

# Unclassified Fictions: The CIA, Secrecy Law, and the Dangerous Rhetoric of Authenticity

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## ABSTRACT

*Zero Dark Thirty, Kathryn Bigelow's cinematic account of the manhunt for Osama bin Laden, attracted tremendous popular attention, inspiring impassioned debates about torture, political access, and responsible filmmaking. But, in the aftermath of the 2013 Academy Awards, critical scrutiny of the film has abated and the Senate has dropped its much-hyped inquiry. If the discussion about Zero Dark Thirty ultimately proved fleeting, our attention to the circumstances of its creation should not. The CIA has a longstanding policy of promoting the accuracy of television shows and films that portray the agency, and Langley's collaboration with Bigelow provided no exception. To date, legal scholarship has largely ignored the CIA's policy, yet the practice of assisting filmmakers has important consequences for national security law.*

*Recently, the CIA's role in Zero Dark Thirty's creation and the agency's refusal to release authentic images of the deceased Osama bin Laden reveals its attitude toward fiction and how it impacts the CIA's legal justifications for secrecy. By conducting a close analysis of CIA affidavits submitted in FOIA litigation and recently declassified records detailing the CIA's interactions with Bigelow, this article demonstrates how films like Zero Dark Thirty function as workarounds where the underlying records are classified. These films are "unclassified fictions" in that they allow the CIA to preserve the secrecy of classified records by communicating nearly identical information to the public. Unclassified fictions, in other words, allow the CIA to evade secrecy while maintaining that secrecy—to speak without speaking.*

*This article also analyzes how the creation of unclassified fictions risks*

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*either undermining valid national security concerns or exposing these concerns as deceptions for the CIA to act secretly. In turn, this article offers a new position from which to analyze the CIA’s related practices and criticize secrecy law. Because the agency’s continued support of unclassified fictions has the potential to undermine FOIA 1 Exemptions, the CIA has an impetus to re-evaluate its relationship with the entertainment industry. Similarly, legal scholarship should devote new attention to the Intelligence Community’s attitude toward fiction, especially because films like Zero Dark Thirty are part of an emerging trend. As we continue to discuss leaks, plants, Glomar responses, deterrence by denial, and FOIA disclosures, we should consider unclassified fictions a related practice in the diverse ecology of the classification system.*

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INTRODUCTION

One day, there may be a film about the making of Kathryn Bigelow’s *Zero Dark Thirty*.<sup>1</sup> Like the history it purports to narrate, the creation of the

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1. Hollywood, after all, loves movies about Hollywood. *See, e.g.*, Owen Gleiberman,

Academy Award winning film has itself the elements of a compelling narrative: famous protagonists, secret agents, political intrigue, Hollywood glamour, high financial stakes, and a multidimensional public scandal.<sup>2</sup> Film critics will debate the accuracy of this metanarrative, just as they criticized the portrayal of the manhunt for Osama bin Laden depicted in *Zero Dark Thirty*. Until then, *Zero Dark Thirty* may fade in our memories as the public opprobrium and praise once accompanying it decrescendos to no more than a few dogged voices.<sup>3</sup> As the accusations against the Obama White House and the Intelligence Community have slowed, so has critical scrutiny of the CIA's cooperation with the media and entertainment industry.<sup>4</sup> Even the Senate has

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*'Argo' at the Oscars: What its Likely Triumph is Really About*, ENTERTAINMENT WEEKLY (Feb. 22, 2013), <http://insidemovies.ew.com/2013/02/22/what-the-oscar-triumph-of-argo-is-about> (“Hollywood has always famously adored movies about Hollywood”); Darren Franich, *'Hugo' and 'The Artist' Lead the Oscar Pack . . . Hollywood Just Loves Movies About Movies*, ENTERTAINMENT WEEKLY (Jan. 24, 2012), <http://popwatch.ew.com/2012/01/24/oscars-2011-nominations-hugo-the-artist>.

2. Protagonists include, among other government and Hollywood royalty, President Obama, Deputy Director of the CIA Michael Morell, and Kathryn Bigelow herself, whose 2010 win at the Academy Awards for Best Director and Best Picture for *The Hurt Locker* “didn’t just punch through the American movie industry’s seemingly shatterproof glass ceiling; it has also helped dismantle stereotypes about what types of films women can and should direct.” Manohla Dargis, *How Oscar Found Ms. Right*, N.Y. TIMES, Mar. 10, 2010, <http://www.nytimes.com/2010/03/14/movies/14dargis.html?hp&r=0>. From the start, Bigelow’s film was mired in politics. As early as August 2011, attention was called to the dubious circumstances of the film’s creation. See, e.g., Maureen Dowd, *Downgrade Blues*, N.Y. TIMES, Aug. 6, 2011, <http://www.nytimes.com/2011/08/07/opinion/sunday/Dowd—The-Downgrade-Blues.html> “The moviemakers are getting top-level access to the most classified mission in history from an administration that has tried to throw more people in jail for leaking classified information than the Bush administration.”; see also Tim Reid & Jill Serjeant, *“Zero Dark Thirty” Fails at Oscars Amid Political Fallout*, REUTERS (Feb. 25, 2013), <http://www.reuters.com/article/2013/02/25/entertainment-us-oscars-zero-idUSBRE91O07S20130225> (describing the outrage over the filmmakers’ use of a recording of a call from flight attendant Betty Ann Ong before her American Airlines plane struck the World Trade Center, and further discussing the political and national security upset surrounding *Zero Dark Thirty*).

3. For an example of praise, see Michael Moore, *In Defense of Zero Dark Thirty*, THE HUFFINGTON POST (Jan. 25, 2013), [http://www.huffingtonpost.com/michael-moore/zero-dark-thirty-torture\\_b\\_2548079.html](http://www.huffingtonpost.com/michael-moore/zero-dark-thirty-torture_b_2548079.html).

4. Especially if, as Tricia Jenkins claims, the CIA “refuses to assist any filmmaker depicting it in an unfavorable light.” TRICIA JENKINS, *THE CIA IN HOLLYWOOD: HOW THE AGENCY SHAPES FILMS AND TELEVISION* 97 (2012). For general background on the raid, see Phil Bronstein, *The Man Who Killed Osama bin Laden . . . Is Screwed*, ESQUIRE (Feb. 11, 2013), <http://www.esquire.com/features/man-who-shot-osama-bin-laden-0313> (interviewing the Navy SEAL who shot Osama bin Laden); Mike Hixenbaugh, *‘Zero Dark Thirty,’ from a Navy SEAL’s Perspective*, THE VIRGINIAN-PILOT (Jan. 13, 2013), <http://hamptonroads.com/2013/01/zero-dark-thirty-navy-seals-perspective>. For an account by a former FBI special agent who “spent a decade chasing, interrogating and prosecuting top members of al-Qaida, see Ali H. Soufan, *Torture, Lies, and Hollywood*, N.Y. TIMES, Feb. 22, 2013, <http://www.nytimes.com/2013/02/24/opinion/sunday/torture-lies-and-hollywood.html>. For an analysis from a 31-year veteran of the CIA, see Jose A. Rodriguez Jr., *CIA Veteran on What ‘Zero Dark Thirty’ gets Wrong About the bin Laden Manhunt*, THE WASH. POST, Jan. 3, 2013, [http://www.washingtonpost.com/opinions/a-cia-veteran-on-what-zero-dark-thirty-gets-wrong-about-the-bin-laden-manhunt/2013/01/03/4a76f1b8-52cc-11e2-a613-ec8d394535c6\\_story.html](http://www.washingtonpost.com/opinions/a-cia-veteran-on-what-zero-dark-thirty-gets-wrong-about-the-bin-laden-manhunt/2013/01/03/4a76f1b8-52cc-11e2-a613-ec8d394535c6_story.html);

dropped its much-hyped inquiry into the CIA's involvement in the film's depiction of enhanced interrogation techniques.<sup>5</sup>

It would be hard to dispute that Katherine Bigelow's film compelled us to think and debate.<sup>6</sup> Perhaps the most enduring lesson from *Zero Dark Thirty*, is that "fiction . . . can be a powerful force."<sup>7</sup> To better understand the potential impact of fiction on the law, this article investigates the CIA's involvement in the creation of *Zero Dark Thirty*. Although the fictional products of the entertainment industry may seem far afield from Intelligence Community concerns, the link may be more intimate than initially suspected. This article investigates the national security and legal consequences of the CIA's collaborations with Hollywood by unearthing the agency's implicit attitude toward fiction. By juxtaposing the CIA's role in the creation of *Zero Dark Thirty* with the CIA's refusal to release images of the deceased Osama bin Laden, this article reveals the agency's overlooked attitude toward fiction and how it influences both the CIA's mission to create accurate films and the CIA's legal justifications for secrecy.

The CIA has a longstanding policy of promoting the accuracy of television shows and films that portray agency. Langley's collaboration with Bigelow and screenwriter Mark Boal in the creation of *Zero Dark Thirty* is not the exception, but the rule. In July 2012, after Bigelow and Boal visited the CIA, George Little, Defense Department Press Secretary and former director of public affairs at the CIA, explained that the visit "was not some kind of exclusive opportunity for one set of producers,"<sup>8</sup> but rather something the CIA

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see also Piya Sinha-Roy, "Zero Dark Thirty" Entertaining but Inaccurate: Ex-CIA Agents, REUTERS (Jan. 25, 2013), <http://www.reuters.com/article/2013/01/25/entertainment-us-sundance-binladen-idUSBRE90016620130125>; Steven Zeitchik, *Sundance 2013: Ex-CIA Officers say 'Zero Dark's' Maya Doesn't Exist*, L.A. TIMES, Jan. 24, 2013, <http://articles.latimes.com/2013/jan/24/entertainment/la-et-mn-sundance-2013-cia-officers-zero-dark-thirty-torture-maya-jessica-chastain-manhunt-20130124>; Hollie McKay, *Sundance: 'Manhunt' CIA Agents Argue Accuracy of 'Zero Dark Thirty' Interrogation Scenes*, FOXNEWS.COM (Jan. 21, 2013), <http://www.foxnews.com/entertainment/2013/01/21/sundance-manhunt-cia-agents-argue-accuracy-zero-dark-thirty-interrogation/>. For background on the political controversies surrounding the film, see generally Emma Saunders, *Jessica Chastain: Zero Dark Thirty 'Forces Audiences' to Question*, BBC NEWS (Jan. 29, 2013), <http://www.bbc.com/news/entertainment-arts-21146736>; Bill Maher, *Zero Dark Hurty*, BILL'S BLOG (Jan. 17, 2013), <http://therealbillmaher.blogspot.com/2013/01/zero-dark-hurty.html>; Scott Shane, *Acting C.I.A. Chief Critical of Film 'Zero Dark Thirty'*, N.Y. TIMES, Dec. 22, 2012, <http://www.nytimes.com/2012/12/23/us/politics/acting-cia-director-michael-j-morell-criticizes-zero-dark-thirty.html>.

5. See Ann Hornaday, *'Zero Dark Thirty' Investigation Closed—Mission Accomplished?*, THE WASH. POST, Feb. 26, 2013, <http://www.washingtonpost.com/blogs/style-blog/wp/2013/02/26/zero-dark-thirty-investigation-dropped-mission-accomplished/>.

6. Bigelow's film was debated from seemingly every angle imaginable, including the "deepest debate." See Samuel G. Freedman, *'Zero Dark Thirty,' Through a Theological Lens*, N.Y. TIMES, Feb. 22, 2013, <http://www.nytimes.com/2013/02/23/us/a-theological-view-of-zero-dark-thirty.html> ("There has been much debate about the film, primarily about its historical accuracy, but one might say not the right debate, not the deepest debate.").

7. *Citizens United v. FEC*, 558 U.S. 310, 371 (U.S. 2010).

8. See Andrea Stone, *Obama Officials Gave Hollywood Filmmaker Access to Team That*

does “on a regular basis all the time.”<sup>9</sup> Instead of getting lost in the politics of *Zero Dark Thirty* or consumed by hackneyed conspiracy theories surrounding Bigelow’s film, we should shift our attention to the broader policy underlying the CIA’s actions—especially if visits like Bigelow’s regularly occur.

Part I of this article briefly details the history of the CIA’s involvement in Hollywood. Part II examines the records detailing Bigelow and Boal’s visit to Washington, revealing that the CIA’s promotion of authenticity renders the agency a virtual collaborating co-author of the film. Using the explanations offered in support of the Langley’s refusal to disclose post-mortem images of Osama bin Laden, Part III highlights common national security concerns cited by the CIA. Part IV then demonstrates how the agency, as a result of its Hollywood collaborations, may actually undermine its own rationale for keeping national security secrets. Finally, Part V discusses the further implications of the CIA’s implicit attitude toward fiction, shedding new light on the secrecy justifications commonly relied upon by the CIA in national security litigation.

The article concludes by briefly exploring how the CIA’s use of fictional works overlaps with other idiosyncratic CIA practices, such as the Glomar responses once common to the debate about the government’s drone program.<sup>10</sup> By providing a theoretical account of the CIA’s attitude toward fictional versus authentic media, this article offers a new position from which to criticize secrecy law, allowing for new assessments of the CIA’s related rhetorical practices, including the slippery distinction between official and unofficial acknowledgments.

## I. THE CIA AND HOLLYWOOD

### A. *Cold War Beginnings*

The history of the CIA’s engagement with Hollywood is well-established, if little known. Although the Academy Award-winning film *Argo* has done much

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*Killed Bin Laden, Records Show*, HUFFINGTONPOST.COM, May 23, 2012, [http://www.huffingtonpost.com/2012/05/23/white-house-kathryn-bigelow-bin-laden\\_n\\_1538847.html](http://www.huffingtonpost.com/2012/05/23/white-house-kathryn-bigelow-bin-laden_n_1538847.html) (quoting George Little).

9. *Id.*

10. In FOIA cases involving national security, an agency can claim that revealing whether responsive records exist would damage national security. The result is a response, in which the agency answers that it can, “neither confirm nor deny” the existence of the requested record, is known as a “Glomar response.” See *Phillippi v. CIA*, 546 F.2d 1009, 1012-13 (D.C. Cir. 1976). When information has been “officially acknowledged,” disclosure may be compelled. Establishing official acknowledgment, however, requires satisfying three strict criteria. *Fitzgibbon v. CIA*, 911 F.2d 755 (D.C. Cir. 1990). Moreover, “prior disclosure of similar information does not suffice; instead, the specific information sought by the plaintiff must already be in the public domain by official disclosure.” *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007). Existence in the public domain is not sufficient; the information must also come from official acknowledgment. *Hunt v. CIA*, 981 F.2d 1116, 1120 (9th Cir. 1992). As a result, information might be unofficially disclosed and within the public domain, but nevertheless secret and exempt from disclosure under FOIA.

to popularize interest in the CIA's work with the entertainment industry, the 2012 "Best Picture" winner does little to capture the evolving policy concerns that have shaped and shifted the agency's collaborations with Hollywood over time.<sup>11</sup> *Argo* recounts the ingenious collaboration between the CIA and Hollywood to extract American diplomats trapped in Iran during the Islamic Revolution in 1979.<sup>12</sup> CIA operatives worked together with film producers and industry artists to create a sham Canadian film studio as a pretense for entering Iran and clandestinely exfiltrating the stranded Americans.<sup>13</sup> Notwithstanding its veracity, the plot of *Argo* belies the more mundane objectives commonly motivating the CIA's work with Hollywood.

A brief account of Langley's changing relationship with the entertainment industry illuminates the CIA's motives for working with Hollywood.<sup>14</sup> During World War II, the CIA's predecessor, the Office of Strategic Services (OSS),<sup>15</sup> established the Morale Operations (MO) Branch to broadcast so-called "black" radio programs throughout Europe.<sup>16</sup> As part of the operation, the OSS recruited Hollywood icons to write and perform songs that would demoralize Nazi soldiers.<sup>17</sup> Among the contributions, Marlene Dietrich's somber "Lili Marlene" was particularly popular, prompting the Nazi government to issue warnings and ban its broadcast.<sup>18</sup> According to the US Strategic Bombing Survey, the OSS's MO programs were "just as devastating to German morale as an air raid."<sup>19</sup>

Given this success, it is unsurprising that the CIA turned to Hollywood shortly after its founding in 1947.<sup>20</sup> In the agency's estimation, films were an

11. See generally ANTONIO J. MENDEZ & MATT BAGLIO, *ARGO: HOW THE CIA AND HOLLYWOOD PULLED OFF THE MOST AUDACIOUS RESCUE IN HISTORY* (2012).

12. For the article that inspired the film, see Joshua Bearman, *How the CIA Used a Fake Sci-Fi Flick to Rescue Americans from Tehran*, WIRE (Apr. 24, 2007), [http://www.wired.com/magazine/2007/04/feat\\_cia](http://www.wired.com/magazine/2007/04/feat_cia).

13. For a fuller account, see ANTONIO J. MENDEZ & MALCOLM MCCONNELL, *THE MASTER OF DISGUISE: MY SECRET LIFE IN THE CIA* (1999).

14. For the history of the CIA's multifaceted dealings with Hollywood that follows, this article owes much to the work of Tricia Jenkins, who published in 2012 the first comprehensive investigation into the relationship between the agency and the entertainment industry. See JENKINS, *supra* note 4.

15. *What was the OSS?*, CIA, <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/oss/art03.htm> (last updated June 28, 2008). See generally DOUGLAS WALLER, *WILD BILL DONOVAN: THE SPYMASTER WHO CREATED THE OSS AND MODERN AMERICAN ESPIONAGE* (2012).

16. *A Look Back . . . Marlene Dietrich: Singing for a Cause*, CIA, <https://www.cia.gov/news-information/featured-story-archive/2008-featured-story-archive/marlene-dietrich.html> (last updated Apr. 30, 2013).

17. *Id.*

18. See generally LIEL LEIBOVITZ AND MATTHEW I. MILLER, *LILI MARLENE: THE SOLDIERS' SONG OF WORLD WAR II* (2009).

19. *A Look Back . . . Marlene Dietrich: Singing for a Cause*, *supra* note 16.

20. The CIA was founded as part of the National Security Act, 50 U.S.C. ch. 15 (2012). Given the success of "black" radio programs, it is easy to conclude that the enthusiasm for Hollywood collaborations was part of the "significant institutional and spiritual legacy" the CIA claims to have derived from the OSS. See *The Office of Strategic Services: America's First*

ideal mass medium for pro-democratic messages and propaganda during the Cold War.<sup>21</sup> As a result, the CIA began utilizing the entertainment industry to aid in the fight against communism. Domestically, the CIA worked with studio executives to help ensure that politically undesirable, left-leaning films did not receive industry honors and awards.<sup>22</sup> Abroad, the CIA helped to finance and distribute foreign films that it thought would instill virtues considered inimical to communism.<sup>23</sup>

Additionally, the agency sought to expunge negative images of America in films by deleting scenes depicting Americans as “drunk, sexually immature, [or] violent.”<sup>24</sup> In one instance, the CIA revised the film version of Graham Greene’s *The Quiet American* by writing an alternate ending in which communists, rather than the Americans in the novel, precipitate a terrorist bombing in Saigon. Although the CIA’s Hollywood-based propaganda efforts peaked in the 1950s and early 1960s,<sup>25</sup> the agency continued to use Hollywood through the end of the 1980s. For example, Langley distributed episodes of the serial soap opera *Dynasty* into East Germany to display the advantages of capitalism and its attendant luxuries.<sup>26</sup>

Tricia Jenkins, author of the first comprehensive study of the relationship between the CIA and the entertainment industry, has convincingly argued that the CIA’s relationship with Hollywood changed at the close of the Cold War. Instead of using films to manipulate communists abroad, the CIA began using the entertainment industry to influence Americans at home by carefully cultivating and controlling its own public image.<sup>27</sup> In 1996, the CIA even created a new position within its ranks—“entertainment industry liaison”—which now exists as part of the CIA Office of Public Affairs (“OPA”).<sup>28</sup>

Today, contact between the CIA and Hollywood takes several forms. In one form, the CIA looks to Hollywood for its backstage expertise, for example, in developing new techniques for its Disguise Unit.<sup>29</sup> In another form, Langley commissions film and television studios or actors to complete specific media

*Intelligence Agency, Foreword*, CIA, <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/oss/foreword.htm> (last updated June 28, 2013). Jenkins similarly notes that the CIA began its engagement with Hollywood during the Cold War. See JENKINS, *supra* note 4, at 6.

21. HUGH WILFORD, *THE MIGHTY WURLITZER: HOW THE CIA PLAYED AMERICA* 117-18 (2008).

22. *Id.* at 7.

23. Like family values and religion. See JENKINS, *supra* note 4, at 6.

24. *Id.*

25. See HARRY ROSITZKE, *THE CIA’S SECRET OPERATIONS: ESPIONAGE, COUNTERESPIONAGE, AND COVERT ACTION* 156 (1988).

26. JENKINS, *supra* note 4, at 9.

27. JENKINS, *supra* note 4, at 11.

28. See *Entertainment Industry Liaison*, CIA, <https://www.cia.gov/offices-of-cia/public-affairs/entertainment-industry-liaison/index.html> (last updated Jan. 23, 2013). Although various agencies within the Intelligence Community have offices of public affairs, for the purposes of this article, “OPA” refers only to the CIA’s Office of Public Affairs.

29. MENDEZ AND MCCONNELL, *supra* note 13 at 118-19.

projects for the agency. This has occurred frequently over the past twenty years. In the mid 1990s, for instance, the CIA collaborated with studio executives to create a television series, *The Classified Files of the CIA*, based on actual agency records.<sup>30</sup> Although the series never aired, the agency had selected a production company and signed a contract stipulating terms of production, including the agency's final review of scripts.<sup>31</sup> In 2004, the CIA enlisted Jennifer Garner, who starred in the popular TV show *Alias*, to act in a recruitment video posted on the CIA website.<sup>32</sup> The CIA also produced a special feature included in the DVD release of the film *The Recruit*. Narrated by the agency's entertainment liaison, the sixteen-minute special, *Spy School: Inside the CIA Training Program*, describes the CIA's recruitment process, accompanied by footage from both the film and the CIA's actual training program.<sup>33</sup>

The most common form CIA-Hollywood collaborations are initiated by entertainment industry executives looking for assistance.<sup>34</sup> In the last twenty years, the CIA has collaborated on several film and television projects, including: *Enemy of the State* (1998), *Bad Company* (2002), *The Sum of All Fears* (2002), *Alias* (2001-2006), and *24* (2001-10).<sup>35</sup> The CIA typically assists filmmakers in the preproduction stages, helping writers develop plausible characters and storylines, and acting as a technical consultant to filmmakers endeavoring to create films that accurately portray CIA missions and life at the agency.<sup>36</sup> Otherwise, the CIA might offer its headquarters for filming or proffer use of its official seal.<sup>37</sup>

For the 1999 movie *In the Company of Spies*, the CIA's entertainment liaison consulted with the screenwriters on the script and the OPA allowed the film's director, producers, and actors to interview CIA officials.<sup>38</sup> Moreover, the OPA authorized the filmmakers to shoot portions of the movie on location at its Langley, VA headquarters, and some 50 CIA employees acted as extras in the film.<sup>39</sup> Recently, the creators of the television series *Covert Affairs* (2010-

30. For an in-depth discussion, see JENKINS, *supra* note 4, at 32-53.

31. *Id.* at 44-45.

32. *New Recruitment Video on the CIA Careers Site*, CIA, <https://www.cia.gov/news-information/press-releases-statements/press-release-archive-2004/pr03082004.html> (last updated June 17, 2008).

33. *THE RECRUIT* (Touchstone Pictures 2003).

34. This is due, in part, to the efforts of the entertainment liaison. See JENKINS, *supra* note 4, at 49 (describing the initial efforts of the entertainment liaison to establish connections in Hollywood).

35. For a fuller catalogue, see JENKINS, *supra* note 4, at 73.

36. *Id.* at 49.

37. JENKINS, *supra* note 4, at 49 (noting that the seal is protected by the National Security Act).

38. *Id.* at 55.

39. Press Release, CIA, CIA Hosts Screening of "In the Company of Spies," (Oct. 14, 1999), available at <https://www.cia.gov/news-information/press-releases-statements/press-release-archive-1999/pr101499.html> (explaining that the agency employees participated "off-duty as 'extras'" for one day of filming on the weekend). Jenkins explains that this was, "to give the



present) sought the agency's guidance while researching their show, which is set at Langley. In addition to sharing details of life within the headquarters (there is a Starbucks inside the campus) and helping the show's creators with agency lingo, the CIA OPA supplied the creators of *Covert Affairs* with high-definition stock footage of the campus.<sup>40</sup>

The CIA, of course, is not alone. Other government agencies regularly work with the entertainment industry at various stages of production, depending on individual agency motivations and assets. The Department of Defense ("DoD"), for instance, collaborates with Hollywood to influence scripts. Movie studios and production companies looking for helicopters, tanks, submarines, and aircraft carriers to feature in their films regularly seek assistance from the Pentagon.<sup>41</sup> The Pentagon, in turn, embraces these requests to gain leverage over the filmmakers' projects.<sup>42</sup> By offering its expensive equipment at minimal or no cost, the Pentagon gains the opportunity to modify objectionable scripts, alter dialogue, and delete scenes.<sup>43</sup> If the filmmakers refuse to make the changes, the Pentagon is always able to withdraw its support—and irreplaceable props—from the project. As a result, the Pentagon has influenced films for decades, including the May 2012 film *Battleship*. During production of *Battleship*, director Peter Berg was granted access to five Navy warships, but the props came at a cost. Berg reported that the Pentagon altered his script, adding a scene to show that a brawling sailor was held accountable for his behavior.<sup>44</sup> The Pentagon also compelled Berg to change his casting because it felt a slightly overweight actor hired to play a sailor was unsuitable for the part.<sup>45</sup>

Without ready props, the CIA lacks the bargaining power of the Department of Defense.<sup>46</sup> But, the CIA may not need the coercive capacity to exert strong influence over projects to achieve its desired ends because the agency's motivations for collaboration opportunely dovetail with the objectives of filmmakers who reach out to the CIA for assistance.

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appearance of a typical day at work and to avoid the hassle of obtaining security clearances for outside actors trying to enter the campus." JENKINS, *supra* note 4, at 56.

40. JENKINS, *supra* note 4, at 51.

41. DAVID L. ROBB, OPERATION HOLLYWOOD: HOW THE PENTAGON SHAPES AND CENSORS THE MOVIES 133-149 (2004).

42. *See id.* at 152 (quoting the CIA's first Entertainment Liaison's assertion that "unlike the Pentagon, I don't have any real leverage").

43. JENKINS, *supra* note 4, at 97.

44. Ken Dilanian & Rebecca Keegan, *Hollywood a Longtime Friend of the CIA*, L.A. TIMES, May 26, 2012, <http://articles.latimes.com/2012/may/26/nation/la-na-cia-hollywood-20120527> (quoting Peter Berg) ("At one point, we hired an actor who was a little overweight to play a sailor. They said, '[t]his kid could not be on a ship,' and we changed the casting. . . . It was important to them that he be held accountable.").

45. *Id.*

46. JENKINS, *supra* note 4, at 48.

### B. Helping Hollywood Create Accurate Films Today

Although Hollywood largely is responsible for negative images of the CIA, it is an ideal partner for two reasons. First, collaborating with filmmakers allows the CIA to address the problem of its portrayal at its source, replacing erroneously negative images with accurate depictions of the agency. Secondly, by capitalizing on the industry's popular influence, the CIA can widely project an accurate image of itself (or an image it would like the public to believe is accurate) and indirectly address a larger audience than an official corrective statement could ever reach.<sup>47</sup> Paul Barry, the CIA's second and current entertainment liaison has asserted, "Hollywood is the only way that the public learns about the Agency."<sup>48</sup> Although his claim may be overstated, Barry's conclusion is not. Barry notes that because Americans do not conduct independent research, Hollywood's depictions of the CIA become very influential.<sup>49</sup> Accordingly, by offering consultations, making its agents available for interviews, providing access to headquarters, supplying stock footage, and even making plot suggestions, the CIA "conveys the reality" of the agency and its work, thus meeting the objectives of its domestic Hollywood mission.<sup>50</sup>

A comprehensive look at Hollywood productions from 1960 to 2000 reveals a striking prevalence of negative representations of the agency.<sup>51</sup> The agency's first entertainment liaison Chase Brandon explained, "year after year" the CIA saw its reputation "constantly sullied with egregious, ugly

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47. For more on the "debate over the power of the film industry to shape public opinion" and recent studies, see ERNEST D. GIGLIO, *HERE'S LOOKING AT YOU: HOLLYWOOD, FILM, AND POLITICS* 20 (2000). Echoing the sentiment of Chase Brandon, Giglio concludes, "as the mediated images proliferate, the desire to strengthen the bond between the image makers (Hollywood) and the policymakers (Washington) grows stronger." *Id.* For a contemporary account of impact of media opinion and commentary on political elites and policy makers more generally, see JACOBS, RONALD N. JACOBS & ELEANOR R. TOWNSLEY, *THE SPACE OF OPINION: MEDIA INTELLECTUALS AND THE PUBLIC SPHERE* (2011).

48. Tricia Jenkins, *How the Central Intelligence Agency Works with Hollywood: An Interview with Paul Barry, the CIA's new Entertainment Industry Liaison*, 31 *MEDIA, CULTURE & SOCIETY* 489, 490 (2009).

49. See *id.* Jenkins similarly notes that Hollywood's depictions "shape the judgments Americans pass on the Agency's performance." JENKINS, *supra* note 4, at 32.

50. See J.D. Biersdorfer, *Hollywood's Gadget Factories*, *N.Y. TIMES*, Sept. 26, 2002, <http://www.nytimes.com/2002/09/26/technology/hollywood-s-gadget-factories.html?pagewanted=2&src=pm>.

51. JENKINS, *supra* note 4, at 14-15. Jenkins, for one, is unwilling to consider the CIA a victim of Hollywood, instead, considering the negative images as partially deserved. See *id.* at 29 ("CIA's lack of transparency, historical unwillingness to talk to the new media, and refusal to declassify older documents have also left the public, including those in Hollywood, to imagine the worst about what activities really take place inside the CIA."). For a discussion of films, see OLIVER BOYD-BARRETT, DAVID HERRERA & JIM BAUMANN, *HOLLYWOOD AND THE CIA* (2011). The authors divide their book into telling chapters: The 1960s: "In the Shadows"; The 1970s: "There are no more secrets"; The 1980s: "We've wiped out entire cultures! And for what?"; The 1990s: Black Ops meet terror; The 2000s: History interrupted. See *id.* Jenkins similarly catalogues the history of the CIA's depiction in Hollywood. See JENKINS, *supra* note 4, at 14-15.

misrepresentations” of who it was and what it stood for.<sup>52</sup> In response, Brandon explained, the CIA made itself more accessible to the people who created its image.<sup>53</sup> Starting with the creation of the entertainment liaison, Langley began working with Hollywood in 1996 to correct misconceptions about the CIA, thus reversing its historical policy of rejecting requests from producers for consultation and research assistance.<sup>54</sup> Consequently, the CIA’s Office of Public Affairs adopted a new mission to promote education about the agency and to ensure the accuracy of its cinematic portrayal.<sup>55</sup> Notably, the CIA accomplishes this mission not through direct means, like funding or rewriting scripts, but by “offering to help with matters of verisimilitude.”<sup>56</sup> The CIA meets this goal in a variety of ways, including “answering questions, debunking myths, or arranging visits to the CIA to meet the people who know intelligence.”<sup>57</sup> Additionally, for select projects, the CIA permits filming at its headquarters and provides “stock footage of locations within and around [its] main building,” like that used in *In the Company of Spies*.<sup>58</sup>

The CIA further reinforces the accuracy of its Hollywood portrayal by offering technical consulting. Filmmakers meet with CIA representatives to “learn about the Agency’s technological capabilities in order to enhance the accuracy, or at least the realism, of their texts.”<sup>59</sup> Among other television series, *Alias* (2001-2006) benefited from such consultation.

In addition to sharing agency protocols and procedures, the CIA briefed the show’s staff on declassified technology to provide a “foundation of what [CIA] equipment and [CIA] capability—technologically speaking—looks like.”<sup>60</sup> Although the CIA has good reason to keep its actual technologies

52. Paula Bernstein, *Hardest-Working Actor of the Season: the C.I.A.*, N.Y. TIMES, Sept. 2, 2001, <http://www.nytimes.com/2001/09/02/arts/television-radio-hardest-working-actor-of-the-season-the-cia.html>.

53. *See id.*

54. *Id.*; JENKINS, *supra* note 4, at 30-31.

55. The CIA’s entertainment liaison website states, “[i]f you are part of the entertainment industry, and are working on a project that deals with the CIA, the Agency may be able to help you.” *Entertainment Industry Liaison*, *supra* note 28. Although the policy change is not internally documented, the CIA’s shift from rejecting consultation requests to actively promoting and even soliciting such requests leaves little doubt about the change. Jenkins notes that the first entertainment liaison “scoured trade journals such as the *Hollywood Reporter* and *Variety* and then contacted the producers of relevant upcoming projects to let them know about his services.” JENKINS, *supra* note 4, at 49.

56. Matthew Alford & Robbie Graham *An Offer They Couldn’t Refuse*, *The Guardian* (Nov. 13, 2008), <http://www.guardian.co.uk/film/2008/nov/14/thriller-ridley-scott>. Indeed, accuracy is of paramount concern to the agency. The official webpage of the CIA’s entertainment liaison explains, “[o]ur goal is an accurate portrayal of the men and women of the CIA, and the skill, innovation, daring, and commitment to public service that defines them.” *Entertainment Industry Liaison*, *supra* note 28.

57. *Id.*

58. *Id.*

59. JENKINS, *supra* note 4, at 90.

60. Biersdorfer, *supra* note 50.

secret, the agency helps filmmakers achieve an authentic look. As Chase Brandon expounded, “You want to have it be a made-up version of something that’s based on reality.”<sup>61</sup> Ultimately, the CIA’s entertainment liaison endeavors to “give greater authenticity to scripts, stories, and other products in development,”<sup>62</sup> to “convey [the] reality” of the agency’s work.<sup>63</sup>

These collaborations work, in part, because the arrangement is mutually beneficial: studios are able to pitch films as authentic and Langley ensures that the projects are accurate representations of the agency and its work. For instance, in *The Recruit*, filmmakers depicted CIA operatives as intelligent, generous, and heroic, which, as part of a larger trend,<sup>64</sup> serves as a notable change from the CIA agent as “buffoon or evil assassin” typically showcased in the previous three decades.<sup>65</sup> The CIA’s eagerness to promote an accurate and positive image is best exemplified by a section on the entertainment liaison’s website titled “Now Playing.” In this section, the site asks readers if they are “[l]ooking for inspiration for a new film or book?” After declaring, “[o]ur Entertainment Industry Liaison offers recommendations” and providing a link to potential storylines, the website reminds visitors to, “[c]heck back often for his new picks.”<sup>66</sup>

### C. Promoting More Than Accuracy?

Often, Langley refuses to support films that unfavorably portray the agency,<sup>67</sup> For example, the CIA eventually denied assistance to Fox’s hit series *24* due to its “negative or inaccurate depictions.”<sup>68</sup> The 2002 film *The Bourne Identity* was similarly rejected by the CIA’s entertainment liaison. After reading 25 pages of the script, Brandon explained, “I lost track of how many rogue operatives had assassinated people.”<sup>69</sup> Owing to this negative representation, Brandon explained, “I chucked the thing into the burn bag.”<sup>70</sup>

Once potential collaborators make decisions contrary to agency preferences, the CIA may threaten to withdraw its support.<sup>71</sup> In the 2001 film

61. *Id.*

62. *Entertainment Industry Liaison*, *supra* note 28.

63. *Id.*

64. See BOYD-BARRETT, HERRERA & BAUMANN, *supra* note 51 (analyzing trends in popular representations of the CIA).

65. JENKINS, *supra* note 4, at 83.

66. *Entertainment Industry Liaison*, *supra* note 28.

67. JENKINS, *supra* note 4, at 97.

68. Josh Young, “24”, “Alias” and the New Spook Shows, ENTERTAINMENT WEEKLY (Sept. 21, 2001), <http://www.ew.com/ew/article/0,,254697,00.html> (“The whole premise is unrealistic because they’ve got a CIA agent protecting the President and that’s the Secret Service’s job. I don’t think they want to be confused by the facts.”) (quoting Chase Brandon).

69. *Id.*

70. *Id.*

71. By selectively denying and granting its assistance, the CIA OPA ostensibly attempts to influence filmmakers at the preproduction stages, when it is still able to shape the film’s narrative. Although the extraordinary success of both *24* and *The Bourne Identity* calls into question the importance of CIA assistance, it is clear that when potential collaborators make decisions contrary

*Spy Game* director Tony Scott and screenwriter John Lee Hancock visited Langley at the CIA's invitation to discuss the script and explore the possibility of filming portions of the film at headquarters.<sup>72</sup> Initially, Chase Brandon was enthusiastic because the filmmakers indicated their desire to create an authentic film.<sup>73</sup> Brandon explained that the filmmakers "spent a day taking notes" and left saying that they "really wanted to turn [the film] into something authentic."<sup>74</sup> But, when Brandon finally received the script, "the film was worse" in terms of accuracy, "so [he] graciously withdrew the offer to film [at the CIA]."<sup>75</sup>

The CIA's selective collaborations hint that the agency is not merely interested in educating the public and promoting accuracy. Jenkins asserts, "concerns of education and accuracy are secondary to the CIA."<sup>76</sup> Instead, as Jenkins contends, the agency's primary objective may be to "project a favorable image of itself in order to boost both its congressional and public support."<sup>77</sup> The entertainment liaison's website supports this contention. Perhaps unsurprisingly, the storylines suggested in the "Now Playing" section exclusively feature agency successes.<sup>78</sup> The CIA's domestic mission may accordingly be reframed as promoting the accuracy of projects that positively depict the agency.

Troublingly, an interest in self-promotion could spawn distortions of reality, thereby contravening the agency's stated goals. But, because OPA has assorted reasons for collaborating with Hollywood, it is difficult to identify the CIA's true motives. Besides securing congressional support and funding, advancing the CIA's image may enhance its recruitment efforts, as evidenced by the Jennifer Garner video and *The Recruit* DVD feature. To attract talent, the CIA OPA must showcase itself as an appealing employer, potentially prompting Langley to overstate its merits as a workplace.

The agency's overseas motivations may similarly motivate Langley to

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to agency preferences, the CIA may threaten to withdraw its support, as with the 2001 film *Spy Game*.

72. After CIA agent Tom Bishop (played by Brad Pitt) is arrested for espionage in China, veteran spy Nathan Muir (played by Robert Redford) uses his talents to rescue his protégé and friend. *SPY GAME* (Universal Pictures, 2001).

73. Young, *supra* note 68.

74. *Id.*

75. *Id.* Jenkins speculates that the creators and producers of television shows who desire continued access to support and research have to continue to present the agency in a mostly favorable manner. JENKINS, *supra* note 4, at 52.

76. JENKINS, *supra* note 4, at 31

77. *Id.*

78. For example, among more than a dozen such recommendations, the Entertainment Industry Liaison suggests stories about: "Two CIA Prisoners in China, 1952-73" (a self-described story of "extraordinary fidelity"); "Tolkachev, A Worthy Successor to Penkovsky" (an "exceptional espionage operation"); "CIA Analysis of the 1967 Arab-Israeli War" (subtitled "getting it right"). *Entertainment Industry Liaison, Now Playing Archive*, CIA, <https://www.cia.gov/offices-of-cia/public-affairs/entertainment-industry-liaison/now-playing-archive.html> (last updated July 26, 2010).

misrepresent work at the agency. As Chase Brandon succinctly observed, “terrorists watch TV, too.”<sup>79</sup> As a result, the CIA has motive to misinform and intimidate its enemies by ensuring it is portrayed as highly capable. Because security concerns prohibit CIA technical advisers from sharing the types of technology that the CIA actually uses, Jenkins conjectures that Langley may overstate its technical capabilities when advising filmmakers rather than have the agency depicted as using average or outdated technology.<sup>80</sup>

Aside from the agency’s motives, it is even harder to isolate exactly how the agency influences the content of its Hollywood projects.<sup>81</sup> CIA public affairs officers are rarely credited in sources or in scrolling credits,<sup>82</sup> and as a result, it is often impossible to determine which films were created with agency assistance. Even where viewers can identify the products of CIA-Hollywood collaborations, the multidimensional objectives driving the CIA’s involvement may obscure how the agency influenced Hollywood projects.

The CIA’s byzantine relationship with the entertainment industry deserves sustained questioning. Concerns about political favoritism and propaganda should rightly be raised. But, in the process of thinking through the ethical and legal dimensions of the CIA’s practices, attention should not be withdrawn from the CIA’s stated mission. Instead of focusing on conspiratorial aspects of the CIA’s partnership with Hollywood, many of which are impossible to confirm, this article focuses on the objectives the CIA has acknowledged. After all, accuracy and self-promotion are not necessarily mutually exclusive. What if the CIA is actually doing what it claims and actively supporting the accuracy of its depictions in Hollywood?

## II. MAKING ZERO DARK THIRTY

The CIA’s policy of promoting the accuracy of its popular portrayal has potentially significant consequences for national security and the agency’s legal justifications for secrecy. To better understand how Langley works with the entertainment industry to accomplish its mission, this Part details Langley’s recent relationship between the creators of *Zero Dark Thirty*. Mark Boal and Kathryn Bigelow’s recent visits to Langley confirm the primacy of the agency’s goals. Part III then investigates how that relationship affects the public’s perception of *Zero Dark Thirty*.

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79. JENKINS, *supra* note 4, at 91.

80. *Id.* at 92. Jenkins further notes that the CIA may also work with studios to devise narratives to intimidate terrorists and, in at least one instance, may have used a television series to “workshop threat scenarios on the CIA’s behalf.” *Id.* at 12.

81. After all, the “process of influence is also subtle and psychologically complicated, making it difficult for even creators, let alone outsiders, to understand how the CIA may have influenced a text.” *Id.* at 52.

82. *Id.* (“[It is] hard for viewers even to identify which texts have a CIA influence unless the media decides to report on it.”).

A. *Boal and Bigelow Visit Langley*

In the summer of 2011, Mark Boal and Katherine Bigelow were working on a movie about the hunt for Osama bin Laden. Boal's completed screenplay centered on the 2001 battle in the Afghan mountains of Tora Bora, where bin Laden was thought to have been hiding.<sup>83</sup> When the Academy Award-winning pair was about to begin shooting in May 2011, the Navy's elite SEAL Team Six successfully executed the now-famous raid on bin Laden's compound in Abbottabad, Pakistan.<sup>84</sup> As a result, Bigelow explained, "what we had been working on became history."<sup>85</sup> Boal reports throwing out his original script and the filmmakers started from scratch.<sup>86</sup>

Although the public quickly learned several details of the May 2, 2011 raid, little had been told of how the Intelligence Community and military, working for a decade, finally located the al-Qaida leader in his Pakistan compound. After the raid, Bigelow and Boal set out to tell that story with *Zero Dark Thirty*, the title of which refers to a military term meaning "30 minutes after midnight," and, as Bigelow explained, is also meant to refer to "the darkness and secrecy that cloaked the entire decade-long mission."<sup>87</sup> Bigelow has made clear that she is telling a true story, as she put it, about "real life heroes"<sup>88</sup> To tell this "real life" story and to make it realistic, Bigelow and Boal went to the CIA and DoD.

Details of those trips were first released in May 2012 after the D.C. District Court ordered, pursuant to the Freedom of Information Act (FOIA), that the CIA and DoD to disclose 266 pages of records related to Boal and Bigelow's visits to the agencies.<sup>89</sup> According to the heavily redacted records, the filmmakers, especially Boal, had significant contact with the CIA. Originally, a planner, operator, and commander of SEAL Team Six were made available for Boal to interview, though it is unclear whether the meeting occurred. George Little, the director of public affairs at the CIA at the time of

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83. Anthony Breznican, *First Look: Obama not in 'Zero Dark Thirty' Thriller about Hunt for Osama bin Laden—Exclusive*, ENTERTAINMENT WEEKLY (Aug. 6, 2012), <http://insidemovies.ew.com/2012/08/06/zero-dark-thirty-first-look/>.

84. *Id.*

85. *Id.*

86. *Id.* Although Boal scrapped his script, he reported that "a lot of the contacts I made[] carried over. The years I had spent talking to military and intelligence operators involved in counterterrorism was helpful in both projects. Some of the sourcing I had developed long, long ago continued to be helpful for this version." *Id.*

87. *Id.*

88. Breznican, *supra* note 83.

89. Press Release, Judicial Watch, *Judicial Watch Obtains DOD and CIA Records Detailing Meetings with bin Laden Raid Filmmakers* (May 2, 2012), *available at* <http://www.judicialwatch.org/press-room/press-releases/13421/>. Four months later, both the CIA and DoD disclosed additional "overlooked" records totaling 139 pages. For petitioner's brief, see Brief for Petitioner, *Judicial Watch v. U.S. Department of Defense*, (D.D.C. Jan. 12, 2012) (No. 1:12-cv-00049), *available at* [http://www.scribd.com/fullscreen/79220433?access\\_key=key-1qr7gfitxlikimbhukii](http://www.scribd.com/fullscreen/79220433?access_key=key-1qr7gfitxlikimbhukii).

the filmmakers' visits,<sup>90</sup> denied that any such meeting took place.<sup>91</sup> And, Boal is keeping quiet, commenting, "I'm going to protect my sources."<sup>92</sup> Nevertheless, a careful analysis of the disclosed FOIA records illuminates telling details of the CIA's considerable cooperation with the filmmakers. The records indicate that Boal obtained permission to visit the CIA at least six times over the course of two months in the summer of 2011 and that Bigelow visited Langley at least once.<sup>93</sup> In addition to touring headquarters and attending CIA events, Boal was granted access to several CIA facilities, including the Counterterrorism Center (CTC),<sup>94</sup> and a classified building inside the CTC known simply as "the Vault," where some of the tactical planning for the bin Laden raid occurred.<sup>95</sup>

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90. Little was also the CIA's chief media spokesperson from October 2010 through July 2011. He has since gone on to work for the Pentagon as the Assistant to the Secretary of Defense for Public Affairs.

91. See Stone, *supra* note 8.

92. Breznican, *supra* note 83.

93. See E-mail from Marie Harf, Media Spokesperson CIA Office of Public Affairs, to Classified Recipient (June 6, 2011, 11:47 A.M.) (on file with author) (documenting Boal's visits on June 6-7, 2011); E-mail from Marie Harf, Media Spokesperson CIA Office of Public Affairs, to Classified Recipient and Preston B. Golson, CIA OPA spokesperson (June 9, 2011, 12:57 P.M.) (on file with author) (discussing a planned June 10, 2011 meeting with Boal); E-mail from Marie Harf, Media Spokesperson CIA Office of Public Affairs, to Mark Boal, journalist and screenwriter (June 23, 2011, 15:23:29) (on file with author) (confirming Boal's attendance at CIA Headquarter events on June 24, 2011); E-mail from Mark Boal, journalist and screenwriter, to Marie Harf, Media Spokesperson CIA Office of Public Affairs (July 11, 2011, 1:45 P.M.) (on file with author) (confirming meeting on July 15, 2011); E-mail from Marie Harf, Media Spokesperson CIA Office of Public Affairs, to Classified Recipients (July 13, 2011, 09:58 A.M.) (on file with author) (discussing Bigelow's and Boal's planned July 15, 2011 visit to Headquarters); see also E-mail from Marie Harf, Media Spokesperson CIA Office of Public Affairs, to George E. Little, Assistant to the Secretary of Defense for Public Affairs for the U.S. Department of Defense, Jennifer N. Youngblood, Preston B. Golson & Classified Recipient (July 14, 2011, 03:33 P.M.) (on file with author) (detailing the final schedule for Bigelow's visit).

94. E-mail from Marie Harf, Media Spokesperson CIA Office of Public Affairs, to Mark Boal, journalists and screenwriter (June 23, 2011, 15:23:29) (on file with author) (confirming Boal's attendance at CIA Headquarter events on June 24, 2011).

95. E-mail from Classified Recipient to Classified Recipients (July 13, 2011, 10:03 A.M.) (on file with author) ("[W]alk-through of the your Vault in the [classified] building that was used for some of the tactical planning in the Bin Ladin Raid . . . The plan is to tour [name redacted] space, but they are also very much interested in seeing the [classified] spaces that were used in the months leading up to the Bin Ladin Raid."). The names of most buildings, however, have been redacted for national security reasons, making it difficult to ascertain the exact itinerary of Boal's visits. An internal e-mail sent between classified CIA employees indicates that Bigelow and Boal were granted access to "the Vault," which is described as the CIA building where some of the tactical planning for the bin Laden raid took place. According to the classified e-mail sender:

I was given your name as the POC in [name redacted] who could determine the feasibility of having a potential walk-through of . . . the Vault in the [name redacted] building that was used for some of the tactical planning in the Bin Laden Raid. In consultation with the Office of Public Affairs and as part of the larger chronicling of the Bin Laden raid, OPA will be hosting some visitors sanctioned by ODCIA this Friday afternoon.

*Id.* The recipient later responded, "Of course this is doable." See E-mail from Classified Recipient to Classified Recipients (July 13, 2011, 9:04 A.M.) (on file with author).



During these visits, Boal and Bigelow met with a number of CIA officials, including George Little and Marie Harf, a media spokesperson for the CIA.<sup>96</sup> Boal also met with the Deputy Director of the CIA Michael Morell at least twice, as well as an unspecified number of National Clandestine Service officers, including at least one who participated in the Abbottabad raid.<sup>97</sup>

Although it is impossible to know exactly with whom Boal and Bigelow met, the disclosed documents suggest that the filmmakers enjoyed access to a number of classified people and places, and that the CIA was ready to talk. Boal's interviews with Langley's classified employees are variously described as "deep dives" and "marathon session," some lasting over two hours.<sup>98</sup> After Boal's initial visit to Langley, Harf wrote to a classified recipient that the screenwriter had "spoken to a number of folks who had worked on the operation from HQs," and to the recipient's predecessor. The recipient, evidently a field agent, also agreed to meet with Boal,<sup>99</sup> as well as a translator who was on the raid.<sup>100</sup> Additionally, according to records of OPA's schedules, Boal also met with available members of "the UBL team."<sup>101</sup>

The availability of rich source material explains why the filmmakers

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96. See, e.g., E-mail from Mark Boal, journalists and screenwriter, to George Little, Assistant to the Secretary of Defense for Public Affairs for the U.S. Department of Defense (July 20, 2011, 06:17 A.M.) (on file with author) (thanking George Little for "pulling for us at the agency").

97. See E-mail from Robert Mehal, Communications Synchronization Advisor in the Office of the Under Secretary of Defense for Intelligence, to Classified Recipient "George" (June 9, 2011, 09:45 A.M.) (on file with author) ("[A]nything worth noting from Mr. Boal's meeting with DD Morell?"); E-mail from Marie Harf, Media Spokesperson CIA Office of Public Affairs, to Mark Boal, journalists and screenwriter (July 14, 2011, 4:01 P.M.) (on file with author) (outlining Boal's schedule, including a 3:00 meeting with Michael Morell); see also E-mail from Classified Sender to Classified Recipient (July 17, 2011, 04:04 P.M.) (on file with author) ("The mtgs on Friday went really, really well. Mr. Morell gave them 40 minutes, talked some of the substance again, told them we're here to help with whatever they need, and gushed to Kathryn about how much he loved 'the hurt locker.'").

98. See E-mail from Marie Harf, Media Spokesperson CIA Office of Public Affairs, to George E. Little, Assistant to the Secretary of Defense for Public Affairs for the U.S. Department of Defense, Jennifer N. Youngblood, Preston B. Golson & Classified Recipient (July 14, 2011, 03:33 P.M.) (on file with author) (describing Boal's meetings with CIA officials as "deep dives"); E-mail from Marie Harf, Media Spokesperson CIA Office of Public Affairs, to Classified Recipients (June 9, 2011, 12:57 P.M.) (on file with author) (characterizing Boal's earlier interviews as a "marathon session").

99. E-mail from Classified Recipient to Marie Harf, Media Spokesperson CIA Office of Public Affairs (June 17, 2011, 03:59 P.M.) (on file with author); see also E-mail response from Classified Recipient, to Marie Harf, Media Spokesperson CIA Office of Public Affairs (June 17, 2011, 03:26 P.M.) (on file with author) ("[Boal has] spoken to a number of folks who have worked on the operation from HGs, and to your predecessor Redacted but he's looking for more color about what it was like to be working this from the field.").

100. E-mail from Classified Sender to Classified Recipient (July 17, 2011, 04:04 P.M.) (on file with author) (confirming that Boal and Bigelow would meet individually with a person whose name was redacted and the translator who was present during the raid).

101. E-mail from Marie Harf, Media Spokesperson CIA Office of Public Affairs, to Classified Recipients, George E. Little, Assistant to the Secretary of Defense for Public Affairs for the U.S. Department of Defense, & Jennifer N. Youngblood (June 3, 2011, 01:47 P.M.) (on file with author) (confirming that Boal would meet with the "UBL team in CTC").

wanted to meet with the CIA. In a letter to George Little Boal wrote that he was looking for “guidance” and that he and Bigelow “intend[ed] to make accuracy and authenticity hallmarks of the production.”<sup>102</sup> Boal believed that the story of the hunt for bin Laden was “one of those rare instances where truth really is more interesting than fiction.”<sup>103</sup> In an internal communication, Commander Robert Mehal, a public affairs officer in the Defense Press Operations, summarized Boal’s objective as wanting to produce “an accurate recreation of a historical event.”<sup>104</sup> Boal also plainly asserted that he hoped “the film will portray this story in a way that people will find . . . believable.”<sup>105</sup>

While the CIA would ensure the accuracy of the film, the filmmakers, in turn, capitalized on that accuracy to encourage the public to trust the film’s narration of events. And, the CIA was ready to help because the filmmaker’s objective dovetailed with the agency’s own goal. Despite their heavy redactions, the disclosed records indicate that the CIA’s support of Boal and Bigelow was extensive. In an internal communication, media spokesperson Harf acknowledged that “[a]s an agency . . . we’ve been pretty forward-leaning with Boal.”<sup>106</sup> OPA’s openness with Boal also seems to be a product of the collaborators’ coextensive goals and Boal’s openness with the agency. As OPA observed, “[Boal] agreed to share scripts and details about the movie with us so we’re absolutely comfortable with what he will be showing.”<sup>107</sup>

#### *B. More than Guidance? How the CIA helped create Zero Dark Thirty*

Although various film and television projects depicting the Osama bin Laden raid sought agency support, *Zero Dark Thirty* was greeted with what appears to be special interest.<sup>108</sup> Marie Harf extolled *Zero Dark Thirty* in an OPA e-mail, emphasizing, “[w]e really do have a sense that this is going to be *the* movie on the UBL operation—and we all want [the] CIA to be as well-represented in it as possible.”<sup>109</sup> The other filmmakers who sought assistance on similar projects were not as warmly supported as Boal and Bigelow, whom OPA named “our Hollywood friends.”<sup>110</sup> The OPA even acknowledged

102. *Id.*

103. *Id.*

104. E-mail from Robert Mehal, Communications Synchronization Advisor in the Office of the Under Secretary of Defense for Intelligence, to Michael Vickers, Under Secretary of Defense for Intelligence (June 9, 2011, 4:39 P.M.) (on file with author).

105. Breznican, *supra* note 83.

106. E-mail from Marie Harf, Media Spokesperson CIA Office of Public Affairs, to Classified Recipients (June 30, 2011, 01:31 P.M.) (on file with author).

107. *Id.*

108. Whereas Boal requested the CIA’s guidance early on, an internal DoD e-mail notes that Boal waited to request formal support from the Pentagon because he realized that the DoD would have required a script for review. This email corroborates the purported tendency of the CIA to shape scripts and storylines during preproduction and the DoD’s more common involvement editing pre-existing scripts to conform to its wishes. *See supra* Part I(a).

109. E-mail from Marie Harf, Media Spokesperson CIA Office of Public Affairs, to Classified Recipients (June 15, 2011, 11:15 A.M.) (on file with author).

110. E-mail from Classified Sender to Marie Harf, Media Spokesperson CIA Office of

concern of perceived “favoritism in the way requests have been doled out.”<sup>111</sup> In another e-mail, Harf wrote:

I know we don’t ‘pick favorites’ but it makes sense to get behind the winning horse . . . I am sure Imagine [film studio] is talking about working with [Ron] Howard, but Mark and Kathryn’s movie is going to be the first and the biggest. It’s got the most money behind it, and two Oscar winners on board. It’s just not a close call.<sup>112</sup>

While working with Boal and Bigelow, the CIA promoted accuracy in several ways. In addition to offering Boal and Bigelow tours of classified places and interviews with classified operatives, the CIA also functioned as a technical consultant by briefing the filmmakers on the layouts of bin Laden’s compound.<sup>113</sup> In one instance, an employee in Boal’s office asked the CIA to confirm if a floor plan in the filmmakers’ possession was accurate.<sup>114</sup> Within hours, an OPA officer confirmed that she “checked with our folks, and that floor plan matches up with what we have. It looks legit to us.”<sup>115</sup> Later, the filmmakers casually asked OPA, “would you mind looking into getting us some of the third floor specs . . .”<sup>116</sup> In their own words, the filmmakers sought additional information because, “[w]e will be building a full scale replica of the house. Including the inhabitants of the animal pen!”<sup>117</sup> And, “the open source plan is missing those [specs]: height of walls, etc?”<sup>118</sup> The OPA spokesperson not only confirmed the request, she “applaud[ed] [their] effort!”<sup>119</sup>

As CIA spokesperson Preston Golson recently claimed, by helping the filmmakers the CIA sought to ensure “an accurate portrayal of the men and

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Public Affairs, (July 11, 2011, 01:11 P.M.) (on file with author).

111. E-mail from Classified Sender, to Jennifer Youngblood, Deputy Director, CIA OPA, (July 14, 2011, 03:25 P.M.) (on file with author).

112. E-mail from Marie Harf, Media Spokesperson CIA Office of Public Affairs, to Classified Recipient “George” (June 7, 2011, 07:34 P.M.) (on file with author).

113. E-mail from Marie Harf, Media Spokesperson CIA Office of Public Affairs, to Geoge E. Little, Assistant to the Secretary of Defense for Public Affairs for the U.S. Department of Defense, Jennifer N. Youngblood, Preston B. Golson & Classified Recipient (July 14, 2011, 03:33 P.M.) (on file with author) (“[The filmmakers would be briefed] on AC1 model by [Redacted Name].”); *see also* PETER L. BERGEN, *MANHUNT: THE TEN-YEAR SEARCH FOR BIN LADEN FROM 9/11 TO ABBOTTABAD 167* (2012) (explaining that bin Laden’s Pakistan hideout was dubbed “Abbottabad Compound 1 (AC1)”).

114. E-mail from Jonathan Leven, assistant to Mark Boal, to Marie Harf, Media Spokesperson CIA Office of Public Affairs (July 13, 2011, 9:05 P.M.) (on file with author).

115. E-mail from Marie Harf, Media Spokesperson CIA Office of Public Affairs, to Jonathan Leven, assistant to Mark Boal (July 14, 2011, 1:06 P.M.) (on file with author).

116. E-mail from Mark Boal, journalist and screenwriter, to Marie Harf, Media Spokesperson CIA Office of Public Affairs, and Jonathan Leven, assistant to Mark Boal (July 14, 2011, 5:27 P.M.) (on file with author).

117. *Id.*

118. *Id.*

119. E-mail Marie Harf, Media Spokesperson CIA Office of Public Affairs, to Mark Boal, journalists and screenwriter, and Jonathan Leven, assistant to Mark Boal (July 14, 2011, 5:33 P.M.) (on file with author).

women of the CIA.”<sup>120</sup> But by supporting the film’s accuracy, the CIA has become a sort of collaborating co-author of the film. Early in its relationship with Boal and Bigelow, the CIA Office of Public Affairs took ownership of the project. In an e-mail thanking several CIA officers for meeting with Boal, Harf told the classified recipients that “we appreciate you and all your colleagues working on this project with us,”<sup>121</sup> signaling that OPA considered the project as one of its own. In fact, both Boal and OPA took ownership of creating characters for the film. Boal naturally treated CIA employees as potential characters,<sup>122</sup> asking interviewees in release forms for permission to “depict a character based in part, or in whole, on the information” provided by the CIA operatives, or on “events that happened to [them].”<sup>123</sup>

After Boal conducted his first interviews, Harf even wrote to a pair of redacted interviewees that Boal said they were “a screenwriter’s dream in terms of compelling characters. I thought that was a pretty good compliment.”<sup>124</sup> Later, Langley began brainstorming compelling characters for the film, looking for possibilities in its own employees. In one instance, OPA wrote to a classified recipient to see if he or she would “sit down and chat with Boal as well.”<sup>125</sup> Notably, the task of identifying characters was embraced by more than OPA staff. One classified CIA employee e-mailed “Team OPA” with suggestions for “good folks for Mark Boal to possibly talk with.”<sup>126</sup>

The CIA’s enthusiasm for *Zero Dark Thirty* was notably not limited to the Office of Public Affairs. In a June 15, 2011 e-mail to the Deputy National Security Advisor for Strategic Communications, the Assistant Secretary of Defense for Public Affairs explained that Boal and Bigelow were getting help

120. Larry Margasak, *Lawmaker: CIA, DoD too Close to Filmmakers*, ARMY TIMES (May 23, 2012), <http://www.armytimes.com/article/20120523/NEWS/205230319/Lawmaker-CIA-DoD-too-close-to-filmmakers> (quoting Golson).

121. E-mail from Marie Harf, Media Spokesperson CIA Office of Public Affairs, to Classified Recipients, *Re: Folks for Mark Boal* (June 15, 2011, 11:15AM).

122. When discussing “Maya,” the protagonist of *Zero Dark Thirty*, screenwriter Mark Boal said, “[s]he is based on a real person, and there are other people who also contributed who are not represented, whose work I hope is reflected in her character.” See Christine Kearney, *Bin Laden Movie “Zero Dark Thirty” Arrives, Mired in Controversy*, REUTERS (Dec. 17, 2012), <http://www.reuters.com/article/2012/12/17/entertainment-us-zerodarkthirty-idUSBRE8BG10B20121217> (quoting Boal).

123. E-mail from Irwin M. Rappaport, entertainment attorney, to Mark Boal, journalists and screenwriter (July 12, 2011, 5:50:27 P.M.) (on file with author).

124. E-mail from Marie Harf, Media Spokesperson CIA Office of Public Affairs, to Classified Recipients (June 9, 2011, 12:57 P.M.) (on file with author).

125. E-mail from Marie Harf, Media Spokesperson CIA Office of Public Affairs, to Classified Recipients (June 30, 2011, 01:31 P.M.) (on file with author). OPA, however, conceded that “this is a little outside what we typically do.” *Id.*

126. E-mail from Classified Sender to Marie Harf, Media Spokesperson CIA Office of Public Affairs, Preston Golson, U.S. Government Spokesman, George Little, Assistant to the Secretary of Defense for Public Affairs for the U.S. Department of Defense, & Jennifer Youngblood (June 10, 2011, 08:53 A.M.) (on file with author) (“In thinking of good folks for Mark Boal to possibly talk with.”); *see also id.* (providing a list of names, presumably, all of which were redacted in the document production).

from the CIA “with the full knowledge and full approval/support of [CIA] Director Panetta.”<sup>127</sup> Although the agency has since sought to distance itself from *Zero Dark Thirty*,<sup>128</sup> the CIA’s imprimatur is still evident on the film, especially in light of the records disclosed pursuant to the FOIA request.<sup>129</sup>

### III. SEEING ZERO DARK THIRTY

#### A. *The Perceived Authenticity of Zero Dark Thirty*

The CIA brings a high degree of verisimilitude to Hollywood films. By associating their films with the CIA, filmmakers are empowered to market their projects as “authentic,” “accurate,” and a “rare insider’s look at the Agency.”<sup>130</sup> *The Recruit*, for instance, was marketed as a film that “for the first time opens the CIA’s infamous closed doors and gives an insider’s view into the Agency.”<sup>131</sup> Filmmakers want their films to be seen as “real” accounts because increasing authenticity increases topical appeal,<sup>132</sup> especially films that purport to tell historical stories endeavor to be seen as the true accounts.<sup>133</sup>

Although the CIA and filmmakers use the related terms “accuracy” and “authenticity” interchangeably when discussing their goals, the notions are meaningfully distinct. Basic concepts of film theory and archival studies elucidate what is at stake when the CIA promotes the accuracy of a given film. “Accuracy” refers to the truthfulness of the content of a record.<sup>134</sup> The film in question might accurately depict a building—for example the Abbottabad compound—by presenting the right number of floors, walls with the proper measurements, and accompanying structures. “Authenticity,” conversely, refers to the trustworthiness of a record as a record. A record is authentic if it exhibits the formal elements designed to provide it with authenticity, or if it is confirmed as such by external sources.<sup>135</sup>

127. E-mail from Douglas Wilson, Assistant Secretary of Defense for Public Affairs, to Jamie Smith & Redacted Recipient George (June 15, 2011, 07:12:33) (on file with author).

128. Press Release, Michael Morell, CIA Acting Director, Message from the Acting Director: “Zero Dark Thirty” (Dec. 21, 2012), *available at* <https://www.cia.gov/news-information/press-releases-statements/2012-press-releases-statements/message-from-adcia-zero-dark-thirty.html>.

129. Even in its attempt to censure the film, the agency could not deny its involvement. Morell explained that the “CIA interacted with the filmmakers through our Office of Public Affairs but, as is true with any entertainment project with which we interact, we do not control the final product.” *Id.*

130. JENKINS, *supra* note 4, at 73.

131. Even though, as Jenkins observes, other films had already done just that. *See id.* at 81.

132. *See* Ben Brewster, *The Fundamental Reproach: Bertolt Brecht and the Cinema*, in *EXPLORATIONS IN FILM THEORY: SELECTED ESSAYS FROM CINÉ-TRACTS* 191, 196 (Ron Burnett, ed., 1991).

133. Breznican, *supra* note 83.

134. LUCIANA DURANTI, *DIPLOMATICS* 27 (1998) (“Diplomatics [is] the study of the *Wesen* [being] and *Werden* [becoming] of documentation, the analysis of genesis inner constitution and trans-mission of documents, and of their relationship with facts represented in them and with their creators.”).

135. Duranti distinguishes between diplomatic authenticity and legal authenticity. *See id.*

Accuracy may be an element used to establish the authenticity of a record. For instance, if a film purports to tell a historical story, the accuracy of the content may help establish the film as authentic. Authenticity, in turn, may heighten the verisimilitude of the film, or the extent to which viewers believe that the film is a true and trustworthy account of that which it purports to narrate. In the case of *Zero Dark Thirty*, the story's basis in a historical event, the CIA's known collaboration, and the medium in which it is told all contribute to the film's striking authenticity and verisimilitude.

Echoing film theorists who argue for cinema's unique ability to portray reality, Mark Boal explained, "I was excited to portray [the bin Laden raid] in film because there are some things that film can do that books can't do, and articles can't do."<sup>136</sup> The portrayed reality depends, in part, on a film's verisimilitude—its believability.<sup>137</sup> The renowned literary theorist Tzvetan Todorov established two broad categories of verisimilitude related to representations: generic verisimilitude and cultural verisimilitude. Notably, neither equates directly to objective reality or truth.<sup>138</sup> Generic verisimilitude describes the degree to which a work adheres to the rule of the genre. Drama and comedy, for example, have different governing norms; a work is a believable drama if, say, it meets the conventions of drama.<sup>139</sup> In contrast, cultural verisimilitude depends on external reactions and not upon internal norms.

Citing Aristotle's *Poetics*, Todorov explains that the verisimilar is "not a relation between discourse and its referent (the relation of truth) but between

at 45-46 ("Diplomatically authentic documents are those which were written according to the practice of the time and place indicated in the text, and signed with the name(s) of the person(s) competent to create them. [By contrast] Legally authentic documents are those which bear witness on their own because of the intervention, during or after their creation, of a representative of a public authority guaranteeing their genuineness.").

136. Breznican, *supra* note 83.

137. Cinema, by virtue of its medium, has the ability to make a story seem real, and film theorists have investigated the tangled relationship between film and reality since the 1930s. Beginning around that time, film theorists began investigating the tangled relationship between film and reality. Rudolf Arnheim noted later that film offered the possibility of "the mechanical imitation of nature." RUDOLF ARNHEIM, *FLIM AS ART* 154 (1964). Even renowned film theorists like Siegfried Kracauer and Béla Balázs, who emphasized the differences between reality and film, testified to the unique ability of film to imitate reality. In his 1945 essay, "The Ontological Realism of the Photographic Image," André Bazin describes film as the fulfillment of the age-old craving for realistic representation. *See* BAZIN, *1 WHAT IS CINEMA?* 196 (Hugh Gray, ed. & trans., U. Cal. Press rev. ed. 2004). Siegfried Kracauer concluded in his 1960 book "Theory of Film: The Redemption of Physical Reality" that of all the arts, film is uniquely qualified to record physical reality. *See* THEORY OF FILM: THE REDEMPTION OF PHYSICAL REALITY (1960). More recently, the philosopher Stanley Cavell has argued for the ontological realism of cinema, illustrating how film displaces people and objects from the world onto the screen. *See* CAVELL, STANLEY, *THE WORLD VIEWED: REFLECTIONS ON THE ONTOLOGY OF FILM* (1971).

138. TZVETAN TODOROV, *INTRODUCTION TO POETICS* 18 (Richard Howard, trans., Univ. of Minn. Press 1981) ("[A work is] said to have verisimilitude in relation to two chief kinds of norms.").

139. *See id.* ("[A] sentimental novel will be probable if its outcome consists in the marriage of hero and heroine, if virtue is rewarded and vice punished.").

discourse and what readers believe is true.”<sup>140</sup> The verisimilitude of a film is therefore as much about the relationship between the text and the viewer as the text and its referent, here the history it purports to portray.<sup>141</sup> The reality of a film, in short, is actually its perceived reality. Here, the connection to accuracy and authenticity is clear. If a film more or less accurately displays the past and is taken as an authentic account of the event, it will likely have a high degree of cultural verisimilitude; that is, the public will likely believe the film depicts the true history of what occurred.

The CIA has implicitly averred to this theory. In its mission to bolster its public image, the agency has chosen to promote the accuracy of its depictions in Hollywood, eschewing print media, press announcements, and official reports as less effective means of presenting the truth about the agency. Recall the complaint of the CIA’s entertainment liaison that Americans learn about the CIA only through Hollywood and that audiences trust films when forming opinions about the agency and its operations.<sup>142</sup> The CIA’s support of films like *Zero Dark Thirty* suggests that the agency believes these films are likely to have a high degree of cultural verisimilitude.

Thanks in large part to the accuracy and resulting authenticity of Bigelow’s film, the public was initially set up to believe that *Zero Dark Thirty* narrates the true account of the hunt for the mastermind of 9/11 attacks. By telling the story of the SEAL raid through a cinematic medium characterized by its realism, Bigelow’s film could have been readily perceived by audiences as the true account of what happened, thus satisfying Boal’s goal that the film be a “believable” and accurate portrayal of an historical event.<sup>143</sup>

Several elements combined to foster the perception that the film was a trustworthy record of the Abbottabad raid. Sony Pictures Entertainment, the film studio responsible for the picture, marketed *Zero Dark Thirty* as the “true story” of bin Laden’s death.<sup>144</sup> Bigelow similarly claimed that her film is about “real life,”<sup>145</sup> and Boal asserted early on that “accuracy and authenticity” would be “hallmarks of the production.”<sup>146</sup> Additionally, the film and its promotional materials look real. The movie poster, for instance, displays an actual satellite image of the Abbottabad compound.<sup>147</sup> Sony also bought out similar movies

140. *Id.* at 18-19.

141. Philip Simpson, *Verisimilitude*, in *CRITICAL DICTIONARY OF FILM AND TELEVISION THEORY* 641, 642 (Roberta E. Pearson & Philip Simpson, eds., 2001).

142. Jenkins, Interview, *supra* note 48, at 490.

143. Breznican, *supra* note 83.

144. By creating promotional material with the expression “the story of history’s greatest manhunt,” Sony, in effect, marketed *Zero Dark Thirty* as a true story. For a further discussion of this topic, see Michael Phillips, *Oscars and American History: True, or True Enough?*, *CHICAGO TRIBUNE*, Feb. 15, 2013, [http://articles.chicagotribune.com/2013-02-15/entertainment/chi-oscars-movies-america-20130215\\_1\\_american-history-historical-fiction-argo](http://articles.chicagotribune.com/2013-02-15/entertainment/chi-oscars-movies-america-20130215_1_american-history-historical-fiction-argo).

145. Breznican, *supra* note 83.

146. *Id.* at 3.

147. Eric Elsenberg, *Kathryn Bigelow’s Zero Dark Thirty Gets a New Poster Featuring a Familiar Location*, *CINEMABLEND.COM* (Oct. 1, 2012),

about the hunt for bin Laden that would have competed with *Zero Dark Thirty*.<sup>148</sup> Sony also bought out similar movies about the hunt for bin Laden that would have competed with *Zero Dark Thirty*, and so by reducing the number of narratives available to the public, Sony further reinforced the perception that *Zero Dark Thirty* is the definitive account of events.

Plus, many of the film's technical elements and effects are real. According to the film's special effects supervisor, Bigelow issued a "mandate of verisimilitude" to guide production. To foster realism, the director incorporated actual sights and sounds into the movie.<sup>149</sup> Perhaps most controversially, the film opens with genuine emergency calls made by victims of the attack on the World Trade Center, creating a kind of aural authenticity.<sup>150</sup> In addition, the creators of *Zero Dark Thirty* hired military consultants to replicate how Navy SEALs speak and compose themselves. For example, SEALs say "decks" not "floors"<sup>151</sup> and lean forward when walking.<sup>152</sup>

In addition to the authentic elements and accurate details, the CIA's collaboration with the filmmakers further amplified the film's cultural verisimilitude. Once the public learned that the Langley supported the project and assisted with the film's accuracy, the public was inevitably inspired to consider the film a true account of the manhunt for Osama bin Laden.<sup>153</sup>

In the wake of the media storm accompanying *Zero Dark Thirty*'s release, it is hard to say whether the film is still widely perceived as an authentic account of the hunt for bin Laden. However, the popular controversy is instructive in its own right. The drive to document the film's inaccuracies derived, in part, from the conviction that audiences were accepting the film as an authentic record. In a CIA press release, then-acting director Michael Morell felt compelled to clarify that "*Zero Dark Thirty* is a dramatization, not a realistic portrayal of the facts" and urged his employees and the public "to

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<http://www.cinemablend.com/new/Kathryn-Bigelow-Zero-Dark-Thirty-Gets-Poster-Featuring-Familiar-Location-33279.html>.

148. E-mail from Thomas Twetten, former CIA Deputy Director of Operations, to Classified Recipient (May 25, 2011, 04:20 A.M.) ("Sony Pictures purchased today another movie about hunt for bin Laden that had been in the works.").

149. See Michael Ordoña, *Painstaking Detail in "Zero Dark Thirty,"* SF GATE, Jan. 10, 2013, <http://www.sfgate.com/movies/article/Painstaking-detail-in-Zero-Dark-Thirty-4184632.php>.

150. Manohla Dargis & A. O. Scott, *Confronting the Fact of Fiction and the Fiction of Fact*, N.Y. TIMES, Feb. 22, 2013, [http://www.nytimes.com/2013/02/23/movies/awardsseason/the-history-in-lincoln-argo-and-zero-dark-thirty.html?\\_r=0](http://www.nytimes.com/2013/02/23/movies/awardsseason/the-history-in-lincoln-argo-and-zero-dark-thirty.html?_r=0) (describing *Zero Dark Thirty* as arriving in theaters "with virtual footnotes and a veneer of visual and aural authenticity").

151. *Id.*

152. *Id.*

153. With *Zero Dark Thirty*, Bigelow found her film ensnared in the messy relationship of verisimilitude and authenticity, but not for the first time. The Academy Award winning director had gotten into trouble with authenticity before. *E.g.*, Julian E. Barnes, Ned Parker & John Horn, "*The Hurt Locker*" sets off Conflict, L.A. TIMES, Feb. 25, 2010, <http://articles.latimes.com/2010/feb/25/entertainment/la-et-hurt-locker26-2010feb26> (documenting critics' praise of the film's authenticity, despite soldiers' criticism that *The Hurt Locker* does not accurately portray combat).



remember that *Zero Dark Thirty* is not a documentary.”<sup>154</sup> If *Zero Dark Thirty* were not widely viewed as authentic, such a statement would not only be superfluous, it would make the agency appear absurd.

Moreover, even if the film’s authenticity has since been disproved, the debate about Bigelow’s film forcefully demonstrates the possibility that another film like *Zero Dark Thirty* could be popularly perceived as an authentic records of events, especially if it fails to generate the same public scrutiny.

### *B. Promoting Accuracy, Protecting Secrets*

Throughout its “forward-leaning” engagement with its “Hollywood friends,” OPA exhibited little worry that its collaboration would engender negative consequences for the agency or America.<sup>155</sup> In fact, Langley evidently considered just one concern related to its promotion of accuracy: that the resulting film could reveal intelligence activities, sources, and methods, including classified tactics, techniques, and procedures (“TTPs”) (collectively, hereinafter “Intelligence”).

This concern, however, was quickly dismissed. In addition to the ability to limit access and curate Boal’s visits, the CIA and DoD apparently trusted Boal and Bigelow not to harm the Intelligence Community. The disclosed FOIA records recount Boal’s assurances that he would not compromise national security, which the agencies ostensibly accepted as satisfactory. Commander Robert Mehal shared his assessment with Defense Undersecretary Michael Vickers that Boal was “not interested in giving away TTPs,” parenthetically noting that Boal was “proud not giving anything away in [his 2011 film] *Hurt Locker*.”<sup>156</sup>

Initially, the public outrage over *Zero Dark Thirty* centered on political unfairness, partially couched in terms of national security. In August 2011, *New York Times* columnist Maureen Dowd called attention to the dubious circumstances of the film’s creation, reporting that the “moviemakers are getting top-level access to the most classified mission in history.”<sup>157</sup> Upon learning of Boal and Bigelow’s visits to Washington, Congressman Peter King, chairman of the House Committee on Homeland Security, voiced his dismay, naming the CIA’s engagement with the filmmakers a “potentially dangerous collaboration.”<sup>158</sup> In a press release, King considered the possibility

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154. Press Release, Michael Morell, CIA Acting Director *supra* note 128.

155. Excepting OPA’s concern that the public may perceive the agency as picking favorites. See E-mail from Marie Harf, Media Spokesperson CIA Office of Public Affairs, to Classified Recipients (June 30, 2011, 01:31 P.M.) (on file with author); E-mail from Classified Sender, to Marie Harf, Media Spokesperson CIA Office of Public Affairs (July 11, 2011, 01:11 P.M.) (on file with author).

156. E-mail from Robert Mehal, *supra* note 104.

157. Dowd, *supra* note 1.

158. Press Release, Representative Peter T. King, Chairperson of the Committee on Homeland Security (May 23, 2012), available at <http://homeland.house.gov/press-release/king-statement-ciadod-documents-osama-bin-laden-movie-collaboration>.

that the filmmakers were exposed to classified information, asking, “if [the classified facility visited by Boal and Bigelow] *is so secret that the name cannot even be seen by the public, then why in the world would the Obama Administration allow filmmakers to tour it?*” King added that the filmmakers’ tour of the CIA’s vaults “*is absolutely shocking to those of us who know the sensitive nature of materials kept there.*”<sup>159</sup>

Such visits, in King’s estimation, were particularly worrisome because senior U.S. government officials had expressed the importance of keeping information about the bin Laden raid secret, including special operations commander Admiral Eric Olson, who asserted that “if we want to preserve [the capability that made the raid successful] nobody better talk about it after.”<sup>160</sup> Resounding the CIA’s internal considerations in higher volume, King and his followers expressly worried that the agency compromised intelligence by collaborating with the filmmakers. However, there was another unstated political worry: that the Obama administration leaked information to support the film, originally set for release just in time for the 2012 November election.

The response to King’s allegations was two-fold. Panetta, then Secretary of Defense and former Director of the CIA, claimed that “nothing inappropriate” was shared with the filmmakers.<sup>161</sup> In response to Judicial Watch’s FOIA request, the CIA and DoD also produced records revealing the nature of Boal and Bigelow’s visits, confirming the non-disclosure of classified Intelligence. Additionally, Sony delayed the film’s release date until after the election,<sup>162</sup> mollifying suspicions that the film was “pro-Obama propaganda.”<sup>163</sup>

Following the film’s first screenings in December 2012, the political conversation about *Zero Dark Thirty* shifted and the film’s portrayal of torture took center stage.<sup>164</sup> The fury culminated in the Senate Intelligence

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159. *Id.*

160. *Id.*

161. Jake Tapper, *Leon Panetta: “Nothing Inappropriate” Shared With Bin Laden Filmmakers*, ABC NEWS (May 27, 2012), <http://abcnews.go.com/blogs/politics/2012/05/leon-panetta-nothing-inappropriate-shared-with-bin-laden-filmmakers/> (“You know, we get inquiries everyday from the entertainment industry. We get inquiries from people writing articles, from people writing books, people doing television shows. And the process that we’ve established is that you know, we will work with those individuals.”).

162. Erica Orden, *A Stealth Release Plan For “Zero Dark Thirty,”* THE WALL ST. J., (Jan. 10, 2013), <http://online.wsj.com/news/articles/SB10001424127887324442304578233962595943342> (discussing the film’s shifting release dates).

163. See Frank Bruni, *Bin Laden, Torture and Hollywood*, N.Y. TIMES, Dec. 8, 2012, [http://www.nytimes.com/2012/12/09/opinion/sunday/bruni-bin-laden-torture-and-hollywood.html?\\_r=0](http://www.nytimes.com/2012/12/09/opinion/sunday/bruni-bin-laden-torture-and-hollywood.html?_r=0) (contending that republicans (wrongly) feared the film would be “pro-Obama propaganda”); see also J. Hoberman, *Zero Dark Thirty: The US Election Vehicle that Came Off the Rails*, THE GUARDIAN, Jan. 18, 2013, <http://www.theguardian.com/film/2013/jan/18/zero-dark-thirty-us-election>.

164. Though the “torture debate” is admittedly multifaceted, the criticism was largely two-fold: that the portrayal of torture celebrated the act as useful; and relatedly, that the CIA overstated the role torture played when collaborating with the filmmakers, thereby misleading the public. See, e.g., *Talk of the Nation: “Zero Dark Thirty” Renews Torture Debate* (NPR radio

Committee's launch of an official inquiry into the contact between the filmmakers and the CIA.<sup>165</sup> This time the concern, as expressed by Senators Feinstein, Levin, and McCain, was not about Intelligence; rather, that "the filmmakers could have been misled by information they were provided by the CIA."<sup>166</sup> Specifically, the senators feared *Zero Dark Thirty* wrongly implies that enhanced interrogation techniques were instrumental in the hunt for al-Qaida, specifically due to misimpressions given by CIA officials.<sup>167</sup> Although the inquiry made splashy headlines, it too was dropped after Bigelow's film failed at the Oscars amid the political fallout.<sup>168</sup>

Despite the extensive public discussion of *Zero Dark Thirty* and the admittedly short-lived official inquiry into the filmmakers' relationship with the CIA, the policy that enabled the film's creation has been left largely unexamined. Like the focus on Intelligence, the emphasis on politics and torture obfuscates the other potential danger engendered by the CIA's domestic policy. The very act of promoting cinematic accuracy, however banal, implicates non-procedural, non-technical, non-tactical matters unrelated to intelligence activities, sources, and methods (in short: non-Intelligence). The agency's mission to promote accuracy, however, nevertheless matters for national security.

In other contexts, the CIA expresses significant concern about these non-Intelligence national security threats. When scrutinizing the CIA's work with Boal and Bigelow, the focus should therefore not be limited to discussions of torture, politics, or the disclosure of intelligence methods and military tactics. Instead, the focus should be on the CIA's practice of helping filmmakers and how this policy illustrates the CIA's understanding of fact and fiction.

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broadcast Feb. 14, 2013), *available at* <http://www.npr.org/2013/02/14/172017167/zero-dark-thirty-renews-torture-debate> (discussing the film's depiction of interrogation techniques); David Edelstein, *David Edelstein's Top Ten Movies of 2012*, NEW YORK MAGAZINE (December 10, 2012), <http://www.vulture.com/2012/11/david-edelstein-top-ten-movies.html> (describing *Zero Dark Thirty* as bordering on the "politically and morally reprehensible" because it "makes a case for the efficacy of torture"); Scott Shane, *Portrayal of C.I.A. Torture in Bin Laden Film Reopens a Debate*, N.Y. TIMES, Dec. 12, 2012, <http://www.nytimes.com/2012/12/13/us/zero-dark-thirty-torture-scenes-reopen-debate.html>; *see also* Bruni, *supra* note 163. The interest in the film's depiction of torture was so great, *Time* magazine even reported on where the scenes took place: not on a Hollywood set, but in a real Jordanian prison. *See*, Lily Rothman, *Seven Secrets of Zero Dark Thirty*, TIME (Dec. 17, 2012), <http://entertainment.time.com/2012/12/17/seven-secrets-of-zero-dark-thirty/>.

165. Letter from Dianne Feinstein, Carl Levin, and John McCain to Michael Morell, Acting Director CIA (Dec. 19, 2012), *available at* <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=0d4e72c7-361a-4271-922f-6e2ccaa3f609>.

166. *Id.*

167. For an analysis *see* Ken Dilanian and Steven Zeitchik, '*Zero Dark Thirty's*' torture implication prompts Senate inquiry, L.A. TIMES, Jan. 3, 2013.

168. *See, e.g.*, Reid & Serjeant, *supra* note 2 (describing the "fierce backlash" over the film's "implied message that torture helped crack the bin Laden case," including the castigation from Senators Feinstein, Levin, and McCain, and attributing the failure of *Zero Dark Thirty* at the Academy Awards to the controversy).

Part IV explores how the CIA uses non-Intelligence concerns to justify its robust secrecy, investigating the CIA's recent decision to withhold videos and photographs of the deceased Osama bin Laden as an exemplary case study. Then, using the CIA's collaboration on *Zero Dark Thirty* as an example, Part IV examines the dangers precipitated by the CIA's support of accuracy in Hollywood.

#### IV. NATIONAL SECURITY SECRETS AND AUTHENTIC MEDIA

Intelligence activities, sources, and methods, together with military tactics, techniques, and procedures ("Intelligence"), are afforded considerable secrecy. Among the government's tools to shield this sensitive information from disclosure, FOIA Exemption 1 allows agencies to withhold information where disclosure might jeopardize national security.<sup>169</sup> Although Intelligence-related national security concerns are regularly enumerated to justify secret-keeping by the CIA and other agencies, non-Intelligence concerns are also routinely cited. And because courts "consistently defer[] to executive affidavits predicting harm to national security,"<sup>170</sup> articulating non-Intelligence national security concerns has historically proven a potent method for moving records into FOIA Exemption 1.<sup>171</sup>

The recent controversy over the disclosure of photographs of the deceased Osama bin Laden offers a rich case study of the non-Intelligence national security concerns regularly introduced in secrecy litigation, but consistently overlooked in legal scholarship. Because the non-Intelligence concerns played an outsized role in the resulting case, *Judicial Watch, Inc. v. United States DOD*,<sup>172</sup> a close reading of the decision and the supporting affidavits submitted by the CIA and DoD isolates the characteristics of national security threats when Intelligence is not explicitly at stake. The bin Laden photographs constitute a particularly powerful case study because they offer a ready comparison to *Zero Dark Thirty*, well illustrating the entangled relationship between the CIA's secrecy justifications and the agency's domestic mission to

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169. Matters exempt from disclosure under FOIA include those "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1) (2012); *see also* *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1271 (U.S. 2011) (naming FOIA Exemption 1 among the most notable secrecy measures).

170. *Judicial Watch, Inc. v. United States DOD*, 857 F. Supp. 2d 44, 60-61 (D.D.C. 2012). Courts must afford "substantial weight" to agency declarations where national security is concerned because courts "lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case." *Krikorian v. Dep't of State*, 984 F.2d 461, 464. As a result, courts have "consistently deferred to executive affidavits predicting harm to national security, and have found it unwise to undertake searching judicial review." *ACLU v. DOD*, 628 F.3d 612, 624.

171. Agencies must do more than merely articulate claims; to justify a FOIA exemption in the national security context, an agency's arguments must be "plausible" and "logical." *Wolf v. CIA*, 473 F.3d 370, 374-75.

172. 857 F. Supp. 2d 44 (D.D.C. 2012), *aff'd*, 715 F.3d 937 (D.C. Cir. 2013).

promote the accuracy of its representation in films and on television. Better understanding the non-Intelligence threats cited by the Intelligence Community to justify secrecy offers new insight into the CIA's national security concerns and the agency's attitude toward authentic versus fictional media.

#### A. *The UBL Photos and/or Video Recordings*

On May 1, 2011, President Obama announced the death of Osama bin Laden (UBL) at the hands of Navy SEAL Team Six.<sup>173</sup> While the exact details of the SEAL's raid are disputed, most accounts agree that bin Laden was shot at least twice, in the chest or head, and killed instantly.<sup>174</sup> Within 24 hours, bin Laden's body was flown from Abbottabad, Pakistan to the aircraft carrier USS Carl Vinson in the North Arabian Sea, where religious rites were performed.<sup>175</sup> Bin Laden's body was washed, wrapped in a white sheet, placed in a weighted bag, and then slid into the sea.<sup>176</sup>

Within days of the raid, media reports claimed the government had taken photographs and video of bin Laden's body. CNN reported that the pictures included scenes inside the Abbottabad compound and images of deceased members of bin Laden's family and the al-Qaida leader himself.<sup>177</sup> Bin Laden was reportedly photographed in several settings.<sup>178</sup> One set of images shows bin Laden's body in an Afghanistan hangar before it was flown to the USS Vinson.<sup>179</sup> CNN describes the hangar photographs as the "the most recognizable with a clear picture of his face," but also "gruesome because he has a massive open head wound across both eyes," concluding "[i]t's very bloody and gory." Other photographs document the burial at sea, showing bin Laden "before the shroud was put on and then wrapped in the shroud."<sup>180</sup>

Amid rampant media speculation about the potential release of the photographs, CIA Director Leon Panetta was initially confident that a photograph "would be presented to the public."<sup>181</sup> However, Defense Secretary Robert Gates and Secretary of State Hillary Clinton lobbied against the

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173. Press Release, The White House, Remarks by the President on Osama Bin Laden (May 2, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/05/02/remarks-president-osama-bin-laden>.

174. See, e.g., CHUCK PFARRER, SEAL TARGET GERONIMO: THE INSIDE STORY OF THE MISSION TO KILL OSAMA BIN LADEN 227 (2011).

175. See Jim Garamone, *Bin Laden Buried at Sea*, AMERICA'S NAVY (May 2, 2011), [http://www.navy.mil/submit/display.asp?story\\_id=60124](http://www.navy.mil/submit/display.asp?story_id=60124).

176. *Id.*

177. See Stacia Deshishku, *Even more details on the OBL photos*, CNN (May 3, 2011), <http://whitehouse.blogs.cnn.com/2011/05/03/even-more-on-the-photos/>.

178. *Id.*

179. *Id.*

180. *Id.*

181. *CIA Director: Bin Laden Death Photo to be Released*, NBCNEWS.COM (May 3, 2011), [http://www.nbcnews.com/id/42873423/ns/world\\_news-death\\_of\\_bin\\_laden/t/cia-director-bin-laden-death-photo-be-released/](http://www.nbcnews.com/id/42873423/ns/world_news-death_of_bin_laden/t/cia-director-bin-laden-death-photo-be-released/).

disclosure.<sup>182</sup> In the end, President Obama decided not to disclose any of the records.<sup>183</sup> In response, Judicial Watch, a conservative watchdog group, submitted a FOIA request to the DoD and CIA 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.”<sup>184</sup> After the CIA and DoD advised Judicial Watch that it would be unable to respond within the 20-day statutory time period,<sup>185</sup> Judicial Watch then filed suit against the DoD and the CIA to compel the agencies to process the requests and release the responsive records.<sup>186</sup> As a result, the CIA located 52 unique records.<sup>187</sup> According to John Bennett, Director of the CIA’s National Clandestine Service, the responsive records are:

Photographs and/or video recordings taken of [Bin Laden] on or about 1 May 2011, the day that the United States conducted an operation that resulted in his death. These records contain post-mortem images of [Bin Laden]’s body. As a result, many of them are quite graphic, as they depict the fatal bullet wound to [Bin Laden]’s head and other similarly gruesome images of his corpse. Many of the images were taken inside of [Bin Laden]’s compound in Abbottabad, Pakistan, in which he was killed, while others were taken as his corpse was being transported from the Abbottabad compound to the location where he was ultimately buried at sea. Several other images depict the preparation of his body for burial as well as the burial itself. Some of the responsive photographs were taken so that the CIA could conduct a facial recognition analysis in order to confirm that the body of the deceased individual was that of [Bin Laden].<sup>188</sup>

The CIA claimed the records were exempt from disclosure and were properly classified under FOIA Exemptions 1 and 3.<sup>189</sup> FOIA Exemption 1 exempts responsive records properly classified as secret in the interest of national defense or foreign policy.<sup>190</sup> FOIA Exemption 3 specifically exempts

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182. See Jake Tapper, *Gates, Clinton Advising President to Not Release OBL Photograph; Obama Increasingly Concerned No Good Would Come from It*, ABC NEWS (May 4, 2011), <http://abcnews.go.com/blogs/politics/2011/05/gates-clinton-advising-president-to-not-release-obl-photograph-obama-increasingly-concerned-no-good/>.

183. Following a press briefing by Jay Carney on May 4 announcing the president’s decision not to release any of the photographs of the deceased bin Laden, the president later detailed his rationale, emphasizing the “national security risk” involved and stating that the photos might serve “[a]s a propaganda tool” or “an incitement to additional violence.” *60 Minutes: Interview with President Obama* (CBS television broadcast May 8, 2011), available at <http://www.cbsnews.com/news/obama-on-pakistan-and-osama-bin-laden/>.

184. *Judicial Watch, Inc. v. United States DOD*, 857 F. Supp. 2d 44, 49-50 (D.D.C. 2012).

185. *Id.*

186. *Id.*

187. *Judicial Watch*, 857 F. Supp. 2d at 50 (citing Bennett Decl. ¶ 11). The DoD did not have any responsive records, such as photographs or videos.

188. *Id.* (citing Bennett Decl. ¶ 10).

189. *Id.* at 51.

190. 5 U.S.C.S. § 552(b)(1) (2012).

documents exempted by other statutes.<sup>191</sup> Ultimately, the court held that each of the disputed photographs and any video recordings of bin Laden's body were exempt from disclosure under FOIA Exemption 1 because the records "pertain[ed] to the foreign activities of the United States" and because "their release could reasonably be expected to damage the national security."<sup>192</sup> This exemption obviated the court's need to reach FOIA Exemption 3.<sup>193</sup>

### B. The CIA's National Security Concerns

In its response to Judicial Watch, the CIA also claimed that the classified records satisfied the procedural and substantive criteria for classification established by Executive Order 13526, which "prescribes a uniform system for classifying, safeguarding, and declassifying national security information."<sup>194</sup> In addition to establishing procedural requirements, E.O. 13526 imposes two substantive barriers to classification: the record-holding agency must verify that the disputed records fall within one of the classification categories outlined in the Order; and the agency must demonstrate that the unauthorized disclosure of the records could reasonably be expected to result in describable damage to national security.<sup>195</sup>

Of the eight categories of information that may be classified under §1.4 of E.O. 13526, the CIA invoked subcategories (a), (c), and (d),<sup>196</sup> which specifically include:

- (a) military plans, weapons systems, or operations;
- (c) intelligence activities (including covert action), intelligence sources or methods, or cryptology; and
- (d) foreign relations or foreign activities of the United States, including confidential sources.<sup>197</sup>

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191. *Id.* § 552(b)(3).

192. *Id.*

193. In the pending lawsuit, Judicial Watch moved for summary judgment, alleging that the DOD's search was too narrow and contending the CIA "neither described those records in sufficient detail nor demonstrated that they are exempt from disclosure." *Id.* at 52. The D.C. District Court quickly found that DOD's search "complied with the obligations imposed by FOIA," but devoted considerable attention to the sufficiency of the CIA's evidence to support its withholdings. *See id.*

194. Exec. Order No. 13526, 75 Fed. Reg. 707 § 1.7 (Dec. 29, 2009).

195. *Id.* §§ 1.1(a)(3), 1.4.

196. *Judicial Watch, Inc. v. United States DOD*, 857 F. Supp. 2d 44, 59 (D.D.C. 2012).

197. Exec. Order No. 13526, 75 Fed. Reg. 707 §1.4. ("Information shall not be considered for classification unless its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security in accordance with section 1.2 of this order, and it pertains to one or more of the following: (a) military plans, weapons systems, or operations; (b) foreign government information; (c) intelligence activities (including covert action), intelligence sources or methods, or cryptology; (d) foreign relations or foreign activities of the United States, including confidential sources; (e) scientific, technological, or economic matters relating to the national security; (f) United States Government programs for safeguarding nuclear materials or facilities; (g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or (h) the development,

In response, Judicial Watch contended that the CIA failed to establish that every one of the 52 responsive records pertains to a classification category and would cause an exceptionally grave national security risk if disclosed.<sup>198</sup>

The court agreed that the CIA failed to show that each of the photographs or videos pertains to intelligence methods, citing as examples the burial photos of bin Laden and images of the body as it was transported to the USS Carl Vinson.<sup>199</sup> In other words, these are non-Intelligence-revealing images. Yet, the court held that each record nevertheless pertains to the “foreign activities of the United States”<sup>200</sup> because the images were, in the words of the Director of the National Clandestine Service, “the product of a highly sensitive, overseas operation that was conducted under the direction of the CIA.”<sup>201</sup> As a result, the court only needed to determine if the CIA demonstrated that the disclosure of the images or videos “reasonably could be expected to cause exceptionally grave damage to the national security.”<sup>202</sup> In making this determination, the court relied on the declarations from a number of officials: John Bennett; Admiral William McRaven, Commander United States Special Operation Commands; and Lieutenant General Robert Neller, Director of Operations, J-3, on the Joint Staff at the Pentagon.<sup>203</sup>

Although neither the court nor the CIA so categorized the images, the declarations reveal that the UBL records fall into two classes: Intelligence-revealing and non-Intelligence-revealing images. A post-mortem photograph of bin Laden used to conduct facial recognition analysis exemplifies the first category, which may constitute the majority of the disputed records.<sup>204</sup> The disclosure of this or other Intelligence-revealing photographs could damage

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production, or use of weapons of mass destruction.”).

198. *Judicial Watch*, 857 F. Supp. 2d at 59.

199. As examples, Judicial Watch named images “that depict the preparation of Bin Laden’s body for burial and the burial itself,” asserting that without knowing more details, the court could not evaluate whether each image relates to the three claimed classification categories. *Id.* at 60 (citing Pl.’s Mot. & Opp. at 32-33.) In response, the court insisted that the “Plaintiff misses the forest for the trees.” *Id.*

200. *Id.* (citing Exec. Order No. 13526, 75 Fed. Reg. 707 § 1.4(d)).

201. *Judicial Watch*, 857 F. Supp. 2d at 59 (citing Bennett Decl., ¶ 21); *see also id.* (“all of the records pertain to . . . the foreign relations and foreign activities of the United States” (citing Bennett Decl., ¶ 21) (alteration in original)).

202. Exec. Order No. 13526, 75 Fed. Reg. 707 § 1.2.

203. As the court notes, the declarations do not announce in conclusory fashion the belief that disclosure would result in exceptionally grave damage to national security. Instead, each declarant “expounds his evaluation of the national-security risk in detail, describing the basis for his beliefs and focusing on those risks that relate to his area of expertise,” providing a wealth of information about the CIA’s reasoning, even if the documents were not ultimately disclosed. *Judicial Watch*, 857 F. Supp. 2d at 61.

204. “The CIA’s facial recognition technology, which is highly classified, compares unique facial features, such as bone structure, age spots, hair growth patterns, and the size and shape of the eyes, ears, and nose, as well as the relative positioning of facial features.” Motion for Summary Judgment, Memorandum of Law, and Statement of Material Facts by CIA, U.S. Dept. of Defense, Bennett Decl. ¶ 11, *Judicial Watch, Inc. v. United States DOD*, 857 F. Supp. 2d 44 (2012) [hereinafter “Bennett Decl.”]. For a fuller explanation of the Intelligence-related national security concerns, *see id.* ¶ 29.



national security in several ways: by showing classified equipment or intelligence activities used during or after operations;<sup>205</sup> revealing information about intelligence or military actors, making them targets;<sup>206</sup> helping the enemy develop countermeasures to defeat future operations; providing insight into the manner in which an analysis was conducted, or the limitation of such analysis;<sup>207</sup> and revealing information about ongoing plans, projects, and negotiations.<sup>208</sup> Based on Bennett and Neller's declarations, the court accepted the conclusion that disclosure of any Intelligence-revealing image raises the specter of damage to national security.<sup>209</sup>

The second class of pictures, including the image of bin Laden wrapped in a white sheet, do not reveal Intelligence. Consequently, for these images, it is more difficult to claim that they could gravely damage national security. As Judicial Watch noted, these pictures might include "images taken on board the *USS Carl Vinson* of the burial at sea" which do not "reveal site exploitation tactics, techniques, or procedures used in the Abbottabad compound or even facial recognition techniques or capabilities."<sup>210</sup> The court agreed, noting, "the military-and intelligence-related risks . . . cannot corroborate the CIA's claim that *each* of the fifty-two responsive records is properly classified."<sup>211</sup> To meet its classification requirements and show that the records were properly withheld, the CIA had the burden of demonstrating that the disclosure of each of the records—even the most innocuous photographs of the deceased bin Laden—would pose a risk of harm to national security.<sup>212</sup> However, in reviewing Bennett and Neller's declarations, the court held that the CIA's explanations of the national security risks applied to *any* photograph or video

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205. Motion for Summary Judgment, Memorandum of Law, and Statement of Material Facts By CIA, U.S. Dept. of Defense, McRaven Decl. ¶ 8, *Judicial Watch, Inc. v. United States DOD*, 857 F. Supp. 2d 44 (2012) [hereinafter "McRaven Decl."].

206. McRaven notes, "the responsive records would reveal unique information about the unit, making members readily identifiable in the future and, therefore, placing them and their families at great risk of being specifically target by the enemies." *Id.* at ¶ 3(a).

207. *Id.* at ¶ 3(c).

208. See Bennett Decl., *supra* note 204, ¶ 28. The declaration from William McRaven is entirely devoted to the risks stemming from the release of information about classified military methods and equipment. See McRaven Decl., *supra* note 205. According to McRaven, "[m]ultiple photos depict equipment used by the particular special operations during this operation" and because "classified Sensitive Site Exploitation (SSE) Tactics, Techniques, and Procedures (TTPs) are also revealed in the photos." *Id.* at ¶ 3(b).

209. *Judicial Watch*, 857 F. Supp. 2d at 61-64.

210. Memorandum in Opposition to Re1414Motion for Summary Judgment, Memorandum of Law, and Statement of Material Facts and Response to Defendants' Statement of Material Facts Filed by Judicial Watch, Inc., at 11, *Judicial Watch, Inc. v. United States DOD*, 857 F. Supp. 2d 44 (D.D.C. 2012).

211. *Judicial Watch*, 857 F. Supp. 2d at 62.

212. *Id.* ("The test is not whether the court personally agrees in full with the CIA's evaluation of the danger—rather, the issue is whether on the whole record the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in this field of foreign intelligence in which the CIA is expert and given by Congress a special role.") (quoting *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982)).

recording of the raid and bin Laden's body, regardless of whether or not the record was Intelligence-revealing or not.<sup>213</sup> As a result, the court found no need for the CIA to disaggregate the fifty-two responsive records and held that no further information about the records was necessary.<sup>214</sup>

Despite the court's realization that the "public would likely desire to see images of this seminal event," and the court's belief that "the more significant an event is to our nation . . . the more need the public has for full disclosure," the court found that the CIA's explanation of the national security threat passed muster and justified keeping the images secret.<sup>215</sup> Echoing the film theory of Kracauer and Bazin,<sup>216</sup> the court further noted, "[a] picture may be worth a thousand words. And perhaps moving pictures bear an even higher value."<sup>217</sup> But, owing to the CIA's valid national security concern and the secrecy it justifies, the court conceded that in this case "descriptions of the death and burial of Osama Bin Laden will have to suffice . . . ."<sup>218</sup>

### C. Non-Intelligence National Security Concerns

Although the court held that the images of bin Laden were exempt from disclosure, the declarations accompanying the CIA's summary judgment motion reveal how the CIA justifies secrecy when Intelligence is not revealed. A close reading of Bennett and Neller's declarations reveals the agency's key non-Intelligence concerns—namely, that disclosing the records could inflame tensions overseas and contribute to propaganda by terrorist groups. In turn, this could have led to "retaliatory attacks against the United States homeland or United States citizens, officials, or other government personnel traveling or living abroad."<sup>219</sup>

Neller and Bennett demonstrate that the disclosure of *any* of the photographs of the deceased al-Qaida leader would have these effects, putting the United States at risk. Describing the post-mortem images of bin Laden as "gruesome," Bennett asserted the release of these images "could be expected to inflame tensions among overseas populations,"<sup>220</sup> for example, by "generat[ing] fodder for extremist commentary."<sup>221</sup> Bennett also warned that the images could have been interpreted "as a deliberate attempt by the United States to humiliate the late al-Qa'ida leader,"<sup>222</sup> in turn, causing "feelings of denigration"

213. *Id.*

214. The court also declined to conduct *in camera* review of the records. *See id.* at 62. Consequently, summary judgment was granted for the DoD and CIA and affirmed by the D.C. Circuit Court. *See Judicial Watch, Inc. v. United States DOD*, 715 F.3d 937 (D.C. Cir. 2013).

215. *Judicial Watch*, 857 F. Supp. 2d at 63; *see also id.* ("the end of Bin Laden's reign of terror certainly ranks high.")

216. *See supra* Part II.

217. *See Judicial Watch*, 857 F. Supp. 2d at 48.

218. *Id.*

219. *See Bennett Decl.*, *supra* note 204, ¶ 23.

220. *Id.*

221. *Id.* ¶ 26.

222. *Id.* ¶ 27.

which could “trigger violence, attacks, or acts of revenge against the United States.”<sup>223</sup> In Bennett’s estimation, any perception that the United States was presenting a trophy could incite tensions, and a non-Intelligence-revealing image could be perceived as such a trophy.<sup>224</sup>

The declarations further maintain that the public release of the UBL images would “provide terrorist groups and other entities hostile to the United States with information to create propaganda.”<sup>225</sup> Bennett observed, “Al-Qa’ida has a very effective propaganda operation.”<sup>226</sup> Similarly, Neller asserted, “it is likely that extremists groups will seize upon these images as grist for their propaganda mill, which will result in addition to violent attacks, increased terrorist recruitment, continued financial support, and exacerbation of tensions between the Afghani people and U.S. and Coalition Forces.”<sup>227</sup> Bennett cited the abuse of the Iraqi detainees at the Abu Ghraib prison as precedence for his predictions.<sup>228</sup> Bennett explained that when the abuse at Abu Ghraib was disclosed, “al-Qa’ida made very effective use of that information on extremist websites that recruit jihadists and solicit financial support.”<sup>229</sup> In Bennett’s estimation, the disclosure of post-mortem images of UBL would provide similar “encouragement and ready-made ammunition for al-Qa’ida.”<sup>230</sup>

Even a non-gruesome picture, like an image of UBL’s burial at sea, could have enhanced “al-Qa’ida’s effort to use these events to further attack and otherwise inflict exceptionally grave damage to the security interests of the United States.”<sup>231</sup> Bennett contended that terrorist propaganda is dangerous to the national security of the United States because it could have been “used to recruit, raise funds, inflame tensions, or rally support for causes and actions that reasonably could be expected to result in exceptionally grave damage to both the national defense and foreign relations of the United States.”<sup>232</sup> In short, any image of bin Laden that provides ready-made ammunition for al-Qa’ida to use in its propaganda mill may rightfully be said to raise national security concerns under the CIA’s reasoning.

#### *D. Attributes of Non-Intelligence-Revealing But National Security-Threatening Images*

According to the CIA, the UBL pictures also constitute a national security

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223. *Id.*

224. *Id.*

225. *Id.* at 24.

226. *Id.*

227. Motion for Summary Judgment, Memorandum of Law, and Statement of Material Facts By CIA, U.S. Dept. of Defense, Neller Decl. ¶ 6, *Judicial Watch, Inc. v. United States DOD*, 857 F. Supp. 2d 44 (2012) [hereinafter “Neller Decl.”].

228. Bennett Decl., *supra* note 204, ¶ 24.

229. *Id.*

230. *Id.*

231. *Id.* at ¶ 25.

232. *Id.* at ¶ 24.

threat because their authenticity and presentation could serve as “ready-made ammunition” for propaganda and enflame tensions between the U.S. and the Arab World.<sup>233</sup> However, an analysis of the CIA’s declarations makes clear that it is not a record’s authenticity that poses the threat, but its *perceived* authenticity. To support his “ready-made ammunition,” Neller cited a *Newsweek* article that “incorrectly reported that U.S. military personnel at Guantanamo Bay, Cuba had desecrated the Koran.”<sup>234</sup> The *Newsweek* report, though, was fictional, but readers around the globe took it for the truth. As a result, “at least eleven people died and many were hurt during several anti-U.S. protests in Afghanistan” despite the story’s fictionality.<sup>235</sup> Neller further explained that the report provoked uprisings and rallies around the globe, some accompanied by shouts of “Death to America!”<sup>236</sup>

Neller’s example is telling. By analogizing the UBL photos to the *Newsweek* article, Neller implicitly recognized that the CIA’s secrecy-justifying national security concerns extend to fictional records. When evaluating the threat to national security, the CIA does not distinguish between non-fictional and fictional records. Images and stories that may incite anger abroad or be used for anti-American propaganda need not convey reality. Rather, the key factor is how the recipient of the information perceives it. If the disclosed records are perceived as authentic, they will constitute a threat to the national security. Thus, both fictional and non-fictional images act as ammunition for terrorists so long as they are perceived to be authentic.

The presentation of non-Intelligence-revealing images similarly influences the risk their disclosure poses to national security. Here, presentation has two dimensions—content and context. Content has a plain bearing on national security. To justify the withholding of the bin Laden images, Bennett cited the mistaken release of posthumous images of the deceased al-Qaida-in-Iraq leader Abu Musab al-Zarqawi.<sup>237</sup> Though the US military took “precautionary steps” to clean the body and make it presentable, Bennett noted, “foreign editorials criticized the release by labeling the photo a ‘trophy.’”<sup>238</sup> And, editorials in Pakistan portrayed “the repeated broadcasts of the photo as an ‘ad for jihad’ that was broadcast around the world.”<sup>239</sup> Bennett’s example indicates that, despite rigorous sanitation, certain subjects may inherently pose a threat to national security. According to the CIA, images of bin Laden fall on the

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233. On appeal, the D.C. Circuit Court declined to decide whether classification was proper on the ground that disclosure of the post-mortem images of bin Laden would facilitate anti-American propaganda; instead, the court relied only on the CIA’s predictions of future violence. See *Judicial Watch, Inc. v. United States DOD*, 715 F.3d 937, 943 (D.C. Cir. 2013). In other instances, however, the court has accepted the CIA’s propaganda fears. See *infra* notes 282-289 and accompanying text.

234. Neller Decl., *supra* note 227, ¶ 7.

235. *Id.*

236. *Id.*

237. Bennett Decl., *supra* note 204, ¶ 26.

238. *Id.*

239. *Id.*

extreme end of the content-volatility spectrum, making the photographs more like to inflame tensions overseas and to encourage terrorist propaganda.

The context of a record also affects its relation to national security. As Bennett asserted, the presentation of even the most innocuous image of bin Laden wrapped in a white sheet may be interpreted as a trophy designed to humiliate al-Qaida. For instance, if “media scenes involving photos of UBL [were] juxtaposed against scenes of celebration in the United States,” this would cause feelings of denigration and thereby trigger a national security threat.<sup>240</sup>

Although the secrecy surrounding the CIA makes it difficult to affirm the agency’s methods for determining grave national security risks, the Bennett and Neller declarations suggest that, even where a record has less-inflammatory content, its presentation may nevertheless render the record a national security risk, even when the content of a record is sanitized or innocuous to American eyes. The perceived relationship between the government and the record, whether it fully endorses or remains silent on a controversial image, also bears on a record’s impact on national security. Neller cited the *Jyllands-Posten* Muhammad cartoons controversy, in which the publication of Danish cartoons depicting the Prophet Muhammad resulted in widespread violence in Afghanistan, Pakistan, Nigeria, Somalia, and Turkey, as well as attacks on the Danish embassies in Iran, Syria, and Lebanon.<sup>241</sup> Although Danish newspapers, including the *Jyllands-Posten*, are privately owned and independent from the government,<sup>242</sup> protestors acted violently against Denmark because they were dissatisfied with government’s reaction when the cartoons were published.<sup>243</sup> The United Nations Commission on Human Rights even criticized the Danish government for its inaction after the publication of the cartoons.<sup>244</sup>

Although non-Intelligence-revealing images may less obviously pose threats to national security, the CIA’s declarations suggest a clear agency belief that such records should be kept secret where they may inflame tensions overseas or be used in terrorist propaganda. Otherwise, the non-Intelligence revealing images of bin Laden should have been disclosed. The declarations underscore that presentation and perceived authenticity may make even the most innocuous image a potential threat to national security.

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240. *Id.* ¶at 27.

241. Neller Decl., *supra* note 227, ¶7-8.

242. See Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination: Situation of Muslims and Arab Peoples in Various Parts of the World*, Comm’n on Human Rights, at 9-15, E/CN.4/2006/17 (Feb. 13, 2006) (by Doudou Diène), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/107/32/PDF/G0610732.pdf?OpenElement>.

243. *Id.*

244. *Id.*

## V. THE CIA'S DANGEROUS MISSION?

The CIA may have assumed a dangerous domestic mission.<sup>245</sup> In its effort to promote the accuracy of its representations in Hollywood, the CIA may undermine its own national security concerns, especially when the resulting film or television show depicts an actual or historical agency operation. Whereas Langley and its critics are quick to ensure that Intelligence is not revealed when the agency collaborates with filmmakers, seemingly little attention is devoted to ensuring that national security concerns unrelated to Intelligence are not breached during these collaborations. Yet, the CIA has declared that potential future damage from inflaming tensions overseas and spreading propaganda can be “exceptionally grave.”<sup>246</sup> Redirecting focus on the consequences of the CIA's under-studied Hollywood policy reveals the ways in which the agency undercuts its own justification for secret-keeping and raises difficult questions about the role of authenticity in the larger landscape of national security and secrecy law.

A. *Does Zero Dark Thirty Pose a Threat to National Security?*

Comparing *Zero Dark Thirty* with the secret Osama bin Laden pictures highlights the potential consequences of the Agency's collaborations with Hollywood. In fact, the CIA itself has obliquely invited this approach. In a 2012 FOIA dispute over videos of the forced cell extractions (FCE) of four Guantanamo detainees, the CIA submitted supporting affidavits from Major General Karl R. Horst, Chief of Staff of USCENTCOM.<sup>247</sup> As in the UBL photo case, Horst argued analogically, providing examples of “violence and anger” provoked by previous releases of photographs.<sup>248</sup> Remarkably, the court

245. The claim that the CIA has a “domestic mission” might fairly be challenged as provocative. Congress, after all, restricted domestic CIA activities to overt support activities. *See* S. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS, FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-755, at 136 (1976); *see also* Stephen W. Preston, *CIA and the Rule of Law*, 6 J. NAT'L SECURITY L. & POL'Y 1 (2012) (presenting a speech from the General Counsel of the CIA describing further limitations on the CIA's domestic activities). But, the National Security Act did not clearly define which domestic CIA actions are acceptable and, courts have similarly “eschewed clear definitions and parameters on CIA domestic activity.” Grant T. Harris, Note, *The CIA Mandate and the War on Terror*, 23 YALE L. & POL'Y REV. 529, 534 (2005). The Court in *Fitzgibbon v. CIA* even acknowledged, “the Agency must, at times, pursue domestically its foreign intelligence mandate.” 911 F.2d 755, 764 (D.C. Cir. 1990). Recent revelations, moreover, leave little doubt that the CIA pursues domestic missions. Whether the mission to promote the accuracy of the agency's representation in films and on television falls within the bounds of permissible domestic activity is a question separate from the issue raised here, but one worth asking.

246. The disputed records at issue here are classified “Top Secret.” Bennett Decl., *supra* note 204, ¶ 22. Information is classified “Top Secret” if its unauthorized disclosure could reasonably be expected to result in *exceptionally grave damage* to national security. Exec. Order No. 13526, 75 Fed. Reg. 707 § 1.2(a)(1) (Dec. 29, 2009) (emphasis added).

247. *Int'l Counsel Bureau & Pillsbury, Winthrop, Shaw, Pittman, LLP v. United States DOD*, 906 F. Supp. 2d 1, 6 (D.D.C. Dec. 4, 2012).

248. *Id.* at 15.

noted that the proffered examples were “not exactly analogous” to the FCE videos in question. Nevertheless, the court found that the examples provided plausible explanations of the harm to national security resulting from disclosure.<sup>249</sup>

Borrowing this analytic approach proves fruitful here. Assessing *Zero Dark Thirty* according to the logic espoused by the CIA in cases involving predictions of future violence unearths the agency’s implicit attitude toward fiction, providing new ground from which to critically assess the CIA’s Hollywood policy and its related use of secrecy law. By the CIA’s reasoning, *Zero Dark Thirty* could arguably present an “exceptionally grave” threat to the national security analogous to the disclosure of the disputed Osama bin Laden photographs.<sup>250</sup> Specifically, the content, context, and perceived authenticity of *Zero Dark Thirty* risk inflaming tensions overseas and encouraging propaganda by terrorists.

The very content of *Zero Dark Thirty* is incendiary. The film’s climatic scene, championed for its “painstaking authenticity,”<sup>251</sup> portrays the same content as the secret UBL images: both depict the Abbottabad raid, bin Laden’s death, and post-mortem images of the al Qaida leader. The film shows bin Laden bleeding on the third floor of his Pakistan hideout and wrapped in a body bag at the US base in Jalalabad.<sup>252</sup>

Like the classified photos, *Zero Dark Thirty* could be seen as a trophy designed to humiliate al-Qaida.<sup>253</sup> The CIA made clear that even the most innocuous photograph of bin Laden could cause humiliation depending on its presentation. For example, John Bennett explained that showing the deceased bin Laden “juxtaposed against scenes of celebration in the United States” would produce a national security threat that warranted classification.<sup>254</sup> This is essentially what Bigelow’s film portrays. After the Hollywood version of Navy SEAL Team Six shoots and kills bin Laden, the Team returns to the Jalalabad base where enthusiastic revelers celebrate their mission accomplished. According to the CIA’s reasoning, the film could therefore function as an “ad for jihad” and be seized upon by extremist groups as grist for their propaganda mills.<sup>255</sup> Moreover, the CIA’s discussion of the *Jyllands-Posten* Muhammad

249. *Id.*

250. Especially if the most innocuous image of bin Laden has been classified “Top Secret.” See discussion *supra* note 246.

251. See Ordoña, *supra* note 149.

252. ZERO DARK THIRTY (Sony Pictures 2012).

253. In fact, Bigelow’s film has already been hailed as a trophy. See Ordoña, *supra* note 149. In addition to memorializing the very act of trophy-taking by depicting the killing and removal of Osama bin Laden from Pakistan at the hands of American Navy SEALs, *Zero Dark Thirty* itself functions as a trophy. The film commemorates an American victory over al-Qaida and celebrates the Intelligence Community as “real life heroes” victorious in the “the greatest manhunt in history.” See Breznican, *supra* note 83.

254. Bennett Decl., *supra* note 204, ¶ 27.

255. Of course, it is possible that the U.S. government now knows, in a way it did not immediately after the raid, that al-Qaida is so weak that any humiliation potential does not pose a

cartoons demonstrate that security threats could arise from beliefs that the government sanctions or even acts indifferently toward incendiary material.

Beyond its content, *Zero Dark Thirty* also shares the same context as the bin Laden photographs that made them a grave national security risk.

Washington has sent decidedly mixed messages about *Zero Dark Thirty*, which in turn could create a perception that the United States was an active creator of provocative material. After all, it is now widely known that the CIA collaborated with Boal and Bigelow.<sup>256</sup> Although agency officials have sought to distance themselves from *Zero Dark Thirty* following its release, the public instead learned that Leon Panetta explicitly approved and supported the project.<sup>257</sup> Even in the act of censuring the film, Michael Morell simply confirmed the agency's role in its creation.<sup>258</sup>

For fear of inflaming local tensions, the release of *Zero Dark Thirty* has been indefinitely suspended in a number of Middle Eastern countries, including Lebanon and Qatar.<sup>259</sup> Pakistani movie distributors and television stations have boycotted the film to avoid "offending sensibilities" and "sparking a violent backlash."<sup>260</sup> Defending the boycott, Mohsin Yaseen, a representative for the film distribution company Cinepax, explained that *Zero Dark Thirty* "has several scenes which could make us feel humiliated," elaborating that "[i]t is against the interests of the Pakistani nation."<sup>261</sup> Indeed, viewers in Pakistan of pirated DVDs of *Zero Dark Thirty* have already described feeling "defamed" by Bigelow's film.<sup>262</sup>

The response is perhaps understandable. In the United States, *Zero Dark*

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real threat.

256. It is possible, of course, that the CIA is purposefully using indirect means of speaking through filmmakers to broadcast its victory. The relation between *Zero Dark Thirty* and other government practices related to the flow of classified information to the media is explored in more detail below. See discussion *infra* Part VI.A.

257. See E-mail from Douglas Wilson, Assistant Secretary of Defense for Public Affairs, to Jamie Smith and Redacted Recipient "George" (June 15, 2011, 07:12:33) (on file with author) (noting that Langley was helping Bigelow and Boal with the "full knowledge and full approval/support" of Director Panetta). For fear of inflaming local tensions, the release of *Zero Dark Thirty* was called off indefinitely in a number of Middle Eastern countries, including Lebanon and Qatar.

258. See Press Release, Michael Morell, CIA Acting Director *supra* note 128.

259. Tim Walker, *Battle Stations: Two New Films Tell Contrasting Stories of the Plot to Assassinate Bin Laden*, THE INDEPENDENT (Dec. 19, 2012), <http://www.independent.co.uk/arts-entertainment/films/features/battle-stations-two-new-films-tell-contrasting-stories-of-the-plot-to-assassinate-bin-laden-8426140.html>.

260. See, AFP, *Zero Dark Thirty Finds No Takers in Pakistan*, DAWN (Pak.), Jan. 29, 2013, <http://dawn.com/2013/01/29/zero-dark-thirty-finds-no-takers-in-pakistan/> (reporting on the reaction of movie distributors in the country). Dawn is Pakistan's most widely-read English-language newspaper.

261. Annabel Symington, *What Pakistan Thinks of Zero Dark Thirty*, WALL ST. J., Feb. 1, 2013, <http://blogs.wsj.com/indiarealtime/2013/02/01/what-pakistan-thinks-of-zero-dark-thirty/> (quoting Mohsin Yaseen).

262. See, e.g., *Zero Dark Thirty gets Cold Reception in Pakistan*, CBC NEWS (Feb. 20, 2013), <http://www.cbc.ca/news/arts/story/2013/02/20/arts-zero-dark-thirty-pakistan.html>.



*Thirty* inspired filmgoers to tweet Islamophobic sentiments, including various explanations that the film “made me want to shoot any Arab in the face” and “I wanna go shoot brown people now while wearing night vision goggles.”<sup>263</sup> Others were more straightforward, proclaiming that “Zero Dark Thirty makes me hate muslims [sic]” or “Have a whole new hatred for muslims and a whole new appreciation for navy seals [sic].”<sup>264</sup> Given the inflammatory response, it is easy to imagine how *Zero Dark Thirty* has the potential to become “anti-American propaganda.”

If *Zero Dark Thirty* were received as a humiliating trophy, posing a threat to national security, wouldn't we know it by now? There have been no known violent protests or riots to date, despite the fears of Pakistani film distributors and outraged audiences. And no terrorist attack has been linked to the film. By contrast, the false *Newsweek* article about American military interrogators' desecration of the Qur'an left more than 17 people dead and 100 injured less than a week after its publication.<sup>265</sup>

It may be too early to judge the ultimate consequences of *Zero Dark Thirty*. Following the Danish cartoon's publication in late September 2005, a handful of Danish newsstands immediately refused to sell the newspaper carrying the cartoons. Though a few peaceful demonstrations were held in Copenhagen in October, widespread violence did not occur until February 2006, nearly six months after publication.<sup>266</sup> The anger then endured through 2008, when Danish authorities foiled a terrorist attack inspired by the then two-year old cartoons.<sup>267</sup> Although there is scant empirical evidence indicating that *Zero Dark Thirty* has already had dangerous effects in terrorist populations, there are ample hints that the film may pose security risks in the future. Among others, Senator John McCain expressed concern that *Zero Dark Thirty* gives ammunition to Islamic extremists.<sup>268</sup> And chatter on *Islamic Awakening*, a

263. Adam Horowitz, *The Reviews are in: "Zero Dark Thirty Makes me Hate Muslims,"* MONDOWEISS (Jan. 17, 2013), <http://mondoweiss.net/2013/01/reviews-thirty-muslims.html> (compiling tumblr reactions to Bigelow's film).

264. *Id.*

265. Dan Glaister & Declan Walsh, *After Week of Riots, Newsweek Admits it Got Qur'an Story Wrong*, THE GUARDIAN (May 16 2005), <http://www.theguardian.com/media/2005/may/16/pressandpublishing.usnews>.

266. See, e.g., Carlotta Gall & Craig S. Smith, *Muslim Protests Against Cartoons Spread*, N.Y. TIMES, Feb. 7, 2006, <http://www.nytimes.com/2006/02/07/international/middleeast/07cartoon.html?pagewanted=all>; *In Libya, 11 Reportedly Die in Cartoon Protests*, CNN.COM (Feb. 18, 2006), <http://edition.cnn.com/2006/WORLD/africa/02/17/libya.cartoons/index.html>; *16 Die in Cartoon Protests in Nigeria*, CNN.COM (Feb. 19, 2006), <http://www.cnn.com/2006/WORLD/africa/02/18/cartoon.roundup/index.html>.

267. Michael Kimmelman, *Outrage at Cartoons Still Tests the Danes*, N.Y. Times, Mar. 20, 2008, <http://www.nytimes.com/2008/03/20/books/20cartoon.html?pagewanted=all>.

268. See, e.g., Tina Daunt, *McCain: "Zero Dark Thirty" Gives Ammunition to Islamic Extremists*, HOLLYWOOD REPORTER (Dec. 20, 2012), <http://www.hollywoodreporter.com/news/mccain-zero-dark-thirty-torture-ammunition-islam-extremists-406026>.

hardline online forum that hosts comments from Islamic extremist groups, indicates that McCain may ultimately prove right.<sup>269</sup> Demonstrating how such propaganda might work, one user who did not watch Bigelow's film commented "I haven't been more disgusted" concluding that reading another user's review was enough to "make[] my blood boil."<sup>270</sup> Another user complained that *Zero Dark Thirty* casts Americans "as some sort of heroes," proclaiming that the real heroes are people like "Osama and mullah omar [sic]," the leader of the Taliban.<sup>271</sup> And in a long post titled "'Zero Dark Thirty' Is Osama bin Laden's Last Victory Over America," still another user described Bigelow's film as a "very effective recruiting tool," forecasting that "[t]his is not going to work out well for the Americans."<sup>272</sup>

### B. The Danger of Perceived Authenticity

Predicting terrorist behavior is extremely difficult and this article makes no attempt to prognosticate future harms;<sup>273</sup> instead, this article aims only to highlight the content and contextual attributes of *Zero Dark Thirty* that raise potential threats because of its similarity to the UBL photographs.<sup>274</sup> Yet, despite these similarities, the film is a *recreated* account of the Abbottabad raid. Although it opens with the "distinctively journalistic" announcement that it is "Based on Firsthand Accounts of Actual Events," *Zero Dark Thirty* is not itself a firsthand narration of bin Laden's death.<sup>275</sup> Nor is the film fully a

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269. See Jarret M. Brachman & Alix N. Levine, *You Too Can Be Awlaki!*, 35 FLETCHER F. WORLD AFF. 25, 37 (2011), available at <http://www.fletcherforum.org/2011/01/20/brachmanlevine/> (describing *Islamic Awakening* as a "hardline Internet discussion forum" and citing users, such as Yousef al-Khattab, who are known members of extremist groups).

270. Post of LionsofIslam, #21, *Re: Zero Dark Thirty*, ISLAMIC AWAKENING, <http://forums.islamicawakening.com/f18/zero-dark-thirty-63461/index3.html> (last visited Apr. 25, 2014).

271. Posts of drkjke, #23, #24, *Re: Zero Dark Thirty*, ISLAMIC AWAKENING, <http://forums.islamicawakening.com/f18/zero-dark-thirty-63461/index3.html> (last visited Apr. 25, 2014).

272. Post of Abu Milk Sheikh, #15, *Re: Zero Dark Thirty*, ISLAMIC AWAKENING, <http://forums.islamicawakening.com/f18/zero-dark-thirty-63461/index2.html> (last visited Apr. 25, 2014).

273. See, e.g., Roy Bijon, *A Case Against Biometric National Identification Systems (NIDS)*, 19 W.R.L.S.I. 45, 62 (2005) ("[P]redicting terrorist behaviour is extremely difficult").

274. Of course, it is possible that national security risks stem from any mass-media renderings of the government's global war on terror. And, if those renderings will be produced with or without the government's assistance, that assistance might not really pose a substantial marginal threat. But, the CIA's assistance in the creation of the film changes its reception. See discussion *infra* Part VI.A.

275. Steve Coll, "Disturbing" and "Misleading," THE NEW YORK REVIEW OF BOOKS, Feb. 7, 2013, <http://www.nybooks.com/articles/archives/2013/feb/07/disturbing-misleading-zero-dark-thirty/?pagination=false> (movie review) ("Boal and Bigelow . . . first promoted the film as a kind of journalism."). Bigelow herself seems to have regarded the material journalistically, explaining that her "sole focus was to try and bring what Mark reported to the screen as faithfully as I could." Michael Cieply & Brooks Barnes, *Bin Laden Film's Focus is Facts, Not Flash*, N.Y. Times, Nov. 23, 2012, <http://www.nytimes.com/2012/11/24/movies/zero-dark-thirty-by-kathryn->

documentary: names were changed and composite characters were created;<sup>276</sup> portions were filmed in Chandigarh, India (albeit designed to mirror Abbottabad);<sup>277</sup> and fictional elements may have been added to create a more compelling story.<sup>278</sup> Accordingly, Bigelow's film is best understood as a docudrama, as a work of fiction.<sup>279</sup>

Some may consequently argue that a film like *Zero Dark Thirty* cannot be said to analogously inflame overseas tension and contribute to the production of terrorist propaganda. This argument, however, overlooks the film's perceived authenticity. Again, the CIA has emphasized that both fictional and nonfictional images can pose grave national security threats so long as they are *perceived* to be authentic. Despite its fictionality, *Zero Dark Thirty* may be indistinguishable from the bin Laden photographs in this respect.

In the wake of the months-long discussions about what *Zero Dark Thirty* bungled, we may have lost sight of the film's overall accuracy and its continued perception as an authentic account of the Abbottabad raid. After all, we had the discussion about what the film "got wrong"<sup>280</sup> because it got so much right.<sup>281</sup>

bigelow-focuses-on-facts.html. And Boal, a trained journalist, proclaimed "I don't want to play fast and loose with history." *Id.*

276. According to Boal, "[a]ll of the characters in the film are based on real people." See Rob Brunner, "Zero Dark Thirty": Kathryn Bigelow and Mark Boal Discuss Bringing Osama bin Laden Hunt to the Screen—Exclusive, ENTERTAINMENT WEEKLY (Nov. 20, 2012), <http://insidemovies.ew.com/2012/11/20/zero-dark-thirty-interview-bigelow-boal/>. For a discussion of the characters, see Shane Harris, *What are the Real names of the Characters in Zero Dark Thirty*, WASHINGTONIAN, Jan. 11, 2013, [http://www.washingtonian.com/blogs/dead\\_drop/film/who-are-the-characters-of-zero-dark-thirty-in-real-life.php](http://www.washingtonian.com/blogs/dead_drop/film/who-are-the-characters-of-zero-dark-thirty-in-real-life.php) ("[P]eel back the aliases and look at who these folks really are."); David Haglund, Aisha Harris & Forrest Wickman, *Who Are the People in Zero Dark Thirty?*, SLATE, [http://www.slate.com/blogs/browbeat/2013/01/14/zero\\_dark\\_thirty\\_fact\\_vs\\_fiction\\_who\\_are\\_the\\_real\\_life\\_inspirations\\_for.html](http://www.slate.com/blogs/browbeat/2013/01/14/zero_dark_thirty_fact_vs_fiction_who_are_the_real_life_inspirations_for.html). (last visited Apr. 25, 2014).

277. See Ankur Batra, *Chandigarh Turns Lahore*, THE TIMES OF INDIA, Mar. 3, 2012, [http://articles.timesofindia.indiatimes.com/2012-03-03/news-interviews/31117436\\_1\\_abbottabad-horse-carts-political-posters](http://articles.timesofindia.indiatimes.com/2012-03-03/news-interviews/31117436_1_abbottabad-horse-carts-political-posters).

278. See, e.g., Paul Kendall, *Zero Dark Thirty: Fact v. Fiction*, THE TELEGRAPH (U.K.), Feb. 14, 2013, <http://www.telegraph.co.uk/culture/film/film-news/9869992/Zero-Dark-Thirty-fact-vs-fiction.html>.

279. Although Bigelow claims it is a mix of genres, including documentary, industry insiders named the film a docudrama in both pre- and post-screening reviews. See, e.g., Darren Franich, "Zero Dark Thirty" Release Date Moved Back, ENTERTAINMENT WEEKLY (Nov. 1, 2012), <http://insidemovies.ew.com/2012/11/01/zero-dark-thirty-release-date/> (describing Bigelow's film as a "terrorist-huntin' docudrama"); Mike D'Angelo, *Zero Dark Thirty's Lone-Wolf Protagonist Makes It More Conventional Than It Seems*, A.V. CLUB (Jan. 14, 2013), <http://www.avclub.com/articles/zero-dark-thirtys-lonewolf-protagonist-makes-it-mo,90794/> (baptizing the film "a good, solid docudrama").

280. See, e.g., Melena Ryzik, *Besides Torture, What Else Did 'Zero Dark Thirty' Get Wrong?*, N.Y. TIMES, Jan. 21, 2013, <http://carpetbagger.blogs.nytimes.com/2013/01/21/besides-torture-what-else-did-zero-dark-thirty-get-wrong/>; Jose A. Rodriguez Jr., *A CIA Veteran on What "Zero Dark Thirty" Gets Wrong About the bin Laden Manhunt*, WASH. POST, Jan. 3, 2013, [http://articles.washingtonpost.com/2013-01-03/opinions/36209291\\_1\\_zero-dark-thirty-cia-officers-interrogation-program](http://articles.washingtonpost.com/2013-01-03/opinions/36209291_1_zero-dark-thirty-cia-officers-interrogation-program); Graham Allison, "Zero Dark Thirty" Has the Facts Wrong—And That's a Problem, Not Just for the Oscars, CHRISTIAN SCIENCE MONITOR (Feb. 22, 2013), <http://www.csmonitor.com/Commentary/Opinion/2013/0222/Zero-Dark-Thirty-has-the-facts->

Debates about the film—excepting those about the role of enhanced interrogation—have mostly focused on trivial details (the dog in the Abbottabad raid was a Belgian Malinois, not a German shepherd).<sup>282</sup>

It is unclear if the debate over accuracy has had a significant impact on its perceived authenticity. Despite the robust scrutiny, the broadest strokes of the narrative have been celebrated as accurate.<sup>283</sup> The raid scene, in particular, has been praised as an overall accurate portrayal of the event, notwithstanding a few very minor details (the film’s helicopters turned the wrong way toward the target; no SEAL called out “Osama” while searching the compound). Even the Navy SEAL who shot Osama bin Laden only had “minor criticisms” of the film’s raid scene—it was just “little stuff” that was “Hollywooded up some.”<sup>284</sup>

It is unclear whether the CIA effectively nullified the film’s assertions of authenticity. In his December 2012 statement, Morell stressed that the film took “considerable liberties” in its depiction of CIA operatives and their mission, but neglected to name specific instances of misrepresentation.<sup>285</sup> Though Morell again hinted at the film’s fictionalism by stating that “[w]e cannot allow a Hollywood film to cloud our memory . . . ,” he failed to positively correct the fictionalized account with an alternate version of events and thus did little to effectively dispute the film’s claim to accuracy.<sup>286</sup> Instead, by limiting his critique to the portrayal of torture, the Acting Director could have negatively

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wrong-and-that-s-a-problem-not-just-for-the-Oscars.

281. A point increasingly acknowledged. See, e.g., Thomas E. Ricks, *Army Intelligence Officers Concludes: “Zero Dark Thirty” Is More Right Than Wrong*, FOREIGN POLICY (Feb. 25, 2013),

[http://ricks.foreignpolicy.com/posts/2013/02/25/army\\_intelligence\\_officer\\_concludes\\_zero\\_dark\\_thirty\\_is\\_more\\_right\\_than\\_wrong](http://ricks.foreignpolicy.com/posts/2013/02/25/army_intelligence_officer_concludes_zero_dark_thirty_is_more_right_than_wrong); Hollie McKay, *Sundance: “Manhunt” CIA Agents Argue Accuracy of “Zero Dark Thirty” Interrogation Scenes*, FOXNEWS.COM (Jan. 21, 2013), <http://www.foxnews.com/entertainment/2013/01/21/sundance-manhunt-cia-agents-argue-accuracy-zero-dark-thirty-interrogation/>.

282. Bronstein, *supra* note 4.

283. See, e.g., Don Mann, *Why Zero Dark Thirty Is Not Your Usual Hollywood Fare*, TIME (Jan. 24, 2013), <http://ideas.time.com/2013/01/24/why-zero-dark-thirty-is-not-your-usual-hollywood-fare/> (“The depiction of Navy SEALs was deadly accurate—and should be celebrated.”).

284. Bronstein, *supra* note 4. In addition to criticizing the tattoo scene (the ST6 assault group would have gotten larger tattoos while waiting in Afghanistan), the Shooter explained, “there was just little stuff. The helos turned the wrong way [toward the target], and they talked way, way too much [during the assault itself]. If someone was waiting for you, they could track your movements that way.” *Id.* (alterations in original). The Shooter also said, “the mission in the damn movie took way too long” and the on-screen tactics “sucked.” *Id.* Bronstein further catalogued the Shooter’s criticisms:

The stairs inside bin Laden’s building were configured inaccurately. A dog in the film was a German shepherd; the real one was a Belgian Malinois who’d previously been shot in the chest and survived. And there’s no talking on the choppers in real life. There was also no whispered calling out of bin Laden as the SEALs stared up the third-floor stairwell toward his bedroom.

*Id.* As the Shooter explained, “[w]hen Osama went down, it was chaos, people screaming. No one called his name.” Bronstein, *supra* note 4.

285. Press Release, Michael Morell, CIA Acting Director *supra* note 128.

286. *Id.*

implied, *qui tacet consentire videtur*, that the rest of the film is indeed accurate.<sup>287</sup> And, by urging the public “to remember that *Zero Dark Thirty* is not a documentary,” Morell attested to the pervasive popular view that the film was authentic.<sup>288</sup>

Hollywood has worldwide reach and growing international clout,<sup>289</sup> and a movie with as much perceived authenticity as this one may provide as much encouragement and ready-made ammunition for al-Qaida as the secret UBL photos—even if technically a work of fiction. Members of al Qaida and other terrorist organizations hostile to the United States will be part of the audience—a point the CIA has admitted by acknowledging “terrorists watch TV, too.”<sup>290</sup> Unlike the quiet administrative release of photographs, which would eventually garner worldwide attention, Sony’s release of *Zero Dark Thirty* is the product of a well-ordered entertainment industry designed to generate attention with worldwide distribution. By contributing to the release of an accurate cinematic recreation of the Abbottabad raid, the CIA has not merely created a record that has presumptively been perceived as an authentic account of classified events, it has guaranteed that the record will reach the widest audience possible with considerable pomp.

In the estimation of OPA, *Zero Dark Thirty* was bound to be the “winning horse.”<sup>291</sup> The disclosed records repeatedly document internal discussion of how the multi-million dollar motion picture would impact the CIA’s public image at home.<sup>292</sup> OPA may have fulfilled its domestic mission to create an authentic account of the bin Laden raid, but at what cost? Even if the perceived authenticity of *Zero Dark Thirty* was ultimately dispelled, the debate about Bigelow’s film forcefully demonstrates the possibility that another film like *Zero Dark Thirty* could be popularly perceived as an authentic record of events, especially if it fails to generate the same public scrutiny.

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287. *Qui tacet consentire videtur*: “he who is silent is taken to agree.” Black’s Law Dictionary 980 (2d. ed. 1910). Although the CIA—obviously—does not believe that (legal) implications can be drawn from its silence (consider Glomar responses), the public in this case may not be influenced by the CIA’s official stance on the issue. Rather, because Morell issued a statement when he would not normally comment on a Hollywood film, the silence could be interpreted by the public to be more significant than the CIA technically intended.

288. Press Release, Michael Morell, CIA Acting Director, *supra* note.

289. As evidenced by the 2012 Academy Awards, where a record seventy-one countries submitted entries for the Best Foreign Language film award. See Adam B. Vary, *Academy Award for Foreign Language Film Nets a Record 71 Submissions*, ENTERTAINMENT WEEKLY (Oct. 8, 2012), <http://insidemovies.ew.com/2012/10/08/academy-award-foreign-language-film-submissions/>.

290. JENKINS, *supra* note 4, at 91.

291. E-mail from Marie Harf, Media Spokesperson CIA Office of Public Affairs, to Classified Recipient “George” (June 7, 2011, 07:34 P.M.) (on file with author).

292. E-mail from Marie Harf, Media Spokesperson CIA Office of Public Affairs, to Classified Recipients (June 30, 2011, 01:31 P.M.) (on file with author).

## VI. THE CIA AND UNCLASSIFIED FICTIONS

A. *The CIA and Unclassified Fictions*

According to the CIA, the disclosure of authentic pictures and videos of Osama bin Laden poses too great a national security risk to justify disclosure, even where those records do not reveal Intelligence; consequently, verbal descriptions of incendiary images must suffice. The problem, as the District Court put it, is precisely that a “picture may be worth a thousand words” and that a motion picture may “bear an even higher value.”<sup>293</sup> Yet the CIA helps to create just that: higher-value, higher-risk pictures.

Revealing the troubling national security consequences of the CIA’s domestic mission raises twin questions about the propriety of the CIA’s work with Hollywood and the validity of the agency’s secrecy justifications. Though the reasoning behind the agency’s decision to create *Zero Dark Thirty* cannot be definitively confirmed, exploring potential explanations sheds new light on Langley’s policy as it relates to national security and secrecy law.

The fact that *Zero Dark Thirty* could pose future harm to national security indicates OPA’s willingness to flout non-Intelligence national security concerns otherwise strictly observed in FOIA litigation. It also suggests that those concerns may be invalid without accompanying Intelligence concerns or that they do not pose the threat the CIA otherwise professes. Would the CIA compromise legitimate national security concerns—even to support the friendliest filmmakers?

A more generous—but no less disturbing explanation—suggests that OPA protects Intelligence from disclosure in its collaborations with Hollywood, but does not actively consider non-Intelligence security concerns. In the case of *Zero Dark Thirty*, there is ample evidence that the CIA was careful not to reveal Intelligence. However, there is no indication that additional national security consequences were discussed, despite the CIA’s contemporaneous insistence in the *Judicial Watch* suit that non-Intelligence-revealing images might alone pose an “exceptionally grave” threat based on potential future harm. In cases where the stakes are high enough to warrant secrecy and where Intelligence is not disclosed, the CIA’s selective contemplation of future harms might fairly be questioned as a dangerous policy. This is especially true where that selectivity corresponds with the agency’s self-promotional accuracy goals.

A careful reading of the disclosed records reveals that OPA *was* in fact aware of the connection between Bigelow’s film and threats to national security. The CIA had already been confronted with industry assessments linking films to terrorist attacks. In an internal e-mail, OPA noted that “Disney said they won’t do [a movie about the hunt for bin Laden] because they fear terrorists at theme parks.”<sup>294</sup> Whether or not Langley agreed with Disney’s

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293. *Judicial Watch, Inc. v. United States DOD*, 857 F. Supp. 2d 44, 48 (D.D.C. 2012).

294. E-mail from Thomas Twetten to Classified Recipient, [Redacted] *Competition in the*

reasoning is unknown, but given this information, it would be surprising if the agency did not consider the possible connection between *Zero Dark Thirty* and national security. Additionally, shortly after Boal's first visits to Langley, John Bennett noted that the damage from the disclosure of the UBL photographs "is not conjectural."<sup>295</sup> To justify the CIA's FOIA Exemption 1 claim, Bennett explained, "since UBL's death, al-Qa'ida has already attempted to use the circumstances surrounding his death and burial as propaganda to recruit and further its goal of harming the United States."<sup>296</sup> Armed with this knowledge, the CIA would presumably have assessed how *Zero Dark Thirty* could play into these circumstances.

If the CIA *did* consider the national security implications of Bigelow's film, the Agency could have determined that *Zero Dark Thirty* did not pose national security threats tantamount to those raised by the secret bin Laden photographs, or that national security benefits stemming from the film outweighed the risks.

*Zero Dark Thirty* serves security objectives, much like leaks, as a tool of "deterrence by denial,"<sup>297</sup> and Langley may have perceived its release as a net-gain in terms of national security.<sup>298</sup> For instance, OPA may have reasoned that, by demonstrating the superior technological and intelligence capabilities of the U.S. government, Bigelow's film could deter would-be enemies from undertaking terrorist activities in the first place.<sup>299</sup> Furthermore, Langley may have believed that film could humanize the CIA, resulting in increased public support and funding.<sup>300</sup> The agency could, therefore, have used the film as an indirect means to broadcast its victory, allowing classified information to flow to the media as part of a calculated weighing of security interests.

Alternately, the CIA may have determined that the film raises no serious security risks. However, a careful analysis of the CIA's FOIA declarations demonstrates that the very act of collaborative assistance may have undermined the agency's security concerns. The potentially antithetical nature of the CIA's domestic Hollywood mission and its national security goals—and the agency's disregard of this tension—reveals the CIA's attitude toward fictional versus authentic media.

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*movie business* (May 25, 2011, 04:20AM) (citing an e-mail from Howard Blum).

295. Bennett Decl., *supra* note 204, ¶ 25.

296. *Id.*

297. For a fuller discussion of deterrence by denial in the context of leaks, see David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512 (2013).

298. *Id.* at 611-13.

299. Pozen expounds this approach, explaining:

[T]he U.S. government should want prospective terrorists to believe it has terrific capabilities of surveillance, infiltration, incapacitation, and so forth, regardless of the true state of those capabilities. Indeed, the larger the gap between our actual expenditures on defensive measures and adversaries' perceptions of their potency, the more efficient our system of deterrence.

*Id.* at 612-13.

300. See JENKINS, *supra* note 4 at 69.

*B. Unclassified Fictions and Their Consequences*

OPA may have differentiated *Zero Dark Thirty* from the UBL images chiefly on the basis of the film's fictionality.<sup>301</sup> But, neither the film's overall context nor its perceived authenticity meaningfully differentiates it from the Osama bin Laden photographs. Additionally, a greater time lapse between the movie, the raid, and the photographs from the raid fails to distinguish the movie in terms of national security.<sup>302</sup> If this is true, then it should follow that the CIA believes that national security threats may stem from the films it helps create.

The CIA, by virtue of its withholding of authentic records and simultaneous creation of their fictional counterparts, has stepped into an ongoing literary debate about the effects of fiction, particularly where that fiction attempts to imitate the truth.<sup>303</sup> But, where the consequences of a work's public dissemination potentially entail grave threats to national security, a party with a nuanced understanding of literary theory should make judgments about the effects of fiction. If it seems inevitable that the CIA will make ontological determinations about the nature of fiction, we might fairly ask if the CIA's understanding of fiction is adequate. Should the CIA recognize a meaningful distinction between an original photograph and a recreated image of the same event? More fundamentally, should the Agency help create accurate fictional recreations?

The calculus of fictionality's influence on national security must include the impact of the CIA's collaboration because the CIA's involvement fundamentally alters the recreated image's nature, regardless or whether there is a material difference between a recreated, fictional, image and its original model. Consider, for example, two hypothetical images of Abu Yahya al-Libi,<sup>304</sup> the former deputy leader of al-Qaida, who was killed in a June 2012 drone strike in Pakistan: the first image, a secret photograph, taken by a CIA operative; the other, a sketch, drawn by an amateur artist at home. In this case, one might fairly distinguish the images and persuasively argue that the sketch does not generate security concerns tantamount to those raised by the secret

301. In other words, the pictures are dangerous because they are "real," but the movie is not because it is technically "fiction."

302. The CIA has said that the passage of time does not necessarily mitigate national security consequences. *See, e.g., Navasky v. CIA*, 499 F. Supp. 269, 277 (S.D.N.Y. 1980) ("The fact that some of the documents pertain to activities over thirteen to thirty years old does not per se divest them of current national security significance.") (citing *Bell v. United States*, 563 F.2d at 486).

303. Beginning with Plato and Aristotle's competing formulations of mimesis, literary theorists have long debated the effects of fiction, particularly where that fiction attempts to imitate the truth. For a general overview of mimesis from its beginning to the Frankfurt School and beyond, see *Mimesis, THE ENCYCLOPEDIA OF AESTHETICS* 223 (Michael Kelly, ed.) (1998). For a sampling, consider Erich Auerbach, *Mimesis: The Representation of Reality in WESTERN LITERATURE* (1953); Walter Benjamin, *On the Mimetic Faculty*, in *REFLECTIONS* (1986).

304. *See, e.g., Declan Walsh & Eric Schmitt, Drone Strike Killed No. 2 in Al Qaeda, U.S. Officials Say*, N.Y. TIMES, June 5, 2012, <http://www.nytimes.com/2012/06/06/world/asia/qaeda-deputy-killed-in-drone-strike-in-pakistan.html?pagewanted=all>.



photograph.<sup>305</sup>

The case can be made much closer, however. Instead of a drawing, imagine an image of al-Libi in a medium celebrated for its ontological realism—film. And, instead of a home movie, consider a cinematic image created by award-winning, professional filmmakers. The distinction between the images shrinks still more where the CIA is involved. What if the film version were based on months of research, including interviews with classified operatives who witnessed the events surrounding the creation of the original secret photograph? And, what if the film were accompanied by vociferous claims of accuracy from the studio—and by revelations that the CIA was an active collaborator on the cinematic recreation? Certainly under these circumstances it is more difficult to distinguish a recreated record from the original on which it is based. The CIA’s involvement, in short, flattens what little distinction exists between films like *Zero Dark Thirty* and classified images like the UBL photographs.

If the CIA understands the effects of its involvement and still chooses to draw distinctions, then fictionality likely operates as no more than a pretense for the CIA to continue its collaborations with Hollywood. Accordingly, in cases like *Zero Dark Thirty*, Hollywood narratives function as workarounds to allow the CIA to preserve the secrecy of classified records for national security reasons while simultaneously communicating nearly identical information to the public. These films are unclassified fictions. They enable the CIA to evade secrecy while maintaining that secrecy— to speak without speaking.<sup>306</sup>

### C. *The Future of Unclassified Fictions*

The CIA’s involvement in advising films like *Zero Dark Thirty* risks either undermining valid national security concerns or exposing the concerns as specious justifications for secrecy. As a result, the CIA’s continued support of unclassified fictions has the potential to undermine its efforts to secure future FOIA 1 Exemptions based solely on non-Intelligence national security concerns.

For decades, the Intelligence Community has cited non-Intelligence national security concerns as the rationale for withholding documents responsive to FOIA requests. And, FOIA requests are seldom granted when the government asserts Exemption 1.<sup>307</sup> Because the courts “consistently” defer to

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305. Though the *Jyllands-Posten* Muhammad cartoons suggests that even this drawing, given the right context and subject matter, together with the government’s endorsement, may pose such a threat.

306. In this way, unclassified fictions resemble planted information. For more on plants, leaks, and pleaks, see *infra* Conclusion.

307. In the rare instances that a district court orders the federal government to disclose a document where FOIA Exemption 1 has been asserted, it is always possible for the circuit court to reverse. For an interesting and recent example, see *Ctr. for Int’l Envtl. Law v. Office of the United States Trade Representative*, 845 F. Supp. 2d 252, 253 (D.D.C. 2012), *rev’d* 2013 U.S. App. LEXIS 11477, 1 (D.C. Cir. June 7, 2013); *See also* *Schlesinger v. CIA*, 591 F. Supp. 60 (D.D.C.

the judgments expressed in executive affidavits, articulating non-Intelligence national security concerns has proven a potent method for withholding records under Exemption 1.<sup>308</sup>

However, because the affidavits and declarations accompanying a request for exemption must provide “reasonably detailed explanations,”<sup>309</sup> they offer unique insight into the government’s non-Intelligence justifications—part of what Seth Kreimer names the transparency cascade resulting from the initial FOIA request.<sup>310</sup> A cursory investigation of Intelligence Community affidavits submitted in FOIA litigation highlights the diverse contexts and substantive range of the government’s various non-Intelligence national security concerns when they concern “foreign relations” under E.O. 13526. Recent nondisclosure justifications include: withholding DoD information about Guantanamo detainees where it could be used by al-Qaida for propaganda;<sup>311</sup> withholding records related to current and former detainees at Guantanamo because countries where those detainees lived or visited could “respond negatively . . . either diplomatically, economically, or in the form of ‘anti-American propaganda;’”<sup>312</sup> withholding documents related to the CIA’s clandestine book publishing activities because of unnamed foreign relations consequences;<sup>313</sup> refusing disclosure of Guantanamo forced cell extraction (FCE) videos because they “are particularly subject to use as propaganda,” could “incite a public reaction”<sup>314</sup> including “angered reactions,” and could lead to accusations that the DoD “created propaganda;”<sup>315</sup> blocking access to CIA records relating to the execution of the 1954 coup in Guatemala because their release could provide a “propaganda advantage to hostile foreign governments who could use

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1984).

308. See, e.g., *New York Times Co. v. United States DOJ*, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012) (“In a FOIA case, ‘[a]ffidavits and declarations . . . giving reasonably detailed explanations why any withheld documents fall within an exemption [from the obligation to disclose] are sufficient to sustain the agency’s burden.’ *Carney v. U.S. Dep’t of Justice*, 19 F.3d 807, 812 (2d Cir.1994) (footnote omitted). ‘[T]he general rule in this Circuit is that in FOIA actions, agency affidavits alone will support a grant of summary judgment . . .’ *Ferguson v. FBI*, No. 89 Civ. 5071(RPP), 1995 WL 329307, at \*2 (S.D.N.Y. June 1, 1995), *aff’d*, 83 F.3d 41 (2d Cir.1996).”); *ACLU v. U.S. Dep’t of Def.*, 628 F.3d 612, 624, 393 (D.C. Cir. 2011).

309. See *Carney v. U.S. Dep’t of Justice*, 19 F.3d 807, 812 (2d Cir. 1994).

310. Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1056 (2008) (“In assessing the efficacy of FOIA, analysis cannot end with the documents released in response to requests or litigation. For just as leaks of prerequisite knowledge can set the stage for successful FOIA requests, information disclosed by FOIA has laid the groundwork for inquiry and disclosure by other institutions. An evaluation of the efficacy of FOIA must account for the further information that cascades from the initial FOIA disclosures.”).

311. *ACLU v. DOD*, 628 F.3d at 624.

312. *Int’l Counsel Bureau v. United States Cent. Intelligence Agency*, 774 F. Supp. 2d 262, 270 (D.D.C. 2011).

313. *Navasky v. CIA*, 499 F. Supp. 269, 276-277 (S.D.N.Y. 1980).

314. *Int’l Counsel Bureau & Pillsbury, Winthrop, Shaw, Pittman, LLP v. United States DOD*, 906 F. Supp. 2d 1, 7 (D.D.C. Dec. 4, 2012).

315. *Id.*

such information against the United States in their dealings with governments in Central America and elsewhere;”<sup>316</sup> withholding of a photograph of Murat Kurnaz, a Turkish citizen and permanent resident of Germany, who was held at Guantanamo Bay from 2002 to 2006, by asserting that disclosure would risk reducing his cooperation—even though he had already been released from the prison.<sup>317</sup>

A closer analysis of the affidavits reveals a special anxiety about authenticity. The 2012 dispute over the Guantanamo FCE videos is again instructive. The DoD was concerned that the requested images could be used to create propaganda and they could be manipulated or doctored.<sup>318</sup> To illustrate the first danger of disclosure, Major General Horst explained that the disclosed images could be “spliced with other footage” and then used in propaganda.<sup>319</sup> Horst implies that the contextual presentation of the images could have an impact on national security, thereby justifying the Department’s exclusive control over the images. Expounding the second concern, Horst noted that that someone could “alter the images of the detainee’s face or person to show physical signs of mistreatment,”<sup>320</sup> which would have suggested that the DoD had used enhanced interrogation techniques. Just as Michael Morell worried about the CIA, the DoD still fears that disclosure could mislead viewers by giving them a “strong impression” that enhanced interrogation techniques played a larger role than they actually did in the department’s operations.<sup>321</sup> The images, if disclosed and fictionalized, could have the veneer of authenticity and mislead viewers. These concerns echo the Intelligence Community’s more general concern that non-Intelligence revealing documents can pose serious threats to national security, depending on their presentation and perceived authenticity.

Disclosing non-Intelligence records, in short, risks raising a national security threat similar to that stemming from the CIA’s involvement in the creation *Zero Dark Thirty*. Notably, the creation of *Zero Dark Thirty* is not an isolated incident. As the OPA explained, “this is something we do on a regular basis all the time.”<sup>322</sup> And, Bigelow’s film is part of an emerging genre of docudramas about war, terrorism, and the Intelligence Community. In the last decade, the conflicts in Iraq and Afghanistan have inspired a number of films, including: *Restrepo* (2010); *The Messenger* (2009); *The Hurt Locker* (2009); *Taxi to the Dark Side* (2008); *No End in Sight* (2007); *Turtles Can Fly* (2005); *The Tiger and the Snow* (2005); *Control Room* (2004); *September Tapes*

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316. Schlesinger v. CIA, 591 F. Supp. 60, 62-63 (D.D.C. 1984).

317. Azmy v. United States DOD, 562 F. Supp. 2d 590 (S.D.N.Y. 2008).

318. *Int’l Counsel Bureau v. DOD*, 906 F. Supp. 2d (citing affidavit of Major General Karl R. Horst, Chief of Staff of USCENTCOM (Sept. 13, 2012), ECF 80-1 ¶ 11(c) and (d)).

319. *Id.* (citing affidavit of Major General Karl R. Horst, Chief of Staff of USCENTCOM (Sept. 13, 2012), ECF 80-1 ¶ 11(d)).

320. *Id.*

321. Press Release, Michael Morell, CIA Acting Director *supra* note 128.

322. *See* Stone *supra* note 8.

(2004).

The popularity of Hollywood depictions of the manhunt for bin Laden exemplifies the entertainment industry's growing interest in contemporary docudramas about agency operations. Despite Sony's efforts, *Zero Dark Thirty* was not the only popular account of the Abbottabad raid. In November, the National Geographic Channel aired SEAL Team Six: The Raid on Osama Bin Laden.<sup>323</sup> Two months later, HBO premiered *Manhunt: The Search for Osama bin Laden*, which was marketed as a firsthand account "revealed . . . by the real insiders who led the CIA's secret war against al-Qaida and Osama bin Laden."<sup>324</sup> There is even a first-person video game based on the Abbottabad raid, "Osama 2011," which allows players to kill (or protect) the al-Qaida leader in a virtual environment designed to look like the Pakistan compound.<sup>325</sup> The game begins with the SEAL Team Six helicopter raid and includes small details like "nighttime sounds of Bin Laden's final compound."<sup>326</sup> The game's creators insist that they are "retelling . . . real-world events" based on "a lot of reading and research, as well as talking with sources" so they could "get it right."<sup>327</sup> It is unknown which of these projects received CIA support. Because the agency often goes uncredited,<sup>328</sup> unless someone involved with the project speaks out, third parties may not have the requisite knowledge to file a FOIA request, let alone think of making a request.<sup>329</sup>

Furthermore, even where the CIA's collaboration is acknowledged, it may not invite popular scrutiny. While *Zero Dark Thirty* was kindling popular passions and inflaming senatorial suspicions, *Argo* was quietly acclaimed. The chief controversy plaguing *Argo* was the Oscar "snub" suffered by director Ben Affleck, even though the CIA arguably offered Affleck more support than Bigelow and Boal. But, Langley's collaboration on *Argo* has generated little discussion.<sup>330</sup> Because the CIA regularly collaborates with filmmakers, we might fairly expect to see many unclassified fictions in the future, especially if docudramas about contemporary agency operations are part of an emerging

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323. For a description see Mandi Bierly, *National Geographic Says 'Seal Team Six' Airdate Before Election Isn't Political*, ENTERTAINMENT WEEKLY, Oct. 8, 2012.

324. For a synopsis, see *Documentaries*, HBO, available at: <https://www.hbo.com/documentaries/manhunt-the-search-for-bin-laden/index.html#/documentaries/manhunt-the-search-for-bin-laden/synopsis.html>.

325. See David Murphy, *Frist-Person Game Recreates Osama Bin Laden Raid*, PCMag.com, May 7, 2013, available at: <http://www.pcmag.com/article2/0,2817,2385051,00.asp>.

326. *Id.*

327. *Id.*

328. As Jenkins observes, this makes it difficult to identify which texts have benefitted from CIA involvement, unless the media decides to report on it. JENKINS, *supra* note 4, at 52.

329. See Kreimer, *supra* note 310, at 2025 ("For FOIA requests to generate illuminating documents, they must be precisely framed, and framing such requests requires knowledge regarding the activities to be illuminated.")

330. See Mark Hosenball, *Senate Intelligence Committee drops bin Laden film probe*, REUTERS (Feb. 25, 2013), <http://www.reuters.com/article/2013/02/25/entertainment-us-usa-congress-cia-film-idUSBRE91O19F20130225> ("The government cooperated as much, if not more, on 'Argo' . . .").

trend.

Langley therefore has good reason to reconsider the impact of its domestic mission. To continue its Hollywood collaborations without undermining non-Intelligence national security concerns or the legitimacy of its FOIA claims, the CIA must adopt a more nuanced understanding of how fiction may pose security risks, especially when the resulting film is based on historical events.

#### CONCLUSION

Unclassified fictions grant agencies considerable power while shielding them from public scrutiny.<sup>331</sup> They currently allow the Intelligence Community to deprive the public of authentic media under the guise of protecting classified records while simultaneously divulging nearly identical information. This allows agencies to control which facts, images, and videos are made public, and when and how they are released.

This manipulation of the classification system might sound familiar, yet unclassified fictions do not fit neatly into secrecy law's existing taxonomy.<sup>332</sup> As authorized disclosures of classified information, unclassified fictions cannot rightly be considered leaks.<sup>333</sup> Nor can these films and television programs be categorized as plants, because the disclosures are not necessarily unattributed.<sup>334</sup> Instead, unclassified fictions more closely resemble what David Pozen names "pleaks"—quasi-authorized disclosures occupying the discursive space between fully authorized plants and fully unauthorized leaks. In Pozen's account, the executive branch tolerates pleaks as a power-enhancing strategy that facilitates information flow, and agencies use pleaks to "highlight helpful facts, undercut rivals, and build support for their initiatives."<sup>335</sup> By allowing the

331. See Steven Aftergood, *Policy Essay: Reducing Government Secrecy: Finding What Works*, 27 *YALE L. & POL'Y REV.* 399 (2009) (describing abuses of classification system); Jameel Jaffer & Nathan Freed Wessler, *The C.I.A.'s Misuse of Secrecy*, *N.Y. Times*, Apr. 29, 2012, <http://www.nytimes.com/2012/04/30/opinion/the-cias-misuse-of-secrecy.html> (discussing the agency's "manifest abuse" of the Glomar doctrine, particularly in the context of its targeted killing program).

332. See Pozen, *supra* note 297, at 43 (conceptualizing disclosures on a spectrum from plants to leaks, organized according to the degree of the disclosure's authorization).

333. "Plants are taken to be 'authorized' disclosures designed to advance administration interests and goals. Leaks are 'unauthorized' disclosures." See *Id.* (distinguishing leaks from plants on the basis of authorization); see also *id.* ("There is no settled definition of a leak in the academic literature or in journalistic usage.").

334. The advantages plants afford an agency are reminiscent of those arising from unclassified fictions. See *id.* at 36 ([Plants, depending on context, may] allow the White House to circumvent or cajole the career bureaucracy, to communicate more efficiently with foreign governments, to send signals and warnings to adversaries without formally engaging them, to float trial balloons . . . to preserve plausible deniability if an initiative is poorly received or an assertion turns out to be false, and generally to impart information about executive branch policies without officially acknowledging those policies and thereby inviting unwanted forms of accountability or constraint." (second alteration in original)).

335. See *id.* at 50; see also *id.* at 42-50 (noting that it is impossible to "draw clean cutoffs between plants and pleaks or between pleaks and leaks," but outlining criteria to provide conceptual guidance and a basis for comparison).

agency to speak without speaking, unclassified fictions also resemble the rhetorically thin distinction between official and unofficial acknowledgements regularly relied upon by the CIA to justify Glomar responses to FOIA requests.<sup>336</sup> Unclassified fictions allow the CIA to have it both ways: to benefit from the perceived authenticity of a work without technically making any “official” disclosures.

However, there may be disadvantages to the CIA’s policy. Although seemingly compatible, the CIA’s accuracy mission and its national security objectives are potentially set in opposition by films based on historical agency operations. Whether the CIA is undermining legitimate national security concerns—or those concerns are less valid than the CIA publically asserts in FOIA disputes—the practice is undesirable for the agency and the public it is meant to protect.<sup>337</sup> To resolve this tension, the CIA must become more transparent about its work with Hollywood or alter how it works with the entertainment industry. The public alone cannot unearth details of the CIA’s relationship with filmmakers, and the abandoned Senate inquiry demonstrates that political measures are similarly little guarantee of information.

As the CIA continues to pursue its domestic mission, the agency should adopt a more nuanced understanding of fiction—one that theorizes the effect of the agency’s collaboration in the creation of films as well as the role of the audience.<sup>338</sup> Author, text, and reader are involved in an ongoing and dynamic process of producing meaning bounded within a framework informed, in part, by the social conditions of the reader and author.<sup>339</sup> Understanding that the meaning of a text or image is not inherent within the text itself, but that it is created within the dynamic process between text and reader would allow the CIA to reevaluate its policy of promoting the accuracy of its Hollywood

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336. The Intelligence Community has defended its stance on non-Intelligence revealing documents by citing the difference between officially acknowledged and unofficial records. FOIA requesters regularly claim that non-Intelligence national security concerns are no longer valid where a disputed photo or video is already publically circulating because the image could already be manipulated or used in propaganda. The Intelligence Community, however, consistently justifies nondisclosure by explaining that an official record is somehow different, even if the same non-Intelligence national security concerns are implicated by the unofficial record. *See, e.g., Navasky v. CIA*, 499 F. Supp. 269, 276-277 (S.D.N.Y. 1980); *Public Citizen v. Department of State*, 11 F.3d 198 (D.C. Cir. 1993) (“An agency official does not waive Freedom of Information Act exemption 1 by publicly discussing the general subject matter of documents which are otherwise properly exempt from disclosure under that exemption.”); *Am. Civil. Liberties Union v. Dep’t of Justice*, 808 F. Supp. 2d 280, 297 (D.D.C. 2011) (“[T]he statements of journalists, ‘experts,’ or even unofficial or unidentified sources (even were they [agency] personnel) are not ‘official’ disclosures by the [agency].”).

337. *See* the National Security Act of 1947, 50 U.S.C. § 3003 (2012). Today, the CIA’s mission statement pronounces “We are the nation’s first line of defense. We accomplish what others cannot accomplish and go where others cannot go.” *See Vision, Mission & Values*, CIA, <https://www.cia.gov/about-cia/cia-vision-mission-values/index.html> (last visited apr. 25, 2014).

338. For more on reception theory and reader response theory, see WOLFGANG ISER, *THE ACT OF READING: A THEORY OF AESTHETIC RESPONSE* (1978).

339. *See* Wolfgang Iser, *The Play of the Text*, in *LANGUAGES OF THE UNSAYABLE* 325 (Sanford Budick & Wolfgang Iser eds., 1987).

depictions of the agency and rethink the range of projects with which it should assist. Until then, if the CIA continues to collaborate in the creation of unclassified fictions like *Zero Dark Thirty*, such works will remain potentially threatening to national security and will weaken the Intelligence Community's FOIA Exemption 1 claims when its justifications are based on predicted future violence and propaganda.<sup>340</sup>

Significantly, the D.C. Circuit Court recently ruled that the rhetorically thin distinction undergirding Glomar responses has finally collapsed with regard to the CIA's drone program.<sup>341</sup> Based on the various public acknowledgements of the program, the Court determined the agency's argument—that official disclosure would reveal something not already in the public domain—was no longer plausible or logical.<sup>342</sup> This decision demonstrates that there is a point beyond which credulity cannot be stretched in terms of rhetorical technicalities. If the line between official and unofficial can collapse, the already blurred distinction between authentic and fictional images might be similarly ruptured. Under what circumstances could the CIA's collaboration on a film amount to unofficial disclosure of the underlying records? In the case of the government's discussion of its drone programs, public perception has finally overcome rhetorical technicality. Could the public perception of CIA-assisted films ever outweigh technical fictionality?

If so, the CIA may have still greater impetus to reevaluate its use of fiction as it continues its relationship with the entertainment industry. Legal scholarship should similarly devote new attention to the Intelligence Community's attitude toward fiction. Analyzing the CIA's exploitation of fictional works offers new insights about the agency as it relates to national security and secrecy law. More broadly, as we continue to discuss leaks, plants, Glomar responses, deterrence by denial, and FOIA disclosures we should consider unclassified fictions as a related practice in the diverse ecology of the classification system.<sup>343</sup>

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340. As Fuchs warns, “[t]he integrity of the classification system is critical to national security. If those inside the system chip it away, then the nation will be exposed to harm.” Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 150 (2006).

341. *ACLU v. CIA*, 710 F.3d 422, 432 (D.C. Cir. 2013) (noting that in this case, involving a FOIA request pertaining to the CIA's use of drones to carry out targeted killing, that the CIA “asked the courts to stretch [the Glomar] doctrine too far—to give their imprimatur to a fiction of deniability that no reasonable person would regard as plausible”).

342. *Id.* at 430.

343. *See Kreimer, supra* note 310.