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March 2, 2020

Via FedEx

Director, Office of Information Policy
United States Department of Justice, Sixth Floor
441 G Street, NW
Washington, DC 20530-0001

Re: Appeal re: FOIA-2020-00035

Dear Director:

We represent the Knight First Amendment Institute at Columbia University ("Knight Institute") and the American Civil Liberties Union ("ACLU") (together "Requesters") in connection with the above-referenced FOIA request. Pursuant to 5 U.S.C. § 552(a)(6)(A)(ii) and 22 C.F.R. § 16.5(e), we submit on Requesters' behalf this administrative appeal of the Department of Justice's Office of Information Policy ("DOJ OIP") denial of expedited processing and the Federal Bureau of Investigation's ("FBI") constructive denial of expedited processing. As required by 5 U.S.C. § 552(a)(6)(E)(ii)(II), "expeditious consideration" of this appeal must be made upon receipt. A failure to do so will render this denial of expedited processing subject to judicial review in federal district court. 5 U.S.C. § 552(a)(4)(B).

On January 27, 2020, Requesters submitted a FOIA request to the DOJ OIP and the FBI seeking, as set forth therein, all correspondence and records relating to the prepublication review or publication of various books, news articles, and television appearances by twenty-five former government employees. *See* Exhibit A. In the request, the Knight Institute and ACLU sought expedited processing of their request pursuant to 5 U.S.C. § 552(a)(6)(E), given the "compelling need" for the release of these records, as defined in 5 U.S.C. § 552(a)(6)(E)(v)(II). *See also* 28 C.F.R. § 16.5(e).

On January 30, 2020, Georgianna Gilbeaux, Secretary at the Office of Information Policy, acknowledged the receipt of the FOIA request received by their office on January 28, 2020, and assigned the reference code F-2020-00035. In this communication, the DOJ OIP asked for clarification as to which of the DOJ's offices and date ranges were sought under the FOIA request. *See* Exhibit B. On January 31, 2020, Requestors responded that they were seeking records of the Offices of the Attorney General and Deputy Attorney General pertaining to prepublication review or publication of (1) former Acting Attorney General Matthew Whitaker, dating from January 1, 2019, and (2) former Deputy Assistant Attorney General John Yoo, dating from December 1, 2016. Ms. Gilbeaux confirmed receipt of this request on February 4, 2020.

On February 7, 2020, DOJ OIP denied request for expedited processing on the ground that the request did not demonstrate a "compelling need" under 28 C.F.R. § 16.5(e)(1)(ii). *See* Exhibit C.

To date, the FBI has not responded to the request for expedited processing. Given that an agency shall give notice of the determination of whether to provide expedited processing within 10 days, FBI has constructively denied the request. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 28 C.F.R. § 16.5(e)(iv)(2).

Requesters respectfully appeal this decision as to the following subset of individuals and publications listed in the FOIA request:[1]

1. **John Bolton**, former National Security Advisor
    a. The Room Where It Happened (forthcoming Mar. 17, 2020)
2. **John Brennan**, former Director of the CIA
    a. Untitled (forthcoming 2020)

[1] Requesters are not withdrawing their FOIA request for records relating to the remaining individuals and publications identified therein. Requesters are entitled to a timely determination and response with respect to all aspects of their FOIA request. 5 U.S.C. § 552(a)(6)(A)(i). However, they appeal DOJ OIP's denial of expedited processing and the FBI's constructive denial of expedited processing only with respect to the subset of requested records identified above.

Michael Hayden, former NSA Director; former CIA Director; former Deputy Director of National Intelligence

a. The Assault on Intelligence: American National Security in an Age of Lies (2018)

4. **Andrew McCabe**, former Deputy Director of the FBI

   a. The Threat: How the FBI Protects America in the Age of Terror and Trump (2019)

5. **Sean Spicer**, former White House Press Secretary; White House Communications Director

   a. The Briefing: Politics, the Press, and the President (2018)

6. **Matthew Whitaker**, former Acting Attorney General

   a. Above the Law: The Inside Story of How the Justice Department Tried to Subvert President Trump (forthcoming May 19, 2020)

7. **Josh Campbell**, former Special Assistant to the FBI Director

   a. Crossfire Hurricane: Inside Donald Trump's War on the FBI (2019)

8. **K.T. McFarland**, former Deputy National Security Advisor

   a. Revolution: Trump, Washington and "We the People" (2020)

9. **H.R. McMaster**, former National Security Advisor

   a. Battlegrounds (forthcoming Apr. 28, 2020)

With respect to these publications, all of which were authored during the Administration of President Trump, Requesters satisfy the "compelling need" standard. Specifically, the records Requesters seek are urgently needed "to inform the public about actual or alleged government activity." 5 U.S.C. § 552(a)(6)(E)(v)(II). As set forth in Requesters' initial submission, which is incorporated by reference, recent allegations raise concerns that the Trump Administration is using the prepublication review process inappropriately to suppress or delay speech that is critical of the President, the White House, or the Executive Branch, but fast-track more complimentary accounts. Whether these reports are true bears directly on voters' choices at the upcoming presidential elections.[2]

[2] DOJ regulations also provide that "[r]equests and appeals shall be processed on an expedited basis whenever it is determined that they involve…a matter of widespread and exceptional media interest in which there exist possible

In recent years, the prepublication review system has become increasingly dysfunctional and politicized, resulting in escalating public and congressional concern.[3] In January, this concern came to a public head when, in the midst of President Trump's Senate impeachment trial, news broke that John Bolton, President Trump's former national security advisor, had included a purportedly first-hand account of the Administration's dealings with Ukraine in his upcoming book, *The Room Where It Happened.*[4] The book reportedly claims that President Trump sought to condition hundreds of millions of dollars of aid to Ukraine on Ukraine's announcement of an investigation into Vice President Joe Biden and his son Hunter Biden.[5] The book reportedly also claims that President Trump granted personal favors to the leaders of China and Turkey.[6]

According to reports, Bolton submitted the manuscript of his book to the White House for prepublication review last December, despite his belief that the book contained no classified information.[7] Although Bolton's book is currently undergoing review, President Trump has tweeted that the book is "nasty & untrue,"[8] and recent news reports recount that President Trump told his staff that the book should not see the light of day before the November election.[9] Bolton himself has stated that he is worried his work will be censored, or worse,

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questions about the *government's integrity that affect public confidence*." 28 C.F.R. § 16.5(e)(1)(iv) (emphasis added). As set forth herein, this standard is met as well given the widespread public concerns that have been raised in the media concerning the prepublication review process that go precisely to whether the government is acting fairly and with integrity. This is an independent basis for expedited processing of this request by DOJ.

[3] *See, e.g.*, 115 Cong. Rec. H3300 (daily ed. May 3, 2017) (statement of Rep. Nunes); 115 Cong. Rec. S2750 (daily ed. May 4, 2017) (statement of Sen. Burr); Michael V. Hayden, PLAYING TO THE EDGE: AMERICAN INTELLIGENCE IN THE AGE OF TERROR 426 (2016) ("Since all of my writing has to be cleared for classification, I dutifully submitted the piece and was told that no articles about drones would be cleared regardless of the content. I actually think that's a misuse of the review process, but beyond that, it's just plain stupid.").

[4] Maggie Haberman & Michael Schmidt, *Trump Tied Ukraine Aid to Inquiries He Sought, Bolton Book Says*, N.Y. TIMES (Jan. 26, 2020), https://www.nytimes.com/2020/01/26/us/politics/trump-bolton-book-ukraine.html.

[5] *Id.*

[6] Eric Lipton & Alan Rappeport, *Bolton Book Puts New Focus on Trump's Actions in Turkey and China Cases*, N.Y. Times (Jan. 28, 2020), https://www.nytimes.com/2020/01/28/us/politics/bolton-book-trump-china-turkey.html.

[7] *Id.*; *see also* Letter from Charles J. Cooper, Counsel to John Bolton, to Ellen J. Knight, Senior Director for Records, Access and Information Security Management (Dec. 30, 2019), *available at* https://int.nyt.com/data/documenthelper/6727-bolton-lawyer-letter/6ec64dfab61cecc9ac2b/optimized/full.pdf.

[8] Donald J. Trump (@realDonaldTrump), Twitter (Jan. 29, 2014, 7:28 AM), https://twitter.com/realDonaldTrump/status/1222496705763008515; Donald J. Trump (@realDonaldTrump), Twitter (Jan. 29, 2014, 7:28 AM), https://twitter.com/realDonaldTrump/status/1222496715422433281.

[9] Josh Dawsey, Tom Hamburger and Carol D. Leonnig, *Trump Wants to Block Bolton's Book, Claiming Most Conversations Are Classified*, N.Y. TIMES (Feb. 21, 2020), https://www.washingtonpost.com/politics/trump-wants-to-block-boltons-book-claiming-all-conversations-are-classified/2020/02/21/6a4f4b34-54d1-11ea-9e47-59804be1dcfb_story.html (reporting that President Trump has told staff that "We're going to try and block publication of the book. . . . After I leave office, he can do this. But not in the White House."); *see also* Eric Lutz, *The White House Is Trying to Throttle John Bolton's Book*, VANITY FAIR (Jan. 29, 2020), https://www.vanityfair.com/news/2020/01/white-house-trump-trying-to-throttle-john-bolton-book.

"suppressed."[10] These news accounts surrounding the prepublication review of Bolton's book reinforce the concern that the Trump Administration may be inappropriately leveraging the prepublication review process to withhold critical information about his presidency from the public in advance of the election.

Transparency regarding the Trump Administration's use of the prepublication review process is also urgent as other former senior officials plan to publish books in advance of the election. For instance, there has been renewed discussion about John Brennan's role in investigating the government's response to allegations of Russian interference in the 2016 election,[11] and Brennan is set to publish his own memoir sometime this year.[12] Likewise, H.R. McMaster, who was dismissed from the Trump Administration, is set to publish a book focusing on national security and his time in the Trump Administration on April 28, 2020.[13] Matt Whitaker, former Acting Attorney General, is also releasing a book on May 19, 2020 focusing on his observations at the Department of Justice about what he has characterized as the "vicious partisan vendetta against President Trump."[14]

Concerns that the Trump Administration has used prepublication review to suppress critical speech about his administration do not rest solely on Bolton's experiences. For example, in 2018, Andrew McCabe, former acting director of the FBI, said in a statement that the FBI's prepublication review process had "taken far longer than they led [him] to believe it would," and, as a result, his book had to be delayed several months.[15] After a protracted prepublication review process, McCabe's book, which was critical of the Trump Administration, was ultimately published in 2019. Comparing the prepublication review of works by former officials who have been more critical of President Trump side by side with other former Trump Administration officials who remain supportive will also help reveal whether the Administration has abused the process for political ends.

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[10] Peter Baker, *Bolton Hints at Further Revelations if He Overcomes White House 'Censorship'*, N.Y. TIMES (Feb. 17, 2020), https://www.nytimes.com/2020/02/17/us/politics/john-bolton-trump-ukraine.html.

[11] Charlie Savage, Adam Goldman and Julian E. Barnes, *Justice Dept. Is Investigating C.I.A. Resistance to Sharing Russia Secrets*, N.Y. TIMES (Feb. 13, 2020), https://www.nytimes.com/2020/02/13/us/politics/durham-cia-russia.html.

[12] Hillel Italie, *Former CIA Head John O. Brennan Writing Memoir, Due in 2020*, ASSOCIATED PRESS, Nov. 28, 2018, https://apnews.com/9f616d3ef6a84b6e811e2de4933c3a56.

[13] Associated Press, *H.R. McMaster Book `Battlegrounds' Coming out in April*, WASH. POST. (Feb. 20, 2020), https://www.washingtonpost.com/entertainment/books/hr-mcmaster-book-battlegrounds-coming-out-in-april/2020/02/20/ff80a382-53f1-11ea-80ce-37a8d4266c09_story.html.

[14] *Above the Law: The Inside Story of How the Justice Department Tried to Subvert President Trump*, AMAZON, https://www.amazon.com/Above-Law-Justice-Department-President/dp/168451049X (last visited Feb. 28, 2020).

[15] Chris Mills Rodrigo, *McCabe Concerned About 'Unfair Treatment' After Book Release Delayed by FBI*, https://thehill.com/blogs/blog-briefing-room/news/410964-mccabe-concerned-about-unfair-treatment-after-book-delayed-over.

Prompt exposure of the Trump Administration's use of prepublication review will ensure that any abuses of the process come to light ahead of the upcoming election.[16] When the Senate impeachment trial was coming to a close, many members of Congress, particularly those who voted to acquit President Trump, did so on grounds that voters have the *constitutional right* to make their own assessment and decision on this issue in the next democratic contest, the 2020 presidential elections. White House Counsel Pat Cipollone argued that "[m]ost importantly," Congress had "to respect and defend the sacred right of every American to vote and to choose their president. The election is only months away. The American people are entitled to choose their president."[17] Whether and to what extent the Trump Administration has used prepublication review to suppress allegations of malfeasance or to fast-track favorable accounts is thus important to the public's ability to make an informed decision. Indeed, prepublication review amounts to a prior restraint on speech, and any abuse of it for political ends would be of particular concern given the First Amendment's special solicitude for speech critical of the government. *See, e.g.*, *New York Times Co.* v. *United States*, 403 U.S. 713 (1971) (finding that the Nixon Administration's efforts to prevent publication of the Pentagon Papers was a violation of the First Amendment).

With the election only months away, it is critical that the records identified above be released to the public on an expedited basis. As courts have recognized, "the primary value of the information [here] lies in its ability to inform the public of ongoing proceedings of national importance." C*enter for Public Integrity* v. *U.S. Dep't of Defense*, 411 F. Supp. 3d 5, 12 (D.D.C. 2019). In other words, "stale information is of little value." *Id.* (quoting *Payne Enterprises, Inc.* v. *United States*, 837 F.2d 486, 494 (D.C. Cir. 1988)). If the information sought is not released soon, and most importantly before the presidential election in November, it will certainly deprive the public of indispensable information that could shape how citizens choose to exercise their right to vote.

The request for expedited processing here falls well within the heartland of the factors that courts use to assess whether there is "compelling need." The request concerns "a matter of exigency to the American public," namely the activities of the Trump Administration in areas of immense public interest, as well as potential attempts by the Administration to

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[16] With regard to Bolton, there is also an urgent need for disclosure in light of the ongoing debate as to whether the House should call Bolton to testify in the aftermath of the impeachment trial. In early February, House Judiciary Committee Chairman Jerry Nadler stated that the House was "likely" to subpoena Bolton, and House Majority Leader Steny Hoyer stated that the House committees were "going to have discussions" about whether "there is still relevant information that needs to be uncovered." Sarah Ferris, *Pelosi Has 'No Plans Right Now' to Seek John Bolton Subpoena*, POLITICO (Feb. 6, 2020), https://www.politico.com/news/2020/02/06/nancy-pelosi-john-bolton-subpoena-111521. Details about the prepublication review process can provide useful information to the public and to political actors within our government in assessing whether the Administration is attempting to censor non-classified information from Bolton's upcoming book and, if so, what appropriate action is necessary to seek release of that information in advance of the presidential election.

[17] Paul Kane, *Trump's Legal Team Has Multiple Arguments Against Impeachment. Letting The Voters Decide Is The Latest Rationale*, WASH. POST (Jan. 28, 2020), https://www.washingtonpost.com/powerpost/trumps-legal-team-has-multiple-arguments-against-impeachment-letting-the-voters-decide-is-the-latest-rationale/2020/01/28/754123aa-41e4-11ea-aa6a-083d01b3ed18_story.html.

suppress information about those activities; delay would clearly "compromise a significant recognized interest" given the intense focus on these issues in connection with the upcoming presidential election, not to mention ongoing debates around critical issues concerning foreign policy and the role and activities of the Department of Justice; and, the request certainly concerns "federal government activity." *Al-Fayed* v. *Central Intelligence Agency*, 254 F.3d 300, 310 (D.C. Cir. 2001) (quoting H.R. REP. NO. 104–795, at 26 (1996)).

Indeed, there are well-established grounds for expedition in these circumstances. In *Wash. Post.* v. *U.S. Dep't of Homeland Security*, 459 F. Supp. 2d 61 (D.D.C. 2006), the Washington Post submitted a FOIA request seeking logs of individuals who had visited Vice President Dick Cheney and the senior staff's White House complex. The court ultimately found that expedited processing was justified because a delay in receiving the requested information would "deprive the public of its ability to make its views known in a timely fashion at the polls, by lobbyists, or through other contacts with public officials." *Id.* at 75. Because the FOIA request was predicated on matters of current national debate and the upcoming election, the court found sufficient urgency in requiring the information be released within ten days of the opinion. Similarly, in *Leadership Conference on Civil Rights* v. *Gonzales*, 404 F. Supp. 2d 246 (D.D.C. 2005), the court determined that an agency should expedite a FOIA request that sought information about an expiring legislative provision because the "importance of this issue [was] paramount" and "expedition of these documents could advance the current debate" and help ensure an informed vote by Congress on whether to renew the legislation. *Id.* at 260.

More recently, courts have granted expedited processing for requests related to the Senate impeachment trial, reasoning that the subject matter of the requests was "of immediate concern to the American public." *See Center for Public Integrity* v. *U.S. Dep't of Defense*, 411 F. Supp. 3d 5, 12 (D.D.C. 2019); *id.* ("dissemination…relating to the ongoing impeachment proceedings contributes to an informed electorate capable of developing knowledgeable opinions and sharing those knowledgeable opinions with their elected leaders."); *Am. Oversight* v. *U.S. Dep't of State*, No. 19-cv-2934-CRC, 2019 WL 5665930 (D.D.C. Oct. 25, 2019) ("As the Supreme Court has observed, public awareness of the government's actions is a structural necessity in a real democracy," therefore requests to the Department of State about communications between senior State Department officials and the White House regarding the former Ambassador to Ukraine was subject to expedited processing) (internal quotation marks omitted).

For all of the reasons stated above, the Requesters are entitled to expedited processing, and request that the DOJ OIP reverse the initial denial of this request, and request that the FBI grant this request.

Requesters reserve all rights and waive none.

Respectfully submitted,

Jonathan M. Moses