13-3684-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CENTER FOR CONSTITUTIONAL RIGHTS,

Plaintiff-Appellant,

—against—

CENTRAL INTELLIGENCE AGENCY, DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, DEFENSE INTELLIGENCE AGENCY, UNITED STATES SOUTHERN COMMAND,

Defendants-Appellees,

(*caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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—and—

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Defendants.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i
SUMMARY OF THE ARGUMENT 1
ARGUMENT 5
I. Excessive Deference Defeats the Purpose of Exemption 1 5
II. The Government Has Failed to Meet Its Burden Under Exemption 1 12
A. The Government Has Failed to Show That Release Would Incite Anti-American Violence 12
B. The Government Has Not Shown That Releasing the Records CCR Seeks Would Compromise Detainee Relationships and Intelligence Gathering 21
C. The Government Has Not Shown That Releasing the Records CCR Seeks Could Undermine Diplomatic Relations Or Facilitate the Sending of Coded Messages 25
D. The Government Has Not Shown That Releasing the FCE Videos Could Harm National Security 27
CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

CASES

ACLU v. DOD,
389 F.Supp.2d 547 (S.D.N.Y. 2005) 9

ACLU v. DOJ,
681 F.3d 61 (2d Cir. 2012) 9

ACLU v. United States DOD,
628 F.3d 612 (D.C. Cir. 2011) 29

al-Qahtani v. Obama,
No. 5 Civ. 1971 (D.D.C. Apr. 20, 2010) 26

Campbell v. U.S. DOJ,
164 F.3d 20 (D.C. Cir. 1998) 5

Ctr. for Nat'l Sec. Studies v. DOJ,
331 F.3d 918 (D.C. Cir. 2003) 19

El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. Dep't of Health & Human Servs.,
396 F.3d 1265 (D.C. Cir. 2005) 19

Fitzgibbon v. CIA,
911 F.2d 755 (D.C. Cir. 1990) 20

Goldberg v. Dep't of State,
818 F.2d 71 (D.C. Cir. 1987) 18

Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy,
891 F.2d 414 (2d Cir. 1989) 20

Judicial Watch, Inc. v. United States DOD,
715 F.3d 937 (D.C. Cir. 2013) 14

King v. United States Dep't of Justice,
830 F.2d 210 (D.C. Cir. 1987) 13

Larson v. Dep't of State,
565 F.3d 857 (D.C. Cir. 2009) 7

Ray v. Turner,
587 F.2d 1187 (D.C. Cir. 1978) 8

Taylor Energy Co. LLC v. United States DOI,
734 F.Supp.2d 112 (D.D.C. 2010) 19

Wash. Post v. DOD,
766 F. Supp. 1 (D.D.C. 1991) 21

Wolf v. CIA,
473 F.3d 370 (D.C. Cir. 2007) 7, 21

STATUTES

5 U.S.C. § 552(a)(4)(B), (b)(1) 5

OTHER AUTHORITIES

Adam M. Samaha,
Government Secrets, Constitutional Law and Platforms for Judicial Intervention, 53 UCLA L. Rev. 909, 940 (2006) 10

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Portraits of Guantanamo,
Miami Herald Tribune, Jan. 31, 2014, *available at* http://www.miamiherald.com/static/media/projects/2014/portraits-of-guantanamo/ 18

Robert P. Deyling,
Judicial Deference and De Novo Review in Litigation Over National Security Information Under the Freedom of Information Act, 37 Villanova L. Rev. 67, 88 (1992) 5

The Guantánamo Docket,
New York Times, *available at*
http://projects.nytimes.com/Guantánamo.....23

The Guantánamo Docket:
Mohammed al Qahtani, *available at*
http://projects.nytimes.com/Guantánamo/detainees/63-mohammed-alqahtani/documents/11 13

SUMMARY OF THE ARGUMENT

Congress expressly amended Exemption 1 of the Freedom of Information Act ("FOIA") to bolster the authority of the courts to curb excessive and arbitrary Executive secrecy. But the position of the Department of Defense ("DoD") in this case is nothing short of an invitation to courts to abandon the role that Congress assigned them. In arguing that courts should not carefully scrutinize classification decisions, it fixates on a single passage from the legislative history voicing Congress's expectation that the courts would give "substantial weight" to demonstrations of agency expertise. But it ignores the remainder of the legislative history – including Congress's repeated rejection of calls for a laxer standard of review and a presumption of validity for classification decisions – that demonstrates Congress's intent to strengthen judicial oversight over agency classification decisions in the FOIA context.

DoD does not contest the consensus view, voiced both within and outside the intelligence community, that the rampant overclassification that motivated the 1974 Exemption 1 amendments persists today. Instead, it asks this Court to simply ignore that fact. This Court should do no such thing: that more than half of all classification designations are unnecessary may not resolve whether *these* records are properly classified, but it underscores the necessity of judicial vigilance and the danger of the rote deference for which DoD advocates.

Skepticism is especially warranted given the facts of this case. To prevail here, DoD must provide a "plausible" and "logical" account as to how disclosing each of the records at issue could reasonably be expected to harm national security; under the plain language of the governing Executive Order, harm that is theoretically conceivable but highly improbable does not meet the plausibility threshold. Here, DoD has failed to satisfy its burden with respect to any of the records at issue.

Thus, DoD claims that its declarant has articulated specific reasons as to how these records could incite anti-American sentiment and endanger lives, but none of the rationales advanced relate specifically to the records CCR seeks. Indeed, under DoD's rationale, the government could classify not only any depiction of any detainee, but any record the release of which could hypothetically arouse – or be doctored to arouse – enmity against the United States. Embracing such a rule would effectively repeal the 1974 amendments, and thereby undermine the very purpose of FOIA. DoD brushes this concern aside, arguing that the Court should decide this case without regard to how these classification rationales might be invoked in future cases. But precedent cannot be made so heedlessly.

In addition to being limitless, DoD's justification is contradicted by the record. *First*, DoD continues to rely on unrest following the revelations of egregious misconduct by U.S. forces to illustrate the dangers of releasing these

images; yet, it maintains that these images display neither illegal nor embarrassing misconduct. *Second*, DoD routinely releases images of detainees – both identifiable and otherwise – without incident. While DoD claims that it only releases identifiable images to detainee family members through the International Committee of the Red Cross (ICRC), and only where the detainee consents, DoD concedes that such images are regularly transmitted to the press. And the fact that a detainee consents (as al-Qahtani has) has no logical bearing on whether the image might be used by enemy propagandists. Nor do DoD's declarants explain why the records CCR seeks are more inflammatory than the unidentifiable images DoD regularly releases notwithstanding its invocation, in its brief, of "common sense."

Third, DoD continues to rely on "official disclosure" cases to argue that its prior releases are irrelevant because they did not include the specific records that CCR seeks. But CCR is not arguing that DoD has waived the right to invoke an exemption based upon an official disclosure; rather, it argues that the prior releases undermine the *plausibility* of DoD's claim that releasing these images will incite violence. Again, the fact that detainee images are regularly disclosed without incident may not be dispositive of DoD's Exemption 1 claim, but it does demand an explanation as to how any marginal harm could result from releasing *these* images. DoD has provided none.

Fourth, DoD's claim that releasing these records would chill cooperation is equally unavailing. Its policy of releasing images of any consenting detainee through the ICRC undercuts the plausibility of its claim that any disclosure could jeopardize detainees' willingness to share intelligence. Its justification is also illogical: if, as DoD now claims, all detainees are assumed to be informants, a detainee does not enhance that risk by cooperating, nor diminish that risk by refusing to do so. Thus, a policy of releasing detainee images should have no bearing on a detainee's decision to cooperate.

DoD's remaining justifications are equally insufficient. DoD has failed to explain how any *additional* damage could result from releasing the forced cell extraction ("FCE") Video, given all it has disclosed about FCE tactics. Its concern that disclosure will call its commitment to the Geneva Convention into question is misplaced given that al-Qahtani consented to the filing of this action. Finally, it has failed to provide any explanation as to how any, much less all, of the records CCR seeks could contain embedded messages of continuing relevance ten years later.

FOIA demands more than the conclusory, unsubstantiated justifications offered by the DoD and more than the perfunctory review provided by the district court. For these reasons, the Court should reverse and remand.

ARGUMENT

I. Excessive Deference Defeats the Purpose of Exemption 1.

As explained in CCR's opening brief, Congress amended Exemption 1 not to further empower agencies to withhold documents on national security grounds, but to bolster courts' ability to curb rampant and arbitrary attempts at government secrecy. Brief for Plaintiff-Appellant ("Pl. Br.") 20-33. To that end, it placed the burden on the government to demonstrate the propriety of classification and assigned courts the role of reviewing such determinations *de novo*, 5 U.S.C. § 552(a)(4)(B), (b)(1), not under the more deferential arbitrary-and-capricious standard traditionally used to review agency decisions. *See* Robert P. Deyling, *Judicial Deference and De Novo Review in Litigation Over National Security Information Under the Freedom of Information Act*, 37 Villanova L. Rev. 67, 88 (1992). While Congress anticipated that courts would show appropriate deference to detailed, credible agency assessments, the drafters of Exemption 1 were acutely aware of the institutional pressures that led agencies to overclassify harmless documents. Pl. Br. 26-27. Congress was, accordingly, emphatic that courts not fall into a trap of rote deference. *Campbell v. U.S. DOJ*, 164 F.3d 20, 30 (D.C. Cir. 1998) ("deference is not equivalent to acquiescence"). But the level of deference that DoD here seeks would effectively repeal the 1974 amendments and reduce the courts to a rubber stamp.

DoD accuses CCR of relying on "selective excerpts" of the legislative history to argue for a more stringent standard of judicial review. Brief for Defendant-Appellee ("Gov't Br.") 18. This accusation is ironic: it is DoD that ignores the *entire legislative history*, save two sentences, ripped from context. Specifically, DoD relies entirely upon an excerpt from the Senate Conference Report voicing Congress's expectation that courts will "accord substantial weight to an agency's affidavit concerning the details of the classified status of the dispute record," arguing from this passage that courts should refrain from carefully scrutinizing agency affidavits in the Exemption 1 context. Gov't Br. 18 (quoting S. Conf. Rep. No. 93-1200, at 12, *reprinted in* 1974 U.S.C.C.A.N. 6285, 6290). But in reaching this conclusion, DoD conveniently overlooks:

- The Senate report, which stated that the courts "when necessary, using special masters or expert consultants of their own choosing to help in such sophisticated determinations . . . are the only forums now available in which [review of classification decisions] can properly be conducted," and concluded that "courts are qualified to make . . . judgments" about the propriety of classification.[1]

- The House and Senate floor debates on the Exemption 1 amendments "that show a Congress nearly unanimous in its desire to direct courts to review FOIA national security cases in a manner similar to any other type of FOIA

[1] Amending the Freedom of Information Act (S. Rept. 93-854), May 16, 1974 *reprinted in* Subcomm. on Gov. Info. & Individual Rights, H. Comm. on Gov. Operations, 94th Cong. & Subcomm. on Admin. Practice & Procedure, S. Comm. on the Judiciary, 94th Cong., Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts, and Other Documents 183 (Comm. Print 1975) (hereinafter, "FOIA Source Book").

case." Deyling, *Judicial Deference*, 37 Villanova L.R. at 80 (citing to House and Senate debates); *see also* Pl. Br. 20-21, 24-29.

- Congress's decision to authorize *de novo* review of classification determinations, a rarity in the administrative context that "indicates the depth of Congress' motivation to provide open access to the workings of government." Deyling, *Judicial Deference*, 37 Villanova L. Rev. at 88.

- The Conference Committee's rejection of President Ford's request to add an "express presumption that the classification was proper" and to clarify that a court could only order the government to disclose information "if it finds the classification to have been arbitrary, capricious, or without a reasonable basis." FOIA Source Book 368-71.

- That fact that when President Ford vetoed the FOIA amendments, citing the court's lack of expertise and calling for a laxer standard of review, Congress overrode his veto by overwhelming margins. FOIA Source Book 431-33, 480.

This legislative history makes clear that the Conference Report's "substantial weight" language on which DoD so heavily relies was not intended as a directive to courts to blithely accept claims of harm that are vague, conclusory, unsubstantiated, or improbable. *See Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009) (heightened scrutiny warranted where agency affidavits controverted by contrary evidence in the record or evidence of bad faith); *Wolf*, 473 F.3d 370, 374 (D.C. Cir. 2006) (same). Rather, the Conference Report sought to assuage concerns that judges would substitute their own judgment for the detailed, credible assesments of experts. As Judge J. Skelly Wright recognized after an extensive review of the legislative history of the 1974 amendments, "[t]he Conference Committee . . . register[ed] its anticipation that rational judges

conducting *de novo* reviews would naturally be impressed by any special knowledge, experience, and reasoning demonstrated by agencies with expertise and responsibility in matters of defense and foreign policy." *Ray v. Turner*, 587 F.2d 1187, 1213 (D.C. Cir. 1978) (Wright, C.J., conucrring). However, the court underscored the importance of "recogniz[ing] the limits, as well as the value, of this language in the Conference Report":

> Stretching the Conference Committee's recognition of the 'substantial weight' deserved by demonstrated expertise and knowledge into a broad presumption favoring all agency affidavits in national security cases would contradict the clear provisions of the statute and would render meaningless Congress' obvious intent in passing these provisions over the President's specific objections. An affidavit explaining in detail the factors about particular material that have convinced the agency that the material should be classified should and will be quite influential with a reviewing court. On the other hand, an affidavit stating only in general or conclusory terms why the agency in its wisdom has determined that the criteria for nondisclosure are met should not and cannot be accorded 'substantial weight; in a *de novo* proceeding. To substitute a presumption favoring conclusory agency affidavits for the courts' responsibility to make a *de novo* determination with the burden on the government would repeal the very aspects of the 1974 amendments that made it necessary for the Congress to override the President's veto.

Id. at 1213-14.

DoD attempts to lighten its burden by emphasizing the inherently speculative nature of predictions about harm to national security. Gov't Br. 20. Of course, an agency claiming Exemption 1 need not prove with certainty that disclosure will harm national security. But both sides agree that the agency's

speculation must at least be "logical" and "plausible." *ACLU v. DOJ*, 681 F.3d 61, 69 (2d Cir. 2012). As explained in the opening brief, for a harm to be "plausible" it must be more than merely "conceivable." Pl. Br. 23; Collins English Dictionary (10th Ed. 2009) (defining "implausible" as "unlikely"). DoD faults CCR for relying on pleading standard case law to define "plausible,"[2] Gov't Br. 20, but it completely ignores the fact that the governing Executive Order – which requires a determination that harm could be "*reasonably* . . . be expected" to result from disclosure, Exec. Order 13,256 § 1.1(a)(4) – compels the same conclusion. A harm – like being struck by lightening or attacked by a shark – may be conceivable yet vanishingly improbable. But FOIA, with its mission of ensuring an informed public, is impotent if transparency must yield to any hypothetical harm cooked up in a session of worst-case-scenario brainstorming. *ACLU v. DOD*, 389 F.Supp.2d 547, 576 (S.D.N.Y. 2005) (The job of the court is "not to defer to [the classification authorities'] worst fears, but to interpret and apply . . . [FOIA], which

[2] Specifically, DoD notes that pleading standards call upon judges to use "judicial experience and common sense" to protect defendants against unnecessary discovery, whereas classification decisions require speculative assessments outside a judge's traditional bailiwick. Congress, however, clearly thought judges competent to – and, in fact, *commanded* that – judges apply common sense to agency classification claims. *See* Pl. Br. 27-29. And the interest at stake here – protecting the public against excessive governmental secrecy – is every bit as critical as safeguarded defendants against gratuitous litigation.

advances values important to our society, transparency and accountability in government.").

Finally, the amount of deference DoD seeks is especially inappropriate in light of the Executive's well-documented penchant for arbitrary secrecy. As explained in the opening brief, that problem continues today: according to policy makers and intelligence officials, well over half of agency classsification designations are unnecessary. Pl. Br. 29-30. DoD dismisses this contention as a "questionable claim" and mere "cynicism," Gov't Br. 21, but fails to present a single whit of evidence challenging the consensus view that agencies habitually overclassify. *See*, e.g., Adam M. Samaha, *Government Secrets, Constitutional Law and Platforms for Judicial Intervention*, 53 UCLA L. Rev. 909, 940 (2006) (citing assessments by policymakers and intelligence officials).[3] Instead, DoD contends that the agencies are entitled to a "presumption of regularity" in their classification decisions. Gov't Br. 21. Such a presumption is wildly off the mark. By placing the burden on the government and directing the courts to conduct *de novo* review, Congress mandated a posture of judicial skepticism toward

[3] *See also* Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 Admin L. Rev. 131, 133 (2006) (citing testimony by Deputy Under Secretary of Defense for Counterintelligence that approximately 50% of classified documents should not be secret, and testimony of former CIA Director that "[W]e overclassify very badly. There's a lot of gratuitous classification going on.").

classification decisions. It considered and explicitly rejected proposals that would have accorded a presumption of propriety to classification decisions, precisely because of the Executive's "record of abus[ing]" its classification authority. 120 Cong. Rec. S19806-19823 (daily ed. Nov. 21, 1974) (Statement of Sen. Muskie); Pl. Br. 27-29. DoD not only asks this court to ignore agencies' well-documented tendency to misuse their classification authority, it also asks this court to flagrantly disregard Congress's core motivation for amending Exemption 1.

The agencies' continued overuse of their classification authority is directly relevant to the level of scrutiny the courts should apply in Exemption 1 cases, including this one. DoD argues that the Court should decide this matter based on the content of DoD's affidavits and not the probability that other documents are misclassified. On that point, CCR completely agrees. The fact of overclassification matters not because it proves that *these* documents are improperly designated. Rather, it matters because it underscores the pitfalls of the courts placing undue trust in the agency classification decisions and, correspondingly, the need to carefully probe all agency claims of secrecy. To require judicial vigilance in this context is not an exercise in cynicism, but the fulfillment of a congressional command.

II. The Government Has Failed to Meet Its Burden Under Exemption 1.

A. The Government Has Failed to Show That Release Would Incite Anti-American Violence.

Under FOIA's segregability requirement, DoD bears the burden of providing a "logical" and "plausible" account as to how each record sought by CCR could reasonably be expected to incite anti-American sentiment and endanger lives. Pl. Br. 18-10. DoD's declarant, Major General Karl B. Horst, has failed to meet that burden. The problems with the declaration are manifold.

First, with the exception of a sentence about the FCE videos (addressed below) none of Horst's predictions of harm to national security relate even remotely to the records CCR seeks. Instead, Horst lays out a rationale for classification which, if accepted, would give the government *carte blanche* to conceal not only any depiction of any detainee, but also any information that might aggravate our enemies. Horst's rationale for classifying these records, on its face, applies to all detainee images. He explains that the very "subject of U.S. detainee operations in Iraq, Afghanistan, and at JTF-GTMO is extremely sensitive"; he further explains that the records CCR seeks could be "used to foment anti-American sentiment" not because there is something unique about those records or al-Qahtani's circumstances, but because "they all depict Mr. al-Qahtani in U.S. custody." JA 1301. Worse, Horst's classification rationale is not confined to visual images of detainees; he himself cites two *written* media reports alleging

mishandling of Korans at Guantánamo, to illustrate the "harm to national security that could reasonably be expected to result from the release of images that our enemies find or choose to characterize as inflammatory." JA 1300. Equally problematic is Horst's assertion that extremists could distort even innocuous records. As set forth in CCR's opening brief, this rationale would infinitely expand Exemption 1 since any record could be doctored by enemy propagandists.[4] In short, the principle Horst asks this Court to embrace is one that would permit the government to hide from the public any facts or depictions that our enemies might – rationally or otherwise – find inciting or that they might refashion in an effort to foment anti-American sentiment. Such a principle is repugnant to FOIA. *See King v. United States Dep't of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987) ("categorical descriptions of redacted material coupled with categorical indication of anticipated consequences of disclosure" was "clearly inadequate").

[4] DoD concedes that any image could be altered or even "entirely fabricated," but argues that the "government should not make that job easy for extremists by providing them with images of detainees in custody." Gov't Br. 26, n.6. But extremist propagandists do not want for images of detainees. As shown below, the DoD routinely releases images of detainees in custody, Pl. Br. 38, and a quick google search of "detainees" produces hundreds more – including pictures which purport to show al Qahtani in U.S. custody. *See The Guantánamo Docket: Mohammed al Qahtani*, *available at* http://projects.nytimes.com/Guantánamo/detainees/63-mohammed-alqahtani/documents/11; *see also United States v. Bari*, 599 F.3d 176, 181 (2d Cir. 2010) (judges may use google "to confirm a reasonable intuition on a matter of common knowledge"). Horst does not explain how any marginal harm would result from adding these records to the heap of publicly available detainee images.

DoD responds in two ways. First, mischaracterizing the Horst declaration, it argues that Horst "notes specifically that it is the release of the videotapes and photographs of al-Qahtani" that could endanger national security. Gov't Br. 23-24. DoD does not identify any aspect of the declaration's rationale that is specific to these records, nor could it: the only portions of the declaration tailored to the images of al-Qahtani are a few paragraphs describing the scope of the agencies' search and the case caption. Instead, DoD points to the *district court*'s conclusion that releasing these records would be particularly damaging given al-Qahtani's status as a high profile detainee whom the government admitted to torturing. Gov't Br. 24. But that conclusion was pure speculation by the district court – it was not supported by anything in the DoD's declarations indicating that al-Qahtani was, for example, sufficiently prominent, recognizable, or otherwise unique such that extremists would rush to convert his released images into propaganda. In that regard, this case is case is vastly different from *Judicial Watch, Inc. v. United States DOD*, 715 F.3d 937 (D.C. Cir. 2013), on which both the DoD and district court rely. That case upheld the CIA's claim to withhold "an *extraordinary set of images*" depicting U.S. personnel handling the dead body of "the founder and leader of al Qaeda." *Id.* at 943 (emphasis added). In fact, the supporting declarations explained that extremists had already mobilized around bin Laden's death and burial. *Id.* If DoD has specific, articulable reasons why his image – like

those of bin Laden's body – would be uniquely inciting, then it was required to present them. FOIA does not permit the court to rescue an agency's facially inadequate rationale by supplying its own speculation.

DoD also accuses CCR of ignoring Horst's "specific statement that images similar to the ones at issue in this case" have been altered to incite anti-American sentiment. Gov't Br. 26-27, n.6. Again, DoD mischaracterizes the Horst declaration. Horst states vaguely that "visual imagery depicting DOD treatment of detainees" has been manipulated to "increase recruitment by extremist groups." But that description – images "depicting DOD treatment of detainees" – encompasses a wide spectrum, from guards innocuously strolling past a detainee's cell to armed soldiers roaming prisons with menacing dogs. Horst does not specify which sorts of pictures have been manipulated, nor does he explain why each individual image or video CCR seeks is equally susceptible. In any event, this response misses the point entirely. DoD is asking this Court to embrace a classification rationale – that is, classification based on the possibility that someone somewhere may refashion an official record into propaganda – that cannot be cabined to pictures of detainees. Extremists groups have, in point of fact, used all manner of images to stoke animosity toward the United States and aid

recruitment. *See* Br. 40.[5] If this is enough to sustain classification, an agency affiant could trot out this rationale in future cases to justify the concealment of virtually any official record.

Second, DoD argues that "[t]he issue is not whether DoD could possibly make a similar argument with respect to future, as-yet-unknown documents regarding various aspects of U.S. foreign policy, but whether DoD's position with respect to the particular Withheld Videotapes and Photographs at issue in this case is logical and plausible." Gov't Br. 31. This argument fails to acknowledge how precedent operates. The DoD is entreating this Court to certify a set of sweeping classification rationales, the legal force of which will necessarily reach beyond the facts of this case to justify secrecy that ought not be permitted under FOIA.

Horst's declaration is inadequate for additional reasons, apart from the impermissibly broad scope of his classification rationales. His declaration fails to provide the Court with the facts necessary to assess the plausibility of his claim that these pictures would be used to foment anti-American sentiment. Horst references the backlash following four widely publicized instances of egregious U.S. misconduct as "demonstrat[ions] [of] the harm to national security that the

[5] *See also Al Qaeda Magazine Inspire Calls For Car Bombs In United States, Features Photo Of Times Square*, Huffington Post, March 20, 2014, *available at* http://www.huffingtonpost.com/2014/03/20/al-qaeda-inspire-bomb-new-york_n_5002530.html.

release of the Withheld Videotapes and Photographs could cause." JA 1299-1300. Yet, by simultaneously insisting that the records CCR seeks depict neither illegal nor embarrassing conduct, DoD admits that these examples are inapposite. Gov't Br. 32-33. In a vain effort to resolve this contradiction, DoD states in its opposition papers that "these past examples . . . are offered not as precise analogies, but as illustrations of the risks [of releasing the images]." Gov't Br. 24. That is absurd: these examples illustrate the risks of disclosing details of scandalous misconduct by U.S. soldiers – they don't illustrate anything about the risks of releasing videos and images that, according to the government itself, are completely innocuous.

DoD faults CCR for ignoring other "examples" in the Horst declaration of incitement and violence following the release of detainee images. Specifically, DoD points to Horst's attestation that extremist elements have used *unspecified* photographs of U.S. forces "interacting with detainees" in *unspecified* ways to "incite violence." JA 1300. But this skimpy account does not remotely show that the images here at issue could be used in the same way. We do not know, for example, whether the images to which Horst refers are innocuous mugshots or images of soldiers brutally beating detainees. DoD simply asks the Court to take it on faith that the images CCR seeks are sufficiently similar to those that caused past flare-ups. But such blind faith, however appropriate in other contexts, is wholly

incompatible with FOIA in general and Exemption 1 in particular, which, it warrants repeating, was enacted to empower the courts to restrain the epidemic of over-classification. *Goldberg v. Dep't of State*, 818 F.2d 71, 77 (D.C. Cir. 1987) (courts must not "relinquish[] their independent responsibility" to review an agency's Exemption 1 claims).

In any event, the record flatly contradicts Horst's assertion that releasing any detainee images could incite anti-American sentiment. As shown in CCR's opening brief, DoD routinely releases images of Guantánamo detainees, including images where the detainee is identifiable, without incident. Pl. Br. 38. DoD attempts to distinguish the release of identifiable images of detainees on the grounds that in those cases, and unlike here, the detainee consented and the photos were released to the detainee's family through the ICRC. Gov't Br. 27-28, n.7. These distinctions are unpersuasive. First, the government has admitted that once it releases photographs to a detainee's family, it relinquishes any ability to control their broader circulation. JA 661-62. And, in fact, detainees' families regularly disseminate those images to press outlets.[6] Second, the fact that the detainee consented to release (as al-Qahtani did) has absolutely no bearing on whether an enemy propagandist can use those images to incite anti-American sentiment or aid

[6] *See, e.g., Portraits of Guantanamo*, Miami Herald Tribune, Jan. 31, 2014, *available at* http://www.miamiherald.com/static/media/projects/2014/portraits-of-guantanamo/.

recruitment.[7] Nor does DoD adequately address the fact that it publicly releases images of detainees – albeit with identities obscured – without creating violence. *None* of DoD's declarants suggest that the propaganda value of an image is appreciably greater simply because the detainee's face is visible. DoD's counsel now opines that it is a "matter of common sense," Gov't Br. 30, n.8, but that is far from obvious, especially given the conceded ease with which someone can realistically graft a face onto a pixilated or obscured image. Pl. Br. 39. Moreover, while the court "owe[s] deference to the government's judgments contained in its affidavits," *Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 927 (D.C. Cir. 2003), no such deference is owed to the judgment of agency counsel expressed in its litigation briefs. *Cf. Taylor Energy Co. LLC v. United States DOI*, 734 F.Supp.2d 112, 119 (D.D.C. 2010) ("[C]ounsel's '*post hoc* rationalizations' cannot substitute for an agency's failure to articulate a valid rationale in the first instance.") (quoting *El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. Dep't of Health & Human Servs*., 396 F.3d 1265, 1276 (D.C. Cir. 2005)).

[7] DoD makes the same point, *see* Gov't Br. 28 ("[al Qahtani's] consent to . . . [would not] diminish the national security harms that are reasonably likely to flow from the disclosure of the materials at issue in this case"), yet in the same page schizophrenically justifies its decision to release identifiable images of detainees pursuant to another FOIA request by pointing out that those detainees consented to have the ICRC take their photographs. Gov't Br. 28, n.7.

Rather than explaining why these records would incite violence when so many similar images have not, DoD retreats to a line of "official disclosure" doctrine cases to argue that the government's release of other detainees' photographs "does not compel the release of these particular videotapes and photographs of al-Qahtani." Gov't Br. 29 (citing cases). But, as explained in CCR's opening brief, DoD's reliance on the official disclosure doctrine is misplaced. That doctrine holds that a government is estopped from claiming an exemption where it has officially disclosed the precise information a FOIA applicant seeks. *See, e.g., Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy*, 891 F.2d 414, 421 (2d Cir. 1989); *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990). But CCR has never claimed that, by releasing other detainee images, DoD has waived its right to claim an exemption with respect to these records under the official disclosure doctrine. Rather, it argues that the harmless prior dissemination of detainee images – both the official disclosures and the *New York Times* publication of images that purport to be of al-Qahtani – exposes the implausibility of DoD's claim that releasing *these* records will harm national security.

Ultimately, DoD's position is that a past disclosure that falls short of triggering estoppel under the official disclosure doctrine can play no role in evaluating the propriety of invoking Exemption 1. That stance – the equivalent of

arguing that the only admissible evidence is dispositive evidence – is patently wrong. To be sure, "the fact that information exists in some form in the public domain does not *necessarily* mean that official disclosure will not cause harm cognizable under a FOIA exemption." *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007) (emphasis added). But "[i]t is a matter of common sense that the presence of information in the public domain makes the disclosure" of similar information "less likely to cause damage to the national security." *Wash. Post v. DOD*, 766 F. Supp. 1, 9 (D.D.C. 1991). In assessing whether the DoD has met its burden of setting forth a plausible claim that releasing these records will incite violence, a court cannot simply disregard the highly relevant fact that substantially similar information has been safely released. Nor may DoD meet that burden by vaguely remarking that these pictures are "different." Rather, DoD must articulate some credible basis for its view that these images, unlike the dozens safely released before it, are likely to harm national security. DoD has not remotely met that burden.

B. The Government Has Not Shown That Releasing the Records CCR Seeks Would Compromise Detainee Relationships and Intelligence Gathering.

In its opposition, DoD appears to have abandoned the argument made by its declarant, Rear Admiral David B. Woods, that releasing a detainee's image would chill others from providing intelligence by somehow exposing the detainee's

cooperation. JA 1284. Instead, DoD contends that hostile forces "assume that an individual [in U.S. custody] . . . is cooperating," and that releasing a picture would assist "hostile forces by confirming the facts upon which they base their assumption of cooperation, namely, the detainee's identity and the fact of his detention by the United States." Gov't Br. 36-37. DoD argues that it must apply the policy of concealing detainee images "as consistently as possible," lest it undermine other detainees' faith in the government's willingness to protect their identities. Gov't Br. 35; JA 1285-86.

This claim is neither logical nor plausible. First, the record flatly contradicts DoD's assertion that releasing detainee images would expose detainees to retribution and chill cooperation. In fact, DoD does not consistently conceal detainee images – far from it, DoD has an official policy of releasing photographs of any consenting detainee. The fact that this is done through the ICRC is irrelevant given the DoD's concession that such images often make their way into the public domain. JA 1661-62; *Portraits of Guantanamo*, Miami Herald Tribune, Jan. 31, 2014. Likewise, DoD's point that al-Qahtani never consented to having his picture taken by the ICRC is a red herring. Logically, the only reason consent would matter is that it might offer reassurance to other detainees contemplating cooperation that the government will not release their likeness against their will. But here, al-Qahtani has consented to the release of these images. JA 37-38. That

he did so by directing his counsel to file this FOIA request as opposed to signing a DoD form authorizing an ICRC photoshoot is of no consequence, or is possessed of a significance which DoD has never been able to articulate. Having consented to the release of these images, as set forth in publicly filed documents including this brief, there is no real risk that disclosing the records CCR seeks would undermine other detainees' confidence that the government will disclose their images without prior authorization.

Moreover, Woods does not present an iota of evidence to back up his claim that releasing detainee images "could reasonably be expected [to] lead to reprisals against the depicted detainee's family or associates." JA 1284. Nor, given the record, should this court simply accept such speculation. As noted above, dozens of identifiable detainee images taken by the ICRC have been published by news outlets; the *New York Times* has published what purports to be pictures of virtually every Guantánamo detainee – past and present – on its website,[8] including al-Qahtani. *The Guantánamo Docket*: *Mohammed al Qahtani*, New York Times. Yet CCR is not aware of a single incident in which any one of these individuals has been retaliated against, and DoD has furnished no examples.[9] On this record,

[8] *See The Guantánamo Docket*, New York Times, *available at* http://projects.nytimes.com/Guantánamo.

[9] To be clear, the *New York Times* images were not officially disclosed by the government and therefore do not trigger the official disclosure doctrine. However,

Woods falls far short of articulating a plausible account that harm to national security is reasonably likely to result from disclosing these images.

Additionally, DoD's claim suffers from a glaring logical flaw. DoD no longer claims that releasing a detainee's image would itself foster suspicions that that detainee cooperated. Rather, DoD claims that *all* detainees are assumed to have cooperated, whether true or not, by virtue of their detention, and that the images would merely enable retaliators to confirm their identities. Gov't Br. 36-37. Even assuming the accuracy of this statement, all detainees have an understandable (albeit waivable) interest in preventing the disclosure of their images. But – and this is the critical point – under DoD's stated rationale, the disclosure or non-disclosure of detainee images would have no effect upon their decision to cooperate. That is, withholding cooperation would not actually reduce a detainee's risk of retaliation because that risk stems not from the fact of cooperation but from the fact of detention. The converse is equally true: if all detainees are, as the government claims, suspected cooperators, a detainee has nothing additional to lose – and quite a bit to gain – by actually cooperating.[10]

DoD has never explained why extremists would be less likely to retaliate on the basis of leaked information than they would on the basis of information that which was officially disclosed.

[10] DoD argues that, as a known cooperator, al-Qahtani and his family are uniquely at risk of retaliation. Putting aside the fact that al-Qahtani accepted any such risk in consenting to this FOIA request, that assertion does nothing to further DoD's

Either way, DoD's claim that releasing these records would impede intelligence gathering efforts is neither plausible (given DoD's policy of releasing the image of any consenting detainee) nor logical (given that releasing images cannot, according to DoD's own rationale, effect a detainee's decision to cooperate).

C. The Government Has Not Shown That Releasing the Records CCR Seeks Could Undermine Diplomatic Relations Or Facilitate the Sending of Coded Messages.

As explained in its opening brief, DoD's concern that releasing the withheld records will call into question its commitment to the Geneva Convention is baseless where, as here, the detainee has consented to release. Pl. Br. 56-57. Again, DoD has recognized as much by releasing images of consenting detainees through the ICRC.

DoD argues, unpersuasively, that these two situations are not analogous because "the ICRC releases photographs only to detainees' family members" and because the ICRC process "'permits detainees to exercise significant control over appropriate release and distribution of their images.'" Gov't Br. 41 (quoting JA 1311). But again, detainees' families routinely send ICRC photographs to media outlets for publication. And, CCR has, in its capacity as habeas counsel, sought and obtained al-Qahtani's consent to acquire and disseminate these records. JA

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claim that releasing detainee images would dissuade *others* from cooperating. All DoD demonstrates through this point is that, if it wishes to secure detainee cooperation, it should not publicize a detainee's decision to cooperate.

37-38. It is patronizing, and more than a little ironic given his torture by the U.S. government, for DoD to invoke al-Qahtani's privacy interest as a basis for concealing records that al-Qahtani himself wishes to be released.

DoD highlights the district court's "skepticism" that al-Qahtani's had the legal capacity to effect a waiver. Gov't Br. 41; SPA 27 n.13. But the district court never made an actual finding, nor could it have given that the only "evidence" in the record pertaining to al-Qahtani's capacity was a single-sentence Minute Order from April 2012 by the habeas judge finding that al-Qahtani was "*currently* incompetent and unable to assist effectively in [his] case." SPA 27 n.13 (quoting order in *al-Qahtani v. Obama*, No. 5 Civ. 1971 (D.D.C. Apr. 20, 2010) (emphasis added). In any event, the district court's skepticism was misplaced: as it explained in its opening brief, al-Qahtani consented to the FOIA action almost a full year before he was deemed incompetent. Pl. Br. 57-58.

DoD's argument that releasing these images would enable detainees to convey messages to enemy forces is equally implausible. It is unfathomable that DoD would permit the ICRC to photograph any consenting detainee, and permit the families to disseminate those images, if it honestly believed that there was a reasonable likelihood that it could undermine national security by enabling detainees to smuggle messages to the enemy. Nor can DoD claim that ICRC photographs pose less of a risk of embedded messages, particularly given its

argument that it cannot segregate the records to eliminate the risk of secret messaging because it is impossible to identifying them.[11] Gov't Br. 42.

Moreover, the images CCR seeks are more than a decade old – the notion that they contain information that could presently undermine national security borders on the fantastical. The response by DoD's counsel that "coded messages do not necessarily expire" is woefully inadequate. There is nothing in DoD's declarations that addresses the issue of whether any message embedded ten years ago is now stale. Moreover, this completely misstates the standard. In essence, DoD is arguing that it should prevail if it can show that it is "not necessarily" the case that disclosure will not result in harm to national security. But it is not CCR's burden to show that there is no conceivable risk to national security; rather, FOIA places the burden on the government to demonstrate that release could "reasonably be expected" to cause such harm. They have not remotely met that burden.

D. The Government Has Not Shown That Releasing the FCE Videos Could Harm National Security.

DoD has also failed to present a plausible and logical account as to how releasing any portion of the FCE Video could reasonably be expected to harm

[11] In any event, that response is unconvincing. Logically, to embed a message in an image, al-Qahtani would have to know that he was about to be photographed or videotaped. At a minimum, DoD should explain why it cannot segregate those images from photographs or videos that were made spontaneously or without al-Qahtani's knowledge.

national security, given that it has previously disclosed extensive documents detailing FCE team tactics and procedures, including numerous visual images. Pl. Br. 51. In addition, DoD has admitted that the FCE procedures in place at Guantánamo are the same as those in facilities across the United States. Thus, if an extremist wanted a video to assist in developing counter-tactics to thwart the FCE teams, all he need do is type "forced cell extraction" into Youtube.com and use any one of the dozens of the publicly available images that will immediately be made available to him.

DoD accuses CCR of "ignor[ing] the qualitative differences between information revealed on the FCE Videotape and that revealed by training materials," and relies on the "well-settled principle that release of some information does not preclude the government from withholding similar information under Exemption 1." Gov't Br. 43-44. CCR does not take issue with that principle; indeed, CCR has never argued that the government is automatically "precluded" from withholding the FCE Videos. Rather it argues that the government bears the burden of articulating the "qualitative differences" between the video CCR seeks and the information previously released, and explaining how disclosing the former would cause additional harm to national security. DoD has failed to satisfy this burden. It relies on a string of Exemption 1 cases in which courts permitted the government to withhold documents describing enhanced

interrogation techniques even though the government released OLC memos outlining the same techniques. Gov't Br. 44 (citing cases). But in those cases, the government carefully articulated the "qualitative difference" between the documents sought and the OLC memos. *See, e.g.*, *ACLU v. United States DOD*, 628 F.3d 612, 620-21 (D.C. Cir. 2011) (noting that the records sought contained a more detailed description of the interrogation techniques and would "reveal far more about the CIA's interrogation process than the previously released records"). DoD, by contrast, vaguely asserts that these records are different from that which has been previously disclosed and asks this Court to take it on faith that these differences are significant. FOIA, and particularly Exemption 1, demands more.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the district court and order disclosure of the withheld documents.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitations of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 6,999 words in this brief.

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