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June 6, 2016

VIA CERTIFIED MAIL & EMAIL

The Honorable John F. Kerry
Secretary of State
Office of the Secretary
U.S. Department of State
Room 7226
2201 C Street, NW
Washington, DC 20520
c/o: schramzi@state.gov; stvensonsn@state.gov

The Honorable Steve A. Linick
Inspector General
Office of Inspector General
U.S. Department of State
Room 8100, SA-3
2201 C Street, NW
Washington, DC 20520-0308
oighotline@state.gov; linicksa@state.gov

Re: Request for Referral to the Attorney General for the Intentional and Unlawful Alteration of a Federal Record by State Department Employees

Dear Secretary Kerry and Inspector General Linick:

I write on behalf of Cause of Action Institute, a nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.¹ In carrying out its mission, Cause of Action Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability.

¹ See CAUSE OF ACTION INSTITUTE, *About*, www.causeofaction.org/about/.

As you are both aware, the State Department (“Department”) has admitted that an individual in the Bureau of Public Affairs ordered an as-of-yet unnamed staffer to delete approximately eight minutes from the video record of the Department’s December 2, 2013 press briefing. Although the video has now been restored, this deletion raises numerous questions about the State Department commitment to transparency and honest dealing with the American public.

It also has possible criminal implications. It is a federal crime to unlawfully remove, destroy, or mutilate a federal record.² The State Department has also revealed that this unnamed staffer did not act alone but that she received a phone call and was told to alter the record. This raises concerns about aiding and abetting or conspiracy under 18 U.S.C. § 371. As Secretary Kerry has stated, it is imperative that the country find out “exactly what happened and why” as it is inappropriate for individuals who engage in this behavior to be employed by the federal government.³

As the head of the State Department and its Office of Inspector General, respectively, you each have an obligation to refer matters to the Attorney General whenever there is a reason to believe that a violation of federal criminal law has occurred. Secretary Kerry has an obligation under 28 U.S.C. § 535(b) to report to the Attorney General “[a]ny information, allegation, matter, or complaint witnessed, discovered, or received in a department or agency of the executive branch of the Government relating to violations of Federal criminal law involving Government officers and employees.”⁴ This is a mandatory requirement, as the statute requires that the allegation or information relating to such criminal violation “*shall* be expeditiously reported.”⁵ Likewise, Inspector General Linick has an obligation under the Inspector General Act of 1978, as amended, to report “to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law.”⁶ This is a mandatory requirement, as the statute requires that “each Inspector General *shall* report expeditiously.”⁷

To date, there is no evidence that federal authorities have begun any criminal investigation of State Department staff conduct under 18 U.S.C. § 2071 regarding this matter. Moreover, the State Department has stated it would no longer investigate this matter, even with

² 18 U.S.C. § 2071.

³ The Associated Press, *Kerry: Doctoring of State Dept video ‘stupid and clumsy,’* POLITICO.COM, June 3, 2016, <http://goo.gl/OiA7P4>.

⁴ 28 U.S.C. § 535(b).

⁵ *Id.* (emphasis added); see also *In re Lindsey*, 158 F.3d 1263, 1274 (D.C. Cir. 1998) (28 U.S.C. § 535(b) “evinces a strong congressional policy that executive branch employees must report information relating to violations of Title 18, the federal criminal code. As the House Committee Report accompanying section 535 explains, the purpose of the provision is to require the reporting by the departments and agencies of the executive branch to the Attorney General of information coming to their attention concerning any alleged irregularities on the part of officers and employees of the Government.”) (citations and internal quotation marks removed); *In re Grand Jury Proceedings*, No. 98-148, 1998 WL 272884, at *2 (D.D.C. May 22, 1998) (“[U]nder section 535(b), Congress imposed a duty on all executive branch personnel to report criminal activity by government officers and employees to the Attorney General”); *Agunbiade v. United States*, 893 F. Supp. 160, 163 (E.D.N.Y. 1995) (28 U.S.C. § 535(b) “contain[s] mandatory language requiring that complaints alleging violations of Title 18 on the part of government officials expeditiously be brought to the attention of the Attorney General”).

⁶ 5 U.S.C. App. (Inspector General Act) § 4(d).

⁷ *Id.* (emphasis added).

considerable gaps in the information still outstanding.⁸ Accordingly, this letter is written to request that you immediately refer and report the relevant staff to the Attorney General for possible criminal violations of this statute arising from their alteration of the video record of the Department's December 2, 2013 press briefing.

Discussion

On December 2, 2013, Fox News reporter James Rosen asked then-State Department spokesperson Jen Psaki whether it was State Department policy to lie in order to achieve its policy goals.⁹ Psaki responded "I think there are times where diplomacy needs privacy in order to progress. This is a good example of that."¹⁰ More than three years later, White House Deputy National Security Advisor Ben Rhodes gave an interview to the *New York Times* where he bragged about his ability to mislead reporters who cover foreign policy.¹¹ Following this story, Rosen recalled his earlier question to Psaki and tried to retrieve the video record of the question.¹² Rosen discovered that his question and Psaki's answer had been excised from the video file and had been replaced with a white flash.¹³ When this issue was brought to the State Department's attention, it initially claimed "[t]here was a glitch in the . . . video[.]"¹⁴

On June 1, 2016, the State Department recanted its claim that a "glitch" was responsible and instead admitted "that a specific request was made to excise that portion of the briefing. [It did] not know who made the request to edit the video or why it was made."¹⁵ State Department spokesman John Kirby expressed surprise that "the Bureau of Public Affairs did not have in place any rules governing this type of action. . . . [so there is] little foundation for pressing forward with a formal investigation. . . . [because] there were no rules, no regulations in place that prohibited this. So I feel like we did due diligence[.]"¹⁶ Instead, Kirby suggested the remedy was for State to "craft[] specific language . . . [to] prevent[] it from happening again."¹⁷

Contrary to spokesman John Kirby's statement that no rules govern the alteration or destruction of records, several legal authorities apply. First, 18 U.S.C. § 2071 makes it a federal crime to destroy federal records. Second, the Federal Records Act establishes record preservation requirements and prohibits the alteration or destruction of any federal record. Third, National Archives and Records Administration regulations clarify that the "penalties for

⁸ Julian Hattem, *State Department refuses to reopen probe into edited video*, THE HILL, June 3, 2016, <http://bit.ly/1U3d5FI>.

⁹ State Dep't, Daily Press Briefing Transcript, Dec. 2, 2013, <http://1.usa.gov/1P9NdIV>.

¹⁰ *Id.*

¹¹ David Samuels, *The Aspiring Novelist Who Became Obama's Foreign-Policy Guru*, N.Y. TIMES, May 5, 2016, <http://nyti.ms/1U2g29E>.

¹² Fox News Insider, *Rosen: State Dept Removed My Iran Questions from Briefing Video*, May 10, 2016, <http://bit.ly/1Wzg5M5>.

¹³ *Id.*

¹⁴ Pete Kasperowicz, *State Dept. blames 'glitch' for missing Iran video*, WASH. EXAMINER, May 10, 2016, <http://washex.am/1O7ykpq>.

¹⁵ State Dep't, Daily Press Briefing Transcript, June 1, 2016, <http://1.usa.gov/1TYbbou>.

¹⁶ *Id.*

¹⁷ *Id.*

the unlawful or accidental removal, defacing, alteration, or destruction of Federal records or the attempt to do so, include a fine, imprisonment, or both.”¹⁸

The identities of both the individual who requested, and the individual who carried out, the alteration of the video remain publicly unknown. However, the State Department Office of Legal Adviser examined the issue and interviewed the person responsible for editing the video. Former State Department spokespersons Jen Psaki and Marie Harf have publicly claimed they are not responsible for requesting the content be deleted.¹⁹

It is unlawful for anyone having custody of any record, book, document, paper or other thing to conceal, remove, mutilate, obliterate, or destroy it, or attempt to do any the forgoing.²⁰ The penalty for this crime includes a fine, imprisonment of not more than three years, forfeiture of public office, and disqualification from holding federal office in the future.²¹ For the purpose of this statute, a video recording of a State Department press briefing qualifies as a “record”²² and the State Department employee who altered the video had “custody” of it.²³ Therefore, there is reason to believe that both the employee who requested the video be altered and the employee who did so may have committed a federal crime.

Conclusion

Notwithstanding the evidence of criminal culpability on the part of State Department employees, it appears that no criminal investigation involving these staffers has commenced. In fact, Mr. Kirby’s statements indicate the State Department has completed its review of this matter. That lack of oversight and enforcement of federal criminal law should and must be addressed. Therefore, pursuant to 28 U.S.C. § 535(b) and section 4(d) of the Inspector General Act, you are each obligated to refer this matter to the Attorney General for a proper investigation.

Please note that Cause of Action Institute is providing notice that within the next sixty days, it will submit a request for access to records under the Freedom of Information Act, 5 U.S.C. § 552, for all records concerning this matter and which reveal your efforts to address the conduct of the subject employees. Therefore, in light of the public interest involved, we request immediate steps to preserve all documents and records, and your prompt attention to this matter.

¹⁸ 36 C.F.R. § 1230.12 (citing 18 U.S.C. § 2071).

¹⁹ Fox News, *Obama adviser lashes out at Fox News amid questions over deleted footage*, June 3, 2016, <http://fxn.ws/1TNsITw>.

²⁰ 18 U.S.C. § 2071(b).

²¹ *Id.*

²² See *United States v. Hitzelberger*, 991 F. Supp. 2d 108, 124 (D.D.C. 2014) (finding statute’s purpose is “to preserve . . . files as evidence relating to things which concern the public and the government”) (alterations omitted) (citing *McInerney v. United States*, 143 F. 729, 731 (1st Cir.1906)).

²³ See *United States v. Poindexter*, 725 F. Supp. 13, 20 (D.D.C. 1989) (“There is no warrant for supposing, and no legislative history suggesting, that Congress meant to subject to punishment under section 2071 only those who are the custodians of records in the technical sense, such as clerks or librarians, but to permit others working in a government agency who have access to sensitive documents to destroy or alter them with impunity. The obvious purpose of the statute is to prohibit the impairment of sensitive government documents by those officials who have access to and control over them, and no court has ever held to the contrary.”).

Secretary Kerry and Inspector General Linick

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If you have questions about this letter, you may contact me at (202) 499-4232 or henry.kerner@causeofaction.org. Thank you for your attention to this matter.

Respectfully,



HENRY J. KERNER

ASSISTANT VICE PRESIDENT