

IT'S NOT JUST THE SHELL GAME OF MOVING OSAMA BIN LADEN RECORDS-IT'S RETROACTIVE CLASSIFICATION OF THEM

Congratulations to the AP, which has caught up to the reporting I did a month ago on the way SOCOM purged their own systems of Osama bin Laden photos (and, apparently, records) and moved them to the CIA.

But it appears that this shell game involved more than just moving all these records to CIA. It appears CIA had to retroactively classify at least the photographs.

As you recall, Judicial Watch (as well as a bunch of other entities) had FOIAed any pictures of the raid. In its motion for summary judgment, JW made several complaints about the government's FOIA response:

- The search, particularly at DOD, was inadequate.
- The government declarations didn't adequately specify what was included in the pictures (I suspect this was done to hide trophy pictures not shown to Congress or, possibly, even the President).
- The government declarations don't prove that all the photos could cause

- exceptionally grave harm.
- The description of the classification process was inadequate.

It is the last of these that is most interesting, given the apparent fact that DOD transferred all its photos to CIA (plus my suspicion that a lot of these are trophy photos, not official operational photos).

First, Defendants fail to identify who classified the records. Director Bennett testifies as to who generally has the authority to classify information as TOP SECRET and who generally has the authority to delegate such authority. Bennett Decl. at ¶¶ 14-15. In addition, Director Bennett states that the “Director of the CIA has delegated original TOP SECRET classification authority to me. As an original classification authority, I am authorized to conduct classification reviews and to make original classification decisions.” Id. at ¶ 18. Yet, Director Bennett does not testify that he personally classified the records. Nor does he state that any other authorized official actually classified the records. If an individual without the proper authority classified the records, Defendants have not complied with the procedural requirements of EO 13526.

Second, Director Bennett does not specifically testify as to when the 52 records were classified. Director Bennett only states that as of September 26, 2011, the 52 records are currently and properly classified. Yet, the day Director Bennett drafted and signed his declaration is inconsequential. The operative date as to whether the classification occurred according to

proper procedures is the date of classification. As stated above, different procedures exist for records that were classified prior to or subsequent to the receipt of a FOIA request. Once a FOIA request has been received, a government agency can only classify material "if such classification meets the requirements of this order and is accomplished on a document-by-document basis with the personal participation or under the direction of the agency head, the deputy agency head, or the senior agency official designated under section 5.4 of this order." E.O. 13526, § 1.7(d) (emphasis added). The raid and the creation of the records occurred on May 1, 2011. Bennett. Decl. at 4, n. 2. Plaintiff and others submitted FOIA requests for the records as early as May 2, 2011.⁵ As stated above, President Obama explained around 1:00 p.m. on May 4, 2011 that he had made the decision to not release post mortem photographs of bin Laden. In addition, then-Director Panetta stated on the evening of May 3, 2011 that at least some of the photographs would be released. In other words, as of the morning of May 4, 2011, no decision had been reached. Since Plaintiff sent its FOIA request on May 2, 2011, it is more than likely that the records were classified after a FOIA request for the records was received. Yet, Defendants have not presented any evidence as to whether the 52 records were classified between their creation and the President's comments, or after the President's comments and prior to September 26, 2011. In addition, if the records were classified after a FOIA request was received, Defendants have failed to demonstrate that the 52 records were classified on a document-by-document basis. Also, as stated

above, Defendants have not presented any evidence of who classified the records. Therefore, Defendants have also failed to demonstrate whether the records were classified with the personal participation or under the direction of the agency head, the deputy agency head, or the senior agency official designated under section 5.4 of this order. [my emphasis]

In response to this motion, CIA submitted a second declaration that still doesn't explain how the photos first got classified (though it does provide additional evidence that it happened retroactively).

At the time of Mr. Bennett's declaration, these records were marked "TOP SECRET" and were otherwise maintained in a manner that satisfied the procedural requirements of the Executive Order under the circumstances.¹ Since then the CIA has, out of an abundance of caution, taken additional steps to ensure that each of these records contains all of the markings required by the Executive Order and its implementing directives, including information that reveals the identity of the person who applied derivative classification markings, citations to the relevant classification guidance and reasons for classification, and the applicable declassification instructions.

As for Plaintiff's inquiry concerning the identity of the original classification authority (OCA), after the CIA received these records, they were derivatively classified in accordance with the guidance provided by the CIA's designated "senior agency official," as authorized by Part 2 of the Executive Order. The CIA official who provides this classification

guidance – and is therefore the OCA for these records – is the CIA’s Director of Information Management Services, who is the authorized OCA who has been designated to direct and administer the CIA’s program under which information is classified, safeguarded, and declassified. When Mr. Bennett, who is himself 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.

1 Contrary 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. [my emphasis]

After JW noted that if the photos were classified after their FOIA, they would have had to have been classified on a photo by photo basis by the Director of CIA, Deputy Director, or a Senior Agency Official in charge of classifications, the CIA responded by saying that, after the CIA got the photos (which by all appearances happened after the FOIA), they were derivatively classified in accordance with the SAO’s guidance.

CIA doesn’t say whether that official reviewed the photos individually or not. Nor does it explain who wrote “TOP SECRET” on them, without adding all the other required classification markers.

And note how the CIA claims these photos “were always considered to be classified” by them – but not necessarily by SOCOM, which originally had the photos. But they don’t even claim they were always considered to be Top Secret.

Now, it's likely that the actual documents pertaining to the OBL raid (if SOCOM had any) were treated somewhat more regularly. At the very least, it's less likely the SEALs who participated in the raid would have trophy documents!

But as far as the photos are concerned, it appears that the shell game included not just the purging of the documents from SOCOM's servers and transferring them to CIA, but also in retroactive classification – which may or may not have complied with regulations – after they got to CIA.