IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
Plaintiff,	)	Civil Action No. 13-cv-1363 (EGS)
v.	)	
U.S. DEPARTMENT OF STATE,	)	
Defendant.	)	

PLAINTIFF'S REPLY TO NON-PARTY
HILLARY RODHAM CLINTON'S OPPOSITION

Plaintiff Judicial Watch, Inc., by counsel, respectfully submits this reply to Non-Party Hillary Rodham Clinton's Opposition to Plaintiff's Motion to Depose Hillary Rodham Clinton, Clarence Finney, and John Bentel.[1] As grounds therefor, Plaintiff states as follows:

I. Introduction.

Secretary Clinton's deposition is necessary to complete the record. Although certain information has become available through investigations by the Benghazi Select Committee, the FBI, and the State Department Inspector General, as well as through Plaintiff's narrowly tailored discovery to date, significant gaps in the evidence remain. Only Secretary Clinton can fill these gaps, and she does not argue otherwise. Secretary Clinton attempts to re-litigate Plaintiff's motion for discovery and even challenges the Court's prior ruling authorizing discovery. Each of her claims lack merit. Plaintiff's motion should be granted.

[1] Due to the lengthy oppositions submitted by Secretary Clinton and the State Department, Plaintiff is submitting separate responses even though some of the issues overlap. To the extent the Court may have questions regarding the factual record, Plaintiff will address them at the upcoming oral argument or otherwise requests the opportunity for supplemental briefing, if the Court believes it is necessary.

II. Argument.

A. Secretary Clinton's testimony is essential.

While other entities have inquired about Secretary Clinton's unprecedented use of the clintonemail.com system to conduct official government business, only Judicial Watch, through court approved discovery, has focused on whether the creation and use of the system was intended to deliberately thwart FOIA[2] or otherwise prevented the State Department from complying with its FOIA and federal recordkeeping obligations.[3] The Benghazi Select Committee was authorized and directed to conduct an investigation about events surrounding the 2012 Terrorist Attack in Benghazi Libya. *See* http://benghazi.house.gov/about. It did not have the authority nor was it directed to conduct an investigation about the purpose for the clintonemail.com system. Similarly, during his testimony before the House Oversight and Government Reform Committee, FBI Director Comey twice explicitly stated that the FBI did not investigate and could not conclude whether the clintonemail.com system was an attempt by Secretary Clinton and the State Department to avoid compliance with FOIA or other federal recordkeeping statutes. *See* http://www.c-span.org/video/?c4609578/scope-clinton-investigation ("Was there any evidence of Hillary Clinton attempting to avoid compliance with the Freedom of Information Act? Th[at] was not the subject of our criminal investigation, so I can't answer that

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[2] No court has squarely addressed the "deliberately thwart FOIA" standard. This Court has suggested that evidence demonstrating that the State Department condoned the use of the clintonemail.com system would be sufficient. Transcript of February 23, 2016 Motion Hearing ("Transcript") at p. 60.

[3] The State Department states, "The Department of Justice is in the process of reviewing the *CEI* decision, which was issued less than a week ago. On its face, however, the D.C. Circuit focused not on whether there is intent to thwart FOIA, but rather on whether the agency has 'ceded' control of the records." Def. Opp. at 19.

sitting here."); *see also* Exhibit C to Clinton Opp. ("[L]et me ask you that, was the reason she set up her own private server in your judgment was because she wanted to shield communications from Congress and the public?" I can't say that.").

The same holds true for the State Department Inspector General's investigations. The State Department Inspector General's January 2016 report addresses only "efforts undertaken by the Department of State to ensure that government records are properly produced in response to FOIA requests involving past and current Secretaries of State." Exhibit F to Clinton Opp. at 1. In addition, the State Department Inspector General's May 2016 report addresses "efforts undertaken by the Department of State to preserve and secure electronic records and communications involving the Office of the Secretary." Exhibit G to Clinton Opp. at 1. Neither investigation sought to determine nor did either report address why the clintonemail.com system was created and used.

These other entities have not sought to collect the evidence necessary for the Court to resolve the issue before it. The record, "extensive" or not, is incomplete. Judicial Watch therefore seeks to depose Secretary Clinton to establish as complete of a record as possible from which the Court can determine "as a matter of law, whether the Government has conducted an adequate search in response to Judicial Watch's FOIA request." Order at 1.

In support of its request to depose Secretary Clinton, Plaintiff identified at least six issue areas in which Secretary Clinton is the only one that can complete the record. Secretary Clinton does not assert that she does not have information about the six issue areas.
Nor does she assert that she does not have any additional information relevant to this matter. She merely argues that they are either complete or irrelevant. This argument is without merit.

1. The purpose for the clintonemail.com system.

To Plaintiff's knowledge, Secretary Clinton has never testified under oath why she created and used the clintonemail.com system to conduct official government business. Her only public statements on the issue are unsworn. The only sworn testimony on the issue is hearsay referencing those unsworn statements. In response to "why did Secretary choose not to have a State.gov email account[,]" Ms. Mills testified, "***I don't know that I can speak for her***. I think she's spoken for this herself and said that part of what she was seeking was obviously the convenience of being able to use a common device, and so that's what she did." Mills Deposition at 172:20 – 173:4 (emphasis added). Similarly, Ms. Abedin testified to the Benghazi Select Committee that Secretary Clinton "has publicly said she did it as a matter of convenience." Ex. B to Clinton Opp. at 188. Neither Ms. Mills nor Ms. Abedin testified that they had spoken to Secretary Clinton about the purpose for the clintonemail.com system. Mills Deposition at 45:7 – 45:20 and Abedin Deposition at 71:16 – 73:2. Secretary Clinton's opposition only highlights the fact that no witness has been able to fully and definitively answer the question as to why Secretary Clinton created and used the system to conduct official government business. They only testified – as could any member of the public for that matter – as to what they heard Secretary Clinton say publicly.

The evidence also suggests a possible discrepancy with the FBI's findings about the creation of the system. Clinton Opp. at 8. The domain name "clintonemail.com" was registered on January 21, 2009. The email address "hdr22@clintonemail.com" was created shortly thereafter. Neither the domain name nor the email address existed on President Clinton's system. Ms. Mills testified that "President Clinton's office originally hosted its office staff email

on an Apple server, and that in 2009, their email was migrated to a newer server that was acquired from excess equipment available from Secretary Clinton's 2008 presidential campaign." Non-Party Cheryl Mills' Responses to Plaintiff's Interrogatories at 4-5. Since the evidence shows that the clintonemail.com email system was created and initially used in late January 2009, it appears as though the evidence may conflict with the FBI's finding that the clintonemail.com system "was an existing system her husband had and she decided to have a domain on that system." Clinton Opp. at 3.

In addition, Secretary Clinton's practice of corresponding with State Department officials on their State Department email accounts is far from definitive evidence that the purpose for the clintonemail.com system was not to deliberately thwart FOIA or otherwise prevented the State Department from complying with its FOIA and federal recordkeeping obligations. Clinton Opp. at 8. The evidence demonstrates otherwise.

First, Ms. Lang, the State Department's 30(b)(6) witness, testified that the State Department could not reasonably search for records responsive to FOIA requests for Secretary Clinton's emails based on her practice because "in order to search, for example, for Secretary Clinton's emails, if they were stored in other custodians' electronic archives, it would not be possible to do that except by searching individual custodian by individual custodian, would not be reasonably possible" because "the department has 70,000 employees possible." Lang Deposition at 103:20 – 104:10.

Second, as noted in Plaintiff's motion, Ms. Mills, Secretary Clinton's chief of staff, always was fully aware that the proper method to respond to a FOIA request is to search an employee's email account for her records. Mills Deposition at 194:22 – 196:8. Ms. Abedin also

was aware that her email account could be searched in response to a FOIA request for her records. Abedin Deposition at 111:7 – 112:10.

Third, there is no dispute that Secretary Clinton at times abandoned her own practice and corresponded with State Department employees, such as Ms. Abedin, on only their non-state.gov email accounts. This demonstrates that, at a minimum, even following her own practice, Secretary Clinton had ample opportunity to shield some of her emails from the public.

Fourth, the fact that Under Secretary Kennedy, Executive Secretary Mull, and Deputy Executive Secretary Lukens all testified that they did not have or were not aware of any concerns about Secretary Clinton's email not being subject to FOIA (Clinton Opp. at 8-9) only raises additional questions. *See* Plf. Mot. at 4; *see also* Kennedy Deposition at 48:11 – 49:20; 50:3 – 50:7; Mull Deposition at 132:8 – 133:5; Lukens Deposition at 82:19-22. In addition, both Executive Secretary Mull and Mr. Bentel reminded Secretary Clinton's staff about her FOIA obligations. Mull Deposition at Exhibit 6; Exhibit 2, document C to Plf. Mot. Evidence that senior agency officials responsible for records management did not follow up on such issues or raise any such concerns suggests that, at a minimum, the State Department condoned Secretary Clinton's use of the clinonemail.com system.

Secretary Clinton's opposition also ignores the striking evidence that Clarence Finney, the State Department official responsible for the day-to-day management of the secretary's records, including FOIA responses for those records, had no knowledge about her use of the clintonemail.com system. Lang Deposition at 165:19 – 166:1. Nor did he apparently know about her alleged practice of corresponding with State Department officials on their State Department email accounts. Lang Deposition at 97:12 – 98:4. This raises serious questions

because, as Ms. Mills testified, Secretary Clinton was in contact with Mr. Finney every day. Mills Deposition at 262:7 – 263:1. Only Secretary Clinton can answer questions about why she chose not to inform Mr. Finney about her use of the clintonemail.com system.

Moreover, no witness has provided any testimony as to why Secretary Clinton continued her email practice even though her legal obligations concerning her records changed. As a U.S. Senator, Secretary Clinton was not subject to FOIA. As Secretary of State, her records conducting State Department business undisputedly were subject to FOIA and other federal recordkeeping statutes. The evidence so far does not reveal what Secretary Clinton was thinking when she decided to continue her practice of using an unofficial email address in light of her new position as a cabinet secretary. Notably, Secretary Clinton does not address this issue in her opposition.

The fundamental question about why Secretary Clinton created and used the clintonemail.com system remains unanswered. All admissible evidence shows that only Secretary Clinton can answer the question. Her testimony is essential.

2. Secretary Clinton's continued use of the system.

Secretary Clinton asserts that she continued to use the clintonemail.com system, even though it appeared to have suffered multiple and repeated technical problems over the four years that she was secretary,[4] because the State Department system also had problems. Clinton Opp. at 9. This makes little sense as Secretary Clinton has asserted repeatedly that she created the

[4] Contrary to Secretary Clinton's and the State Department's claims, the issues with the clintonemail.com were not short-term inconveniences. The evidence shows that Secretary Clinton faced difficulties for at least more than two years. *See*, Mull Deposition at Exhibits 5 and 6; Exhibit 2 at documents B, D, and E; *see* also Mills Deposition at Exhibit 9.

system for "convenience." On the other hand, had Secretary Clinton used a state.gov email account, the State Department would not have had to cope with significant issues such as the ability of emails transmitted through Secretary Clinton's email account to reach State Department officials and employees using their state.gov email accounts. Use of a state.gov account also would have enabled Secretary Clinton to utilize the extensive State Department resources intended to ensure that her communication systems functioned properly.

In addition, contrary to Secretary Clinton's assertion (Clinton Opp. at 10), she did not write in an email that "she did not want her 'personal' emails to be accessible." She wrote, "Let's get separate address on device but I don't want any risk of the personal being accessible." When asked about the email, Ms. Abedin testified that she does not recall discussing the email with Secretary Clinton and that she only thinks she knows what the secretary meant by the email. Abedin Deposition at 189:1 – 189:14. There is no evidence whatsoever that speaks to what Secretary Clinton meant by "I don't want any risk of the personal being accessible[,]" and the meaning is not readily apparent on its face. Only Secretary Clinton can provide an answer as to what she meant and why she continued to use the flawed clintonemail.com system.

3. Secretary Clinton's claim over her emails.

The most startling argument in Secretary Clinton's opposition is her claim that "the e-mail account, which was hosted on private server equipment, was possessed privately under a claim of right, and has never been the property of or in the possession or control of the State Department." Clinton Opp. at 11. It appears that Secretary Clinton is now arguing that she personally possessed a claim of right to the approximately 30,000 emails that she belatedly returned to the State Department as well as the thousands of other official government emails

that she never did return to the State Department. This assertion is directly contrary to previous representations made by both the State Department and Secretary Clinton indicating the State Department's right to and control over the emails. *See* Letter from Undersecretary Patrick F. Kennedy to David E. Kendall (March 23, 2015), attached as Exhibit A; *see also* Letter from David E. Kendall to the Hon. Trey Gowdy (March 27, 2015), attached as Exhibit B at 2 ("Secretary Clinton is not in a position to produce any of those emails to the Committee in response to the subpoena without approval from the State Department."). What exactly she means by this new assertion is highly relevant to the issue before this Court and only Secretary Clinton can provide such evidence. In addition, this new claim highlights the fact that other critical questions remain unanswered. These questions include whether the system was "allowed," whether the State Department authorized the system's use, and whether the State Department maintained constructive control or, conversely, ceded control over the emails on the system.

Still unanswered is the basic question of whether Secretary Clinton's use of the clintonemail.com system was authorized by the State Department. Secretary Clinton continues to suggest that the use of the system was "allowed." Clinton Opp. at 8-9. The State Department correctly points out, however, that "[d]iscovery has produced no evidence that Secretary Clinton's use of a personal email account was approved by State." Def. Opp. at 17. The State Department itself still coyly refuses to state whether Secretary Clinton received approval. Unanswered questions also remain about what discussions Secretary Clinton had with State Department officials and why she believes that the State Department approved her use of the clintonemail.com system to conduct official government business.

Secretary Clinton also misconstrues the applicability of *Competitive Enterprise Institute v. Office of Science and Technology*, Case No. 15-5128 (D.C. Cir. July 5, 2016). Whether the case is directly on point is irrelevant. The pertinent point is what the D.C. Circuit believes are the relevant factors as to when an agency is required to search a private email account controlled by an agency head. *Competitive Enterprise Institute*, Case No. 15-5128, slip. op. at 2. Knowing whether the system was formally authorized or even informally allowed is a key component of understanding why the system was created and the legal status of the records on the system. Secretary Clinton alone can shed light on this issue.

Finally, there is no evidence in the record about whether Secretary Clinton thought FOIA applied to the emails relating to State Department business on the clintonemail.com system. Abedin Deposition at 115:17 – 116:3. Secretary Clinton argues that she has already provided such testimony to the Benghazi Select Committee (Clinton Opp. at 11); however, it is not readily apparent that she did. The extent of Secretary Clinton's testimony was that she believed that all of her emails relating to State Department business "were being captured and preserved." Ex. A to Clinton Opp. at 425. She has not answered the question of whether she understood that her emails conducting State Department business through the clintonemail.com system were subject to FOIA. Again, only Secretary Clinton has such answers.

4. Secretary Clinton's inventorying of records.

Secretary Clinton's entire response to this line of inquiry is that "Secretary Clinton was not at the meeting" and that she "was not the person inventorying her records." Clinton Opp. at 12. Secretary Clinton argues that because she was not in the meeting and did not physically place records in boxes, she did not have the ultimate responsibility for the inventorying her

records. This cannot be the case. All of the staff who inventoried the records worked for the secretary. Their jobs were to provide logistical support to Secretary Clinton. Also, the emails conducting State Department business were sent or received by Secretary Clinton. Only she had access to them. Mills Deposition at 188:3 – 188:14 (The Executive Secretariat's staff "did not have access to her email account."). The emails could only be inventoried if she permitted it.

In addition, everyone who was at the meeting with Finney and was responsible for inventorying Secretary Clinton's records knew about the use of the clintonemail.com system to conduct official government business, yet not one shared this information with Mr. Finney. Only Secretary Clinton can testify as to whether she provided instructions to staff with respect to inventorying the official emails on the clintonemail.com system and, if not, why such instructions were not provided. Abedin Deposition at 143:11 – 143:15.

5. Secretary Clinton's choice of type of email system.

Plaintiff does not seek answers about Secretary Clinton's choice of the type of email system she used to conduct official government business because of what she could or could not retrieve from the AT&T account that she used early in her tenure. Clinton Opp. at 13. The type of email system Secretary Clinton used is significant because the type of system she selected did not allow for archiving. Plf.'s Mot. at 11. Director Comey suggested that if she had used a state.gov email account or even a commercially available email system, her emails would have been archived in the normal course. Statement by FBI Director James B. Comey on the Investigation of Secretary Hillary Clinton's Use of a Personal E-Mail System, available at https://www.fbi.gov/news/pressrel/press-releases/statement-by-fbi-director-james-b.-comey-on-the-investigation-of-secretary-hillary-clintons-use-of-a-personal-e-mail-system ("Because she

was not using a government account—or even a commercial account like Gmail—there was no archiving at all of her e-mails . . .”). Instead, Secretary Clinton decided to use a system that apparently did not preserve her official emails for future use, access, and review. This troubling choice raises further questions about the purpose of the clintonemail.com system. Discovery to date has shown that no one but Secretary Clinton can answer questions about her decision to use a non-archiving system to conduct official government business.

6. Mr. Pagliano's role in creating and operating the system.

Notably absent from Secretary Clinton's opposition is any discussion about the lack of evidence concerning the information technology services that Mr. Pagliano provided to Secretary Clinton while she was employed by the State Department. Abedin Deposition at 61:6 – 63:12; 70:3 – 70:12; Mills Deposition at 93:14 – 94:8; 160:10 – 161:4; and Kennedy Deposition at 70:13 – 73:15. Because Mr. Pagliano invoked his Fifth Amendment right against self-incrimination, and no other witness could provide meaningful testimony about the work he may have performed on the clintonemail.com system, either for the State Department or for Secretary Clinton, Plaintiff has been unable to obtain evidence from this important source. Secretary Clinton has not disputed that she has this relevant information. Her deposition is necessary.

B. Secretary Clinton's deposition is appropriate under the circumstances.

While rare, Secretary Clinton does not dispute that a court can require a former top official to appear for a deposition in “extraordinary circumstances.” Clinton Opp. at 14-15 (*citing Simplex Time Recorder Company v. Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985) (top official can be required to testify in “extraordinary circumstances” regarding “their reasons for taking official actions”). This is the extraordinary case. At issue is the

unprecedented use of an unofficial system by the Secretary of State and her deputy chief of staff to conduct official government business and communicate with fellow State Department employees and other federal government employees, including those at the White House, as well as foreign leaders and other interested individuals. Although the system was used exclusively by Secretary Clinton for four years, the public did not know about it until the State Department and Secretary Clinton only acknowledged the system when compelled to do so by a *New York Times* report in March 2015, two years after she had left office. As this Court has stated previously, "This is a very troubling case." Transcript at pp. 63-64. In addition, Judge Lamberth has characterized Secretary Clinton's use of the clintonemail.com system as "extraordinary." *Judicial Watch, Inc. v. U.S. Department of State*, No. 14-cv-1242, 2016 U.S. Dist. LEXIS 41183 (D.D.C. Mar. 29, 2016). If there was ever an appropriate time for the deposition of a former agency head, this is it.

In addition, Secretary Clinton does not dispute that she has the relevant information that Plaintiff seeks. She only argues that the identified issues have been answered or are irrelevant. As Plaintiff demonstrates above, that assertion is meritless.

If the Court agrees that Secretary Clinton has relevant information and the circumstances are extraordinary, the Court should order Secretary Clinton to sit for a deposition instead of submitting information in writing. Secretary Clinton has not stated that she could not be available for a three-hour deposition at a time and location most convenient to her. Nor will written discovery be sufficient. The ability to ask follow-up questions, to explore and understand answers cannot be accomplished through a declaration or interrogatory responses prepared for a witness by a lawyer. Numerous declarations also have already been filed in this case. This

includes the declaration by Secretary Clinton, about which Plaintiff has significant questions and Secretary Clinton fails to address. Plf. Mot. at 5. In addition, as this Court noted, there has been "a constant drip, a declaration drip." Transcript at p. 38. The deposition of Secretary Clinton is the most efficient and effective means to discover the information pertinent to this case. Any written discovery would most likely lead to extended negotiations and more proceedings.

Finally, the deposition of Secretary Clinton will not be futile. Until the Court determines whether the State Department has conducted an adequate search in response to Judicial Watch's FOIA request, a discussion about remedies is premature. Transcript at 39-45. In addition, a subpoena to Secretary Clinton (Clinton Opp. at 15-16) is not the only available remedy. The Court also could order the State Department to search all archived and active email accounts of former and current State Department employees that may have communicated with Secretary Clinton by email. The Court also could order the State Department to subpoena other government agencies or other pertinent entities for emails from Secretary Clinton. The Court does not need to undertake an analysis of potential remedies until it rules on the sufficiency of the search, and it should not even attempt to resolve that issue until the record is complete.

C. The Court should not reconsider its discovery order.

Secretary Clinton argues that this Court lacked jurisdiction at the outset to order discovery in this case. Clinton Opp. at 16-20. Secretary Clinton's desire to reargue claims that have already been rejected is not an adequate justification for reconsideration. She offers no change in law, fact or other reason that this Court should revisit its previous analysis of *Kissinger*, other than the startling assertion that she has a "claim of right" to all emails in which she conducted official government business. As the Court stated:

> The Court is unpersuaded by the State Department's reliance on *Kissinger*. The *Kissinger* Court explicitly did not address whether the 'withholding' standard must be measured from the time a request is received under circumstances where it is 'shown that an agency purposefully routed a document out of agency possession in order to circumvent a FOIA request.' *Id*. at 167, fn 9. Here, Judicial Watch alleges that the State Department and Mrs. Clinton sought to 'deliberately thwart FOIA' through the creation and use of clintonemail.com. Pl.'s Mot. Discovery, Docket No. 48 at 3. This allegation goes directly to the type of circumstance Kissinger did not address.

Order at 10-11.

The Court already has found that *Kissinger* does not apply to the unprecedented situation currently before the Court. There is no reason to revisit this ruling in light of the law of the case doctrine, which provides that "[w]here issues have been resolved at a prior state in the litigation, based upon principles of judicial economy, courts generally decline to revisit [them]. *New York v. Microsoft*, 209 F. Supp. 2d 132, 141 (D.D.C. 2002). The law of the case doctrine "bars reconsideration of a court's explicit decisions [in earlier phases of a case] as well as those issues decided by necessary implication." *Id*. (*citing Crocker v. Piedmont Aviation, Inc*., 49 F.3d 735, 739 (D.C. Cir. 1995); *LaShawn A. v. Barry*, 87 F.3d 1389, 1394 (D.C. Cir. 1996) (en banc) ("[T]he same issue presented a second time in the same case in the same court should lead to the same result."). The fact that Secretary Clinton's counsel seeks to participate is not a legitimate reason for the Court to revisit its ruling.

Similarly, a court should "grant a motion for reconsideration of an interlocutory order only when the movant demonstrates: (1) an intervening change in the law; (2) the discovery of new evidence not previously available; or (3) a clear error in the first order." *BEG Investments, LLC v. Alberti*, 85 F. Supp. 3d 54, 58 (D.D.C. 2015) (*quoting Stewart v. Panetta*, 826 F. Supp. 2d 176, 177 (D.D.C. 2011)). District courts should "be guided by the general principles

underlying the [law-of-the-case] doctrine" in applying these factors to the reconsideration of interlocutory orders. *Sloan v. Urban Title Services, Inc.*, 770 F. Supp. 2d 216, 224 (D.D.C. 2011). Secretary Clinton has not demonstrated that any of those factors apply in this case. All that she argues is that the court should reconsider its ruling because her counsel "respectfully submit" the Court was "incorrect." Clinton Opp. at 19.

III. Conclusion.

For the reasons set forth in Plaintiff's initial brief and the additional reasons stated above, Plaintiff respectfully requests that the Court authorize Plaintiff to take the depositions of Hillary Clinton, Clarence Finney, and John Bentel within four weeks.

Dated: July 14, 2016

Respectfully submitted,

/s/ Michael Bekesha

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