

June 18, 2020

The Honorable Stephen J. Akard
Acting Inspector General
U.S. Department of State
SA-39
1700 North Moore Street
Alexandria, VA 22209

Re: Request for Investigation of State Department Response to Congressional Oversight Requests

Dear Inspector General Akard,

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully requests that the Office of Inspector General (“OIG”) investigate the State Department’s documented recalcitrance in response to congressional oversight requests from Democratic congressional committee chairs, as well as allegations that the State Department (“Department”) has politicized its approach to several high-profile congressional investigations. In particular, the Department has failed to provide documents, information, and witnesses in response to requests from Democratic committee chairs with direct legislative authority over the agency, but at the same time has provided prompt and voluntary compliance with requests from Republican committee chairs investigating political rivals of President Trump.

If true, these allegations regarding the Department’s handling of congressional inquiries indicate conduct inconsistent with executive branch policy, Department protocols, and federal statutes barring the obstruction of federal employees communicating with Congress. CREW, therefore, respectfully requests that the OIG conduct a review to determine whether the Department’s employees are working to accommodate requests of congressional committee chairs regardless of their political party, in a manner consistent with applicable executive branch and Department policies, as well as federal appropriations laws, and whether the Department has sufficient policies and internal controls to ensure timely and adequate responses to congressional oversight requests.¹

Factual Background

There is substantial evidence that Department employees have executed President Trump’s directive to only cooperate with Republican oversight requests, including a partisan investigation aimed at the President’s political rival, former Vice President Joe Biden, while

¹ Given your dual leadership role as Director of the Office of Foreign Missions’ (“OFM”) while serving as Acting Inspector General, if there is a reasonable likelihood that this investigation would include a review of OFM’s handling of congressional requests, we request that you honor your previously reported commitment to recuse yourself from matters related to OFM.

stonewalling and stymieing Democratic requests for documents and information perceived to be politically damaging to the President.

Trump White House Issues Partisan Directive on Oversight

In 2017, the White House reportedly instructed federal agencies to refuse congressional oversight requests from Democrats in an effort to “head off possible attacks on President Donald Trump.”² According to public reports, then-Deputy Counsel to the President Uttam Dhillon instructed top agency officials to “disregard requests for information from Democrats,” who were then in the minority in both the House of Representatives and the Senate.³ According to a June 2017 *Politico* article, Republican sources inside and outside the Administration corroborated the existence of this White House directive, saying, “The idea . . . is to choke off the Democratic congressional minorities from gaining new information that could be used to attack the [P]resident.”⁴ This directive followed an opinion from the Department of Justice’s Office of Legal Counsel (“OLC”) stating that “[i]ndividual members of Congress, including ranking minority members” lack the legal authority to conduct oversight without a specific delegation from the full chamber, committee, or subcommittee.⁵

The Trump Administration maintained its partisan directive regarding congressional oversight after Democrats took control of the House in 2019.⁶ Since, President Trump has made clear both in public statements and in action that his administration will only submit to oversight from Republicans chairs in the Senate and will ignore oversight requests from Democratic committee chairs in the House.⁷ For example, in 2019, Pompeo told Rep. Eliot Engel, Chairman of the House Committee on Foreign Affairs, Rep. Adam Schiff, Chairman of the House Intelligence Committee, and Rep. Elijah Cummings, Chairman of the House Oversight Committee, that five current and former State Department officials would not appear for depositions scheduled by the Democratic chairmen, citing, “insufficient time” for them to prepare, and questioning the chairmen’s authority to compel the appearances.⁸ House Democratic chairs also sued the administration in federal court to compel compliance with duly authorized subpoenas for documents and witness testimony.⁹ More recently, in May 2020, the

² Gabrielle Levy, White House Blocks Democrats' Oversight Efforts, *U.S. News & World Report*, June 2, 2017, <https://bit.ly/2XP8rCe>.

³ *Id.*

⁴ Burgess Everett and Josh Dawsey, White House Orders Agencies to Ignore Democrats' Oversight Requests, *Politico*, June 2, 2017, <https://politi.co/36RwKDA>.

⁵ U.S. Department of Justice, Office of Legal Counsel, Letter Opinion for the Counsel to the President: Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch, May 1, 2017 (“OLC Letter Opinion”), <https://www.justice.gov/olc/file/966326/download>.

⁶ Kevin Breuninger and Christina Wilkie, Trump: ‘We’re Fighting All the Subpoenas’ from House Democrats, *CNBC*, Apr. 24, 2019, <https://cnb.cx/3cIt8oM>.

⁷ Kevin Liptak, Trump Says He Only Will Submit to GOP Oversight for His Administration, *CNN*, May 5, 2020, <https://cnn.it/30kbzZJ>.

⁸ Cristina Marcos, House Committee Chairs Warn Pompeo that Stonewalling Could be Used as Evidence of Obstruction, *The Hill*, Oct. 1, 2019, <https://bit.ly/37swaN8>.

⁹ David Morgan, House Approves Authority to Sue Trump Advisers who Ignore Subpoenas, *Reuters*, June 11, 2019, <https://reut.rs/3cI7txc>; see also Andrew Desiderio and Kyle Cheney, Oversight Panel Sues William Barr, Wilbur Ross over 2020 Census Documents, *Politico*, Nov. 26, 2019, <https://politi.co/3cNhZD3>.

White House blocked Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases, from testifying before a Democrat-led House panel on the Administration's response to the coronavirus, but allowed him to appear at a Republican-controlled Senate hearing on May 12, 2020.¹⁰ On May 5, 2020, the President explained the decision stating, “[t]he House is a bunch of Trump-haters,”¹¹ effectively admitting that he “was looking to prevent Democrats from conducting their oversight duties . . . even as he’s willing to allow Republicans to proceed.”¹²

Allegations of Selective Oversight Compliance at the State Department

The Department has executed President Trump’s directive by actively cooperating with congressional oversight requests from Republican committee chairs in the Senate while ignoring inquiries from Democratic committee chairs in the House, as well as Senate Democrats.¹³ For example, the Department appears to be eagerly complying with a Senate oversight investigation seemingly designed to harm the Democratic party’s presumptive nominee for president while ignoring requests that could be damaging to President Trump.¹⁴ In November 2019, Republican Senators Ron Johnson, Chairman of the Senate Homeland Security and Governmental Affairs Committee (“HSGAC”), and Chuck Grassley, Chairman of the Senate Finance Committee (“SFC”), wrote to Secretary of State Mike Pompeo requesting information about how a consulting firm hired by Burisma Holdings allegedly tried to leverage Biden’s son’s role on the Burisma board, including to influence Department matters.¹⁵ Despite impeachment proceedings, which featured several Department witnesses, and the coronavirus pandemic, the Department voluntarily produced thousands of pages of documents to both Chairman Johnson and Chairman Grassley in February and April 2020.¹⁶ These responses, however, only addressed requests made by the Republican Chairs and ignored requests made by SFC Ranking Member Ron Wyden.¹⁷

In stark contrast to the Department’s prompt and voluntary compliance with oversight requests from Republican committee chairs, the Department has continually failed to provide documents, information, and witnesses in response to requests from Democratic committee chairs with direct legislative authority over the agency. These unfulfilled oversight requests include multiple inquiries from Chairman Engel and other Democratic chairs dating back to

¹⁰ Liptak, *CNN*, May 5, 2020.

¹¹ The White House, Remarks by President Trump Before Marine One Departure, WhiteHouse.gov (May 5, 2020; 10:21A.M.), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-89/>.

¹² Liptak, *CNN*, May 5, 2020.

¹³ Letter from House Committee on Foreign Affairs Chairman Eliot L. Engel to Secretary of State Mike Pompeo, May 21, 2020 (“Engel Letter”), <https://bit.ly/2MCNKEf>.

¹⁴ See Emma Loop, A Top Democrat Says The State Department Has Sent Republicans Thousands Of Pages For Their Biden Investigation While Ignoring Democratic Requests, *Buzzfeed*, May 6, 2020, <https://bit.ly/2Uhq1g3>.

¹⁵ Letter from Senate Finance Committee Chairman Charles E. Grassley and Senate Homeland Security and Governmental Affairs Committee Chairman Ron Johnson to Secretary of State Michael R. Pompeo, Nov. 7, 2019, <https://bit.ly/2APraWB>.

¹⁶ Letter from Senate Finance Committee Ranking Member Ron Wyden to Secretary of State Michael Pompeo, at 1-2, May 6, 2020 (“Wyden Letter”), <https://bit.ly/2MCNKEf>; Engel Letter at 2.

¹⁷ Wyden Letter at 2; Loop, *Buzzfeed*, May 6, 2020.

February 2019.¹⁸ Chairman Engel has indicated that many of these investigations relate to “serious allegations” about the President’s conflicts of interest and abuse of the power of his office.¹⁹ At least three of these requests have been outstanding for more than a year.²⁰

On May 21, 2020, in a letter to Secretary Pompeo, Chairman Engel documented how the Department has repeatedly ignored his requests while voluntarily supplying thousands of pages of documents to the SFC and HSGAC despite the ongoing coronavirus pandemic and the fact that neither of these Republican-led committees has primary jurisdiction over the Department.²¹ Chairman Engel explained:

The Department has refused to provide the information the Committee has requested, and frequently produced nothing at all, in response to these requests. In the case of the impeachment inquiry, the Department’s posture was an unprecedented blanket defiance of a duly authorized subpoena and attempts to muzzle key witnesses.²²

At least one Department political appointee, Undersecretary of State for Management Brian Bulatao, instructed several agency officials “not to provide testimony to Congress.”²³ They include: Ambassador Gordon Sondland (October 7, 2019); Deputy Assistant Secretary of State George Kent (October 10, 2019); Ambassador Marie Yovanovitch (October 10, 2019); and Counselor of the Department T. Ulrich Brechbuhl (October 10, 2019).²⁴ Chairman Engel described this disparate treatment as a “partisan misuse” of Department resources to “assist Senate Republicans in a political smear of Democratic presidential nominee and former Vice President Joe Biden.”²⁵

Potential Subjects of Investigation

The Department’s recalcitrance to oversight by Democratic committee chairs, particularly in light of its apparent compliance with Republican requests regarding Burisma, suggests that agency officials are in violation of executive branch and Department policy, as well as federal laws regarding agency employees’ communications with Congress. It also may suggest that the Department lacks adequate guidance or internal controls to ensure prompt compliance with oversight requests from committee chairs without regard to political affiliation.

¹⁸ Letter from House Committee on Foreign Affairs Chairman Eliot L. Engel, House Committee on Oversight and Reform Chairman Elijah E. Cummings, and House Permanent Select Committee on Intelligence Chairman Adam to Secretary of State Michael R. Pompeo, Sept. 27, 2019, <https://bit.ly/3d3b9d7>; Engel Letter at 1; Letter from House Committee on Foreign Affairs Chairman Eliot Engel and House Committee on Foreign Affairs Subcommittee on Oversight and Investigations Chairman Joaquin Castro to Secretary of State Michael R. Pompeo, May 18, 2020, <https://bit.ly/2MC293G>.

¹⁹ Engel Letter at 1.

²⁰ *Id.*

²¹ *Id.* at 2.

²² *Id.* at 1-2.

²³ *Id.* at 2, n.2.

²⁴ *Id.*

²⁵ *Id.* at 1.

Executive Branch Policy

The Executive Branch has a longstanding policy to engage in an “established process” for accommodating congressional requests for information without regard to partisanship.²⁶ On May 1, 2017, OLC issued a Letter Opinion titled *Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch* in which Acting Assistant Attorney General Curtis E. Gannon explained that the “Executive Branch’s longstanding policy has been to engage in the established process for accommodating congressional requests for information only when those requests come from a committee, subcommittee, or chairman constitutionally authorized to conduct oversight.”²⁷ The “established process” prescribes that upon receipt of a “properly authorized” oversight request—i.e., from a committee chairman—the Executive Branch will “engage in the accommodation process by supplying the requested information ‘to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch.’”²⁸ Shortly after the release of OLC’s memo, a White House spokeswoman told *Politico* that the Trump administration’s policy is “to accommodate the requests of chairmen, regardless of their political party.”²⁹ At that time, however, Republicans controlled both chambers of Congress, so there were no Democratic committee chairs.

The State Department’s apparent noncompliance with requests made by Democratic chairs appears to directly conflict with the executive branch’s longstanding policy and established process, which prohibits Department employees from purposefully ignoring inquiries from committee chairs. According to Chairman Engel, however, more than a dozen of his oversight requests to the Department are past due, or the Department has produced nothing at all, in some cases, for more than a year.³⁰ As Chairman Engel wrote in his recent letter to Secretary Pompeo, the Department’s “striking failure” to produce documents responsive to a long list of requests from the House Committee on Foreign Affairs stands in stark contrast to the “trove” of documents provided to Republican committee chairs of SFC and HSGAC.³¹ The Department’s quick and fulsome response to these inquiries about Burisma and the Bidens, despite the coronavirus pandemic, makes clear that the Department is able to fulfil such requests when it desires to do so. Given the numerous unfulfilled requests from Chairman Engel and other committee Democrats, it seems highly likely that the Department’s apparent disregard of Democrats’ requests violates executive branch policy regarding compliance with congressional oversight without regard to the party of the requester.

²⁶ OLC Letter Opinion at 1.

²⁷ *Id.*

²⁸ *Id.* at 3 (citing Congressional Research Service, *Congressional Oversight Manual*, at 56, Dec. 19, 2014, <https://bit.ly/30mvR4E> (“Individual Members, Members not on a committee of jurisdiction, or minority Members of a jurisdictional committee, may, like any person, request agency records. When they do, however, they are not acting pursuant to Congress’s constitutional authority to conduct oversight and investigations.”))

²⁹ Everett and Dawsey, *Politico*, June 2, 2017.

³⁰ Engel Letter at 1.

³¹ *Id.*

State Department Policies and Protocols

In addition to the executive branch's longstanding policies related to congressional oversight, the Department also has explicit directives related to responding to congressional letters and subpoenas. While these policies do not specifically address all of the situations in which the Department has failed to respond to oversight requests, they do not authorize the Department to promptly and fully respond to committee chairs from one political party while ignoring those from chairs of another party. Unfortunately, it appears that the Department's compliance with many requests from Democratic committee chairs failed to meet even this low bar, and that the Department may need more robust standards.

With regard to responding to congressional letters, the Department's general directive provides: "Officers must draft Congressional letters promptly and address the immediate request."³² Responses to congressional letters also must receive "final clearance and signature" by the Assistant Secretary for Legislative Affairs, who reports directly to the Secretary of State.³³ Separate guidance regarding compliance with congressional subpoenas provides, among other things, that the same official must authorize subpoena responses:

Any subpoena served on behalf of a committee of Congress, for official records or for testimony of an employee, on matters within the scope of their official responsibility will be brought to the attention of the Assistant Secretary for Legislative and Intergovernmental Affairs (H), the Office of the Legal Adviser (L), and the Under Secretary for Management (M). No response shall be made to any Congressional subpoena except upon the specific authorization of the Assistant Secretary for Legislative and Intergovernmental Affairs.³⁴

The Department's documented policies for preparing responses to congressional oversight requests and subpoenas prioritize providing timely responses and create a "multistage process" to ensure compliance,³⁵ including review and approval by senior Department officials.³⁶ Department guidelines do not appear to include any directives that specifically apply to concerns of partisanship, but nothing in these policies permits or directs Department employees to be unresponsive to oversight requests from committee chairs of one political party while prioritizing

³² 5 Foreign Affairs Handbook [FAH]-1 H-521 (Oct. 2018) (Preparing Congressional Letters, General), <https://fam.state.gov/FAM/05FAH01/05FAH010520.html>.

³³ 5 FAH-1 H-528 (Oct. 2018) (Preparing Congressional Letters, Assembly and Dispatch), <https://fam.state.gov/FAM/05FAH01/05FAH010520.html>; Department of State Organization Chart, Feb. 2020, <https://www.state.gov/department-of-state-organization-chart/>; Bureaus and Offices Reporting Directly to the Secretary, U.S. Department of State, <https://www.state.gov/bureaus-offices/bureaus-and-offices-reporting-directly-to-the-secretary/>.

³⁴ 2 Foreign Affairs Manual [FAM] 511.5 (June 2016) (Assistant Secretary for Legislative and Intergovernmental Affairs (H)) (emphasis added), https://fam.state.gov/FAM/02FAM/02FAM0510.html#M511_5.

³⁵ GAO, Report to the Chairman, Subcommittee on Financial and Contracting Oversight, Committee on Homeland Security and Government Affairs, U.S. Senate, STATE DEPARTMENT: Process to Track Responses to Congressional Correspondence Can Be Improved, GAO-14-424, at 1-5, May 2014, <https://www.gao.gov/assets/670/663331.pdf>.

³⁶ 5 FAH-1 H-528 (Oct. 2018) (Preparing Congressional Letters, Assembly and Dispatch).

another party's requests. OIG should investigate the allegations described by Chairman Engel and whether the Department's internal policies are sufficient to prohibit and prevent partisan recalcitrance or responsiveness to congressional oversight inquiries. While Chairman Engel's account suggests that the State Department has not cleared even the lowest hurdle for compliance with his requests, the Department's guidance related to congressional letters is painfully thin and does not fully address the kind of misconduct alleged here. If Department employees are in violation of existing policy or if the Department lacks sufficient written guidance, then the OIG should make recommendations to ensure that the Department's policies and its employee's conduct are consistent with executive branch policy and federal law.

Federal Appropriations Law

Since 1998, annual appropriations acts each year have contained a government-wide prohibition on the use of appropriated funds to "pay the salary of any federal official who prohibits or prevents another federal employee from communicating with Congress."³⁷ Specifically, the provision provides:

No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who . . . prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee . . .³⁸

Language prohibiting payment of employees' salaries if they are involved in obstructing congressional inquiries has been carried forward into annual fiscal years appropriations and continuing appropriations, including in the 2019 Consolidated Appropriations Act, which specifically provides appropriations to the Department.³⁹

The Government Accountability Office ("GAO") most recently opined on this provision in 2016 when it concluded that the Department of Housing and Urban Development ("HUD") appropriation was not available to pay the salaries of two HUD officials, because it found that

³⁷ GAO, Office of the General Counsel, Principles of Federal Appropriations Law: Chapter 3, Availability of Appropriations: Purpose, Fourth Edition, 2017 Revision, GAO-17-797SP, at 298, Sept. 14, 2017, <https://www.gao.gov/assets/690/687162.pdf> (citing Pub. L. No. 105-61, § 640, 111 Stat. 1272, 1318, (the Treasury and General Government Appropriations Act (1998))).

³⁸ Treasury and General Government Appropriations Act, 1998, H.R. 4104, 105th Cong., § 640 (1998).

³⁹ Consolidated Appropriations Act, 2019, H.J. Res. 31, 116th Cong., § 713, (2019) ("This section prohibits the use of funds to prevent federal employees from communicating with Congress or to take disciplinary or personnel actions against employees for communicating with Congress.").

their communications with congressional staff, as well as with a third HUD employee, “resulted in prohibiting or preventing, or attempting or threatening to prohibit or prevent, [the third] HUD employee from communicating with Congress.”⁴⁰ GAO concluded that despite HUD’s decision to ultimately produce the requested witness without a subpoena, the ongoing dialogue about the congressional request ceased to “reflect a continuing negotiation of mutual accommodation with the committee to reach resolution of its request” and instead “the delay became a denial to make the [the third HUD employee] available for interview.”⁴¹

It is highly likely that one or more Department employees have violated federal law by prohibiting or preventing a federal officer from communicating with Congress. The Trump administration’s directives regarding congressional oversight make clear that President Trump does not want federal agencies to make documents or witnesses available to Democratic members of Congress. Given the Department’s numerous unfulfilled requests documented by Chairman Engel, as well as its cooperation with Senate Republicans’ investigation into Burisma, the Department appears to be implementing the President’s strategy for obstruction. As Chairman Engel noted, the Department “has refused to provide the information the Committee has requested, and frequently produced nothing at all, in response to these requests.”⁴² In addition, Chairman Engel has already identified at least one political appointee at the Department involved in instructing four Department “officials not to provide testimony to Congress.”⁴³ These facts, if true, go far beyond obstructive conduct that has been previously found to violate federal appropriations law.

Conclusion

Congressional oversight is essential to the legislative process and the system of checks and balances enshrined in the Constitution. The Department’s documented recalcitrance to congressional oversight requests from Democratic committee chairs clearly violates the executive branch’s “longstanding policy,” as well as the Department’s purported processes for providing timely responses to Congress. Federal law also prohibits the use of appropriated funds to pay the salary of any Department employee who prohibits or prevents, or attempts or threatens to prohibit or prevent, another federal officer or employee from communicating with Congress.

⁴⁰ GAO, Department of Housing and Urban Development—Application of Section 713 of the Financial Services and General Government Appropriations Act, 2012 (Reconsideration), B-325124.2, Apr. 5, 2016, <https://www.gao.gov/products/D13038>.

⁴¹ Letter from GAO General Counsel Susan Poling to Sen. Charles Grassley, *et al.*, Re: Department of Housing and Urban Development—Application of Section 713 of the Financial Services and General Government Appropriations Act, 2012 (Reconsideration), B-325124.2, at 15, Apr. 5, 2016, <https://www.gao.gov/assets/680/676341.pdf>; *see also* GAO, Department of Health and Human Services—Chief Actuary's Communications with Congress, B-302911, Sept. 7, 2004 (finding that the provision precluded the payment of the Centers for Medicare & Medicaid Services director's salary because he specifically prevented another employee from communicating with Congress), <https://www.gao.gov/assets/380/372162.pdf>.

⁴² Engel Letter at 1.

⁴³ *Id.* at 2.

Hon. Stephen J. Akard

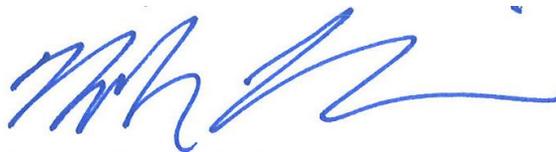
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The Department's recalcitrance to oversight requests from Democratic members of congress demands review by OIG.⁴⁴

The Department's voluntary and efficient cooperation with document requests from Republican Senate chairs regarding the Bidens and Burisma, while refusing to comply with numerous requests for information and testimony from Chairman Engel suggests a more nefarious purpose that has substantial legal implications. CREW therefore requests that the OIG investigate the Department's policies and actions by employees related to congressional oversight to determine any deficiencies or misconduct.

Sincerely,



Noah Bookbinder
Executive Director

⁴⁴ In one recent instance, the State Department was able to reach an accommodation with Chairman Engel. On June 12, 2020, Engel wrote to Secretary Pompeo to accept his "offer to permit Under Secretary for Management Brian Bulatao to appear at a hearing before the Committee on Foreign Affairs in the matter of the firing of State Department Inspector General Steve A. Linick." Letter from House Committee on Foreign Affairs Chairman Eliot Engel to Secretary of State Mike Pompeo, June 12, 2020, <https://bit.ly/2Y7DF9b>. As GAO has noted, under federal appropriations law, eventual compliance is not a defense for an extended delay in cooperating with a congressional request. GAO, Department of Housing and Urban Development—Application of Section 713 of the Financial Services and General Government Appropriations Act, 2012 (Reconsideration), B-325124.2, at 15, Apr. 5, 2016. Moreover, compliance with one request does not excuse or defend the Department's numerous failures to provide prompt responses to other requests. Indeed, this accommodation demonstrates that the Department can engage in constitutionally required negotiation and accommodation when it chooses, and that it has failed all too often to do so in response to Chairman Engel and his Democratic colleagues.