

No. 13-238

IN THE
Supreme Court of the United States

JUDICIAL WATCH, INC.

Petitioner,

v.

UNITED STATES DEPARTMENT OF DEFENSE
AND CENTRAL INTELLIGENCE AGENCY,

Respondents.

**On Petition for a Writ of Certiorari to
the United States Court of Appeals for
the District of Columbia Circuit**

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION1

ARGUMENT2

 I. Deference Is Not Equivalent
 to Acquiescence2

 II. The Lower Courts Afforded the
 Executive Branch Blind Deference..... 6

 III. This Case Raises an Important
 Question Concerning the Proper
 Construction and Interpretation
 of Exemption 18

CONCLUSION10

TABLE OF AUTHORITIES

CASES

<i>Center for National Security Studies v. Department of Justice, 331 F.3d 918 (D.C. Cir. 2003)</i>	4, 5
<i>Central Intelligence Agency v. Sims, 471 U.S. 159 (1985)</i>	8-9
<i>Department of the Air Force v. Rose, 425 U.S. 352 (1976)</i>	9
<i>Department of the Navy v. Egan, 484 U.S. 518 (1988)</i>	2
<i>Federal Bureau of Investigation v. Abramson, 456 U.S. 615 (1982)</i>	9
<i>Federal Open Market Committee of Federal Reserve System v. Merrill, 443 U.S. 340 (1979)</i>	9
<i>Federal Trade Commission v. Grolier, Inc., 462 U.S. 19 (1983)</i>	9
<i>Gilligan v. Morgan, 413 U.S. 1 (1973)</i>	3, 4, 7, 8
<i>Goldman v. Weinberger, 475 U.S. 503 (1986)</i>	3, 4

<i>John Doe Agency v. John Doe Corporation</i> , 493 U.S. 146 (1989)	8
<i>Judicial Watch, Inc. v. United States Department of Defense</i> , 857 F. Supp. 2d 44 (D.D.C. 2012)	7
<i>Judicial Watch, Inc. v. United States Department of Defense</i> , 715 F.3d 937 (D.C. Cir. 2013)	7
<i>Kissinger v. Reporters Committee for Freedom of the Press</i> , 445 U.S. 136 (1980)	9
<i>Milner v. Dep't of the Navy</i> , 131 S. Ct. 1259 (2011)	2, 3, 6
<i>National Labor Relations Board v. Sears, Roebuck & Company</i> , 421 U.S. 132 (1975)	9
<i>Renegotiation Board. v. Bannerkraft Clothing Company</i> , 415 U.S. 1 (1974)	9
<i>Renegotiation Board v. Grumman Aircraft Engineering Corporation</i> , 421 U.S. 168 (1975)	8
<i>United States Department of Justice v. Reporters Committee for Freedom of the Press</i> , 489 U.S. 749 (1989).....	8

*United States Department of Justice v.
Tax Analysts*, 492 U.S. 136 (1989)8

*United States Department of State
v. Ray*, 502 U.S. 164 (1991)8

*United States Department of State v.
Washington Post Company*,
456 U.S. 595 (1982)9

STATUTES

5 U.S.C. § 552(a)(4)(B)2, 6, 8

5 U.S.C. § 552(b)(7)(A)4

MISCELLANEOUS

H.R. Rep. No. 93-1380,
93rd Cong. 2d Sess. 219 (1974)3

SUP. CT. R. 10.....8

INTRODUCTION

This case is about the withholding of images of Osama bin Laden's dead body, primarily those images that depict the body cleaned and prepared for burial or actually being buried at sea. This case is not about the withholding of prototypical, classified information that identifies military plans, weapons systems, or operations or even intelligence sources or methods.

The Executive Branch argues that this Court should not, and cannot, conduct meaningful review of its withholding regardless of how flawed the process was or how weak the justifications are. The Executive Branch also argues that the Court, like the courts below, should simply ignore the explicit intentions of Congress as well as the plain language of FOIA and "rubber stamp" the Executive Branch's withholding of the requested images because the process was, and the justifications are, "good enough." That is not the law. Nor should it be. The Court therefore should grant certiorari to resolve the important question concerning the proper construction and interpretation of Exemption 1.

ARGUMENT

I. Deference Is Not Equivalent to Acquiescence.

The issue is not whether the Executive Branch is afforded some deference or even “substantial deference” by the courts concerning classification decisions. The issue is whether the two lower courts properly afforded blind deference to the Executive Branch concerning its decision to withhold images of bin Laden’s dead body.

The Executive Branch cites a litany of cases that purportedly support its assertion that the Court should not conduct a meaningful review of its classification decision. However, each case is inapposite and only weakens the Executive Branch’s position.

At issue in *Department of the Navy v. Egan* was whether the courts had the authority to review a decision to deny or revoke a security clearance. 484 U.S. 518, 520 (1988). In deciding that the courts do not have such authority, this Court stated, “[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.” *Id.* at 530. Unlike decisions concerning security clearances, Congress specifically has provided the courts with the authority to review *de novo* classification decisions within the FOIA context. 5 U.S.C. § 552(a)(4)(B); *see also Milner v.*

Department of the Navy, 131 S. Ct. 1259, 1266 (2011).

Similarly, in *Gilligan v. Morgan*, this Court concluded, “The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments.” 413 U.S. 1, 10 (1973). Therefore, whether the Ohio National Guard violated students’ rights of speech and assembly was not a justiciable controversy because the relief sought required review and continuing surveillance over the training, weaponry, and standing orders of the National Guard. *Id.* at 11-12. Because Congress specifically provided courts with the authority to review decisions of the Executive Branch to withhold purportedly classified information, any concern that judicial relief would interfere with professional military judgments is unfounded. *See* H.R. Rep. No. 93-1380, 93rd Cong. 2d Sess. 219, 228-229 (1974).

At issue in *Goldman v. Weinberger* was whether an Air Force regulation prohibiting members from wearing headgear while indoors violated an officer’s *First Amendment* rights because the regulation forbade him from wearing a yarmulke. 475 U.S. 503, 504 (1986). In concluding that the regulation did not violate the *First Amendment*, this Court stated:

In the context of the present case, when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts

must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.

Id. at 507. The Court did not address any issues relating to any classification decisions. The Court's decision is more akin to the issue in *Gilligan* than the issue in the instant matter. The Court provided deference to the Executive branch with respect to the "professional military judgment" concerning "composition, training, equipping, and control of a military force." *Gilligan*, 413 U.S. at 10.

Finally, the Executive Branch cites to *Center for National Security Studies v. Department of Justice*, 331 F.3d 918 (D.C. Cir. 2003), the only FOIA case upon which it relies. However, in that case, the Executive Branch was withholding information under Exemption 7(A), which allows an agency to withhold information that, if released, "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). The U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") stated, "Exemption 7(A) explicitly requires a predictive judgment of the harm that will result from disclosure of information, permitting withholding when it could 'reasonably be expected' that the harm will result." *National Security Studies*, 331 F.3d at 928. The harm in that case would be the ability of "al Qaeda or other terrorist groups to map the course of the investigation and thus develop the means to impede it." *Id.* The

Executive Branch continues to withhold the images of bin Laden's dead body under Exemption 1. The predictive judgment related to the potential effect on future law enforcement proceedings is simply irrelevant to the instant matter.

In addition, in distinguishing the level of review conducted by the courts concerning claims of Exemption 1 and claims of Exemption 7(A), the *National Security Studies* dissent stated:

In any event, the government's case fails even under the heightened deference we have applied in Exemption 1 and National Security Act cases. No matter the level of deference, our review is not "vacuous." Even when reviewing Exemption 1's applicability to materials classified in the interest of national security, we have made clear that no amount of deference can make up for agency allegations that display, for example, a lack of detail and specificity . . . since deference is not equivalent to acquiescence.

National Security Studies, 331 F.3d at 939-940 (Tatel, J., dissenting) (internal citations omitted).

Simply put, the Executive Branch has failed to demonstrate why it should be afforded blind deference to withhold material that may not have been properly classified nor specifically authorized to be classified. Nor has it demonstrated that the

Court cannot conduct meaningful review of classification decisions. Instead, the Executive Branch weakly argues that the decision by the D.C. Circuit does not conflict with an opinion of this Court or any other court of appeals and that “Petitioner’s contentions are fact-bound and warrant no further review.” Brief for Respondents in Opposition at 8-9. Implicit in those arguments is the Executive Branch’s tried position that the requested records purportedly have been classified and therefore any review is unnecessary. That is not the law. Nor should it be. FOIA specifically authorizes courts to review the Executive Branch’s withholding of information. § 552(a)(4)(B) (“[T]he court shall determine the matter *de novo*.”). Anything short of meaningful review will cause FOIA to become less of “a disclosure than a withholding statute.” *Milner*, 131 S. Ct. at 1270.

II. The Lower Courts Afforded the Executive Branch Blind Deference.

As demonstrated in the Petition, this case is the poster child for blind deference. First, the lower courts expressed concern that the withheld records were not properly classified. Second, both courts failed to conduct meaningful review of the Executive Branch’s claims that all of the images conformed to the substantive criteria for classification. Nevertheless, in the end, the courts concluded that, regardless of the clear failure on the part of the Executive Branch to fully satisfy its burdens under Exemption 1, the evidence submitted was “good

enough” for all images of bin Laden’s dead body to be withheld.

With respect to whether the images of bin Laden’s dead body were properly classified, the U.S. District Court for the District of Columbia stated, “As a preliminary matter, Judicial Watch is correct that the CIA’s declarations are not a model of transparency.” *Judicial Watch, Inc. v. United States Department of Defense*, 857 F. Supp. 2d 44, 56-57 (D.D.C. 2012) (App. 40a). In addition, the court found that the CIA failed to submit evidence that demonstrated basic facts such as “the identity of the individual who originally classified the records in question.” *Id.* at 57 (App. 40a). Similarly, the D.C. Circuit concluded, “[W]e cannot determine whether the derivative classifier misapplied the guide, or whether the guide’s instructions were so vague as to operate as no constraint at all.” *Judicial Watch, Inc. v. United States Department of Defense*, 715 F.3d 937, 944 (D.C. Cir. 2013) (App. 16a-17a).

With respect to whether the images of bin Laden’s dead body conformed to the substantive criteria for classification, the court of appeals concluded that the Executive Branch’s blanket withholding of all of the images was proper because the submitted declarations expressed “determinations that releasing any of the images, including the burial images, could reasonably be expected to trigger violence and attacks ‘against United States interests, personnel, and citizens worldwide.’” *Judicial Watch*, 715 F.3d at 942 (App. 13a) (internal citations omitted). Such

determinations are not the classic “professional military judgments” that are typically afforded substantial deference because they concern the “composition, training, equipping, and control of a military force.” *Gilligan*, 413 U.S. at 10. The images of bin Laden’s dead body do not reveal military plans, weapons systems, or operations or even intelligence sources or methods. Nor did the Executive Branch assert that the images depicted prototypical, classified information. Nevertheless, the lower court did no more than blindly affirm the Executive Branch’s determinations. It wholly failed to conduct a meaningful, *de novo* review of the classification decision as required by statute. *See* 5 U.S.C. § 552(a)(4)(B).

III. This Case Raises an Important Question Concerning the Proper Construction and Interpretation of Exemption 1.

This Court grants certiorari when “a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court.” SUP. CT. R. 10. In fact, in at least 14 FOIA cases heard by this Court, certiorari was granted because the Court sought to resolve important questions concerning “the proper construction and interpretation of” various FOIA exemptions. *Renegotiation Board v. Grumman Aircraft Engineering Corporation*, 421 U.S. 168, 183 (1975); *see also United States Department of State v. Ray*, 502 U.S. 164 (1991); *John Doe Agency v. John Doe Corporation*, 493 U.S. 146 (1989); *United States*

Department of Justice v. Tax Analysts, 492 U.S. 136 (1989); *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989); *Central Intelligence Agency v. Sims*, 471 U.S. 159 (1985); *Federal Trade Commission v. Grolier, Inc.*, 462 U.S. 19 (1983); *Federal Bureau of Investigation v. Abramson*, 456 U.S. 615 (1982); *United States Department of State v. Washington Post Company*, 456 U.S. 595 (1982); *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980); *Federal Open Market Committee of Federal Reserve System v. Merrill*, 443 U.S. 340 (1979); *Department of the Air Force v. Rose*, 425 U.S. 352 (1976); *National Labor Relations Board v. Sears, Roebuck & Company*, 421 U.S. 132 (1975); *Renegotiation Board v. Bannerkraft Clothing Company*, 415 U.S. 1 (1974).

None of those cases concern the construction and interpretation of Exemption 1 since it was rewritten 30 years ago. As demonstrated in the Petition, Congress overrode a presidential veto and amended Exemption 1 for the express purpose of replacing the blind deference standard with a standard that provides substantial weight to the Executive Branch while authorizing the courts to conduct meaningful review. The lower courts did not conduct such review in this case. Therefore, the Executive Branch's repeated assertion that there is no "conflict of authority" plainly misses the mark. This Court can, and should, grant certiorari to resolve important questions concerning the proper construction and interpretation of Exemption 1.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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