil, 441 U.S. at 223.

III. Analysis

This case largely comes down to a simple balancing act between "the need for disclosure" and "the need for continued secrecy." Douglas Oil, 441 U.S. at 222. On the one hand, Plaintiffs argue that disclosure is crucial, as they must access any facts that Defendants use to support their Motion to Dismiss. See Mot. to Produce at 7. To refresh, that Motion turns on whether Defendants have already exhausted all avenues for email recovery, such that any action under the FRA would be to adopt the D.C. Circuit's metaphor fruitless. As a result, they submitted the Second Declaration, averring that the FBI "undertook all reasonable and comprehensive efforts" to recover relevant emails and providing supporting evidence. See Second Decl., ¶ 11. Not surprisingly, Plaintiffs are loath to take the Government's word for it. Ordinarily, they argue, *in camera* and *ex parte* review is appropriate only "when a party seeks to prevent use of the materials in the litigation," such as by asserting an evidentiary privilege. Abourezk v. Reagan, 785 F.2d 1043, 1061 (D.C. Cir. 1986). In that instance, a court may properly inspect the evidence "alone for the limited purpose of determining whether the asserted privilege is genuinely applicable." Id. This case assumes a different posture: The Government hopes it can rely on its grand-jury subpoenas while still shielding their contents from Plaintiffs

and the public. "Only in the most extraordinary circumstances," however, "does [] precedent countenance court reliance upon *ex parte* evidence to decide the merits of a dispute." Id.

On the other hand, the Government seeks to preserve the secrecy of grand-jury proceedings, an interest that would typically weigh heavily in its favor. As an initial matter, though, the Second Declaration largely steers clear of Rule 6(e)'s bread and butter: "the identities of witnesses or jurors, the substance of testimony as well as actual transcripts, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like." In re Motions of Dow Jones & Co., Inc., 142 F.3d 496, 500 (D.C. Cir. 1998) (internal quotation marks omitted). Rather, it recounts one agent's description of grand-jury subpoenas. The D.C. Circuit "has recognized that the term 'grand jury subpoena' is in some respects a misnomer, because the grand jury itself does not decide whether to issue the subpoena; the prosecuting attorney does." Lopez v. DOJ, 393 F.3d 1345, 1349 (D.C. Cir. 2005) (quoting Doe v. DiGenova, 779 F.2d 74, 80 & n.11 (D.C. Cir. 1985)). Although such a subpoena likely falls under Rule 6(e)'s purview for instance, when it betrays "the direction of the relevant investigation," id. at 1350 the Government's broad summary of its generic subpoenas starts with a somewhat more tenuous claim to secrecy.

More importantly, the D.C. Circuit's case law "reflects the common-sense proposition that secrecy is no longer 'necessary' when the contents of grand jury matters have become public." In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1138, 1140 (D.C. Cir. 2006). In this case, the Government has already revealed that it issued grand-jury subpoenas to Clinton's service providers. See First Decl., ¶ 4. That information, then, "is sufficiently widely known [such] that it has lost its character as Rule 6(e) material." In re North, 16 F.3d 1234, 1245 (D.C.

Cir. 1994). After reviewing the Second Declaration *in camera*, the Court confirms that disclosure thereof would imperil little other secret information.

The Second Declaration consists of 12 paragraphs, six of which are redacted. See Second Decl., ¶¶ 1-11. The first three redacted paragraphs (mistakenly labeled Paragraphs 5, 5, and 6) largely confirm what the Government had "discussed in [the] first declaration" namely, that Clinton used two Blackberry email accounts between January 21, 2009, and March 18, 2009. Cf. First Decl., ¶ 4 (describing her use of hr15@mycingular.blackberry.net and hr15@att.blackberry.net during that time period). It then overviews, as the First Declaration did, the agency's efforts to recover those emails, including by grand-jury subpoenas. Cf. id., ¶¶ 4, 10.

Paragraph 7 lists the identities of subpoena recipients. Here, Defendants make their first (and only) case for confidentiality: they ask the Court to shield those identities, as "secrecy is critical to maintaining positive working relationships with [the providers] and other similarly situated companies." Def. Opp. at 5. This argument might have more force had Defendants not already made public that 1) the FBI issued grand-jury subpoenas to "providers," and 2) Clinton used a "BlackBerry device with service initially from Cingular Wireless and later AT&T wireless." First Decl., ¶ 4. It's not hard to connect the dots. See Josh Gerstein, FBI Confirms Grand Jury Subpoenas Used in Clinton Email Probe, Politco (Apr. 27, 2017), http://www.politico.com/blogs/under-the-radar/2017/04/27/hillary-clinton-emails-subpoenas-fbi-237712 ("Priestap did not provide details about the subpoenas, although he suggested they were served on AT&T Wireless and a firm it acquired, Cingular."). There is thus little value in redacting those identities, with one exception: the Second Declaration states that the FBI also subpoenaed Clinton's e-mail service provider. The agency has never previously disclosed the identity of that company and thus maintains an interest in its secrecy. For Plaintiffs, it should

suffice to know that the FBI subpoenaed a third party (and not, as they suggest, "Clinton's staff or attorneys"). See Reply at 4. Defendants may therefore continue to redact the email provider's name.

Moving to Paragraphs 8 and 9, the Declaration states that no service providers retained any data from Clinton's accounts, and thus none could recover any relevant emails. The First Declaration already said as much. Cf. First Decl., ¶ 4. Those paragraphs then add a few more particulars, such as that the FBI complied with its statutory obligations by requesting only "transaction information," like subject lines and e-mail addresses, from the service providers. Any observer could likely so surmise based on 18 U.S.C. § 2703, which limits the scope of electronically stored information available with a grand-jury subpoena. The declaration also reveals that the FBI reissued subpoenas to providers to double check that no data would be available. Again, the bottom line is the same as the FBI's public disclosures: its subpoenas "produced no responsive materials, as the requested data was outside the retention time utilized by those providers." First Decl., ¶ 4. The Government asserts no interest in keeping those details secret, and the Court detects no overriding reason to do so.

That leaves Paragraph 10. This Paragraph, at least ostensibly, adds new information about the scope of subpoenas: when the FBI discovered that Clinton had potentially transmitted classified information to private third-party e-mail accounts, it sought "additional legal process." The paragraph might be read to suggest that the Bureau subpoenaed the provider information of third parties, such as Clinton's staff. But it provides no information on 1) which third parties had classified information, 2) which providers, if any, were subpoenaed, and 3) the returns on any subpoenas. And it is hardly news that the FBI used "legal process" to recover classified information relayed to Clinton's staffers. Most infamously, many a news outlet reported that the

FBI obtained a search warrant for Clinton aide Huma Abedin's emails. See, e.g., Matt Apuzzo *et al.*, Justice Department Obtains Warrant to Review Clinton Aide's Emails, N.Y. Times (Oct. 30, 2016). The First Declaration alludes to the same incident. See First Decl., ¶ 14. Paragraph 10 like the much of what came before it thus reveals little to no secret information. The scale therefore tips once again towards Plaintiffs' need for disclosure.

Finally, Defendants note that even if "this Court does grant [Plaintiffs'] motion . . . , [they] must then proceed to the court which empaneled the grand jury at issue," to allow that court to make a final determination about disclosure. See Def. Opp. at 6. Not so. It is true, as Defendants say, that when the court that empaneled the grand jury differs from the court considering a Rule 6(e) request, the two courts may cooperate. The latter, for instance, might certify the question of disclosure to the grand-jury court. See, e.g., United States v. Alston, 491 F. Supp. 215, 216-217 (D.D.C. 1980). But as the Supreme Court has made clear, "[T]here will be cases in which the court to whom the Rule 6(e) request is directed will be able intelligently . . . to decide that disclosure plainly is inappropriate or that justice requires immediate disclosure to the requesting party, without reference of the matter to any other court." Douglas Oil, 441 U.S. at 231. This is such a case. While the grand-jury court may typically be better positioned to evaluate the need for secrecy, the Defendants here have already let the grand-jury cat out of the bag. For the reasons discussed above, there is little remaining information to keep secret, and this Court can therefore appropriately order disclosure.

IV. Conclusion

For the foregoing reasons, the Court will substantially grant Plaintiffs' Motion to Produce and order that if the Government intends to rely on the Second Priestap Declaration, it must

resubmit an unredacted version (except as to the identity of Clinton's email provider). A contemporaneous Order to that effect will issue this day.

/s/ *James E. Boasberg*
JAMES E. BOASBERG
United States District Judge

Date: August 31, 2017