

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

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4
5 JUDICIAL WATCH, INC.,

6 Appellant,

7 v.

No. 12-5137

8 UNITED STATES DEPARTMENT OF
9 DEFENSE, ET AL.,

10 Appellees.

11
12 Thursday, January 10, 2013

13 Washington, D.C.

14 The above-entitled matter came on for oral
15 argument pursuant to notice.

16 BEFORE:

17 CIRCUIT JUDGES ROGERS AND GARLAND, AND SENIOR
18 CIRCUIT JUDGE EDWARDS

19 APPEARANCES:

20 ON BEHALF OF THE APPELLANT:

21 MICHAEL BEKESHA, ESQ.

22 ON BEHALF OF THE APPELLEES:

23 ROBERT M. LOEB, ESQ.
24
25

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C O N T E N T S

ORAL ARGUMENT OF:

PAGE

Michael Bekesha, Esq.
On Behalf of the Appellant

3; 27

Robert M. Loeb, Esq.
On Behalf of the Appellees

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P R O C E E D I N G S

THE CLERK: Case number 12-5137, Judicial Watch, Inc., Appellant v. United States Department of Defense, et al. Mr. Bekesha for the Appellant; Mr. Loeb for the Appellees.

JUDGE ROGERS: Good morning.

ORAL ARGUMENT OF MICHAEL BEKESHA, ESQ.

ON BEHALF OF THE APPELLANT

MR. BEKESHA: Good morning, may it please the Court, Michael Bekesha on behalf of Appellant and Plaintiff Judicial Watch.

Judicial Watch is not here today asking that this Court substitute its own judgment for that of the Government. In this case with these specific facts the Government is not entitled to the substantial weight that is usually afforded in the typical national security and intelligence cases. This is so for three reasons, first, the Government has failed to provide a sufficiently specific affidavit or evidence that the release of each image, all 52 images of the body of Osama bin Laden could be expected to cause exceptionally grave damage to the national security. Second, the images at issue in this case are not the typical scenario where courts usually defer to Agency assessments of harm; and third, not all of the 52 images pertain to foreign activities or intelligence activities in a meaningful way.

First, I just want to make clear that I'm referring

1 to images today because we still do not know whether or not we
2 are talking about photographs or video recordings. The
3 Government --

4 JUDGE ROGERS: I got -- yes. Could I just ask you,
5 I just want to be clear I got the third point, you say the
6 declarations are not as specific as to each of the 52, then
7 what was the next one?

8 MR. BEKESHA: The second one was that this isn't the
9 typical scenario.

10 JUDGE ROGERS: Not the typical scenario, what does
11 that mean?

12 MR. BEKESHA: In the, typical scenario, for example,
13 of a *Students Against Genocide* case the images at issue, or
14 the information at issue involve sensitive intelligence
15 information, intelligence activities, sources --

16 JUDGE ROGERS: I see.

17 MR. BEKESHA: -- methods.

18 JUDGE ROGERS: All right. And then your third one
19 was something about it's not related to national security in a
20 meaningful way?

21 MR. BEKESHA: Foreign activities or intelligence
22 activities.

23 JUDGE ROGERS: And in a meaningful way?

24 MR. BEKESHA: In a meaningful way. Yes, Your Honor.

25 JUDGE ROGERS: And who makes that judgment?

1 MR. BEKESHA: I think this Court makes that
2 judgment.

3 JUDGE ROGERS: As to whether it's meaningfully
4 related to foreign affairs and national security?

5 MR. BEKESHA: That's correct. In this case, Your
6 Honor, the Government has only said that these records pertain
7 to foreign activities, or pertain to intelligence activities
8 because they were a product of an overseas operation.

9 JUDGE GARLAND: Well, what -- it seems pretty -- the
10 Executive Order says foreign relations or foreign activities,
11 and you just said overseas, that sounds foreign.

12 MR. BEKESHA: Yes.

13 JUDGE GARLAND: There's no dispute that all of these
14 photographs were of something that took place outside of the
15 domestic United States, right?

16 MR. BEKESHA: That is correct, Your Honor.

17 JUDGE GARLAND: So, why isn't that a foreign
18 activity of the United States?

19 MR. BEKESHA: At least some of these images took
20 place on a U.S. aircraft carrier.

21 JUDGE GARLAND: Located in, outside of the United
22 States, right?

23 MR. BEKESHA: That's correct.

24 JUDGE GARLAND: In international waters.

25 MR. BEKESHA: Yes, that is correct, Your Honor.

1 JUDGE GARLAND: Well, why isn't that foreign?

2 MR. BEKESHA: It's extremely broad, vague, and it's
3 not a real standard. The concern would be --

4 JUDGE GARLAND: Well, I'm not sure whether it
5 matters whether it's a real standard, the issue in FOIA is
6 whether it comes within the Executive Order, the Executive
7 Order says foreign activities, it doesn't seem vague. I mean,
8 it might be vague if it was, you know, I don't know, docked
9 within 100 miles of the United States, but when it's docked in
10 international, when the boat is in international waters and
11 many more than 1,000 miles from the United States it seems
12 pretty hard not to say that's a foreign activity. Wouldn't
13 you agree with that? I mean, really, this isn't the essence
14 of your argument, is it?

15 MR. BEKESHA: It's not the essence, no. It's our
16 third argument, Your Honor. Our first two arguments are the
17 stronger arguments. First, that these records, that the
18 affidavits provided by the Government, the Government provided
19 three affidavits, that they weren't sufficiently specific with
20 regard to each of the 52 records. The Government has
21 generally stated that some of their records were taken at the
22 compound immediately after the raid, some of the records were
23 taken during the transportation of bin Laden's body, some of
24 the records were taken during the preparation for the burial,
25 and some of the images depict the burial itself.

1 In their declarations the Government only states
2 that the graphic and gruesome photographs that depict the
3 bullet wound to bin Laden's head their release would cause
4 harm to the national security.

5 JUDGE GARLAND: That's not quite what they say, they
6 say all the documents --

7 JUDGE ROGERS: Right.

8 JUDGE GARLAND: -- and they do mention and talk
9 about the graphic ones, but Mr. Neller's affidavit says the
10 release of the responsive records, and then it gives two
11 examples. So, I think you are right to focus on the, what
12 would seem like the least dangerous of the photos, namely the
13 burial, and that's what Judge Boasberg did, he said you have
14 to have an explanation that covers even the least graphic,
15 which would be the burial. But Mr. Neller says that this
16 likely to lead to injury to Americans, violence and rioting
17 abroad, exposing innocent Afghan and American civilians to
18 harm, and he gives two examples to support this, one was the
19 incorrect reporting by News Week that the Quran had been
20 desecrated, and that by itself led to 11 people dying in
21 Afghanistan, 30 people being injured in Egypt, and the
22 reaction of the republication of the Danish cartoon of the
23 Prophet Mohammad, which resulted in at least 11 people being
24 killed in Afghanistan, including two who died when protestors
25 turned on the U.S. airbase at Bagram. Our standard is

1 plausible or logical, right, that's the standard?

2 MR. BEKESHA: Yes, Your Honor.

3 JUDGE GARLAND: So, is it not at least plausible
4 that a Government expert who testifies that this is likely to
5 cause the same consequences as the release of the Quran, or
6 the claim about the Quran, or the cartoon of Mohammad, why
7 should we not defer to them? You say this is not a question
8 we should defer, but it's not just him, it's also Mr. Bennett
9 who is the Director of the National Clandestine Service, and
10 they're both telling us that there is a risk, not telling it's
11 certain that there is a risk that Americans and others will
12 die if we release the documents, and our only question is is
13 that plausible? Is that right? Did I at least focus the
14 question correctly?

15 MR. BEKESHA: To an extent, Your Honor, with all due
16 respect, the case law seems to suggest, and it's pretty clear
17 that deference is only provided when the affidavits or
18 declarations are sufficiently specific.

19 JUDGE GARLAND: Well, here it's specific, they have
20 given, he's given, Neller has given two examples of releases
21 of information that did result in death, and Mr. Bennett has
22 given further explanations of the way in which al-Qaeda is
23 likely to use this information based on the way it's used
24 information in the past, including the, particularly the use
25 of the deaths of, let's see, I'm just trying to find the page

1 here, when the abuse of Iraqi detainees in Abu Ghraib was
2 disclosed, and after Osama bin Laden's death he says at
3 paragraph 25 that al-Qaeda has already attempted to use this
4 trying to stoke inflammation through Inspire magazine, that
5 al-Zawahiri released a video attacking assertions that he was,
6 that --

7 JUDGE ROGERS: Is there a question?

8 JUDGE GARLAND: I'm sorry?

9 JUDGE ROGERS: Is there a question?

10 JUDGE GARLAND: Bin Laden has been actually
11 appropriately buried at sea, why aren't those specific? You
12 said it has to be specific, I think you're correct about that,
13 why isn't this specific enough?

14 MR. BEKESHA: Because declarations generally speak
15 about all responsive records. The Government fails to
16 appreciate that there are various types of images, there are
17 some images that are graphic and gruesome, and those are the
18 images that Director Bennett focuses on. He focuses on the
19 graphic and gruesome images. The focus is not on those images
20 that depict somber and dignified burial at sea. Those images
21 are not discussed, they are only referenced to, when
22 discussing about harm to national security they're only
23 discussed as other records. The use of the phrase other
24 records this Court has not found to be sufficient in the past.
25 There is no specificity about each record and how the release

1 of each individual record, the various images of the body
2 cleaned and wrapped in a white sheet, the body placed in a
3 weighted body bag, the body placed on a board and tipped over
4 the side of the U.S. aircraft carrier how the release of each
5 of those images may cause harm to national security. The
6 Government just doesn't specify the harm associated with the
7 assessment with those records.

8 JUDGE ROGERS: Well, you started out by talking
9 about a typical national security case, and the declaration
10 suggests that this is not typical, this is the founder, so
11 that almost anything associated with him involving foreign
12 affairs is necessarily of concern for the reasons Judge
13 Garland has just related, you say you're not asking the Court
14 to second guess these evaluations and predictions, but what
15 are you asking?

16 MR. BEKESHA: in the typical scenario the
17 information being withheld would reveal intelligence, sources,
18 methods, and operations. For example, in the *Students Against*
19 *Genocide* case the concern with the release --

20 JUDGE ROGERS: I understand, but what about the
21 concern that these images could be used for propaganda for
22 other reasons negative to the interests of the United States,
23 that type of explanation by these experts?

24 MR. BEKESHA: We think in this case, in this
25 scenario the Court is fully capable of reaching its own

1 determination about the logic and plausibility about the
2 release of this specific information based not only on the
3 declarations, but also all the additional information that the
4 Government has officially acknowledged about the raid, and
5 about the burial. In this case unlike those cases where the
6 information would reveal secret locations overseas, or secret
7 conversations or discussions with foreign leaders, potentially
8 foreign terrorist organizations, this will not reveal any
9 secret information.

10 JUDGE GARLAND: Right. But so the question really
11 is isn't this worse? They're telling us this could result in
12 death, not just release of secret information, but death. And
13 we do know of examples where in this country we would think
14 that the release of certain things would not have lead to
15 this, and yet there were, not very long ago a video was
16 released that did lead to death of an American ambassador, of
17 other people, of riots in other cities, when the Government
18 tells us that this is likely to lead to death isn't that even
19 more, something we should defer to even more than when they
20 say well, this is going to lead to, you know, the release of
21 some secret information?

22 MR. BEKESHA: The declarations of the Government
23 should always be reviewed, always, there's some deference that
24 is provided to the Executive there. However, in this
25 instance, in these instances this Court has the experience to

1 look at the entire picture, to look at the specific facts and
2 not just rubber stamp what the Government says may or may not
3 cause harm.

4 JUDGE ROGERS: So, is part of your argument that
5 given that the Executive Branch has already described in some
6 detail the nature of the burial, precisely what was done both
7 in preparing the body and burying the body, and the words that
8 were said at the burial, that in effect they have already
9 painted a picture, and therefore what more harm, as it were,
10 could ensue --

11 MR. BEKESHA: The Government --

12 JUDGE ROGERS: -- by releasing the images, or at
13 least some of the images?

14 MR. BEKESHA: The Government has already painted a
15 picture. In fact, it's painted a more complete picture than
16 what the photographs themselves would disclose. We know from
17 their official, the Government's official statements that it
18 was conducted on the deck of the US Carl Vinson, we know it
19 took place in the North Arabian Sea, we know that the burial
20 began at 1:00 a.m. and ended at 2:00 a.m., and then we know
21 the details about how the body was prepared, what the visual
22 image looked like.

23 JUDGE ROGERS: So, what would be your best case for
24 the proposition that the declaration would have to say, for
25 example, image number 32, which shows, and if you've ever seen

1 a picture of an Egyptian mummy wrapped in an empty room, even
2 that causes us as experts to be concerned about the potential
3 risk to United States interests, as well as to the injury to
4 people.

5 MR. BEKESHA: I think *Lesar*, I think *Allen*,
6 *Campbell*, all those cases talk about the deference provided
7 after substantially sufficient, very specific declarations are
8 provided. The case law of this Circuit is pretty clear on
9 that, the deference is afforded to the Government but only
10 when there is specificity, when each record is accounted for
11 on its own.

12 JUDGE ROGERS: How do you factor in the fact of who
13 this is?

14 MR. BEKESHA: The Government in its opposition brief
15 mentions, they assert that because this is bin Laden it's a
16 different scenario, it's a different case, this isn't the same
17 as the images being released by Saddam Hussein's children and
18 other terrorists. However, the declarations don't address
19 that issue, the declarations do not address what concerns the
20 Government may or may not have when releasing those images
21 versus releasing the specific images. The Government in its
22 brief talks about well, there was some result when those
23 images were released, that some rioting may have occurred, but
24 there is no sworn declaration, there is no actual evidence in
25 the record that that took place. The Government is making

1 that assertion now, but there's no evidence at the District
2 Court to say that.

3 This was the mastermind of 9-11, this was the most
4 wanted terrorist in the world, but the Government according to
5 its own official statement provided the body of bin Laden a
6 dignified and proper burial at sea. The Government has not
7 said those records of this somber event would cause grave
8 national security harm if released.

9 JUDGE ROGERS: All right. Why don't we hear from
10 the Government and give you a couple of minutes on rebuttal.

11 MR. BEKESHA: Thank you.

12 ORAL ARGUMENT OF ROBERT M. LOEB, ESQ.

13 ON BEHALF OF THE APPELLEES

14 MR. LOEB: May it please the Court, my name is
15 Robert Loeb from the Department of Justice, and I represent
16 the Department of Defense and the CIA in this appeal.

17 The District Court's ruling here is correct and
18 should be affirmed. The Court properly held that the
19 Government's declarations here submitted by Director Bennett
20 and by Lieutenant General Neller provided detailed and cogent
21 explanations of why release of these materials could
22 reasonably be expected to harm national security. As they
23 say, they will incite violence, they will aid al-Qaeda in
24 recruitment, and will lead to attack on U.S. military, U.S.
25 citizens, and attacks against our allies. The question under

1 this Court's precedence is whether those declarations are
2 sufficiently detailed, and whether the predictions of the
3 likelihood of harm to national security are plausible and
4 logical, and the District Court correctly found that they
5 were.

6 The Plaintiffs here argue that those declarations
7 are not sufficiently detailed, Director Bennett with 25 years
8 of experience in dealing with terrorist groups and al-Qaeda is
9 one our nation's leading experts on such matters, submitted a
10 22-page declaration cogently explaining why release of all the
11 records here, and that all the records here regarding and
12 depictions of bin Laden's body, why release of all those
13 materials would harm national security. The Plaintiffs argue
14 here that he did not make distinctions between the
15 photographs, and that's simply not the case. The declaration
16 specifically speaks to the photographs regarding the burial at
17 sea and said release of those, as well, would cause a grave
18 harm, and specifically he notes that in general, speaking to
19 all the photographs that they will be used to inflame
20 tensions, they'll be used to encourage retaliatory attacks,
21 but as to the burial images specifically noted that at the
22 time the al-Qaeda leader al-Zawahiri already had tried to use
23 bin Laden's death and the treatment of his body to inflame
24 violence against the United States and against United States
25 citizens, and had already asserted that the method of the

1 burial that we undertook did not a adhere to Islamic law.
2 Releasing those images would just provide additional
3 ammunition for those who want to distort what happened, and to
4 make claims that we were being disrespectful to Islamic law,
5 that we were being disrespectful to bin Laden, or to the
6 Muslim people, and that that itself could be used as
7 propaganda or could be used to incite violence. Specifically,
8 Lieutenant General Neller and Director Bennett here said the
9 release of these materials including the burial images would
10 be used to recruit, to raise funds for al-Qaeda and inflame
11 tensions in general. And both of them specifically said this
12 was not just mere conjecture, they were doing it based on
13 experience, past experience of violence when similar things
14 had occurred.

15 The Plaintiffs here referred to the deaths of Saddam
16 Hussein's sons and release of those images, but even the
17 materials they submitted on that showed that the Government
18 experts at the time said the release of those materials would
19 in fact inflame violence, but they found there was an
20 overriding need at the time to prove to the Iraqi people that
21 Saddam Hussein's sons were dead. And of course, that's an
22 assessment the Executive Branch can make on its own under the
23 Executive Order regarding whether materials should be released
24 or not. I mean, certainly the materials they submitted
25 regarding Saddam Hussein's sons do not show that there is not

1 a likelihood of harm and violence, and in fact, it shows just
2 the opposite.

3 This Court has already addressed their argument
4 regarding whether this pertains to foreign activities.
5 Obviously, all this, their own FOIA request regarding the
6 killing of bin Laden in Pakistan, that was the words in their
7 own FOIA request --

8 JUDGE GARLAND: Mr. Loeb, could I ask you about I
9 think what's probably the third prong which is so in addition
10 to the requirement that it be specifically authorized, and the
11 Executive Order criteria has to be properly classified, this I
12 take to be their arguments regarding the procedures of
13 classification, could you explain paragraph eight of Ms.
14 Culver's affidavit, that is I am not clear as to whether there
15 is an original classification authority named on the document
16 at all, or whether there never was an original classification
17 authority because it was derivative we applied from a
18 classification manual, and I'd say the paragraph is not clear
19 to me, could you explain that?

20 MR. LOEB: What that paragraph says is that the,
21 what's identified is the person who first classified it using
22 derivative authority under classification guidance.

23 JUDGE GARLAND: So, there is no, the first
24 classifier is not an original classification, is that correct?

25 MR. LOEB: As appropriate under the Executive

1 Order --

2

3 JUDGE GARLAND: I just want to -- I'm not --

4 MR. LOEB: -- yes, that is --

5 JUDGE GARLAND: I'm not challenging the
6 appropriateness, that's the next question, but the first --

7 JUDGE ROGERS: Yes.

8 JUDGE GARLAND: -- question is just the facts.

9 MR. LOEB: Yes, Your Honor.

10 JUDGE GARLAND: So, there is no original
11 classification authority other than the classification guide,
12 is that right?

13 MR. LOEB: Well, in those instances under the
14 Executive Order the person who authorizes the classification
15 guidance and approves it is considered the original
16 classification --

17 JUDGE GARLAND: And is the author of the guide.

18 MR. LOEB: Is considered the original classification
19 authority, and the person then acting under that is using that
20 derivative authority. But so, the person who's identified is
21 not the original classification, or it does identify the
22 original classification authority as the guide.

23 JUDGE GARLAND: I see. And could you take me
24 through the Executive Order, I take that to be part two,
25 derivative classifications --

1 JUDGE ROGERS: Could I just follow up on Judge
2 Garland's question, though?

3 MR. LOEB: Sure.

4 JUDGE ROGERS: And my hypothetical is someone with
5 the original authority comes up with a guide and it says there
6 are 10 things you could consider, and then a lower level
7 employee who has no authority in and of himself as a result of
8 his position makes the determination that these documents are
9 secret, and then someone comes along like Bennett, re-
10 evaluates, does a complete independent assessment, is that our
11 situation here?

12 MR. LOEB: Yes, but let me give a caveat, you said
13 the person who has no experience, people who are allowed to do
14 derivative classification are people who are trained to do so,
15 or are aware of -- it's not just every -- that the Executive
16 Order has a separate provision for just your average day Joe
17 who comes into contact with information which may be
18 classified, they can treat it as presumptively classified and
19 required to do so until they can give it to someone who has
20 either original or derivative classification authority.

21 JUDGE GARLAND: That's the exceptional circumstances
22 part.

23 JUDGE ROGERS: Right.

24 MR. LOEB: Right. Right.

25 JUDGE ROGERS: Okay.

1 JUDGE GARLAND: But so this case it's somebody with
2 derivative authority, so in other words, the first person to
3 mark this document is not somebody with original authority,
4 it's with derivative authority.

5 MR. LOEB: Right. And the declaration does make
6 clear that all times it was being treated as classified, and
7 then the mark gets classified by the derivative authority --

8 JUDGE GARLAND: All right.

9 MR. LOEB: -- and that's the person who's
10 identified --

11 JUDGE GARLAND: What I want you to do is explain to
12 me how the Executive Order authorizes this kind of procedure,
13 but I also wanted to ask, because we don't have the guide
14 here, can you give us an idea of what kind of thing might be
15 in the guide that leads to this? So, for example, would the
16 guide say something like photos of covert operations abroad
17 are to be classified, or inflammatory photos abroad, or, I
18 mean, what level of generality is the guide at with respect to
19 the way in which the person with only derivative authority is
20 making the classification?

21 MR. LOEB: I believe the guide itself is classified,
22 and I'd be hesitant to, I mean, I would say those kind of
23 things here, I'd be fine --

24 JUDGE GARLAND: Well, the reason I ask this is
25 because this is the only case I found that has addressed this

1 issue was a Southern District of New York case in which they
2 quote from the guide. So, obviously not all of the guide
3 is --

4 MR. LOEB: Obviously not all of it is --

5 JUDGE GARLAND: -- classified. Yes.

6 MR. LOEB: -- but we have, it wasn't part of the
7 record here, and I'm not --

8 JUDGE GARLAND: I see. All right. Well, in that
9 case could you explain to me how this procedure is authorized
10 by the Executive Order?

11 MR. LOEB: All right. So, if you look at our
12 addendum, page six, which is --

13 JUDGE GARLAND: Just tell me the section. I have
14 the Executive Order separately.

15 MR. LOEB: It's 2.1, it says person derivative
16 classification authority is someone who's either reproducing
17 something that's already been classified, or, in the end of
18 the sentence, or is directed by a classification guidance.
19 And then in the next section is 2.2 which gives the criteria
20 for --

21 JUDGE GARLAND: But it says, then it says persons
22 who apply derivative classification markings shall, and lists
23 three things, the second of which is observe and respect
24 original classification decisions. Where is the original
25 classification decision here?

1 MR. LOEB: That is, again, the original
2 classification in that instance is the guidance itself. And
3 as --

4 JUDGE GARLAND: For us to make that judgment doesn't
5 it really depend on us seeing the guide, or some level of
6 specificity in the guide. What if the guide just says do
7 whatever you want?

8 MR. LOEB: Well, the criteria for the guide has to
9 meet the Executive Order 2.2, which is the next provision.
10 And it requires a certain amount of training, it requires a
11 certain amount of, it doesn't talk about the level of
12 specificity, but it talks about the type of criteria that need
13 to be, and standards that need to be in the guide itself. So,
14 and the Plaintiffs here haven't argued -- and whatever the
15 guideline is here that they haven't argued that that's been
16 violated, or that there's any --

17 JUDGE GARLAND: No, but what they --

18 MR. LOEB: -- judicial rights created by the
19 guideline itself.

20 JUDGE GARLAND: No, no, but they have argued that
21 there's no original classification authority listed on the
22 document.

23 MR. LOEB: I think whether there was or not we have,
24 as Judge Rogers pointed out we have Director Bennett who --

25 JUDGE GARLAND: So, I take it that to be a fallback

1 position, that is --

2 MR. LOEB: Right. What happened here was what
3 happens, you know, usually the person who foreuns the
4 information in the first instance is not an original
5 classification authority, those people are very few in the
6 Government. So, you know, I would say a large percentage of
7 the classification is done in material, people are done under
8 the guidelines, people who are abroad, people are here, you
9 know, on ships abroad, or in NCI locations abroad, so this is
10 sort of, there's something sort of unusual about what went on
11 here, and then what happens is part of the job of Director
12 Bennett is to review those determinations and to de-classify
13 things which don't need to be classified.

14 JUDGE GARLAND: Is part of his job to review those
15 things regardless of whether there was a FOIA request? That
16 is had there been no FOIA request is it his obligation to
17 review all initial classifications that are only derivative
18 and to decide whether they were appropriately done?

19 MR. LOEB: I don't think it's his job to review all
20 because the amount of derivative classifications --

21 JUDGE GARLAND: Right. I would imagine.

22 MR. LOEB: -- of the Government is probably
23 tremendous, but certainly that's within his job description is
24 that he is to ensure that, is that information is properly
25 classified and de-classify information that is, you know,

1 over-classified.

2 JUDGE GARLAND: All right. And what about their
3 question which, and again, I'm not clear from the responses,
4 was the first classification applied by the person with
5 derivative authority made before or after the FOIA request
6 reached the CIA?

7 MR. LOEB: As the District Court recognized under
8 their own time line the decision --

9 JUDGE GARLAND: I'm interested in what the answer
10 is.

11 MR. LOEB: Our position is that it was done before
12 the FOIA request to the CIA here, which was -- so --

13 JUDGE GARLAND: Okay. When you say it's your
14 position that's your position as a matter of fact.

15 MR. LOEB: As a matter of fact, yes.

16 JUDGE GARLAND: Okay. And what about the markings,
17 were they put on before or after the FOIA request?

18 MR. LOEB: The declarations on this say that they
19 were marked at the time of Director Bennett's review as top
20 secret, and that additional review was --

21 JUDGE GARLAND: So, that would have been afterwards?

22 MR. LOEB: That would have been afterwards, Your
23 Honor. There's no -- the declarations don't speak to how they
24 were marked before.

25 JUDGE GARLAND: So, we don't know how they were

1 marked before?

2 MR. LOEB: Right. I don't personally know that.
3 And Ms. Culver's declaration explains that additional review
4 and scrutiny was done of them to make sure that all the proper
5 markings were made and that, you know, in her declaration she
6 explains that, you know, that as of the time of her
7 declaration we have that they're marked with the identity of
8 the original classifier who was under derivative authority,
9 his authority which is the guidance, the basis for the
10 classification, de-classification instructions, that those
11 things are all marked on each record. And it really matter as
12 a matter of law as to when those markings were made --

13 JUDGE GARLAND: Well, it does matter because if
14 they're put on after then you have the provision that requires
15 document by document review, in this case there was document
16 by document review, according to Ms. Culver, but if there
17 hadn't been it would matter, isn't that right?

18 MR. LOEB: As to the markings? I mean, that goes to
19 the substance of the review, but as to the markings the
20 question is before the Court are they marked appropriately
21 procedurally under the Executive Order, and we have a
22 declaration, a very sufficient detailed declaration from Ms.
23 Culver explaining how they're marked, et cetera, and that
24 they're sufficiently marked today. And the District Court
25 correctly said in light of that detailed declaration there was

1 no need for in camera review to make sure they were
2 appropriately marked because the declaration tells you
3 everything you need to know.

4 JUDGE GARLAND: The provision that's applicable to
5 things that are done afterwards is that only to the whether
6 classification was made afterwards, or does it apply to the --

7 MR. LOEB: It speaks to the classification. So, if
8 the classification --

9 JUDGE GARLAND: I see.

10 MR. LOEB: So, here there's no doubt the
11 classification was done beforehand, but even if it wasn't we
12 have under 1.7(d) it says it's completely fine to classify it
13 after a FOIA request as long as the person reviewing it is
14 doing it under the direction of the Agency head, which is what
15 we have here, Director Bennett under the declarations was
16 reviewing these on a document, document basis under direction
17 of the Director of the CIA, and made a determination that
18 after that document by document review that it's all properly
19 classified. So, that's Section 1.7(d) of the Executive Order,
20 and that's, I think they try to make some big deal that this
21 is some sort of extraordinary thing that is again a fairly, a
22 usual course of events, as well. And so, it complies with the
23 Executive Order because they were appropriately marked and
24 they meet the standards of the Executive Order. And as to the
25 timing, 1.7(d) just makes that issue moot because even if

1 they're correct about, even if they're correct in their
2 speculation that it was classified after they requested it
3 just doesn't make a difference because the review was done at
4 the direction of the Director of the CIA in a document by
5 document basis. And Ms. Culver's declaration expressly states
6 those salient facts.

7 JUDGE ROGERS: Anything further?

8 MR. LOEB: No, Your Honor. We would ask this Court
9 to affirm the District Court's judgment here. Thank you.

10 JUDGE ROGERS: Thank you.

11 ORAL ARGUMENT OF MICHAEL BEKESHA, ESQ.

12 ON BEHALF OF THE APPELLANT

13 MR. BEKESHA: I just want to briefly talk about the
14 classification procedures. The Government seems to suggest
15 that this isn't a big deal, that we are --

16 JUDGE ROGERS: I didn't hear them say that.

17 MR. BEKESHA: He suggested that this is how it
18 happens all the time, if there were a problem they fixed it,
19 and the Court should not be concerned about the classification
20 procedures. However, exemption one specifically requires that
21 material be withheld only if it meets the classification
22 requirements and that it was properly classified. To strike
23 out one component of exemption one would change the exemption
24 into a disclosure statute instead of --

25 JUDGE ROGERS: I know, but I think your burden now

1 is to show that Mrs. Culver's declaration is contrary in some
2 way to the procedures authorized by the Executive Order.

3 MR. BEKESHA: I think there are two point there.
4 One, there is no evidence in the record that the
5 classification took place prior to the receipt of the FOIA
6 request.

7 JUDGE ROGERS: Okay.

8 MR. BEKESHA: It's not in the record, none of the
9 declarations state that, we heard it here today for the first
10 time. Before today we were unaware that the Government made a
11 classification prior to the FOIA request, it's just not in the
12 record.

13 JUDGE GARLAND: That is what the District Court
14 said, though, right?

15 MR. BEKESHA: That it wasn't in the record?

16 JUDGE GARLAND: No, the District Court --

17 JUDGE ROGERS: No.

18 JUDGE GARLAND: -- said that it was done before, not
19 the markings, but the classification was done before.

20 MR. BEKESHA: I believe the District Court said in
21 the end it didn't, the Court didn't find that it mattered
22 because of the clarification in the supplemental declaration.
23 There's nowhere in either affidavit that states that the
24 classification took place prior to the FOIA request, and why
25 that is important is because Section 1.7(d) talks about the

1 proper authority may classify or re-classify information after
2 receiving a FOIA request, it doesn't talk about a review on a
3 document by document basis. The Government's argument is that
4 Director Bennett reviewed the documents individually,
5 therefore it complies with the Executive Order. However, the
6 Executive Order doesn't talk about subsequent review on a
7 document by document basis, it talks about a classification on
8 a document by document basis. In this instance there's no
9 evidence that the Government followed the proper
10 classification procedures when it allegedly classified all 52
11 records, we don't know when it took place, really how it took
12 place, this was the first time --

13 JUDGE GARLAND: What was the difference between
14 reviewing and classifying? Ms. Culver says I have personally
15 reviewed each of the 52 unique responsive documents at issue
16 in this litigation, based on this review I have confirmed that
17 each of these records satisfies the procedural requirements of
18 Executive Order 13526.

19 MR. BEKESHA: She talks about review there.

20 JUDGE GARLAND: Well, she said she confirms, she's
21 confirming that they are properly classified. I mean --

22 MR. BEKESHA: That's correct, but --

23 JUDGE GARLAND: -- even if that classification
24 occurred afterwards here's somebody with original
25 classification authority who has, who says she's personally

1 reviewed it and she confirms that they're properly classified,
2 what more do you want her to say?

3 MR. BEKESHA: The Executive Order seems to be, the
4 language is clear that it's a classification on an individual
5 basis after the fact. Ms. Culver doesn't say that she
6 classified the records.

7 JUDGE GARLAND: She said she reviewed them and they
8 were at that point properly classified. You mean the
9 difference would be and I hereby therefore re-classify them,
10 that's the additional words that have to be said?

11 MR. BEKESHA: In the FOIA context a declaration the
12 words matter, and in this instance we --

13 JUDGE GARLAND: There's no case where they've had
14 both the head of the Clandestine Service and the person
15 responsible for classification under the Clandestine Service
16 saying that they have reviewed case by case, and confirmed
17 that it is now properly classified. So, when say there are
18 cases, and there's actually no case that's ever released a
19 document on this ground, all the cases simply remand, but none
20 of them have had one. I mean, in those cases this is what we
21 would be asking, we would be asking to send it back for a
22 remand for somebody to confirm that they're properly
23 classified, and here you already have two people saying that,
24 why isn't that good enough?

25 MR. BEKESHA: The two declarations taken as a whole

1 really doesn't explain what occurred when the classifications
2 occurred and how they occurred. Today was really the first
3 time that this discussion of a guide was used for the initial
4 classification. Prior to this point it appeared, and I
5 believe the District Court talked about that somebody else
6 first classified the information, it was then sent or
7 received, somehow the CIA took possession of the information
8 and the images and they conducted a derivative classification
9 of the information. It's unclear, as Your Honor said, what
10 this guide is, what is in the guide. I mean, these affidavits
11 about the classification are murky, they're unclear, they're
12 not transparent, and the courts to be able to decide whether
13 or not the Government followed the classification procedures,
14 which is required by exemption one, the declarations have to
15 be more sufficient, they have to be more specific, they have
16 to be clearer, because otherwise there's room for abuse. And
17 in this instance for whether or not these materials would harm
18 national security, whether or not these materials pertain to
19 foreign activities, whether or not these materials would
20 reveal intelligence activities or methods, all we are asking
21 for --

22 JUDGE GARLAND: Yes, but this, what you're talking
23 about now is the substance. What you were talking about a
24 minute before was the procedure, right?

25 MR. BEKESHA: That's correct, Your Honor. But in

1 all of these circumstances --

2 JUDGE GARLAND: So, the only issue about what Ms.
3 Culver was testifying about who has the original, et cetera,
4 that has to do with the procedures by which they were marked,
5 right?

6 MR. BEKESHA: That's correct, Your Honor.

7 JUDGE GARLAND: So, the issues that you're talking
8 about now are the ones that are either in Bennett's
9 explanation of the danger that will result, or in the other
10 one, Neller, I think.

11 MR. BEKESHA: That's correct, Your Honor. I was
12 just trying to -- but in all those instances whether or not
13 it's the substance, or of a classification over those three or
14 four affidavits, the issue is a lack of specificity, a failure
15 to satisfy the Government's burden of providing the Court, as
16 well as the FOIA requester with enough information to figure
17 out what the Government did to properly and sufficiently
18 analyze the claims of exemption, and in this case with whether
19 it be in regard to the classification procedure, or of a
20 substance of the images the Government failed to provide the
21 specificity necessary.

22 JUDGE ROGERS: All right. Thank you.

23 MR. BEKESHA: Thank you.

24 JUDGE ROGERS: We'll take the case under advisement.

25 (Recess.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct
transcription of the electronic sound
recording of the proceedings in the
above-entitled matter.



Paula Underwood
DEPOSITION SERVICES, INC.

April 19, 2013