[ORAL ARGUMENT SCHEDULED FOR JANUARY 10, 2013]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5137

JUDICIAL WATCH, INC.

Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF DEFENSE AND
CENTRAL INTELLIGENCE AGENCY

Defendants-Appellees.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF APPELLANT JUDICIAL WATCH, INC.

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* Authorities upon which Plaintiff-Appellant chiefly relies are marked with asterisks.

GLOSSARY OF ABBREVIATIONS

CIA	Central Intelligence Agency
DoD	U.S. Department of Defense
EO 13526	Executive Order 13526
FOIA	Freedom of Information Act
JA	Joint Appendix

SUMMARY OF THE ARGUMENT

To be properly withheld under Exemption 1 of the Freedom of Information Act ("FOIA"), a government agency must demonstrate that the information 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 this case, the U.S. Department of Defense ("DoD") and the Central Intelligence Agency ("CIA") (collectively "Defendants") failed to sufficiently demonstrate that all 52 images of Osama bin Laden were properly classified and that Defendants followed proper classification procedures when classifying the images.

Specifically, Defendants have failed to provide any evidence that all 52 images, including those depicting bin Laden's burial at sea, pertain to "foreign activities of the United States." Defendants also have failed to provide any evidence that images depicting the burial at sea actually pertain to "intelligence activities." Nor have they demonstrated that the release of images of a somber, dignified burial at sea reasonably could be expected to cause identifiable or describable exceptionally grave damage to national security. Similarly, Defendants have failed to provide any evidence that all 52 images were classified in compliance with Executive Order 13526 ("EO 13526"). For these reasons, the District Court's judgment should be reversed.

ARGUMENT

I. The Withheld Images Depict More Than Just Gruesomeness.

Defendants would have the Court believe that the only images at issue in this case are gruesome, graphic images depicting a bullet wound in bin Laden's head and other wounds of his corpse taken moments after he was killed. *See* Brief for Appellees at 33. Yet at least some of the 52 responsive images depict more than just a bloody mess. John Bennett, Director of the National Clandestine Service of the CIA, has testified that, although some of the images "show the fatal bullet wound to bin Laden's head and other similarly graphic images of the corpse[,]" "other images show the preparation of bin Laden's body for burial[,]" and yet "other images show the burial itself." Defs' Reply at 8; see also Bennett Decl. at ¶ 11 (Joint Appendix ("JA") 22). In other words, a subset of the 52 images depicts 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. The government has described the scene in the following official statement:

> Today's religious rites were conducted for the deceased on the deck of the USS Carl Vinson, which is located in the North Arabian Sea. Preparations for at-sea burial began at 1:10 a.m. Eastern Standard Time and were completed at 2:00 a.m. Eastern Standard Time.
>
> Traditional procedures for Islamic burial were followed. The deceased's body was washed and then placed in a white sheet. The body was placed in a weighted bag, a military officer read prepared religious remarks, which

> were translated into Arabic by a native speaker. After the words were complete, the body was placed on a prepared flat board, tipped up, whereupon the deceased's body was eased into the sea.

Exhibit B to the Declaration of Michael Bekesha (JA 79).

How many records specifically depict the burial at sea is unknown. Defendants have not provided a *Vaughn* index identifying how many images depict graphic images and how many images depict the preparation of bin Laden's body for burial or the burial itself. The only information provided by Defendants is a bald assertion that "the release of [the] graphic photographs and ***other images***" of bin Laden reasonably could be expected to cause exceptionally grave damage to national security. Bennett Decl. at ¶ 23 (JA 29) (emphasis added); *see also* Brief for Appellees at 33. Because they have glossed over the various images that are being withheld and treated them all in the same manner, Defendants have failed to satisfy their burdens under FOIA.

II. Defendants Have Failed to Demonstrate That All 52 Records Pertain to "Foreign Activities" or "Intelligence Activities" of the United States."

EO 13526, § 1.4 requires that classified material pertain to one or more of seven specified categories. Of those seven categories, Defendants, in the District Court, asserted that all 52 records pertain to the following three categories:

(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.

Bennett Decl. at ¶ 21 (JA 27). Yet in their opposition Defendants, for the first time, argue that it is irrelevant whether some images pertain to one or more categories because all 52 images "plainly 'pertain' to both 'foreign activities' and 'intelligence activities.'" Brief for Appellees at 28-29. Implicit in this argument is the concession that at least some of the images do not depict military plans, weapons systems or operations, intelligence sources or methods, or cryptology.

The District Court found the requirement that the records pertain to "foreign activities" is not "very demanding." Opinion at 23 (JA 230). This Court however has expressed concern that the category "foreign relations or foreign activities" "might be excessively vague." *McGehee v. Casey*, 718 F.2d 1137, 1144 (D.C. Cir. 1983). In *McGehee*, the plaintiff, a former CIA officer who sought pre-approval of a manuscript he wrote, sought a declaratory judgment that the CIA classification and pre-approval scheme violated his First Amendment rights. *Id.* at 1139. In arguing that the pre-approval process violated his First Amendment rights, the plaintiff alleged that the classification category "concern[ing] foreign relations or foreign activities of the United States" was too vague. *Id*. 1144-1145. In

ultimately finding that the plaintiff's first amendment rights were not violated, the Court concluded:

> Standing alone, such a classification standard might be excessively vague. The CIA, however, has articulated narrower standards to guide classification decisions under [the category concerning foreign relations or foreign activities of the United States]. The guidelines pertinent to this case are sufficiently precise to withstand a challenge for unconstitutional vagueness.

Id. at 1145. In that case, the CIA provided the following limitation as part of its *Agency Information Sec. Program Handbook*:

> Information that could identify or otherwise disclose activities abroad in support of national foreign policy objectives, and planned and executed so that the role of the United States Government is not apparent or acknowledged publicly; or information that could reveal support for such activities.

Id. In addition, the Court noted:

> This is not to say, of course, that imprecise standards would not still present an intolerable burden by allowing the censor unwarranted discretion in vetoing material, but, as we have said, we do not find the standards for classifying material as 'secret' unconstitutionally vague. And we note that the agent may seek judicial review of the CIA's classification decision.

Id. In other words, the Court held that the additional, narrower and more precise standards of the CIA's guidelines prevented the "foreign relations or foreign activities of the United States" classification category from being too vague and

imprecise. Moreover, and importantly, in the end, the Court could review the agency's classification decision. *Id*.

FOIA was enacted to overhaul an earlier public records provision that had become more of "a withholding statute than a disclosure statute." *Milner v. Department of the Navy*, 131 S. Ct. 1259, 1262 (2011) (*quoting Environmental Protection Agency v. Mink*, 410 U.S. 73, 79 (1973)). It is the role of the courts to ensure that the nine delineated exemptions do not become sweeping exemptions, "posing the risk that FOIA would become less a disclosure than a withholding statute." *Milner*, 131 S. Ct. 1259, 1270. In other words, the same concerns of government overreaching the Court raised in the First Amendment context in *McGehee* are relevant here.

Defendants assert that all 52 images "pertain to foreign activities of the United States" solely because they were the product of an "overseas operation." Brief for Appellees at 28-29 ("There can be no question that the May 1, 2011 operation at the compound in Abbottabad, the removal of bin Laden's dead body from the compound and the burial of the body at sea were 'foreign activities by the United States.'"). However, as this Court decided in *McGehee*, the application of "foreign activities" must be narrower and more precise than how Defendants apply it. Not everything the government does overseas can properly be subject to classification. Any such broad application of EO 13526 can only lead to an abuse

of power. *See e.g., Zweibon v. Mitchell*, 516 F.2d 594, 653 (D.C. Cir. 1975). In addition, Defendants have not presented any case law supporting their expansive if not all encompassing definition of the term "foreign activities" in the FOIA context, or any other context for that matter. In fact, there appears to be no precedent of this Court, or any court, that permits classification of records as "pertaining to foreign activities" merely because the records concern an overseas operation.

Defendants similarly assert that all 52 images "pertain to intelligence activities" because "the entire May 1, 2011 operation was conducted under the 'direction of the CIA.'" (JA 29). This assertion suffers from the same fatal flaw as the assertion addressed above. The category "intelligence activities" is simply too vague and imprecise to apply without narrower standards to guide classification decisions. *McGehee*, 718 F.2d at 1145. In addition, with respect to the specific images being withheld, Defendants fail to demonstrate how the images depicting bin Laden's body after it had been cleaned and prepared for burial as well as images depicting the burial itself pertain to "intelligence activities." There is no apparent nexus between "intelligence activities" and these images. Nor do Defendants provide one.

Finally, "deference is not equivalent to acquiescence." *Campbell v. U.S. Department of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998). Defendants have failed

to provide sufficient specificity and the lower court improperly gave substantial weight to nothing more than Defendants' broad brush assertions that "all of the responsive records are the product of a highly sensitive, overseas operation" and that "all of the records pertain to . . . foreign activities of the United States." Brief for Appellees at 29; Declaration of Bennett at ¶ 21 (JA 27). Such conclusory statements do not satisfy Defendants' burden. *Allen v. Central Intelligence Agency*, 636 F.2d 1287, 1291-92 (D.C. Cir. 1980).

III. Defendants Have Failed to Demonstrate That the Release of All 52 Images Reasonably Could Be Expected to Cause Exceptionally Grave Damage to National Security.

Defendants have not presented a complete or sufficient explanation as to why all 52 images, including those images depicting bin Laden's burial at sea, reasonably could be expected to cause identifiable or describable exceptionally grave damage to national security. Time and again, Defendants focus on the gruesome images of bin Laden's head moments after he was killed and gloss over the fact that they are withholding other images as well.

President Obama stated that "[i]t is important for us to make sure that very graphic photos of somebody who was shot in the head are not floating around as an incitement to additional violence. As a propaganda tool." Brief for Appellees at 6. Similarly, in their brief, Defendants assert that Director Bennett "explained in detail" why the release of all 52 images could cause damage to national security.

Brief for Appellees at 33. That assertion is simply incorrect. Director Bennett testifies only with respect to the gruesome images of bin Laden's body. Specifically, he stated:

> In this case, the responsive records contain images of UBL's body after he was killed. These post-mortem images of the former leader of al-Qa'ida include photographs of the gun-shot wound to his head. In short, these pictures are gruesome. As a result, the release of these graphic photographs ***and other images*** of UBL's corpse reasonably could be expected . . .

Bennett Decl. at ¶ 23 (JA 29) (emphasis added); *see also* Brief for Appellees at 33. There is no discussion of the images depicting bin Laden's body after it had been cleaned and prepared for burial as well as the images depicting the burial itself. Nor do Defendants present any evidence demonstrating why images depicting a respectful, dignified burial (Exhibit B to the Declaration of Michael Bekesha (JA 79)) would "provide al-Qaeda and other entities hostile to the United States with material they could use to recruit, raise funds, inflame tensions, and rally support." Brief for Appellees at 33. Based on the complete lack of evidence presented by Defendants, the release of some of the images cannot be reasonably expected to cause identifiable or describable exceptionally grave damage to national security.

In addition, the government's own actions squarely contradict Defendants' assertions. In their brief, Defendants assert that the reporting of an event is just as likely as the release of images of the event to cause violent protests. Brief for

Appellees at 34-35. Yet, with respect to the responsive records in this case, the government has repeatedly described, albeit in other contexts, what the images depict. *See supra* p. 2 (official statement describing the burial at sea). Also, most recently, in response to a FOIA request from the Associated Press, DoD released an email from a rear admiral present during the burial, which described the burial in detail:

> Traditional procedures for Islamic burial was [sic] followed. The deceased's body was washed (ablution) then placed in a white sheet. The body was placed in a weighted bag. A military officer read prepared religious remarks, which were translated into Arabic by a native speaker. After the words were complete, the body was placed on a prepared flat board, tipped up, whereupon the deceased's body slid into the sea.

Emails about Osama bin Laden's burial, http://www.politico.com/news/stories/1112/84155.html#ixzz2Em1QlyEm. Not only does this release of information raise questions about the validity of the classifications at issue in this case – why are images depicting the event classified when written descriptions of the event itself are not classified – but it also raises doubts as to the alleged harm that will result from the release of the images.

Moreover, contrary to Defendants' assertions, the images of bin Laden – especially those of his body cleaned and prepared for burial or actually being buried at sea – do not present the typical scenario in which courts defer agencies' assessments of harm to national security. *See ACLU v. U.S. Department of*

Defense, 628 F.3d 612, 623-25 (D.C. Cir. 2011). The Court is fully capable of reaching its own determination about the logic and plausibility of Defendants' assertions of harm, taking into account not only Defendants' declarations, but also the substantial information that Defendants have already released to the public about the operation, the death of bin Laden, his burial at sea, and even the images themselves. *See* Exhibits A-J attached to the Declaration of Michael Bekesha (JA 76-160).

Finally, "deference is not equivalent to acquiescence." *Campbell,* 164 F.3d at 30. Defendants have failed to provide sufficient specificity and the lower court improperly gave substantial weight to nothing more than the broad brush statement that "the release of these graphic photographs and other images" of bin Laden reasonably could be expected to cause identifiable or describable exceptionally grave damage to national security. Bennett Decl. at ¶ 23 (JA 29); *see also* Brief for Appellees at 33. Such conclusory assertions simply do not satisfy Defendants' burden. *Allen*, 636 F.2d at 1291-92.

IV. Defendants Have Failed to Demonstrate That They Complied With the Classification Procedures of EO 13526.

The law is clear. In order to withhold records under Exemption 1, an agency must demonstrate that withheld records were "classified in accordance with the procedural criteria of the governing Executive Order." *Lesar v. U.S. Department of Justice*, 636 F.2d 472, 483 (D.C. Cir. 1980).

Defendants have failed to demonstrate that they satisfied the procedural requirements of EO 13526. They have not provided any evidence of who made the original classification decision, when that classification took place, whether that individual determined that the unauthorized disclosure of the information reasonably could be expected to result in damage to national security, or whether the original classification occurred before or after receipt of Judicial Watch's FOIA. Similarly, Defendants provided no evidence of who made the derivative classification, when that classification took place, what procedures were followed, and whether all of the requirements of EO 13526 were followed.

In response, Defendants suggest that whether the images were properly classified is irrelevant. Brief for Appellees at 56. Yet such an assertion contradicts the plain language of Exemption 1. Exemption 1 explicitly states that information may only be withheld 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) (emphasis added).

In addition, the Supreme Court has emphasized, to avoid overly expansive applications of the exemptions and maintain FOIA's status as a disclosure statute, courts should adhere to the plain meaning of the language used by Congress. *Milner*, 131 S. Ct. at 1266. Since Congress believed it was important for withheld

information to be classified pursuant to proper procedure, this Court should reject the lax standard asserted by Defendants.

CONCLUSION

For the reasons set forth in Judicial Watch's opening brief and the additional reasons set forth above, Judicial Watch respectfully requests that this Court reverse the District Court's order granting Defendants' motion for summary judgment and denying Judicial Watch's cross-motion for summary judgment and remand this matter for further proceedings.

Dated: December 13, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7). The brief, excluding exempted portions, contains 2,916 words (using Microsoft Word 2010), and has been prepared in a proportional Times New Roman, 14-point font.

/s/ Michael Bekesha

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December 2012, I filed via the CM/ECF system the foregoing **REPLY BRIEF OF APPELLANT JUDICIAL WATCH, INC.** with the Clerk of the Court. Participants in the case are registered CM/ECF users and service will be accomplished by the Appellate CM/ECF system.

I also certify that I caused eight copies to be delivered to the Clerk of Court via hand delivery.

/s/ Michael Bekesha