

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ACCURACY IN MEDIA, INC., et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 14-1589 (EGS)
)	
DEPARTMENT OF DEFENSE, et al.,)	
)	
Defendants.)	
_____)	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS FOR
SUMMARY JUDGMENT, CROSS-MOTIONS FOR SUMMARY JUDGMENT,
AND MOTION FOR LEAVE TO PROPOUND INTERROGATORY TO DOD

COME NOW Plaintiffs Roger L. Aronoff, 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., by counsel, under Rule 56 of the Federal Rules of Civil Procedure, and respectfully move the Court for entry of Summary Judgment in their favor, and for Leave to Propound an Interrogatory to the Department of Defense.

In support of this relief, plaintiffs respectfully submit the attached Memorandum in Support, Plaintiffs' Statement of Material Facts to which there is No Genuine Issue, the Affidavit of Admiral James A. Lyons, Jr., USN (Ret), the Affidavit of Rear Admiral Charles R, Kubic, CEC, USN (Ret), the Declaration of John H. Clarke, together with the exhibits thereto, and Plaintiffs' Counter-Statement of Material Facts to which there is a Genuine Issue.

Date: June 25, 2018.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT,
AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTIONS FOR SUMMARY JUDGMENT,
AND
MOTION FOR LEAVE TO PROPOUND INTERROGATORY TO DOD

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DEPARTMENT OF DEFENSE

This case seeks disclosure of records confirming or refuting the government's version of its response to the September 11, 2012 attack on U.S. facilities in Benghazi, Libya. It is more accurately described as a siege, as plaintiffs' summarized in their Second Amended Complaint ("Compl."), ECF 31 at 1.

Most of the roughly 17 items sought from DOD seek disclosure of records revealing the government's initial communications, and orders, to all assets—with the State Department facility;¹ up the chain-of-command,² and to other U.S. assets, worldwide, including to Sicily,³

¹ 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.

² 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..." Compl. ¶¶ 20, 80.

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..." Compl. ¶¶ 19, 110.

³ 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 communications with, and orders to, NAS Sigonella... [re deployment and] to abort or turn back." Compl. ¶¶ 22, 42, 59, 67.

northern Italy, Spain,⁴ Croatia,⁵ Djibouti, and the United States,⁶ as well as maps of available personnel and assets,⁷ including an accounting of personnel and aircraft.⁸ Other requests at issue are records of Gaddafi's March 2011 offer of abdication,⁹ and assets prepositioned off the coast

⁴ 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..." Compl. ¶¶ 42, 50, 59, 67, 90.

⁵ 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." Compl. ¶¶ 27, 37, 67, 90.

⁶ 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..." Compl. ¶¶ 29, 90.

⁷ 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.

⁸ 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.

⁹ Gaddafi's March 2011 interest in truce and abdication made 10/1/14 to Africa Command: "Records of... March of 2011... Gaddafi's expressed interest in a truce and possible abdication and exile out of Libya, by or to: (a) ...General Abdulqader Yusef Dibri; (b) Rear Admiral (ret.) Chuck Kubic; (c) AFRICOM personnel, including... (i) General Ham and (ii) Lt, Commander Brian Linvill; and (d) CIA." Compl. ¶¶ 35, 87.

of Tripoli in October of 2011.¹⁰

The DOD produced or identified over 1,200 pages of records. *See*

<http://www.aim.org/benghazi/freedom-of-information-act-records-produced/>

I. Records of Initial Orders

The DOD produced, as its earliest record of any order, or communication, an execute order, or EXORD, issued on September 12, at 3:00 a.m. This order was generated over 11 hours after the onset of hostilities, 10 hours after the Pentagon and Mr. Panetta were notified, and over eight hours after the DOD claims to have finally issued the order to deploy, "by 7:00," which was three-and-a-half hours into the siege.

¹⁰ During the parties' discussions narrowing the issues, the DOD stated that it would withhold, on the same grounds as it did for maps of assets, records of assets off the coast of Tripoli during Secretary Clinton's October 2011 visit. The parties' dispositive motions do not address the issue. The government noted in its dispositive memorandum that "the parties believe the Court's decision on this issue also will be dispositive on the issue of DOD's decision to withhold records regarding personnel and other available assets, which are the subject of Plaintiffs' other FOIA requests directed at DOD." ECF 58-2 at 12. The parties believe that the matter will be resolved informally. In any event, also at issue is the request for "Records identifying DoD assets pre-positioned off the coast of Tripoli on October 18, 2011..." (Compl. ¶¶ 36, 42, 80, 95, 105), made 3/31/14 to (1) Navy, (2) Africa Command, (3) Office of the Secretary of Defense and the Joint Staff, and (4) Defense Intelligence Agency.

The government's memorandum (ECF 58-2 at 12) identifies several issues that the plaintiffs do not contest. Plaintiffs do not challenge (1) withholdings of confidential sources under Exemption 7(D), (2) information protected by privacy afforded by Exemptions 6 and 7(C) (with the exception of the request for video), (3) the "search for records responsive to the portion of plaintiffs' FOIA request to the State Department cited in ¶ 116(6) of the Second Amended Complaint," (4) whether the State Department properly withheld in full or part a call log and three interview summaries, (5) the CIA's *Glomar* assertion in response to plaintiffs' request for records of Gaddafi's expressed interest in a truce and possible abdication and exile out of Libya, (6) the CIA's search for records in response to the request for all records of CIA Director Petraeus's and Deputy Director Morell's actions and communications for the 24-hour period beginning when first notified, and (7) the DIA's withholding of four September 12, 2012, records—three intelligence reports and one situation report.

Yet, the DOD posits that its searches did not yield earlier orders for one reason, and one reason only: They do not exist. *See* Declaration of Mark H. Herrington, ECF 68-4 ¶¶ 4, 22 ("Herrington Decl.").

As explained in detail below, with respect to Plaintiffs' request for records reflecting initial reports and orders, the relevant DoD components conducted a thorough search for records responsive to Plaintiffs' requests seeking initial orders and communications... [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.

Additionally, the DOD posits, the existence, or nonexistence, of the records is irrelevant under the FOIA. That is generally correct. *See Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982), observing that an agency is not required to demonstrate that all responsive documents were found and that no other relevant documents could possibly exist. "The issue to be resolved is not whether there might exist any... documents possibly responsive to the request, but rather whether the search for those documents was adequate." *Weisberg v. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (internal citation omitted).

But here, the DOD's unequivocal position is that the records do not exist, even while it has a history of unequivocally representing to Congress, and to the public, that the records do exist. Thus, the government is not saved by its seemingly "good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

While plaintiffs are not in a position to dispute the particulars of the DOD's search (*see* Plaintiffs' Counter-Statement of Material Facts ¶¶ 11-18, 20-23), the record in this matter, generated over the course of seven Congressional probes, is replete with references to orders and communications that the DOD now claims never existed.

The government's chronology, in sum, is that Mr. Panetta learned that the siege was underway at 4:42 p.m., told the President in person around an hour later, traveled back to the Pentagon where he convened meetings at 6:00, and gave the order over an hour after that, sometime before 7:19 p.m. Two hours later, after 9:00 p.m., the orders were relayed to assets.

Here, the record of the DOD's responses to congressional inquiries is a moving target. Moreover, to this day, the DOD has provided only ranges of time within which the order is said to have been given. Initially, it reported, the order was given sometime between 6:00 p.m. and 8:00 p.m. Later, it was "by 7:19 p.m.," and a later was "by 7:00." Given the absence of an exact time, the DOD obviously did not produce to Congress the records of its initial orders that are sought in this lawsuit.

An EXORD is, by definition, the first order. The DOD produced around 70 pages of corresponding FRAGORDS, or fragmentary, follow-up, orders. The referenced EXORD is attached hereto as Exhibit 1 to the Declaration of John H. Clarke ("Clarke Decl."), at Bates 1-2.

In November of 2013, the DOD had prepared, in response to Congressional inquiries, a timeline. It is Exhibit 2 to the Clarke Decl., at Bates 3-4. The DOD submitted it with the Herrington Decl., "in an effort to assuage Plaintiffs' concern that the DoD production failed to include these alleged earlier written orders." ECF 68-4 ¶ 18.

Exhibit 3 is a 43-page selection from the transcript of Leon Panetta's closed-door testimony before the *Select Committee on the Events Surrounding the 2012 Terrorist Attack in Benghazi* ("*Select Committee*"). Mr. Panetta testified on January 8, 2016. The *Select Committee* released the transcript, redacted, in 2017.

A review of the record in the matter reveals the existence of a number of records that the DOD claims do not exist. Moreover, the DOD's chronologies are conflicting, illogical, and, it would appear, untrue.

A. DOD Timeline

The November 2013 DOD timeline, Exhibit 2, reveals communications that generated records, or that are contradicted by the DOD's later version, or both.

1. Pentagon Notified at 4:32 p.m.

Secretary of Defense Panetta learned of the onset of the siege by 4:32 p.m. This entry reads:

4:32 pm // 10:32 pm The National Military Command Center at the Pentagon, after receiving initial reports of the incident from the State Department, notifies the Office of the Secretary of Defense and the Joint Staff. The Information is quickly passed to Secretary Panetta and General Dempsey.

Seven minutes into the attack, at 3:49 p.m., personnel in both Tripoli and Benghazi contacted the State Department's Diplomatic Security Command Center. *See Select Committee Report*, Exhibit 4 at 52. 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" (*id.*), about the same time that "members within the AFRICOM command structure learned of the attack, just more than 30 minutes after it began." *Id.* It took 20 more minutes to notify the Pentagon.

More to the point, there is a record of the communication to State's Diplomatic Security Command Center, a record of the "Ops Alert," if not of communication to Secretary Panetta and General Dempsey.

2. 5:00 p.m. White House Meeting

5:00 pm // 11:00 pm Secretary Panetta and General Dempsey attend a previously scheduled meeting with the President at the White House. The leaders discuss potential responses to the emerging situation.

Contrary to this account, Mr. Panetta testified that he discussed no "potential responses" with the President. Exhibit 3, Panetta *Select Committee* testimony, at 14:

- Q. And during the course of that meeting with the President, the unclassified timeline indicates that the leaders discussed potential response to the emerging situation.... And did you or General Dempsey discuss with the President what resources might be available during the course of that meeting?
- A. We did not go into particulars about what resources would or would not be deployed because, frankly, at that point, we had to get back to the Pentagon...

3. 8:30 p.m. DOD Conference Call

8:30 pm // 2:30 pm The National Military Command Center conducts a Benghazi Conference Call with representatives from AFRICOM, EUCOM, CENTCOM, TRANSCOM, SOCOM, and the four services

There is a record of this call, and of the information shared. Curiously, the DOD excluded its participation in the 7:30 p.m. videoconference with the CIA and Mrs. Clinton.¹¹

¹¹ See Exhibit 7, Testimony Secretary Clinton before Senate Committee on Foreign Relations, U.S. Senate, Jan. 2013, re "Benghazi: The Attacks and The Lessons Learned," excerpts, and testimony before *U.S. House of Representative Select Committee on the Events Surrounding the 2012 Terrorist Attack in Benghazi*, ("Clinton Congressional testimony"), excerpts, at 75, 76:

- A. I had conference calls with our team in Tripoli. I was on a—what's called a SVTS, a, you know, videoconference with officials who had operational responsibilities in the Defense Department, in the CIA, at the National Security Council.

* * *

- Q. I want to make sure this is clear. Panetta and Dempsey were the decision-makers when it came to response. We've already talked about the FEST. So I'm not going to get back into that. But what I'm trying to clarify is that they were the decision-makers. Your people were on the ground in harm's way and you never had a conversation with them.
- A. I did not need to. During the turmoil of that afternoon and into the evening, we knew the president had personally told them both in the Oval Office that he expected them to do everything they possibly could do. And I knew that they would then turn to those officers responsible for carrying out that order. They were represented on that SVTS. That's why I sat in it...

4. Order "verbally conveyed" between 6:00 p.m. and 8:00 p.m.

Having provided only a two-hour window within which the order was said to have been given, the DOD obviously had not, a year after the event, reviewed the record of the initial orders at issue here.

6:00-8:00 pm // 12:00-2:00 am	During this period, actions are verbally conveyed from the Pentagon to the affected Combatant Commands in order to expedite movement of forces...
-------------------------------	---

The EXORD's reference to a telephone conversation at 6:28 p.m. ("2228 Zulu") does not cure the DOD's deficiency, contrary to its position. *See* Herrington Decl., ECF 68-4 ¶¶ 19-20:

[D]uring the timeframe of 6:00-8:00 P.M.... Secretary Panetta... provides verbal authorization... [B]ased on Secretary Panetta's *verbal* orders, the timeline specifically states that "[d]uring this period, actions are *verbally conveyed* from the Pentagon to the affected Combatant Commands in order to expedite movement of forces upon receipt of formal authorization." (emphasis added).... the initial orders in response to the September 11, 2012 attack on the United States mission in Benghazi, Libya, were conveyed *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, as reference A. The subsequent FRAGORD lists the phone conversation as reference A and the EXORD as reference B. *See* Exhibit 7.

Thus, the sole record of any communication or order before 3:00 a.m. in DOD's production is a reference to a 6:28 p.m. telephone conversation, referenced in an order that was issued eight hours later.

5. Orders to Deploy at 8:39 p.m. and 8:53 p.m.

8:39 pm // 2:39 am	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.
--------------------	--

8:53 pm // 2:53 am

As ordered by secretary Panetta, the National Military Command Center transmits formal authorization to deploy a special operations force, and associated equipment, from the United States to an intermediate staging base in southern Europe.

"Somebody then types those orders out," before they are "transmitted," explained Mr.

Panetta. Exhibit 3 at 33:

- 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.

B. Secretary of Defense Testimony

Mr. Panetta testified that he gave the order three-and-a-half hours after being informed.

1. Onset of Siege at 3:42 p.m.

Using Washington time, the attack began at 3:42 p.m. (or 3:32 by at least one account).

2. Secretary Notified at 4:42 p.m.

Mr. Panetta was notified an hour later, at 4:42 p.m. He learned almost nothing, and appears to have understood that hostilities had ended. "All I knew at that point was that an attack had happened."¹² He could not remember who "mentioned the events that were taking place in

¹² Exhibit 3 Panetta *Select Committee* testimony, at 34:

- A. I think, you know, again, it was, you know, a situation in which we had, you know, bits and pieces of information about what was taking place there. All I knew at that point was that an attack had happened. As to what the nature of it was, what, you know, what was involved, we really didn't have all of those details.

Benghazi,"¹³ and was not sure where he was when notified.¹⁴

He was "not aware" that the State Department had a facility in Benghazi (*id.* at 45), but knew of the CIA facility, which had been operating when Mr. Panetta had been President Obama's CIA Director.¹⁵

3. Departed Pentagon Minutes after Notification

"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*, Exhibit 4 at 54. But the attack had not been the catalyst for the trip to the White House, because, coincidentally, he claimed, when the Secretary of Defense and Chairman of the Joint

¹³ *Id.*:

Q. So the unclassified timeline reflects that at 3:42 the attack at the Benghazi Temporary Mission Facility begins and at 4:32 the National Military Command Center at the Pentagon notifies the Office of the Secretary of Defense. Who would the NMCC have notified both at OSD and at the Joint Staff? Would that be your military assistant? Would that be—

A. Well, yeah, I was going to say I don't specifically recall who actually mentioned the events that were taking place in Benghazi...

¹⁴ *Id.* at 11:

Q. Sir, where are you located or what were you doing, if you can recall, when you first learned of the attack?

A. My best recollection is that I was in the Secretary's office at the Pentagon, probably preparing for the meeting that we have with the President. I had a regularly scheduled meeting with the President that General Dempsey and I usually attended to discuss defense and national security issues.

¹⁵ *Id.* at 9-10:

Q. Were you aware of a single facility or more than one facility in that timeframe?

A. I was not aware of the number of facilities. I knew we had a presence there.

Q. And were you aware of the agencies that may have constituted that presence, whether State Department, CIA, or any other U.S. Government agency?

A. Because of my old job, I knew that there was a CIA presence there.

Chiefs received word of the attack, they were about to leave the Pentagon to go the White House to meet with the President on other matters.

General Ham, the combatant commander of Africa Command, was also at the Pentagon, and would have been similarly notified. But Mr. Panetta could not recall whether spoke with General Ham before leaving the Pentagon, or whether General Dempsey had spoken with General Ham.¹⁶ Nor could he recall the next time he had spoken with the President after the September 11th meeting.¹⁷

4. Notified President during 5:00 p.m. White House Meeting

The meeting did not, as the DOD claimed, commence at 5:00 p.m. Having departed the Pentagon sometime after 4:42, and driven in 5:00 traffic, Panetta and Dempsey could not have driven to the White House and commenced their meeting with the President by 5:00.

And, upon their arrival, they did not proceed to the oval office. Rather, they first went to the National Security Council quarters for "additional information... about events in Benghazi."

This Situation Room visit was one hour after its receipt at 4:05 p.m. of the alert from the State Department's Operations Center. National Security Director Tom Donilon, who was a

¹⁶ *Id.* at 12-13:

- Q. And prior to the beginning of that meeting with the President, had you had an opportunity to speak with General Ham, the combatant commander of Africa Command, or had you not heard anything from him as of that point?
- A. I don't recall speaking with General Ham before that, going into that.
- Q. Did General Dempsey indicate whether he had heard from General Ham that he relayed to you prior to you both journeying over to the White House?
- A. I don't recall that.

¹⁷ *Id.* at 37-38:

- Q. Okay. You said you didn't talk to the President that night. When did you next talk to the President after the meeting that you had in the White House? Do you recall?
- A. I don't recall.

participant with Mr. Panetta and General Dempsey in the meeting with the President, had been apprised, by Mrs. Clinton, also an hour earlier. She had "first called Tom Donilon" upon being notified," at or shortly after 4 p.m."¹⁸

But Mr. Panetta testified that he could not recall whether Tom Donilon, or the President, for that matter, even knew about the hostilities. The information gleaned from his visit to the (fully engaged) Situation Room, was, he said, that he did not "think we received any additional intelligence."¹⁹

Mr. Panetta told the President that he "did not have information about the state of the situation," and, at one point, described it as a "potential" attack. And he "did not go into

¹⁸ Exhibit 7, Clinton Congressional testimony, at 70:

I was notified of the attack shortly after 4 p.m... I spoke to the National Security Adviser, Tom Donilon, several times. I briefed him on developments. I sought all possible support from the White House, which they quickly provided. Tom was my first call. I spoke with our charge in Tripoli to get situation updates. I spoke with former CIA Director Petraeus to confer and coordinate, given the presence of his facility, which, of course, was not well known but was something that we knew and wanted to make sure we were closely lashed up together.... I participated in a secure video conference of senior officials from the intelligence community, the White House, and DOD. We were going over every possible option, reviewing all that was available to us, any actions we could take.

¹⁹ Exhibit 3 Panetta *Select Committee* testimony at 12:

Q. And so, at 5:00 p.m.—is that your recollection of the start of the meeting you had with President Obama?

A. Approximately. I think, at the time—we and, again, I'm doing this by best recollection, General Dempsey and I arrived at the White House, and I think we both kind of pulled aside into the National Security Council quarters there to see if there was any additional information that we could get with regards to what we were picking up about events in Benghazi. And we did not have—I don't think we received any additional intelligence. But I wanted to make sure that we knew everything possible before meeting with the President. And then we proceeded upstairs to the Oval Office. And so the meeting approximately began about 5 o'clock.

particulars about what resources would or would not be deployed" (*id.* at 21), contrary to the DOD's position in 2013, *supra*.

The meeting with the President lasted about a half hour. *Id.* at 20. About the time it started, or a few minutes into it, at 5:10 p.m., the drone arrived over the State Department facility. *See Select Committee Report*:

At 11:10 p.m. [5:10 p.m. in Washington], an explosive device detonated several meters inside the back gate, starting the second wave of attacks at the Benghazi Mission compound. Around the same time, the drone arrived on station over the compound. GRS officers returned fire after being fired on by the attackers, while the Diplomatic Security Agents loaded their vehicle and departed the compound under fire at 11:16 p.m. [5:16 p.m.]

Exhibit 4 at 56, footnotes omitted.

Mr. Panetta appears to have described the drone's feed as providing a clear picture of events.²⁰

However, at this juncture, the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, the National Security Director, and the President, would seem to be among the last to know any particulars.

²⁰ *Id.* at 34:

- Q. Did you consider, at some point, even if you didn't watch it, at some point I'm sure you became aware of what she said. Did you discuss with the President or anyone else that our intelligence, our evidence, does not back what we told the American people?
- A. Well, you know at that point, I think it was—my understanding was that there was going to be an effort to deploy a team there to determine exactly what had taken place, and it was within—I mean, I can't recall just exactly the time, but that ultimately a video was produced, I guess, based on some of the stuff we were getting from the UAVs. And, look, if you've looked at that, and I don't know whether you've looked at that video, but if you've looked at it, at least initially there is clearly a demonstration, and there is clearly a demonstration on that appears to get out of control.

5. Returned to Pentagon for 6:00 p.m. Meeting

An hour and a half into hostilities, and having scant information, Mr. Panetta and General Dempsey travelled back to the Pentagon. They did so because 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." He "remember[s] immediately leaving the Oval Office, jumping into the vehicle, and heading right back to the Pentagon." *Id.* at 14-15. So, they "had to get back" to determine what steps to take, yet, minutes after being notified, they had left the Pentagon.

Here too the times are not accurate. Mr. Panetta could not have driven from the White House conference, upon its 5:30 conclusion, in rush-hour traffic, to the Pentagon, and then commence his meeting there with General Ham, General Dempsey, General Kelly, Admiral Winfield, and Jeremy Bash, in 30 minutes, by 6:00.²¹

6. Order to go by 7:19 p.m.

Mr. Panetta testified that, sometime before Jeremy Bash sent his email at 7:19 p.m.,²² he

²¹ *Id.* at 15:

A. And at the time I arrived back at the Pentagon, probably somewhere close to 6 o'clock, you know, if not before that, at that point immediately calling a meeting with General Dempsey, who was with me. Called them in. We added—at that point realized General Ham, the AFRICOM commander, was not in Africa or in Europe but was there the Pentagon, which was something I was not aware of, and asked General Ham to come in, as well. General Kelly was there. Admiral Winfield, who was the deputy to the Chairman, he also would come in and out as he was trying to get additional information. You know, I believe Jeremy Bash was also there.

²² *Id.* at 33:

Q. Sure. Let's go back to the email, Secretary Panetta. So just want to be clear. You said the first hour, the questioning from, I guess, all three of us, that even though—notwithstanding the email that says, "assuming principals agree," that you had already, prior to this email being sent at 7: 19 eastern time on the 11th, you had already told the Special Ops, and the FAST team to deploy?

A. Well, just to be correct, I told General Dempsey to deploy those forces.

ordered immediate deployment of four units.²³

He testified that it was "by 7:19," while the *Select Committee* reported that it was "by 7:00 p.m." In either event, defendant's response is a range of time, so, again, proof positive that the DOD did not review, or provide to Congress, the records at issue here.

The "what" of the order was clear, "Go," as the *Select Committee* observed:

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, Exhibit 4 at 69.

In fact, Mr. Panetta stated over a dozen times that the order was to go.²⁴

²³ *Id.* at 25-26:

Q. Okay. Thank you, Mr. Secretary, for being with us. Let's go back to the email from Mr. Bash. The email says, "We have identified the forces that could move to Benghazi. They include" and he mentions two. What other forces, again, were available?

A. Well, there were three that—actually, four units that I had ordered. There were two FAST teams, Marine teams, to get them to deploy, one to Tripoli and one to Benghazi. The other was the In-extremis Force that was located in Europe, get them to go, as well.
[REDACTION]

²⁴ See Panetta *Select Committee* testimony Exhibit 3 at 14: "Based on their recommendations, that we have our FAST teams, Marine FAST teams, respond, be prepared to—you know, not only prepare to deploy but deploy;" at 16: "So those were the orders that I gave. And I had the authority to give those orders. And those orders were carried out. But it was very clear: They are to deploy;" at 19: "My directions were very clear; those forces were to be deployed, period;" at 23: "I'm not aware of that point that you've made here. As far as I was concerned, once I issued the orders, they were moving;" at 27: "You know, that is my view, as Secretary, is: I issued the orders. I want those units in place. Do whatever the hell you have to do in order to make it happen;" at 30: "Q. So no one would have been waiting on you to issue a subsequent order. A. That's correct. Q. You were clear the first time. A. Absolutely;" at 34: "Q. So we can eliminate the President being part of that principal, plural, and your testimony is that there was no

The Pentagon was keeping the White House informed,²⁵ but those communications too are said to have generated no records.

7. Order to Africa Command at 8:02 p.m.

Chief Investigative Counsel Dana Chipman referred Mr. Panetta to Chipman's own copy of the DOD timeline, to which he had added his own notes regarding other events. The notes included an order from General Ham, given at 8:02 p.m. *Id.* at 47:

Q. Exhibit 4 is, in essence, a series of times and dates and activities, added to by majority counsel, in trying to get a compilation of what appears to be supported by other evidence and by other witnesses we have talked to and by message traffic. So there are no citations on this document, and we can certainly supplement the record, should we need to, with what we are basing these times on. But it appears that General Ham's guidance was issued certainly by 8: 02 p.m. and the EUCOM SOF in Croatia learned then that they might have the potential to deploy into Benghazi.

General Ham's "guidance," by 8: 02 p.m., appears to have been an alert, forces "learned they might have the potential to deploy." Mr. Chipman's notes were "supported by other

ambiguity in terms of what you said you wanted done? A. That's right;" at 43: "Q. Your direction was, 'Move out as quickly as you can.' A. That's right;" at 45: "It makes sense to me. But, you know, again, as to the specific timeline, I was not—you know, the Secretary is not really aware of the specific timeline. My view was: Get them going as quickly as you can;" at 48: "You know, the specifics of what they do or do not have, you know, it's not something I'm that familiar with. But, clearly, my viewpoint was: These are elite forces. When you order them to go, they go."

²⁵ *Id.* at 63:

Q. Is it your understanding that your staff at DOD, the National Military Command Center, that they were all in continual communications with the staff at the White House, the national security staff, and others?

A. That was my understanding. I mean, I knew that the White House was being kept informed of what steps we were taking.

evidence and by other witnesses we have talked to and by message traffic," contrary to the DOD's production.

8. 7:19 p.m. to after 9:00 p.m.—Failures to Communicate Orders, Failure to Stay Apprised, Misunderstandings

For "at least a couple of hours" after Mr. Panetta gave that order to deploy, "the principals were... mak[ing] sure that the steps that" Mr. Panetta "had ordered were taking place,"²⁶ and "were assuring me that the forces were moving into place." *Id.* at 31. Mr. Panetta "continued to talk with General Dempsey and with Admiral Winfield and, obviously, General Kelly, my military aide, and continued to ask, 'Give me updates,' to make sure these people are on the move... [to] check to see what was happening and what was moving."²⁷ He was told that "things are moving."

²⁶ *Id.* at 17:

- Q. So a meeting that occurred back at the Pentagon that resulted in a series of directives from you to prepare to deploy and deploy these various forces, can you recall the timeframe that that meeting took, that you met with Admiral Winfield, General Dempsey, General Kelly, Jeremy Bash? And General Ham. And General Ham. Thank you.
- A. I mean, we were meeting kind of on an ongoing basis, as you can imagine. 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 and also, frankly, trying to get intelligence about what the hell was happening in Benghazi. I mean, it was very fragmented information about what was taking place there.

²⁷ *Id.* at 28:

- Q. And then, that night, as with respect to after you gave the order to deploy sometime between 6 and 8, and more probably before 7: 19, and it obviously appears surprising to you to learn about the—and now we're re at 11 o'clock and so forth. 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 Winfield 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.

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.

Id. at 28.

But, even with the principals, as well as Mr. Panetta himself, "making sure" that the orders were being followed, they were not, as Mr. Panetta is said to have learned only later. He been unaware of the inaction because he just "assumed that they were moving as expeditiously as they could,"²⁸ and did not learn "when those respective forces actually took off."²⁹

The DOD did not transmit the order for the next two hours, because, as the *Select Committee* perfunctorily declared, "no one stood watch."

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.

²⁸ *Id.* at 45:

Q. Knowing that the incident was notified to the Office of SecDef at 4:30, it's that time, between 4:30 and 11, that would cause me to wonder, were we moving out as smartly as you, Mr. Secretary, directed personally. Is that a fair question? Is that a fair observation?

A. You know, I think it's obviously, it's a fair question, but it's not one that I can answer, because, frankly, my view was, "Go," and I assumed that they were moving as expeditiously as they could.

²⁹ *Id.* at 34:

Q. Sure. Let's go back to the email, Secretary Panetta. So I just want to be clear. You said the first hour, the questioning from, I guess, all three of us, that even though—notwithstanding the email that says, "assuming principals agree," that you had already, prior to this email being sent at 7: 19 eastern time on the 11th, you had already told the Special Ops, and the FAST team to deploy?

A. Well, just to be correct, I told General Dempsey to deploy those forces.

Q. Okay. And do you know when those respective forces actually took off?

A. I don't.

Select Committee Report, Exhibit 4 at 56.

That is the sum total of the explanation of inaction during this two-hour period. It was a bureaucratic glitch.

The absence of Mr. Panetta's communications during this period is also odd. He did not participate in the 8:30 p.m. Benghazi conference call among representatives from AFRICOM, EUCOM, CENTCOM, TRANSCOM, SOCOM,³⁰ and remained oblivious to the information shared among DOD components on that call. He didn't watch the video feed,³¹ did not seek help from the Libyan government,³² did not speak with Secretary Clinton, or anyone else at the State Department,³³ was unaware of any request for "cross-border authority" from Libya,³⁴ and did not speak with the President.

³⁰ *Id.* at 36-37:

Q. ...and you say you talked to the Benghazi conference call or representatives from AFRICOM, EUCOM, CENTCOM, TRANSCOM, SOCOM?

A. I wasn't part of that conversation.

³¹ *Id.* at 39:

Q. You talked about the video you saw afterwards. Did you have real-time video that evening that you were seeing?

A. Mr. Panetta. No, no. I didn't see it, no.

³² *Id.*:

Q. Okay. Did you speak to the defense minister of Libya, the senior defense person at Libya, during the course of the events that evening?

A. I did not.

³³ *Id.* at 29:

Q. Did you specifically talk with Secretary Clinton and say—well, first of all, did you talk with Secretary Clinton that night?

A. I did not.

Q. Did you talk with anyone at the State Department and say, it's going to take some time to get folks there?

A. I did not.

³⁴ *Id.* at 20:

Q. And so, when Mr. Bash asks of State Department colleagues, "We will ask

Nor did he correspond with anyone by email, as he had "made the decision not to use email" while serving as Chief of Staff to President Clinton, and continued this practice as CIA Director, and as Secretary of Defense.³⁵

9. 11:00 p.m. Order to Deploy

Dana Chipman referred to an order given at 11:00 p.m.

Q. And I think that, from my perspective, Mr. Secretary, I would agree with you that that is an accurate assessment. But it's that idea of "started moving forces" that I think is worthy of some discussion. And so, if you don't start moving forces until the 11 o'clock order is issued, then you're going to build in some more time. So there is time from the incident to notification to liftoff. There is time from liftoff to arrival. And what I think I would take issue with, at least in part, from this particular statement, is that we seem to have a significant time from the incident to notification to deploy.

Id. at 44.

State to secure the approval from host nation," is that, again, from the nation to which we sought to deploy these forces, whether that be Crete or Greece or Sigonella, Italy? Or is this Libya? Or do you have any recollection of what that might have referred to?

A. I don't know what he was referring to, but when you deploy a Marine FAST team, particularly going into Tripoli or elsewhere, you can't just drop these guys into a country without getting the permission of that country.

Q. And so it is consistent with your expectation that State would have been asked to secure the approval from the host nation, whatever that host nation would have been.

A. I assume that would have been the case.

³⁵ *Id.* at 18:

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.

10. 3:00 a.m. EXORD

Even if the three-and-a-half hour delay to issue the order were credible, which it is not, and even if the DOD could be taken at its word that it had communicated orders to go "by 7:00," which it cannot, that leaves an eight-hour discrepancy. Taking the a bureaucratic glitch of two more hours as a satisfactory explanation, which it is not, that still leaves six hours before the earliest communication disclosed, European Command's 3:00 a.m. EXORD.

11. Other Defects in DOD's Chronology**(a) Assertion of Absence of Real-time Information**

Just as he had testified before the Armed Forces Committee, Mr. Panetta excused the three-and-a-half hour delay³⁶ 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." Panetta *Select Committee* testimony at 126. "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."³⁷

³⁶ *Id.* at 22:

Q. And, sir, as I look through this time sequence again, I look at roughly 4:30, the National Military Command Center is aware of the attack; at roughly 5 p.m. or shortly thereafter, the President is aware of the attack; roughly 6 p.m., somewhere between 6 and 7 p.m. or 6 to 8 p.m., as the timeline reflects, you have already given the order to prep, deploy, and to move. And so it's still roughly 3 1/2 hours from notice of the attack to your decision to get them moving.

A. Right.

³⁷ *Id.* at 38:

Q. You said shortly after the attack, you said quote—these are your words, and we can go find them: "You don't deploy forces into harm's way without knowledge of what's going on," end of quote. And because we didn't have real-time information, quote, "we couldn't put forces at risk." Do you stand by that statement?

He did. Communications had begun at 3:44 p.m., when 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." *Id.* at 56.

Secretary Clinton was notified "at or just after" 4:00 p.m.³⁸ Her first call was to National Security Director Tom Donilon,³⁹ about the same time the Situation Room received its "Ops Alert." At 4:42 p.m., the Pentagon was notified. By 5:10 p.m., when the Unmanned Aerial Vehicle, or surveillance drone, arrived on scene, the White House, State Department, Pentagon, including the commanding officer of Africa Command, as well as Secretary Clinton, were fully engaged.

A. Yes.

Q. But that's not true. 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.

A. We had pretty good information. You don't drop people into a situation unless you have some idea what you're getting into.

³⁸ Exhibit 7, Clinton Congressional testimony at 70: "I was notified of the attack shortly after 4 p.m."

³⁹ *Id.* at 71: "I spoke to the National Security Adviser, Tom Donilon, several times. I briefed him on developments. I sought all possible support from the White House, which they quickly provided. Tom was my first call."

But, as set forth above, after 5:00 p.m., Mr. Panetta claims to have received "no intelligence" from the White House Situation room, and he could "not recall" whether Mr. Donilon, who would have been following events for the last hour or so, had even been notified.

(b) Records reciting that Deployment was Awaiting Further Authorization

Mr. Panetta's "very clear" unequivocal order "not only prepare to deploy but deploy" is contradicted by virtually all other documentation from the DOD and the White House, as the *Select Committee* observed.

The DOD timeline, Exhibit 2, recounts that, sometime between 6:00 p.m. and 8:00 p.m. the initial order was "verbally conveyed from the Pentagon to the affected Combatant Commands in order to expedite movement of forces *upon receipt of formal authorization*." Further, at 8:39 p.m., the timeline reads, "[a]s ordered by Secretary Panetta, the National Military Command Center transmits formal authorization for the two FAST platoons, and associated equipment, to *prepare to deploy*..."

Jeremy Bash's 7:19 email relates the condition precedent to deployment as "assuming the Principals agree to deploy." *See* Exhibit 3 Panetta *Select Committee* testimony at 27, 34:

Q. Okay. "Principals"—Mr. Bash uses the plural, and your testimony, I believe, a little earlier was that should just have read "principal." It was solely your decision to deploy what you just walked us through.

A. That's correct.

Q. Why did he use plural then?

A. You ought to ask him.

Q. Well, I'm going to.

* * *

Q. All right. I want to ask you about the email, just to make it absolutely clear in my mind. There are two principals, you and the Commander in Chief. Are there any other principals, if Mr. Bash correctly used the plural, could there be any other principals he was talking about?

A. The only individual that had the authority to issue those orders was the Secretary of Defense, and the only person who could contradict those orders would be the President of the United States.

And the *Select Committee* referenced the 7:30 p.m. White House "roughly two-hour meeting... containing the phrases '[i]f any deployment is made,' and 'Libya must agree to any deployment,' and "'[w]ill not deploy until order comes to go to either Tripoli or Benghazi.'" *Select Committee Report*.

(c) Absence of Request "Cross-border authority" from Libya

Mr. Panetta testified that permission from Libya would have been necessary.⁴⁰ But is was not requested.

**(d) No Deployment in First 13 Hours,
Claimed Transit Time of 9 to 12 Hours**

Mr. Panetta claimed that the attack had ended before any assets could even get airborne.⁴¹ Moreover, the entire issue was moot, because, according to Mr. Panetta, even if assets had timely

⁴⁰ Exhibit 3 Panetta *Select Committee* testimony at 20:

- Q. And so, when Mr. Bash asks of State Department colleagues, "We will ask State to secure the approval from host nation," is that, again, from the nation to which we sought to deploy these forces, whether that be Crete or Greece or Sigonella, Italy? Or is this Libya? Or do you have any recollection of what that might have referred to?
- A. I don't know what he was referring to, but when you deploy a Marine FAST team, particularly going into Tripoli or elsewhere, you can't just drop these guys into a country without getting the permission of that country.
- Q. And so it is consistent with your expectation that State would have been asked to secure the approval from the host nation, whatever that host nation would have been.
- A. I assume that would have been the case.

⁴¹ *Id.* at 24:

- Q. And so, if I go to page 44, in the middle of the page, page 44, there's a question from Senator Graham. "My question is, did anybody leave any base anywhere to go to the aid of the people under attack in Benghazi, Libya, before the attack ended?" And Secretary Panetta responded, "No, because the attack ended before they could get off the ground."
- A. Just to clarify the record, I was speaking specifically about the task forces that I had ordered to deploy...

departed, it would have been nine to 12 hours of transit time.⁴² In fact, however, transit time is much less.

(e) Initial Orders in the Public Domain

The record does contain two sets of initial orders, one to the first responders at the CIA Annex, and the other to first responders at the Embassy in Tripoli. The orders were the same at both facilities, to stand down.

(i) Order relayed from AFRICOM to Embassy Tripoli to stand down

Exhibit 5 (at 61-64) is the Deputy Chief of Mission Gregory Hicks testimony before *House Oversight and Government Reform Committee* that, as Lieutenant Colonel Gibson and his team were on their way to board a C-130 from Tripoli for Benghazi, Colonel Gibson received a phone call from AFRICOM, ordering him not to board the flight:

- 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 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.

Id. at 63.

⁴² *Id.* at 40:

- Q. Tell me what would be reasonable. I want to look at this going forward, because we have got to protect these State Department workers.
- A. I understand what you're saying, but assuming that you're operating from the bases where we can operate from, which is either Rota in Spain, or Sigonella in Italy, which are the main bases we have because we don't have that capability in Africa to be able to deploy, you're still talking about 9 to 12 hours in transit time. You can in the very least, ought to be able to cut that down to at least an hour or two preparation and then get on the plane and move.

Notwithstanding that a team of four military personnel at Embassy Tripoli were ordered by their DOD superiors to stand down, Mr. Panetta was said to been unaware of this order.⁴³ (Nor was he aware that the seven-man Tripoli Task Force rescue team, including two DOD personnel, had responded to Benghazi.⁴⁴)

(ii) Order to CIA force to Stand Down

The *Select Committee* recounted the differing versions of whether Chief of Base of the CIA Annex ("COB") ordered the Quick Reaction Force ("QRF," also known as Global Response Staff "GRS") to "stand down." The COB, who is said to have issued the order, denied it to the *Select Committee*, "I did not issue a stand-down order." (Exhibit 4 at 41), and to the Washington

⁴³ Exhibit 3 Panetta *Select Committee* testimony at 41-42:

- Q. It has been alleged that a team of four military personnel of Embassy Tripoli on the night of the attacks who were considering flying on a plane to Benghazi were ordered by their superiors to stand down, meaning to cease all operations. Military officials have stated that those four individuals were instead ordered to remain in place in Tripoli to provide security and medical assistance in their current location. A Republican staff report issued by the House Armed Services Committee found that, quote, "there was no stand-down order issued to U.S. military personnel in Tripoli who sought to join the fight in Benghazi," end quote. Do you have any evidence to contradict the conclusion of the House Armed Services Committee that there was no stand-down order issued to U.S. military personnel in Tripoli who sought to join the fight in Benghazi?
- A. No, I do not.

⁴⁴ *Id.* at 24:

- Q. There's a question from Senator Graham. "My question is, did anybody leave any base anywhere to go to the aid of the people under attack in Benghazi, Libya, before the attack ended?" And Secretary Panetta responded, "No, because the attack ended before they could get off the ground."
- A. Just to clarify the record, I was speaking specifically about the task forces that I had ordered to deploy. As you're aware, there was a security team that moved out of Tripoli on their own to be able to respond to what took place. I was not aware that that was taking place. But, clearly, there were some DOD personnel that were part of that team.

Post. *See* "Former CIA chief in Benghazi challenges the story line of the new movie '13 Hours'" (Jan. 15, 2016).

QRF testified that the teams were packed up and ready to go in under five minutes, and that the COB did, in fact, order QRF to "stand down," resulting in a 20-minute delay. *See Select Committee Report*, Exhibit 4 at 41-46. He used those "exact words." *Id.* at 46. QRF opined that, had they not been ordered to stand down, they could have saved Sean Smith and Christopher Stevens, and that, had they not ultimately disobeyed the stand down order, the other five Americans at State's facility would have died. (The conduct of the COB is an issue in plaintiffs' case against the CIA, discussed below.)

Here too, Mr. Panetta denied any knowledge of this stand down order.⁴⁵

II. Records of Available Assets

Several of plaintiffs' FOIA requests seek identification of available assets, both personnel and aircraft. *See infra* notes 7-8. A number of the DOD's withholdings, in whole or in part, apparently responsive to these requests, are interspersed among the 1,200 pages that it produced or otherwise identified. During the course of the parties' discussions aimed at narrowing the issues to be adjudicated, the DOD informed plaintiffs that the requested maps of available assets duplicate this withheld information. So, for simplicity sake, plaintiff agreed to narrow their

⁴⁵ *Id.* at 52-53:

Q. There has been a similar urban myth surrounding the efforts by those at the Annex to rescue those at the diplomatic facility. That is, that the people at the Annex were ordered to stand down and not come to the assistance of those at the diplomatic facility. The Republican lead and bipartisan House Intelligence Committee debunked that myth, General Petraeus came in again yesterday and debunked that myth. Are you aware of any evidence from your involvement in this that there was any stand down order of those at the temporary—at the Annex CIA facility to come to the rescue of those at the diplomatic facility?

A. No, not at all.

challenge to the withholding of records of available personnel and aircraft to just these maps.

The DOD is in accord. *See* government's Memorandum, ECF 68-2 at 12.

Thus, the DOD's failure to produce records of its initial communications is accompanied by its refusal to disclose the records revealing to whom the order to deploy could have been given. It posits that disclosure of the information of the placement of its assets, six years ago—and the vast majority of which is already in the public domain—could provide adversaries with information that could now be expected to cause serious damage to national security. This is not so.

The DOD's position is advanced by Vice Director of Operations for the Joint Staff at the Pentagon, Rear Admiral James J. Malloy ("Malloy Decl.") The DOD is withholding, in their entirety, 12 pages of maps, which are said to contain virtually all of the responsive information regarding available assets. Malloy Decl., ECF 69-1 ¶¶ 4, 22:

The 12 pages withheld by Joint Staff contain the force posture of the Department of Defense for the European Command, Central Command, and Africa Command areas of responsibility as well as the force posture of Special Operation forces worldwide during the relevant timeframe in September 2012. These documents contain the numbers and locations of ships, submarines, response forces, and aircraft surrounding Benghazi, Libya. They further contain the numbers of military personnel located in particular countries during that time. Finally, they contain the transit time required for each available asset to reach Benghazi.

This information is sensitive and classified at the Secret level, because the release 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.

Admiral Malloy's discussion of the age of the record is simply, "Even with the passage of time."

Plaintiffs' expert, Admiral James A. Lyons, Jr., USN, does address the fluidity of assets. His opinion is logical.

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.

Affidavit Admiral James A. Lyons, Jr. (Ret), USN ¶ 5.

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 *Select Committee* had sought these records, but the DOD did not cooperate, notwithstanding that "it is in the public interest that it do so:"

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, Exhibit 4 at 70. (Footnotes omitted.)

The DOD also declined to produce to the *Select Committee* 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.

Id. at 64.

The locations of assets, as far the *Select Committee* learned, appears in its map, Exhibit 4 at 50. Plaintiffs' complaint, filed in 2014, recounts publicly available information on available assets.

At the time, a 130-man Marine Force Reconnaissance force, along with an AC-130 Spectre gunship, was stationed in Sigonella, Sicily—about an hour's flight from the Mission. US aircraft at Aviano Air Base, in northeastern Italy, were about two hours away. US F-16 Aircraft were located at Souda Bay, Greece. Two Marine Corps Fleet Antiterrorism Security Teams were stationed three-and-a-half to four hours away, in Rota, Spain. Also about three-and-a-half hours away, in Croatia, a forty man Special Operations Commander's-in-Extremis Force was conducting a counterterrorism exercise. In the United States, Special Operations Forces were eight hours flying time from bases in Sicily and Spain...

Compl., ECF 31 at 1.

III. Other Records at Issue

1. OPREP-3 Report

The DOD explains that "a PINNACLE OPREP 3" 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., ECF 68-4 ECF 68-4 ¶ 24. Further, "the combatant command with the area of responsibility for the location of the incident would be responsible for the report (*id.* ¶ 8), which

is AFRICOM. *Id.* ¶ 24. The DOD's search yielded the record that it attached as its Exhibit 10 (*id.* at 54).

But, at the top of the referenced report, the date January 12 appears. The dates on that record do reflect an OPREP 3, seemingly issued in September, but on the 12th, not on September 11. Moreover, the document refers to an OPREP 3, but is not the OPREP 3 itself.

2. Records of Gaddafi's March 2011 Offer to Abdicate

Plaintiffs seek from Africa Command records of Gaddafi's March 2011 interest in a truce and abdication:

Records of... March of 2011... Gaddafi's expressed interest in a truce and possible abdication and exile out of Libya, by or to: (a) ...General Abdulqader Yusef Dibri; (b) Rear Admiral (ret.) Chuck Kubic; (c) AFRICOM personnel, including... (i) General Carter Ham; and (ii) Lieutenant Commander Brian Linvill; and (d) The CIA.

Compl., ECF 31 ¶ 87.

Plaintiffs submit the Affidavit of Retired Navy Rear Admiral Charles Kubic ("Kubic Affidavit), whose account is the genesis of the FOIA request to Africa Command. Admiral Kubic relates that on March 19 of 2011, "through intermediaries, [he] became aware that Gaddafi was ready to step aside." *Id.* ¶ 3. "[P]eople who knew me as a businessman also knew that I was a retired Admiral, and they came and they asked me, "How could this be arranged?" *Id.*

"I then... contacted the command center at AFRICOM... and was put in in touch with Lieutenant Colonel Brian Linvill... and he passed this information quickly up his chain of command to General Carter Ham, who was the commander of AFRICOM, that the Libyans wanted to talk... he came back he very quickly, he said, "Yes, ... *Id.* ¶ 5.

And the points were that they would propose a 72-hour truce for the purpose of conducting negotiations... discussions would be between Major General Abu-

Bakr, and [] [Yunis] Jabr, who was the Libyan Defense Minister, and General Carter Ham... the Libyans would stop all operations immediately... [Africa Command] said, "We need some proof that this is real. Will he pull back his troops now from the outskirts of Benghazi?" and the Libyans complied.

* * *

However, despite the willingness of Africa Command and how things were set for the 72-hour truce to discuss the cease fire, the idea was shot down above AFRICOM.... I was shocked.... And, I guess, as I step back from that, I thought to myself, number one, we were so close. Number two, it was beyond me that we couldn't give 72 hours for a cease fire, particularly when we had a leader who had won a Nobel peace prize and was unable to basically give peace a chance for 72 hours.

Id. ¶¶ 7, 9.

The DOD located no responsive records. It pleads that its search was adequate, and included Colonel Linvill himself having conducted "a search of his electronic and paper files because Plaintiffs specifically mentioned him in the request." Herrington Decl., ECF 68-4 ¶ 25.

But this search was deficient.

First, the search was limited to electronic records, "In order to locate any electronic records responsive to Plaintiffs' request..." *Id.* An Agency's search for records under the FOIA includes paper records.

It excluded the search term "CIA," the only party to the communications "specifically mentioned" in the request that the DOD did not use, having employed "broad search terms such as 'Gaddafi,' 'Qaddafi,' 'Dibri,' 'Kubic,' 'Ham,' and 'Linvill.'" *Id.* ¶ 26.

The government described its search terms as "extend[ing] to all known spelling variants of the individuals named in this request," but it needs to specify the actual the search terms used, not merely describe them as "all known spelling variants."

And the Declaration does not disclose the number of responsive "hits" that were obtained during its searches, nor its procedure for reviewing those potentially responsive records.

As government declarations are based upon information the declarant learns in his "official capacity," or hearsay, the DOD is free to include in its declaration whether Colonel Linvill is aware of the existence of any responsive records.

Nor does the DOD relate whether it searched General Carter Ham's records. Here too the DOD should include in its declaration whether General Ham is aware of any such records. Admiral Kubic's sworn account, which the government cannot dispute, warrants a further search.

IV. Motion for Leave to Propound Interrogatory to DOD

Federal Rule of Civil Procedure 56, Summary Judgment, paragraph (d), provides:

- (d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
 - (1) defer considering the motion or deny it;
 - (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.

If, after the government has submitted its motion for summary judgment, the plaintiff is unable to oppose the motion without further discovery, he may file a Rule 56(d) motion. *Schaffer v. Kissinger*, 505 F.2d 389, 390-91 (D.C. Cir. 1974); *Am. Broad. Co. v. U.S. Info. Agency*, 599 F. Supp. 765, 768 (D.D.C. 1984).

Discovery in FOIA cases should "ordinarily occur after the government moves for summary judgment." *Murphy v. FBI*, 490 F. Supp. 1134, 1136 (D.D.C. 1980). Whether a case "warrants discovery is a question of fact that can only be determined after the defendants file their dispositive motion and accompanying affidavits." *Id.* Summary Judgment is not appropriate at this juncture because plaintiffs have not been allowed to discover the facts of when, and by what means, communications with assets were first made. The DOD's account of

the matter begs the production of the corroborating records sought, irrespective of its version, or versions, of the chronology.

Moreover, the DOD has not been candid, as set forth above. According to the government, when Mr. Panetta and General Dempsey first learned of the hostilities, they immediately left the Pentagon, where AFRICOM Commander General Carter Ham was located, and the very location that they "had to get back to" before issuing orders. The reported times of the meetings are wrong.

The first stop at the White House was the Situation Room, which had been alerted at 4:05 p.m., just as Mrs. Clinton had had called National Security Director Donilon. But the Situation Room imparted "no intelligence," according to Mr. Panetta, and he could not remember whether Mr. Donilon already knew. In 2012, the President had been apprised of "potential responses to the emerging situation," while later the story changed to there was "no discussion of what resources would or would not be deployed."

For two hours after the "by 7:00 p.m." order to go was said to have been issued, "the principals were... mak[ing] sure" that the orders were being followed, Mr. Panetta was "continually" asking for updates, and military leaders "were assuring" him that "the forces were moving into place." Yet, the *Select Committee* Report related the exact opposite: "No one stood watch to steer the Defense Department's bureaucratic behemoth forward to ensure the Secretary's orders were carried out."

Even the DOD's version of the contents of the order itself is contradicted. The DOD claims that the order was unequivocally to go, while, by all other accounts, deployment required further authorization.

Most revealing here is the government's various *ranges* of time that the order was given, which are between 6:00 p.m. and 8:00 p.m., by 7:00 p.m., and by 7:19 p.m. The DOD has yet to state the exact time of the order because it has yet to produce the records at issue here. The record in the matter reflects at least five communications that generated records that the DOD claims do not exist—7:00. 8:02 p.m., 8:39 p.m., 8:53 p.m., and 11:00 p.m.

The existence of the DOD's various versions of initial 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, while first responders in Tripoli and in Benghazi were ordered to stand down. Even if the DOD's claim of the absence of any record of any EXORD before 3:00 a.m. were true, disclosure of records of communications over those 11 hours will reveal the truth of the DOD's initial response. Congress took the DOD's word for it.

Thus, there is good cause, and an enormous public interest, in ordering the DOD to respond to a single interrogatory, submitted herewith as Exhibit 6:

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.

WHEREFORE, plaintiffs respectfully pray for entry summary judgment in their favor, together with an order requiring:

- I. Defendant Department of Defense to:
 - A. Release:
 - (1) The 12 pages of maps at issue;
 - (2) Records of assets at Souda Bay, Greece;
 - (3) The OPREP-3 Report.
 - B. Produce records of communications of the first 12 hours from the onset of the attacks, including but not limited to orders made at:
 - (1) 7:19 p.m.;
 - (2) 8:39 p.m.;
 - (3) 8:53 p.m.; and

- (4) 11:00 p.m.
- C. Conduct an additional search for records of Gaddafi's March 2011 Offer to Abdicate, including the search term "CIA," and likely depository of General Carter Ham's Records; and
- D. Answer Plaintiffs' Interrogatory.

CENTRAL INTELLIGENCE AGENCY

The single item at issue here is the CIA's redactions to its production of records of a complaint to the CIA Inspector General ("IG"). *See* Compl. ECF 31 ¶ 144(1). 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 attached as Exhibit 8, at 77-111.

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 nature of 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."

As plaintiffs explained in their September 29, 2014, administrative appeal, this record is not exempt as an "operational file of the Central Intelligence Agency," 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 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.

Here, the CIA's disclosure must include information as to what the allegation of wrongdoing was—"the specific subject matter," under the CIA Information Act.

The Declaration of Antoinette B. Shiner, ECF 69-5 ("Shiner Decl.") 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 subject of an IG complaint 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" (*id.* ¶¶ 35, 43), 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—the "specific subject matter" under 50 U.S.C. § 431(c)(3)—is improper.

The CIA's production of IG records at issue (Exhibit 8) discloses that, in September or October of 2012, Director Petraeus had communicated to CIA employees some information regarding the attacks, but that information is redacted. Based on Petraeus' communication (whatever it was), on November 1, 2012, a CIA Officer emailed CIA Inspector General David

Buckley ("IG"), asking that the (redacted) information be provided to Mr. Petraeus, anonymously. The IG promptly did so. The following week, two IG Agents interviewed the email's author.

Given the absence of disclosure of the "subject matter," except that it "call[ed] into question some actions and decisions made by the Chief of Base, Benghazi," the public is left to speculate what it was that Mr. Petraeus had said that had been the catalyst for the email to the IG.

Exhibit 8 discloses that the IG had declined to elevate the complaint because it "concern[ed] largely matters that would... be addressed by the Accountability Review Board" or the ongoing FBI probe, it would have "the potential [for] disruption" of those probes, and an IG case would not have added "sufficient value" to the matter. Further, there was to be an "internal [CIA] investigation into Benghazi," with "an interview team [that] then Director Petraeus was putting together to interview Agency Personnel."

The IG complaint may be related to the controversy over the CIA Chief of Base's ("COB") order to stand down noted above. By February 24, 2017, FOIA request, plaintiffs had asked for the September 19, 2012, CIA "Memorandum for the Record,"⁴⁶ which had been

⁴⁶ Plaintiffs' February 24 letter to the CIA, Shiner Decl. ECF 68-5 at 61-62:

This request is narrowed to specify identify only Memorandum for the Record, prepared by the Deputy Chief of Base "Events of 11- 12 SEP 2012 at Benghazi Base, Libya." September 19, 2012. That record is cited on page 5, footnote 13 of the January 15, 2014, U.S. Senate Select Committee on Intelligence Review of the Terrorist Attacks on U.S. Facilities in Benghazi, Libya, September 11-12, 2012:

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. However, a Memorandum for the Record prepared by the Deputy Chief of Base specifically states that the Chief "authorized the move" and the Chief told the Committee: "We launched QRF [Quick Reaction Force] as soon as possible down to the State [Department] compound." Memorandum for the Record. Events of 11-12 SEP 2012 at Benghazi Base. Libya." September 19, 2012. p. 1.

"officially disclosed" in the January 15, 2014 Report of US Senate Select Intelligence Committee, "Review of the Terrorist Attacks on U.S. Facilities in Benghazi..." That Committee had relied on the Memorandum in accepting the CIA's position that the COB had "launched QRF [Quick Reaction Force] as soon as possible."⁴⁷ On March 1, 2017, the CIA responded to the FOIA request, and produced the September 19, 2012 Memorandum for the Record, a copy is attached as Exhibit 9, at 104-108. Its author, the CIA Deputy Chief, had written:

[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.

Id. at 104.

Public interest in disclosure of the IG records, Exhibit 8, could be significant, if, for example, Mr. Petraeus had remarked that there had been no stand down order, and the CIA

⁴⁷ See January 15, 2014 Report of US Senate Select Intelligence Committee, "Review of the Terrorist Attacks on U.S. Facilities in Benghazi..." reporting at 5 that "some members of the security team expressed frustration that they were unable to respond more quickly to the Mission compound," and footnoted:

Footnote 12: SSCI Memorandum for the Record, "Staff Briefing and Secure Video Teleconference (SVTC) with CIA Benghazi Survivors," June 27, 2013. Committee found no evidence of intentional delay or obstruction by the Chief of Base or any other party.

Footnote 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. However, a Memorandum for the Record prepared by the Deputy Chief of Base specifically states that the Chief "authorized the move" and the Chief told the Committee: "We launched QRF [Quick Reaction Force] as soon as possible down to the State [Department] compound." Memorandum for the Record, "Events of 11-12 SEP 2012 at Benghazi Base, Libya," September 19, 2012, p. 1; and SSCI Transcript, *Member and Staff Interview of former Chief of Base*, December 20, 2012, p. 3.

Officer had written the email to inform the Director of his misunderstanding. Mr. Petraeus had denied any order to stand down to two Congressional Committees.⁴⁸

WHEREFORE, plaintiffs respectfully pray for entry summary judgment in their favor, together with an order requiring Central Intelligence Agency to release the information withheld that discloses the specific subject of the matter, or genesis, of the Inspector General Complaint.

STATE DEPARTMENT

At issue here are records of surveillance video recordings at the State Department's facility in Benghazi, between September 11 and September 12, 2012.⁴⁹ The State Department withholds, in full, the video recordings, apparently of twelve segments. It asserts numerous grounds for withholding video footage.

⁴⁸ Panetta *Select Committee* testimony at 52-53:

Q. Mr. Schiff: There has been a similar urban myth surrounding the efforts by those at the Annex to rescue those at the diplomatic facility. That is, that the people at the Annex were ordered to stand down and not come to the assistance of those at the diplomatic facility. The Republican lead and bipartisan House Intelligence Committee debunked that myth, General Petraeus came in again yesterday and debunked that myth. Are you aware of any evidence from your involvement in this that there was any stand down order of those at the temporary—at the Annex CIA facility to come to the rescue of those at the diplomatic facility?

A. No, not at all.

⁴⁹ In an effort to speed up this litigation, plaintiffs dismissed from this case, without prejudice, their request for "All notes, memoranda, and correspondence generated between January of 2007 and September 11, 2012, regarding meetings between Christopher Stevens or any other Tripoli Embassy official, and one or more of the following [nine named] individuals." Compl. ¶ 116(11). The State Department agreed that this FOIA request would remain in the queue, and that the requestors have exhausted their administrative remedies.

The government wrote in its Memorandum that the video's release would be of "images and identities of [State] agents, government contractors, and local forces assisting in the protection of the Benghazi facility" (ECF 68-2 at 49), that disclosure would reveal "security measures and procedures, defensive capabilities, and counter-measures in place at the Benghazi facility that are indicative of the protections currently in place at other current State Department facilities" (*id.* at 52), and that nondisclosure is proper under Exemption (b)(7)(F) as the information could be expected to endanger individuals' life or physical safety. *Id.* at 53.

On behalf of the FBI, as well as itself, State wrote that the video's release could "reasonably be expected to interfere with current law enforcement activities of [State] and the FBI" under Exemption (b)(7)(A). *Id.* at 38. On behalf of the CIA, State asserted that the "video footage, if disclosed, would reveal or disclose the functions of the CIA." *Id.* at 52.

Nondisclosure on the CIA's behalf was proper as the records contain national security information under Exemptions 1 and 3, and Executive Order 13526 § 1.4(a)—Military Plans, Weapons, or Systems (*id.* at 33), and § 1.4(d)—Foreign Relations or Foreign Activities of the United States (*id.* at 35).

The government's justifications, as numerous as they are, cannot be applicable to footage broadcast nationally on NBC Nightly News in October or November of 2017. *See* Clarke Decl. ¶ 3. The same is true for the footage shown at the trial of Ahmed Abu Khattala for his participation in the attack. *Id.* ¶ 2. That trial began on October 2, 2017, and ended on November 28. The State Department's Declaration of Eric F. Stein, ECF 68-6 ¶ 26, states, incorrectly, that State "has not previously authorized or officially acknowledged public release of this information."

Nor did the government consider the footage released by the attackers themselves, which is available on YouTube.

While the government broadly claims that the "CIA, DIA, DOD, and State carefully reviewed all documents from which information was withheld for reasonable segregation of non-exempt information and implemented segregation when possible" (government Memorandum, ECF 68-2 note 2 at 30), State makes no claim as to segregability of the videotapes. State's declarant does not purport to have viewed them, having based his declaration on personal knowledge or "information furnished." Stein Decl., ECF 68-6 ¶ 26. There are no faces identifiable in the attackers' YouTube video, and State does not say whether the actors appearing on its videos are recognizable.

Deputy CIA Director Michael Morell wrote in his book, *The Great War of Our Time* (May 2015, Grand Central Pub., at p. 230), that he does "not know why the White House did not release this information [surveillance video]—this despite urgings to do so from Jim Clapper, the director of national intelligence, and from other senior intelligence officials, including me."

WHEREFORE, plaintiffs respectfully pray for entry summary judgment in their favor, together with an order requiring State Department to release the all nonexempt, segregable, portions of the subject videotapes.

DEPARTMENT OF JUSTICE

At issue here the February 21, 2014, FOIA request for disclosure of FBI 302 Interview Reports of FBI interviews conducted in Germany. *See* Compl., ECF 31 ¶ 126 (8):

All records generated between September 11, 2012 and the present, by survivors of the September 11th and 12th attacks on the Benghazi mission and the Benghazi CIA Annex, or by any person regarding the survivors' accounts of the attack.

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., ¶ 126 (9), states, in part:

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...

The government responded that it will neither confirm nor deny the existence of responsive records (*Glomar* response), because the information, if it exists, would have been compiled for law enforcement purposes, and its disclosure could reasonably be expected to interfere with enforcement proceedings, and, thus, is exempt under FOIA Exemption (b)(7)(A). *See* government's Memorandum, ECF 68-2 at 27-29.

Courts have long accepted that Congress intended Exemption (b)(7)(A) to apply whenever the government's case in court would be harmed by the premature release of evidence or information. However, where information sought is already in targets' possession, "the government must show, by more than conclusory statements... precisely how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding." *Goldschmidt v. Dep't of Agric.*, 557 F. Supp 274, 278 (D.D.C. 1983), citing *Campbell v. Department of Health and Human Services*, 682 F. 2d 256, 259, (DC Cir. 1982). The court in *Campbell* held that information to which the target of the probe already had access cannot be withheld under Exemption 7(A) because the government could not demonstrate how

the documents provided to the target of the investigation could "interfere with enforcement proceedings." *Id.*

Here, Exemption (b)(7)(A) is unavailable because any subject of the government's probe already has access to the information. The *Select Committee* interviewed, and released, the transcripts, to quote the FOIA request, of "all U.S. personnel who had been on the compound in Benghazi during the attack." See *Select Committee* Report, Exhibit 4 at 58-60, listing 30 "Diplomatic Security Agents" and five "GSR." Plaintiffs seek the FBI 302 interview reports and accompanying handwritten notes ("302s"). Had the government addressed the existence of the transcripts, its argument would necessarily have been premised on the dubious claim that the 302s contain different, or more, information than appears in the transcripts.

Regarding the five GSR, the book *13 Hours, The Inside Account of what Really Happened in Benghazi* (Hachette Book Group in September 2014), recites that the "main sources of this book are the five surviving American security force contractors, known as 'operators.'" The book recites:

Based on exclusive firsthand accounts... their intent is to record for history, as accurately as possible, what they did, what they saw, and what happened to them—and to their friends, colleagues, and compatriots—during the Battle of Benghazi.... [Their] only editorial demand was that the story be told truthfully.

Id.

Since the publication of *13 Hours*, three of the five Annex security team members (Dave Benton, Mark Geist, Kris Paronto, "Jack Silva," and John Tiegen) have sought, and received, widespread publicity, including appearances on Fox News' broadcasts with Sean Hannity, Greta Van Susteren, and Megyn Kelly. In 2016, the movie, *13 Hours*, was released. Based on the book, it was directed and produced by Michael Bay. "The film follows six members of Annex Security Team who fought to defend the American diplomatic compound

in Benghazi, Libya after waves of attacks by Islamic militants on September 11, 2012," explains Wikipedia.

In this case, the government cannot explain any harm resulting from disclosure of the 302s of these witnesses because their accounts are known. Disclosure could not chill any prosecution because any potential target of any probe can simply review the transcripts or read the book.

WHEREFORE, plaintiffs respectfully pray for entry summary judgment in their favor, together with an order requiring Department of Justice to release the all nonexempt, segregable, portions of the 302s of personnel who had been in the Benghazi mission, and the Benghazi CIA annex, during the September 11th and 12th attacks on those facilities.

CONCLUSION

The FOIA affords plaintiffs the ability obtain the records which will confirm, or refute, the government's version of its response to the September 11, 2012 attack on U.S. facilities in Benghazi, Libya.

Date: June 25, 2018.

Respectfully submitted,

/s/

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