No. ___

IN THE
Supreme Court of the United States

JUDICIAL WATCH, INC.
Petitioner,

v.

UNITED STATES DEPARTMENT OF DEFENSE
AND CENTRAL INTELLIGENCE AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

Michael Bekesha
Counsel of Record
JUDICIAL WATCH, INC.
425 Third Street, S.W., Suite 800
Washington, DC 20024
mbekesha@judicialwatch.org
(202) 646-5172
Counsel for Petitioner

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

QUESTION PRESENTED

Whether 5 U.S.C. § 552(b)(1), which allows the Executive Branch to withhold information "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and [is] in fact properly classified pursuant to Executive order," limits courts to provide almost blind deference to the Executive Branch's classification determinations or whether it mandates that courts conduct meaningful review of those determinations.

PARTIES TO THE PROCEEDINGS

Petitioner Judicial Watch, Inc. is a not-for-profit, educational foundation that seeks to promote integrity, transparency, and accountability in government and fidelity to the rule of law. In furtherance of its public interest mission, Petitioner regularly requests access to public records of federal, state, and local government agencies and officials and disseminates its findings to the public.

Petitioner initiated the proceedings below by filing a complaint under the Freedom of Information Act ("FOIA") against respondents Department of Defense ("DoD") and Central Intelligence Agency ("CIA") in the United States District Court of the District of Columbia ("District Court"). The District Court granted summary judgment in favor of the DoD and the CIA and dismissed the case. Petitioner appealed the District Court's ruling to the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), which affirmed the District Court's grant of summary judgment. Petitioner is not a publicly-owned corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Judicial Watch, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

DECISIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit, published as *Judicial Watch, Inc. v. United States Department of Defense,* 715 F.3d 937 (D.C. Cir. 2013), is reprinted in the Appendix (App.) at 3a. The decision of the United States District Court of the District of Columbia, published as *Judicial Watch, Inc. v. United States Department of Defense,* 857 F. Supp. 2d 44 (2012), is reprinted at App. 19a.

JURISDICTION

The Court of Appeals affirmed the District Court's grant of summary judgment for Respondents. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION

5 U.S.C. § 552(b) of the Freedom of Information Act provides in pertinent part:

> (b) This section [providing for public access to government records] does not apply to matters that are:
>
> (1)
> (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and
>
> (B) are in fact properly classified pursuant to such Executive order.

STATEMENT

On May 1, 2011, President Barack Obama announced to the world that the United States had conducted an operation that resulted in the death of Osama bin Laden. *Judicial Watch*, 857 F. Supp.2d at 48 (App. 19a). Shortly thereafter, Petitioner submitted FOIA requests to the DoD and CIA seeking copies of all photographs and video recordings of bin Laden taking during or after that operation. *Id.* (App. 19a-20a). After both agencies advised that they would be unable to process the requests within the time permitted under the statute, Petitioner filed suit. *Id*. (App. 20a).

After searching the components that it determined were most likely to possess the sought-after records, the DoD turned up nothing responsive to Petitioner's request. *Id*. (App. 20a). The CIA, however, located 52 responsive records. Although the CIA did not provide an index identifying which of the 52 images were photographs or video recordings or what was depicted in each image, the CIA disclosed that the 52 images consisted of five general categories: (1) images taken inside the compound in Abbottabad, Pakistan, where bin Laden was killed; (2) images taken as bin Laden's body was transported from the Abbottabad compound to the location where he was buried at sea; (3) images depicting the preparation of bin Laden's body for the burial; (4) images of the burial itself; and (5) images taken for purposes of conducting facial recognition analysis of the body in order to confirm that it was bin Laden. *Id*. at 50-51 (App. 25a).

The CIA withheld all 52 records, claiming that the photographs and/or video recordings of bin Laden's death and burial were exempt from disclosure under Exemptions 1 and 3, the exemptions for classified materials and for information specifically exempted by other statutes. *Judicial Watch,* 715 F.3d at 939-940 (App. 5a-9a). The CIA subsequently moved for summary judgment. *Id*. (App. 4a-8a).

On April 26, 2012, the District Court granted the CIA's motion for summary judgment. *Id.* (App. 4a-8a). The District Court "concluded that the CIA had sustained its burden of showing that the images of bin Laden satisfied the substantive and procedural criteria for classification." *Id.* (App. 4a-8a). Because the court found that all records were being properly withheld under Exemption 1, the District Court did not address the CIA's claims of withholding under Exemption 3. *Id.* (App. 4a-8a).

On appeal, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the District Court's ruling. *Id*. at 944 (App. 18a).

REASONS FOR GRANTING THE PETITION

At issue is the role of the courts in reviewing determinations of the Executive Branch to withhold material under Exemption 1 of the FOIA. Petitioner does not dispute that the Executive Branch may properly withhold material under Exemption 1. Nor does Petitioner dispute that the courts should afford some deference to the Executive Branch. Rather,

Petitioner requests that this Court grant certiorari to address whether the courts should conduct meaningful review of classification decisions of the Executive Branch.

In 1973, Exemption 1 allowed a government agency to withhold material that was "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." *Ray v. Turner*, 587 F.2d 1187, 1190-1191 (D.C. Cir. 1978) (*quoting* 5 U.S.C. § 552(b)(1) (1970)). That year, in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973), this Court considered a challenge to the withholding of material pursuant to Exemption 1 and held that courts "should not review the substantive propriety of the classification or go behind an agency affidavit stating that the requested documents had been duly classified." *Id.* In other words, Exemption 1, as written, permitted – if not required – courts to provide effectively blind deference to the Executive Branch.

The following year, "Congress overrode a presidential veto and amended the FOIA for the express purpose of changing" the blind deference standard set forth in *Mink*. *Ray,* 587 F.2d at 1190-1191. FOIA Exemption 1 now allows a government agency to withhold material only if it is "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and [is] in fact properly classified pursuant to Executive order." 5 U.S.C. § 552(b)(1). In addition, in drafting, discussing, and debating the revisions to Exemptions 1, Congress

> recognize[d] that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects might occur as a result of public disclosure of a particular classified record. Accordingly, [Congress] expects[s] that Federal courts, in making *de novo* determinations, will accord substantial weight to any agency's affidavit

H.R. Rep. No. 93-1380, 93rd Cong. 2d Sess. 219, 228-229 (1974). In other words, Congress sought to replace the blind deference standard with a standard that provides substantial weight to the Executive Branch but also affords the courts with an opportunity to conduct meaningful review.

Yet, in the succeeding 30 years, contrary to the express wishes of Congress, courts have reverted back to their old ways of conducting essentially meaningless review of Executive Branch determinations. As then-Chief Judge of the U.S. District Court for the District of Columbia Royce C. Lamberth recently stated, "Most judges give almost blind deference on Exemption 1 claims. . . . It bothers me that judges, in general, are far too deferential to Exemption 1 claims." Josh Gerstein, *Judge: Courts too deferential on classified information*, Politico (May 13, 2013), available at http://www.politico.com/blogs/under-the-radar/

2013/05/judge-courts-too-deferential-on-classified-information-163826.html.

The instant case is the poster child of the almost blind deference being provided to the Executive Branch. First, both courts confirmed and expressed concern that the records were not properly classified. Second, both the District Court and D.C. Circuit failed to conduct meaningful review of the CIA's claims that all 52 images conformed to EO 13526's substantive criteria for classification. Nevertheless, in the end, both courts concluded that, regardless of any failure on the part of the CIA to fully satisfy its burdens under Exemption 1, the evidence submitted was "good enough" for all 52 images to be withheld. The D.C. Circuit did not even remand the case to afford the CIA a second opportunity to remedy their failures.

By ignoring the explicit intentions of Congress and providing almost blind deference to the CIA to withhold material that may not have been properly classified nor specifically authorized to be classified, the D.C. Circuit has once again reverted back to meaningless review by the courts, causing the FOIA to become more of a withholding statute than a disclosure statute. *See Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1270 (2011). Petitioner therefore requests that this Court grant certiorari to address this disturbing reversal identified by Chief Judge Lamberth.

I. The FOIA Is a Disclosure Statute.

As this Court has recently reiterated, the FOIA was enacted to overhaul an earlier public records provision that had become more of "a withholding statute than a disclosure statute." *Milner,* 131 S. Ct. at 1262 (*quoting Mink,* 410 U.S. at 79). For the FOIA to escape this same fate, the nine exemptions contained therein must be interpreted narrowly. *Id.* (The exemptions are "explicitly made exclusive and must be narrowly construed." (internal citations omitted)); *id.* at 1265 ("We have often noted the Act's goal of broad disclosure and insisted that the exemptions be given a 'narrow compass.'"). To avoid overly expansive applications of the exemptions and maintain the FOIA's status as a disclosure statute, this Court explained that the lower courts should adhere to the plain meaning of the language used by Congress. *Id.* at 1270 (holding that an odd reading of the plain language "would produce a sweeping exemption, posing the risk that FOIA would become less a disclosure than a withholding statute.") (internal citations omitted).

In addition, the role of the courts is "to enforce that congressionally determined balance rather than . . . to assess case by case, department by department, and task by task whether disclosure interferes with good government." *Id.* at 1266. If an exemption does not permit the withholding of information that the government believes is in the country's interest to withhold, "the Government may of course seek relief from Congress." *Id.* at 1271. This Court concluded, "All we hold today is that Congress has not enacted

the FOIA exemption the government desires. We leave to Congress, as is appropriate, the question of whether it should do so." *Id.*

II. Exemption 1 Indisputably Requires All Withheld Material to Be Classified in Accordance with the Procedural Criteria As Well As Its Substantive Terms.

Almost thirty years ago, Congress decided that the courts should – and must – conduct meaningful review of the Government's determinations. Therefore, Congress carefully crafted Exemption 1 to allow only the withholding of material that is "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and [is] in fact properly classified pursuant to Executive order." 5 U.S.C. § 552(b)(1).

Since then, courts have held that to properly invoke Exemption 1, a government agency must "comply with the classification procedures established by EO 13526 and withhold only such material as conforms to EO 13526's substantive criteria for classification." *See e.g., King v. U.S. Department of Justice*, 830 F.2d 210, 214 (D.C. Cir. 1987); *Lesar v. U.S. Department of Justice*, 636 F.2d 472, 483 (D.C. Cir. 1980) (withheld material "must be classified in accordance with the procedural criteria of the governing Executive Order as well as its substantive terms."). Nevertheless, in the instant action, the D.C.

Circuit failed to follow this well-established, indisputable standard.

III. The D.C. Circuit Blindly Approved the CIA's Withholding of the Requested Images Even Though the Records Were Not Properly Classified.

With respect to whether the CIA properly classified the images, the District Court aptly stated, "As a preliminary matter, Judicial Watch is correct that the CIA's declarations are not a model of transparency." *Judicial Watch,* 857 F. Supp. 2d at 56-57 (App. 40a). In addition, the District Court found that the CIA failed to submit evidence that demonstrated basic facts such as "the identity of the individual who originally classified the records in question." *Id*. at 57 (App. 40a). However, the court found that the CIA cured its failure to originally classify the records through a process known as derivative classification. *Judicial Watch*, 715 F.3d at 937 (App. 8a-9a).

On appeal, the D.C. Circuit also identified concerns that it had with the evidence submitted by the CIA. The court explained:

> Even if the CIA is right that documents can be derivatively classified and marked in this way – and we express no view on the matter – we cannot determine whether derivative classification of the images was proper without some description of the

> classification guide on which the derivative classifier purportedly relied. Yet in this case, the CIA has provided no description of the guide's provisions, not even a general description, that would permit us to determine whether the derivative classification was properly based on the guide. Hence we cannot determine whether the derivative classifier misapplied the guide, or whether the guide's instructions were so vague as to operate as no constraint at all.

Id. at 944 (App. 16a-17a) (internal citation with discussion omitted). Unlike the District Court, the D.C. Circuit determined that there was no evidence that the procedural defect was cured. In other words, the two courts collectively concluded that the CIA provided no evidence to demonstrate that the images were properly classified. *Id.* at 940 (App. 16a-17a); *id.* at 944 (App. 16a-17a). In fact, the D.C. Circuit even remarked that its usual course of action would be to remand the case and order the government agency to submit sufficient information. *Id.* at 944 (App. 17a).

Yet the D.C. Circuit did not remand the case. Instead, the court agreed with the District Court that the records should not be released. In the end, the reasoning of both courts was the same: regardless of whether there is any evidence that the CIA properly classified the images, the records may be withheld because, after-the-fact and during the litigation, the images were reviewed by the agency and determined

by the agency to be correctly classified. This blind deference provided by the courts makes a mockery out of the well-established, indisputable standard that records are only properly withheld when a government agency "compl[ies] with the classification procedures established by EO 13526." 5 U.S.C. § 552(b)(1).

IV. The D.C. Circuit Blindly Approved the CIA's Claim That the Release of the Images Reasonably Could Be Expected to Cause Exceptionally Grave Damage to National Security.

To properly withhold the requested images the CIA was required to demonstrate that the release of each of the records "reasonably could be expected to cause identifiable or describable exceptionally grave damage to national security." "National Security" is defined by EO 13526 as "the national defense or foreign relations of the United States." EO 13526, § 6.1(cc). The D.C. Circuit concluded that the CIA's withholding of all of the images was proper because the submitted declarations supporting the Executive Branch's "determinations that releasing any of the images, including the burial images, could reasonably be expected to trigger violence and attacks 'against United States interests, personnel, and citizens worldwide.'" *Judicial Watch,* 715 F.3d at 942 (App. 13a) (internal citations omitted). In addition, the court seems to suggest that the result of such violence and attacks is equivalent to exceptionally grave damage to national security. *Id.* (App. 13a). Prior to this ruling, no court had ever held that speculative,

unspecific violence harms the national defense of the United States.

As the D.C. Circuit noted, Petitioner focused its appeal "on the most seemingly innocuous of the images: those that depict the preparation of bin Laden's body for burial and the burial itself." *Id.* at 942 (App. 12a). Although the CIA arguably presented sufficient evidence as to how the release of gruesome images of bin Laden could trigger violent attacks by terrorists, the D.C. Circuit did conduct meaningful review of the CIA's determination to withhold images of a somber, dignified burial at sea.

Because the withholding of images of a somber, dignified burial had previously never been upheld, the D.C. Circuit should have conducted a more meaningful review of the CIA's justifications for its alleged classification. For example, it can be argued that although any attack on U.S. interests or citizens is regrettable and unfortunate, not every such event causes exceptionally grave damage to the nation's national defense of foreign relations. In fact, the most recent, despicable attack on American interests – the September 11-12, 2012 killings of four U.S. government personnel, including the U.S. Ambassador to Libya – does not align within the typical scenario of harm to national security. *See ACLU v. U.S. Department of Defense*, 628 F.3d 612, 623-25 (D.C. Cir. 2011).

Similarly, it could be argued that the release of images depicting a somber burial in which the body of the mastermind of the most deadly terrorist attack of

the United States was treated with the utmost dignity and respect could lead to the easing of tensions overseas. Instead of conducting meaningful review of the CIA's determination, the Court merely concluded that the CIA's justifications that "al Qaeda has already devoted attention to the 'so-called martyrdom' of bin Laden and has specifically 'attacked the United States' assertions that [he] received an appropriate Islamic burial at sea'" and "releasing the images of the burial at sea 'could be interpreted as a deliberate attempt by the United States to humiliate' bin Laden" were "logical" and "plausible" reasons for why the images may be withheld. *Judicial Watch*, 715 F.3d at 942 (App. 13a). However, the release of images depicting the traditional procedures for Islamic burials that were followed could discredit such claims by terrorists and provide less, not more, reason to attack American interests overseas. Yet the D.C. Circuit blindly affirmed the Executive Branch's determinations.

V. The Courts' Almost Blind Deference Eviscerates the FOIA As a Disclosure Statute.

This case presents an important question of federal law because it highlights the disturbing fact that courts have once again reverted back to meaningless review. In doing so, courts continue to eviscerate the FOIA as a disclosure statute by directly contradicting the plain language of Exemption 1 and the explicit intentions of Congress. By providing almost blind deference to the Executive Branch, it is foreseeable that the Executive Branch will abuse its

seemingly unreviewable authority and will claim Exemption 1 to avoid disclosure. Therefore, if this Court does not grant certiorari and address this disturbing reversal identified by Chief Judge Lamberth, Exemption 1 will remain "a sweeping exemption" and the FOIA will continue as less of "a disclosure than a withholding statute." *Milner*, 131 S. Ct. at 1270.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael Bekesha
Counsel of Record
JUDICIAL WATCH, INC.
425 Third Street, S.W., Suite 800
Washington, DC 20024
mbekesha@judicialwatch.org
(202) 646-5172

Counsel for Petitioner

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5137 **September Term, 2012**
FILED ON: May 21, 2013

JUDICIAL WATCH, INC.,
APPELLANT

v.

UNITED STATES DEPARTMENT OF DEFENSE AND CENTRAL INTELLIGENCE AGENCY,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:11-cv-00890)

Before: GARLAND, *Chief Judge,* ROGERS, *Circuit Judge*, and EDWARDS, *Senior Circuit Judge*

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael McGrail
Deputy Clerk

Date: May 21, 2013

Opinion Per Curiam

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 10, 2013 Decided May 21, 2013

No. 12-5137

JUDICIAL WATCH, INC.,
APPELLANT
v.
UNITED STATES DEPARTMENT OF DEFENSE AND CENTRAL INTELLIGENCE AGENCY,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:11-cv-00890)

Michael Bekesha argued the cause and filed the briefs for appellant. *Paul J. Orfanedes* and *James F. Peterson* entered appearances.

Robert M. Loeb, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief were *Stuart Delery*, Principal Deputy Assistant Attorney General, *Ronald C. Machen Jr.*, U.S. Attorney, and *Matthew Collette*, Attorney.

Before: GARLAND, *Chief Judge*, ROGERS, *Circuit Judge*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed *PER CURIAM*.

PER CURIAM: Judicial Watch filed a Freedom of Information Act request seeking disclosure by the Central Intelligence Agency of 52 post-mortem images of Osama bin Laden. The agency refused on the ground that the images were classified Top Secret. Judicial Watch sued, and the district court granted summary judgment for the agency. We affirm because the images were properly classified and hence are exempt from disclosure under the Act.

I

On May 1, 2011, President Obama announced that American personnel had killed al Qaeda leader Osama bin Laden in Abbottabad, Pakistan and buried his body at sea. Shortly thereafter, Judicial Watch filed Freedom of Information Act (FOIA) requests with the Department of Defense and the Central Intelligence Agency (CIA) seeking any photographs or videos depicting bin Laden "during and/or after the U.S. military operation in Pakistan." The Defense Department responded that it had no such images. The CIA acknowledged that it had 52 responsive records, but said that it intended to withhold them because they were classified Top Secret.[1] Judicial

[1] After oral argument on this appeal, the CIA acknowledged that it had located seven additional responsive records, which it withheld on the same basis as the original 52

Watch sued, and the parties filed cross-motions for summary judgment.

The Government supported its motion with three declarations that are relevant on appeal.[2] The first, a lengthy declaration by John Bennett, Director of the CIA's National Clandestine Service, stated that all 52 responsive records contained "post-mortem images of [bin Laden's] body." Bennett Decl. ¶ 11. Many, he said, were "quite graphic" and "gruesome" pictures displaying the bullet wound that killed bin Laden; some showed bin Laden's face in a way intended to enable facial recognition analysis; and some documented the transportation and burial of bin Laden's corpse. *Id.* Bennett attested that he had personally reviewed each image and concluded that all of them were properly classified Top Secret because, if disclosed, they could be expected to lead to retaliatory attacks against Americans and aid the production of anti-American propaganda. *Id.* ¶¶ 4, 12, 23. Bennett analogized the bin Laden images to post-mortem photographs of al Qaeda leader Abu Musab al-Zarqawi, which had been portrayed in Pakistan as an "ad for jihad," *id.* ¶ 26, and to images of abuse at Abu Ghraib prison, which had been used "very effective[ly]" by al Qaeda to recruit supporters and raise funds, *id.* ¶ 24. He said that al Qaeda had already produced propaganda relating to bin Laden's

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images. *See* Rule 28(j) Letter from CIA Counsel (filed Feb. 15, 2013)

[2] A fourth declaration, filed by William Kammer, Chief of the Department of Defense's Freedom of Information Division, attested that the Pentagon possessed no responsive records. Judicial Watch no longer contests this point.

death, and that its new leader had questioned whether bin Laden had in fact received a proper burial at sea. *Id.* ¶ 25. Bennett also noted that a subset of the records, including those used to conduct facial recognition analysis, could enable foreign intelligence services to infer certain CIA intelligence techniques. *Id.* ¶ 29.

Lieutenant General Robert Neller, the Director of Operations, J-3, on the Joint Staff at the Pentagon, affirmed that he, too, had personally reviewed the images. *See* Neller Decl. ¶ 2. Like Bennett, Neller believed that their release would "pose a clear and grave risk of inciting violence and riots against U.S. and Coalition forces," and "expose innocent Afghan and American civilians to harm." *Id.* ¶ 6. Neller cited the fatal riots that had followed both the publication of a Danish cartoon of the Prophet Muhammad and an erroneous report that American soldiers had desecrated the Koran. *Id.* ¶¶ 7-8. Neller believed that a similar violent reaction could be expected to follow the release of the bin Laden images. *Id.* ¶ 9.

Admiral William McRaven, Commander of the United States Special Operations Command, submitted a third, partially classified declaration.[3] In the non-classified portions of the declaration, McRaven attested, again on the basis of first-hand review, that disclosure of some of the images would enable identification of the special operations unit that participated in the Abbottabad operation,

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[3] The CIA filed an unredacted version of the McRaven declaration *ex parte*. We do not rely on the classified portions of the declaration in this opinion.

thereby exposing its members and their families to great risk of harm. McRaven Decl. ¶ 5. He explained that other images would reveal classified methods and tactics used in U.S. special operations. *Id.* ¶ 6. As a result, he believed release "could reasonably be expected to cause harm to the national security." *Id.* ¶ 8.

In its cross-motion for summary judgment, Judicial Watch argued that the CIA's declarations failed to demonstrate either substantive or procedural compliance with the criteria for classification. With respect to the latter, Judicial Watch argued that the declarations failed to identify the "original classification authority" who had classified the records, or to attest that the records had been properly marked. The CIA responded by filing a fourth declaration, written by Elizabeth Culver, the Information Review Officer for the CIA's National Clandestine Service. Culver explained that the images had initially been "derivatively classified" by a CIA official in accordance with the criteria set out in a classification guide written by the CIA's Director of Information Management. Culver Decl. ¶ 8. At the time Director Bennett had filed his declaration, the records each contained the marking "Top Secret." *Id.* ¶ 7. Since then, "out of an abundance of caution," other markings had been added to the records, including the identity of the derivative classifier, citations to the classification guide and the reasons for classification, and the applicable declassification instructions. *Id.* Culver said she had confirmed, after personally reviewing the records, that each now contained all the required classification markings. *Id.*

On the basis of these declarations, the district court concluded that the CIA had sustained its burden of showing that the images of bin Laden satisfied the substantive and procedural criteria for classification. *See Judicial Watch, Inc. v. U.S. Dep't of Def.*, 857 F. Supp. 2d 44, 52 (D.D.C. 2012). The CIA's declarations, the court said, gave a "plausible" and "logical" account of the harm to national security that might result from the release of these images. *Id.* at 63. While the record left uncertain whether the images had been classified according to proper procedures at the time Judicial Watch made its FOIA request, the court said the declarations submitted by Bennett and Culver demonstrated that the agency had since remedied whatever procedural defects might have existed. *Id.* at 57-58. Accordingly, the court held that the CIA had properly withheld these records under FOIA Exemption 1.[4] *Id.* at 63-64. Judicial Watch appealed.

II

FOIA requires agencies to disclose records on request unless one of nine exemptions applies. *See Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1262 (2011). Exemption 1, which the CIA invokes in this case, permits agencies to withhold records that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest

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[4] The district court did not address the agency's alternative argument that some of the images could be withheld under FOIA Exemption 3. *See Judicial Watch*, 857 F. Supp. 2d at 55; 5 U.S.C. § 552(b)(3). We also do not reach that question.

of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Agencies may establish the applicability of Exemption 1 by affidavit (or declaration). *See ACLU v. U.S. Dep't of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011). We accord such an affidavit "substantial weight": so long as it "describes the justifications for withholding the information with specific detail, demonstrates that the information withheld logically falls within the claimed exemption, and is not contradicted by contrary evidence in the record or by evidence of the agency's bad faith, . . . summary judgment is warranted on the basis of the affidavit alone." *Id.* (internal quotation marks omitted); *see Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009); *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007); *Miller v. Casey*, 730 F.2d 773, 776 (D.C. Cir. 1984). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *ACLU*, 628 F.3d at 619 (quoting *Larson*, 565 F.3d at 862 (quoting *Wolf*, 473 F.3d at 374–75)).

Executive Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009), the operative classification order under Exemption 1, sets forth both substantive and procedural criteria for classification. *See, e.g.*, *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 481 (D.C. Cir. 1980) (explaining that the Executive Order's substantive and procedural criteria must be satisfied for an agency to properly invoke Exemption 1); H.R. REP. NO. 93-1380, at 228-29 (1974) (same). The Order's substantive criteria, as relevant here, are twofold. First, classified information must pertain to

at least one of eight subject-matter classification categories. *See* Exec. Order No. 13,526, §§ 1.1(a)(3), 1.4. Second, disclosure of that information must reasonably be expected to cause some degree of harm to national security -- in the case of Top Secret information, "exceptionally grave" harm -- that is identifiable or describable. *See id.* §§ 1.1(a)(4), 1.2(a)(1), 1.4. The Order also establishes two pertinent procedural requirements. Information may be classified only by an individual with original or derivative classification authority. *See id.* §§ 1.1(a)(1), 2.1. And classified documents must be marked with several pieces of information, including the identity of the classifier and instructions for declassification. *See id.* §§ 1.6, 2.1(b).

Judicial Watch raises both substantive and procedural challenges to the CIA's classification decision. We consider each in turn.

A

Turning first to the substantive question, it is indisputable that the images at issue fall within the Executive Order's subject-matter limits. At least some of the images "pertain[] to . . . intelligence activities (including covert action), [or] intelligence sources or methods," Exec. Order No. 13,526, § 1.4(c), and all 52 images plainly "pertain[] to . . . foreign activities of the United States," *id.* § 1.4(d). As the district court observed, "pertains" is "not a very demanding verb." *Judicial Watch*, 857 F. Supp. 2d at 60. And every image at issue documents events

involving American military personnel thousands of miles outside of American territory.

There is also no doubt that the declarations of Director Bennett and Admiral McRaven establish the requisite level of harm -- the second substantive limit on classification -- for a great many of the images. The photographs used to conduct facial recognition analysis could reasonably be expected to reveal classified intelligence methods. *See* Bennett Decl. ¶ 29; Judicial Watch Br. 12-13 (conceding the point). The images displaying members of the special operations unit that conducted the raid could reasonably be expected to endanger those personnel. *See* McRaven Decl. ¶¶ 3, 5. These are valid grounds for classification under our precedents. *See, e.g.*, *Miller*, 730 F.2d at 775-77; *Halperin v. CIA*, 629 F.2d 144, 148-50 (D.C. Cir. 1980). Furthermore, Judicial Watch does not appear to seriously question the CIA's contention that the most "graphic" and "gruesome" of the remaining images -- those displaying the bullet wound to bin Laden's head -- merit classification because of the danger that their release would lead to violence against American interests. *See* Judicial Watch Reply Br. 2, 8-9. In any event, the rationale for withholding less graphic and gruesome images of bin Laden (discussed below) would apply *a fortiori* to these images.

Judicial Watch correctly focuses instead on the most seemingly innocuous of the images: those that depict "the preparation of [bin Laden's] body for burial" and "the burial itself," Bennett Decl. ¶ 11. *See* Judicial Watch Reply Br. 1. Judicial Watch contends

it is unlikely that the disclosure of those images would cause any damage, let alone exceptionally grave damage, to U.S. national security. It argues that al Qaeda and its affiliates "do not need a specific reason to incite violence," and that any claim that individuals would engage in violence upon seeing such images is mere speculation. Judicial Watch Br. 23-24.

As the district court rightly concluded, however, the CIA's declarations give reason to believe that releasing images of American military personnel burying the founder and leader of al Qaeda could cause exceptionally grave harm. *See Judicial Watch*, 857 F. Supp. 2d at 62. General Neller's declaration describes prior instances in which reasonably analogous disclosures have led to widespread and fatal violence in the Middle East, some of it directed at U.S. interests. The publication of a Danish cartoon of the Prophet Muhammad led to hundreds of injuries and deaths, as well as to an attack on a U.S. airbase in Afghanistan. *See* Neller Decl. ¶ 8. Likewise, an erroneous article in *Newsweek*, alleging that American soldiers had desecrated the Koran, led to eleven deaths and many injuries during protests against the United States in Afghanistan and Egypt. *Id.* ¶ 7. Director Bennett's declaration gives plausible reason to believe that a comparable reaction would follow the release of post-mortem images of bin Laden, "including images of his burial." Bennett Decl. ¶ 27. Bennett explains that al Qaeda has already devoted attention to the "so-called 'martyrdom'" of bin Laden and has specifically "attacked the United States' assertions that [he] received an appropriate Islamic burial at sea." *Id.* ¶ 25. Bennett also notes

that releasing the images of the burial at sea "could be interpreted as a deliberate attempt by the United States to humiliate" bin Laden. *Id.* ¶ 27. Together, these declarations support their declarants' determinations that releasing any of the images, including the burial images, could reasonably be expected to trigger violence and attacks "against United States interests, personnel, and citizens worldwide." Neller Decl. ¶ 9; *see id.* ¶ 6; Bennett Decl. ¶¶ 25, 27.[5]

Judicial Watch protests that the government's declarations show nothing more than that release of the images may cause "some individuals who do not like the United States" to commit violence overseas, and that the courts should not succumb to this kind of blackmail. Judicial Watch Br. 21-22. First, it is important to remember that this case does not involve a First Amendment challenge to an effort by the government to suppress images in the hands of private parties, a challenge that would come out quite differently. *Cf. Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992) ("Speech cannot be . . . banned, simply because it might offend a hostile mob."). Rather, it is a statutory challenge, in

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[5] For the same reasons, these declarations support the agency's determination that releasing the images of bin Laden would cause harm notwithstanding its prior "written descriptions of the event," Judicial Watch Reply Br. 10. *See ACLU*, 628 F.3d at 625 ("[W]e have repeatedly rejected the argument that the government's decision to disclose some information prevents the government from withholding other information about the same subject."); *Wolf*, 473 F.3d at 378 (permitting withholding notwithstanding "the fact that information exists in some form in the public domain").

which the sole question is whether the CIA has properly invoked FOIA Exemption 1 to authorize withholding images in its own possession. *Cf. Afshar v. Dep't of State*, 702 F.2d 1125, 1131 (D.C. Cir. 1983) (permitting the withholding of documents under FOIA where release "may force a [foreign] government to retaliate"). Second, this is not a case in which the declarants are making predictions about the consequences of releasing just any images. Rather, they are predicting the consequences of releasing an extraordinary set of images, ones that depict American military personnel burying the founder and leader of al Qaeda. Third, the declarants support those predictions not with generalized claims, but with specific, reasonably analogous examples. Finally, it is undisputed that the government is withholding the images not to shield wrongdoing or avoid embarrassment, *see* Exec. Order No. 13,526, § 1.7(a), but rather to prevent the killing of Americans and violence against American interests. Indeed, because the CIA's predictions of the violence that could accompany disclosure of the images provide an adequate basis for classification, we do not rely upon or reach the agency's alternative argument that the images may be classified on the ground that their disclosure would facilitate anti-American propaganda. *See ACLU*, 628 F.3d at 624 (declining to decide whether classification on that ground is proper).

As we have said before, "any affidavit or other agency statement of threatened harm to national security will always be speculative to some extent." *Id.* at 619 (citation omitted). Our role is to ensure that

those predictions are "'logical' or 'plausible.'" *Id.* (quoting *Larson*, 565 F.3d at 862). We agree with the district court that the CIA's declarations in this case cross that threshold. *See Judicial Watch*, 857 F. Supp. 2d at 62.

B

An agency may withhold records under Exemption 1 only if they are "classified in accordance with the procedural criteria of the governing Executive Order as well as its substantive terms." *See Lesar*, 636 F.2d at 483. On appeal, Judicial Watch argues that the CIA failed to follow proper procedures in two respects.

First, Judicial Watch argues that the images at issue were not classified until after the CIA received its FOIA request, thereby triggering special procedural requirements that Judicial Watch alleges were not followed. *See* Exec. Order No. 13,526, § 1.7(d) (providing that previously undisclosed information may be classified after an agency has received a FOIA request "only if such classification . . . is accomplished on a document-by-document basis with the personal participation or under the direction of the agency head, deputy agency head, or the senior agency official designated under [a section of] this order"). But Judicial Watch's factual premise is mistaken, as the CIA has averred that the images were in fact classified before it received the appellant's FOIA request, *see* Culver Decl. ¶ 7 n.1; CIA Br. 52; Oral Arg. Recording at 28:50-29:20, and there is no evidence to the contrary.

Second, Judicial Watch argues that the images do not contain all of the proper classification markings because they fail to name the person with "original classification authority" who first classified them. *See* Exec. Order No. 13,526, § 1.6(a)(2). The Culver declaration, which the agency clarified at oral argument, explains the CIA's position: the records were not initially classified by someone with original classification authority, but rather by an individual who "derivatively" classified the records by "apply[ing] classification markings . . . as directed by a classification guide." Culver Decl. ¶ 8; Exec. Order No. 13,526, § 2.1(a); *see* Oral Arg. Recording at 21:30-23:10. Accordingly, the CIA says, the only original classification authority identified on the records was the classification guide itself. *See* Culver Decl. ¶¶ 7-8; Oral Arg. Recording at 23:05-08.

Although this explanation may account for why the CIA did not mark the documents with the name of a person possessing original classification authority, it raises a separate problem. Even if the CIA is right that documents can be derivatively classified and marked in this way -- and we express no view on the matter -- we cannot determine whether derivative classification of the images was proper without some description of the classification guide on which the derivative classifier purportedly relied. Yet in this case, the CIA has provided no description of the guide's provisions, not even a general description, that would permit us to determine whether the derivative classification was properly based on the guide. *Cf. Wilson v. McConnell*, 501 F. Supp. 2d 545,

553 (S.D.N.Y. 2007) (concluding that the derivative classification of a document was proper by examining specific provisions of a CIA classification guide that the agency had provided to the court). Hence, we cannot determine whether the derivative classifier misapplied the guide, or whether the guide's instructions were so vague as to operate as no constraint at all.

In some cases, an agency's silence on such a matter would merit a remand requiring an agency official to review the documents and file an additional affidavit, or, in rare cases, requiring the district court to review the documents *in camera*. *Cf. Allen v. CIA*, 636 F.2d 1287, 1292 (D.C. Cir. 1980); *Lesar*, 636 F.2d at 485; *Halperin v. Dep't of State*, 565 F.2d 699, 707 (D.C. Cir. 1977). In this case, however, we already have a declaration from Director Bennett, who has original classification authority, *see* Bennett Decl. ¶ 18, averring that he reviewed the images and determined that they were correctly classified Top Secret, *id.* ¶ 27. Accordingly, because the "affidavits clearly indicate that the documents fit within the substantive standards of [the] Executive Order," and because the Bennett declaration removes any doubt that a person with original classification authority has approved the classification decision, any failure relating to application of the classification guide would not "reflect adversely on the agency's overall classification decision." *Lesar*, 636 F.2d at 484, 485. Therefore, no further steps are required for us to determine that withholding the images was warranted. *See id.*

III

For the foregoing reasons, the judgment of the district court is

Affirmed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
Plaintiff,	)	
v.	)	No. 11-890 (JEB)
U.S. DEPARTMENT OF DEFENSE, *et al*.,	)	
Defendants.	)	

MEMORANDUM OPINION

A picture may be worth a thousand words. And perhaps moving pictures bear an even higher value. Yet, in this case, verbal descriptions of the death and burial of Osama Bin Laden will have to suffice, for this Court will not order the release of anything more.

On the evening of May 1, 2011, President Barack Obama announced to the world that the United States had conducted an operation that resulted in the death of Bin Laden, the leader of the terrorist organization al Qaeda. The very next day, Plaintiff Judicial Watch submitted a Freedom of Information Act request to Defendant Department of Defense seeking any photographs and video recordings of Bin Laden taking during or after that

operation. Judicial Watch sent a similar request to Defendant Central Intelligence Agency a few days later. After both DOD and the CIA advised that they would be unable to process the requests within the time permitted under the statute, Plaintiff filed suit.

Both agencies have since issued final responses to Plaintiff's requests. After searching the components that it determined were most likely to possess the sought-after records, DOD turned up nothing responsive to Judicial Watch's request. The CIA, however, located fifty-two responsive records, all of which it withheld. Specifically, the agency claimed that the photographs and/or video recordings of Bin Laden's death and burial were exempt from disclosure under FOIA Exemptions 1 and 3, the exemptions for classified materials and for information specifically exempted by other statutes.

Both sides now seek summary judgment. Plaintiff claims that DOD did not conduct an adequate search. In addition, it challenges the level of generality at which the CIA described the fifty-two responsive records and contends that the agency has not demonstrated that each record may be properly withheld under either claimed exemption. For their part, Defendants maintain that DOD's search was sufficient and that the CIA has provided adequate support for its withholdings.

Defendants' arguments carry the day. The affidavits they have provided are sufficient to establish that DOD conducted an adequate search for responsive records and that the records identified by

the CIA were classified materials properly withheld under Exemption 1. The Court declines Plaintiff's invitation to substitute its own judgment about the national-security risks inherent in releasing these records for that of the executive-branch officials who determined that they should be classified. The Court, accordingly, will grant Defendants' Motion and deny Plaintiff's.

I. Background

On May 1, 2011 (May 2, 2011, in Pakistan's time zone), American forces captured and killed Osama Bin Laden at his compound in Abbottabad, Pakistan. See Transcript of President Obama's May 1, 2011, Remarks, available at http://www.whitehouse.gov/the-press-office/2011/05/02/remarks-president-osama-bin-laden. Executive officials have confirmed that the team then took custody of Bin Laden's body and transported it to the aircraft carrier *USS Carl Vinson* in the North Arabian Sea. See, e.g., Pl.'s Mot. & Opp., Declaration of Michael Bekesha, Exh. D (Press Briefing by Press Secretary Jay Carney, May 3, 2011) at 2. There, "[t]he deceased's body was washed and then placed in a white sheet." Bekesha Decl., Exh. B (DOD Background Briefing with Senior Defense Officials from the Pentagon and Senior Intelligence Officials by Telephone on U.S. Operations Involving Osama Bin Laden, May 2, 2011) at 1. Religious remarks were read, and the prepared body was placed in weighted bag and onto a flat board. See id. As the board was tipped up, Bin Laden's body slipped into the sea. See id.

Shortly after the President's announcement, the media began to report that the government had taken photographs of Bin Laden's body in the aftermath of the raid. See, e.g., Bekesha Decl., Exh. A (Stacia Deshishku, "Even More Details on the OBL Photos," CNN, May 3, 2011). This was confirmed by White House officials, see, e.g., Bekesha Decl., Exh. C (Press Briefing by Jay Carney and Assistant to the President for Homeland Security and Counterterrorism John Brennan, May 2, 1011) at 4-5, who suggested that, as of May 3, no decision had yet been made concerning whether the photographs would be released. See id.; Press Briefing by Jay Carney, May 3, 2011, at 2-3. In particular, Press Secretary Carney expressed concern about "the sensitivities involved" in releasing the images and the potential that doing so "could be inflammatory." Press Briefing by Jay Carney, May 3, 2011, at 3. CIA Director Leon Panetta, however, was more confident "that ultimately a photograph would be presented to the public." Bekesha Decl., Exh. E ("Leon Panetta Talks About Whether or not a Photo of Osama Bin Laden Will Be Released to the Public," *NBC Nightly News*, May 3, 2011) at 1. On May 4, Carney announced that "the President ha[d] made the decision not to release any of the photographs of the deceased Osama bin Laden." Bekesha Decl., Exh. F (Press Briefing by Jay Carney, May 4, 2011) at 1. The President himself later explained this decision, emphasizing the "national security risk" involved and stating that the photos might serve "[a]s a propaganda tool" or "an incitement to additional violence." Interview with President Obama, *60*

Minutes, May 8, 2011, transcript available at http://www.cbsnews.com/8301-504803_162-20060530-10391709.html.

By letter dated May 2, 2011, Judicial Watch, "a non-profit, educational foundation," Am. Compl., ¶ 3, submitted a FOIA request to DOD for "all photographs and/or video recordings of Osama (Usama) Bin Laden taken during and/or after the U.S. military operation in Pakistan on or about May 1, 2011." See Def.'s Mot., Declaration of William Kammer, Exh. 1 (Letter from Michael Bekesha, May 2, 2011). DOD's Office of Freedom of Information (OFOI) received it the following day. See Kammer Decl., ¶ 3. By letter dated May 9, 2011, OFOI acknowledged receipt of the request, but advised that it would be "unable to make a release determination . . . within the 20-day statutory time period" and that the 10-day extensions provided for by FOIA would also not provide sufficient time for the agency to complete processing. See Kammer Decl., Exh. 2 (Letter from Paul Jacobsmeyer, May 9, 2011).

On May 4, Judicial Watch submitted a substantively identical FOIA request to the CIA. See Def.'s Mot., Declaration of John Bennett, Exh. A (Letter from Michael Bekesha, May 4, 2011). The CIA received it the following day, May 5. See Bennett Decl., ¶ 5. By letter dated May 23, the CIA acknowledged receipt of the request and advised Judicial Watch that, in light of "[t]he large number of FOIA requests the CIA receives," it would be "unlikely that [the agency could] respond within the

20 working days the FOIA requires." Bennett Decl., Exh. B (Letter from Susan Viscuso, May 23, 2011).

Seeking to compel the agency to process its request and release all non-exempt responsive records within the timeframe mandated by the statute, Judicial Watch filed suit against DOD on May 13, 2011. A few weeks later, it filed an Amended Complaint that added the CIA as a Defendant. Both agencies have in the meantime finished processing Plaintiff's requests.

In attempting to locate responsive records, DOD's OFOI first determined that the DOD components most likely to have the records Plaintiff was seeking were the Office of the Joint Chiefs of Staff (OCJCS), the U.S. Special Operations Command (USSOCOM), and the Department of the Navy. See Kammer Decl., ¶ 4. Officers then proceeded to search those files and electronic record-storage systems within these three components in which they believed responsive records might plausibly be found. See id., ¶¶ 5-8. DOD ultimately located no records responsive to Judicial Watch's request. See id.

The CIA's search was more fruitful. The agency conducted a search of those "components most likely to have records related to the 1 May 2011 operation" – a determination made easier by "the nature of the operation and the close proximity in time between the operation and Plaintiff['s] FOIA request." See Bennett Decl., ¶ 10. Fifty-two unique responsive records were located. See id., ¶ 11. The records are

described by John Bennett, Director of the CIA's National Clandestine Service (NCS), as follows:

> These records are photographs and/or video recordings taken of [Bin Laden] on or about 1 May 2011, the day that the United States conducted an operation that resulted in his death. These records contain post-mortem images of [Bin Laden]'s body. As a result, many of them are quite graphic, as they depict the fatal bullet wound to [Bin Laden]'s head and other similarly gruesome images of his corpse. Many of the images were taken inside of [Bin Laden]'s compound in Abbottabad, Pakistan, in which he was killed, while others were taken as his corpse was being transported from the Abbottabad compound to the location where he was ultimately buried at sea. Several other images depict the preparation of his body for burial as well as the burial itself. Some of the responsive photographs were taken so that the CIA could conduct a facial recognition analysis in order to confirm that the body of the deceased individual was that of [Bin Laden].

Id.

But all of these photographs and/or videos, the CIA claims, are beyond FOIA's reach. See id., ¶¶ 12-36. Specifically, Bennett averred both that the records in question are classified materials exempt from

disclosure under FOIA Exemption 1 and that they are exempted from disclosure by other statutes and, accordingly, fall within the ambit of Exemption 3. See id., ¶¶13-35. With respect to Exemption 1, Bennett stated not merely that the responsive records are in fact classified, but also that they were properly classified – *i.e.*, that they met the procedural and substantive criteria for classification set forth under Executive Order (EO) 13526. See id., ¶¶ 13-22. His statement concerning EO 13526's procedural criteria is buttressed by the declaration of Elizabeth Culver, the Information Review Officer for the NCS. See generally Def.'s Opp. & Reply, Decl. of Elizabeth Culver. With regard to the Order's substantive requirements, Bennett's averments are supplemented by the declarations of Robert Neller, the Director of Operations, J-3, on the Joint Staff at the Pentagon, and William McRaven, Commander of the USSOCOM. See generally Def.'s Mot., Decl. of Robert Neller; Def's Mot., Decl. of William McRaven.

Both parties now seek summary judgment.

II. Legal Standard

Summary judgment may be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986); *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by citing to particular parts of materials in

the record." Fed. R. Civ. P. 56(c)(1)(A). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "[A] material fact is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party" on an element of the claim. *Liberty Lobby, Inc.*, 477 U.S. at 248. Factual assertions in the moving party's affidavits or declarations may be accepted as true unless the opposing party submits his own affidavits, declarations, or documentary evidence to the contrary. *Neal v. Kelly*, 963 F.2d 453, 456 (D.C. Cir. 1992).

FOIA cases typically and appropriately are decided on motions for summary judgment. *Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009); *Bigwood v. United States Agency for Int'l Dev.*, 484 F. Supp. 2d 68, 73 (D.D.C. 2007). In a FOIA case, the Court may grant summary judgment based solely on information provided in an agency's affidavits or declarations when they describe "the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). Such affidavits or declarations are accorded "a presumption of good faith, which cannot be rebutted by 'purely speculative claims about the existence and discoverability of other documents.'" *SafeCard Servs., Inc. v. SEC*, 926 F.2d

1197, 1200 (D.C. Cir. 1991) (*quoting Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981)).

III. Analysis

Congress enacted FOIA in order to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose,* 425 U.S. 352, 361 (1976) (*quoting Rose v. Dep't of Air Force,* 495 F.2d 261, 263 (2d Cir. 1974)) (internal quotation marks omitted). The statute provides that "each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules . . . , shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A). Consistent with this statutory mandate, federal courts have jurisdiction to order the production of records that an agency improperly withholds. See 5 U.S.C. § 552(a)(4)(B); *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989). "Unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary and capricious, the FOIA expressly places the burden 'on the agency to sustain its action' and directs the district courts to 'determine the matter de novo.'" *Reporters Comm.,* 489 U.S. at 755 (quoting 5 U.S.C. § 552(a)(4)(B)). "At all times, courts must bear in mind that FOIA mandates a 'strong presumption in favor of disclosure' . . . ." *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002) (*quoting U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991)).

In this case, Judicial Watch levels a different challenge against each Defendant agency. With respect to DOD, which found no records responsive to its request, Plaintiff contends that that the agency's search was too narrow. With respect to the CIA, which located fifty-two responsive records, Plaintiff alleges that the agency has neither described those records in sufficient detail nor demonstrated that they are exempt from disclosure. The Court will first address the deficiencies ascribed to DOD, finding that the agency's search complied with the obligations imposed by FOIA. It will then turn to the more difficult of Plaintiff's claims and the crux of the dispute: whether the CIA has produced sufficient evidence to support its withholdings. At the end of the day, because the agency's declarations establish that the records in question were properly classified, that they pertain to the foreign activities of the United States, and that their release could reasonably be expected to damage the national security, the Court concludes that the photographs and/or video recordings of Osama Bin Laden's body are exempt from disclosure under FOIA Exemption 1.

A. DOD's Search

To gain summary judgment on Plaintiff's challenge to the adequacy of its search, DOD must demonstrate "beyond material doubt [ ] that it has conducted a search reasonably calculated to uncover all relevant documents." *Morely v. CIA*, 508 F.3d 1109, 1114 (D.C. Cir. 2007) (*quoting Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)) (internal quotation mark omitted) (alteration in original); *see also Nation Magazine v. U.S. Customs Service*, 71

F.3d 885, 890 (D.C. Cir. 1995). The agency "must make 'a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested,' . . . and it 'cannot limit its search to only one record system if there are others that are likely to turn up the information requested.'" *Nation Magazine*, 71 F.3d at 890 (*quoting Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). "A reasonably calculated search," however, "does not require an agency to search every file where a document could possibly exist." *Hidalgo v. FBI*, No. 10-5219, 2010 WL 5110399, at *1 (D.C. Cir. Dec. 15, 2010) (*citing SafeCard Servs.,* 926 F.2d at 1201). Instead, it merely "requires that the search be reasonable in light of the totality of the circumstances." Id. "[A]ffidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice to demonstrate compliance with the obligations imposed by FOIA." *Negley v. FBI*, 169 Fed. Appx. 591, 594 (D.C. Cir. 2006) (*quoting Meeropol v. Meese*, 790 F.2d 942, 952 (D.C. Cir. 1986)) (internal quotation marks omitted) (alteration in original).

William Kammer, Chief of DOD's Freedom of Information Division, stated that DOD searched for records responsive to Judicial Watch's request in the three locations determined to be the most likely to possess responsive records: the OCJCS, USSOCOM, and the Department of the Navy. See Kammer Decl., ¶¶ 1, 4. Within the OCJCS, a single officer maintained all documents related to the May 1, 2011, operation. See id., ¶ 5. That officer searched all hard-

copy records and the only computer used to store electronic records. See id. In addition, "the email files of the Chairman of the Joint Chiefs of Staff, Admiral Mike Mullen, were searched," along with "the active inbox on the Exchange server and all supporting personal storage table files within Admiral Mullen's profile on the Secure Internet Protocol Router network." Id. For its part, USSOCOM searched its headquarters and relevant components, combing "all hard copy and electronic records including all email records during the inclusive dates of May 1, 2011, through May 31, 2011." Id., ¶ 7. Finally, because Bin Laden's body was buried at sea from the Navy aircraft carrier *USS Carl Vinson*, OFOI coordinated with the Commander of the U.S. Pacific Fleet to have the ship's system searched. See id., ¶ 8. The Commander advised that no *USS Carl Vinson* personnel took any photographs or videos of the burial and that a search of the ship's computer system for email discussions of any such photographs or video recordings had turned up nothing relevant. See id.

Judicial Watch nonetheless challenges the adequacy of DOD's search in three respects. First, it contends that "DOD did not search at least one critical location – the Office of the Secretary," Pl.'s Mot. & Opp. at 16, and that this omission rendered DOD's search unreasonably narrow. Because "it has been widely reported that Secretary Gates advised President Obama about whether to release post mortem photographs of Bin Laden," Judicial Watch argues that "it is nearly inconceivable that DOD did not have possession of the photographs" and suggests that they likely reside in the Office of the Secretary.

Id. But even if Secretary Gates gave such advice, it does not necessarily follow that he ever saw the photos. And even if he did seem them, that does not mean that he actually possessed them and also retained them in his office. Plaintiff's speculation that Secretary Gates must have kept copies of these classified records is just that: speculation. Because "[a]gency affidavits are accorded a presumption of good faith which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents," *Negley*, 169 Fed. Appx. at 594 (*quoting SafeCard Servs.*, 926 F.2d at 1200) (internal quotation marks omitted) (alteration in original), such bald conjectures do not undermine the agency's position.

Second, Plaintiff maintains that Kammer's declaration does not demonstrate that Defendants searched the Joint Worldwide Intelligence Communications System (JWICS), a system of interconnected computer networks used by, *inter alia*, DOD and the U.S. Department of State to transmit classified information. See Pl.'s Mot. & Opp. at 17. "Because it has also been reported that Secretary of State Hillary Clinton provided advice to President Obama about whether to release post mortem photographs of Bin Laden," Plaintiff reasons, "it is more than plausible that responsive records were transmitted to/from DOD or the U.S. Department of State via JWICS." Id. Again, Judicial Watch would have the Court infer from the media's reports that Secretary Clinton advised President Obama concerning the photographs' release that she in fact possessed copies of those photographs – or, more

specifically, that she viewed them through JWICS. As with Secretary Gates, however, this inference is entirely unsupported by evidence.

Third, Judicial Watch complains that Kammer did not specifically state that the agency searched for photographs or videos taken during the "period after the SEALs left Pakistan with Bin Laden's body." Pl.'s Mot. & Opp. at 17. If, as the media have reported, see, e.g. Deshishku, "Even More Details on the OBL Photos" at 1, such records were made, Plaintiff argues, "it is highly likely that such records would be in the possession of DOD." Pl.'s Opp & Mot. at 17. Kammer's declaration that the search of the *USS Carl Vinson* for mention of "photographs or videos of the burial" turned up no "responsive video recordings or photographs," Kammer Decl., ¶ 8, however, plainly covers photographs and videos taken after the mission in Pakistan. More broadly, Kammer repeatedly explains that the searches of the various components revealed no "responsive" records. See id., ¶¶ 5, 7, 8. Because Judicial Watch requested all photographs and videos "taken during and/or after" the operation in Pakistan, see Letter from Michael Bekesha, May 2, 2011, at 1, Kammer's statements that no responsive records were located clearly includes those records "created subsequent to the completion of the intelligence mission within Pakistan." Pl.'s Mot. & Opp. at 17. Judicial Watch cannot seriously argue otherwise.

It should be emphasized that this was not a request for some broadly defined class of documents the existence and whereabouts of which the agency

was likely unaware and that might be maintained in any number of records systems. On the contrary, Judicial Watch's request related to a discrete set of extraordinarily high-profile records concerning "the most highly classified operation that this government has undertaken in many, many years." Press Briefing by Jay Carney, May 3, 2011, at 2. If DOD has possession of these records, the relevant individuals are well aware of that fact.

Judicial Watch's challenge to the adequacy of DOD's search, accordingly, seems to reduce to a suggestion that the agency acted in bad faith (although Judicial Watch makes no explicit accusation to that effect). Plaintiff, however, has neither rebutted the presumption of good faith afforded the agency's declarations nor proffered "countervailing evidence" that raises "a substantial doubt" as to the adequacy of the agency's search. *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 314 (D.C. Cir. 2003). On the basis of Kammer's declaration, which provides a "relatively detailed and nonconclusory" explanation of DOD's search, *SafeCard Servs.,* 926 F.2d at 1200 (*quoting Ground Saucer Watch*, 692 F.2d at 771)) (internal quotation mark omitted), therefore, the Court will grant Defendants' Motion and deny Plaintiff's on the adequacy-of-search issue.

B. The CIA's Withholdings

Although DOD did not possess the records Judicial Watch sought, the CIA found exactly what Plaintiff was looking for: fifty-two "photographs

and/or video recordings taken of [Bin Laden] on or about 1 May 2011." Bennett Decl., ¶ 11. Frustratingly for Plaintiff, however, the CIA claims that each and every one of them is exempt from disclosure under FOIA. It is to the sufficiency of the agency's support for its withholdings that the Court now directs its focus.

Congress exempted nine categories of documents from FOIA's broad sweep. "[T]he statutory exemptions, which are exclusive, are to be 'narrowly construed.'" *Norton*, 309 F.3d at 32 (quoting Rose, 425 U.S. at 361). The CIA here relies on the application of both Exemption 1 and Exemption 3. Exemption 1 applies to materials that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and . . . are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Exemption 3 covers information that is "specifically exempted from disclosure by statute," if that statute meets certain statutorily enumerated criteria. Id. § 552(b)(3).

An agency may invoke Exemption 1 in withholding records "only if it complies with classification procedures established by the relevant executive order and withholds only such material as conforms to the order's substantive criteria for classification." *King v. DOJ*, 830 F.2d 210, 214 (D.C. Cir. 1987); *see also Lesar v. DOJ*, 636 F.2d 472, 483 (D.C. Cir. 1980) ("To be classified properly, a document must be classified in accordance with the procedural criteria of the governing Executive Order

as well as its substantive terms."). Judicial Watch questions the CIA's compliance with EO 13526 on both procedural and substantive grounds. As the Court finds that the CIA's declarations, which are afforded "substantial weight," *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980), establish that the agency has properly withheld the photographs and/or video recordings of Bin Laden's body pursuant to Exemption 1, it will grant Defendants summary judgment without reaching the question of Exemption 3's applicability.

1. *EO 13526's Procedural Requirements*

EO 13526, which "prescribes a uniform system for classifying, safeguarding, and declassifying national security information," sets out the procedures by which information may be classified. The Order's procedural requirements govern a wide set of issues that range from the authority of the original classifier to the proper identification and marking of classified material. The CIA maintains that the declarations of John Bennett, Director of the NCS, and Elizabeth Culver, Information Review Officer for the NCS, establish that the fifty-two records were classified consistent with EO 13526's procedural requirements. Both of these individuals have declared that they possess original TOP SECRET classification authority, see Bennett Decl., ¶¶ 2, 18; Culver Decl., ¶ 3, that they personally reviewed each of the records at issue, see Bennett Decl., ¶ 4; Culver Decl., ¶ 7, and that EO 13526's procedural requirements were satisfied. See Bennett Decl., ¶ 13; Culver Decl., ¶ 7.

Judicial Watch disagrees. In its Motion, it argued that Bennett's declaration – the only one that had then been submitted on the procedural issues – did not suffice to establish procedural compliance because it failed to identify who originally classified the records, when original classification occurred (in particular, whether the records were classified before or after Plaintiff's request was received), the date or event upon which the records will be declassified, and whether the records were properly identified and marked. See Pl.'s Mot. & Opp. at 23-27. The CIA subsequently submitted the Culver declaration along with its Opposition and Reply in an attempt to address these specific concerns. See Culver Decl., ¶ 6. Culver stated, in relevant part:

> I have confirmed that each of these records satisfies the procedural requirements of Executive Order 13526. At the time of Mr. Bennett's declaration, these records were marked "TOP SECRET" and were otherwise maintained in a manner that satisfied the procedural requirements of the Executive Order under the circumstances. Since then the CIA has, out of an abundance of caution, taken additional steps to ensure that each of these records contains all of the markings required by the Executive Order and its implementing directives, including information that reveals the identity of the person who applied derivative classification markings,

> citations to the relevant classification guidance and reasons for classification, and the applicable declassification instructions.
>
> As for Plaintiff's inquiry concerning the identity of the original classification authority (OCA), after the CIA received these records, they were derivatively classified in accordance with the guidance provided by the CIA's designated "senior agency official," as authorized by Part 2 of the Executive Order. The CIA official who provides this classification guidance – and is therefore the OCA for these records – is the CIA's Director of Information Management Services, who is the authorized OCA who has been designated to direct and administer the CIA's program under which information is classified, safeguarded, and declassified. When Mr. Bennett, who is himself is [*sic*] an OCA acting under the direction of the CIA Director, later reviewed each of these records for the purpose of this litigation, he reaffirmed that these prior classification determinations were correct and that the records continued to meet the criteria of the Order.

Id., ¶¶ 7-8 (footnote omitted).

Far from convinced, Judicial Watch suggests that Culver's declaration "only further confirms that Defendants have failed to satisfy their burden of proof." Pl.'s Reply at 3. It points out that "derivative classification" is defined by EO 13526 as "the incorporating, paraphrasing, restating, or generating in new form information that is already classified, and marking the newly developed material consistent with the classification markings that apply to the source information." EO 13526 § 6.1(o). "Original classification," on the other hand, is "an initial determination that information requires, in the interest of the national security, protection against unauthorized disclosure." Id. § 6(ff). Even if Culver's statements establish that the records were derivatively classified consistent with EO 13526's requirements, so the argument goes, neither her testimony nor Bennett's establishes that an original classification authority originally classified the information properly. In addition to failing to identify who originally classified the records, her statements do not identify when original classification occurred or whether the records, which she avers now contain the required markings, were properly marked to begin with. See Pl.'s Reply at 3-9.

As a preliminary matter, Judicial Watch is correct that the CIA's declarations are not a model of transparency. Although both Bennett and Culver assert that EO 13526's procedural requirements were satisfied, see Bennett Decl., ¶ 13; Culver Decl., ¶ 7, and Culver fleshes out her conclusion with additional details, see Culver Decl., ¶¶ 7-8, neither reveals, for example, the identity of the individual who originally

classified the records in question. The Court, nevertheless, will not order these records released on procedural grounds for two reasons. First, even if there had been some procedural defect in the original classification, it was cured by proper derivative classification and by Bennett and Culver's subsequent reviews. Second, even if no cure had taken place, any hypothetical defect would not require that the documents be released so long as it did not undermine the agency's assessment of the substantive criteria for classification.

a. Any Defect Cured

EO 13526 describes in detail the procedures by which a document may be classified, and FOIA requires an agency to demonstrate conformity with those procedures. See *King*, 830 F.2d at 214. Neither the EO nor the statute, however, specifies the level of detail with which an agency's declaration, which is entitled to a "presumption of good faith," *see SafeCard Servs.*, 926 F.2d at 1200, must recount its compliance. Especially given the lack of evidence of bad faith, it is thus possible that Bennett and Culver's more general statements that all of EO 13526's procedural requirements were satisfied, see Bennett Decl., ¶ 13; Culver Decl., ¶ 7, are sufficient. See, e.g., Schoenman v. FBI, 575 F. Supp. 2d 136, 151-52 (D.D.C. 2008) (testimony that record was "properly marked 'CONFIDENTIAL' because it contains classified national security information," while "could stand to be more specific as to the procedural requirements," found sufficient). But in light of *Allen v. CIA*, 636 F.2d 1287 (D.C. Cir. 1980), overruled on other grounds by

Founding Church of Scientology v. Smith, 721 F.2d 828, 830 (D.C. Cir. 1983), which deemed declarations that omitted details such as the identity of the original classifier insufficient to demonstrate procedural compliance, id. at 1292, that is not likely. Although Allen may be distinguishable – for instance, on the ground that the court found that the agency had also failed to demonstrate substantive compliance – the Court need not venture down that path.

That is because even if Plaintiff were correct in its speculation that there may have been procedural flaws in the original classification, such flaws were cured by proper derivative classification and subsequent classification reviews. *See, e.g., Washington Post v. DOD*, 766 F. Supp. 1, 7-9 (D.D.C. 1991) (subsequent review by individual with original classification authority cured actual procedural defects); *cf. Carlisle Tire and Rubber Co. v. U.S. Customs Serv.*, 663 F.2d 210, 215 (D.C. Cir. 1980) ("[P]roper subsequent classification under [a new EO] suffices to cure any procedural and substantive defects in classification which may have existed under [the old EO]."). Where, as Culver has averred, the individual who conducts the derivative classification himself has original classification authority, see Culver Decl., ¶ 8, and where two additional individuals with original classification authority (Bennett and Culver) review the classified records and attest to their compliance with the EO's procedural and substantive requirements, speculative defects in the original classification procedure are immaterial.

Culver, moreover, expressly confirms that the records bear "all of the markings required by the Executive Order." Id., ¶ 7. Notably, the EO requires that those markings include, among other things, the identity of the original classification authority, the agency of origin, and declassification instructions. See EO 13526 § 1.6. Culver's testimony that the records contain all of the required markings, accordingly, addresses most of the issues Plaintiff has raised, if not with the specificity it might prefer. In addition, even if Plaintiff is correct that Culver's statements imply that the records may not have initially carried all of the required markings, that they are currently so marked suffices. *See, e.g., Washington Post*, 766 F. Supp. at 7 (deemed adequate that agency, which "concede[d] that many documents were not properly marked," . . . "under[took] to correct [them]").

Finally, Plaintiff's claim that Defendants must disclose the date of the original classification is unfounded. EO 13526 does not require that the date of classification be indicated on the records themselves, and Plaintiff does not show it need be included in a supporting declaration. Plaintiff's explanation for why it needs this information, moreover, does not hold water. Plaintiff contends that Defendants must disclose the date of original classification so as to demonstrate that the additional procedural requirements that pertain to classifications that occur after FOIA requests are received – specifically, such classifications must be "accomplished on a document-by-document basis with the personal participation or under the direction of"

particular officials, see EO 13526 § 1.7(d) – did not apply. But Judicial Watch's speculation that the records were classified subsequent to the agency's receipt of its request is belied by Bennett's declaration and its own chronology. Bennett attests, and Judicial Watch does not appear to dispute, that the CIA received its FOIA request, which was dated May 4, 2011, see Letter from Michael Bekesha, May 4, 2011, at 1, on May 5. See Bennett Decl., ¶ 5. Even according to Plaintiff's own timeline, however, classification occurred before then. See Pl.'s Mot. & Opp. at 25. Indeed, the formal announcement that the records would not be released came on May 4. See Press Briefing by Jay Carney, May 4, 2011, at1. Judicial Watch's suggestion that the operative date is May 3, the day DOD received its request, see Kammer Decl., ¶ 3, rather than the day the CIA received its request, moreover, is flawed, since the request at issue was made to the CIA. In any event, even if Plaintiff were correct that the records were classified after its FOIA request was received, Bennett's review of "each" of the responsive records, Bennett Decl., ¶ 4, which was conducted under the direction of the CIA Director, see Culver Decl., ¶ 8, meets the requirements of EO 13526 § 1.7(d). See Washington Post, 766 F. Supp. at 8-9 (subsequent document-by-document review by appropriate official satisfied parallel requirement of prior EO).

b. Defect Would Not Require Release

Even assuming there had been some uncured defect in the original classification procedure – again, Judicial Watch has presented no evidence that this

was in fact the case – "actual procedural defects do not necessarily require the document to be disclosed." *Allen*, 636 F.2d at 1292 n.27 (*citing Lesar*, 636 F.2d at 478, 484). Indeed, such a rule "could have intolerable consequences for national security interests." *Lesar*, 636 F.2d at 484. "To release these materials because of a mere mishap in the time of classification, when the documents are sworn to contain sensitive information, would only be perverse." Id. While this does not mean that only conformity with the EO's substantive requirements is required, see id., the D.C. Circuit has emphasized that the consequences of procedural violations vary according to the significance of the violation. Id. at 485; *see also Allen*, 636 F.2d at 1292 n.27. Specifically, where a violation is "of such importance" that it "reflect[s] adversely on the agency's overall classification decision," *in camera* inspection may be necessary. *Lesar*, 636 F.2d at 485. Other violations, however, "may be insignificant, undermining not at all the agency's classification decision." Id. So long as procedural violations do not undermine the agency's decision to classify – as when, for example, a procedural violation suggests that, contrary to the EO, classification was undertaken in order to conceal a violation of law – the Court will not order documents to be released on that ground.

At the end of the day, given the derivative classification and two subsequent classification reviews, all by individuals with original classification authority, the averments that EO 13526's procedural requirements were satisfied, the seemingly undisputed procedural conformity of the derivative-classification process, and the lack of any evidence

tending to undermine the agency's classification decision, the Court finds that any possible procedural errors plainly do not warrant release. In light of the Court's subsequent conclusion that the records meet EO 13526's substantive criteria for classification, the Court will not order them released on the basis of merely conjectural procedural shortcomings. "[P]ure speculation as to the [agency's] procedural compliance" is simply insufficient "to establish that the information withheld . . . should be produced to Plaintiff – *i.e.*, essentially declassified – notwithstanding its substantively correct classification." *Schoenman*, 575 F. Supp. 2d at 152 n.9.

2. *Substantive Requirements*

Having determined that any alleged procedural shortcomings have been cured or do not require the disclosure of those records that meet the substantive classification criteria, the Court now turns to those substantive criteria. EO 13526 imposes two primary substantive barriers to classification, both of which are at issue here. First, the information in question must fall within one of the "classification categories" outlined in § 1.4 of the Executive Order. See EO 13526 §§ 1.1(3), 1.4. Second, it must be the case that the unauthorized disclosure of the information reasonably could be expected to result in describable damage to the national security. See id. §§ 1.1(4), 1.4. As the records at issue have been classified as TOP SECRET, Bennett Decl., ¶ 22, the potential damage to national security must be "exceptionally grave." EO 13526 § 1.2(a)(1).

a. Classification Categories

Section 1.4 of EO 13526 identifies eight categories of information that may potentially be subject to classification. See id. §§ 1.4(a)-(h). Classified records must "pertain[ ]" to one of these categories. See id. § 1.4. The CIA here invokes three of them: "(a) military plans, weapons systems, or operations"; "(c) intelligence activities (including covert action), intelligence sources or methods, or cryptology"; and "(d) foreign relations or foreign activities of the United States, including confidential sources." Id. §§ 1.4(a), (c), (d). Specifically, Bennett here avers that "all of the responsive records," which were "the product of a highly sensitive, overseas operation that was conducted under the direction of the CIA[,] . . . pertain to intelligence activities and/or methods as well as the foreign relations and foreign activities of the United States." Bennett Decl., ¶ 21 (emphasis added). He further attests that "the responsive records also reveal information concerning 'military plans, weapons systems, or operations.'" Id.

Judicial Watch maintains, however, that even if the agency's declarations establish that some of the records in question pertain to the classification categories, they do not demonstrate that each of the fifty-two records so pertains. In particular, while some of the records in question may well reveal classified military tactics or equipment, see McRaven Decl., ¶¶ 2-3, 5-8, and others may well disclose classified intelligence methods, see Bennett Decl., ¶ 29, Judicial Watch contends that Defendants have

failed to establish that every one of the records – for example, those "that depict the preparation of Bin Laden's body for burial and the burial itself" – pertains to one or more of the classification categories. Pl.'s Mot. & Opp. at 32-33. Without knowing more details about the fifty-two responsive records, Plaintiff asserts, the Court cannot evaluate whether each of them relates to one of the three claimed classification categories.

Plaintiff misses the forest for the trees. Judicial Watch may be correct that the CIA has not demonstrated that the burial photos, for example, pertain to "intelligence methods." EO 13526 § 1.4(c). It may similarly be correct that the agency has not shown that the photographs or videos taken as the body was transported to the *USS Carl Vinson* pertain to "military plans . . . or operations." Id. § 1.4(a). It is patently clear, however, that all fifty-two records – which, by the terms of Judicial Watch's own request, depict Bin Laden during and after the May 1, 2011, operation in Abbottabad, Pakistan – pertain to the "foreign activities of the United States." EO 13526 § 1.4(d). Plaintiff's allegation that "no one testifies that any of the records pertain to foreign relations or foreign activities of the United States," Pl.'s Mot. & Opp. at 34, is plainly contradicted by Bennett's declaration. See Bennett Decl., ¶ 21 ("all of the records pertain to . . . the foreign relations and foreign activities of the United States" (emphasis added)). Given that the records in question "were the product of a highly sensitive, overseas operation that was conducted under the direction of the CIA," id., no further information is required to conclude that each

of them "pertains" – notably, not a very demanding verb – to the United States' foreign activities.

b. National Security

Having concluded, therefore, that all of the records pertain to at least one of the classification categories, only the second substantive hurdle remains. Specifically, the Court must determine whether the CIA's declarations demonstrate that the release of the images and/or videos "reasonably could be expected to cause exceptionally grave damage to the national security." EO 13526 § 1.2(1); see also id. §§ 1.1(4), 1.4. "National security," the Executive Order provides, "means the national defense or foreign relations of the United States." Id. § 6.1(cc).

Although the Court reviews Defendants' withholdings *de novo*, see 5 U.S.C. § 552(a)(4)(B), it must afford "substantial weight" to agency declarations where the national security is concerned. *Krikorian v. Dep't of State*, 984 F.2d 461, 464 (D.C. Cir. 1993) (*quoting Military Audit Project*, 656 F.2d at 738); *see also ACLU v. DOD*, 628 F.3d 612, 621, 624 (D.C. Cir. 2011). "Because courts 'lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case,'" *ACLU*, 628 F.3d at 619 (*quoting Krikorian*, 984 F.2d at 464), they "have consistently deferred to executive affidavits predicting harm to national security, and have found it unwise to undertake searching judicial review." Id. at 624 (*quoting Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 927 (D.C. Cir. 2003)) (internal quotation mark omitted). Ultimately, "[t]he CIA's arguments

need only be both 'plausible' and 'logical' to justify the invocation of a FOIA exemption in the national security context." Id. at 624 (*citing Wolf v. CIA*, 473 F.3d 370, 374–75 (D.C. Cir. 2007)).

In their declarations, Bennett, Neller, and McRaven attest to their beliefs that releasing the records Judicial Watch seeks "reasonably could be expected to result in exceptionally grave damage to the national security." Bennett Decl., ¶¶ 22-30; Neller Decl., ¶¶ 2-3, 6-10; McRaven Decl., ¶¶ 2-3, 5-8. These assessments, moreover, are not announced in a conclusory fashion. Rather, each declarant expounds his evaluation of the national-security risk in detail, describing the basis for his beliefs and focusing on those risks that relate to his area of expertise.

Bennett, for one, explains that release of any of the records "reasonably could be expected to inflame tensions among overseas populations that include al-Qa'ida members or sympathizers, encourage propaganda by various terrorist groups or other entities hostile to the United States, or lead to retaliatory attacks against the United States homeland or United States citizens, officials, or other government personnel traveling or living abroad." Bennett Decl., ¶ 23. He fleshes out his account with examples of ways in which al Qaeda has already used Bin Laden's death and burial as an opportunity to further its anti-American agenda, and he highlights other examples of the organization's tendency to use similar incidents to propagandize and incite anti-American sentiment. See id., ¶¶ 24-27. In addition, Bennett describes "additional harm to national security [that] could be caused by the fact that release

of certain responsive records could also reveal intelligence activities and methods that were employed during or after the operation." Id., ¶ 28. "By way of example," he explains, "release of post-mortem photographs of [Bin Laden] that were used to conduct facial recognition analysis could provide insight into the manner in which such analysis is conducted or the extent or limitation of such analysis." Id., ¶ 29.

Neller's testimony is consistent with Bennett's. His declaration attests to his belief "that extremist groups will seize upon these images as grist for their propaganda mill, which will result, in addition to violent attacks, [in] increased terrorist recruitment, continued financial support, and exacerbation of tensions between the Afghani people and U.S. and Coalition Forces." Neller Decl., ¶ 6. He further avers "that the release of the responsive records will pose a clear and grave risk of inciting violence and riots against U.S. and Coalition forces" and "expose innocent Afghan and American civilians to harm as a result of the reaction of extremist groups, which will likely involve violence and rioting." Id. Neller's assessment not only draws from his "years of experience and judgment," id., ¶ 9, but, like Bennett's, is also buttressed by historical precedent. See id., ¶¶ 7-10. In particular, Neller references the violence that resulted from *Newsweek*'s incorrect report that "U.S. military personnel at Guantanamo Bay . . . had desecrated the Koran," id., ¶ 7, as well as that which resulted from the "re-publication of the Danish cartoon of the Prophet Muhammad." Id., ¶ 8.

McRaven's partially classified declaration covers somewhat different ground, focusing on the risks relating to the release of information about classified military methods and equipment. Although the details of the methods and equipment he claims the records would reveal are classified, his conclusion is not:

> It is my opinion that the release of the responsive records could reasonably be expected to cause harm to the national security by making the special operations unit that participated in this operation and its members more readily identifiable in the future; providing the enemy information that will allow them to analyze the [Tactics, Techniques, and Procedures] used during [Sensitive Site Exploitation], including the methods used for identification of captured and killed enemy personnel; and possibly provide them the opportunity to defeat [Special Operations Forces] practices in the future.

McRaven Decl., ¶ 8.

As a threshhold matter, the Court agrees with Plaintiff that some of the declarants' testimony, by their own admission, applies only to certain of the fifty-two records at issue. For example, the risk of exposing military methods and equipment that McRaven describes and the risk of revealing intelligence techniques that Bennett explains only

relate to some of the records in question. "Obviously, images taken on board the *USS Carl Vinson* of the burial at sea are not going to reveal site exploitation tactics, techniques, or procedures used in the Abottabad compound or even facial recognition techniques or capabilities." Pl.'s Reply at 11. The military- and intelligence-related risks, accordingly, cannot corroborate the CIA's claim that each of the fifty-two responsive records is properly classified. In order to obtain summary judgment on its claim that the release of any of the records in question reasonably could be expected to pose a risk of harm to the national security, the agency thus must rely on those national-security risks that are applicable to all of the records. Put differently, the Court must find that the declarants' predictions of national-security harm are both "plausible" and "logical" with respect to even the most innocuous photograph of the deceased Bin Laden.

Although this frame takes McRaven's declaration out of the picture, Bennett and Neller's specific and detailed averments, which are based on long and distinguished careers in the intelligence community, suffice to carry the government's burden. Remember, "[t]he test is not whether the court personally agrees in full with the CIA's evaluation of the danger – rather, the issue is whether on the whole record the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in this field of foreign intelligence in which the CIA is expert and given by Congress a special role." *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982); *see also Military Audit Project*, 656

F.2d at 738 ("[T]he Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [*sic*] might occur as a result of public disclosures of a particular classified record."). Bennett and Neller's accounts easily clear the low hurdles of reasonableness, logic, and plausibility. Their assessments, moreover, are "called into question [neither] by contradictory evidence in the record [n]or by evidence of agency bad faith." *Halperin*, 629 F.2d at 148.

Because Bennett and Neller's explanations of the national-security risks apply to any photograph or video recording of Bin Laden's body, moreover, Defendants need not further disaggregate the fifty-two responsive records. No further information about the records is necessary to "demonstrat[e] 'that material withheld is logically within the domain of the exemption claimed.'" *Campbell v. DOJ*, 164 F.3d 20, 30 (D.C. Cir. 1998) (*quoting King*, 830 at 217). As Bennett's description of the responsive records is "specific enough to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding," King, 830 F.2d at 218, individual descriptions of each record are not required. Nor is *in camera* review.

While Judicial Watch expresses concern that deferring to an agency's assessment of generalized risks related to potential propagandizing and the inflammation of anti-American sentiment opens the door to potentially unlimited withholdings, such

justifications will only pass muster where, as here, they are sufficiently detailed and both plausible and logical. If the risks Bennett and Neller anticipate are speculative, such is the nature of risk. Indeed, "any affidavit or other agency statement of threatened harm to national security will always be speculative to some extent, in the sense that it describes a potential future harm." *ACLU*, 628 F.3d at 619 (*quoting Wolf,* 473 F.3d at 374) (internal quotation mark omitted). The United States captured and killed the founding father of a terrorist organization that has successfully – and with tragic results – breached our nation's security in the past. Bennett and Neller's testimony that the release of images of his body could reasonably be expected to pose a risk of grave harm to our future national security is more than mere speculation. While al Qaeda may not need a reason to attack us, that does not mean no risk inheres in giving it further cause to do so.

It is true, as Plaintiff points out, that in *ACLU v. DOD*, the D.C. Circuit did not reach the question of whether the agency's argument that withheld documents "would be effective propaganda for al Qaeda" sufficed to justify its classification of those documents and subsequent claim for exemption. 628 F.3d at 624. But failure to reach that question, of course, does not equate with a rejection of that justification. In any event, that case raised a distinct issue about whether the propaganda-based national-security justification made sense where the potential for propagandizing stemmed from the fact that the allegations contained in the documents in question were "embarrassing to the United States and possibly

violations of law." Id. Because the relevant EO "prohibit[ed] the classification of information to 'conceal violations of law' or to 'prevent embarrassment to a person, organization, or agency,'" the agency's justification was called into question. Id. (quoting EO 12958 § 1.7(a)(1)-(2)). No such issue, however, is presented here.

The Court is also mindful that many members of the public would likely desire to see images of this seminal event. Indeed, it makes sense that the more significant an event is to our nation – and the end of Bin Laden's reign of terror certainly ranks high – the more need the public has for full disclosure. Yet, it is not this Court's decision to make in the first instance. In the end, while this may not be the result Plaintiff or certain members of the public would prefer, the CIA's explanation of the threat to our national security that the release of these records could cause passes muster. This was "the most highly classified operation that this government has undertaken in many, many years." Press Briefing by Jay Carney, May 3, 2011, at 2. The Director of the NCS, the USSOCOM Commander, and a Director of Operations on the Joint Staff of the Pentagon – not to mention the President of the United States – believe that releasing the photographs and/or videos of Bin Laden's body would threaten the national security. While "deference is not equivalent to acquiescence," Campbell, 164 F.3d at 30, the CIA's declarations are comprehensive, logical, and plausible. This Court will not overturn the agency's determination on Plaintiff's speculation that these executive-branch officials made an over-cautious assessment of the risks

involved. FOIA permits an agency to withhold properly classified information in the interest of national security; as the CIA has established that the records Judicial Watch seeks were properly classified, the Court will not order them released.

IV. Conclusion

For the foregoing reasons, the Court will issue a contemporaneous Order granting Defendants' Motion for Summary Judgment and denying Plaintiff's.

/s/ James E. Boasberg
JAMES E. BOASBERG
United States District Judge

Date: April 26, 2012

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., Plaintiff, v. U.S. DEPARTMENT OF DEFENSE, *et al*., Defendants.	No. 11-890 (JEB)

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, the Court

ORDERS that:

1. Defendants' Motion for Summary Judgment is GRANTED;

2. Plaintiff's Motion for Summary Judgment is DENIED; and

3. Judgment is ENTERED in favor of Defendants.

SO ORDERED.

/s/ James E. Boasberg
JAMES E. BOASBERG
United States District Judge

Date: April 26, 2012