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# United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

MICHAEL L. ALEXANDER, STAFF DIRECTOR  
BRANDON L. MILHORN, MINORITY STAFF DIRECTOR AND CHIEF COUNSEL

April 19, 2010

The Honorable Robert M. Gates  
Secretary  
U.S. Department of Defense  
1000 Defense Pentagon, Room 3E718  
Washington, DC 20301

The Honorable Eric Holder  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Dear Secretary Gates and Attorney General Holder:

The failure by the Departments of Defense and Justice to produce voluntarily documents and witnesses the Senate Committee on Homeland Security and Governmental Affairs has sought over the past five months for its bipartisan investigation of the attack at Fort Hood, Texas, now force us to issue subpoenas. Since November 13, 2009, we have sent four formal request letters for information to DOD and two to DOJ. Our staff has engaged in lengthy but ultimately unproductive discussions with your departments. We have personally contacted high-level officials in the White House and DOD to seek the Administration's cooperation in this important investigation. Our efforts have been met with delay, the production of little that was not already publicly available, and shifting reasons why the departments are withholding the documents and witnesses that we have requested.

On March 23, 2010, we made one final effort at resolving our differences in a cooperative manner. We sent separate letters to you requesting that you provide the most critical information needed for our investigation by today, April 19, 2010, and telling you that if we did not receive that information, we would issue subpoenas. Your departments sent a response to us on April 12, 2010, again refusing to cooperate.

On April 15, 2010, we publicly announced our intention to issue subpoenas if the departments did not produce the requested documents and witnesses by today at noon. You have

neither produced them nor provided us with adequate reasons to withhold them. As a result, we are now issuing subpoenas.

1. These Subpoenas Are Necessary Because DOD and DOJ Have Frustrated Our Investigation for Five Months.

The purpose of the Committee's investigation of the Fort Hood attack is to answer questions that are critical to our government's ability to counter homegrown terrorism: Given the warning signs of Major Nidal Malik Hasan's extremist radicalization and growing hostility toward the U.S. military and the United States generally, why was he not stopped before he took thirteen American lives, and how can we prevent such a tragedy from happening again? In order to answer those questions, we must assess the information that the U.S. Government had prior to the attack and the actions it took in response to that information.

We have repeatedly sought your departments' cooperation for more than five months. During that period, we wrote four times to DOD and two times to DOJ seeking witnesses and documents related to the investigation of Major Hasan prior to the attack and Major Hasan's conduct and performance in the military.

- On November 13, 2009, we requested all policies and regulations concerning how DOD handles extremist servicemembers and information-sharing with other agencies.
- On November 20, 2009, we wrote to DOD to request Major Hasan's personnel file.
- On December 3, 2009, we wrote to DOD and DOJ seeking witnesses and documents regarding Major Hasan's reported communications with the violent Islamist extremist, Anwar al-Alakwi. We also submitted to DOD a list of requested witnesses and documents related to Major Hasan's conduct at Walter Reed Army Medical Center and Fort Hood.
- On January 22, 2010, we wrote to John Brennan, Assistant to the President for Homeland Security and Counterterrorism, who we understood was coordinating the Executive Branch's response to our requests. We expressed our disappointment with the departments' response and stated that we would begin the process of issuing subpoenas if the Executive Branch did not comply.
- Finally, we wrote to DOD and DOJ on March 23, 2010, and warned that we would issue a subpoena if we did not receive specified witnesses and documents most critical to our investigation.

DOD and DOJ produced little in response to these requests, and certainly not the key documents and witnesses that are necessary for Congress to fulfill its Constitutional obligation to conduct effective oversight of the Executive Branch. Both DOD and the Federal Bureau of Investigation (FBI) have provided closed briefings with senior personnel, but Congress cannot conduct effective oversight based only on those facts the agencies want Congress to have. Although both DOD and FBI have provided hundreds of pages of documents, much of that

material has been publicly available and, more important, the departments have withheld the key witnesses and documents that will shed light on the FBI's and DOD's aborted investigation of Major Hasan before the attack and his conduct while at Walter Reed Army Medical Center.

2. DOD and DOJ Have No Basis for Refusing to Produce the Critical Witnesses and Documents that the Committee Has Requested.

As we noted above, our March 23 letter requested only specified witnesses and documents that are most critical to our investigation. We have also repeatedly offered to discuss protocols for access to witnesses and documents to ensure that we do not interfere with the prosecution of Major Hasan. Unfortunately, the DOD and DOJ response on April 12 offered a series of unconvincing reasons for refusing to produce that information or engage in such discussions.

A. Interviews with DOD and FBI Agents Who Investigated Major Hasan Following His Reported Communications with Anwar al-Alakwi, and Access to Their Documents.

Interviews with DOD and FBI agents and access to their working documents are crucial for the Committee to understand (1) how DOD and the FBI reacted to these communications in light of who al-Alakwi is – a violent Islamist extremism so notorious that the Administration reportedly has authorized killing him, (2) the state of information-sharing among FBI field offices and between the FBI and DOD, and (3) why the agents apparently did not investigate Major Hasan further by interviewing his associates and superiors at Walter Reed Army Medical Center, including any impediments that the agents perceived to doing so.

Your staff writes that some of the agents may be witnesses at trial or sentencing and that Congressional interviews could compromise those agents' independent recollections; that there is no precedent for Congress to interview agents who are potential witnesses in an ongoing criminal case; and that Congressional interviews of front-line agents would chill intelligence and law enforcement activities. None of these arguments withstands scrutiny.

At the outset, we note that your staff initially argued that producing these witnesses would result in the creation of materials that would have to be disclosed to Major Hasan's defense attorneys. When our staff informed your staff that Congress's materials are protected from disclosure by the Constitution's Speech or Debate Clause, your staff then shifted to arguing that the agents could be witnesses and that our asking questions could affect the agents' recollections. We are particularly skeptical of your departments' current argument given that the FBI agents with whom we wish to speak *have already been interviewed by an official who is not part of the prosecution*: The FBI Deputy Director already interviewed the agents as part of the FBI's internal review. If those interviews are not harmful to the prosecution, then it is hard to discern why ours would be.

Most important, we must reiterate that we are *not* investigating the attack itself. That is, we are not investigating whether Major Hasan intentionally killed thirteen people or what

punishment he should receive if convicted – the matters at issue in the criminal case. Instead, we want to know whether the government officials responsible for protecting our homeland against terrorists – foreign or domestic – correctly did their jobs. The Administration has yet to explain to us how such questions will in anyway affect testimony in a trial seeking to determine whether Major Hasan murdered thirteen people.

Finally, there is substantial precedent for Congress interviewing FBI agents who could be witnesses in parallel criminal cases. For example, the Congressional Joint Inquiry into 9/11 interviewed agents who had detained the notorious ‘20<sup>th</sup> hijacker,’ Zacarias Moussaoui, before 9/11, even though Moussaoui had already been indicted and some of the agents were potential witnesses at Moussaoui’s trial. And numerous FBI agents testified at Congressional hearings concerning the 1995 Ruby Ridge incident even though there was a simultaneous federal criminal investigation pending. In both cases, Congress obtained the information that it needed from the agents, and the criminal cases proceeded unimpeded to convictions.

Your April 12th letter also asserts that Congress should not interview front-line agents concerning their conduct and instead should conduct oversight of the Executive Branch via second-hand summaries from senior department officials. The 1994 letter from a prior Attorney General is not relevant because it concerns access to prosecutors relating to matters of prosecutorial discretion. Moreover, as detailed in our March 23 letter, Congress has repeatedly rejected that view and has interviewed front-line agents when it determined such interviews to be necessary. We have so determined in this case.

Finally, the departments’ April 12 letter states that we will receive access to these agents’ working documents, including any emails exchanged within and among the Joint Terrorism Task Forces located in San Diego, CA, and Washington, DC. However, we have not received such access by today at noon, as specified in our March 23 letter.

B. Records of Prosecutorial Interviews of Witnesses Provided to DOD’s Independent Review Related to Fort Hood.

The explanation for denying us access to summaries or transcripts of the prosecution’s interviews with witnesses also is not credible. DOD told us that access to such documents has already been given to the DOD-commissioned review of the Fort Hood attack, headed by former Secretary of the Army Togo West and retired Admiral Vern Clark. Secretary West and Admiral Clark are private citizens, and their review is not involved in the prosecution. Yet DOD apparently concluded that their access to witness statement summaries and transcripts would not interfere with the prosecution.

Congress cannot settle for less access than the West-Clark review received. The Committee’s investigation includes the extent to which Major Hasan’s behavior should have triggered – or did trigger – concern, reporting, and action by his associates and superiors. Review of these documents will assist the Committee in determining which of his associates and superiors are most important to be interviewed. We have pointed out several times to the

departments that the Committee has strict internal rules regarding the handling of investigative material and has conducted numerous investigations in a bipartisan manner and maintained appropriate confidentiality. And as noted above, we have offered many times to work with the departments on protocols necessary to alleviate any legitimate concerns.

C. Major Hasan's Official Personnel File and Records in His Personnel, Training, or Credentialing Files of Performance Evaluations or Assessments.

The departments are withholding another set of documents, apparently for reasons entirely unrelated to the prosecution of Major Hasan. We have asked for Major Hasan's personnel file and related performance evaluations in order to determine what information was known about Major Hasan's agitation toward the U.S. military and the United States and what actions, if any, were taken or attempted in response to that information. The departments refuse to provide this information by arguing that personnel documents are shown only to the Senate Armed Services Committee for purposes of Senate confirmation of officers of lieutenant colonel rank and above. Respectfully, that response is entirely unpersuasive.

DOD gave Major Hasan's personnel file to the Senate Armed Services Committee *after* the Fort Hood attack – at a time that no one could reasonably believe that the Committee needed to review it for promotion purposes. Instead, that Committee, like this Committee, has a legitimate interest in reviewing that file as part of its oversight activities related to the Fort Hood attack. We are not seeking to supplant the Armed Services Committee's work with respect to military promotions. We are instead attempting to investigate what went wrong with respect to counter-terrorism efforts in your departments. Our jurisdiction to conduct that investigation is clear under Senate rules. Your desire to avoid giving us those files does not provide a legitimate basis for withholding them.

D. The "For Official Use Only" Annex to the January 15, 2010, Report by DOD's Independent Review Related to Fort Hood.

This annex reportedly discusses Major Hasan's conduct and the reactions of his associates and superiors. The departments claim that they cannot provide this document to our Committee – even though, as noted above, we have clear jurisdiction under applicable Senate rules to conduct our investigation – until after DOD's disciplinary proceedings against Major Hasan's superiors and associates are completed. This explanation is plainly contradicted by the fact that DOD has *already* shown this document to the Senate and House Armed Services Committees. Moreover, the annex was written under the leadership of two private citizens, former Secretary West and retired Admiral Clark, meaning that DOD has *already* permitted the information supporting the annex to be viewed by parties outside the Executive Branch.

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Unfortunately, it is impossible for us to avoid reaching the conclusion that the departments simply do not want to cooperate with our investigation. It is with great disappointment and reluctance that we have directed service of subpoenas to you which demand

disclosure of the requested information by Monday, April 26, 2010, at 10 a.m. We fully expect that your departments will fulfill their legal obligation under these subpoenas and comply by the appointed time.

Sincerely,

Handwritten signature of Joseph I. Lieberman in blue ink.

Joseph I. Lieberman  
Chairman

Handwritten signature of Susan M. Collins in blue ink.

Susan M. Collins  
Ranking Member