

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24-5165  
(C.A. No. 14-01589)

ROGER ARONOFF, Appellant,	)
	)
v.	)
	)
CENTRAL INTELLIGENCE AGENCY, et. al., Appellees.	)
	)
_____	)

**BRIEF FOR APPELLANT**

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On Appeal from the United States District Court for the District of Columbia,  
Hon. Emmet G. Sullivan and Hon. Loran L. Alokhan, District Judges.

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**APPELLANT'S CERTIFICATE AS TO  
PARTIES, RULINGS, AND RELATED CASES**

Pursuant to D.C. Circuit Rules 15(c)(3), 26.1 and 28(a)(1), counsel for Appellant certifies as follows:

**I. Parties**

The sole Appellant is Roger L. Aronoff, one of eight plaintiffs in the District Court. The other seven plaintiffs are Captain Larry W. Bailey, USN (Ret.), Lieutenant Colonel Kenneth Benway, USA (Ret.), Colonel Richard F. Brauer, Jr., USA (Ret.), Clare M. Lopez, Admiral James A. Lyons, Jr., USN (Ret.), Kevin Michael Shipp, and Accuracy in Media, Inc.

Appellees are three of the four defendants in the District Court; the Department of Defense, the Central Intelligence Agency, and the Department of Justice. The Department of State was also a defendant below.

**II. Ruling Under Review**

At issue in this appeal are (1) the Honorable Emmet G. Sullivan's November 28, 2022 Memorandum Opinion and Order granting the Defendants' Motion for Summary Judgment and denying Plaintiffs' Cross-Motion for Summary Judgment, and (2) the Honorable Loran L. Alokhan's April 26, 2024, Memorandum Opinion and Order granting the Defendant's Motion for Summary Judgment and denying Plaintiffs' Cross-Motion for Summary Judgment.

### III. Related Cases

Undersigned counsel is not aware of any pending related cases.

Respectfully submitted,

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**APPELLANT'S CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Accuracy in Media, Inc. ("AIM"), a plaintiff in the Court below, is a not-for-profit corporation, duly organized and existing under the laws of the District of Columbia. AIM is not a publicly held corporation, has no parent companies, and no companies have a 10% or greater ownership interest in AIM.

Respectfully submitted,

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GLOSSARY

<u>Abbreviation</u>	<u>Definition</u>
CIA	Central Intelligence Agency
COB	CIA Chief-of-Base
DoD	Department of Defense
DOJ	Department of Justice
EXORD	Execute order. DoD Definition: 1. An order issued by the Chairman of the Joint Chiefs of Staff, by the authority and at the direction of the Secretary of Defense, to implement a decision by the President or Secretary of Defense to initiate military operations. 2. An order to initiate military operations as directed. Also called EXORD.
FOIA	Freedom of Information Act
QRF	CIA Quick Reaction Force
302s	FBI 302 reports of interviews of QRF conducted in Germany on September 15, 2012

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## APPELLANT'S OPENING BRIEF

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### BACKGROUND AND STATEMENT OF THE CASE

#### A. September 11, 2011 Benghazi attacks

##### 1. Attack

While the incident is referred to as an attack, a more accurate description is siege, as it lasted for 10 hours. Plaintiffs summarized its onset in the Preliminary Statement of their Amended Complaint ("*Compl.*"), JA 24:

[On September 11, 2012... at 3:32 p.m. eastern time], dozens of attackers, armed with assault rifles and anti-tank rocket-propelled-grenades, swarmed the gate at the State Department's Benghazi Special Mission Compound, which, at the time, housed seven Americans. Moving with military tactics, the invaders lobbed a grenade into the Mission's command post, and then fired AK-47's into its main doorway. Eventually, their numbers swelled to more than 60. Within minutes, Ambassador Stevens called his second in command, in Tripoli, Deputy Chief of Mission Greg Hicks. "Greg, we're under attack." Hicks immediately called the CIA Chief in Tripoli, the operations Center at the State Department in Washington, and the CIA's Benghazi facility, the "CIA Annex," the Agency's secret headquarters in Benghazi...

Henderson stayed in contact, as did Hicks, while the Tripoli Defense Attaché kept African Command and the Joint Chiefs of Staff informed. Word quickly reached Defense Secretary Leon Panetta and chairman of the Joint Chiefs of Staff General Martin Dempsey. Global conference calls included European Command, Central Command, Special Operations Command, Transportation Command, and the Army, Navy, Air Force, and Marines. Thirty-three minutes into the attack, at 4:05 p.m. Washington time, State's Operations Center issued an alert to the White House Situation Room, the FBI,

and the Office of the Director of National Intelligence, among other key government and intelligence offices.

An "OPREP-3 Pinnacle Report" alerted the Pentagon's National Military Command Center. By the time that Africa Command's reconnaissance drone arrived overhead, ninety minutes into the siege, the attackers had set multiple fires. Within five minutes of Henderson's first call to the CIA Annex, five of the Agency's Quick Reaction Force there had "jockeyed up" and assembled in two armored cars, ready to go. But the CIA Chief of Base, who was in charge, forbade the rescuers' departure while he spoke by phone with officials. After being ordered to stay in place at least three times, when they heard Henderson plead, "If you guys do not get here, we're going to die," the rescuers disobeyed orders, and "moved to the sound of the guns" a half mile away, which they could hear in the distance...

The Americans had averted a tragedy on a larger scale during the eight-hour siege only by performing extraordinary acts of courage and heroism...

## **2. Public Interest**

Media coverage and public debate during the 30 months following the attack was enormous. A LexisNexis search for "Benghazi" from September 11, 2012, to February 8, 2015, yields 52,404 newspaper articles, 32,185 news releases, and 14,698 news transcripts.<sup>1</sup>

The debate had been fueled by the public disclosure that the genesis of the attack had not been a demonstration over a YouTube video that had spontaneously

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<sup>1</sup> *Tappan Decl.* JA 16-17.

erupted into violence, as then UN Ambassador Susan Rice had initially declared on the Sunday news shows. This version was repeated by the President, his spokesman Jay Carney, CIA Director David Petraeus, Assistant Director Michael Morell, and Secretary of State Hillary Clinton and her Assistant Secretary Victoria Nuland.

Public disclosure that this was not true, together with ongoing Congressional probes, as well as questions about the delay in affecting a rescue, and whether assets had been ordered to stand down, resulted in news saturation—for the next four years.

## **B. Six Congressional Probes**

### **1. 2012 Congressional Report**

Almost four months after the attack, on December 30, 2012, Congress released its first of seven reports on the matter, when the Senate Committee Homeland Security and Governmental Affairs concluded that there had been ample warnings of an attack, and that there had been no protest.<sup>2</sup>

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<sup>2</sup> See *Clarke Decl.*, JA 366-374 ¶ 3: Summarizing December 30, 2012, FLASHING RED: A SPECIAL REPORT ON THE TERRORIST ATTACK AT BENGHAZI, issued by both parties U.S. Senate Committee on Homeland Security and Governmental Affairs. Fifty security incidents in Benghazi served as a "flashing red" warning. ... Failing to suspend or abandon the Benghazi facilities was a "grievous mistake." Key findings include State Department initial knowledge that the attack was preplanned and the absence of any protest, at least by September 15th.

## 2. Two 2013 Congressional Reports

Four months later, on April 23, 2013, the Republican Majorities of five House Committees issued its Report concluding that the State Department had known that there had been no demonstration before Ambassador Rice claimed otherwise on talk shows, and observed that the President and Secretary Clinton had appeared in an advertisement broadcast in Pakistan disavowing the YouTube video.<sup>3</sup> Congress's other 2013 report, issued on September 13 by the House Committee on Oversight and Government Reform, critiqued various State Department failures and opined that the Accountability Review Board's report was unreliable.<sup>4</sup>

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<sup>3</sup> *Id.*: April 23, 2013, Summarizing INTERIM PROGRESS REPORT FOR THE MEMBERS OF THE HOUSE REPUBLICAN CONFERENCE ON THE EVENTS SURROUNDING THE SEPTEMBER 11, 2012 TERRORIST ATTACKS IN BENGHAZI, LIBYA, issued by Republican Majority of five House Committees. On "the same day and prior to" Ambassador Rice's talk show appearances, "a senior official on the ground in Libya informed senior leaders...that there was no demonstration prior to the attack." The Administration had altered its talking points to "remove references to the likely participation of Islamic extremists." The President and Secretary Clinton appeared in a \$70,000 advertisement campaign in Pakistan disavowing the YouTube video.

<sup>4</sup> *Id.*: September 16, 2013, Summarizing BENGHAZI ATTACKS: INVESTIGATIVE UPDATE INTERIM REPORT ON THE ACCOUNTABILITY REVIEW BOARD, issued by Republican Majority of Committee on Oversight and Government Reform. Under-Secretary of Management at the Department of State Ambassador Kennedy... decided to discontinue the Security Support Team, and approved the extension of the facility "as is." All four State Department officials who were placed on administrative leave failed to receive due process from the State Department.... Hillary Clinton selected four of the

### 3. Three 2014 Congressional Reports

Congress issued three more reports in 2014.

In January, the Senate Select Committee on Intelligence reported that the attacks had been in three distinct phases, terrorists had participated, and that a month before the attacks the CIA had advised of the locations of ten Islamist militias and Al Qaeda training camps. It too faulted the State Department for inadequate security.<sup>5</sup>

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five Accountability Review Board members, Undersecretary Kennedy oversaw the selection of ARB staff, and the ARB failed to interview Clinton. Admiral Mullen gave Cheryl Mills a friendly "heads up" that Charlene Lamb would not be a good witness.

<sup>5</sup> *Id.*: January 15, 2014, summarizing TERRORIST ATTACKS ON U.S. FACILITIES IN BENGHAZI, LIBYA, SEPTEMBER 11-12, 2012, TOGETHER WITH ADDITIONAL VIEWS," issued by U.S. Senate Select Committee on Intelligence. The bipartisan report holds the State Department responsible for inadequate security at the Mission ... and the tragedy "preventable." There were three diplomatic Security agents assigned to the Mission, whereas nine security officers were assigned at the CIA Annex. Itemization of security improvements at the CIA Annex is redacted, while the Mission failed to keep all surveillance cameras running or install its new cameras. ... This Report details ... [a] classified cable: "A CIA officer 'briefed the EAC on the location of approximately ten Islamist militias and AQ training camps within Benghazi.'" "Individuals affiliated with terrorist groups, including AQIM, Ansar al- Sharia, AQAP, and the Mohammad Jamal Network, participated in the September 11, 2012, attacks."

On February 7, the House Foreign Affairs Committee found that Secretary Clinton had been aware of the security problems in Libya, and critiqued other State Department actions.<sup>6</sup>

On February 10, the House Armed Services Committee declared that there had been no "stand down" order, and that the military had acted appropriately given the inadequate posture of its forces.<sup>7</sup>

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<sup>6</sup> *Id.*: February 7, 2014, summarizing BENGHAZI: WHERE IS THE STATE DEPARTMENT ACCOUNTABILITY? Republican Majority of the House Foreign Affairs Committee. Secretary Clinton was aware of the security problems in Libya and should have acted accordingly, according to this Republican report. Of the four reinstated employees who had been placed on leave (Charlene Lamb, Scott Bultrowicz, Ray Maxwell, and Eric Boswell), two retired with full benefits, and the other two have been reassigned to positions with commensurate pay and benefits. Elizabeth Dibble, Jake Sullivan, and Victoria Nuland were all promoted. Patrick Kennedy was not held accountable, even after (1) "approv[ing] a one-year extension of the Benghazi SMC in December 2011," (2) telling "the Defense Department in July 2012 that the State Department would no longer need the U.S. military's 16-member SST," and (3) "terminat[ing] Embassy Tripoli's use of a DC-3 aircraft that provided logistical support to the SST" on May 3.

<sup>7</sup> *Id.*: February 10, 2014, summarizing BENGHAZI INVESTIGATION UPDATE, issued by Republican Majority of House Armed Services Committee. While this Republican report declares that there was no "stand down" order given and that the military acted appropriately given the resources available, the Committee questions the posture of military forces. "Why didn't the Administration prioritize a violent Libya among the ongoing threats"? ...Why didn't General Ham know that the CIA had a facility in Benghazi? ... The attack was "carefully planned," with a "scouted... scene beforehand."

### C. DOD issued Timeline, 2013

The first six Congressional probes had not investigated the issue of when military assets had been ordered to commence a rescue operation. But the question had been posed. In response, in November of 2013 the DoD distributed a timeline. Plaintiffs submitted it as Ex. 2 to the *Clarke Decl.*, JA 373-374 (hereinafter "*Timeline*"), and the DoD submitted it with the *Herrington Decl.*, JA 156-157.

It states that, between 6:00 p.m. and 8:00 p.m. "Secretary Panetta directs (provides verbal authorization)" for forces in Spain, and in Croatia, to "prepare to deploy to Benghazi... upon receipt of formal authorization." *Timeline* JA 373. (All times provided are Washington time.) The order to go, according to the *Timeline*, was given at 8:39 p.m.<sup>8</sup>

Plaintiffs observed that the DoD's *Timeline* raises several questions. Why does it begin at 6:00 p.m. when Mr. Panetta was notified at 4:42 p.m.? Why does it provide a two-hour window, as opposed to a specific time, for when the initial order to prepare to deploy was given? Why did that entry begin at exactly 6:00

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<sup>8</sup> *Id.*: 8:39 pm As ordered by Secretary Panetta, the National Military Command Center transmits formal authorization for the two FAST platoons, and associated equipment, to prepare to deploy and for the EUCOM special operations force, and associated equipment, to move to an intermediate staging base in southern Europe.



p.m. and end at exactly 8:00 p.m.? Why did it take so long for Mr. Panetta to order forces to respond?

**D. Seventh Congressional Probe Report, House of Representatives *Final Report of the Select Committee on The Events Surrounding the 2012 Terrorist Attack in Benghazi* ("Select Committee")**

Pressure on House Speaker Boehner to call for a vote to establish a Select Committee was fueled by widespread recognition that Congress has not yet ferreted out the truth, even after 13 hearings and six Committee Reports on various aspects of the matter. In May of 2014, Congress established the House Select Committee on Events Surrounding the 2012 Terrorist Attack in Benghazi ("*Select Committee*"). H. Res. 36—113th Congress (2013-2014) provides that "(a) The Select Committee is authorized and directed to conduct a full and complete investigation and study and issue a final report of its findings to the House regarding... internal and public executive branch communications about the attacks... [and] the response to the attacks..." (emphasis added).

Representative Trey Gowdy (R-South Carolina), who had publicly vied to serve as Committee Chairman, was appointed. He told Fox News' Greta Van Susteren on May 6, 2014, that he "want[s] to see every single solitary relevant material document." On November 9, 2014, he stated on Van Susteren's show, "[t]here's no way we can get to the bottom of Benghazi without [then-CIA

Director] David Petraeus." He similarly declared his commitment to reporting the unvarnished truth in press releases.

Mr. Gowdy's opening remarks at the *Select Committee* hearing included:

We will have hearings in January, February, March and until there is a full understanding of what happened in Benghazi. That means access to all documents and all witnesses. We are going to answer the questions surrounding the attacks in Benghazi.

On December 7, 2016, the *Select Committee* issued its 650-page, *Final Report of the Select Committee on The Events Surrounding the 2012 Terrorist Attack in Benghazi*.

#### **E. FOIA Requests and Productions**

Plaintiffs had submitted their FOIA requests while the *Select Committee* was conducting its probe. After six different Congressional probes, involving 13 days of public hearings, the release of the some of the transcripts of witnesses who had given closed-door testimony, and the issuance of six Committee Reports on various aspects of the matter, the only information the DoD provided regarding when the order to respond was its claims that (1) an order to "prepare" to respond had been given orally sometime between 6:00 p.m. and 8:00 p.m., and that (2) an order to go had been given at 8:39 p.m. (The DoD's various versions of the response are discussed below.)

Congressional testimony also disclosed that no U.S. forces had been airborne when the survivors had finally escaped 13 hours after the siege had begun.

And the House Armed Services Committee concluded that there had been no order for forces to stay in place, or to "stand down."

## 1. DoD

Given this void of evidence of when Secretary Panetta had first ordered assets to deploy, plaintiffs sought that first order to respond, as well as coterminous communications, under the Freedom of Information Act. In March, April, and May of 2014, plaintiffs submitted their FOIA requests. Most of the roughly 17 items sought from DoD seek disclosure of records revealing the government's initial communications, and orders, with all relevant assets—with the State Department facility;<sup>9</sup> up the chain-of-command,<sup>10</sup> and to other U.S. assets, including to Sicily,<sup>11</sup>

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<sup>9</sup> Radio communications from compound requested 3/31/14 from Africa Command: "*Audio*. All records of radio communications... from the Compound's Tactical Operations Center... September 11 and 12, 2012...." *Compl.* ¶¶ 18, 80, JA 32, 55-56.

<sup>10</sup> Communications to and from AFRICOM Joint Operations Center, made 3/31/14 to Africa Command: "*AFRICOM communications*. All records of AFRICOM Joint Operations Center (JOC) Chief's communications subsequent to that Officer's receipt of messages emanating from the Compound..." *Id.* ¶¶ 20, 80, JA 33, 55-56.  
Contemporaneous notifications to DOD, sought from Defense Intelligence Agency on 5/28/14: "*Op Rep 3's*. The OPEREP-3 PINNACLE reports used to provide... notification of, or information about..." *Id.* ¶¶ 19, 110, JA 33, 66.

<sup>11</sup> Orders to 130-man Marine Force team at Naval Air Station Sigonella, Sicily made 3/31/14 to (1) Navy, (2) Air Force, (3) Marines, and (4) European Command: "Records disclosing the readiness status of the 130-man Marine Force Reconnaissance Team at NAS Sigonella, including: (a) All

northern Italy, Spain,<sup>12</sup> Croatia,<sup>13</sup> Djibouti, and the United States.<sup>14</sup>

**(a) Production of First Order to Respond—3:00 a.m.  
EXORD**

The DOD produced, as its earliest record of any order, or communication, an order to execute, or to go, known as an EXORD. It was issued on September 12, at 3:00 a.m. An EXORD is, by definition, the first order. The referenced EXORD is Ex. 1 to the Declaration of John H. Clarke ("*Clarke Decl.*"), JA 371-372.

The EXORD contradicts the DoD's version of events.

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<sup>12</sup> communications with, and orders to, NAS Sigonella... [re deployment and] to abort or turn back." *Id.* ¶¶ 22, 42, 59, 67. JA 33-34, 41-42, 48, 51-52. Orders to two Marine Corps Fleet Antiterrorism Security Teams in Rota, Spain made 3/31/14 to (1) Navy, (2) Marines, (3) European Command, and (4) Special Operations Command: "*Rota*. Records revealing the status of two Marine Corps... ("FAST"), at the Spanish naval base Naval Station Rota ("NAVSTA Rota"), including: (a) All communications... [and] if applicable, orders to abort or turn back..." *Id.* ¶¶ 42, 50, 59, 67, 90, JA 41-42, 45, 48, 51-52, 59-60.

<sup>13</sup> Orders to Special Operations Commanders-In-Extremis Force in Croatia made 3/31/14 to (1) Army, (2) European Command, and (3) Special Operations Command: "Records regarding the readiness status of, and orders given to, airborne special operations unit, 'Commanders-In-extremis Force'... in Croatia, including... orders... to deploy to NAS Sigonella; and [a]ll communications... that aircraft was airborne... and, if applicable, orders to abort or turn back." *Id.* ¶¶ 27, 37, 67, 90, JA 35, 39, 51-52, 59-60.

<sup>14</sup> Orders to Special Operations in the United States made 3/31/14 to Special Operations Command: "Records disclosing the readiness status of, and orders given to, Special Operations Forces... in the United States..." *Id.* ¶¶ 29, 90, JA 36, 59-60.

**(b) *Select Committee*—Unaware of EXORD**

The *Select Committee* Report recites that it had asked for the records of the orders to respond, but that the Committee had not received them. The Report simply states, in *Appendix J Requests and Subpoenas for Documents*, at page 611, that "documents relating to orders or commands given to defend against the attacks or rescue Americans in Benghazi is pending production."

The DoD had produced the EXORD to plaintiffs on May 16, 2016, six months before the *Select Committee* issued its Report. But the Committee was wholly unaware of even the existence of the order to deploy.

According to the *Select Committee* Report, Mr. Panetta had given the order "by 7:00," but "nearly two more hours elapsed before the Secretary's orders were relayed," so the order was transmitted by 9:00. *Select Committee Report Clarke Decl. Ex. 4, JA 425-426.*

The EXORD had been issued on September 12, at 3:00 a.m. This is six hours later than Mr. Gowdy had concluded.

Mr. Gowdy's *sole* source of when the order was given, and received, is Mr. Panetta's January 8, 2016, closed-door testimony before the *Select Committee*. Selected pages of the transcript are a part of the record below. *Clarke Decl. Ex. 3, Panetta testimony, JA 375-418.*

**(c) First Alert—OPREP-3**

Plaintiffs also sought disclosure of the PINNACLE OPREP-3 Report,<sup>15</sup> which, as the DoD explained, "describes an event of such importance that it needs to be brought to the immediate attention of the National Command Authority, Joint Chiefs of Staff/National Military Command Center, and other national-level leadership." *Herrington Decl.* ¶ 4, JA 117. Further, "the combatant command with the area of responsibility for the location of the incident would be responsible for the report (*id.* ¶ 8 JA 112), which is AFRICOM. *Id.* ¶ 24, JA 117.

The *Select Committee* did not obtain this first alert.

The DoD's search did not locate it, suggesting that the plaintiffs had sought the alert from the wrong DoD component. The District Court agreed.

**(d) Maps of Available Assets**

Several of plaintiffs' FOIA requests seek identification of available assets, both personnel and aircraft.

The DoD responded that its 12 pages of maps contains the force posture of "forces worldwide during the relevant timeframe in September 2012," as well as

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<sup>15</sup> *Compl.* ¶ 19(1), JA 33:  
*Op Rep 3's*. The OPEREP-3 PINNACLE reports used to provide any Department of Defense division (or office or entity) with notification of, or information about, the September 11th and 12th, 2012 attacks on U.S. facilities in Benghazi, Libya...

"the numbers and locations of ships, submarines, response forces, and aircraft surrounding Benghazi, Libya," but are withheld in their entirety as that disclosure could provide adversaries with information that could now be expected to cause serious damage to national security. *Malloy Decl.* ¶ 12, JA 96. The District Court agreed.

**(e) *Select Committee Failed to Obtain Maps of Available Assets***

The *Select Committee* had sought these records, but the DoD did not cooperate. Even while recognizing that the DoD's production of "maps failed to include assets," Mr. Gowdy simply advised DoD that it "it is in the public interest" that the DoD release the information:

The Defense Department provided copies of maps identifying assets present in European Command, AFRICOM, and Central Command's areas of responsibility on September 11, September 12, and September 13 to the Committee. The assets identified on the maps were purportedly considered during this meeting, although the Joint Staff at the time did not keep a daily updated list of assets and their locations. During its investigation, the Committee determined the maps failed to include assets that actually were deployed in response to Benghazi.... Given this discrepancy, the Committee requested it confirm whether there were any additional assets not identified on the maps or any assets withheld due to special access programs restrictions. It did not respond to the Committee's request. This failure to respond unnecessarily and unadvisedly leaves questions the Defense Department can easily answer, and it is in the public interest that it do so.

*Select Committee Report* (footnotes omitted), *Clarke Decl.* Ex. 4, JA 425.

The *Select Committee* also observed that the DoD refused to produce records of aircraft that were stationed at Souda Bay, Greece. Under the heading, *Assets at Souda Bay, Crete*, the Report relates:

While conducting oversight in Souda Bay, Members of the Committee received a briefing regarding special operations aircraft that were stationed at Souda Bay on the night of the attacks in Benghazi and could have been utilized in response to the attacks. The Committee sought confirmation of this information through interviews and requests for information from the Defense Department. The Defense Department has not denied the presence of these assets.

*Select Committee* Report at page 64. (Not in the District Court record.)

The *Select Committee* included a map of flight times in its Report, but does not identify the assets at each location. JA 420. Plaintiffs had submitted their own map depicting flight times as well as assets. *Clarke Aff.* Ex 12, JA 483. Plaintiffs' entry for Souda Bay:

Souda Bay, Greece.  
Air Force Base.  
320 miles, 40-minute flight.  
Assets unknown, and withheld,  
but may be USAF F-16 Aircraft.

## **2. CIA and the Order to Stand Down**

Plaintiffs appeal the CIA's redactions to its production of records of a complaint to the CIA Inspector General ("IG"). *See Compl.* ¶ 144(1) JA 82. On September 25, 2017, the CIA advised that it had located twenty responsive records.



It withheld 12 documents in their entirety, and released eight, totaling 25 pages.

Nine of these pages are wholly redacted, with the balance heavily redacted.

The 25-page production is a part of the record below. *CIA Inspector General Records, Clarke Decl.* Ex. 8, JA 447-473.

The release discloses the existence of the CIA IG complaint, its administrative history, and the chronology of a Congressional inquiry. But it does not reveal what, exactly, is the underlying grievance. The *only* information regarding the subject matter is that it "calls into question some actions and decisions made by the Chief of Base, Benghazi."

Plaintiffs argued that the CIA has improperly redacted the specific subject matter of an investigation, and seek disclosure of the whistleblower's account of the CIA Chief-of-Base's instructions to forces regarding a response—specifically whether the order was to stay put, or to "stand down." The District Court held that the CIA's redactions were proper.

### **3. FBI and the Order to Stand Down**

By February 21, 2014, FOIA request, plaintiffs sought disclosure of FBI 302 Interview Reports ("302s") of FBI interviews conducted in Germany. *See Compl.*,

¶ 126 (8), JA 73:

September 15th or 16th FBI 302 Interview Reports, and corresponding handwritten notes, of interviews conducted in Germany of United States personnel who had been in the Benghazi mission and

the Benghazi CIA annex during the September 11th and 12th attacks on those facilities.

The following paragraph of the *Compl.* (§ 127 *id.*) quotes a report regarding the FBI interviews at issue:

For your reference, the following is an excerpt from the December 30, 2012, Senate Committee On Homeland Security And Governmental Affairs, *Flashing Red: A Special Report On The Terrorist Attack At Benghazi*:

On September 15th and 16th, officials from the FBI conducted face-to-face interviews in Germany of the U.S. personnel who had been on the compound in Benghazi during the attack. The U.S. personnel who were interviewed saw no indications that there had been a protest prior to the attack. Information from those interviews was shared on a secure video teleconference on the afternoon of the 16th with FBI and other IC officials in Washington.

Here, the FBI withholds, in full, the FBI 302-interview reports of the survivors of the attack, even while plaintiffs seek only disclosure of whether the QRF had reported to the FBI that the CIA Chief-of-Base had ordered the five members of the Agency's Quick Reaction Force to stand down.

The District Court held that the FBI's withholding the 302s, in their entirety, was justified.

### **JURISDICTION**

The District Court had subject-matter jurisdiction over this action under the Freedom of Information Act, 5 U.S.C. § 552 et seq. This Court has jurisdiction under 28 U.S.C. § 1291.

By Memorandum Opinion and Order entered on November 28, 2022, Honorable Emmet G. Sullivan granted two of the Defendants' Motion for Summary Judgment and denied Plaintiffs' Cross-Motion for Summary Judgment. By Memorandum Opinion and Order entered on April 26, 2024, the Honorable Loran L. Alokhan granted the Defendant's Motion for Summary Judgment and denied Plaintiffs' Cross-Motion for Summary Judgment.

On June 22, 2024, plaintiff Roger L. Aronoff timely filed his Notice of Appeal.

### ISSUES PRESENTED

#### Department of Defense

1. Did the District Court erroneously fail to find as fact that the order to respond, known as an EXORD, is, by definition, the first order to respond.
2. Did the District Court erroneously fail to find as fact that the EXORD, transmitted at 3:00 a.m. September 12, disproves the DoD's version that the order to respond had been given "by 7:00 p.m." and the *Select Committee's* account that the order had been relayed to forces by 9:00 p.m.
4. Could disclosure of placement of assets available to respond—twelve years ago—provide adversaries with information that could now be expected to cause serious damage to national security, contrary to the protection provided by Exemption 1.
5. Where the Congressional record is replete with discussions of the assets, travel times, and available personnel and aircraft, and was coterminous with widespread media reports, did plaintiffs meet their burden to show that the information has already been made public through official sources.

6. Did the District Court err in failing to recognize that the DoD component receiving the FOIA request for the initial alert, the "OPREP-3," was required to forward it to other components likely to possess it.

Central Intelligence Agency

7. Where CIA Director David Petraeus testified that he was unaware of any "stand down" order having been given by the COB to the QRF, was the redaction of that information from a whistleblower's complaint, and its resultant Report of the CIA Inspector General, justified under Exemptions 1, 3, 5, 6 and 7.

Department of Justice

8. Where plaintiffs seek only those portions of the 302s which recount the COB's stand down order to the QRF, does the FBI have a rational basis to assert that such disclosure "could reasonably be expected to interfere with enforcement proceedings" under Exemption 7(A).
9. Where plaintiffs seek only those portions of the 302s which recount the COB's stand down order to the QRF, does the FBI's withholding-in-full violate its mandate to release reasonably segregable information.
10. Where plaintiffs seek records generated twelve years ago, has the FBI met its burden of showing that prosecutions are "pending or reasonably anticipated" under Exemption 7(A).
11. Where the QRF's accounts of the COB's stand down order is vastly public, and in the Congressional record, did the FBI properly withhold that information from the 302s under privacy Exemptions.
12. Is the FBI properly withholding, on privacy grounds, the 302 of John Tiegen, notwithstanding its receipt of Mr. Tiegen's written privacy waiver.

## SUMMARY OF ARGUMENT

### DoD

The moving party bears the initial burden "of informing the district court of the basis for its motion, and identifying those portions of the pleadings... which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). This burden "may be discharged by showing... that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. As set forth below, there is no absence of evidence to support the plaintiffs' case.

The District Court denied plaintiffs' prayer that the Court order the DoD to answer a single interrogatory. While the Court's exercise of its discretion in denying discovery in a FOIA case is entitled to deference, plaintiffs are entitled to a meritorious finding of fact upon which that ruling is based.

In this *de novo* review, the plaintiffs are asking this Court to rule, as a finding of fact, that the DoD did not order any response to the ongoing attack until September 12 at 3:00 a.m.

Plaintiffs also posit that (1) release of maps disclosing the placement of assets available to respond—twelve years ago—could not provide adversaries with information that could be expected to cause serious damage to national security,

and (2) the DoD component receiving the FOIA request for the OPREP-3 is required to forward it to other components likely to possess it.

### **CIA and FBI**

Plaintiffs posit that no FOIA Exemption justifies the CIA's and the FBI's redactions of the CIA order to its Quick Reaction Force to remain in place, or to "stand down."

### **STANDARD OF REVIEW**

This Court reviews the action of the district court in a Freedom of Information Act case *de novo*. *Summers v. Dep't of Justice*, 140 F.3d 1077, 1079 (D.C. Cir. 1998).

### **ARGUMENT**

#### **I. DoD**

The *Select Committee* stated that Mr. Panetta gave the order to deploy "by 7:00 p.m.," but there had been a delay in transmitting the order for "nearly two more" hours:

Yet nearly two more hours elapsed before the Secretary's orders were relayed to those forces. Several more hours elapsed before any of those forces moved. During those crucial hours between the Secretary's order and the actual movement of forces, no one stood watch to steer the Defense Department's bureaucratic behemoth forward to ensure the Secretary's orders were carried out with the urgency demanded by the lives at stake in Benghazi.

*Select Committee* Report. JA 426.

While the *Select Committee* wrote that Mr. Panetta had given the order to respond "by 7:00 p.m.," Mr. Panetta testified that it was sometime before 7:19 p.m. *Panetta testimony*, JA 397.

## 1. EXORD

### (a) EXORD Proves Falsity of DoD Account

The DoD produced, as its earliest record of any order to deploy, the EXORD, meaning order to go, or to execute. It was issued on September 12, at 3:00 a.m. It is attached hereto as Ex. 1 to *Clarke Decl.*, JA 371-372.

An EXORD is, by definition, the first order. The government agrees that it is the first, but opines that an order had been transmitted to forces six hours earlier, but only verbally, so there is no record of that order to go.

The DoD produced around 70 pages of corresponding FRAGORDS, or fragmentary, follow-up, orders. There are no FRAGORDS between 8:39 p.m., around when the DoD claims to have transmitted its order to go, and the 3:00 a.m. EXORD. There are no FRAGORDS during this time because there was no EXORD. Again, an EXORD is, by definition, the first order.

The District Court found otherwise. This was error.

**(b) Panetta Testimony and Timeline  
Proves the Falsity of DoD Account**

**(i) Order to Deploy was transmitted in Writing**

The DoD's claim that the 8:39 p.m. order was conveyed only verbally originated in this action, in response to plaintiffs' observation that the EXORD is the first order to respond. "[T]he initial orders in response to the September 11, 2012 attack on the United States mission in Benghazi, Libya, were conveyed verbally." *Herrington Decl.*, ¶¶ 19-20, JA 116. "[Plaintiff's complaint] is based solely on Plaintiffs' unsubstantiated speculation that other responsive records exist. They do not.... The EXORD mentioned above and attached is the first *written* order—there are no others. (Emphasis in original.) *Id.* ¶¶ 4, 22, JA 110, 117.

The government posits that, since the *Timeline* refers to orders having been given verbally, the absence of any written orders is not unexpected.

However, the *Timeline* relates that only the order to "prepare" to go was relayed verbally, using the term, "provides verbal authorization," sometime between 6:00 and 8:00 p.m. The *Timeline* does not reflect that the order to go, allegedly given at 8:39 p.m., had been transmitted orally.

The District Court misread the evidence:

Plaintiffs' objection fails because the evidence they cite is entirely consistent with DOD's representations. In the congressional testimony, former Secretary Panetta explained that the National Military Command Center issued a formal order at 8:39 P.M. that was "the oral direction[] that commenced the action for the task forces and



the other units to move.” Clarke Decl., Ex. 3 (“Panetta Test.”), ECF No. 71-1 at 15-16.

*Mem. Op.* JA 551.

The Court was mistaken. Mr. Panetta never claimed that his order "to move" was given at 8:39 p.m. Mr. Panetta, and the *Select Committee*, stated that he had given the order to deploy "by 7:00 p.m.," and the *Select Committee* claimed that the order to go had not been transmitted for "almost two hours." The time, 8:39 p.m., comes from the *Timeline*.

While the District Court accurately quoted Mr. Panetta, it omitted that, in the previous sentence, he related that authorization would be typed:

- Q. And then there were orders issued, the formal orders, issued by the National Military Command Center at 8:39 p.m. and 8:53 p.m., respectively, reflected in the DOD unclassified official—
- A. As you know, those are the—somebody then types those orders out, in terms of a formal authorization. But, as I said, it was the oral directions that commenced the action for the task forces and the other units to move.

*Panetta testimony*, JA 391.

The entry in the *Timeline* for the order to deploy, at 8:39 p.m., states, "As ordered by Secretary Panetta, the National Military Command Center transmits formal authorization." The government's theory is that the *Timeline* is internally inconsistent: It includes "provides verbal authorization" for its earlier orders, but failed to do so in relating its order to deploy, which it now claims was also provided only verbally.

And 8:39 p.m. appears to be a reference to a record, not to three or four telephone calls.

**(ii) No Order to "Prepare" to Deploy**

Another glaring contradiction in the DoD's account is the question of what order Mr. Panetta gave. The *Timeline* reports that 6:00 and 8:00 p.m.:

A Fleet Antiterrorism Security Team (FAST) platoon, stationed in Rota, Spain, to prepare to deploy to Benghazi, and a second FAST platoon, also stationed in Rota, Spain, to prepare to deploy to the Embassy in Tripoli.

The 8:39 p.m. includes:

As ordered by Secretary Panetta, the National Military Command Center transmits formal authorization for the two FAST platoons, and associated equipment, to prepare to deploy and for the EUCOM special operations force, and associated equipment, to move to an intermediate staging base in southern Europe.

*Timeline*, JA 156-157.

These events are unequivocally contradicted by Mr. Panetta's testimony.

While the Committee members asked few follow-up questions, the question of exactly what he ordered was asked over a dozen times. Each time he was asked he was clear, he gave the order one time, and one time only, and it was to deploy, to go. There was no order to prepare.<sup>16</sup>

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<sup>16</sup> See, e.g., *Panetta testimony*, JA 415:

Q. So no one would have been waiting on you to issue a subsequent order.

A. That's correct.

The *Select Committee* agreed. The order was, "go."

The Secretary said his orders were active tense. "My orders were to deploy those forces, period... [I]t was very clear: They are to deploy." He did not order the preparation to deploy or the planning to deploy or the contemplation of deployment. His unequivocal testimony was that he ordered the identified assets to "deploy." By 7:00 p.m. in Washington [1:00 a.m. in Benghazi], nearly three hours after the attacks began, the Secretary issued what he believed, then and now, to be the only order needed to move the FAST platoons, the CIF, and the U.S. SOF.

*Select Committee* Report, JA 425-26.

### (iii) Updates on Deployment False

According to the *Select Committee* Report, Mr. Panetta had given the order "by 7:00," p.m., but there had been a two-hour bureaucratic delay, so the order was not relayed to forces until around 9:00 p.m. "During those crucial hours between the Secretary's order and the actual movement of forces," according to Mr. Gowdy, "no one stood watch to steer the Defense Department's bureaucratic behemoth forward to ensure the Secretary's orders were carried out with the urgency

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Q. You were clear the first time.

A. Absolutely.

*See also id.* 384, 385, 386, 390, 400: "N]ot only prepare to deploy but deploy... I had the authority to deploy those forces. And I ordered those forces to be deployed... My directions were very clear; those forces were to be deployed, period... [M]y view was, 'Go,'... [T]here was no ambiguity... move out as quickly as you can."

demanded by the lives at stake in Benghazi." *Select Committee Report* excerpt, JA 426.

But Mr. Panetta testified that, during the 6:00 p.m. meeting at the Pentagon with General Ham, Admiral Winfield, General Dempsey, General Kelly, and Jeremy Bash—he repeatedly communicated with these "principals" to check that his orders were being carried out.

I mean, I issued the orders with regards to those teams that ought to respond, but we continued to be there. And I think, you know, it was probably at least a couple hours where the principals were still kind of talking and continuing to talk to make sure that the steps that I had ordered were taking place.

*Panetta testimony*, JA 387.

This testimony is remarkable, given that the order was not even transmitted for two hours after it is said to have been given.

Even more remarkable is his testimony that his staff told him that "things are moving." *Id.* at JA 398:

- Q: ... After you gave the order to deploy, why did you not check to see what was happening and what was moving?
- A. I did. And, I mean, I continued to talk with General Dempsey and with Admiral Winnefeld and, obviously, General Kelly, my military aide, and continued to ask, "Give me updates," to make sure these people are on the move and ready to deploy. And, you know, they indicated things were moving.
- Q. Mrs. Brooks. And so is that as specific as they were? "Things are moving"?
- A. Yeah, I mean, my whole point as Secretary was to make sure that the units that I had ordered were moving. And I didn't go into, you know, particulars about the number of people, you know, et cetera. But I

said, I want to make sure that they are moving and that we are getting them deployed as soon as possible.

This is false. Mr. Panetta's staff were not assuring him that forces were moving into place when they were not.

**(iv) Feigned Ignorance of Ongoing Attack**

Communications regarding the attack began just minutes after it began, and continued throughout the siege. At 3:44 p.m. State's Technical Operations Center opened communications with both the CIA Annex and the Embassy in Tripoli. Less than a minute later, Deputy Chief of Mission Gregory Hicks spoke briefly with Christopher Stevens, "Greg, we're under attack." Going forward, Mr. Hicks would maintain communications with both facilities in Benghazi, and with Washington.

Personnel in both Tripoli and Benghazi opened communications with the State Department's Diplomatic Security Command Center. At 4:05 p.m., the State Department Operations Center issued an "Ops Alert" to "senior Department officials, the White House Situation Room, and others." About the same time, "members within the AFRICOM command structure learned of the attack, just more than 30 minutes after it began." *Select Committee Report* at p. 56.

Secretary Clinton was notified "at or just after" 4:00 p.m. Her first call was to National Security Director Tom Donilon, about the same time the White House Situation Room received its "Ops Alert." "I briefed him on developments," she

testified. "I sought all possible support from the White House, which they quickly provided." Secretary Clinton testimony *Senate Committee on Foreign Relations, Clarke Decl.* Ex 7., JA 441.

At 4:42 p.m., the Pentagon was notified.

At 5:10 p.m. the surveillance drone, or Unmanned Aerial Vehicle, arrived above the CIA facility, adding visual to the ongoing communications. By this time, the White House, the State Department, the Pentagon, including the commanding officer of Africa Command, as well as Secretary Clinton, were fully engaged.

Mr. Panetta testified that, within minutes of being informed of the attack at 4:42 p.m., he and General Martin Dempsey traveled to the White House and went straight to the Situation Room. *Id.* at 17. When the two men entered the White House Situation Room, after 5:00 p.m., that command-and-control facility had been fully engaged for an hour, having received the alert from the State Department's Operations Center at 4:05 p.m. At 5:10 p.m., the DoD's surveillance drone arrived on-scene and began transmitting a live feed of the attack.

After his visit to the Situation Room, he and General Dempsey proceeded to meet with the President and National Security Director Tom Donilon.

Mr. Panetta's version of these events is not believable.

"Just minutes after word of the attack reached the Secretary, he and General Martin E. Dempsey, Chairman of the Joint Chiefs of Staff, departed the Pentagon." *Select Committee Report*, JA 424. But the attack had not been the catalyst for the trip to the White House, according to the DoD, because, coincidentally, that meeting with the President had already been scheduled, to discuss other matters. The visit to the White House Situation Room, which had been following the attack for an hour, was to gather "additional information... about events in Benghazi." But Mr. Panetta claims to have learned nothing. "I don't think we received any additional intelligence." *Id.* at 382. Notwithstanding the ongoing communications, Mr. Panetta claimed to be ignorant of any specifics. Mr. Panetta testified, "All I knew at that point was that an attack had happened."

Just as he had testified before the *Armed Forces Committee*, Mr. Panetta excused the three-and-a-half-hour delay to give the order on the absence of real-time information. He had to "calculate what kind of resistance are they going to incur... You don't just go charging in." "But that's not true," questioned Mr. Pompeo. "We put folks in harm's way all the time without perfect real-time information. You did it, in fact, as the Secretary of Defense multiple times. So help me, Mr. Panetta." Mr. Panetta answered, "We had pretty good information." *Id.* at 408.

(v) **Other Credibility Issues**

The *Select Committee* concluded that Mr. Panetta gave the order "by 7:00 p.m.," based on his closed-door testimony. But he testified before the *Senate Intelligence Committee* that he gave the order "immediately" upon his return to the Pentagon, at 6:00. "We both went back to the Pentagon and immediately I ordered the deployment of these forces into place." *Senate Intelligence Committee* testimony, Feb, 7, 2013 JA 481.

He could not remember who informed him (*Panetta testimony*, JA 404), or where he was when notified (*id.* at 381), or whether spoke with General Ham before leaving the Pentagon. *Id.* at 382-83. He could not recall whether the President or Mr. Donilon were even aware of the attack, in spite of the that fact that, at least an hour before that meeting, Mr. Donilon had told Secretary Clinton that the White House was fully committed to help. *Infra.*

Notwithstanding that a team of four military personnel at Embassy Tripoli were ordered by their DoD superiors to stand down,<sup>17</sup> Mr. Panetta was said to been

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<sup>17</sup> *Clarke Dec. Ex. 5*, JA 433, Deputy Chief of Mission in Tripoli Gregory Hicks testimony before *House Oversight and Government Reform Committee*:

Q. How did the personnel react to being told to stand down?

A. They were furious. I can only say—well, I will quote Lieutenant Colonel Gibson. He said, "This is the first time in my career that a diplomat has more balls than somebody in the military."

Q. So the military is told to stand down, not engage in the fight. These



unaware of this order (*id.* at 412), and he was unaware that the seven-man Tripoli Task Force rescue team had responded to Benghazi. *Id.* at 394.

Mr. Panetta testified that during the meeting with the President he "did not go into particulars about what resources would or would not be deployed" (*id.* at 21), while the *Timeline* states, "The leaders discuss potential responses to the emerging situation." JA 373.

Mr. Panetta testified that they "had to get back to the Pentagon in order to determine what steps ought to be taken to try to respond to the situation." *Panetta testimony* JA 384. Yet, minutes after being notified, they had left the Pentagon.

Even the times of early events do not jibe. The *Timeline* states that Secretary Panetta and General Dempsey met with the President at 5:00, eighteen minutes after having departed the Pentagon at 4:42 p.m. But the drive was during rush-hour, and their first stop was not the meeting, but rather was the Situation Room.

The absence of Mr. Panetta's communications during this period is odd. He did not participate in the 8:30 p.m. Benghazi conference call among representatives

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are the kind of people willing to engage. Where did that message come down, where did the stand-down order come from?

A. I believe it came from either AFRICOM or SOCAFRICA.

from AFRICOM, EUCOM, CENTCOM, TRANSCOM, SOCOM (*id.* at 406-07), and remained oblivious to the information shared among DoD components on that call. He was unaware that security team had left Tripoli on their rescue mission (*id.* at 394). He didn't watch the video feed (*id.* at 407), did not seek help from the Libyan government (*id.*), did not speak with Secretary Clinton or anyone else at the State Department (*id.* at 399), and was unaware of any request for "cross-border authority" from Libya (*id.* at 390). Nor did he correspond with anyone by email.<sup>18</sup> And there is no record of his having spoken with anyone by phone during his drive from the Pentagon to the White House, or his return to the Pentagon.

**(vi) DoD Cannot Meet its Burden of Production**

Logic dictates that if orders had, in fact, been transmitted to four units—(1) two Marine Corps Antiterrorism Security Teams at Naval Station Rota, Spain, (2) a forty-man Special Operations Airborne Commander's-in-Extremis Force in

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<sup>18</sup> *Panetta testimony*, JA 388:

Q. Sir, during your time as Secretary of Defense, were you a user of email?

A. No, and hell no. Actually, going back to when I was chief of staff to President Clinton, I made the decision not to use email at that time. I told people, if they wanted to talk to me, they came to my office and talked to me. And so I began that kind of approach going back to the time I was chief of staff, continued it when I was Director of the CIA and also as Secretary of Defense.

Croatia, and (3) United States Special Operations Forces—to deploy, there would be some record of these orders having been sent, a record of the commands having received such an order.

The absence of any record whatsoever would not be credible even if the EXORD were not, by definition, the first order, and even if Mr. Panetta had not testified that his order to deploy had been typed.

Mr. Panetta testified that the attack had ended before any assets were airborne. *Id.* at 394. He also testified, "These are elite forces. When you order them to go, they go." *Id.* at 417. So, according to the DoD, its elite, rapid-response forces had been ordered to go at 7:00 p.m., but were not even airborne six hours later.

In lieu of providing the affidavit of the individuals who are said to have placed those telephone calls, or the affidavit of any member of any of the four units that are said to have received that verbal order, or an affidavit from any of the hundreds of men who are said to have been ordered to go at 8:39 p.m., the government offers only the theory, first asserted in this action, and contradicted by the all the evidence in the record, that the 8:39 p.m. order to go was verbal.

*Herrington Decl.*, ECF 68-4 ¶¶ 19-20, JA 116.

The *Herrington Decl.* also posits that the EXORD's reference to a telephone conversation bolsters its theory that the order to go was provided verbally: "This

timeline of events is further supported by the fact that the EXORD (Exhibit 6), lists a phone conversation at 2228 Zulu on September 11, 2012" *Herrington Decl.*, ¶¶ 19-20, JA 116. But the EXORD's reference to a telephone conversation at 6:28 p.m. is irrelevant to the issue of whether the first order to respond had been transmitted at 8:39 p.m., as the DoD claims, or at 3:00 a.m., as plaintiffs aver.

Had the order to go been transmitted at 9:00 p.m., assets would have been enroute well before hostilities subsided, whereas Mr. Panetta admitted that the attack had ended before any assets were airborne. *Panetta testimony*, JA 116.

"[T]he inferences to be drawn from the underlying facts... must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation and internal quotation marks omitted).

The DoD bears the initial burden "of informing the district court of the basis for its motion, and identifying those portions of... the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The *Herrington Decl.* fails to do so.

### (c) **Bad Faith and Proposed Interrogatory**

Whether to grant discovery in a FOIA case is at the discretion of the District Court. But plaintiffs are entitled to have that decision based upon correct findings

of fact. Agency bad faith is relevant as undermining the credibility of the agency's affidavits. *Allen v. CIA*, 636 F.2d 1287 (D.C. Cir. 1980).

The burden is on the FOIA requester to produce "countervailing evidence" creating a genuine dispute of material fact, *id.* (quoting *Morley v. C.I.A.*, 508 F.3d 1108, 1116 (D.C. Cir. 2007)), and the requester "can only . . . rebut[]" the agency's affidavits "with clear evidence of bad faith," *Bigwood v. U.S. Dep't of Def.*, 132 F. Supp. 3d 124, 136 (D.D.C. 2015).

Here, the DoD has represented, to Congress and to the public, that it ordered forces to respond at 8:39 p.m. This is untrue. And it was unequivocally made in bad faith. "[W]here it becomes apparent that the subject matter of a request involves activities which, if disclosed, would publicly embarrass the agency or that a so-called 'cover up' is presented, government affidavits lose credibility." *Rugiero v. U.S. Dept. of Justice*, 257 F.3d 534 (6th Cir. 2001).

The DoD's account of the matter begs the granting of the relief sought. Plaintiffs seek to discover the facts of when communications with assets were first made and what those communications were. The existence of the DoD's various versions of events, and chronologies, is accompanied by its failure to identify any record of any communication or order until 3:00 a.m. the next day. Thus, there is good cause, and an enormous public interest, in ordering the DOD to answer the following interrogatory:

State the times of all electronic, verbal, and written, communications, from 3:32 p.m., through 3:00 a.m., by and among all DOD components, the total number of individuals on the communication, their titles and locations, and the substance of that communication. Include in your answer a description of all records, in any form, containing, reflecting, or otherwise corroborating, that communication.

*Clarke Decl.* Ex. 6 JA 436.

## **2. DIA Required to Forward Request for OPREP-3 to Proper Component**

Plaintiffs sought the first alert from the DIA. The DoD's search did not locate it.

The DoD named three of its command-and-control units as the recipients of the OPREP-3, and stated that AFRICOM would be "responsible for the report," not the DIA. The Report and Recommendation ("*Rep. & Rec.*") agreed. Further, the *Rep. & Rec.* opined that plaintiff had not proffered any evidence that the DoD is the custodian, or that the OPREP-3 may have been transmitted to DoD components only verbally, or that the OPREP-3 may not be responsive to plaintiffs' FOIA request, not recognizing that plaintiffs had specifically requested the OPREP-3. *See Compl.* ¶ 110, JA 66. The DoD had not advanced these views.

The District Court agreed that plaintiffs had requested the record from the wrong component of the DoD:

Plaintiffs also claim that DOD's search was inadequate because the agency did not produce a "PINNACLE OPREP-3 Report." *See Pls.' Objs.*, ECF No. 87 at 23-25. In their Complaint, they explain that they

requested these reports from the DIA in their May 28, 2014 FOIA request. *See Compl.*, ECF No. 1 ¶¶ 19, 98. DOD explained that, although the DIA “conducted [a search] in response to this request,” it was unable to locate the reports because ““the OPREP 3 report would come from [AFRICOM],” not the DIA. *Herrington Decl.*, ECF No. 68-4 ¶¶ 23-24. As Magistrate Judge Robinson explained in her R. & R., Plaintiffs have not provided any countervailing evidence to rebut this affidavit and suggest that the DIA should have been able to locate the reports among its records.

*Mem. Op.* JA 554-55.

But DoD regulations mandate that the DoD forward to the relevant combatant command. *DoD Freedom of Information Act (FOIA) Program*, 82 FR 1197, *FOIA Request Processing § 286.7 General provisions*, subpart (c), states:

*Re-routing of misdirected requests.* DoD Components receiving a misdirected FOIA request for records clearly originating with another DoD Component (*e.g.* the Air Force receives a FOIA request for a Navy contract) will route the FOIA request to the appropriate DoD Component and inform them of the date the FOIA request was initially received. Additionally, it will advise the FOIA requester of the routing of the request. This routing requirement only applies to those FOIA requests directed to a DoD Component that seek documents for which the DoD is responsible. If it is known that responsibility for the requested records rests with a non-DoD Federal agency (*e.g.*, Department of State), then the DoD Component need only advise the FOIA requester to submit the FOIA request to the proper Federal agency. DoD Components will not route misdirected FOIA requests to a Defense Criminal Investigation Organization or Intelligence Community component without first contacting the other component or agency for guidance.

### 3. Withholding Maps of Available Assets Unjustified

Plaintiffs also sought maps of available personnel and assets,<sup>19</sup> and an accounting of personnel and aircraft.<sup>20</sup> The DoD responded with the Declaration of Vice Director of Operations for the Joint Staff at the Pentagon, Rear Admiral James J. Malloy. *Malloy Decl.* JA 97-98. He wrote that the DoD's has 12 pages of maps that contain the posture of "forces worldwide during the relevant timeframe in September 2012," the numbers and locations of ships, submarines, response forces, and aircraft surrounding Benghazi, as well as travel times. *Id.* ¶ 4.

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<sup>19</sup> Maps depicting assets made 3/31/14 to (1) European Command, (2) Africa Command, (3) Central Command, (4) Office of the Secretary of Defense, and (5) DIA (4/7/14): "*Maps*. Maps depicting all assets that could have been dispatched to the Benghazi mission or the CIA annex facility on September 11th and 12th, 2012..." *Compl.* ¶¶ 30, 75, 80, 95, 105, JA 36, 54, 55-56, 61-62, and 64.

<sup>20</sup> US aircraft in Djibouti made 10/1/14 to Africa Command: "Records identifying, and concerning, all US aircraft in Djibouti on September 11, 2012... include[ing] those that disclose the readiness status of all AC-130 gunships." *Compl.* ¶¶ 28, 87. US aircraft at Aviano, Italy, made 4/7/14 to Air Force: "[D]isclosure of records identifying all US aircraft at Aviano Air Base in northeastern Italy on September 11th and 12th, 2012..." *Compl.* ¶¶ 25, 56. US aircraft in Sigonella, Sicily made 3/31/14 to (1) Navy, (2) Air Force, and (3) European Command: "*Sigonella*. Records identifying, and concerning, all US aircraft at NATO Base... Naval Air Station Sigonella in Sicily, Italy..." *Compl.* ¶¶ 23, 42, 50, 67, JA 34, 41-42, 45, 51-52.



The maps are withheld in their entirety. Admiral Malloy posits that disclosure could provide adversaries with information that could now be expected to cause serious damage to national security.

[R]elease of this information reasonably could be expected to cause serious damage to the national security. Even with the passage of time, how DoD's forces are positioned at a particular time could provide potentially damaging and/or threatening insight to adversaries regarding DoD's interests, intent, and potential operations in these volatile regions of the world. Tensions with hostile foreign governments could rise depending on the disclosure of such positioning. Terrorist organizations, violent extremist organizations, or hostile foreign governments could use transit time capability information to plan attacks within windows of perceived vulnerability. It is for this reason that this information is currently and properly classified and must not be released.

*Malloy Decl.* ¶ 9 JA 97.

Plaintiffs' expert, Admiral James A. Lyons, Jr., USN (Ret.) disagrees:

The disposition of our forces in September 2012 is tactical information that is perishable in that immediate time frame. Therefore, to continue to maintain that revealing that tactical information six years later has no basis in fact. Disclosure of this information could not provide adversaries with information that could harm national security. The U.S. deployment in the region almost six years ago could be of no value to an adversary.

*Lyons Aff.* ¶ 5 JA 485.

Admiral Lyons' analysis is logical. Admiral Malloy's is not. Admiral Malloy's discussion of the age of the record is simply, "even with the passage of time." That is an insufficient explanation to the question of the fluidity of assets.

It has now been 12 years since the maps were generated. The government has not met its burden to show the applicability of the exemption. In *Campbell v. US Dept. Justice*, 164 F.3d 20, 31 (DC Cir. 1998), the D.C. Circuit made clear that declarations that "fail to draw any connection between the documents at issue and the general standards that govern the national security exemption" are inadequate.

The agency invoking a FOIA exemption bears the burden of demonstrating it applies. *U.S. Dep't of Just. v. Reps. Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989).

"It is in the public interest" that the DoD release the information, wrote the *Select Committee*. JA 425. Plaintiffs agree.

## **2. The CIA Cannot Justify Redacting Stand Down Order**

At issue here is the CIA's response to plaintiffs' FOIA request for "Any and all... records of CIA activities in Libya in the aftermath of the September 11 and 12, 2012 attacks in Benghazi, Libya, including but not limited to records in possession of the CIA Office of Inspector General." *Compl.* ¶ 144(1) JA 82.

On September 25, 2017, the CIA advised that it had located twenty responsive records. It released eight, totaling 25 pages. Nine of these pages are wholly redacted, with the balance heavily redacted. Additionally, it withheld 12 documents in their entirety. The 25-page production is a part of the record. CIA Production, *Clarke Aff.* Ex. 8, JA 447-73.

The production reflects that, in the aftermath of the attack, in September of 2012, Director Petraeus spoke to a group of CIA personnel who had been at the Annex. Thereafter, one employee emailed the CIA IG asking that certain information be provided to Mr. Petraeus, anonymously. The IG promptly did so. (The whistleblower's email may have been the one referenced in the Senate Select Intelligence Committee's Report.<sup>21</sup>)

Plaintiffs believe that the information redacted is that, in his talk to the employees, Mr. Petraeus had stated that the CIA had taken immediate action, and the whistleblower had sought to disabuse him of that notion, relating that the Chief-of-Base (COB) had repeatedly ordered the QRF to "stand down."

But that information is redacted. The release discloses the existence of a CIA IG complaint, its administrative history, and the chronology of a Congressional inquiry, but it does not reveal the underlying grievance. The *only* information regarding the "subject matter" is that it "calls into question some actions and decisions made by the Chief of Base, Benghazi." *Id.* JA 455.

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<sup>21</sup> January 15, 2014 Report of US Senate Select Intelligence Committee, "REVIEW OF THE TERRORIST ATTACKS ON U.S. FACILITIES IN BENGHAZI..." note 13:

According to informal notes obtained from the CIA, the security team left for the Annex [sic] without the formal approval of the Chief of Base, *see* attachments to e-mail from CIA staff [redacted] to CIA staff [redacted] September 23, 2012.

Here, plaintiffs simply ask that the CIA disclose only those portions of its records that relate that the COB ordered the QRF to "stand down."

While the CIA did not assert that these records are exempt from the FOIA as operational records, the CIA Act's language mandating release of "the specific subject matter" of an IG complaint is instructive here. *See* 50 U.S.C. § 431(c)(3): "[E]xempted operational files shall continue to be subject to search and review for information concerning... *the specific subject matter* of an investigation by the... Office of Inspector General of the Central Intelligence Agency..." (Emphasis supplied.)

The CIA's disclosure must include what wrongdoing was alleged.

The Declaration of Antoinette B, Shiner (*Shiner Decl.* JA 164-240), identified redactions and withholdings on, variously, national security grounds under Exemptions (b)(1) and (b)(3) of 5 U.S.C. § 522, on privacy grounds under Exemptions (b)(6) and (b)(7)(C), and as law enforcement information as defined in Exemption (b)(7)(D). Absent from the CIA's stated position is any explanation on how or why disclosure of the stand down order could "reasonably be expected to result in some level of damage to the national security" *Id.* ¶ 34(d). Nor does the *Shiner Decl.* explain why it could not produce the non-exempt portion while redacting the "identification of CIA sources, methods, and activities" (*Shiner Decl.* ¶¶ 35, 43, JA 164-240), or code words (*id.* ¶ 36), or "the names of covert CIA

personnel" (*id.* ¶ 38), or "the identity of a confidential source" (*id.* ¶ 51), or any other names, to protect privacy. *Id.* ¶¶ 45-49.

The government in its Memorandum (ECF 68-2 at 41) states:

Indeed, in this case it is not difficult to conceive the potential damage to national security of disclosing the names, functions, and other identifying information of CIA personnel who were interviewed by the IG as it assessed the efficacy of the CIA's operations with respect to the September 2012 attack on the diplomatic facility in Benghazi, Libya. Under these circumstances, the CIA properly invoked Exemption 3 and the CIA Act to withhold information identifying information about CIA personnel, including names, official titles, and organizations, as referenced in the IG report.

Plaintiffs agree. While many of the CIA's redactions are undoubtedly proper, its nondisclosure of the substance of the underlying allegation is improper.

The August 27, 2020 *Rep. & Rec.* opined that the redactions were proper, reasoning that plaintiffs' request for disclosure of references to the order to stand down "seek the details of the IG Files... that are protected from disclosure by Exemptions 1, 3, and 7. *See* Pls.' Reply at 3-4 ('What 'fulsome details' had Director Petraeus not been told?')." *Rep. & Rec.* JA 518-519.

The District Court adopted the *Rep. & Rec.* that the CIA had properly redacted the CIA Inspector General files under Exemptions 1, 3, 6, and 7.

Here, the government cannot explain how disclosure will interfere such that the court can "trace a rational link between the nature of the document and the alleged likely interference." *Crooker v. Bureau of Alcohol, Tobacco, & Firearms,*

789 F.2d 64, 67 (D.C. Cir. 1986); *Citizens for Resp. & Ethics in Wash.*, 746 F.3d at 1098. In lieu of providing any analysis or theory of how disclosure of the stand down order could lead to the disclosure of the whistleblower's identity, or how that disclosure could relate to intelligence sources and methods, the District Court dismissed plaintiffs' arguments as unsupported:

[D]isclosure of the specifics of the wrongdoing alleged could lead to the disclosure of the whistleblower's identity, and that nondisclosure is justified as the information 'relates to intelligence sources and methods.'" Pls.' Objs., ECF No. 87 at 29-30 (footnotes omitted). The Court need not consider these objections as Plaintiffs have not made any argument or cited any law to support these bare points. *See Berry L. PLLC v. Kraft Foods Grp., Inc.*, No. CV 13-0475 (RBW), 2013 WL 12061613, at \*5 (D.D.C. Dec. 11, 2013) ("The Court need not consider unsupported, cursory arguments.").

Here, disclosure of the stand down order will prove that Director Petraeus lied to Congress when he testified before the House Intelligence Committee that he was unaware of any such order having been given. While that testimony remains withheld, *Select Committee* member Adam Schiff stated that the CIA Director had denied knowledge of a stand down order: "The Republican lead and bipartisan House Intelligence Committee debunked that [stand down order] myth, General Petraeus came in again yesterday and debunked that myth." *Panetta testimony*, JA 401.

### III. The FBI Cannot Justify Redacting Stand Down Order

Plaintiffs seek disclosure of the FBI FD-302 reports and corresponding handwritten notes for interviews conducted on September 15 and 16, 2012, in Germany, containing the narratives of United States personnel who survived the September 11 and 12, 2012 Benghazi attacks on the State Department Mission, and thereafter on the CIA Annex (hereinafter “302s.”)

#### 1. Privacy Exemptions Unavailable

Privacy exemptions are unavailable for the 302s of interviews of Benghazi survivors Mark Geist, Kris Paronto, and John Tiegen. Their accounts are extremely public, having been the subject of a book, a feature length movie, and in broadcast appearances. Additionally, John Tiegen's privacy waiver is in the District Court record. “I waive any privacy interest I may have in the FBI's reports of its interview with me.” *Tiegen Aff.* JA 908.

The only names that plaintiffs seek are those in FBI 302 interview reports of these three CIA Annex security team members.

In September of 2014, Hachette Book Group published "*13 Hours, The Inside Account of what Really Happened in Benghazi*," by "Mitchell Zuckoff with the Annex Security Team." The "Annex Security team" refers to five Quick Reaction Force ("QRF") members, the three identified above and two more, Dave Benton and Jack Silva. "QRF" below refers to Mark Geist, Kris Paronto, and John

Tiegen. The book relates that the QRF's "only editorial demand was that the story be told truthfully."

The book recounts that, after being ordered to stay in place at least three times, the rescuers disobeyed orders.<sup>22</sup> The movie, *13 Hours: The Secret Soldiers of Benghazi*, released on January 15, 2016 by Paramount Pictures, depicts the same order to stand down as does the book. The movie grossed \$69 million.

Moreover, these three witnesses have made significant, and successful, efforts to publicly describe their accounts. See, e.g., *Fox News* Sean Hannity and

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<sup>22</sup> See, e.g., *13 Hours, The Inside Account of what Really Happened in Benghazi*, Sept. 2014 Hachette Books:

Standing outside the Mercedes, Tig called out, "Hey, we gotta go now! We're losing the initiative!" "No, stand down, you need to wait," Bob the base chief yelled back. "We need to come up with a plan," the Team Leader repeated. In the meantime, Tanto told the bosses, he and the other operators were overdue to move out. CIA chief looked at Tanto, then at the Team Leader, then back to Tanto. Tanto felt as though the chief was looking right through him. "No," Bob said, "hold up." "We're going to have the local militia handle it." Tanto couldn't believe his ears. He turned to the Team Leader: "Hey, we need to go." "No," the T.L. said, "we need to wait. The chief is trying to coordinate with 17 Feb and let them handle it." "What do you mean, 'Let them handle it?'" Tanto demanded. "We're being attacked!" one yelled, his voice tight with stress. "There's approximately twenty to thirty armed men, with AKs firing. We're being attacked! We need help! We need help now!" Adrenaline surged through the operators' veins, but again they were told to wait. They were used to following orders, and they knew that insubordination could mean their jobs or worse. But a shared thought took hold in both vehicles: If they weren't given permission to move out soon, they'd take matters into their own hands.



Greta Van Susteren segments in September and October 2014, interviewing all three.

Exemptions 6 and Exemption 7(C) protect against invasion of privacy. Exemption 6 protects against "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy (5 U.S.C. § 552(b)(6)), and Exemption 7(C) protects "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information... could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

Plaintiffs have no objection to the FBI's redaction of identifying information of the six categories of individuals it listed:

- (1) FBI Special Agents and Professional Staff;
- (2) Personnel from Non-FBI Federal Agencies;
- (3) Third Parties Merely Mentioned in the Responsive Records;
- (4) Persons of Investigative Interest;
- (5) Local Law Enforcement Personnel; and
- (6) Individuals who Provided Assistance to the CIA.

## **2. Other Exemptions Unavailable**

Many of the exemptions that the FBI asserted are well-founded, for which redactions are proper. The FBI does not, and cannot, articulate how survivors' accounts of the order to stand down implicates the protections of the exemptions it asserts.

The FBI asserts that there are no "reasonably segregable" portions of the 302's that are not subject to one FOIA exemption or another, and so it withholds all responsive records, in full, categorically, maintaining that there are no non-exempt portions of the records.

The FBI identified redactions and withholdings on, variously, national security grounds under Exemptions Exemptions 1 and 3, the deliberative process privilege under Exemption 5, and Exemption 7 law enforcement information that could (1) interfere with enforcement proceedings, or (2) disclose techniques and procedures and risk circumvention of law, or (3) endanger life or physical safety. (Exemptions 7(A), 7(E), and 7(F)).

The Court in *Campbell v. United States Department of Health & Human Services*, 682 F.2d 256, 265 (D.C. Cir. 1982) held that a "district court must conduct a more focused and particularized review of the documentation on which the government bases its claim that the information [the plaintiff] seeks would interfere with [an] investigation" when an agency withholds records requested by a third party to which the targets of the investigation have access.

*See also Chesapeake Bay Found., Inc. v. U.S. Army Corps of Eng'rs*, 677 F. Supp. 2d 101, 108 (D.D.C. 2009) (concluding agency's invocation of Exemption 7(A) was improper where it failed to "explain how its investigation will be

impaired by the release of information that the targets of the investigation already possess”).

Here, any potential target of the investigation has access to the accounts of the three named QRF, as their accounts of the stand down order appear in their book, *13 Hours: The Inside Account of What Really Happened in Benghazi*, and in the movie, *13 Hours: The Secret Soldiers of Benghazi*.

Here too the government proffers no theory of how disclosure of the order to stand down, properly redacted, could be expected to result in violations of any interest protected by any exemption.

### **3. Controversy over Stand Down Order Unresolved**

Within five minutes of the first call from the State Department facility to the CIA Annex asking for help, five members of the Agency's QRF at the CIA Annex had assembled in two armored cars, armed and ready to go. This much is uncontested.

The issue of whether the COB ordered the GSR to stand down has been the subject of a very public debate, and is a central issue here.

According to the QRF, the COB, who was in charge, forbade the rescuers' departure, repeatedly told them to "stand down" and "hold up." After being ordered to stay in place at least three times, the rescuers disobeyed orders, and set out on their rescue mission.

The CIA, on the other hand, has an entirely different version. "The Chief-of-Base was adamant," writes the *Select Committee*, "that he never told the Annex team members to 'stand down.'" *Clarke Decl.* Ex. 4, JA 423. "I did not tell anybody to stand down," he testified to the *Select Committee. Id.*

The other Committee to consider the matter was the Senate Select Committee on Intelligence in its January 2014 Report, REVIEW OF THE TERRORIST ATTACK ON U.S. FACILITIES IN BENGHAZI, LIBYA, SEPTEMBER 11-12, 2012. It concluded that the "Committee found no evidence of intentional delay or obstruction by the Chief of Base or any other party." It credited the Deputy COB's September 19, 2012, *Memorandum for the Record* relating that the COB had "launched QRF [Quick Reaction Force] as soon as possible." The CIA Deputy Chief wrote:

[The GRS] advised he had just received a call from the State compound indicating they had been penetrated and were taking fire. He strongly recommended taking the available GRS personnel then on base, himself and five other personnel. I found the COB and we apprised him of the situation. He authorized the move.

*CIA Memorandum for the Record,*" *Clarke Decl.* Ex. 9, JA 474

The *Select Committee* recounted both versions, but made no finding.

The matter remains unresolved. *See, e.g., Former CIA Chief in Benghazi Challenges the Story Line of the New Movie "13 Hours,"* Jan. 15, 2016, Wash. Post.

*See also Benghazi Heroes Debunk House Intel Report as 'Full of Inaccuracies' with Firsthand Account, Breitbart.com Dec. 2, 2014:*

[QRF] Paronto knows specifically of a CIA employee that was poorly treated while in Tripoli due to disagreeing with the story that was being fabricated by the CIA. The CIA employee also filed a complaint with the CIA Inspector General.

The QRF estimated that the stand down orders delayed their arrival at the State Department Compound by around 20 minutes, that Ambassador Christopher Stevens and Sean Smith may have lived but for the delay, and that all seven men at the State Department compound would have been killed had the QRF not disobeyed the order.

Just as the identification of the specific subject matter of the CIA whistleblower's complaint would shed light on whether an order to stand down had been given (and whether Mr. Petraeus lied to Congress), so too with disclosure of this information in the 302's.

The "only relevant 'public interest in disclosure' to be weighed in this balance is the extent to which disclosure would serve 'the core purpose of... FOIA,' which is "contribut[ing] significantly to public understanding of the operations or activities of the government." *SafeCard Servs.*, 926 F.2d at 1206.

## CONCLUSION

The question of when forces were ordered to respond, and whether there had been any orders not to respond, are central to the controversy over the government's conduct in response to the Benghazi attack.

Given the investigative history of this matter, prosecution of this FOIA case opens up the inner working of not only government agencies, but also of congressional oversight. The *Select Committee's* decision not to exercise its subpoena power is inexplicable, as is its reliance on Mr. Panetta's thoroughly contradicted, and even nonsensical, testimony.

Plaintiffs have met their burden to show bad faith.

The government has not met its burden to show the applicability of any FOIA exemption to any of the disclosures that plaintiffs seek.

WHEREFORE, Appellant Roger Aronoff, as well as the other plaintiffs in this action, respectfully pray that this Court:

- I. Find as a fact that the Department of Defense did not order its assets to respond until 3:00 a.m. Washington time, and to order the District Court to consider this fact in determining whether to allow plaintiffs to take discovery.
- II. Order the Department of Defense to:
  - A. Refer the FOIA Request for the OPREP-3 to the proper components; and
  - B. Release the 12 pages of maps of available assets, withheld in their entirety.

- III. Order Federal Bureau of Investigation to produce those portions of its 302 interview reports relating the Chief-of-Base's instructions to the rescuers regarding their response to the attack.
- IV. Order the Central Intelligence Agency to produce its records of the specific subject matter of a whistleblower's complaint to the Agency's Inspector General.

Date: January 17, 2025.

Respectfully submitted,

/s/ John H. Clarke

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**CERTIFICATE OF COMPLIANCE FRAP 27(d)(2)(A)**

The text for this Brief for Appellant was prepared using Times New Roman, 14 point, and contains 12,863 words as counted by Microsoft Word.

/s/ John H. Clarke

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on January 17, 2025, I have caused the foregoing Appellant's Opening Brief to be served on Appellee's counsel by filing the Certificate on the Court's CM/ECF system. Counsel is a registered user.

/s/ John H. Clarke



**ADDENDUM**

The Freedom of Information Act  
5 U.S.C. § 552. Excerpts. . . . . 1

DoD Freedom of Information Act (FOIA) Program,  
82 FR 1197, *FOIA Request Processing* § 286.7  
*General provisions, subpart (c) Re-routing of  
misdirected requests* . . . . . 3

50 U.S. Code § 3141(c)(3)—*Operational files of the  
Central Intelligence Agency.* . . . . . 4

**The Freedom of Information Act**  
**5 U.S.C. § 552. Public information; agency rules, opinions, orders, records,  
and Proceedings. Excerpts**

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(a) Each agency shall make available to the public information as follows:

\* \* \*

(3) (A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

\* \* \*

(4) (B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters

to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

\* \* \*

(b) This section does not apply to matters that are—

(1)

(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

\* \* \*

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A)

- (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
- (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

\* \* \*

(5) inter-agency or intra-agency memorandums or letters which that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information

- (A) could reasonably be expected to interfere with enforcement proceedings,
- (B) would deprive a person of a right to a fair trial or an impartial adjudication,
- (C) could reasonably be expected to constitute an unwarranted

- invasion of personal privacy,
- (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,
  - (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or
  - (F) could reasonably be expected to endanger the life or physical safety of any individual;

**DoD Freedom of Information Act (FOIA) Program, 82 FR 1197, *FOIA Request Processing* § 286.7 General provisions, subpart (c), *Re-routing of misdirected requests***

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*Re-routing of misdirected requests.* DoD Components receiving a misdirected FOIA request for records clearly originating with another DoD Component (*e.g.* the Air Force receives a FOIA request for a Navy contract) will route the FOIA request to the appropriate DoD Component and inform them of the date the FOIA request was initially received. Additionally, it will advise the FOIA requester of the routing of the request. This routing requirement only applies to those FOIA requests directed to a DoD Component that seek documents for which the DoD is responsible. If it is known that responsibility for the requested records rests with a non-DoD Federal agency (*e.g.*, Department of State), then the DoD Component need only advise the FOIA requester to submit the FOIA request to the proper Federal agency. DoD Components will not route misdirected FOIA requests to a Defense Criminal Investigation Organization or Intelligence Community component without first contacting the other component or agency for guidance

**50 U.S. Code § 3141(c)(3)—Operational files of the Central Intelligence Agency**

(c) SEARCH AND REVIEW FOR INFORMATION

Notwithstanding subsection (a) of this section, exempted operational files shall continue to be subject to search and review for information concerning—

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- (3) the specific subject matter of an investigation by the congressional intelligence committees, the Intelligence Oversight Board, the Department of Justice, the Office of General Counsel of the Central Intelligence Agency, the Office of Inspector General of the Central Intelligence Agency, or the Office of the Director of National Intelligence for any impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity.