IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., Plaintiff, v. U.S. DEPARTMENT OF DEFENSE, and CENTRAL INTELLIGENCE AGENCY, Defendants.	Civil Action No. 1:11-cv-00890-JEB

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Defendants' motion for summary judgment established that the Central Intelligence Agency and the Department of Defense properly withheld from disclosure 52 records responsive to plaintiff Judicial Watch's Freedom of Information Act request 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." The government classified these records, which all show Osama bin Laden after he was killed by the United States, because of their potential to ignite anti-American sentiments and incite violence against the United States and its officials and citizens abroad, and because they reveal specific intelligence activities and methods and specific military methods, tools, equipment, and techniques employed during or after the operation. The government described the records with enough specificity to allow Judicial Watch and the Court to determine whether the records were properly withheld under FOIA Exemption 1, without

revealing sensitive, classified information. The law requires nothing more. In addition, the government established that all of the responsive records pertain to intelligence activities and methods because they are the product of a highly sensitive operation conducted under the direction of the CIA. Thus, all of the records fit squarely within the coverage of the National Security Act, the Central Intelligence Agency Act, and FOIA Exemption 3.

In opposition, Judicial Watch launches a host of complaints about the adequacy of the declarations submitted in support of withholding the records. Judicial Watch errs, however, by focusing on bits and pieces of information the government did not provide, as opposed to explaining how the information the government did provide prevents it or the Court from evaluating the soundness of the government's withholdings. Tellingly, Judicial Watch never explains how the information it wants the government to provide—ranging from the specific type of record, to the specific location where each image was taken, to the specific purpose for which each record was taken—is relevant to contesting the government's withholding rationales. Indeed, given the detailed descriptions of the records already provided by the government, and the detailed rationales for the government's classification decision, there exists no apparent basis for demanding additional information that is plainly not needed for purposes of testing the government's claims. To the extent plaintiff's true motive is to obtain through its demand for a more detailed *Vaughn* declaration information that is itself exempt, plaintiff's demand should be rejected. The law is clear that the government is not required to disclose information in its *Vaughn* declaration that, if public, would compromise national security.

Judicial Watch's argument on the merits is even less persuasive. The government's declarations easily establish the logic and plausibility of the government's determination that

release of the post mortem images of bin Laden reasonably could be expected to cause exceptionally grave damage to national security, notwithstanding Judicial Watch's own opinion that no additional harm can come from releasing the images because al-Qa'ida already hates America. It is the Executive Branch, not Judicial Watch, that is responsible for the nation's security and the security of American personnel overseas. The Executive departments have "unique insights" into the harm that could result from the disclosure of these images of bin Laden, *Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 927 (D.C. Cir. 2003), and the court should defer, therefore, to the declarants' substantial experience and judgment, rather than to plaintiff's opinion. *Id.*

Finally, Judicial Watch's arguments that DoD did not conduct an adequate search and that the CIA did not demonstrate that it complied with the procedural requirements for classification should be swiftly rejected. Judicial Watch's complaints about the adequacy of DoD's search are based on pure supposition about where certain officials viewed the records, and are negated by Judicial Watch's own recitation of events. And, to the extent the Court has any doubts about the CIA's compliance with the procedures required for classification (which it should not based on declarations already submitted), the CIA has submitted an additional declaration making even more plain that the CIA has complied with all procedural steps required by Executive Order 13,526. Accordingly, DoD conducted a reasonable search, and the CIA has carried its burden in justifying the withholding of the requested records under FOIA Exemptions 1 and 3. The Court should deny plaintiff's cross-motion for summary judgment and enter judgment on behalf of defendants.

ARGUMENT

I. DoD'S SEARCH WAS ADEQUATE BECAUSE DoD SEARCHED ALL LOCATIONS WHERE RESPONSIVE DOCUMENTS WERE REASONABLY LIKELY TO BE FOUND.

Judicial Watch's challenge to the adequacy of DoD's search is based on three alleged "critical omissions" in the declaration of William T. Kammer: (1) that DoD did not search Defense Secretary Gates' office; (2) that DoD did not search the "Joint Worldwide Intelligence Communications System ('JWICS')"; and (3) that "Mr. Kammer did not testify as to whether any records exist depicting the period after the SEALS left Pakistan with bin Laden's body." Pl.'s Mot. at 16-17. None of these alleged "omissions" undermine Kammer's declaration or the adequacy of DoD's search, which need not include every office in DoD, but only those where documents were reasonably likely to reside. *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007).

DoD determined that the Office of the Chairman of the Joint Chiefs of Staff ("OCJCS"), the U.S. Special Operations Command ("USSOCOM"), and the Department of the Navy were the DoD Components likely to have responsive records and searched those offices. Kammer decl. at ¶ 4. Mr. Kammer explained why those offices would be the most likely repository for the records at issue. *Id*. at ¶¶ 5-7. Nevertheless, Judicial Watch argues that DoD should have searched Secretary Gates' office for responsive records because "it has been widely reported that Secretary Gates advised President Obama about whether to release post mortem photographs of bin Laden. To be able to provide such advice, it is nearly inconceivable that DoD did not have possession of the photographs." Pl.'s Mot. at 16. The argument that Secretary Gates must have maintained copies of photographs of bin Laden merely because he saw them is pure speculation,

and not very convincing speculation at that. It is of course conceivable that Secretary Gates viewed the photographs somewhere other than his office and/or that he did not keep copies of them. In fact, Judicial Watch itself reports that members of Congress viewed post mortem photographs of bin Laden at CIA headquarters. *Id*. at 10. *See also* Bennett decl. at ¶¶ 10-11 (responsive photographs were located at the CIA).

The same is true for Judicial Watch's theory that DoD should have searched the "JWICS," asserted by Judicial Watch to be "a system of interconnected computer networks used by DoD and the U.S. Department of State to transmit classified information by packet switching over TCP/IP in a secure environment." Pl.'s Mot. at 17. DoD should have searched JWICS, Judicial Watch argues, because "it has . . . been reported that Secretary of State Hillary Clinton provided advice to President Obama about whether to release post mortem photographs of bin Laden," thus "it is more than plausible that responsive records were transmitted to/from DoD or the U.S. Department of State via JWICS." *Id*. This argument suffers from the same logical flaw as the one about Secretary Gates, as Secretary Clinton too could have viewed the photographs in a location other than her office. Nor does Judicial Watch provide any basis for its assertion that Secretary Clinton's purported viewing was accomplished via JWICS. Unlike FOIA requests for large, amorphous collections of documents, plaintiff's request here targeted a known universe of documents. DoD targeted the locations where, if they existed at DoD, the documents would reside. Plaintiff's speculation, based on nothing more than press reports that Secretaries Gates and Clinton saw the documents, cannot defeat the reasonableness of DoD's search.

Judicial Watch's additional claim that "Mr. Kammer did not testify as to whether any records exist depicting the period after the SEALS left Pakistan with bin Laden's body," Pl.'s

Mot. at 17, is simply incorrect. Mr. Kammer specifically stated that emails in the computer system of the USS Carl Vinson, the aircraft carrier from which bin Laden's body was buried at sea, were searched for any mention of responsive photographs or videos, but that this search did not reveal evidence of any such photographs or videos on the USS Carl Vinson. Kammer decl. at ¶ 8. More generally, after describing all of the offices searched, Mr. Kammer stated "no records responsive to plaintiff's request were located." Plaintiff's request, as Judicial Watch well knows, was 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." *Id*. at ¶ 3 and Exhibit 1 thereto (emphasis added). Thus, Mr. Kammer clearly answered the question of whether any photographs or video of bin Laden taken after the raid—i.e., "depicting the period after the SEALs left Pakistan with bin Laden's body"—were found.

II. THE GOVERNMENT ADEQUATELY DESCRIBED THE RESPONSIVE RECORDS.

Throughout its brief, Judicial Watch attacks the adequacy of the declarations submitted in support of the withholding of the responsive records. Rather than focus on the specific information defendants *did* provide about the records, Judicial Watch instead complains about bits and pieces of information defendants did not provide. Judicial Watch fails to explain, however, why it actually needs any of this information to contest the government's basis for withholding the records, which is the undisputed purpose of *Vaughn* declarations. *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973) (holding that agencies must provide sufficient detail to determine whether the information withheld under FOIA falls within the terms of a statutory exemption). Judicial Watch compounds this failure by ignoring the fact that the government cannot further describe the records on the public record without potentially causing harm to

national security. Bennett decl. at ¶ 12. The government has provided sufficient information about the records to allow Judicial Watch and the Court to evaluate the claimed withholdings—all that it is required to do. Judicial Watch's improper attempt to secure more information about these highly sensitive records should be denied.

The specificity requirement for an agency's Exemption 1 declaration is not an abstract one, but rather has a targeted purpose: an agency's Exemption 1 declaration is required to be "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 v. DOJ*, 830 F.2d 210, 218 (D.C. Cir. 1987). *See also Campbell v. DOJ*, 164 F.3d 20, 30 (D.C. Cir. 1998). And a declaration need only be specific enough to "demonstrat[e] 'that material withheld is logically within the domain of the exemption claimed.'" *Campbell*, 164 F.3d at 30 (quoting *King*, 830 F.2d at 217). *See also ACLU v. DoD*, 628 F.3d 612, 619 (D.C. Cir. 2011) ("Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical and plausible.") (internal quotations omitted). Nor must a declaration contain "'factual descriptions that if made public would compromise the secret nature of the information.'" *Hayden v. NSA*, 608 F.2d 1381, 1384-85 (D.C. Cir. 1979) (quoting *Vaughn*, 484 F.2d at 826). *See also Bassiouni v. CIA*, 392 F.3d 244, 245-47 (7th Cir. 2004) (CIA not required to provide a list of responsive documents and claim document-by-document exemptions for those whose contents are classified, where doing so would reveal details about intelligence-gathering methods).

The government clearly has met this standard. Its descriptions of the content of the withheld records and the justifications for withholding were sufficiently detailed and specific to

allow Judicial Watch and the Court to evaluate the government's Exemption 1 and 3 claims. The government provided as fulsome a description of the records as possible without revealing classified information. The CIA identified the number of responsive records (52); the medium of the records (photographs and/or video recordings); the date the photographs and/or video recordings were taken (on or about May 1, 2011); and the content of the records, *i.e*., depictions of Osama bin Laden after he was killed. Bennett decl. at ¶ 11. The CIA further explained that many of the records show the fatal bullet wound to bin Laden's head and other similarly graphic images of his corpse; many were taken inside bin Laden's compound in Abbottabad, Pakistan, where he was killed, while others were taken as his corpse was being transported from the Abbottabad compound to the location where he was buried at sea; other images show the preparation of bin Laden's body for burial; and other images show the burial itself. *Id*.

In addition, the CIA explained that some of these records were taken for purposes of facial recognition analysis, the release of which would reveal classified information about how the CIA conducts this analysis. *Id*. at ¶¶ 11, 29. Other records reveal other intelligence equipment or tools used during this highly sensitive intelligence operation. *Id*. at ¶ 29. Some of the records reveal unique information about the Special Operations unit that participated in this operation, making its members readily identifiable in the future. McRaven decl. at ¶¶ 3, 5.[1] Multiple photographs show equipment used by the particular Special Operations unit during the operation. *Id*. at ¶ 5. Classified Military Sensitive Site Exploitation Tactics, Techniques, and

[1] All references to Admiral McRaven's declaration are to the redacted version filed on the public record. Admiral McRaven's classified declaration was lodged with the Court when defendants filed their summary judgment motion. *See* Dkt. No. 15 (notice of lodging of classified declaration).

Procedures are also depicted in the photos. *Id*. at ¶ 6. Certain records reveal the methods that special operations forces use for identification of captured and killed personnel. *Id*. at ¶ 3.

The government's description of the records is more than sufficiently detailed to justify withholding all of the records under Exemptions 1 and 3. The description establishes that all 52 records fall into one or more of the categories of information listed in section 1.4 of Executive Order 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009). In order to be responsive to Judicial Watch's request, all of the records are, by definition "photographs and/or video recordings of Osama bin Laden taken during and/or after the U.S. military operation in Pakistan on or about May 1, 2011." Thus, "*all* of the records are the product of a highly sensitive, overseas operation that was conducted under the direction of the CIA; accordingly, . . . *all* of the records pertain to intelligence activities and/or methods as well as the foreign relations and foreign activities of the United States." Bennett decl. at ¶ 21 (emphasis added); E.O. 13,526 at § 1.4(c), (d). In *addition*, the description establishes that *some* of the records reveal specific intelligence activities and methods employed during or after the operation, and others reveal information pertaining to military plans, weapons systems, or operations. *See* Bennett decl. at ¶¶ 21, 28, 29; McRaven decl. at ¶¶ 3, 5; E.O. 13,526 at § 1.4(a). There is simply no reason (and Judicial Watch has identified none) why Judicial Watch needs a numbered list of each record with the corresponding section 1.4 categories in order to challenge the government's withholdings, and, accordingly, the government is not required to provide such a list.

The description of the records is also sufficiently detailed to permit the Court and Judicial Watch to determine if the CIA's claim that release of all of the records reasonably could be expected to result in exceptionally grave damage to national security is "plausible" and

"logical." *ACLU*, 628 F.3d at 619. The description establishes that all of the records show bin Laden after he was killed by U.S. forces. The CIA and DoD plausibly and logically determined that release of each of these images of a deceased bin Laden poses a clear risk of inciting violence against the United States. For over two decades, bin Laden was the leader and symbol of al-Qa'ida, a terrorist organization at war with the United States. The mere release of the images could be interpreted as a deliberate attempt by the United States to humiliate bin Laden, which could trigger violence, attacks, or acts of revenge against the United States. The release of images showing the bullet wound to bin Laden's head plausibly and logically pose a particularly grave threat of inflaming anti-American sentiment and resulting in retaliatory harm. Bennett decl. at ¶¶ 23-27. This justification, that images of a deceased bin Laden, after his death at the hands of U.S. forces, reasonably could be expected to incite violence against the United States and its personnel overseas, is the core Exemption 1 justification for withholding all 52 records, which all contain post mortem images of bin Laden. Thus, even if any sensitive information about specific intelligence methods or specific military operations could be redacted from the records, as Judicial Watch suggests is possible, the remaining material—*i.e.*, post mortem images of the dead body of the former leader of al-Qa'ida—would still be exempt from disclosure. *See also* Bennett decl. at ¶ 35 (segregability analysis).

Judicial Watch makes much of the fact that the CIA did not state which particular records fall into each "category" of records, described by Judicial Watch as (1) images taken inside the compound in Abbottabad, (2) images taken as bin Laden's body was transported from the compound to the location where he was buried at sea, (3) images depicting the preparation of bin Laden's body for burial, (4) images of the burial itself, and (5) images taken for purposes of

conducting facial recognition analysis.[2] Pl. Mot. at 19-22. Reduced to its essence, Judicial Watch's complaint is that the CIA did not list the responsive records by number and then describe what each numbered record shows. But the CIA could not have done this without potentially revealing classified information. Bennett decl. at ¶ 12 ("[B]ecause of the highly classified nature of these images, I cannot further describe their contents or the circumstances in which they were obtained on the public record without potentially causing harm to national security. Among other things, release of additional descriptive information concerning the responsive records could expose whether the CIA utilized certain intelligence methods, equipment, tools, technical capabilities, or other operational methods in the course of and immediately after effectuating this highly sensitive operation."); *Hayden*, 608 F.2d at 1384-85; *Bassiouni*, 392 F.3d at 245-47. Remarkably, Judicial Watch does not acknowledge this fact, let alone contest it, anywhere in its 45-page brief, despite the government's emphasizing this precise point in its opposition to Judicial Watch's motion for a Vaughn index and stay of the briefing schedule. *See* Dkt. No. 18 at 6-7.

Moreover, no where does Judicial Watch articulate why it needs a numbered, document-by-document description of the responsive records in order to challenge the withholdings. The fact that Judicial Watch may want such a description to compare to various press reports is immaterial. For instance, based on one media report, Judicial Watch claims that "there were numerous news reports that the President received three categories of photographs. The three categories included: (1) photographs taken within the compound in Pakistan; (2) photographs of

[2] The CIA did not describe the records as falling into five distinct categories; this characterization is Judicial Watch's.

bin Laden's body at a hangar after it was brought to Bagram Airbase in Afghanistan; and (3) photographs taken prior to and during the burial at sea . . . . Defendants fail to even address whether photographs were taken at Bagram Airbase or whether they are included in the 52 records." Pl.'s Mot. at 20.[3] This argument begs the question, how would knowing the number of photographs or video recordings, if any, taken at Bagram Airbase, as opposed to other locations, add to the description already provided in terms of evaluating the soundness of the withholdings? Judicial Watch does not say. Nor does it say why a breakdown of the number of photographs versus video recordings, or how the number of records that fall within each of Judicial Watch's five categories, is necessary to Judicial Watch's ability to challenge the withholdings, given the detailed description of the records provided by the government. Judicial Watch is silent on the relevant question before the Court: does the information the government *did* provide in its declarations provide a logical basis to believe the withheld information falls within the claimed exemptions? Providing the information that Judicial Watch wants (but does not need) will not help Judicial Watch or the Court scrutinize the government's rationale for withholding the records, but it will disclose classified information.[4]

[3] This one media report, which Judicial Watch refers to repeatedly in its brief, is not necessarily inconsistent with the descriptions provided by the CIA, *see* Bennett decl. at ¶ 11, and does not constitute contrary evidence sufficient to defeat summary judgment. *See ACLU*, 628 F.3d at 619. The same is true of statements that Judicial Watch attributes to Senator Inhofe. *See, e.g.*, Pl.'s Mot. at 20.

[4] The CIA reiterates its position that, if the Court requires, it is prepared to provide a classified, *ex parte* declaration containing additional information that the CIA cannot file on the public record. *See* Bennett decl. at ¶ 1.

III. THE GOVERNMENT ESTABLISHED THAT RELEASE OF ALL 52 RESPONSIVE RECORDS REASONABLY COULD BE EXPECTED TO CAUSE EXCEPTIONALLY GRAVE DAMAGE TO NATIONAL SECURITY.

As noted above, defendants established in their declarations and opening brief that the CIA logically and plausibly determined that the release of images depicting Osama bin Laden after he was killed by U.S. forces, many of which contain graphic details, reasonably could be expected to inflame anti-American sentiment and provoke deadly attacks on the United States or its citizens abroad. Indeed, the CIA and DoD's arguments about the potential for such harm were not only logical and plausible—all they need to be to command deference—but highly persuasive. Judicial Watch challenges the opinion of the CIA and DoD by asserting its own, contrary opinion that al-Qa'ida already hates America and needs no additional fuel to flame its hatred. Because any subsequent attack on America could not be conclusively tied to the release of these images, the argument goes, the CIA and DoD's opinion that release of the images could result in attacks on America is "speculative at best." Pl.'s Mot. at 38. The Court should reject this oft-attempted, yet always unsuccessful, effort to second-guess executive declarations' predictions of harm to national security, "a uniquely executive purview." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 926-27.

The standard of review here is paramount and bears repeating. "[I]n the FOIA context, [the D.C. Circuit has] consistently deferred to executive affidavits predicting harm to the national security, and [has] found it unwise to undertake searching judicial review." *Id.* at 927. This is "'because the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [sic] might occur as a result of a particular classified record.'" *Id.* (quoting *McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983)).

When faced with a "clash of opinion" about the harm to national security, "the courts must hew to the statutory mandate to place *substantial weight* on the agency's assessment of risks." *Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984) (internal quotations omitted) (emphasis in original). The test is simply not whether Judicial Watch, or even the Court, agrees with the CIA and DoD's assessment of the danger. *ACLU v. DOJ*, – F. Supp. 2d –, 2011 WL 4005324, at * 6, 16 (D.D.C. Sept. 9, 2011). Rather, defendants' arguments "need only be both 'plausible' and logical' to justify the invocation of a FOIA exemption in the national security context." *ACLU*, 628 F.3d at 624.

It is certainly plausible and logical that release of the post mortem images of bin Laden, the leader and symbol of al-Qa'ida for over two decades, could incite attacks against the citizens of the country that killed him, even though it is already known that he was killed at the hands of U.S. forces and even though al-Qa'ida has a pre-existing dislike for America. *Cf. ACLU*, 2011 WL 4005324, at * 16 ("The fact that the public may already speak freely of the existence of drones, or speculate openly that such a program may be directed in part or in whole by the CIA, does not emasculate the CIA's warnings of harm were it forced to acknowledge officially the existence or nonexistence of requested records."). Defendants do not have to show that release of the images will lead to attacks or otherwise harm national security, just that they "reasonably could be expected to" do so. E.O. 13,526 §§ 1.1(a)(4), 1.2(a)(1). Given this standard, an agency's assessment of harm is necessarily predictive. *Wolf v. CIA*, 473 F.3d 370, 377 (D.C. Cir. 2007) ("any . . . 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."); *Int'l Counsel*

Bureau v. CIA, 774 F. Supp. 2d 262, 271 (D.D.C. 2011).[5] While al-Qa'ida has demonstrated that it does not need a reason to attack us, that does not mean that it will not use the release of these images as a reason to attack us, and that release of the images will not cause harm to national security. Importantly, the CIA and DoD declarants have actually seen and assessed the images on which they opine, as opposed to Judicial Watch. Notwithstanding Judicial Watch's contrary opinion, defendants' expert opinion on the potential harm from the release of the records easily satisfies the highly deferential standard of "plausible" and "logical."[6]

Judicial Watch's reliance on *ACLU v. DoD*, 389 F. Supp. 2d 547 (S.D.N.Y. 2005), for dicta about terrorists not needing a pretext to attack us, is misplaced. *See* Pl.'s Mot. at 36-37. In that case, the government claimed that photographs depicting abusive treatment of detainees by U.S. soldiers in Iraq and Afghanistan were exempt from disclosure under FOIA Exemption 7(F), pertaining to law enforcement records that could reasonably be expected to endanger any

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[5] That the classification authority must be able to "identify or describe" the damage to national security, E.O. 13,526 § 1.1(a)(4), does not mean that the harm cannot be predictive. *See* Pl.'s Mot. at 39.

[6] Judicial Watch brazenly claims that the CIA and DoD declarants do not have the "expertise and qualifications" to make the assessment that release of the images reasonably could be expected to cause harm to national security, but that it does. Pl.'s Mot. at 38. The CIA submitted the declaration of John Bennett, the Director of the CIA's National Clandestine Service, the organization within the CIA responsible for conducting the CIA's foreign intelligence and counterintelligence activities. Mr. Bennett has over 25 years of experience as a CIA officer, and most of his career with the CIA was spent in overseas operational positions. His declaration is based, among other things, on his experience countering the current threat that the United States faces from al-Qa'ida and other hostile groups. Bennett decl. at ¶¶ 1-4.

On this point, DoD submitted the declaration of Lieutenant General Neller, the Director of Operations, J-3, on the Joint Staff at the Pentagon. The J-3 is responsible for all DoD operational matters outside the continental United States. Neller decl. at ¶ 1. Mr. Bennett and Lieutenant General Neller are unquestionably qualified to assess the harm to national security that could be caused by release of the images.

individual, not Exemption 1. In the same opinion from which Judicial Watch quotes extensively, the district court in fact acknowledged the risk that release of the photographs could incite violence, but went on to balance it against the benefits of disclosure and ordered the photos released. 389 F. Supp. 2d at 578. *See also ACLU v. DoD*, 543 F.3d 59, 67 (2d Cir. 2008), *vacated*, – U.S. –, 130 S. Ct. 777 (2009). In a related opinion, the Second Circuit also assumed that "the photographs could reasonably be expected to incite violence against United States troops, other Coalition forces, and civilians in Iraq and Afghanistan," but disposed of the issue by interpreting Exemption 7(F) to require the government to identify at least one individual at risk with specificity. *ACLU*, 543 F.3d at 67 n. 3.[7] The case was decidedly not an Exemption 1 case (the photographs in that case were not classified, *see ACLU*, 389 F. Supp. 2d at 568-79; *ACLU*, 543 F.3d at 73 n. 7). Had Exemption 1 been invoked, the court would have been required to defer to the acknowledged governmental assessment of harm, as the Court is required to do here.

Judicial Watch also argues that "other graphic post mortem photographs of notable figures"—specifically Saddam Hussein's sons and Abu Musab al-Zarqawi, the Iraqi insurgent leader—"have been released in similar circumstances in the past, without any claim of harm to the national security . . . ." Pl.'s Mot. at 38. As an initial matter, there is no support in this record for Judicial Watch's assumption that the release of those photographs produced no harm to national security. Judicial Watch claims it is defendants' burden to show such harm, but that is simply not the case—the only withholding at issue here that the government is obligated to

[7] The photographs at issue in Second Circuit case were technically different from the ones at issue in the district court case cited by Judicial Watch, but they were highly similar, and the cases involved the same legal issues. *ACLU*, 543 F.3d at 65.

support is the withholding of the bin Laden images that plaintiff requested. *See also Military Audit Project v. Casey*, 656 F.2d 724, 740 (D.C. Cir. 1981) (CIA not required to show specific harm materialized as a result of earlier revelations to protect information still secret). In any event, the release of post mortem photographs of Saddam Hussein's sons and of al-Zarqawi cannot be compared to the release of post mortem images of Osama bin Laden, a *sui generis* enemy of America. Furthermore, the fact that the government released post mortem photographs of Saddam Hussein's sons and of al-Zarqawi, but *not* of bin Laden, strengthens rather than weakens the government's assessment of harm expected from the release of the bin Laden photos. It shows that the government conducted a careful analysis tailored to the specific images at issue here, and determined that even though it had released different post mortem images in the past, these particular images could not be released without risking grave harm to national security. *See id.* at 754 (fact that agency released related documents suggests a stronger, rather than a weaker, basis for the classification of documents still withheld).

Judicial Watch erroneously reads defendants' declarations as asserting that the only harm that is reasonably expected to come from release of the post mortem images of bin Laden is that they will be used for anti-American propaganda. Pl.'s Mot. at 40 ("[N]o court has ruled that the propaganda justification alone is sufficient, and this Court should not be the first to create a significant new FOIA exemption."). Instead, the declarations clearly state that (1) propaganda is only part of the harm expected to occur, and (2) the concern is not with propaganda in and of itself, but that it could lead to a violent attack. *See, e.g.*, Bennett decl. at ¶ 23 ("the release of these graphic photographs and other images of [Osama bin Laden's] corpse 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."); *id*. at ¶ 24 ("post-mortem images of [bin Laden] would provide encouragement and ready-made ammunition for al-Qa'ida propaganda which could lead to violence and deadly attacks against the United States homeland or United States citizens, officials, or other government personnel traveling or living abroad."); Neller decl. at ¶ 6 ("I believe that release of the responsive records will pose a clear and grave risk of inciting violence and riots against U.S. and Coalition forces. I also believe that release of the responsive records will expose innocent Afghan and American citizens to harm as the result of the reaction of extremist groups, which will likely involve violence and rioting. It is likely 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.").

Judicial Watch is also wrong that defendants' withholding based on the potential for a retaliatory attack is "unprecedented." Pl.'s Mot. at 39-40. Courts have, in fact, frequently accepted this reason as a basis to withhold information under Exemption 1. *See, e.g., Miller,* 730 F.2d at 777 (confirmation of attempted hostile action against foreign country by United States "might provide the critical bit of information that would support retaliation against former intelligence sources."); *Afshar v. Dep't of State*, 702 F.2d 1125, 1131, 1133 n. 12, 1134 (D.C. Cir. 1983) (official acknowledgment of intelligence relationship could cause retaliation by foreign governments); *Int'l Counsel Bureau*, 774 F. Supp. 2d at 270 (CIA claimed that if its

interest in a foreign national was publicly acknowledged, countries where that foreign national lived could use the information as a reason for retaliation against former associates, including American citizens or other American interests); *Riquelme v. CIA*, 453 F. Supp. 2d 103, 110 (D.D.C. 2006) (acknowledgment of clandestine activities could elicit retaliatory action against American citizens); *Halpern v. FBI*, No. 94-CV-365A(F), 2002 WL 31012157, at * 8 (W.D.N.Y. Aug. 31, 2002) (release of location of CIA stations in foreign countries could cause foreign countries or entities hostile to the United States to retaliate against the host country for cooperating with the CIA or against American citizens or interests). Courts have also permitted withholding under Exemption 1 where release of information could have publicly humiliated our adversaries, adversely affecting national security. *See, e.g.*, *Phillippi v. CIA*, 655 F.2d 1325, 1332-33 (D.C. Cir. 1981).

As we have already explained, each and every responsive record contains a post mortem image of bin Laden, and thus all of the responsive records are properly withheld under Exemption 1 based on the harm expected to result from the release of those images. Additional harms are reasonably expected to occur from the release of images containing specific intelligence activities and methods employed during or after the operation, or information pertaining to military plans, weapons systems, or operations. *See* Defs.' opening brief at 14-16. Judicial Watch concedes the propriety of withholding such information from public disclosure, but repeats its complaint that defendants did not provide a numbered list of which records contained this type of information. *See, e.g.*, Pl.'s Mot. at 30. Again, it is unclear why knowing that, for example, record number X contains unique information about the Special Operations unit that participated in the operation better arms Judicial Watch to rebut the rationale that

disclosure of such information makes the unit's members more readily identifiable in the future and therefore places them and their families at great risk of being targeted by the enemy. *See* McRaven decl. at ¶¶ 3, 5.

Judicial Watch also points to news reports about what equipment was used during the operation. Pl.'s Mot. at 30 n. 6. Media reports do not, of course, constitute official government acknowledgment or confirmation as to what equipment was used and therefore do not undermine defendants' Exemption 1 claim over the withheld information. *See, e.g.*, *ACLU*, 628 F.3d at 625; *Military Audit Project*, 656 F.2d at 743-45; *Int'l Counsel Bureau*, 774 F. Supp. 2d at 275. Nor are reports that some members of the administration may have disagreed with the decision not to publicly release the responsive records at all relevant. The government has logically and plausibly shown that release of the images could be expected to cause exceptionally grave damage to the national security. Accordingly, it is entitled to summary judgment on its decision to withhold the responsive records under FOIA Exemption 1.

IV. THE CIA COMPLIED WITH THE PROCEDURAL REQUIREMENTS OF EXECUTIVE ORDER 13,526 IN CLASSIFYING THE RESPONSIVE RECORDS.

"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." *Lesar v. DOJ*, 636 F.2d 472, 483 (D.C. Cir. 1980). Mr. Bennett declared that he is authorized to make original classification and declassification decisions, including Top Secret classification decisions, Bennett decl. at ¶¶ 2, 18; that he personally reviewed each responsive record, *id*. at ¶ 4; and that he determined, based on his 25 years of experience with the CIA, his knowledge of the operation that killed Osama bin Laden and of the responsive records, and his experience

countering current terrorism threats, that the responsive records are "currently and properly classified in accordance with the substantive and procedural requirements of Executive Order 13526 . . . . " *Id*. at ¶¶ 4, 13. He further attested, in detail, to the conditions set forth in section 1.1(a) of the Executive Order being met. *Id*. at ¶ 17-30.

Judicial Watch attacks Mr. Bennett's declaration for not identifying who classified the records, when the records were classified, when the records will be declassified, and whether the records were properly marked and identified. Pl.'s Mot. at 23-26. The Executive Order requires classified information to be marked with some of this information, but not all of it, and does not require it to be disclosed to plaintiff. *See* E.O. 13,526 §§ 1.6(a), 2.1(b).[8] Moreover, Mr. Bennett's statement that the responsive records are "currently and properly classified in accordance with the substantive and procedural requirements of Executive Order 13526" establishes that the agency complied with the procedural requirements of the Executive Order. *See Schoenman v. FBI*, 575 F. Supp. 2d 136, 152 (D.D.C. 2008) (in light of declarant's statement that document was properly marked confidential because it contained classified national security

[8] For instance, the Executive Order does not require the date of classification to be indicated on the records. Judicial Watch provides no authority for its assertion that "[i]t is defendants' burden to demonstrate specifically when the records were classified . . . ." Pl.'s Mot. at 25; *see also id.* at 12-14. Nor is there any reason why it needs to know this. Judicial Watch claims it needs to know when the records were classified to determine if document-by-document review under E.O. 13,526 § 1.7(d) (pertaining to information classified *after* an agency has received a request for it) was required. But according to Judicial Watch's own chronology (Pl.'s Mot. at 25), the decision to classify the images of bin Laden was made before the CIA received Judicial Watch's FOIA request for them on May 5, 2011. Bennett decl. at ¶ 5. Moreover, even if § 1.7(d) was applicable, which it is not, the records were in fact classified on a document-by-document basis under the direction of the CIA Director. Bennett decl. at ¶ 4 (declaring that he "personally reviewed" "each" of the responsive records and determined they are properly classified); Declaration of Elizabeth Anne Culver, Information Review Officer, National Clandestine Service, CIA, at ¶ 8 (stating that Mr. Bennett was acting under the direction of the CIA Director when he conducted his review) (attached hereto as Ex. A).

information, and presumption of good faith accorded agency affidavits in FOIA cases, plaintiff's speculation that the document may not have been properly marked was insufficient to establish procedural noncompliance, even though the declaration "could stand to be more specific as to the procedural requirements of [the] Executive Order . . . .").

In any event, the CIA submits with this brief another declaration to put to rest any question about whether the agency complied with the procedural requirements of E.O. 13,526 in classifying the responsive records. Declaration of Elizabeth Anne Culver, Information Review Officer, National Clandestine Service, CIA. Ms. Culver confirms that each responsive record is marked "Top Secret" and 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. Culver decl. at ¶ 7. In addition, Ms. Culver explains that "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 [original classification authority] 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 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*. at ¶ 8.[9]

Accordingly, the CIA has cured any alleged procedural defect and demonstrated, beyond a shadow of a doubt, that it has complied with the substantive and procedural criteria of E.O. 13,526. *See Lesar*, 636 F.2d at 484-85 (no consequence for insignificant procedural violation of Executive Order that did not undermine the agency's classification decision).

V. THE GOVERNMENT ESTABLISHED THAT ALL 52 RESPONSIVE RECORDS ARE EXEMPT FROM DISCLOSURE UNDER EXEMPTION 3.

Judicial Watch challenges the government's Exemption 3 assertion on the sole ground that defendants have not sufficiently described "which records are being withheld because they would reveal intelligence activities and methods." Pl.'s Mot. at 44. However, as demonstrated above, Mr. Bennett unambiguously stated that "*all* of the records are the product of a highly sensitive, overseas operation that was conducted under the direction of the CIA; accordingly, . . . *all* of the records pertain to intelligence activities and/or methods as well as the foreign relations and foreign activities of the United States." Bennett decl. at ¶ 21. The fact that some of the responsive records *also* reveal *specific* intelligence activities and methods employed during or after the operation does not undercut Mr. Bennett's assertion that *all* of the records pertain to intelligence activities or methods, thereby bringing all of the records squarely within the coverage of the National Security Act, 50 U.S.C. § 403-1(I), the Central Intelligence Agency Act of 1949, 50 U.S.C. § 403g, and Exemption 3.

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[9] Ms. Culver further explains that "[c]ontrary to Plaintiff's suggestion, after their creation these extraordinarily sensitive images were always considered to be classified by the CIA and were consistently maintained in a manner appropriate for their classification level." Culver decl. at ¶ 7 n. 1.

CONCLUSION

For all of the foregoing reasons, and the reasons set forth in the Memorandum of Law in Support of Defendant's Motion for Summary Judgment, the Court should grant summary judgment in favor of the defendant agencies, deny plaintiff's cross-motion for summary judgment, and dismiss plaintiff's amended complaint it its entirety.

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., Plaintiff, v. U.S. DEPARTMENT OF DEFENSE, and CENTRAL INTELLIGENCE AGENCY, Defendants.	Civil Action No. 1:11-cv-00890-JEB

DEFENDANTS' RESPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Local Civil Rule 7(h) of the Rules of the United States District Court for the District of Columbia, defendants hereby submit the following response to Plaintiff's Statement of Material Facts Not in Dispute in Support of Plaintiff's Cross-Motion for Summary Judgment.[10]

1. Disputed. *See* Declaration of John Bennett, Director, National Clandestine Service ("NCS"), Central Intelligence Agency, at ¶ 11.

2. Defendants do not dispute that the quoted statements appear in the cited transcript, but respectfully refer the Court to the full transcript for a complete and accurate statement of its contents. This "fact" is immaterial to the issues before the Court.

3. Defendants do not dispute that the quoted statement appears in the cited transcript, but respectfully refer the Court to the full transcript for a complete and accurate statement

[10] Plaintiff's objection to Defendants' Statement of Material Facts as not complying with Local Rule 7(h) is meritless. Defendants' Statement of Material Facts sets forth the material facts as to which defendants contend there is no genuine issue, and includes references to the record.

of its contents. This "fact" is immaterial to the issues before the Court.

4. Defendants respectfully refer the Court to the full cited transcript for a complete and accurate statement of its contents. This "fact" is immaterial to the issues before the Court. *See* Bennett decl.; Declaration of Elizabeth Anne Culver, Information Review Officer, National Clandestine Service, CIA, at ¶ 8.

5. Disputed. The quoted statements do not appear verbatim in the cited transcript; this "fact" is immaterial to the issues before the Court; and defendants cannot confirm or deny the substance of any of the quoted statements.

6. Disputed and immaterial.

7. Disputed and immaterial.

8. Defendants cannot confirm or deny this "fact," which is immaterial to the issues before the Court.

9. Defendants cannot confirm or deny this "fact," which is immaterial to the issues before the Court.

10. Disputed and immaterial.

Respectfully Submitted,

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