

In the Supreme Court of the United States

UNITED STATES OF AMERICA, UNITED STATES
DEPARTMENT OF JUSTICE, AND UNITED STATES
DEPARTMENT OF STATE, PETITIONERS

v.

LESLIE R. WEATHERHEAD

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the Freedom of Information Act's national security exemption, 5 U.S.C. 552(b)(1), does not apply to a letter sent in confidence from the government of Great Britain to the Department of Justice concerning a sensitive extradition matter, where the State Department officials' uncontested affidavits explain that disclosure and the resultant breach of the British government's trust will damage the United States' foreign relations both by impairing the United States' ability to engage in and receive confidential diplomatic communications and by impeding international law enforcement cooperation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 157 F.3d 735. The opinions of the district court (Pet. App. 21a-28a, 29a-42a) are unreported.

JURISDICTION

The court of appeals entered its judgment on October 6, 1998. A petition for rehearing was denied on February 26, 1999 (Pet. App. 44a-45a), and an amended order denying rehearing was entered on March 9, 1999 (Pet. App. 46a-47a). The petition for a writ of certiorari was filed on May 27, 1999. Certiorari was granted on September 10, 1999. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND EXECUTIVE ORDER INVOLVED

The text of the Freedom of Information Act, 5 U.S.C. 552 (1994 & Supp. IV 1998) is set forth in an appendix to this brief. Executive Order No. 12,958, 3 C.F.R. 333 (1996), governing the classification of national security information, is set forth at Pet. App. 65a-111a.

STATEMENT

1. Through the Freedom of Information Act (FOIA), 5 U.S.C. 552 (1994 & Supp. IV 1998), Congress attempted “to balance the public’s need for access to official information with the Government’s need for confidentiality.” *Weinberger v. Catholic Action*, 454 U.S. 139, 144 (1981). While FOIA generally calls for “broad disclosure of Government records,” Congress also recognized that “public disclosure is not always in the public interest and thus provided that agency records may be withheld from disclosure” if they fall within one of the Act’s nine exemptions. *CIA v. Sims*, 471 U.S. 159, 166-167 (1985). Those exemptions “are intended to have meaningful reach and application.” *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). The first of those exemptions protects from disclosure “[m]atters” 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).

Executive Order No. 12,958, 3 C.F.R. 333 (1996), is the currently applicable Order governing the classification of national security information. The Order establishes four prerequisites to classification: (1) the information is classified by an original classification authority (*i.e.*, an Executive Branch official authorized to classify information under the Order); (2) the information is under the control of the government; (3) the information falls within one or more of the categories of information listed in Section 1.5 of the Order that may be considered for classification; and (4) “the original classification authority determines that unauthorized disclosure of the information reasonably could be expected to result in damage to the national security” and is “able to identify or describe the damage.” Exec. Order No. 12,958, § 1.2(a)(4). “Damage to the national security” is defined as “harm to the national defense or foreign relations of the United States from the unauthorized disclosure of in-

formation, to include the sensitivity, value, and utility of that information.” *Id.* § 1.1(l).

Categories of information that may be considered for classification include “foreign government information” and information concerning the “foreign relations or foreign activities of the United States, including confidential sources.” Exec. Order 12,958, § 1.5(b) and (d).¹ Information may be classified at one of three levels: “Top Secret,” “Secret,” or “Confidential.” *Id.* § 1.3. Information may be classified as “[c]onfidential” if “the unauthorized disclosure of [the information] reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe.” *Id.* § 1.3(a)(3).

The Executive Order charges the Director of the Information Security Oversight Office with responsibility for overseeing implementation of the Executive Order and monitoring agency compliance with it. Exec. Order No. 12,958, §§ 5.2, 5.3.² The Order further provides that, upon the request of an agency or the Director of the Information Security Oversight Office, the Attorney General “shall ren-

¹ Section 1.1(d)(1) of the Executive Order defines “foreign government Information” to include “information provided to the United States Government by a foreign government * * * with the expectation that the information, the source of the information, or both, are to be held in confidence.” The term also embraces “information received and treated as ‘Foreign Government Information’ under the terms of a predecessor order.” *Id.* § 1.1(d)(3).

² Under the terms of the Executive Order, the Director of the Office of Management and Budget delegated the Order’s implementation and monitoring functions to the Director of the Information Security Oversight Office. Exec. Order No. 12,958, § 5.2(b). When the Executive Order issued, that Office was an administrative component of the Office of Management and Budget. It is now an administrative component of the National Archives and Records Administration. The Information Security Oversight Office receives policy and program guidance from the Assistant to the President for National Security Affairs. See *id.* § 5.3(b).

der an interpretation of this order with respect to any question arising in the course of its administration.” *Id.* § 6.1(b).

2. a. Sally Anne Croft and Susan Hagan were followers of Indian guru Bhagwan Shree Rajneesh and were high-level officers in the commune that Rajneesh established in Oregon in the 1980s. See Pet. App. 2a; *United States v. Croft*, 124 F.3d 1109, 1113 (9th Cir. 1997). When investigations by the United States Attorney for the District of Oregon threatened to expose illegal activities by community members, a number of Rajneesh’s officers conspired to murder the United States Attorney. *Id.* at 1113-1114. Hagan was a member of the “hit team” designated to commit the murder; Croft financed the acquisition of guns and passports. *Id.* at 1114.

In 1994, after contesting extradition for nearly four years, Croft and Hagan were extradited from Great Britain to stand trial for conspiracy to murder a federal official (see 18 U.S.C. 1111, 1114, 1117). Shortly after their extradition, the British Home Office sent a letter to the Director of the Justice Department’s Office of International Affairs in which the British government “convey[ed] certain concerns of the U.K. Government regarding the case which apparently was the subject of considerable attention in the British Parliament and otherwise in the U.K.” Pet. App. 54a. Both Croft and Hagan subsequently were convicted of conspiracy to murder the United States Attorney. *Croft*, 124 F.3d at 1114. They have since completed their sentences and returned to Great Britain.

b. Respondent is a criminal defense attorney who represented Croft during her trial. In 1994, respondent submitted FOIA requests to the Department of Justice and the Department of State for a copy of the letter from the British government. Pet. App. 2a-3a. The Justice Department had possession of the letter but, because the letter had been created by a foreign government, it forwarded the letter to the State Department for response to the FOIA request. *Id.*

at 3a; see also 28 C.F.R. 16.4(c); 5 U.S.C. 552(a)(6)(B)(iii)(III). As it commonly does, the State Department requested the views of the British government on disclosure. Pet. App. 58a, para. 8. The British government responded that it was “unable to agree to [the letter’s] release,” because “the normal line in cases like this is that all correspondence between Governments is confidential unless papers have been formally requisitioned by the defence.” Resp. Br. in Opp. App. 30a (emphasis in original); Pet. App. 3a. The British government further explained that, “[i]n this particular case,” a request by representatives of the defendants to see the letter had been “refused on grounds of confidentiality” by the British government. *Ibid.* The British government also expressed concern that disclosure of even part of the letter would set a “precedent” that “would quickly become common knowledge amongst lawyers dealing with extradition matters.” Resp. Br. in Opp. App. 30a-31a. The State Department subsequently classified the letter as “confidential” and informed respondent that the letter would not be released because it fell within FOIA Exemption 1. Pet. App. 3a-4a; J.A. 42-43. The Justice Department denied respondent’s FOIA request on the same ground. J.A. 50-51.

3. Respondent then filed suit under the FOIA, 5 U.S.C. 552(a)(4)(B), and moved for summary judgment on procedural grounds.³ In opposing the motion, the government submitted the declaration of Peter M. Sheils, the Acting Director of the State Department’s Office of Freedom of Information, Privacy, and Classification Review.⁴ Mr. Sheils’ declaration explained that the letter “was intended by the

³ Respondent sought summary judgment solely on the grounds that the government took more than ten days to process his FOIA requests and that the letters denying the FOIA requests failed to identify the governing Executive Order. See Pl.’s Mem. in Supp. of Summ. J. at 3-4.

⁴ The government also submitted the declaration of Marshall Williams, who recounted the administrative processing of respondent’s FOIA claim. J.A. 44-49.

U.K. Government to be held in confidence” and that violation of that “clearly stated expectation of confidentiality would cause foreign officials, not only of the government providing the information, but of other governments as well, to conclude that U.S. officials are unable and/or unwilling to preserve the confidentiality expected in exchanges between governments.” Pet. App. 52a-53a. As a result of such a breach of confidentiality, Mr. Sheils continued, the British government and other foreign governments would be “less willing in the future to furnish information important to the conduct of U.S. foreign relations” and “less disposed to cooperate in foreign relations matters.” *Id.* at 53a. Mr. Sheils therefore concluded that disclosure of the document “would inevitably result in damage to relations between the U.K. and the U.S.” *Id.* at 54a.

The district court rejected both procedural grounds for summary judgment advanced by respondent. Pet. App. 30a-31a. At that point, the federal defendants had not moved for summary judgment on the merits, and respondent had not taken issue with the foreign relations harm that the Sheils declaration stated would result if the letter were released notwithstanding the British government’s expectation of confidentiality. The district court nevertheless proceeded to rule on the merits of the government’s showing in support of withholding and, on that issue, granted summary judgment for respondent. *Id.* at 31a-39a. The court concluded that the threatened harm to national security identified in the Sheils declaration did not justify withholding because it concerned “the act of disclosure itself, not disclosure of the *contents*” of the letter. *Id.* at 39a.

The government immediately moved to alter or amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure, Pet. App. 21a-28a, and submitted the declaration of Patrick F. Kennedy, the Assistant Secretary of State for Administration. Mr. Kennedy’s declaration elaborated upon the “longstanding custom and accepted practice in inter-

national relations to treat as confidential and not subject to public disclosure information and documents exchanged between governments and their officials.” *Id.* at 56a. “Diplomatic confidentiality obtains,” he explained, “even between governments that are hostile to each other and even with respect to information that may appear to be innocuous,” and “[w]e expect and receive similar treatment from foreign governments.” *Id.* at 56a-57a. Mr. Kennedy further stated that, in his expert judgment, “[t]he information in this [requested] document is of a nature that it is evident that confidentiality was expected at the time it was sent.” *Id.* at 57a. For that reason, disclosure of the letter “in violation of the accepted rule of diplomatic confidentiality reasonably could be expected to cause damage to relations between the U.S. and the originating government,” because it “may lead not only the government directly affected, but also other governments more generally to conclude that the U.S. cannot be trusted to protect information furnished by them.” *Ibid.* The resulting “reluctan[ce]” of other governments “to provide sensitive information to the U.S. in diplomatic communications” would “damag[e] our ability to conduct the foreign relations of the U.S. and our national security, in which information received from foreign government officials plays a major role.” *Ibid.*

In particular, Mr. Kennedy stressed that disclosure could undermine the United States’ international “law enforcement interests such as those involved in the extradition case that is the subject of the document at issue in this litigation.” Pet. App. 58a. He continued:

Cooperation between the U.S. and the U.K. in international extradition of fugitives is a matter of substantial national interest to both governments. It can also be a matter of political sensitivity in the extraditing country, as has been the case with regard to fugitives extradited by the U.S. to the U.K. charged with crimes in Northern

Ireland and extradition of the two women by the U.K. to the U.S. in the case discussed in the British document at issue here.

Ibid. In addition to submitting Mr. Kennedy's declaration, the government proffered the letter itself for *in camera* review and offered to file *in camera* affidavits elaborating upon the basis for withholding. *Id.* at 21a-22a.

The district court did not consider the Kennedy declaration adequate to support withholding, but did review the letter *in camera*. The court did so out of a concern that "highly sensitive and injurious material might be released only because defendants were unable to articulate a factual basis for their concerns without giving away the information itself." Pet. App. 27a. "That proved to be the case." *Ibid.* The court explained:

When the Court read the letter, it knew without hesitation or reservation that the letter could not be released. The Court is unable to say why for the same reason defendants were unable to say why. The letter is two pages long, tightly written, and there is no portion of it which could be disclosed without simultaneously disclosing injurious materials.

Id. at 27a-28a⁵

4. a. A divided panel of the court of appeals reversed and ordered the letter disclosed. Pet. App. 1a-20a. Because respondent abandoned on appeal his contention that the letter did not qualify as information concerning "foreign relations or foreign activities of the United States," *id.* at 7a, the only issue before the court of appeals was whether withholding

⁵ Respondent subsequently moved to set aside the district court's judgment under Rule 60(b)(6) of the Federal Rules of Civil Procedure, asserting that an unidentified British government employee had disclosed the contents of the letter to an unidentified acquaintance of respondent. J.A. 52-56. The district court denied respondent's motion (J.A. 57-61), and he did not appeal that ruling.

could be sustained on the basis of the State Department's determination "that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security"—*i.e.*, "harm to the national defense or foreign relations of the United States." Pet. App. 7a-8a (quoting Exec. Order No. 12,958, §§ 1.2(a)(4), 1.1(l)).

The majority concluded that the "government never met its burden of identifying or describing any damage to national security that will result from release of the letter." Pet. App. 9a. Specifically, the majority faulted the Sheils and Kennedy declarations for "focus[ing] on how disclosure by the U.S. of foreign government information causes harm to U.S. foreign relations, and, thus, to national security even if the content 'appear[s] to be innocuous.'" *Id.* at 13a; see also *id.* at 12a. The majority rejected that basis for withholding, on the ground that not all information exchanged with foreign governments or all extradition communications are categorically confidential under the Executive Order. *Id.* at 14a-16a. The court declined to give any deference to the Executive's identification, in the Sheils and Kennedy declarations, of the particular damage to foreign relations that would result from disclosure of the letter, because, in the court's view, the government had failed to make "an initial showing which would justify deference." *Id.* at 16a. The court therefore decided that it should only "look to the individual document itself" in assessing the potential harm to national security. *Ibid.* After reviewing the document *in camera*, the majority labeled the letter "innocuous," stating that the majority "fail[ed] to comprehend how disclosing the letter at this time could cause 'harm to the national defense or foreign relations of the United States.'" *Ibid.* The court accordingly reinstated the grant of summary judgment for respondent. *Id.* at 18a.

b. Judge Silverman dissented, Pet. App. 18a-20a, finding "no basis in the record to conclude otherwise than that * * * release [of the letter] would cause damage to the na-

tional security,” *id.* at 20a. He emphasized that the government’s declarations of confidentiality and harm were uncontroverted and, indeed, were corroborated by the British government’s own refusal on grounds of confidentiality to release the letter. *Id.* at 18a-19a.⁶ Judge Silverman then concluded:

[W]e judges are outside of our area of expertise here. *
* * [T]he majority has presumed * * * to make its own
evaluation of both the sensitivity of a classified document
and the damage to national security that might be caused
by disclosure. With all due respect, I suggest that in
matters of national defense and foreign policy, the court
should be very leery of substituting its own geopolitical
judgment for that of career diplomats whose
assessments have not been refuted in any way.

Id. at 20a.

c. The government then filed a motion to stay the court of appeals’ mandate pending the filing of a petition for a writ of certiorari. In support of the motion, the government submitted the declaration of then Acting Secretary of State Strobe Talbott (Pet. App. 60a-64a), who reemphasized that the extradition of the two women was “a matter of political sensitivity” to Great Britain. *Id.* at 62a. He also reiterated the importance of maintaining the confidentiality of the letter:

Great Britain is perhaps our staunchest and certainly one of our most important allies. On a daily basis, the United States engages in complex and sensitive discussions with the British at various levels on numerous important subjects of concern, including weapons non-proliferation,

⁶ During oral argument, counsel for the United States represented to the court that the recently installed Labor Party government in Great Britain had informed the State Department that, like the predecessor Conservative Party government, it considered disclosure of the letter at issue in this case to be “out of the question.”

trade disputes, matters before the United Nations Security Council, human rights and law enforcement. In many of these areas we have engaged in diplomatic dialogue with officials of the British [government] in the course of which information was exchanged with an expectation of confidentiality. Such confidential diplomatic dialogue is essential to the conduct of foreign relations.

Id. at 61a.

Based upon his personal review of the letter, the Acting Secretary concluded that disclosure of Britain's confidential communication "could reasonably be expected to cause damage to the foreign relations of the United States" and, in particular, could impair the "general bilateral relationship between the U.S. and the U.K. on law enforcement cooperation and other matters" by "dealing a setback to U.K. confidence in U.S. reliability as a law enforcement partner." Pet. App. 63a. The Ninth Circuit granted the motion to stay the mandate. J.A. 6.

SUMMARY OF ARGUMENT

1. A divided court of appeals ordered the release of a sensitive and classified diplomatic communication based solely on its conclusion that the document "appear[s]" to be "innocuous" and that, in the court's judgment, the document's disclosure could not reasonably be expected to result in damage to the national security of the United States. In so holding, the court expressly refused to accord any deference to the declarations of the responsible Executive Branch officials, which explained how disclosure of the document *would* damage the foreign relations of the United States, both with Great Britain and more broadly. In particular, the declarations explained in detail how the very act of disclosure of a letter that was sent in confidence by the British government and that pertains to a diplomatically sensitive extradition case would undermine ongoing and future exchanges with the British government on many matters, in-

cluding in the vitally important area of law enforcement cooperation.

Since the founding of the Republic, Congress and the courts have consistently recognized that the separation of powers compels courts to accord the Executive Branch's foreign affairs judgments the utmost deference. Judgments about the damage to national security that disclosure of a communication with a foreign government could entail necessarily involve delicate political predictions and nuanced assessments of diplomatic conditions and expectations. The determinations must be made by officials who are responsible for and well-versed in geopolitical developments and the interconnection of foreign relations matters. Judges lack expertise in foreign relations matters and their review necessarily is confined to the examination of the particular document(s) before them, within the confines of courtroom procedures and divorced from their larger diplomatic context. They therefore should defer to the Executive Branch unless its identification of the harm to national security is implausible. Nothing in the Freedom of Information Act's text, structure, or legislative history supports the contrary approach taken by the court of appeals here, which disregarded the constitutionally compelled rule of deference to the Executive Branch.

2. The damage to the national security against which the Executive Order protects includes the harm arising from the very act of disclosure and the attendant breach of a foreign government's trust. The plain text of the Executive Order embraces that harm, and two centuries of diplomatic practice and decisions of this Court confirm that it is a substantial one. Indeed, the Executive Branch's ability to maintain confidential relationships is critical to its ability to obtain information that is vital to the protection of the United States' national defense and foreign relations. Negotiations and candid appraisals of foreign intelligence information and political developments abroad are indispensable to the

United States' foreign policy; yet, they cannot proceed in the absence of trust. In the realm of international law enforcement, moreover, preserving the ongoing trust and cooperation of foreign governments is a critical foreign policy objective in its own right. If foreign governments cannot be assured that their communications with the United States will enjoy meaningful protection from disclosure and that they will be spared the risks to their interests that may attend such exposure, the United States will not be able to obtain the information it so critically needs for the conduct of its foreign relations.

ARGUMENT

THE COURT OF APPEALS DISREGARDED THE REQUIREMENT UNDER THE CONSTITUTION AND THE FREEDOM OF INFORMATION ACT THAT IT ACCORD THE UTMOST DEFERENCE TO THE EXECUTIVE BRANCH'S DETERMINATION THAT THE REQUESTED INFORMATION MUST BE CLASSIFIED IN THE INTEREST OF NATIONAL SECURITY

Section 552(b)(1) of the Freedom of Information Act (FOIA) exempts from disclosure all matters that are “specifically authorized under criteria established by Executive order to be kept secret in the interest of national defense or foreign policy” and “are in fact properly classified pursuant to such an Executive order.” The Executive Order applicable to this case is Executive Order No. 12,958, 3 C.F.R. 333 (1996). It provides that information may be classified if four conditions are met. Only the fourth condition is at issue in this case.⁷ That criterion is that the

⁷ The first condition is that the information is classified by an “original classification authority,” which occurred here. See Exec. Order. No. 12,958, §§ 1.2(a)(1), 1.4(a) and (c); 22 C.F.R. 9.7; Pet. App. 7a, 32a. The second—that the information is “under the control of the United States government”—also is plainly satisfied here. Pet. App. 6a-7a, 32a. Finally,

original classification authority—here, the responsible State Department official—has “determine[d] that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security” and has been “able to identify or describe th[at] damage.” Exec. Order. No. 12,958, § 1.2(a)(4). The uncontested State Department declarations meet that standard. They identify and describe a concrete harm to the United States’ foreign policy interests—a breach of the trust of an important ally. They also explain how disclosure of the letter in violation of that trust reasonably could be expected to damage the United States’ foreign relations with Great Britain and other nations by impairing the United States’ ability to engage in and obtain confidential diplomatic communications and by impeding international law enforcement cooperation. That explanation fully satisfied the governing Executive Order and, therefore, also satisfied Exemption 1 of FOIA.

the district court and court of appeals found (*id.* at 7a, 35a), and respondent has conceded (*id.* at 7a), that the British government’s letter qualifies for classification as information concerning the “foreign relations or foreign activities of the United States.” See Exec. Order No. 12,958, § 1.5(d).

In the district court and the court of appeals, the government argued that the letter also was properly regarded as “Foreign Government Information.” The district court concluded (Pet. App. 33a-35a) that the letter did not qualify as foreign government information because the British government lacked a contemporaneous expectation of confidentiality. That ruling improperly disregarded the State Department’s expert assessment that the document is “of a nature that it is evident that confidentiality was expected at the time it was sent” (*id.* at 57a), and the British government’s explicit representation that “the normal line in cases like this” is that such “correspondence between Governments is confidential” (Resp. Br. in Opp. App. 30a). Furthermore, the British government sent the letter at a time when the United States government presumed the confidentiality of such communications. See Exec. Order No. 12,356, 3 C.F.R. 169, § 1.3(c) (1983) (Resp. Br. in Opp. App. 7a); see also Exec. Order No. 12,958, § 1.1(d)(3) (“Foreign Government Information” includes all “information received and treated as ‘Foreign Government Information’ under the terms of a predecessor order”).

A. The President’s Constitutional Responsibilities For National Defense And Foreign Relations Include The Authority, Long Recognized By Congress, To Protect Confidential National Security Information

The Ninth Circuit held that no deference was owed to the Executive Branch officials’ explanation of the basis for classification of the British government’s confidential letter, because deference was not “justif[ied]” by an unspecified “initial showing,” and because the harm identified by State Department officials did not fall within the court’s own straitened view of what constitutes damage to the national security. Pet. App. 13a-14a, 16a. Other courts of appeals in FOIA Exemption 1 cases, however, have consistently accorded “substantial weight” to the declarations of Executive Branch officials explaining the basis for the classification of documents and the risk that disclosure would pose to national security.⁸ That virtual unanimity in approach is rooted in the separation of powers under the Constitution. Indeed, Congress itself has long recognized that fundamental principle of deference to the Executive Branch in protecting confidential information concerning the Nation’s defense and foreign relations, and it intended FOIA to be implemented in a manner that would respect that principle.

1. The Executive Branch’s “authority to classify and control access to information bearing on national security * * * flows primarily from th[e] constitutional investment of power in the President * * * as head of the Executive Branch and as Commander in Chief,” and thus “exists quite apart from any explicit congressional grant.” *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President’s exclusive authority to “receive Ambassadors and other public Ministers,” U.S. Const. Art. II, § 3, provides further textual grounding specifically for the Executive’s primacy in managing the Nation’s diplomatic relations. Accordingly,

⁸ See Pet. 13 & n.5 (citing cases); Pet. Reply 2 n.2 (same).

“courts traditionally have been reluctant to intrude upon the authority of the Executive” over the management of national security information, because of “the generally accepted view that foreign policy [is] the province and responsibility of the Executive.” *Egan*, 484 U.S. at 529-530 (quoting *Haig v. Agee*, 453 U.S. 280 293-294 (1981)).⁹ With respect to that area of Presidential responsibility, “the courts have traditionally shown the *utmost deference*.” *Egan*, 484 U.S. at 530 (emphasis added) (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)).¹⁰

The President’s paramount authority in the area of foreign relations has been recognized since the founding of the Republic. Thomas Jefferson advised President Washington that “[t]he transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, *except* as to such portions of it as are specially submitted to the Senate. *Exceptions* are to be construed strictly.” 16 *The Papers of Thomas Jefferson* 379 (J. Boyd, ed. 1961). In an early extradition matter involving Great Britain, John Marshall, who was then a Member of Congress, declared that the President is “the sole organ of the nation in its external relations, and its sole representative with foreign nations,” and that “[t]he [executive] department * * * is entrusted with the whole foreign intercourse of the nation.” Speech of March 7, 1800, in 4 *The Papers of John Marshall* 104-105 (C. T. Cullen ed., 1984).¹¹

⁹ See also *New York Times Co. v. United States*, 403 U.S. 713, 727 (1971) (Stewart, J., concurring) (“[T]he Executive is endowed with enormous power in the two related areas of national defense and international relations.”).

¹⁰ See also *Haig*, 453 U.S. at 292 (“Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.”).

¹¹ See also Senate Comm. on Foreign Relations, 14th Cong., 1st Sess., Report of Feb. 15, 1816, reprinted in 8 *Comp. of Reports of the Senate Comm. on Foreign Relations, 1789-1901*, at 24 (1901) (“The President is

2. It also has been recognized “since the beginning of the Republic” that the “President’s constitutional authority to control the disclosure of documents and information relating to diplomatic communications” is an indispensable adjunct of his foreign affairs power.¹² Thus, John Jay explained in *The Federalist No. 64*:

There are cases where the most useful [foreign policy] intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. * * * [T]here doubtless are many [such persons] who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly. The convention have done well, therefore, in so disposing of the power of making treaties that although the President must in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.

The Federalist No. 64, at 392-393 (C. Rossiter ed., 1961).

So complete is the President’s ability to protect against the unauthorized disclosure of foreign relations information that it includes the authority to withhold information about foreign affairs and diplomatic negotiations even from Congress, “if in [the President’s] judgment disclosure would be incompatible with the public interest;” and that is so

the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success.”) (quoted in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936)); Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28-29 (in creating the Department of Foreign Affairs, Congress gave the President wide discretion to determine what activities the department would undertake in the realm of diplomatic relations).

¹² The Sufficiency of the President’s Certification Under the Mexican Debt Disclosure Act, 20 Op. Off. Legal Counsel 673, 678 (1996).

notwithstanding the Senate's role under Article II, Section 2 of the Constitution in giving its advice and consent to the making of treaties.¹³ That discretion to withhold confidential national security information even from Congress, or to restrict the extent of Congress's access to it, has been exercised by almost every President, from the time of George Washington to the present, in those instances when the President has determined that disclosure would be "incompatible with the public interest." President Washington refused to lay before the House of Representatives instructions, correspondence, and documents underlying the negotiation of the Jay Treaty because "[t]o admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent." 1 J. Richardson, *Messages and Papers of the Presidents* 195 (1896). The "wisdom" of that decision "was recognized by the House itself and has never since been doubted." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). That is because "[a] discretion in the Executive Department how far and where to comply in such cases is essential to the due conduct of foreign negotiations." 20 *The Papers of Alexander Hamilton* 68 (H. Syrett ed., 1974) (Letter from Alexander Hamilton to President Washington (Mar. 7, 1796)).¹⁴

¹³ Memorandum from John R. Stevenson, Legal Adviser, Dep't of State, and William H. Rehnquist, Assistant Attorney General, Dep't of Justice, Office of Legal Counsel, The President's Executive Privilege to Withhold Foreign Policy and National Security Information (Dec. 8, 1969) (Stevenson Memo.).

¹⁴ President Washington also refused to accede to a Senate request for copies of correspondence "between the Minister of the United States at the Republic of France and said Republic." 4 *Annals of Cong.* 34, 37-38 (1794); see also W. Dellinger & H. Powell, *The Attorney General's First Separation of Powers Opinion*, 13 *Const. Commentary* 309, 316 (1996).

President Tyler likewise withheld from the House of Representatives correspondence between the United States and Great Britain over the United States' Northeastern and Northwestern boundaries, because "no communication could be made by me at this time on the subject of its resolution without detriment or danger to the public interests." 4 J. Richardson, *supra*, at 101, 201-211. President Polk declined to comply with a request from the House of Representatives for information concerning efforts to negotiate a peaceful resolution of disputes with Mexico because disclosure "could not fail to produce serious embarrassment in any future negotiation between the two countries." *Id.* at 566.¹⁵

Correspondingly, Congress historically has accorded the utmost deference to such Presidential judgments in the for-

¹⁵ Similar decisions to withhold information where the Executive Branch determined that disclosure was not in the public interest were made by, among others, Presidents Fillmore (proposal by the King of the Sandwich Islands to transfer the islands to the United States); Lincoln (communications with New Granada); and Cleveland (correspondence with Spain). See *History of Refusal by Executive Branch Officials to Provide Information Demanded by Congress*, 6 Op. Off. Legal Counsel 751, 759-770 (1982); see also *The Sufficiency of the President's Certification Under the Mexican Debt Disclosure Act*, 20 Op. Off. Legal Counsel 673 (1996); *East-West Trade: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Gov't Operations*, 84th Cong., 2d Sess. 162 (1956) (Secretary of State refuses to disclose documents pertaining to discussions with foreign governments, in part because it "would constitute a breach of trust"); S. Doc. No. 130, 67th Cong., 2d Sess., 62 Cong. Rec. 2771-2772 (1922) (President Harding declines to submit to Congress records of discussions and conversations with foreign governments that occurred during the Washington Conference on the Limitation of Armament); S. Docs. Nos. 798, 799, 63d Cong., 3d Sess., 52 Cong. Rec. 2854-2855 (1915) (President Wilson declines to disclose diplomatic communications relating to the shipment of copper to neutral countries); Stevenson Memo., *supra* (chronicling history of presidential refusals to disclose foreign policy information if it was considered contrary to the national interest to do so); H. Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 Fed. Bar J. 103-150, 223-259, 319-350 (Apr., July & Oct. 1949) (additional examples).

eign policy area. “A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.” *Curtiss-Wright*, 299 U.S. at 321. Indeed, in requesting national defense information from President Theodore Roosevelt, Senator Spooner acknowledged:

It would not be admissible at all that either House should have the power to force from the Secretary of State information connected with the negotiation of treaties, *communications from foreign governments*, and a variety of matters which, if made public, would result in very great harm in our foreign relations.

41 Cong. Rec. 98 (1906) (emphasis added).¹⁶ Congress even has permitted the President to withhold the text of secret agreements with foreign nations from the full Congress if, in the President’s judgment, public disclosure would “be prejudicial to the national security.” 1 U.S.C. 112b(a). Such agreements need only be submitted to two specially designated congressional committees, whose members operate “under an appropriate injunction of secrecy *to be removed only upon due notice from the President.*” *Ibid.* (emphasis added).

In short, at the time Congress amended Exemption 1 of FOIA in 1974, Congress itself had, over the course of almost 200 years, consistently acquiesced in decisions by the President to decline to furnish information pertaining to foreign affairs, or otherwise accommodated his requests to maintain the confidentiality of such information. And, where the Executive Branch has made such information available to Congress, the conditions of secrecy have been respected between the Branches, so that confidentiality could be maintained as against the outside world. That history of

¹⁶ See also *New York Times*, 403 U.S. at 729 (Stewart, J., concurring) (“[U]nder the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power [over the conduct of foreign affairs] successfully.”).

congressional respect for the Executive's judgments concerning the confidentiality of information about foreign relations or national defense provides compelling support for a rule of great deference to the Executive's classification judgments in the context of FOIA, which provides for disclosure of non-exempt documents to the public at large.¹⁷

B. The Complex And Delicate Character Of Diplomatic Relations Requires That Courts Also Accord Utmost Deference To Executive Branch Determinations To Preserve The Confidentiality Of National Security Information

Like Congress, the courts have historically afforded the Executive Branch's foreign policy judgments and concomitant classification decisions the utmost deference, reflecting the distinct institutional roles and capabilities of the two Branches:

[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); accord *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-166 (1803). Accordingly, “[e]ven if there is

¹⁷ “[T]he practical construction of the Constitution, as given by so many acts of congress, and embracing almost the entire period of our national existence, should not be overruled” absent compelling evidence to the contrary. *Field v. Clark*, 143 U.S. 649, 691 (1892).

some room for the judiciary to override the executive determination [on classification], it is plain that the scope of review must be exceedingly narrow.” *New York Times Co. v. United States*, 403 U.S. 713, 758 (1971) (Harlan, J., dissenting).

First, deference to the Executive Branch is indispensable because the impact that revelation of a foreign government’s confidences would have on the conduct of the Nation’s foreign policy cannot be assessed in a vacuum. The United States’ relationship with a particular foreign government—especially as close an ally as Great Britain—necessarily involves multiple negotiations and dialogues about a variety of sensitive subjects at any given time.¹⁸ In light of the inevitable give-and-take and delicate balancing of interests that such ongoing relations entail, courts considering Executive Branch declarations in FOIA cases must keep in mind that geopolitical developments outside the courtroom can give a document a sensitivity that is not apparent to a non-expert from the face of the document.

Second, judgments about the harm to foreign relations and national security necessarily entail large elements of prediction, and those predictive judgments “must be made by those with the necessary expertise in protecting classified information.” *Egan*, 484 U.S. at 529.

For reasons too obvious to call for enlarged discussion, the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it. Certainly, it is not reasonably possible for an outside non-expert body to review the sub-

¹⁸ See Pet. App. 61a (“On a daily basis, the United States engages in complex and sensitive discussions with the British at various levels on numerous important subjects of concern, including weapons non-proliferation, trade disputes, matters before the United Nations Security Council, human rights and law enforcement.”).

stance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction [of risk to national security] with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk.

Ibid. (internal quotation marks, citation, and ellipsis omitted); see also *Snepp v. United States*, 444 U.S. 507, 513 n.8 (1980) (per curiam) (“The problem is to ensure *in advance* * * * that information detrimental to national interest is not published.”).

Executive Order No. 12,958 itself incorporates those elements of judgment and prediction in safeguarding the Nation’s secrets. It permits the classification of information if the responsible classifying official “determines,” on the basis of his or her expertise, that disclosure “reasonably could be expected to result in damage to the national security.” *Id.* § 1.2(a)(4). Courts must respect such determinations. Executive Branch experts are better acquainted than courts, for example, with the politically sensitive and volatile context in which a government extradites one of its own citizens to stand trial in a foreign land,¹⁹ and the adverse

¹⁹ With respect to the public perception in Great Britain of the extraditions out of which this case arose, see, *e.g.*, O. Bowcott, *Extra-special Relationship*, *The Guardian*, July 5, 1994, at T18 (describing the 124-year history of British/U.S. cooperation in extradition matters; Croft’s attorney claims the Home Secretary is “fearful of upsetting the Americans maybe because he wants IRA suspects held in the States sent back here”; “[e]xtradition appeals have the quality of transforming themselves into political issues”); C. Reed, *IRA “Quid Pro Quo” Deal Suspected*, *The Guardian*, Apr. 5, 1994, at 4 (“It will not have escaped the Home Secretary’s notice in considering the extradition to America of Sally Croft and Susan Hagan * * * that four IRA prison escapers in California are the subject of intense—and so far unsuccessful—attempts to extradite them to Britain.”); S. Tendler, *MPs Seek to Halt Extradition of Ex-Cult Members*, *The Times of London*, Mar. 29, 1993, available in 1993 WL 10565426 (“There is concern [the Home Secretary] may be under pressure

consequences that might ensue for a foreign government if a confidential diplomatic communication with the United States were to be disclosed.²⁰

Third, diplomatic relationships come with a history and a future. With respect to any particular nation at any given time, the United States may be attempting to repair a serious breach in relations, to set the foundation for a new and enduring relationship, or to build upon and expand a prior history of cooperation. In that context, the old saw that “timing is everything” assumes critical weight. Elections, coups, no-confidence votes, and unforeseen domestic developments in a foreign country can transform overnight the significance and sensitivity of a communication. Likewise, a judicial order to breach a foreign government’s trust and disclose a sensitive communication that issues at a time when the Executive Branch is struggling to repair or maintain contacts with that government due to other developments in the international arena could have grave and enduring repercussions for United States’ foreign policy.

Judges, who are neither versed in the intricacies of diplomatic dialogue nor schooled in the often tangled weave

to allow the extradition because of the need to guarantee continued cooperation from the American authorities on areas such as the extradition of IRA suspects.”).

²⁰ While the political sensitivity of information in this country will not warrant classification under the Executive Order if the sensitivity arises solely out of a desire to “prevent embarrassment to a person, organization, or agency” in the United States government, Exec. Order No. 12,958, § 1.8(a)(2), that concern is an important and highly relevant consideration when information supplied by a foreign government is at issue and the information is sensitive to that nation. Cf. *United States Dep’t of State v. Ray*, 502 U.S. 164, 176-177 & n.12 (1991) (exposure of persons outside the government to embarrassment, in violation of a promise of confidentiality, is a relevant consideration under Exemption 6). Indeed, it is in those circumstances that release of a document in breach of an expectation of confidentiality could have a particularly negative impact on relations with that country.

of foreign policy operations, and who must review a single document or group of documents within the narrow framework of case-specific courtroom litigation, are ill-equipped to identify or predict independently the national security implications that would attend the disclosure of foreign government communications. As courts have recognized in the analogous context of intelligence information, the collection and preservation of information affecting the national security “is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair.” *Halkin v. Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978).

The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.

United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972).²¹ Thus, what is “seemingly innocuous” or “superficially innocuous” to non-expert bodies may be of great significance to experts in national security matters (*CIA v. Sims*, 471 U.S. 159, 176, 178 (1985));²² accordingly, the classification judgments of those

²¹ See also *The Federalist No. 64*, *supra*, at 393 (Jay) (“Those matters which in negotiations usually require the most secrecy and the most dispatch are those preparatory and auxiliary measures which are not otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negotiation.”)

²² Contrary to respondent’s assertion in its Brief in Opposition (at i, 17), we have never conceded and do not concede here that the contents of the letter at issue in this case are innocuous. See, *e.g.*, June 3, 1996 Tr. 12. We contend only that some communications bearing on foreign relations matters may, to untrained eyes, appear to be so. See Pet. App. 56a.

“who must of course be familiar with ‘the whole picture,’ as judges are not, are worthy of great deference” (*id.* at 179).

International law enforcement efforts and extradition matters, like those at issue in this case, well illustrate the need for substantial judicial deference to the “broad view of the scene,” *Marchetti*, 466 F.2d at 1318, and to the contextual judgment that Executive Branch officials bring to bear on classification decisions. “[R]elations with foreign nations * * * are necessarily implied in the extradition of fugitives from justice.” *United States v. Rauscher*, 119 U.S. 407, 414 (1886).²³ The United States is involved in an average of 50 extradition matters with Great Britain each year.²⁴ In addition, the United States is often engaged in a variety of other law enforcement matters with Great Britain, such as cooperative efforts to apprehend and bring to justice international terrorists and to prevent criminal activities. At the time of Croft’s and Hagan’s extradition proceedings, for example, the United States also was seeking the extradition of two of their co-conspirators from the Federal Republic of Germany and South Africa. Moreover, some extraditions—such as those involving former heads of state or international terror-

²³ See also *Terlinden v. Ames*, 184 U.S. 270, 290 (1902) (“The decisions of the Executive Department in matters of extradition, within its own sphere, and in accordance with the Constitution, are not open to judicial revision.”); *Austin v. Healey*, 5 F.3d 598, 600 (2d Cir. 1993) (“Extradition is primarily a function of the executive branch, and the judiciary has no greater role than that mandated by the Constitution, or granted to the judiciary by Congress.”), cert. denied, 510 U.S. 1165 (1994); *Martin v. Warden*, 993 F.2d 824, 829 (11th Cir. 1993) (“Extradition ultimately remains an Executive function. * * * The Secretary [of State] exercises broad discretion and may properly consider myriad factors affecting both the individual defendant as well as foreign relations which an extradition magistrate may not.”).

²⁴ Current extradition matters include the United States’ effort to extradite from the United Kingdom three persons suspected of involvement in the 1998 bombing of the American embassies in Tanzania and Kenya, which killed 224 people, including twelve Americans.

ists²⁵—necessarily entail a high degree of political and diplomatic dialogue and sensitive judgments.

For those reasons, the concerns that State Department officials expressed (Pet. App. 53a, 57a-58a, 62a-63a) about the real-world impact of breaching Great Britain’s confidence on the United States’ law enforcement efforts in the United Kingdom and more generally with other nations do not “lack[] * * * particularity” (*id.* at 12a). Quite the opposite, they reflect realistic appraisals of a complicated and intertwined diplomatic situation by State Department experts who have the institutional responsibility and experience to see the foreign relations “forest” and not just the particular “tree” before the court, and who thus can foresee the ripple effect that a single breach of trust would have on important United States foreign policy and international law enforcement objectives.²⁶ “The judiciary is not well-positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions.” *INS v. Aguirre-Aguirre*, 119 S. Ct. 1439, 1445 (1999).

C. Courts Likewise Must Accord The Utmost Deference To Executive Branch Classification Decisions Concerning Documents That Are The Subject Of Suits Under The Freedom Of Information Act

FOIA’s Exemption 1 protects from mandatory disclosure matters that are “(A) specifically authorized under criteria established by an Executive order to be kept secret in the

²⁵ For example, the United States is currently attempting to extradite to Switzerland the former prime minister of the Ukraine, Pavel Lazerenko, to face money laundering charges involving the alleged embezzlement of national assets (No. Cr 99-0122-MJJ-MISC, N.D. Cal.). The extradition from Pakistan of Ramzi Yousef, who was charged with the World Trade Center bombing in New York City, was likewise of particular political and diplomatic sensitivity.

²⁶ Cf. *Snepp*, 444 U.S. at 512-513 (describing ripple effect of former intelligence agent’s publication of *unclassified* information, without CIA review, on government’s ability to obtain intelligence information).

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). Consistent with the constitutional history and the executive, congressional, and judicial practice discussed above, that statutory provision retains in the President broad authority, first, to identify and define through established criteria the types of disclosures that, in his judgment, threaten national security, and, second, to provide for the determination by Executive Branch officials in particular cases whether information should be classified under those criteria. FOIA’s text, structure, and legislative history evidence Congress’s intent that Executive Branch judgments be accorded the utmost deference in both respects. The court of appeals ignored that command.

1. The Utmost Deference Is Owed To The Executive’s Interpretation Of Its Own Executive Order That Damage To The National Security Includes Harm Resulting From The Act Of Disclosing A Confidential Communication From A Foreign Government

In ordering disclosure of the British Government’s confidential communication, the Ninth Circuit did not find that the State Department declarations failed to identify a threatened harm to national security. To the contrary, the court criticized the State Department officials for “focus[ing] on how disclosure by the U.S. of foreign government information causes harm to U.S. foreign relations, and, thus, to national security even if the content ‘appear[s] to be innocuous.’” Pet. App. 13a. Nor did the court of appeals disagree with the State Department’s determination that such harm “reasonably could be expected to result” (Exec. Order No. 12,958, § 1.2(a)(4)) from disclosure of the letter. Rather, the Ninth Circuit found the State Department’s classification of the document to be improper because it rested largely upon the “damage resulting solely from disclosing foreign government information” even when the document’s “con-

tent appear[s] to be innocuous” (Pet. App. 13a, 14a), rather than upon the harm arising from disclosing “the individual document itself” (*id.* at 16a). By imposing its own conception of harm to the national security on the Executive Branch, the court of appeals transgressed FOIA’s demarcation of the proper boundaries of judicial review, ignored the Executive Order’s language, and paid scant heed both to this Court’s precedents and the “practical necessities” of modern diplomatic relations. *Sims*, 471 U.S. at 169.

a. FOIA requires deference to the President’s specification of classification criteria: The text and structure of Exemption 1 respect the President’s inherent, plenary authority to identify those “matters” that should be “kept secret in the interest of national defense or foreign policy.” 5 U.S.C. 552(b)(1)(A). Congress did not attempt to restrict Executive Branch classification judgments to Congress’s vision of harm to the national security or to standards articulated in FOIA itself. Rather, the exemption specifically accedes to the President’s own formula for classifying national security information, as established in the governing Executive Order. See also 120 Cong. Rec. 6811 (1974) (Rep. Moorhead) (“[T]he court must accept the language of the Executive order as it was written.”).

Congress, moreover, protected under Exemption 1 all “matters” that an Executive Order authorizes to be kept secret “in the interest of national defense or foreign policy.” 5 U.S.C. 552(b). “[M]atters” is a capacious term that invites consideration of informational disclosures that go beyond the words written on a piece of paper. At a minimum, Congress’s use of such broad language provides no basis for contracting the exemption’s protective sphere.

b. The Executive Order protects against the harm that arises from the very act of disclosure: The text of the Executive Order, to which FOIA itself gives operative effect, does not support a conception of harm to national security that is confined to the four corners of a document.

The Order’s definition of “[d]amage to the national security” reaches harm “from the unauthorized disclosure of information.” Exec. Order No. 12,958, § 1.1(*l*). That language is most naturally read to include harm emanating both from the information itself and from the very act of disclosure.

The “information” that the Executive Order protects from disclosure, moreover, is separately defined to mean “any knowledge that can be communicated * * * regardless of its physical form or characteristics.” Exec. Order No. 12,958, § 1.1(*b*). That language plainly embraces not just the tangible document at issue in a FOIA case, but also less tangible knowledge that would be revealed by the act of disclosure, such as the acknowledgment that a foreign government made a particular communication or that it conveyed specific statements, views, or concerns to another government.

The definition of “damage to the national security” goes on to “include the sensitivity, value, and utility of that information.” *Ibid.* One important measure of the “sensitivity” of the information in this case is the fact that the foreign government communicated it in confidence and continues (reasonably in the view of the United States government) to object to its disclosure in breach of that trust. The court of appeals’ attempt to distinguish between the “sensitivity” of a document’s contents (which it would deem covered by the Executive Order) and the foreign government’s “sensitivity” about disclosure of those contents (which the court would not protect), fails to recognize that the two are closely intertwined. In any event, the ordinary meaning of the word “includ[es]” “is not one of all-embracing definition, but connotes simply an illustrative application of the general principle.” *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941). Accordingly, the Executive Order textually envisions that other types of harm also may be considered by classifying agencies, such as broader, institutional impacts on the United States’ relations with a particular country or on the overall conduct of the United States’ for-

eign affairs and extradition matters with other nations. See Exec. Order No. 12,958 (preamble) (the national interest requires certain information to be maintained in confidence to protect “our participation in the community of nations”).

Any possible doubt about the scope of the harm to national security addressed by the Executive Order is laid to rest by the Order’s provisions regarding the duration of classifications. There, the Executive Order specifically provides that, if “the release” of classified information will “damage relations between the United States and a foreign government,” the document falls within the extraordinary category of information that is exempt from the general ten-year rule for declassification. Exec. Order No. 12,958, § 1.6(d)(6).²⁷ Those special exceptions confirm that the damage to diplomatic relations resulting from the act of releasing a document is an independent and highly relevant component of the “[d]amage to the national security” against which the Executive Order is intended to guard.

If the Executive Order were nonetheless thought to be ambiguous on the point, however, the court of appeals should have deferred to the Executive Branch’s reasonable interpretation of its language. See *Udall v. Tallman*, 380 U.S. 1, 4 (1965) (“The Secretary’s interpretation [of Executive Orders] may not be the only one permitted by the language of the orders, but it is quite clearly a reasonable interpretation; courts must therefore respect it.”).²⁸ Congress in-

²⁷ See also Exec. Order No. 12,958, § 3.4(b)(6) (exempting from automatic declassification after 25 years information “the release of which should be expected to * * * seriously and demonstrably impair relations between the United States and a foreign government, or seriously and demonstrably undermine ongoing diplomatic activities of the United States”).

²⁸ Deference to the Executive’s interpretation of an Executive Order should be even greater than it is to an agency’s construction of its own regulations (see *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 150-151 (1991)). In the latter area, the agency’s regulation

tended that well-established rule of deference to apply in Exemption 1 cases.²⁹ Moreover, because the Executive Order concerns foreign affairs and national security—matters steeped in a tradition of independent Executive authority—the rule of deference to the Executive’s interpretation of its own Order should apply with particular force, sustaining any rational construction of the Order that is not clearly foreclosed by its text.

The court of appeals reasoned that the harm arising from the very act of disclosure could not be considered because the current Executive Order eliminated a presumption in the prior Order that the release of “foreign government information” would damage the United States’ foreign relations. See Exec. Order No. 12,356, § 1.3(b) and (c), 3 C.F.R. 169 (1983). But elimination of the across-the-board presumption that the disclosure of “foreign government information” will *always* harm national security because of the prospect of a broader impact on diplomatic communications plainly does not mean that the disclosure of foreign gov-

and ultimately its interpretation must reasonably correlate with a substantive standard set by an Act of Congress. With respect to Executive Orders, by contrast, the Executive Branch is wholly responsible for establishing the Order’s operational goals, selecting the substantive criteria to regulate Executive Branch behavior, interpreting the Order’s terms, and applying the Order in various factual contexts. The entire process is thus internalized to the Executive Branch and involves subjects of “predominant executive authority and of traditional judicial abstention.” *Webster v. Doe*, 486 U.S. 592, 616 (1988) (Scalia, J., dissenting); see also *New York Times*, 403 U.S. at 729 (Stewart, J., concurring) (the promulgation and enforcement of executive regulations governing classified information in the foreign affairs realm is “a matter of sovereign prerogative and not * * * a matter of law as courts know law”); compare *Curtiss-Wright*, 299 U.S. at 319-322; *Loving v. United States*, 517 U.S. 748, 772-774 (1996).

²⁹ See 120 Cong. Rec. 6811 (1974) (Rep. Erlenborn) (“[T]he court would not have the right to review the criteria under the Executive Order. The description ‘in the interest of the national defense or foreign policy’ is descriptive of the area that the criteria have been established in but does not give the court the power to review the criteria.”).

ernment information will *never* harm the national security in that way. It simply means that such harm will no longer be presumed for every bit of information the United States receives from foreign governments.³⁰ Indeed, none of the Executive Orders issued before 1978 contained such a presumption either,³¹ yet the impact of breaching confidentiality on the United States' ability to receive vital, candid foreign policy information from other governments has long been recognized. It is inconceivable that the President, in issuing Executive Order No. 12,958, intended to mandate a wholesale abrogation of the longstanding practice of diplomatic confidentiality without giving a hint of that intent in the actual text of the Executive Order.³²

Moreover, the approach taken by the court of appeals—that the Government must be able to make a particularized showing on a case-by-case basis regarding the specific harm that would be caused by disclosure of the *contents* of the specific communication in order to protect confidential diplomatic communications from public disclosure—would be un-

³⁰ Cf. *Legille v. Dann*, 544 F.2d 1, 10 (D.C. Cir. 1976) (presumptions are procedural and do not change substantive law). If anything, the elimination of the presumption magnified the court of appeals' error: it did not simply fail to heed a generalized presumption; it refused to grant meaningful deference to the expert and individualized judgments of Executive Branch officials focused on the precise disclosure issue before the court.

³¹ See Exec. Order No. 11,652, 37 Fed. Reg. 5209 (1972) (effective 1972-1978); Exec. Order No. 10,501, 18 Fed. Reg. 7049 (1953) (effective 1953-1972); Exec. Order No. 10,290, 16 Fed. Reg. 9795 (1951) (effective until 1953).

³² Highlighting the flaw in the court of appeals' reasoning is the fact that the presumption of harm also was eliminated for "the identity of a confidential foreign source, or intelligence sources or methods." See Exec. Order No. 12,356, § 1.3(c). Surely a court could not extrapolate from that action the conclusion that the government intended to foreclose itself from showing in individual cases that an intelligence source communicated information against a background understanding or assumption of confidentiality and that breach of his trust would seriously impair the government's intelligence gathering capability. See *Sims*, 471 U.S. at 169-180.

workable in practice. Because a content-based analysis, by its nature, could be made only once the substance of the communication is known, *i.e.*, after its delivery, the court of appeals' test would fail to furnish an assurance of confidentiality *in advance*, which often is essential to candid communications.

Thus, the revision of the Executive Order in no way bars the Executive from showing that particular foreign government communications were made against the established background expectation of confidentiality for diplomatic communications, the breach of which would damage the United States' foreign relations. Rather, elimination of the automatic presumption contemplated only that, in some cases—such as routine scheduling information or congratulatory/condolence messages from certain governments, and perhaps, on occasion, more substantive matters—the established norm of confidentiality in diplomatic relations might never attach, could be outweighed by other considerations, or could be waived. Elimination of the automatic presumption also has the effect of requiring an actual judgment by a responsible Executive Branch official about each document that may be withheld, thereby enhancing the integrity of the classification process and promoting public confidence in its operation. The current Executive Order therefore simply requires that a responsible Executive Branch official make a judgment that the interest in maintaining the confidentiality of diplomatic discourse should be invoked with respect to each document. The declarations submitted in this case did precisely that, and they explain that disclosure of this particular document can reasonably be expected to damage the Nation's foreign relations by undermining that confidentiality.³³

³³ In any event, the present case was decided on the basis that the classified letter constituted information concerning the “foreign relations or foreign activities of the United States,” not that it qualified as “foreign

c. Historical practice supports the Executive Branch’s interpretation: The court of appeals’ insistence that identifiable harm to national security must arise from within the four corners of the classified document—and not from the repercussions of the breach of confidentiality in its own right—is contrary to historical practice and common experience. “Secrecy is the very soul of diplomacy.” F. de Callieres, *On the Manner of Negotiating with Princes* 142 (Univ. of Notre Dame Press, 1919) (A. Whyte trans.). It is thus “obvious to anyone who has been in charge of the interests of his country abroad that the day secrecy is abolished negotiations of any kind will become impossible.” J. Cambron, *The Diplomatist* 30 (Philip Allan, 1931) (C. Turner trans.).

That principle was well understood by the Framers. Even before the Constitution was adopted, the Founders established a Committee of Secret Correspondence of the Continental Congress, which, true to its name, placed great emphasis on the secrecy of communications with foreign governments in its conduct of the Nation’s earliest intelligence activities. See *Halperin v. CIA*, 629 F.2d 144, 157 (D.C. Cir. 1980) (citing 3 Journals of the Continental Congress 392 (1905)). Later, in 1794, President Washington refused to disclose correspondence between the French government and the United States’ ambassador. See 4 Annals of Congress 34, 37-38 (1794). President Washington also withheld from Congress communications with foreign governments that underlay the negotiation of the Jay Treaty—not on the basis of particular secrets identified in each document that would harm the United States if disclosed, but because

government information.” See Pet. App. 7a. Nothing in the new Executive Order altered the manner in which “foreign relations or foreign activities” information is classified. See Exec. Order No. 12,958, § 1.5(d); Exec. Order No. 12,356, § 1.3(a)(5).

[t]he nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers.

Curtiss-Wright, 299 U.S. at 320-321.³⁴ If the “pernicious influence on future negotiations” was considered a sufficient threat to the public interest for President Washington to decline to share foreign correspondence even with Congress, it must surely be a sufficient basis for withholding the British government’s letter from the public at large under FOIA.

President Hoover similarly refused Congress’s demand (S. Doc. No. 216, 71st Cong., Special Sess. (1930)) to publicize “statements, reports, tentative and informal proposals as to subjects, persons, and governments given to [him] in confidence” during negotiations over the London Treaty for the Limitation and Reduction of Naval Armaments. In words that speak directly to the court of appeals’ ruling here, President Hoover explained:

The Executive, under the duty of guarding the interests of the United States, in the protection of future negotiations, and in maintaining relations of amity with other nations, must not allow himself to become guilty of a breach of trust by betrayal of these confidences. He must not affront representatives of other nations, and

³⁴ See also *The Federalist No. 64*, *supra*, at 393 (“[T]he Constitution provides that our negotiations for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations, on the one hand, and from secrecy and dispatch on the other.”).

thus make future dealings with those nations more difficult and less frank. To make public in debate or in the press such confidences would violate the invariable practice of nations. It would close to the United States those avenues of information which are essential for future negotiations and amicable intercourse with the nations of the world. I am sure the Senate does not wish me to commit such a breach of trust.

*Ibid.*³⁵

d. This Court’s decisions support the Executive Branch’s interpretation: This Court has long recognized that the Executive Branch’s ability to maintain confidential relationships is essential for the protection and advancement of the United States’ national security and foreign relations interests. In *CIA v. Sims*, the Court sustained the government’s denial of a FOIA request on national security grounds and, in so doing, underscored the inappropriateness of courts superintending Executive Branch judgments about the need to preserve the confidentiality of communications bearing on national security. The Court observed that, if important sources of national security information “come to think that the [United States] will be unable to maintain the confidentiality of its relationship to them, many could well refuse to supply information to the [United States] in the first place.” 471 U.S. at 175. Further, the Court “seriously doubt[ed]” that potential sources of information “will rest assured knowing that judges, who have little or no background in the delicate business of intelligence gathering” (or, here,

³⁵ See also pp. 17-20, *supra*; 1 Op. Off. Legal Counsel 269, 270 (1977) (where disclosure of confidential communications and notes of meetings with foreign government officials could “impair our relations with the foreign governments involved, both by breaching a pledge of confidentiality and by releasing information possibly detrimental to the interests of the other governments,” the documents may be considered “state secrets”); *United States v. Reynolds*, 345 U.S. 1 (1953).

foreign diplomacy) will order the government’s secrets revealed “only after examining the facts of the case to determine whether the [government] actually needed to promise confidentiality in order to obtain the information.” *Id.* at 176.

In *Haig v. Agee*, the Court likewise held that “the Government has a compelling interest in protecting both the secrecy of information important to our national security and the *appearance of confidentiality* so essential to the effective operation of our foreign intelligence service.” 453 U.S. at 307 (emphasis added). “It is elementary that the successful conduct of international diplomacy * * * require[s] both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept.” *New York Times Co.*, 403 U.S. at 728 (Stewart, J., concurring).³⁶

Those cases recognize the utter unworkability of a scheme under which courts would make their own independent judgments about maintaining the confidentiality of national security information—either because deference is not deemed to have been “justif[ied]” through an unspecified “initial showing” in a particular case, or because of a disagreement with the Executive Branch about the causes and nature of damage to foreign relations that may be taken into account. The President’s singular authority to maintain secrecy is essential to the conduct of foreign affairs:

In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or *listen* as a representative of the nation.

* * * * *

³⁶ See also *Snepp*, 444 U.S. at 512 (“The continued availability of these foreign sources depends upon the CIA’s ability to guarantee the security of information.”); *Arieff v. United States Dep’t of the Navy*, 712 F.2d 1462, 1470 (D.C. Cir. 1983) (“[T]his is a matter in which appearance is as important as reality.”).

The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.

* * * * *

[The President] has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.

Curtiss-Wright, 299 U.S. at 319, 320 (emphasis added; internal quotation marks omitted).

The loss of important information, candid dialogue, and honest assessments by foreign governments that would follow in the wake of a judicially ordered breach of another nation's trust would deal a tremendous blow to the United States' diplomatic efforts. As in *Sims*, there is little reason for foreign governments "to have great confidence in the ability of judges" to make the "complex political [and] historical" judgments that underlie classification decisions, since judges "have little or no background in the delicate business" of foreign diplomacy. 471 U.S. at 176. In particular, if foreign governments cannot be assured that their communications with the United States will enjoy meaningful protection from disclosure and that they will, as a result, be spared the risks to their interests that may attend such exposure, they are likely to "close up like a clam," *id.* at 172, leaving the United States unable to obtain the information it so critically needs for the successful conduct of its foreign affairs.³⁷ From the foreign government's perspec-

³⁷ See also *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 803 n.23 (1984) ("[M]uch if not all of the information * * * would not find its way into the public realm even if we refused to recognize the privilege, since under those circumstances the information would not be obtained by the Government in the first place."); cf. *Sims*, 471 U.S. at 175 (if

tive, “[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.” *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). The protection accorded confidences of the United States government by other nations may be eroded as well. In short, this is an area that “uniquely demand[s] single-voiced statement of the Government’s views.” *Baker v. Carr*, 369 U.S. 186, 211 (1962).

Indeed, experience validates the State Department’s expressed concern that breach of a foreign government’s trust will reverberate through our diplomatic relations. Disclosure of the Pentagon Papers impaired our diplomatic relations with foreign governments who were concerned about the United States’ ability to preserve their confidences. Secretary of State William Rogers explained:

I’ve had several conversations with foreign governments * * * who’ve expressed their concern about discussions with us on matters that are confidential. * * * Now, if those governments feel that those discussions cannot be held in confidence, then we have a serious problem which can be very harmful to the national interest, not only in the long run but in the short run. * * * For example, I had one ambassador who came in and said that our Government had assured his Government that the role that they played in attempting to work out a peaceful settlement in Vietnam would never be disclosed. And he said “I’m not going to trust your Government from now on. You’ve disclosed it.”

65 State Dep’t Bull. 79 (1971); see also *New York Times*, 403 U.S. at 762-763 (Blackmun, J., dissenting). Similarly, the Mexican government’s failure to preserve the confidentiality

confidentiality is not protected, “many [sources] could well refuse to supply information to the Agency in the first place”).

of the United States' settlement efforts derailed peaceful efforts to avert the Mexican War. K. Bauer, *The Mexican War 1846-1848*, at 21-26 (1974).³⁸

Preserving the confidentiality of communications in the area of international law enforcement and extradition is critical in its own right. Under the extradition treaty between the United States and the United Kingdom, like most of the extradition treaties entered into by the United States in the last fifteen years, the government from whom extradition is requested is obligated to represent the requesting State in the extradition proceedings.³⁹ When extradition is contested, as it was by respondent's client, the requesting and sending governments may spend years

³⁸ On a more global level, preserving the confidentiality of communications over time builds trust between government officials, on both an institutional and a personal level. Such banked trust may often be a critical factor in allowing governments to prevent the escalation of problems, to defuse confrontations, and to manage crises when they arise. Cf. *Van Atta v. Defense Intelligence Agency*, No. 87-1508, 1988 WL 73856 (D.D.C. July 6, 1988) (confidential communications of Vietnamese government properly protected under Exemption 1 because breach of that government's trust would jeopardize ongoing and future efforts to account for soldiers missing in action); *U.S. Gov't Information Policies and Practices The Pentagon Papers (Part III): Hearings Before a Subcomm. of the House Comm. on Gov't Operations*, 92d Cong., 1st Sess. 900-901 (June 30 & July 7, 1971) (testimony of William Macomber, Deputy Under Secretary, Dep't of State) ("I think it is equally important to remember that diplomacy cannot function if we cannot deal with other governments in the world and especially with governments that are not particularly friendly to us, if we cannot deal with them on a basis of confidence—if they cannot speak to us in confidence and have confidence that we will protect from disclosure what they are saying to us. If you remove the element of confidentiality from the diplomatic process, you destroy the diplomatic process. * * * [I]n many places in the world, as we conduct our diplomatic processes, if we can't keep our mouth shut, we haven't got any chance at all of moving toward peace.").

³⁹ See Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, June 8, 1972, art. XIV, 28 U.S.T. 229, 233.

engaged in sensitive communications pertaining to issues raised in the legal proceedings, the location of fugitives, investigative sources and methods, investigative or prosecutorial strategies, security issues, humanitarian concerns, and the domestic and diplomatic repercussions of the extradition. One government may question the strength of a case or the commitment of the other government to a pending extradition matter, or it may seek to assuage particular political or humanitarian concerns in the sending country. With many countries whose legal systems differ from ours, concerns about the nature of the criminal proceedings, the motivation for the prosecution, or conditions of incarceration may be expressed confidentially that neither government would wish to have voiced publicly.

With respect to international law enforcement more generally, preserving the trust and ongoing cooperation of foreign governments and protecting the confidentiality of the candid information they share—as participants in transnational efforts to prevent terrorism, to locate and bring to justice international fugitives, and to combat (for example) narcotics trafficking, alien smuggling, and illegal weapons sales—represent distinct foreign policy objectives, separate and apart from any individual criminal matter. Given the vital importance of cultivating an atmosphere of trust in which candid and timely exchanges of information can be encouraged, “[g]reat nations, like great men, should keep their word.” *Sims*, 471 U.S. at 175 (quoting *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting)). “Effectiveness in handling the delicate problems of foreign relations requires no less.” *United States v. Pink*, 315 U.S. 203, 229 (1942).⁴⁰

⁴⁰ See also 65 State Dep’t Bull. at 80 (Secretary of State Rogers) (“If we can’t keep our word as a nation * * * then we’re going to have serious difficulty in dealing with other nations. It’s as simple as that.”).

Accordingly, this Court should reject the court of appeals' counterintuitive and perilous conclusion that no threat of "harm" to the "foreign relations of the United States" (Exec. Order No. 12,958, § 1.1(*l*)) is presented by the prospect of a foreign government limiting or terminating negotiations or cooperation with the United States on a sensitive matter, or refusing to afford reciprocal protection for the confidences of the United States, if its confidences are not preserved. The "changeable and explosive nature of contemporary international relations," *Haig*, 453 U.S. at 292, and the breach of trust that disclosure of the British government's confidences would cause in foreign relations generally and in the delicate arena of international law enforcement and extradition in particular, warrant reversal of the court of appeals' judgment.

2. FOIA requires utmost deference to the Executive Branch's judgment that disclosure of the British government's letter will damage national security by breaching that government's trust

The court of appeals held that the State Department declarations discussing the harm that release of the British Government's letter would cause to the Nation's foreign relations merited no deference in this FOIA suit because the Executive Branch must "justify" judicial deference to its foreign relations judgments through an unspecified "initial showing." Pet. App. 16a. That conclusion is inconsistent with the historical, constitutionally based tradition of judicial deference to the Executive in such matters (see pp. 15-26, *supra*), and with the 1974 amendments to FOIA, in which Congress enacted Exemption 1 in its present form. Pub. L. No. 93-502, § 2(a), 88 Stat. 1563.

The amendment to Exemption 1 was enacted in response to this Court's decision in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973). Prior to the 1974 amendments, Exemption 1 protected any matters "specifically required by

Executive order to be kept secret in the interest of national defense or foreign policy.” 5 U.S.C. 552(b)(1) (1970). In *Mink*, the Court found “wholly untenable any claim that [FOIA] intended to subject the soundness of executive security classifications to judicial review at the insistence of any objecting citizen,” and it likewise rejected “the proposition that Exemption 1 authorizes or permits *in camera* inspection of a contested document bearing a single classification stamp so that the court may separate the secret from the supposedly nonsecret and order disclosure of the latter.” *Id.* at 84. Congress amended FOIA in 1974, in part, to “override” *Mink* “with respect to *in camera* review of classified documents,” S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 11 (1974), and to permit courts to “examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld under any of the exemptions,” 5 U.S.C. 552(a)(4)(B). Congress also amended Exemption 1 itself to add its second condition on withholding—that the matters involved “are in fact properly classified pursuant to [an] Executive order.” The circumstances of the enactment of the 1974 amendments demonstrate, however, that they are properly read to respect the Executive’s paramount authority in protecting national security information.

When the proposed amendments to FOIA were before a Conference Committee, President Ford wrote a letter in which he objected that the bill “place[d] the burden of proof upon an agency to satisfy a court that a document * * * [was] properly classified,” and he urged that the amendments “not usurp my Constitutional responsibilities as Commander-in-Chief.” 120 Cong. Rec. 33,158 (1974). President Ford further explained that his “great respect for the courts does not prevent me from observing that they do not ordinarily have the background and expertise to gauge the ramifications that release of a document may have upon our national security.” *Ibid.* The President proposed specifying

that a court could order release of a document only if it found the “classification to have been arbitrary, capricious, or without a reasonable basis.” *Ibid.*

“[T]he ensuing conference actions on these matters were responsive to [the President’s] concerns and were designed to accommodate further interests of the Executive Branch.” 120 Cong. Rec. 33,159 (1974) (Letter from Senate Kennedy and Rep. Moorhead to President Ford (Sept. 23, 1974)). The Conference Report expressed Congress’s intent that courts, “in making *de novo* determinations in section 552(b)(1) cases,” accord “substantial weight” to an agency’s “unique insights into what adverse [e]ffects might occur as a result of public disclosure,” and thus of the necessity of classification in the national security area. See S. Conf. Rep. No. 1200, *supra*, at 11. Members of Congress echoed that expectation.⁴¹

President Ford vetoed the 1974 amendments to FOIA, in part because:

[T]he courts should not be forced to make what amounts to the initial classification decision in sensitive and complex areas where they have no particular expertise. As the legislation now stands, a determination by the Secretary of Defense that disclosure of a document would endanger our national security would, even though reasonable, have to be overturned by a district judge who thought the plaintiff’s position just as reasonable. Such a provision would violate constitutional principles.

H.R. Doc. No. 383, 93d Cong., 2d Sess. III (1974). The President proposed, instead, that courts be required to

⁴¹ See 120 Cong. Rec. 6808 (1974) (Rep. McCloskey) (1974 FOIA amendments are enacted “with the confidence” that courts “will * * * be very reluctant to override” an agency decision “relative to declassification of such information”); *id.* at 34,166 (Rep. Moorhead) (“[T]he court should give great weight to an affidavit by the Department that this was properly classified.”); *ibid.* (Rep. Erlenborn) (“great weight”).

uphold the classification decision if it has any “reasonable basis to support it,” *ibid.*, that is, unless the classification decision is “arbitrary, capricious, or without a reasonable basis,” 120 Cong. Rec. at 33,158. Congress ultimately overrode the President’s veto, but not without agreement that, under the President’s reading, the provision for judicial review is “an obviously dangerous provision,” and that the courts therefore should review classification decisions in “exactly the way” the President proposed. House Comm. on Gov’t Operations & Senate Comm. on the Judiciary, *Freedom of Information Act and Amendments of 1974 Source Book*, 94th Cong., 1st Sess. 405 (1975). (Rep. Moorhead, Chairman of the House Conferees); see also *id.* at 416 (Rep. Erlenborn) (“great weight” is due agency judgments).

Thus, the 1974 amendments were intended to give courts some role in reviewing decisions to withhold information under Exemption 1, and thereby to overrule *Mink*. Congress intended that role to be narrow and appropriately deferential, consistent with the separation of powers and the President’s responsibilities under the Constitution for the conduct of national defense and foreign affairs. The Ninth Circuit departed dramatically from the role Congress carefully crafted for courts, by denying deference to and by second-guessing the foreign policy judgment of the Executive Branch. Yet, it is only by cleaving strictly to the standard of “substantial weight” Congress intended when Exemption 1 was enacted in 1974—and thus limiting judicially ordered disclosures to those instances where the Executive Branch’s explanation of the harm to national security is implausible or foreclosed by the plain terms of the Executive Order—that a court can conform its FOIA review to the Constitution’s command that the “utmost deference” be accorded the Executive’s judgment regarding the need for secrecy in the conduct of foreign relations. See *Nixon*,

418 U.S. at 710.⁴² Correspondingly, the ability of a court to order disclosure where it concludes that the Executive’s explanation of the harm to the national security is implausible (even after giving it utmost deference) or contrary to the plain terms of the Executive Order—and to review a document *in camera* in appropriate circumstances—meets the concerns identified in the separate opinions in *Mink* that courts not be required by Exemption 1 to give “blind acceptance to Executive fiat,” 410 U.S. at 95 (Stewart, J., concurring), or to sustain withholding even where the information might bear no “discernible relation” to the national security, *id.* at 110 (Douglas, J., concurring).

The utmost deference standard comports with FOIA’s provision for de novo district court review, 5 U.S.C. 552(a)(4)(B). Congress’s reference to de novo review must be read against the well-established judicial tradition of affording expert agency judgments substantial deference in the course of deciding legal questions over which the court has plenary authority.⁴³ Indeed, this Court reaffirmed just last Term that a statutory provision for de novo review does not license courts to disregard relevant agency interpretations and judgments.⁴⁴ Likewise, the Administrative Procedure Act directs reviewing courts to “decide all relevant questions of law” and to “interpret * * * statutory provisions,” 5 U.S.C. 706, yet those provisions have never been

⁴² See *Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984) (“Since the agency assessments are both plausible and factually uncontradicted, the trial court would have been remiss in disregarding them.”); *Halperin*, 629 F.2d at 149, 150 (“plausible”).

⁴³ See *United States v. Wilson*, 503 U.S. 329, 336 (1992) (“It is not lightly to be assumed that Congress intended to depart from a long established policy.”).

⁴⁴ *United States v. Haggard Apparel Co.*, 119 S. Ct. 1392, 1399 (1999) (Court of International Trade must accord Chevron deference to Customs regulations despite statutory provisions directing de novo decision-making).

read to foreclose appropriate deference to agency judgments. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984). Application of that background principle of judicial deference “is especially appropriate,” moreover, when Executive Branch officials “exercise especially sensitive political functions that implicate questions of foreign relations.” *Aguirre-Aguirre*, 119 S. Ct. at 1445.⁴⁵ Accordingly, FOIA’s reference to de novo review should not be construed to create constitutional problems that the Act’s text, structure, and legislative history eschew.⁴⁶

That is especially so in light of the 1996 amendments to FOIA that provide for the disclosure of electronic records. Pub. L. No. 104-231, 110 Stat. 3049. In those amendments, Congress added a sentence to FOIA’s judicial review provision, immediately following the one that provides for de novo review, stating that, “[i]n addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency’s determination as to the technical

⁴⁵ See also *Sims*, 471 U.S. at 179 (holding that the national security judgments of Executive Branch officials “are worthy of great deference,” notwithstanding FOIA’s provision for de novo review.); *Church of Scientology v. IRS*, 792 F.2d 153, 168 n.6 (D.C. Cir. 1986) (Silberman, J., concurring) (“Thus, Congress recognized that even within the de novo review that it directed courts to conduct under FOIA, there was room for deference to the agency on factual issues relating to the availability of an exemption in a particular case within the agency’s delegated area of responsibility.”), *aff’d*, 484 U.S. 9 (1987); *Halperin*, 629 F.2d at 148 (“limited standard for *de novo* review” applies in “national security FOIA case[s]”). That *Sims* involved Exemption 3 of the FOIA, rather than Exemption 1, is immaterial, because de novo review applies to both. See *Halperin*, 629 F.2d at 148 (“The logic of this judicial review standard applies equally to all national security FOIA cases, whether they arise formally under Exemption 1 or Exemption 3.”).

⁴⁶ See *Public Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 466 (1989) (construing statute to avoid separation-of-powers concerns).

feasibility” of making records available in electronic format. See Pub. L. No. 104-231, § 6, 110 Stat. 3052; see 5 U.S.C. 552(a)(4)(B) (Supp. IV 1998). The reference to “any other matters” on which a court “accords substantial weight” must include the established practice under Exemption 1 of according that measure of deference to Executive classification decisions, consistent with the 1974 Conference Report’s assurance that courts would give “substantial weight” to agency affidavits explaining the basis for classification. See pp. 45-46, *supra*. Thus, FOIA’s text now provides the precise “substantial weight” formulation of deference to Executive decisions that Congress intended under FOIA in the national security area and that the Constitution requires.

Given that the rule of utmost deference to Executive Branch classification decisions and foreign policy judgments is firmly embedded both in our national experience and in the relevant constitutional and statutory framework, the Ninth Circuit plainly erred in holding (Pet. App. 16a) that the Executive Branch must “justify” judicial deference to its foreign relations judgments through an unspecified “initial showing.” The State Department declarations in this case plainly identified and described the harm to national security that disclosure threatened—interference with pending and future extradition matters and cooperative law enforcement efforts with Great Britain; a breach of trust between governments; and a larger threat to the United States’ ability to receive candid, confidential information from foreign governments and to insist on equivalent protections for its own communications. See Pet. App. 52a-54a, 56a-58a. That explanation bore a plausible (indeed, compelling) connection to the Nation’s foreign policy and national security, and respondent introduced no affirmative argument or evidence to the contrary. Because the Executive Branch thus brought the “very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations” squarely to bear (*Curtiss-Wright*,

299 U.S. at 320) on the litigation, the judiciary's constitutional and statutory obligation to afford the Executive Branch the utmost deference in its foreign policy judgment was triggered. The court of appeals had no authority to insist on more.⁴⁷

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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⁴⁷ We previously lodged copies of the classified document under seal with the Clerk of this Court.

STATUTORY APPENDIX

The Freedom of Information Act, 5 U.S.C. 552 (1994 & Supp. IV 1998) provides:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member

of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that—

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided*, That the court's review of the matter shall be limited to the record before the agency.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[(D) Repealed. Pub.L. 98-620, Title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357.]

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney

fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and

legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, “unusual circumstances” means, but only to the extent reasonably necessary to the proper processing of the particular requests—

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency

to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term “exceptional circumstances” does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records—

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure—

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term “compelling need” means—

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(b) This section does not apply to matters that are—

(1)(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;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of

an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information shall be indicated at the place in the record where such deletion is made.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the

requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include—

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests;

(F) the total amount of fees collected by the agency for processing requests; and

(G) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.

(2) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means.

(3) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.

(4) The Attorney General of the United States, in consultation with the Director of the Office of Management

and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(5) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term—

(1) “agency” as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) “record” and any other term used in this section in reference to information includes any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format.

(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including—

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

(As amended Pub. L. 104-231, §§3-11, Oct. 2, 1996, 110 Stat. 3049-3054.)