No. 13-238

In the Supreme Court of the United States

JUDICIAL WATCH, INC., PETITIONER

v.

DEPARTMENT OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that images of Osama bin Laden's dead body are exempt from mandatory disclosure under Exemption 1 of the Freedom of Information Act, 5 U.S.C. 552(b)(1).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-18a) is reported at 715 F.3d 937. The opinion of the district court (Pet. App. 19a-57a) is reported at 857 F. Supp. 2d 44.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on May 21, 2013. The petition for a writ of certiorari was filed on August 19, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In May 2011, the United States conducted an overseas operation in Abbottabad, Pakistan that killed Osama bin Laden. Pet. App. 4a. Shortly thereafter, the United States buried bin Laden's body at sea, *id.*

at 21a, and publicly announced that the President had determined that photographs of the body should not be publicly released, *id.* at 21a-22a.

Petitioner submitted requests under the Freedom of Information Act (FOIA), 5 U.S.C. 552, to the Department of Defense (DoD) and Central Intelligence Agency (CIA) seeking all photographs and video recordings of bin Laden taken "during and/or after the U.S. military operation" that killed him. Pet. App. 4a, 23a. DoD located no responsive records. *Id.* at 4a, 5a n.2. The CIA located 52 post-mortem images of bin Laden's body, many of which are "quite graphic" and "gruesome." *Id.* at 4a-5a.

The CIA withheld all the image records under two FOIA exemptions: Exemptions 1 and 3, 5 U.S.C. 552(b)(1) and (3). See Pet. App. 8a & n.4. The petition for a writ of certiorari concerns Exemption 1, which exempts from mandatory disclosure under FOIA those matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. 552(b)(1).

The post-mortem images at issue were classified under Executive Order No. 13,526, 3 C.F.R. 298 (2009 Comp.), available at 50 U.S.C. 435 note (Supp. V 2011). Under that Order, an "original classification authority" may classify information owned by, produced by or for, or under the control of the United States government if he or she "determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" (*i.e.*, "the national defense or foreign relations of the United States," including "defense against transna-

tional terrorism") and "is able to identify or describe the damage." *Id.* §§ 1.1(a)(1), (2) and (4), 6.1(cc). The information also must "pertain[]" to one or more classification categories, which include "military * * * operations"; "intelligence activities (including covert action)"; "intelligence sources or methods"; and "foreign activities of the United States." *Id.* §§ 1.1(a)(3), 1.4(a), (c) and (d). Such information is then classified as "Top Secret," "Secret," or "Confidential," based on the degree of "damage to the national security" that "the unauthorized disclosure of [the information] reasonably could be expected to cause." *Id.* § 1.2(a).

When information is originally classified, Executive Order No. 13,526 directs that the information shall be properly identified and marked. See Exec. Order No. 13,526, § 1.6. Among other things, the classification level of the information (*e.g.*, Top Secret), the identity of the original classification authority, the agency and office of origin, and declassification instructions normally should be indicated. *Id.* § 1.6(a) and (b). The absence of such markings, however, does not affect the status of the underlying information as properly classified. "Information assigned a level of classification under [Executive Order No. 13,526] or predecessor orders shall be considered as classified at that level of classification despite the omission of other required markings." *Id.* § 1.6(f).

Once information has been originally classified, personnel other than an original classification authority may designate "derivative[ly] classifi[ed]" materials. Exec. Order No. 13,526, § 2.1. Such personnel are authorized to apply "derivative classification markings" when they "reproduce, extract, or summarize classified information," "apply classification markings

derived from source material," or apply such markings "as directed by a classification guide." *Id.* § 2.1(a).

2. Petitioner filed suit in district court before the CIA and DoD completed processing petitioner's FOIA requests. Pet. App. 23a-24a. After the agencies processed the requests, the government moved for summary judgment based on declarations explaining the CIA's decision to withhold the post-mortem images of bin Laden, including declarations from John Bennett, the Director of the CIA's National Clandestine Service; Lieutenant General Robert Neller, the Director of Operations, J-3, on the Pentagon's Joint Staff; Admiral William McRaven, Commander of the United States Special Operations Command; and Elizabeth Culver, a CIA Information Review Officer. See *id.* at 5a-7a & n.3.

As relevant here, Culver explained that the records had been "derivatively classified" by a CIA official pursuant to a classification guide authored by the CIA's Director of Information Management; that the relevant records had all been marked "Top Secret"; and that the records had subsequently been marked "out of an abundance of caution" with additional markings that, *e.g.*, identify the derivative classifier, cite the classification guide and the reasons for classification, and provide declassification instructions. Pet. App. 7a.

Director Bennett explained that he had reviewed the records and had independently determined (as an original classification authority) that they were properly classified Top Secret. Pet. App. 5a, 17a; see *id.* at 38a. He explained that the records pertain to appropriate classification categories: All the images are

products of a highly sensitive overseas operation and thus pertain to intelligence activities and/or methods; foreign relations; and foreign activities of the United States. *Id.* at 46a.

Director Bennett further explained that the records were properly classified Top Secret because, based on his 25 years of CIA experience (which included extensive service in hostile overseas environments), he concluded that public disclosure of the records "reasonably could be expected to result in exceptionally grave damage to the national security," including "retaliatory attacks" against Americans. Pet. App. 49a. He stated that al Qaeda had already utilized the "so-called 'martyrdom'" and burial of bin Laden for its own propaganda purposes and had previously used similar events to incite anti-American sentiment. *Id.* at 12a, 49a. Bennett also concluded that releasing the records "reasonably could be expected to inflame tensions among overseas populations that include al-Qa'ida members or sympathizers," to "encourage propaganda by various terrorist groups or other entities hostile to the United States," and to "lead to retaliatory attacks against the United States homeland or United States citizens, officials, or other government personnel traveling or living abroad." *Id.* at 49.

General Neller reinforced Director Bennett's conclusions by explaining that he had determined, based on his own extensive experience in the field and his review of past incidents, that releasing the records would "pose a clear and grave risk of inciting violence and riots against U.S. and Coalition forces" and "expose innocent Afghan and American civilians to harm." Pet. App. 6a. The General noted that fatal

riots ensued after a false press report that American soldiers had desecrated the Koran and after the publication of a Danish cartoon of the Prophet Muhammad. *Ibid.* The General concluded that "a similar violent reaction could be expected to follow the release of the bin Laden images." *Ibid.*

3. The district court entered summary judgment for the government. Pet. App. 58a-59a; see *id.* at 19a-57a (opinion). The court held that "the records identified by the CIA were classified materials properly withheld under Exemption 1." *Id.* at 20a-21a. The court explained that the government's declarations showed that the records had been properly classified under Executive Order No. 13,526 because the order's substantive requirements (*id.* at 45a-55a) and procedural requirements (*id.* at 36a-45a) had been satisfied.

4. The court of appeals affirmed. Pet. App. 3a-18a.

The court of appeals stated that a reviewing court must accord "substantial weight" to agency declarations describing the applicability of Exemption 1. Pet. App. 9a (quoting *ACLU* v. *DoD*, 628 F.3d 612, 619 (D.C. Cir. 2011)). The court explained that an agency's conclusion that disclosure reasonably could be expected to result in damage to the national security always will be "speculative to some extent" and that the role of a reviewing court is to ensure that the Executive Branch's predictive judgment about the national security implications of release are "'logical' or 'plausible.'" *Id.* at 9a, 14a-15a (quoting *ACLU*, 628 F.3d at 619). The court further explained that if agency declarations "describe[] the justifications for withholding the information with specific detail" and "demonstrate[] that the information withheld logically falls within the claimed exemption," a court may grant

summary judgment to the government on the basis of the declarations, so long as they are "not contradicted by contrary evidence in the record or by evidence of the agency's bad faith." *Id.* at 9a (quoting *ACLU*, 628 F.3d at 619).

In this case, the court of appeals continued, the government's declarations established that the substantive and procedural requirements of the Executive Order governing classified national security information had been met and that Exemption 1 therefore protected the post-mortem images of bin Laden from mandatory FOIA disclosure. Pet. App. 9a-17a. The court explained that it was "indisputable" that the records satisfied the substantive requirement that each record pertain to one or more of the subject-matter categories identified in the Executive Order. *Id.* at 10a-11a. The court also stated that there was "no doubt" that, for "a great many of the images," the government's declarations had established the "requisite level of [national-security] harm" to warrant classification. *Id.* at 11a.

Petitioner, the court of appeals observed, "correctly focuse[d] on the most seemingly innocuous of the images," *i.e.*, the images that depict the preparation of bin Laden's body for burial and the burial itself. Pet. App. 11a. But the court concluded that the government's declarations provided sufficient reason to believe that releasing the images "could cause exceptionally grave harm" to the national security. *Id.* at 12a. The court reasoned that the government's documentation of "prior instances in which reasonably analogous disclosures have led to widespread and fatal violence," some of which was directed at U.S. interests, provided "an adequate basis for classification"

and for the government's conclusion that releasing the records here "could reasonably be expected to trigger violence and attacks 'against United States interests, personnel, and citizens worldwide.'" *Id.* at 12a-14a. The court explained that the government's position was further reinforced by the nature of the records in question, which are "an extraordinary set of images" that "depict American military personnel burying the founder and leader of al Qaeda." *Id.* at 14a.

The court of appeals rejected petitioner's contention that the government had failed to satisfy the procedural requirements for classification. Pet. App. 15a-17a. The court found "no evidence" contradicting the government's evidence that the images were "classified before [the CIA] received [petitioner's] FOIA request." *Id.* at 15a. And although the court stated that it could not fully evaluate the CIA's derivative classification of the images based on the current record, it concluded that a remand was not warranted in this case. *Id.* at 16a-17a. The court reasoned that an original classification authority (Director Bennett) had already personally reviewed the images and confirmed that they were properly classified, thereby "remov[ing] any doubt that a person with original classification authority has approved the classification decision." *Id.* at 17a.

ARGUMENT

The decision of the court of appeals upholding the application of FOIA Exemption 1 to CIA images of Osama bin Laden's dead body is correct and does not conflict with any decision of this Court or any other court of appeals. Indeed, petitioner does not even attempt to identify a division of authority that might

warrant certiorari. Petitioner's contentions are fact-bound and warrant no further review.

1. Exemption 1 took its current form in 1974, when Congress amended the Exemption in response to *EPA* v. *Mink*, 410 U.S. 73 (1973). See H.R. Conf. Rep. No. 1380, 93d Cong., 2d Sess. 12 (1974) (*1974 Conf. Rep.*). In *Mink*, this Court had held that Exemption 1 as originally enacted precluded *any* "judicial review" of "the soundness of executive security classifications" and that the only relevant consideration at that time was "[t]he fact of [a] classification[]" under an Executive Order. 410 U.S. at 84. The Court further held that courts were not authorized under FOIA to conduct "*in camera* inspection" of agency records for which the government invoked Exemption 1. *Ibid.*; see *id.* at 81-84. Congress then amended Exemption 1 to require some judicial inquiry into whether the information in question was "properly classified" under an Executive Order, 5 U.S.C. 552(b)(1), and amended other FOIA provisions to grant courts discretionary authority to conduct *in camera* review. See *1974 Conf. Rep.* 4, 12.

Congress, however, made clear that courts conducting *de novo* review of the government's invocation of Exemption 1 must give "substantial weight" to government affidavits providing "details of the classified status of the disputed record[s]." *1974 Conf. Rep.* 12. Congress recognized that such "substantial" deference was warranted because "the Executive departments responsible for national defense and foreign policy matters" possess "unique insights into what adverse [national-security] [e]ffects might occur as a result of public disclosure." *Ibid.* The manager of the 1974 FOIA amendments in the House of Repre-

sentatives accordingly explained that courts "would clearly rule for the Government" under the revision to Exemption 1 if the government's classification decision had a "reasonable" basis under the governing Executive Order. 120 Cong. Rec. 36,623 (1974) (statement of Rep. Moorhead). He emphatically rejected the possibility that a court could overturn a "reasonable" classification judgment by a government official if the court "thought the plaintiff's position just as reasonable." *Ibid.* "[N]o one familiar" with the drafting history, he explained, "could ever imagine that Members of Congress" would adopt "such an obviously dangerous provision." *Ibid.*

The "substantial" deference that Congress understood must govern a court's Exemption 1's inquiry reflects this Court's longstanding and substantial deference to Executive judgments in the realm of national security. An assessment of risk to national security requires a "[p]redictive judgment" that "must be made by those with the necessary expertise in protecting classified information." *Department of the Navy* v. *Egan*, 484 U.S. 518, 529 (1988). "For 'reasons . . . too obvious to call for enlarged discussion,' the protection of classified information must [therefore] be committed to the broad discretion of the agency responsible." *Ibid.* (quoting *CIA* v. *Sims*, 471 U.S. 159, 170 (1985)); see *Sims*, 471 U.S. at 180-181. This Court has recognized that substantial deference is particularly warranted in national-security contexts, because "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973); see, *e.g.*, *Goldman* v. *Weinberger*, 475 U.S. 503, 507 (1986) ("courts must give great deference to the pro-

fessional judgment of military authorities concerning the relative importance of a particular military interest"); *Center for Nat'l Sec. Studies* v. *Department of Justice*, 331 F.3d 918, 928 (D.C. Cir. 2003) ("[T]he judiciary is in an extremely poor position to second-guess the executive's judgment in [the] area of national security."), cert. denied, 540 U.S. 1104 (2004).

The central role of the government's national-security judgment in the Exemption 1 context is reinforced by the terms of Executive Order No. 13,526. That order authorizes the original classification of information only when a specially trained Executive Branch official vested with "original classification authority" determines that disclosure "reasonably *could* be expected"—not just when disclosure *would* be expected—to harm the national security. Exec. Order No. 13,526, § 1.1(a)(4) (emphasis added); see *id.* § 1.3(a) (original classification authority).

Even petitioner concedes that courts must give "some deference to the Executive Branch" in this context. Pet. 4. Petitioner also acknowledges that Congress intended that courts would accord "substantial weight" to the government's explanation of its classification decisions in agency declarations. Pet. 6 (citing *1974 Conf. Rep.* 12). Yet petitioner offers no alternative formulation by which to judge Executive Branch national-security judgments other than petitioner's assertion (Pet. 5) that some form of "meaningful review" is warranted. Nor does petitioner explain how the court of appeals erred in formulating the relevant standard when the court explained that it must accord "substantial weight" to the government's declarations if they "describe[] the justifications for withholding the information with specific detail" and "demon-

strate[] that the information withheld logically falls within the claimed exemption." Pet. App. 9a. The fact that petitioner has not even attempted to identify a conflict of authority over the relevant standard of review underscores that petitioner ultimately seeks review based on its fact-bound disagreement with the court of appeals' decision. That dispute merits no further review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

2. Petitioner's specific fact-bound contentions confirm that certiorari should be denied.

Petitioner's principal contention is that the court of appeals erred because the court concluded that the government failed to sufficiently show that the records had properly been derivatively classified under Executive Order No. 13,526 but, rather than remand to allow the government to "submit sufficient information" about the derivative classification, the court upheld the government's invocation of Exemption 1. Pet. 10-12. As the court of appeals recognized, a remand would have been pointless given that Director Bennett—an *original* classification authority—determined that the records in question had been properly classified as Top Secret. Pet. App. 17a; see also *id.* at 15a (explaining that the record established that the relevant records had been classified before the CIA received petitioner's FOIA request and that petitioner presented "no [contrary] evidence").

Petitioner further contends (Pet. 12-14) that the "D.C. Circuit did [not] conduct meaningful review" because, petitioner posits, it "can be argued" that post-mortem images of bin Laden's body taken while the body was being prepared for burial and during bin

Laden's burial at sea might not impermissibly harm national security. Petitioner, for instance, suggests (Pet. 12-13) that "speculative, unspecific violence" in the form of "attack[s] on U.S. interests or citizens," while "regrettable," might not cause exceptionally grave damage to the national security. But national security "includes defense against transnational terrorism" as part of "the national defense," see Exec. Order No. 13,526, §§ 1.1(a)(4), 6.1(cc), and retaliatory acts against United States interests have long been understood to constitute damage to the national security. See, *e.g.*, *Miller* v. *Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984); *Afshar* v. *Department of State*, 702 F.2d 1125, 1132-1133 & n.12, 1134 (D.C. Cir. 1983). Furthermore, as the court of appeals explained, judgments about the risk of harm to the national security "will always be speculative to some extent" because they are by definition predictive judgments. Pet. App. 14a. In this case, the government amply explained—and both courts below accepted as reasonable—the conclusion that disclosing the post-mortem images of bin Laden's body "reasonably could be expected" to cause exceptionally grave harm to the national security, Exec. Order 13,526, §§ 1.1(a)(4), 1.2(a)(1).

Finally, petitioner contends (Pet. 13-14) that "it could be argued" that releasing post-mortem pictures of bin Laden's body "could lead to the easing of tensions overseas" because the images could confirm that the United States treated bin Laden's body with "the utmost dignity and respect." Because petitioner merely states that this position "could be argued," Pet. 13, it is unclear whether petitioner actually embraces this exceedingly optimistic projection, which conflicts with the seasoned judgment of the Executive

Branch's national-security personnel. But even if petitioner were to advocate that view, and even if it might plausibly be argued to be a "reasonable" projection, Congress (as petitioner acknowledges, Pet. 6) intended courts to give "substantial weight" to the declarations of Executive Branch officials having national-security expertise, not to litigants having no national-security responsibilities. Indeed, the position petitioner appears to advocate regarding Exemption 1 reflects precisely the sort of "obviously dangerous provision" that "no one familiar" with Exemption 1's drafting history "could ever imagine that Members of Congress" would have adopted. 120 Cong. Rec. at 36,623 (statement of Rep. Moorhead).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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