No. 16-629

In the Supreme Court of the United States

AMERICAN CIVIL LIBERTIES UNION, ET AL.,
PETITIONERS

v.

CENTRAL INTELLIGENCE AGENCY, 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

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
CHAD A. READLER
Acting Assistant Attorney General
MATTHEW COLLETTE
THOMAS PULHAM
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a classified report by the Senate Select Committee on Intelligence concerning the Central Intelligence Agency's now-defunct detention and interrogation program became an "agency record" for purposes of the Freedom of Information Act, 5 U.S.C. 552, when the Committee transmitted it with restrictions to certain Executive Branch agencies.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and rule: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 823 F.3d 655. The opinion of the district court (Pet. App. 28a-59a) is reported at 105 F. Supp. 3d 35.

JURISDICTION

The judgment of the court of appeals (Pet. App. 26a-27a) was entered on May 13, 2016. A petition for rehearing was denied on July 13, 2016 (Pet. App. 62a-64a). On September 30, 2016, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 10, 2016, and the petition was filed on November 9, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. This action under the Freedom of Information Act (FOIA), 5 U.S.C. 552, concerns a highly classified December 2014 report by the Senate Select Committee on Intelligence (Committee or SSCI) about a now-defunct Central Intelligence Agency (CIA) detention and interrogation program. The report is entitled *Committee Study of the CIA's Detention and Interrogation Program* (*Senate Report*). Under FOIA, a federal agency must generally make agency records available to any person who has submitted a "request for [such] records," unless a statutory exemption or exclusion applies. 5 U.S.C. 552(a)(3)(A); see 5 U.S.C. 552(b) (FOIA exemptions) and (c) (exclusions). If the agency fails to release the records, FOIA authorizes the requestor to file suit in a district court, which has authority to "order the production of any agency records improperly withheld." 5 U.S.C. 552(a)(4)(B).

FOIA does not define "agency record." But Congress defined "agency" for FOIA purposes to mean "each authority of the Government of the United States," excluding, as relevant here, "the Congress." 5 U.S.C. 551(1); see 5 U.S.C. 552(f)(1). It is thus undisputed that congressional records are not subject to FOIA's disclosure requirements. Pet. App. 11a. The *Senate Report* at issue in this case was transmitted to certain federal agencies as explained below. This case concerns whether the *Senate Report* became an "agency record" upon such transmission.

This Court has identified two requirements that "must be satisfied for requested materials to qualify as 'agency records'" under FOIA. *United States Dep't of Justice* v. *Tax Analysts*, 492 U.S. 136, 144 (1989). "First, an agency must 'either create or obtain' the

requested materials 'as a prerequisite to its becoming an 'agency record.'" *Ibid.* (citation omitted). The government has not disputed that the relevant agencies "obtained" copies of the *Senate Report*. "Second, the agency must be in control of the requested materials at the time the FOIA request is made." *Id.* at 145. In this case, as petitioners stated below, there is "no dispute that when Congress authors a document and an agency then possesses it, two factors are 'effectively dispositive' of agency control: the intent of Congress to retain or relinquish control, and the ability of the agency to use and dispose of the record as it sees fit." C.A. Pet. for Reh'g 7 (citation omitted). That test, as petitioners explained, "ultimately boils down to a question of congressional intent." *Ibid.* This case has thus been litigated on the premise that the relevant question is whether the SSCI sufficiently expressed its intent to retain control over its highly classified report.

b. In March 2009, the SSCI initiated a comprehensive review of the CIA's former detention and interrogation program as part of its oversight of the intelligence community. See S. Rep. No. 288, 113th Cong., 2d Sess. 8, 455, 457 (2014) (*Public Senate Summary*); Pet. App. 95a. To conduct that review, Senate personnel needed to access millions of pages of CIA documents containing highly sensitive and compartmented classified information. Pet. App. 5a, 29a, 95a. The CIA and the SSCI negotiated an inter-branch accommodation providing such access that "respected both the President's constitutional authorities over classified information and . . . Congress's constitutional authority to conduct oversight of the Executive Branch." *Id.* at 29a (citation omitted).

On June 2, 2009, the terms of the arrangement were memorialized in a letter from the Committee's Chairman and the Vice Chairman to the CIA Director. Pet. App. 95a-100a. Under the agreement, the CIA provided Committee members and staff with access to unredacted documents in a secure electronic reading room at a CIA facility. *Id.* at 30a, 96a-97a. The secure room included a segregated network drive on which Committee personnel could confidentially prepare and store their work product. *Id.* at 30a, 97a.

A "key provision of the 2009 letter, and 'a condition upon which SSCI insisted,' concerned the status of such work product." Pet. App. 30a (citation omitted). The 2009 letter required that "[a]ny documents generated on the network drive * * * , as well as any other notes, documents, draft and final recommendations, reports or other materials generated by Committee staff or Members, are the property of the Committee." *Id.* at 97a. "These documents," the letter continued, "remain congressional records in their entirety and disposition and control over these records, even after the completion of the Committee's review, lies exclusively with the Committee." *Ibid.* The letter accordingly instructed that "these records are not CIA records under the Freedom of Information Act or any other law," and that the CIA "may not disseminate or copy them, or use them for any purpose without the prior written authorization of the Committee." *Id.* at 97a-98a.

Committee personnel accordingly drafted the initial versions of the Committee report on the segregated network drive at a CIA facility. Pet. App. 7a. As its work progressed, the Committee worked with the CIA to transfer portions of the report to secure facili-

ties in the U.S. Capitol complex so that the Committee could complete the drafting process in its own workspace. *Ibid.*

On December 13, 2012, the SSCI voted to approve an initial draft of the *Senate Report*, which included a draft stand-alone Executive Summary and a draft full report (Full Report) that was approximately 6000 pages long. Pet. App. 7a, 101a; see *Public Senate Summary* 8. The Committee then sent the draft "to an approved list of individuals in the Executive Branch for the limited purpose of eliciting their comments and proposed edits." Pet. App. 7a; see *id.* at 102a. The SSCI Chairman stated that the SSCI would consider revisions and then "consider how to handle any public release of the report, in full or otherwise." *Id.* at 102a.

On April 3, 2014, after revising the report in response to CIA comments, the SSCI approved the updated version of the *Senate Report* (including both the Executive Summary and the Full Report), but it voted to send only its findings and conclusions and its revised Executive Summary to the President for declassification review. *Public Senate Summary* 9; see Pet. App. 104a. Over the next several months, the Committee and Executive Branch officials engaged in discussions regarding the declassification review, and the Committee continued to revise the *Senate Report*. Pet. App. 7a-8a. Upon completion of the negotiations, the Director of National Intelligence declassified the Committee's findings and conclusions and its Executive Summary with minimal redactions. *Id.* at 8a; see *Public Senate Summary* i.

On December 9, 2014, the SSCI "publicly released the declassified Executive Summary and Findings and

Conclusions" with the additional and minority views of its members. Pet. App. 107a. Those materials, including the Committee's 499-page Executive Summary, are printed in the *Public Senate Summary* (S. Rep. No. 288). The Chairman's forward explained that the Committee's report was final, that declassification had not been sought for its Full Report because "the Executive Summary includes enough information to adequately describe the CIA's Detention and Interrogation Program," but that "[d]ecisions will be made later on the declassification and release of the full 6,700 page Study." *Public Senate Summary* vi, viii.

The next day, the Full Report was transmitted to the President, the heads of the certain agencies (including respondent agencies), and the CIA Inspector General. See Pet. App. 107a-108a. SSCI Chairman Dianne Feinstein stated in a cover letter that "the full report should be made available within the CIA and other components of the Executive Branch for use as broadly as appropriate to help make sure that this experience is never repeated." *Id.* at 108a. The Senator added that, "[t]o help achieve that result, I hope you will encourage the use of the full report in the future development of CIA training programs, as well as future guidelines and procedures for all Executive Branch employees, as you see fit." *Ibid.*

In January 2015, the SSCI's chairmanship passed to Senator Richard Burr. Pet. App. 9a. Shortly thereafter, Chairman Burr sent a letter to the President reporting that he had been unaware of former-Chairman Feinstein's efforts to distribute the Full Report within the Executive Branch. Chairman Burr requested that "all copies of the full and final report in the possession of the Executive Branch be returned immediately to

the Committee." *Id.* at 9a, 34a (quoting C.A. App. 136). Senator Feinstein, then Vice Chairman of the Committee, responded with her own letter, "ask[ing] that [the President] retain the full 6,963-page classified report." *Id.* at 9a (quoting C.A. App. 139) (second set of brackets in original).

2. Meanwhile, in 2013, petitioners submitted a FOIA request seeking disclosure of the SSCI report. Pet. App. 9a. After the CIA denied petitioners' request, petitioners filed this FOIA action in district court. *Id.* at 9a-10a. Petitioners then submitted FOIA requests for the report to the other respondent agencies. *Id.* at 10a. The parties subsequently agreed to interpret petitioners' amended complaint as seeking disclosure of the final version of the Full Report that was transmitted to the respondent agencies in December 2014. *Ibid.*

The district court dismissed petitioners' complaint for lack of jurisdiction. Pet. App. 28a-59a. The court explained that the parties agreed that the Full Report "constituted a congressional document exempt from FOIA" "at the time SSCI drafted [it]," and that the parties' dispute was thus "whether the Report, once transmitted to [respondents], *became* an 'agency record' subject to FOIA." *Id.* at 42a. That issue, the court explained, turned on whether "there exist 'sufficient indicia of congressional intent to control' the Full SSCI Report." *Id.* at 44a (citation omitted). The court held that the report was a congressional, not an agency, record and was thus not subject to FOIA because "SSCI's June 2009 letter to the CIA, Senator Feinstein's December 2014 letter transmitting the Final Report, and SSCI's treatment of the Executive Summary" demonstrated the Senate's intent to retain

control of the Full Report. *Id.* at 28a-29a, 44a-45a, 52a; see *id.* at 41a-53a.

3. On appeal, petitioners argued, based on D.C. Circuit precedents, that when an agency receives "a document authored by Congress," the document constitutes an agency record under FOIA unless "Congress clearly expresses its intent to control" the document. Pet. C.A. Br. 14, 19-21. As such, petitioners reasoned that the relevant "inquiry is a simple one: whether [the respondent agencies] have met their burden to show that the SSCI clearly asserted control over the Final Report." *Id.* at 14. Petitioners argued that the district court both "applied the wrong legal standard" in failing to require "a '*clear* assertion' of congressional control" and erred because, in petitioners' view, the record "clear[ly]" showed that "the SSCI relinquished control over the Final Report." *Id.* at 15, 21.

The court of appeals affirmed. Pet. App. 1a-25a. The court explained that "the term 'agency records' [in FOIA] extends only to those documents that an agency both (1) 'creates or obtains,' *and* (2) 'controls . . . at the time the FOIA request is made.'" *Id.* at 12a (quoting *Tax Analysts*, 492 U.S. at 144-145) (brackets omitted). The court further stated (as petitioners had argued) that "when an agency possesses a document that it has obtained from Congress," the question whether the "agency has sufficient control over [the] document to make it an 'agency record'" "'turns on whether Congress has manifested a clear intent to control the document.'" *Id.* at 12a-13a (citation omitted); see *id.* at 16a. The court then rejected petitioners' record-based contentions, holding that the SSCI's

"intent to retain control of the Full Report is clear" on the record of this case. *Id.* at 24a; see *id.* at 17a-24a.

The court of appeals reasoned that "the critical evidence in this case is the June 2009 Letter," which "makes it plain that the Senate Committee intended to control any and all of its work product, including the Full Report, emanating from its oversight investigation of the CIA." Pet. App. 17a-18a. The court rejected petitioners' argument that the letter addressed only Committee documents stored on the segregated network drive, or otherwise kept at CIA facilities, as contradicting "the plain language of the Letter." *Id.* at 19a. The letter "unambiguously includes the Full Report," the court concluded, because it expressly "applies to all 'documents generated on the network drive' *and* to 'any other notes documents, draft and final recommendations, reports or other materials generated by the Committee staff or Members.'" *Ibid.* (quoting *id.* at 97a). The court explained that those documents, according to the letter, were to "remain congressional records in their entirety . . . even after the completion of the Committee's review." *Ibid.* (quoting *id.* at 97a).

The court of appeals similarly rejected petitioners' contention that "the circumstances surrounding the transmittal of the Full Report to [the respondent agencies] demonstrate that the Senate Committee intended to relinquish its control over the Full Report." Pet. App. 21a. When the SSCI in December 2012 provided the initial draft of the report "to specific [Executive Branch] individuals" for comment, the court explained, it imposed "specific limitations on its use" by those officials and "emphasized that the Committee alone would 'consider how to handle any

public release of the report, in full or otherwise.'" *Id.* at 22a (quoting *id.* at 102a). That "reinforced what had already been made clear in the June 2009 Letter, *i.e.*, that the Committee intended to retain control over the Full Report." *Ibid.*

The court of appeals likewise concluded that when the SSCI transmitted the final version of the report to the Executive Branch in December 2014, its transmittal letter did "not vitiate Congress' existing, clearly expressed intent to maintain control of the Full Report." Pet. App. 23a. The court reasoned that although the 2014 letter "gives the Executive Branch some discretion to use the Full Report for internal purposes," that limited authorization neither "over-r[o]de the Senate Committee's clear intent to maintain control of the Full Report expressed in the June 2009 Letter" nor its intent expressed in the December 2012 letter that the Committee would later decide "if and when to publicly disseminate the Full Report." *Id.* at 23a-24a. The court accordingly determined that "the Committee's limited transmittal of the Full Report—*especially in contrast with its public release of the Executive Summary*—in no way vitiated its existing, clearly expressed intent to control the Full Report." *Id.* at 21a.

4. In December 2016, the Counsel to the President informed Vice Chairman Feinstein that the President's copy of the Full Report would be transferred to the National Archives and Records Administration (NARA) for preservation under the authority of the Presidential Records Act of 1978 (PRA), 44 U.S.C. 2201 *et seq.* See Letter from W. Neil Eggleston to Vice Chairman Dianne Feinstein (Dec. 9, 2016), http://go.usa.gov/

x86nB.[1] The President's counsel explained that "[t]he determination that the Study will be preserved under the PRA has no bearing on copies of the Study currently stored at various agencies." *Ibid.*[2]

In early 2017, a military judge ordered that the Department of Defense preserve a copy of the Full Report pending discovery and litigation of certain issues. Order at 4, *United States* v. *Mohammad*, No. AE 286T (Military Comm'ns Trial Judiciary Jan. 10, 2017). Separately, the government also complied with orders in two habeas corpus actions requiring that the government transmit a copy of the Full Report to a court security officer pending adjudication of the habeas petitioners' non-FOIA claims of entitlement to access the report. See Notice in Connection with the Court's Orders, *al-Nashiri* v. *Trump*, No. 1:08-cv-1207 (D.D.C. Feb. 10, 2017), and *Husayn* v. *Mattis*, No. 1:08-cv-1360 (D.D.C. Feb. 10, 2017).

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[1] NARA has informed this Office that the President's copy of the Full Report was physically transferred to NARA in December 2016.

[2] The PRA mandates that "the Archivist of the United States shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of [a] President" upon the conclusion of that President's "last term" of office. 44 U.S.C. 2203(g)(1) (Supp. II 2014). For purposes of the PRA, "[t]he term 'Presidential records' means documentary materials * * * created or received by the President" or certain members of his staff "in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President," with specified exceptions. 44 U.S.C. 2201(2) (2012 & Supp. II 2014). That statutory definition of "Presidential records" is different from the prerequisites that this Court has identified in the FOIA context for determining whether materials constitute "agency records." Cf. pp. 2-3, *supra*.

ARGUMENT

Petitioners argue (Pet. 10-13) that the court of appeals erred by applying the wrong "test for whether a document is an 'agency record' under FOIA," Pet. 10. Petitioners alternatively argue (Pet. 13-21) that, even if the court applied the correct test, it reached the wrong result because "Congress did not clearly assert control over the Final Report" on the record of this case, Pet. 13. Both arguments are incorrect. Petitioners themselves advocated the test applied by the court of appeals and, even if they had preserved their ability to argue otherwise, no division of authority on the question exists that might warrant certiorari. The court of appeals, moreover, correctly held on the record of this case that the SSCI's report was not an "agency record" given the SSCI's clear intent to retain control of its sensitive and highly classified report. Petitioners' fact-bound disagreement with that determination merits no further review.

1. a. FOIA vests district courts with "jurisdiction to enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld" from the FOIA requestor. 5 U.S.C. 552(a)(4)(B). As a result, "federal jurisdiction [in a FOIA case] is dependent upon a showing that an agency has (1) 'improperly'; (2) 'withheld'; (3) 'agency records.'" *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980); cf. *Forsham* v. *Harris*, 445 U.S. 169, 178 n.8 (1980) (explaining that the "agency record[]" requirement "is implicit throughout [FOIA]"). The court of appeals correctly concluded in this case that the SSCI's Final Report was not an "agency record" subject to FOIA.

"Congress did not define 'agency record' under the FOIA, but it did define 'agency.'" *Forsham*, 445 U.S. at 178. Congress defined "agency" for FOIA purposes to mean "each authority of the Government of the United States," excluding, as relevant here, "the Congress." 5 U.S.C. 551(1); see 5 U.S.C. 552(f)(1). As a result, it is undisputed that the SSCI's Final Report was a congressional record—and not an "agency record[]"—"when [it] w[as] made." *Kissinger*, 445 U.S. at 156 (holding that records produced by the Office of the President are not "agency records" when they are made because that Office is not an "agency" under FOIA); see Pet. App. 11a.

The Final Report did not later become an "agency record" when the SSCI transmitted it to certain federal agencies. This Court has identified two prerequisites that "must be satisfied for requested materials to qualify as 'agency records'" under FOIA. *United States Dep't of Justice* v. *Tax Analysts*, 492 U.S. 136, 144 (1989). The first is satisfied here because the respondent agencies "'obtain[ed]' the requested materials," *ibid.* (citation omitted), when the SSCI transmitted its Final Report to them. The second prerequisite is that "the agency must be in control of the requested materials at the time the FOIA request is made." *Id.* at 145. No such agency "control" existed here.

An agency's possession of documents is not itself dispositive of agency "control." In *Kissinger*, for instance, the Court considered a FOIA request for telephone notes created by Henry Kissinger when he was serving as Assistant to the President for National Security Affairs that, at the time of the FOIA request, had been moved to the Department of State. 445 U.S. at 155-156; see *id.* at 139-140. The Court concluded

that the "notes were not 'agency records' when they were made," because FOIA's definition of "agency" does "not include the Office of the President." *Id.* at 156. The Court further held that the notes did not later "acquire[] th[e] status" of "'agency records'" by virtue of their transmission "to Kissinger's office at the Department of State." *Id.* at 157. The Court concluded that, even though the agency physically held the papers, they "were not in the *control* of the State Department at any time." *Ibid.* (emphasis added).

"FOIA's structure and legislative history," moreover, "make clear that agency control over requested materials is a 'prerequisite to triggering *any* duties under the FOIA.'" *Tax Analysts*, 492 U.S. at 148 n.9 (citation omitted). For instance, FOIA's "withholding" requirement for a court's exercise of authority to compel disclosure embodies a "control inquiry" that "replicates part of the test for 'agency records.'" *Ibid.* This Court has likewise held that an agency does not "improperly" withhold records under FOIA if a federal court enjoins disclosure. *GTE Sylvania, Inc.* v. *Consumers Union of the U.S., Inc.*, 445 U.S. 375, 384-387 (1980). The Court reasoned that FOIA was enacted to constrain the previously "unbridled discretion" of an agency to withhold requested records but that, when a court enjoins disclosure, "it is not the [agency's] decision to withhold the documents" because the agency "simply has * * * no discretion for [it] to exercise" in the matter. *Id.* at 385-386. By complying with an order from a coordinate Branch of Government, the Court concluded, "the agency has made no effort to avoid disclosure." *Id.* at 386.

The same holds true here. This case concerns a highly classified congressional report that Congress in its oversight role has transmitted to certain federal agencies for certain limited, internal purposes, while clearly expressing its intent to retain control over the report. In such FOIA contexts, the D.C. Circuit has recognized that "requiring the disclosure of documents or information generated by Congress itself" implicates "special considerations." *Judicial Watch, Inc.* v. *United States Secret Serv.*, 726 F.3d 208, 225-226 (D.C. Cir. 2013); see *id.* at 221-222. Given that Congress excluded its own records from FOIA's reach and in light of the separation-of-powers concerns that would be implicated if FOIA were construed to "force Congress 'either to surrender its constitutional prerogative of maintaining secrecy, or to suffer an impairment of its oversight role,'" the D.C. Circuit has determined that "'due deference [should be given] to Congress' affirmatively expressed intent to control its own documents.'" *Id.* at 221 (citations omitted).[3] Where Congress has "clearly expressed an intent to retain control over" the documents it has created, the D.C. Circuit has thus held that an agency does not sufficiently control disposition of those documents, which do not constitute "agency records" under FOIA. *Ibid.*; see Pet. App. 13a.

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[3] "Congress has undoubted authority to keep its records secret, authority rooted in the Constitution, longstanding practice, and current congressional rules." *Goland* v. *CIA*, 607 F.2d 339, 346 (D.C. Cir. 1978) (footnotes omitted), cert. denied, 445 U.S. 927 (1980). Congress also exercises oversight over federal agencies, *INS* v. *Chadha*, 462 U.S. 919, 955 n.19 (1983), and thus has a strong "interest in exchanging documents with those agencies to facilitate their proper functioning." *Goland*, 607 F.2d at 346.

b. Petitioners argue (Pet. 10, 12-13) that the D.C. Circuit's conclusion that a "document[] created by Congress" is not an agency record under FOIA "[w]hen Congress clearly expresses its intent to control the requested document" is "in tension with" and "distort[s]" this Court's "simple definition of agency control" in *Tax Analysts*. *Tax Analysts*, as petitioners note (Pet. 11), stated that FOIA's "agency record" requirement will not be satisfied unless the agency has "control of the requested materials" and that "[b]y control we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties." 492 U.S. at 145. Petitioners argue (Pet. 13) that that "control test is satisfied here." Petitioners are mistaken.

Tax Analysts involved requested records in the agency's possession—*i.e.*, district court tax opinions—that were themselves "publicly available" documents over which the agency's "control" of further dissemination was not limited in any way. 492 U.S. at 139, 149. In that context, the agency's possession of the documents would itself confer the requisite "control." Moreover, "general expressions" in *Tax Analysts*, as "in every opinion, are to be taken in connection with the case in which those expressions are used." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994) (quoting *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) (Marshall, C.J.)). The Court in *Tax Analysts* had no occasion to address "control" in contexts like those presented here, where Congress has clearly expressed its intent to retain control over documents that Congress itself created. Indeed, *Tax Analysts* recognized that "disputes over control" might arise, for instance, when the "requested materials might be

on loan," and the Court emphasized that it was "leav-[ing] consideration of these issues to another day." 492 U.S. at 146 n.6.

Petitioners invoke (Pet. 13) *Tax Analysts*' conclusion that a document's status as an "agency record" does not turn on the *purpose* for which the document was created. See 492 U.S. at 147 (rejecting reliance on such "intent of the [document's] creator"; holding that an agency record need not be "'prepared substantially to be relied upon in agency decisionmaking'") (citation omitted). That conclusion, however, does not address whether and to what extent Congress's clearly expressed intent to control access to and dissemination of its own documents is relevant to the "agency record" inquiry. Such control was not at issue in *Tax Analysts* because the district courts that created the requested documents intentionally released them to the public.

c. In any event, this case would be a poor vehicle for this Court's review, for two reasons. First, no conflict of authority exists over how to analyze an agency's requisite "control" over records created by Congress. Although FOIA cases may be brought in every federal district court and may thus be reviewed by every court of appeals having territorial jurisdiction, see 5 U.S.C. 552(a)(4)(B) (FOIA actions suit may be filed in "the district in which the complainant resides"), petitioners do not contend that any court of appeals has adopted a conflicting analytical approach.

Second, petitioners failed to preserve any disagreement with the test for "control" that the court of appeals applied in this case because they never disputed that test in the court of appeals. This Court has excused litigants from the normal obligation to challenge

circuit precedent in the case under review if the litigant *both* (1) had previously challenged that precedent "in 'the recent proceeding upon which the lower courts relied for their resolution of the issue'" *and* (2) "'did not concede in the current case the correctness of that precedent.'" *United States* v. *Vonn*, 535 U.S. 55, 58 n.1 (2002) (quoting *United States* v. *Williams*, 504 U.S. 36, 44-45 (1992)). But here, petitioners affirmatively advocated the test that the court of appeals applied without expressing any disagreement with D.C. Circuit precedent. See p. 8, *supra*. And when petitioners sought review by the en banc court—which was not bound by earlier circuit precedent—they invoked *Tax Analysts*' requirement of agency control and made clear that there was "*no dispute* that when Congress authors a document and an agency then possesses it, two factors are 'effectively dispositive' of agency control: the intent of Congress to retain or relinquish control, and the ability of the agency to use and dispose of the record as it sees fit." C.A. Pet. for Reh'g 7 (quoting panel opinion, Pet. App. 13a) (emphasis added). Petitioners then expressly adopted the standard applied by the panel, arguing that, "[a]s the panel opinion recognized, this two-factor test ultimately boils down to a question of congressional intent," because "[w]hen Congress clearly expresses its intent to control a document, the agency cannot lawfully 'use or dispose' of the record as it sees fit." *Id*. at 7-8 (citation omitted).

2. Petitioners alternatively argue (Pet. 13-21) that, even if the court of appeals used the correct "agency-control test," it nevertheless erred because, on the record of this case, "Congress did not clearly assert control over the Final Report," Pet. 13. In petitioners'

view, the SSCI's clear expression of control in its June 2009 letter did not apply to its Final Report, Pet. 14-18, and that SSCI's December 2014 letter transmitting the Final Report "relinquished control" over that report, Pet. 18-21. Those contentions lack merit and do not warrant review.

a. The court of appeals and the district court fully addressed and correctly rejected petitioners' fact-bound contentions. See pp. 8-10, *supra*; Pet. App. 17a-24a, 44a-51a. They explained, for instance, that the June 2009 letter was not limited to the SSCI's work product on the network drive or otherwise held in a CIA facility. Pet. App. 19a, 46a-47a. The letter states that "[a]ny documents generated on the network drive * * * , *as well as any other* notes, documents, draft and final recommendations, reports or other materials generated by Committee staff or Members, are the property of the Committee." *Id.* at 97a (emphasis added). "These documents," the letter continues, "remain congressional records in their entirety and disposition and control over these records, *even after the completion of the Committee's review*, lies exclusively with the Committee." *Ibid.* (emphasis added). Both courts below similarly determined that that the December 2014 letter did not relinquish that control. *Id.* at 22a-24a, 48a-51a. The analysis of those courts fully answer petitioners' factual contentions in this Court.

b. In any event, petitioners' fact-bound disagreement with the decisions below presents no question warranting review. This Court does "not grant * * * certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). That holds true even if the lower court arguably may have erred. See Sup. Ct. R. 10 ("A petition

for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law."); see also *City & Cnty. of San Francisco* v. *Sheehan*, 135 S. Ct. 1765, 1780 (2015) (Scalia, J., concurring in part and dissenting in part) (explaining that this Court is "not, and for well over a century ha[s] not been, a court of error correction"). Indeed, where, as here, both courts below agree on the relevant factual questions, the Court's "settled practice" is to "accept[], absent the most exceptional circumstances, [such] factual determinations in which the district court and the court of appeals have concurred." *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980).

Petitioners' failure to preserve their current contention that the court of appeals applied the wrong test for agency "control," see pp. 17-18, *supra*, makes this case a particularly poor vehicle to review petitioners' fact-bound arguments about the extent of agency control shown by the record of this case. The Court's resolution of those factual issues would have to proceed on the assumption that "the D.C. Circuit's agency-control test applies" in this context, Pet. 13, even though petitioners now contend that that test is incorrect. Such review would not resolve any significant or enduring legal questions.

Finally, petitioners contend (Pet. 21-22 & n.5) that review is warranted because the SSCI's Final Report is an important document that should be released to the public and because, absent review, "there is a risk that the Final Report may never see the light of day" because it could "'remain locked in a Senate vault for good,'" Pet. 23 n.5 (citation omitted). The Senate, however, has already publicly released the SSCI's 18 pages of findings and conclusions and its 499-page

Executive Summary with minimal redactions after the government completed a declassification review. See *Public Senate Summary* x-xxviii, 1-499. Petitioners' disagreement with the Senate's decision not to seek a declassification review for yet further public disclosure of its study is not a basis for certiorari. Petitioners also exaggerate the consequences of denying review. There is no risk that "all copies of the Final Report [will be] returned to the Senate," where they might "remain locked in a Senate vault." Pet. 23 n.5 (citation omitted). The President has already transferred his copy of the Full Report to the National Archives for preservation. See pp. 10-11 & n.1, *supra*. And the government, pursuant to court orders, has lodged a copy of that report with a court security officer with appropriate security measures. See p. 11, *supra*. Such actions underscore that review in this case is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
CHAD A. READLER
Acting Assistant Attorney General
MATTHEW COLLETTE
THOMAS PULHAM
Attorneys

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