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House of Representatives

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STAFF DIRECTOR

September 5, 2013

The Honorable John F. Kerry
Secretary
U.S. Department of State
2201 C Street, NW
Washington, D.C. 20520

Dear Mr. Secretary:

As part of the Committee on Oversight and Government Reform's ongoing investigation into the facts and circumstances surrounding the September 11, 2012, attacks on U.S. facilities in Benghazi, on August 1, 2013, the Committee issued a subpoena to you for "all documents provided by the State Department to the Accountability Review Board (ARB)" and "all documents and communications referring or relating to ARB interviews or meetings, including, but not limited to, notes or summaries prepared during and after any ARB interview or meeting." In an August 23, 2013, response, the Department asked the Committee to reconsider the documents outlined in the subpoena. After careful consideration of the Department's request, we have determined that the Department has not cited any valid reason why Congress is not entitled to this information. Failure to produce the materials subpoenaed by the Committee makes our constitutionally mandated review of the ARB's work impossible.¹ This response is inadequate, unjustified, and represents the latest example of the State Department's resistance to congressional oversight of the events surrounding the Benghazi attacks.

Background

On January 28, 2013, my colleagues – Chairman Ed Royce of the House Committee on Foreign Affairs and Chairman Jason Chaffetz of the House Oversight and Government Reform Subcommittee on National Security – and I sent a letter to the State Department requesting documents and information related to the events in Benghazi. Included in this letter was a specific request for "[a] complete list of every individual – including name, title, and agency – interviewed by the ARB for the December 19, 2012, report, **and any documents and communications referring or relating to the interviews.** . . ."²

¹ Letter from Thomas B. Gibbons, Acting Ass't Sec., Leg. Affairs, U.S. Dep't of State, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform (Aug. 23, 2013).

² Letter from Chairmen Darrell Issa, Ed Royce, and Jason Chaffetz to Hon. Hillary Clinton, Sec'y, U.S. Dep't of State (Jan. 28, 2013).

The Department chose not to respond to this inquiry for nearly three months. In a cursory response dated March 29, 2013, the Department stated, “[i]ncluded in the classified version is a list of individuals interviewed by the ARB.”³ The Department did not, however, provide “any documents and communications referring or relating to the interviews,” as requested by the Committees. At the time, and in the following months, the Department expressed no concerns about the substance of this request, and made no attempt to address the Committees’ request. Rather, it simply failed to respond.

On April 15, 2013, the Committees followed up on the Department’s inadequate response with a request for additional information related the ARB review. This request included the following:⁴

1. Whether the Department retained a complete set of documents provided to the [ARB];
2. Whether the Board reviewed the more than 25,000 pages of documents referenced in the March 29, 2013, response letter prior to the issuance of the Board’s report; and,
3. Whether the Department will make the Board’s staff, including but not limited to, all staff listed in 12 FAM 032.3, available to answer specific questions about the Board’s review process.

Once again, the Department failed to respond to the requests from the Committees.

After five months of inaction and silence from the Department on the production of these documents, and left with no alternative, on August 1, 2013, I issued a subpoena for documents relating to the ARB’s review of the events in Benghazi, including documents provided to the ARB and any notes or summaries of interviews conducted by the ARB.

The Department’s Position

At no point prior to the August 1, 2013, subpoena did the Department provide specific objections to requests by this and other congressional committees for material related to the ARB review, other than claiming that providing the requested documents to Congress would chill the work of future Accountability Review Boards. It simply ignored the requests and failed to produce any responsive documents. In its August 23, 2013, response to the subpoena, however, the Department expressed “grave concerns about the Committee’s unprecedented request for documents from the files of the ARB.”⁵

³ Letter from Thomas B. Gibbons, Acting Ass’t Sec., Leg. Affairs, U.S. Dep’t of State, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov’t Reform (Mar. 29, 2013).

⁴ Letter from Chairmen Darrell Issa, Ed Royce, and Jason Chaffetz to Hon. John Kerry, Sec’y, U.S. Dep’t of State (Apr. 15, 2013).

⁵ Letter from Thomas B. Gibbons, Acting Ass’t Sec., Leg. Affairs, U.S. Dep’t of State, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov’t Reform (Aug. 23, 2013).

According to the Department, the Committee's request "inappropriately intrudes into the investigative process in a way that threatens to undermine the ability to conduct independent and effective ARBs in the future."⁶ The Department argues that the provisions of the existing statute - enacted by Congress - "evidence a framework that is designed to protect the internal deliberations and processes of ARBs."⁷ The Department cites its "longstanding precedent" of not disclosing ARB files as important to maintaining the framework envisioned by existing statute.⁸ The Department does not, however, provide any examples of previous requests for ARB files that serve as the basis for this precedent. Nor does the Department cite a statute or rule to support its position. In fact, as quoted above, the Department claimed the Committee's request is "unprecedented." Moreover, the Department has given the Committee no indication that the documents it must produce pursuant to the subpoena may be subject to an assertion of executive privilege by the President.

The Department also argues that disclosure of ARB files "would have a chilling effect on future ARBs."⁹ According to the Department, such a disclosure could "decrease the willingness of witnesses to cooperate with an ARB and cause them to be less forthcoming and expansive in their responses to questions."¹⁰ This statement completely ignores the fact that interviews with an ARB are not voluntary. The Board possesses the tools, including the ability to serve subpoenas and obtain testimony under oath, to obtain the information necessary to conduct its review.

In addition, the Department believes that disclosure of internal files will "chill open and candid discussion and deliberation among ARB members and would potentially discourage qualified individuals from serving on an ARB."¹¹ This statement is puzzling. The ARB is a congressionally mandated review. Any Board member unwilling to have the Board's conclusions subject to independent congressional oversight can choose not to participate.

The Department further states that ARBs "cannot function effectively if they are perceived to be conduits for Congress[.]"¹² The Department appears to suggest that it views the ARB process as a way of concealing methods and information from Congress, presenting only a final report without revealing anything that informs, supports, or was potentially excluded from the report.

The Department asked the Committee to "respect the integrity of the ARB working files, just as congressional committees have traditionally respected the internal files of analogous investigative bodies such as Offices of Inspectors General."¹³ As the Chairman of the committee responsible for oversight of the community of Inspectors General, I am quite familiar with the Committee's investigative prerogatives for such "analogous investigative bodies." This

⁶ *Id.* at 2.

⁷ *Id.* at 3.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

Committee routinely requests and receives internal investigative files from the IG community, including unredacted documents and transcripts of testimony obtained in the course of IG investigations. I encourage you, therefore, to respect the importance of congressional oversight and adopt a position that is more in line with “analogous investigative bodies.”

The Department further justifies withholding this information from the Committee based on its belief that the Committee “has already had ample and unprecedented access to the ARB’s work.” To support this position, the Department cites the Committee’s access to the classified and unclassified versions of the ARB report. While helpful, the final product does not clarify what information the ARB obtained or reviewed in the course of generating the final report. The Department’s own statements have contributed to the Committee’s lack of clarity on this matter. For example, in the March 29, 2013, response to the Committee, the Department stated that the 25,000 pages made available to Congress, “also were available to the ARB during the course of its investigation.”¹⁴ The Department refused to specify which of those 25,000 documents the ARB reviewed. In the August 23, 2013, response to the subpoena, however, the Department offered – for the first time – to discuss the “approximately 7,000 State Department documents, numbering thousands of pages, that are known to have been received by the ARB as part of its investigation.”¹⁵

The Department has presented the ARB’s work and findings as an independent review. At the same time, it has refused to comply with the Committee’s subpoena for relevant documents. This refusal raises serious questions about the ARB’s independence. If the ARB’s work reflected a truly independent review, as the Department maintains, it should present no problem whatsoever to share all relevant documents with Congress.

The Department also points to selected statements from witnesses during transcribed interviews as evidence that the Committee has all the information necessary to assess the thoroughness and completeness of the ARB. A number of witnesses did, as the Department observed, suggest that the ARB was thorough and tough. The Department omits, however, the numerous statements made by witnesses that otherwise question the ARB’s findings or recommendations. For example, senior officials cited areas where they felt the report was unclear or could have gone further to reflect new realities facing foreign service officers.

Testimony from witnesses also raises concern about how the ARB vetted or corroborated information prior to reaching their conclusions, especially related to accountability. For example, Ambassador Elizabeth Jones, the Acting Assistant Secretary for NLA and her deputy, Elizabeth Dibble, both questioned the propriety or relevance of the ARB’s finding regarding Raymond Maxwell. While both agreed it was inappropriate for him to stop attending the daily intelligence read-book meetings, neither found his conduct detrimental to his performance. They agreed that it had no bearing on the security posture of the U.S. mission in Benghazi.

¹⁴ Letter from Thomas B. Gibbons, Acting Ass’t Sec., Leg. Affairs, U.S. Dep’t of State, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov’t Reform (Mar. 29, 2013).

¹⁵ Letter from Thomas B. Gibbons, Acting Ass’t Sec., Leg. Affairs, U.S. Dep’t of State, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov’t Reform (Aug. 23, 2013), at 5.

The ARB's conclusions about Maxwell were based on information that Maxwell himself conveyed in his interview with the Board. There was no further evaluation or effort to understand what, if any, of the conduct criticized by the ARB had on the security of U.S. facilities in Benghazi. In fact, senior supervisors, including Ambassador Jones, testified that the ARB never asked them about the conduct by their subordinates that was criticized in the ARB report. Senior officials, including those held accountable by the State Department, also expressed disappointment that they were not given an opportunity to comment on the ARB's conclusions regarding their conduct.

The testimony obtained from Dibble, Jones, and other senior officials raised serious questions about the ARB's conclusions regarding accountability. Since the Department relied on these conclusions to relieve individuals of their duties and place them on administrative leave for eight months, the Committee needs to better understand the basis for these findings. This information, therefore, is important to understand what was conveyed to the ARB through documents and interviews. In addition, witnesses provided contradictory testimony that must be resolved. Since the ARB did not transcribe its interviews, these documents are the only record available to corroborate what was said to or reviewed by the ARB.

The Department also seemingly reserves the right to further restrict the congressional investigation due to a purported ongoing criminal investigation. The Department has provided no information, however, about the status of any ongoing criminal investigation. The existence of a parallel criminal investigation does not obviate the need for effective congressional oversight. It did not appear to be an issue during the Department's own internal ARB investigation, or during Mr. Sullivan's external review.

Finally, the Department argues that the testimony provided to the Committee by Ambassador Pickering and Admiral Mullen, combined with their public statements, should undoubtedly answer all of the Committee's questions about the ARB investigation. Contrary to the implication in the Department's August 23 letter, the Committee's interest in internal ARB files does not equate to "questioning the integrity or competence of Ambassador Pickering and Admiral Mullen."¹⁶ These two men, and the other members of the Board, have served this country with distinction and honor, and their work on the Benghazi ARB is no exception. Their prior and future testimony is invaluable to the Committee's interest in learning from the past to improve the ARB process for the future.

Conclusion

In order to ensure that its investigation proceeds responsibly, the Committee is willing to engage in a cooperative dialog with the Department. The Committee shares the Department's interest in moving forward "to ensure that we as the United States government do our best to protect our diplomats and development experts who serve on the frontlines every day."¹⁷ The Department, however, seeks to move forward without a thorough examination of the facts and

¹⁶ Letter from Thomas B. Gibbons, Acting Ass't Sec., Leg. Affairs, U.S. Dep't of State, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform (Aug. 23, 2013), at 5.

¹⁷ *Id.* at 6.

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circumstances surrounding the attacks in Benghazi, and will not allow any independent assessment of the ARB's work. Rather than living up to its stated interest in "working together" with Congress, the Department continues to demonstrate a blatant disregard for legitimate congressional oversight.

The documents in question are critical to the Committee's review of the ARB. For over six months, the Department ignored the Committee's interest in this material. Only now, and under a subpoena, does the Department raise objections to the Committee's desire to review this information. Understanding what information the ARB requested, received and reviewed is crucial to the Committee's evaluation of this process. In addition, determining how the ARB arranged, conducted, and recorded interviews is necessary to gain important insight into the processes and procedures of the ARB. Finally, a record of these interviews is important in developing the Committee's understanding of what information was conveyed to the ARB.

The State Department cannot dictate the terms of Congress's constitutional authority and responsibility for oversight. I urge you to reconsider the Department's position so that we can learn from the past and work together to consider additional reforms that will benefit our overseas missions and the brave men and women who serve our interests across the globe. Please also provide, in writing, valid legal justification of the Department's position to withhold documents, including whether any documents are subject to a valid assertion of privilege, as soon as possible, but by no later than September 19, 2013.

Thank you for your attention to this important matter. Please contact Jonathan Skladany or Brien Beattie of the Majority staff at (202) 225-5074 with any further questions.

Sincerely,



Darrell Issa
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Minority Member