No. 98-1904

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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

On November 23, 1999, we moved this Court to vacate the judgment below and remand for dismissal based on mootness. In the event the Court does not determine that the case is moot, however, we submit this reply brief.

1. The Executive Order Protects Against The Harm To National Security That Arises From The Act Of Disclosing A Confidential Communication From A Foreign Government

Respondent "has no quarrel" (Resp. Br. 15) with the constitutional principles outlined in our opening brief (Gov't Br. 15-16, 21-27) establishing that the Executive Branch—not Congress and not the courts—has the primary responsibility and authority for managing the Nation's foreign relations. Nor does he contest that the ability to protect the secrecy of foreign government communications is integral to the exercise of that power. See *id.* at 17-27. Respondent, moreover, concedes (Br. 13) that the State Department's declarations in this case showed that "the British government wished the letter [at issue] kept confidential," and that the United States' "important" relationship with Britain "might suffer if the letter [were] released despite British protest." Instead, respondent argues only that the harm arising from breaching a foreign government's expectation of confidentiality does not constitute "damage to the national security," as defined in Executive Order No. 12,958, 3 C.F.R. 333 (1996). Respondent is wrong.

a. One scours respondent's brief in vain for reference to any language in the Executive Order that forecloses consideration of the harm arising from breach of a foreign government's trust—a harm that Presidents have recognized and protected since the dawn of the Republic (Gov't Br. 17-20, 35-37). His argument finds no home in the Order's definition of "[d]amage to the national security," which

encompasses all "harm to the national defense or *foreign relations* of the United States *from the unauthorized disclosure of information*, to include the sensitivity, value, and utility of that information." Exec. Order No. 12,958, § 1.1(*l*) (emphasis added). That language plainly embraces the harm to "foreign relations" emanating from the very act of "unauthorized disclosure of information." The Order thus recognizes that there are circumstances when, for example, although the words in a particular letter might appear innocuous, a series of developments in the foreign affairs arena might leave the United States' relations with the authoring country in such a condition that any additional breach of trust could seriously undermine important diplomatic efforts and thus "harm" the Nation's "foreign relations."

The Executive Order, moreover, specifically provides in its declassification provisions 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); see also *id.* § 3.4(b)(6) (similar, for 25-year declassification rule). 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. Respondent's only answer to this argument is to suggest (Br. 43-44), without reasoned explanation, that the Order entirely disconnects the foreign relations harms that permit classification in the first instance from those that prohibit declassification. Yet the latter is simply a form of continued or renewed "classification." There is simply no basis for concluding that the Executive Order was intended to be solicitous of a foreign government's expectations of confidentiality concerning 25-year-old documents, but not with respect to communications sent last week.

b. Respondent attempts (Br. 38, 40-42) to avoid the Executive Order's clear import by equating the "information" that the Order protects from disclosure with the "content[s]" of a document. But that is wrong. The Executive Order defines the "[i]nformation" that it protects from disclosure as "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 internal contents of a document, but also "any knowledge" that disclosure of the document would reveal, such as the acknowledgment that a foreign government made a particular communication, that it communicated with the United States government at all, or that it chose to convey views or concerns about a particular subject to the United States or another government.[1] Further, respondent's isolated focus on a single document's words overlooks the fact that

> [t]he 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.

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[1] For example, if the United States had completely severed relations with Country X, and the head of that country subsequently wrote a letter to a newly inaugurated President that stated only "I congratulate you on your election," the Executive Order (unlike respondent) would recognize the impact on foreign relations that could result not just from releasing the words in the letter, but also from prematurely disclosing that the leader of Country X made any communication at all with the United States. Similarly, if the pro-Western prime minister of a hypothetical country sought to maintain a precarious domestic position by voicing in emphatic terms criticisms of the President of the United States, but then later expressed his views in a letter to the President in markedly more restrained terms out of his respect for the President or support of the relevant American policy, the Executive Order would permit protection of that unwritten "information" because of the harm to the Nation's foreign relations that discrediting the pro-Western government would entail.

United States v. *Marchetti*, 466 F.2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972); see also *CIA* v. *Sims*, 471 U.S. 159, 178-179 (1985).

Respondent next seizes upon that part of the definition of "[d]amage to the national security" that states that the analysis is "to include the sensitivity, value, and utility of that information." Exec. Order No. 12,958, § 1.1(*l*). That addendum does nothing to aid respondent's reading of the Order. As explained in our opening brief (at 30), one important measure of the "sensitivity" of information is the fact that the foreign government communicated it in confidence and continued at the time of a FOIA request to object to its disclosure in breach of that trust. Respondent's attempt to distinguish between the "sensitivity" of a document's contents (which he would deem covered by the Executive Order) and the foreign government's "sensitivity" about disclosure of those contents (which he would not protect), erects an artificial and, for all practical diplomatic purposes, inscrutable line between protected and unprotected communications. Furthermore, 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). Respondent attempts to distinguish *Bismarck* by pointing out (Br. 43) that "the formulation that does appear" in the Executive Order is "to include" rather than "includes." Why respondent thinks the infinitive of a verb rather than one of its active tenses fundamentally alters its meaning escapes us. Whether the word is "prescriptive" (*ibid.*) or descriptive, it is not *exhaustive*.[2]

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[2] In fact, the "to include" language is designed to ensure that the concept of damage to the national security is *not* given a narrow scope. It requires that, in determining the harm that could result from disclosure, consideration be given not only to negative impacts in their own right, but also to the inherent and positive "value" or "utility" to the United States of controlling certain information.

c. Unable to support his cramped view of damage to national security with the actual text of the Executive Order, respondent relies (Br. 39-41) on words that are not there—that is, on the absence in the current Executive Order of 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). Even if one assumes the highly questionable proposition that the absence of language is sufficient to overcome the Executive Branch's reasonable interpretation of the actual text of its own Executive Order, respondent's argument is to no avail. First, the present case was decided on the basis that the classified letter concerned the "foreign relations or foreign activities of the United States," not that it was "foreign government information." Pet. App. 7a & n.2. 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).

Second, even assuming it is relevant, elimination of the across-the-board presumption that 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 such information will *never* harm the national security in that way. It simply means that such harm will no longer woodenly be presumed for every bit of information that is tied to a foreign official. Instead, the Executive Order requires that an actual judgment be made by a responsible Executive Branch official that the interest in maintaining the confidentiality of diplomatic discourse is relevant to and should be invoked for each document considered for classification.[3]

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[3] Other courts have recognized that the current Executive Order continues to protect against the harm arising from the breach of a foreign

Third, the flaw in respondent's reasoning is highlighted by 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). Yet there is no basis for extrapolating from that action the counterintuitive conclusion that the government intended to foreclose itself from determining in individual cases that an intelligence source or confidential foreign source communicated information against a background understanding or assumption of confidentiality, and that breach of that person's trust would seriously impair the government's ability to gather intelligence or foreign relations information in the future. See *Sims*, 471 U.S. at 169-180.

Respondent asserts (Br. 46 n.24) that, for intelligence sources and confidential foreign sources, the government could simply "'identify and describe' the harm that would flow from disclosure of this 'information.'" But respondent cannot have it both ways. If, as respondent's answer assumes, the Executive Order continues to include within the definition of "damage to the national security" the harm that arises solely from breaching the expectation of confidentiality of an intelligence source or confidential foreign source, notwithstanding the elimination of the prior Order's presumption to that effect, then the current Executive Order also must continue to afford such protection to foreign government information. Respondent's effort to elide the problem by asserting (*ibid.*) that confidential foreign sources and intelligence sources can be protected under Exemption 3 overlooks the fact that (unlike intelligence sources) no separate statute protects "confidential foreign sources" as such. In any event, the fact that Congress has chosen to protect

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government's expectation of confidentiality. *McErlean* v. *United States Dep't of Justice*, No. 97 Civ. 7831, 1999 WL 791680, at *5 (S.D.N.Y. Sept. 30, 1999); *Students Against Genocide* v. *Department of State*, No. CIVA96-667, 1998 WL 699074, at *11 (D.D.C. Aug. 24, 1998); *Billington* v. *Department of Justice*, 11 F. Supp. 2d 45, 58 (D.D.C. 1998).

intelligence sources under a statutory scheme of its own making says nothing about the President's independent intent or ability to protect such information as he considers necessary in his own Executive Order.[4]

d. If there were any ambiguity in the Executive Order's text, 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). Indeed, 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 situation, the agency's regulation and ultimately its interpretation must correlate with the terms of 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). Moreover, because the Order concerns foreign affairs and national security—matters steeped in a tradition of independent Executive authority and accumulated exper-

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[4] Respondent's constricted vision of damage to the national security also fails to account for the fact that the Executive Order specifically defines "foreign government information" and "confidential source" by reference to the foreign government's or individual's expectation of confidentiality. Exec. Order. No. 12,958, § 1.1(d) and (k). The fact that the Order makes that expectation an important definitional criterion renders implausible the assertion that the Executive Branch must ignore the impact of a breach of that expectation in evaluating the damage to national security that would be caused by disclosure.

tise—the rule of deference to the Executive's interpretation should apply with particular force.

Respondent's contention (Br. 37 n.15) that the construction of the Executive Order by those whom the President expressly charged with its interpretation and implementation (see Gov't Br. 3-4) merits no deference is baseless. Respondent objects (Br. 37 n.15) that petitioners' withholding of the letter he requested did not rest on a settled interpretation of the Executive Order, yet fails to recognize that this litigation arose on the heels of the new Executive Order's effective date. Both of the State Department declarations, which explain the basis for non-disclosure and articulate the Executive Branch's construction of the Order, were filed within six months of the Order's effective date, see Exec. Order. No. 12,958, § 6.2. Respondent offers no explanation why such a contemporaneous construction of the Order should not receive substantial deference.

Respondent's extraordinary contention (Br. 28, 32, 37 n.15) that, in FOIA, Congress foreclosed judicial deference to the Executive's interpretation of its own Order is unsupported by citation to any specific statement in FOIA's text or legislative history evidencing such an unprecedented abandonment of traditional principles of administrative law and inter-branch comity.[5] Absent compelling indications to the contrary, this Court should be loath to infer that Congress intended courts to afford the Executive Branch less deference in construing the language of *its own Order* addressing a subject matter (foreign affairs) that respondent concedes (Br. 15) "is the province and responsibility of the Executive," than courts traditionally afford the Executive

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[5] In fact, the legislative history is to the contrary. 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.").

Branch's construction of text enacted by Congress. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984).

e. Finding no basis for his position in the Executive Order, respondent repeatedly cites (Br. 41, 44) the President's statement when he signed the Executive Order, that "we will no longer presumptively classify certain categories of information, whether or not the *specific information* otherwise meets the strict standards for classification." (Respondent's emphasis). But that statement supports our reading of the Executive Order. It shows that the President did not alter the underlying definition of "damage to the national security," and thereby abandon a conception of harm to foreign relations that has been recognized since George Washington's administration (see Gov't Br. 17-21, 35-37).[6] Instead, the President eliminated an across-the-board presumption that every single communication from a foreign government automatically requires classification and substituted in its place a directive that each "specific" piece of foreign government "information" be independently evaluated for the impact its disclosure would have on national security.

Respondent's additional suggestion (Br. 44-45) that the Executive Branch's reading of its own Order somehow un-

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[6] This conclusion is reinforced by numerous other passages in the President's signing statement, which give assurance that the new Executive Order "still maintain[s] necessary controls over information that legitimately needs to be guarded in the interests of national security," "safeguard[s] the information that we must hold in confidence to protect our Nation and our citizens[]," "continue[s] to protect information that is critical to the pursuit of our national security interests," "maintain[s] every necessary safeguard and procedure to assure that appropriately classified information is fully protected," "can [be] trust[ed] to protect our national security," and provides "a model for protecting our national security." Resp. Br. Opp. App. 26a-28a; see also Exec. Order No. 12,958 (preamble) (the national interest requires certain information to be kept confidential to protect "our participation in the community of nations").

dercuts its commitment to reform of the classification system is belied by his amici's concession that, "[d]uring the first three years of the Clinton Order's implementation, federal agencies declassified 131 percent more pages than during the previous sixteen years combined." Reporters Comm., *et al.* Br. 13 (citing Information Security Oversight Office, *1998 Report to the President* (Aug. 31, 1999) (*1998 Report*)). Moreover, the State Department, which has been classifying information based on the reading of the Executive Order that respondent considers "meaningless" (Br. 45), accounts for only one percent of all national security classification decisions made by Executive Branch agencies, and has been commended for its exceptional declassification efforts. See *1998 Report* at 5, 26.

2. Courts In FOIA Cases Must Afford The Utmost Deference To Executive Branch Judgments That Disclosure Could Reasonably Be Expected To Damage The National Security

a. Respondent insists (Br. 16-33) that this Court must adopt a construction of FOIA that "would empower a court to substitute its own [classification] decision for that of the agency" (*id.* at 31 (emphasis and citation omitted)), and thus would effectively vest in the judiciary the final judgment on what matters should be classified in the interests of national security. All this, respondent claims (Br. 33-35), can be done without raising any constitutional concerns. But, as demonstrated in our opening brief (at 15-27) with authority that respondent does not challenge (see Resp. Br. 15):

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. * * * They are delicate, complex, and involve large elements of prophecy. * * * 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). Because judgments about the harm to foreign relations and national security necessarily entail large elements of prediction, those predictive judgments "must be made by those with the necessary expertise in protecting classified information." *Department of the Navy* v. *Egan*, 484 U.S. 518, 529 (1988).

> For reasons too obvious to call for enlarged discussion, the protection of classified information must 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 substance 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).[7] Accordingly, the classification judgments of those "who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference." *Sims*, 471 U.S. at 179.[8]

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[7] Accord *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 166 (1803) ("The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. *The acts of such an officer, as an officer, can never be examinable by the courts*.") (emphasis added).

[8] Amici Center for National Security Studies, *et al.*, claim (Br. 14-16) that Congress has long asserted control over national security information. While we do not dispute that Congress has some role in this area, as specifically demarcated by the Constitution (see, *e.g.*, Art. I, § 8; Art. II,

b. Before interpreting FOIA in such a constitutionally suspect manner, this Court would have to find the clearest expression of an intent by Congress to abandon centuries of congressional respect for the Executive's judgments concerning the confidentiality of national security information. See Gov't Br. 17-21. That evidence is wholly lacking.

First, respondent is correct that FOIA provides that courts "shall determine the matter de novo." 5 U.S.C. 552(a)(4)(B) (Supp. IV 1998). "But it is a 'fundamental principle of statutory construction (and, indeed, of language it-

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§ 2, para. 2), neither amici nor respondent cites any authority for the proposition that Congress may assign to the Judicial Branch the power to substitute its own classification decisions for those of the Executive Branch. Cf. *Morrison* v. *Olson*, 487 U.S. 654, 677 (1988) ("duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution"). Amici's only support for the existence of such a power, moreover, is a number of assertions of congressional power the constitutionality of which remains an open question. Compare Nat'l Sec., *et al.* Br. 15 n.15 with *American Foreign Serv. Ass'n* v. *Garfinkel*, 490 U.S. 153 (1989). It also rests (Nat'l Sec., *et al.* Br. 15) upon a misreading of House and Senate rules that (i) in fact do not permit Congress to "declassify" (*ibid.*) anything, (ii) pertain only to disclosure of information *in Congress's possession* (as opposed to information in the Executive Branch's possession), and (iii) permit public release of classified information over a Presidential objection only under circumstances so extraordinary that we are aware of no instance in which they were ever successfully invoked. Finally, amici's argument that this Court has never invalidated an Act of Congress on separation of powers grounds that did not violate a specific provision of the Constitution is wrong (see *Metropolitan Wash. Airports Auth., Inc.* v. *Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252 (1991); *Myers* v. *United States*, 272 U.S. 52 (1926)); is irrelevant (see Gov't Br. 15 (citing express textual authority for President's control over national security information); *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 488-489 (1989) (Kennedy, J., concurring) (statute that "interfere[s] with the manner in which the President obtains information necessary to discharge his duty assigned under the Constitution" violates that same constitutional provision)); and is beside the point, because we do not argue that FOIA, as properly construed, is unconstitutional, but rather that the court of appeals' erroneous construction of FOIA and the Executive Order raises substantial constitutional concerns.

self) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'" *Reno* v. *Koray*, 515 U.S. 50, 56 (1995). Thus, "[a]s [this Court's] decisions underscore, a characterization" of statutory terms, like de novo, that is "fitting in certain contexts may be unsuitable in others." *NationsBank.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 262 (1995). Such caution is particularly appropriate when courts construe statutory language that arises at the delicate intersection of Congress's power to legislate and the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

The starkest evidence that Congress intended a particular and nuanced application of de novo review in Exemption 1 cases is the fact that, in the immediately following sentence of the judicial review provision, FOIA directs 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 * * * technical feasibility" of making records available in electronic format. 5 U.S.C. 552(a)(4)(B) (Supp. IV 1998). Given (i) Congress's addition of the "substantial weight" language in 1996 against the backdrop of an unbroken wall of judicial precedent according "substantial weight" to Executive Branch declarations describing the basis for classification judgments in national security cases[9]; (ii) the 1974 Conference Report's

[9] At the time Congress added the "substantial weight" language to FOIA's text in 1996, no fewer than 46 court of appeals' decisions had held that courts must afford "substantial weight" to agency affidavits in national security exemption cases (predominantly arising under Exemption 1, but some also arising under Exemption 3). See *Minier* v. *CIA*, 88 F.3d 796, 800 (9th Cir. 1996); *Oglesby* v. *United States Dep't of Army*, 79 F.3d 1172, 1178 (D.C. Cir. 1996); *Jones* v. *FBI*, 41 F.3d 238, 244 (6th Cir. 1994); *McDonnell* v. *United States*, 4 F.3d 1227, 1242-1244 (3d Cir. 1993); *Maynard* v. *CIA*, 986 F.2d 547, 554-556 & n.7 (1st Cir. 1993); *Krikorian* v. *De-*

explicit statement that courts would give "substantial

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partment of State, 984 F.2d 461, 464 (D.C. Cir. 1993); *Hunt* v. *CIA*, 981 F.2d 1116, 1119 (9th Cir. 1992); *Wiener* v. *FBI*, 943 F.2d 972, 980 (9th Cir. 1991), cert. denied, 505 U.S. 1212 (1992); *Bowers* v. *U.S. Dep't of Justice*, 930 F.2d 350, 357 (4th Cir.), cert. denied, 502 U.S. 911 (1991); *Fitzgibbon* v. *CIA*, 911 F.2d 755, 762, 766 (D.C. Cir. 1990); *Patterson* v. *FBI*, 893 F.2d 595, 601 (3d Cir.), cert. denied, 498 U.S. 812 (1990); *Alyeska Pipeline Serv. Co.* v. *EPA*, 856 F.2d 309, 315 (D.C. Cir. 1988); *American Friends Serv. Comm.* v. *Department of Defense*, 831 F.2d 441, 444 (3d Cir. 1987); *King* v. *United States Dep't of Justice*, 830 F.2d 210, 225-226 (D.C. Cir. 1987); *Goldberg* v. *United States Dep't of State*, 818 F.2d 71, 76 (D.C. Cir. 1987), cert. denied, 485 U.S. 904 (1988); *Simmons* v. *United States Dep't of Justice*, 796 F.2d 709, 711 (4th Cir. 1986); *Miller* v. *United States Dep't of State*, 779 F.2d 1378, 1383, 1387 (8th Cir. 1985); *Doherty* v. *United States Dep't of Justice*, 775 F.2d 49, 52 (2d Cir. 1985); *Abbotts* v. *Nuclear Regulatory Comm'n*, 766 F.2d 604, 606 (D.C. Cir. 1985); *Miller* v. *Casey*, 730 F.2d 773, 776, 777 (D.C. Cir. 1984); *Davis* v. *CIA*, 711 F.2d 858, 860 (8th Cir. 1983), cert. denied, 465 U.S. 1035 (1984); *Afshar* v. *Department of State*, 702 F.2d 1125, 1131 (D.C. Cir. 1983); *Ingle* v. *Department of Justice*, 698 F.2d 259, 268 (6th Cir. 1983), abrogated on other grounds, *United States Dep't of Justice* v. *Landano*, 508 U.S. 165 (1993); *Salisbury* v. *United States*, 690 F.2d 966, 970 (D.C. Cir. 1982); *Gardels* v. *CIA*, 689 F.2d 1100, 1104 (D.C. Cir. 1982); *Hrones* v. *CIA*, 685 F.2d 13, 18 (1st Cir. 1982); *Taylor* v. *Department of Army*, 684 F.2d 99, 106-107 (D.C. Cir. 1982); *Carlisle Tire & Rubber Co.* v. *United States Customs Serv.*, 663 F.2d 210, 216, (D.C. Cir. 1980); *Stein* v. *Department of Justice*, 662 F.2d 1245, 1253 (7th Cir. 1981); *Military Audit Project* v. *Casey*, 656 F.2d 724, 738, 741, 745, 747 (D.C. Cir. 1981); *Phillippi* v. *CIA*, 655 F.2d 1325, 1332 (D.C. Cir. 1981); *Baez* v. *United States Dep't of Justice*, 647 F.2d 1328, 1335 (D.C. Cir. 1980); *Sims* v. *CIA*, 642 F.2d 562, 571 (D.C. Cir. 1980); *Lesar* v. *United States Dep't of Justice*, 636 F.2d 472, 481 (D.C. Cir. 1980); *Halperin* v. *CIA*, 629 F.2d 144, 147-148, 150, 152-153 (D.C. Cir. 1980); *Founding Church of Scientology* v. *National Sec. Agency*, 610 F.2d 824, 830 n.54 (D.C. Cir. 1979); *Hayden* v. *National Sec. Agency/Central Sec. Serv.*, 608 F.2d 1381, 1384, 1387 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980); *Goland* v. *CIA*, 607 F.2d 339, 350 n.64, 352 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980); *Founding Church of Scientology* v. *Bell*, 603 F.2d 945, 951 (D.C. Cir. 1979); *Terkel* v. *Kelly*, 599 F.2d 214, 215 (7th Cir. 1979), cert. denied, 444 U.S. 1013 (1980); *Irons* v. *Bell*, 596 F.2d 468, 471 n.5 (1st Cir. 1979); *Ray* v. *Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978); *DiViaio* v. *Kelley*, 571 F.2d 538, 542 (10th Cir. 1978); *Halperin* v. *Department of State*, 565 F.2d 699, 705 (D.C. Cir. 1977); *Weissman* v. *CIA*, 565 F.2d 692, 697 n.10 (D.C. Cir. 1977); *Bell* v. *United States*, 563 F.2d 484, 487 (1st Cir. 1977).

weight" to an agency's "unique insights into what adverse [e]ffects might occur as a result of public disclosure," S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 11 (1974); and (iii) the absence of any other established use of the "substantial weight" standard under FOIA to which Congress could have been referring, this 1996 amendment provides a powerful textual confirmation that de novo review under FOIA operates (as the Constitution requires and as Congress intended in 1974) with special delicacy and utmost deference to agency expertise in national security cases.[10] So considered, respondent's insistence that the meaning of "de novo" is "fixed" and unwavering (Br. 18 n.10) rings hollow.[11]

Second, the Conference Report on the 1974 amendments to FOIA, in which Exemption 1 was enacted in its current form, establishes 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. See Gov't Br. 45 n.41. Respondent's lengthy review of the 1974 legislative history (Br. 24-33) never comes to grips with that straightforward (and now codified) language of the Conference Report, which specifically reconciles the standard of "substantial weight" with the provision for de novo review.

Moreover, in securing final passage of the bill, as well as in overriding President Ford's veto, sponsors and supporters of

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[10] See also *Sims*, 471 U.S. at 179 (national security judgments of Executive officials under FOIA Exemption 3 "are worthy of great deference").

[11] Cf. *NationsBank*, 513 U.S. at 262 ("The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.").

the legislation repeatedly cited the quoted language of the Conference Report as critical to their understanding of the effect of the amendments to Exemption 1.[12] Sponsors also explained that the language was designed to "accommodate" President Ford's concerns both before and after the veto.[13] Indeed, Representative Moorhead, the bill's House sponsor, explicitly advised his colleagues that the final bill required deference. 120 Cong. Rec. 34,166 ("great weight"); see also *id.* at 34,167 (judge would not decide "whether he himself would have classified the document in accordance with his own ideas of what should be kept secret").[14] Furthermore, there is no merit to respondent's contention (Br. 26-27) that Congress's rejection of a version of the bill that created a *presumption* that agency judgments were reasonable forecloses all *deference* to the agency.[15]

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[12] See 120 Cong. Rec. 36,866 (1974) (Sen. Kennedy) (courts would be expected to give agency affidavits "considerable weight"); *id.* at 36,623 (Rep. Moorhead); *id.* at 34,166, 36,627 (Rep. Ehrlenborn); *id.* at 36,630 (Rep. Horton); *id.* at 36,628-36,629 (Rep. Rousselot); *id.* at 36,628 (Rep. Broomfield); *id.* at 36,629 (Rep. Aspin); *id.* at 36,870 (Sen. Muskie); *id.* at 36,880 (Sen. Ribicoff); cf. *id.* at 6813 (Rep. Mink) (advocating deference before Conference Report adopted); *id.* at 6804 (Rep. Matsunaga) (same); *id.* at 6808 (Rep. McCloskey) (same).

[13] See 120 Cong. Rec. 36,244, 36,622 (1974) (Rep. Moorhead); *id.* at 33,159 (letter from Sen. Kennedy and Rep. Moorhead to President Ford).

[14] Respondent's assertion (Br. 30 n.13) that Representative Moorhead did not support deference parses the Representative's statements beyond recognition. In reality, Representative Moorhead explained that "no one familiar with the legislative history could ever imagine that Members of Congress could almost unanimously vote to write into law" amendments that allowed a court to overturn an agency's "'reasonable'" conclusion that "'disclosure of a document would endanger our national security.'" 120 Cong. Rec. 36,623 (1974). It was that "obviously dangerous provision"—advanced here by respondent—that Congress rejected. *Ibid.*

[15] See *Universal Elecs., Inc.* v. *United States*, 112 F.3d 488, 492-493 (Fed. Cir. 1997) ("[M]uch of the confusion in this area of the law arises from commingling the notion of a presumption of correctness with the notion of deference — two notions that are designed to serve separate functions. Unlike the burden of production and burden of persuasion, each of which allocates roles between the two parties to a litigation, deference

Third, the fact that FOIA directs courts to "determine the matter de novo" simply begs the question of precisely what "matter" is to be reviewed de novo in Exemption 1 cases. Unlike most other FOIA exemptions, for which Congress set the substantive terms and conditions for withholding, Exemption 1 specifically defers to the President's own formula for classifying national security information. Thus, the text of Exemption 1 envisions a court reviewing de novo only the discrete inquiries whether the "matters" exempted from disclosure 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). Those inquiries do not, by their nature, entail more than ensuring that the agency has applied only those classification criteria and categories identified in the Executive Order, followed the procedures outlined in the Order for classifying information, and articulated a substantive classification judgment that neither is foreclosed by the Order's text nor lacks any plausible basis.[16]

Nothing in the text of Exemption 1 or FOIA's provision for de novo review, in other words, compels courts to probe behind the Executive Branch's reasoned explanation and second-guess the Executive's predictive and experiential judgments about whether and how the release of foreign affairs information will adversely impact the United States' diplomatic relations. Indeed, even respondent concedes (Br. 28) that judicial superintendence of the agency's factual conclusions must halt at this point. But if FOIA's de novo

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is a legal concept that allocates roles between one adjudicating tribunal and another.") (citation omitted).

[16] Cf. *Aronson* v. *IRS*, 973 F.2d 962, 967 (1st Cir. 1992) ("[O]nce a court determines that the statute in question is an Exemption 3 statute, and that the information requested at least arguably falls within the statute, FOIA *de novo* review normally ends. * * * Any further review must take place under more deferential, administrative law standards.").

provision permits deference to agency factual determinations, it surely is sufficiently capacious to permit deference to those delicate and seasoned predictive judgments about foreign relations repercussions that Executive Branch officials are singularly well-positioned to make and that fall outside the responsibility and expertise of the Judicial Branch. See S. Conf. Rep. No. 1200, *supra*, at 11 ("substantial weight" should be given to an agency's "*unique insights* into what adverse [e]ffects might occur as a result of public disclosure") (emphasis added).

Respondent's insistence that the Executive Order must "specifically authorize[]" (Br. 19) each classification decision misapprehends its terms and operation.[17] The Order requires only that an Executive Branch official "determine[]" that the appropriate level of damage "reasonably could be expected to result" from disclosure, and then articulate the basis for that judgment. Exec. Order No. 12,958, § 1.2(a)(4). The word "determine" envisions a conclusion based on investigation and reasoning, or a reasoned choice between viable alternatives. See *Webster's Third New Int'l Dictionary* 616 (1986). The requisite decision, moreover, is not that damage definitively will or will not result, but that it "reasonably could be expected" to occur. Thus, in an Exemption 1 case, a court could not order release of a document that has been classified under the Executive Order unless the court decided—viewing the matter from the perspective of responsible Executive Branch officials, who are acting on behalf of the President and have expertise and insights that are themselves entitled to the utmost judicial deference—that those officials could not permissibly determine, on the basis of all information they deem relevant, that identified

[17] Contrary to respondent's characterization (Br. 19), FOIA does not require that each classification judgment be "specifically authorized," but only that the classification be shown to have been made pursuant to "specifically authorized * * * criteria." 5 U.S.C. 552(b)(1).

harm to the national security could reasonably be expected to result from disclosure.

It follows, then, that classification judgments in the national security arena are not amenable to judicial labeling as "right" or "wrong," "authorized" or "unauthorized." No predicate "showing" (Resp. Br. 13) or quantum of courtroom proof is required by the Executive Order (or FOIA) to undergird every calibrated judgment about damage to national security. Rather than being provable as "right" or "wrong," classification judgments fall along a spectrum from the most plausibly correct to the implausible. Yet nothing in FOIA directs courts (much less provides them the equipment or guidance necessary) to sift out the most plausible from the moderately plausible classifications and order disclosure of the latter, or to shelter the moderately plausible while exposing the merely plausible. Permitting judicial invalidation of only those classification judgments that fall at the implausible end of the spectrum is thus the only form of de novo review that successfully reconciles the limited textual scope of the Exemption 1 inquiry, the language of the Executive Order, the realities of national security classification decisionmaking, and the Constitution's separation-of-powers mandate.[18]

c. Finally, the complaint of amici Center for National Security Studies, *et al.* (Br. 22-25) that enforcing Congress's requirement of deference to Executive Branch judgments in national security cases is inconsistent with FOIA's goal of encouraging governmental openness misses the mark. It in fact is respondent's, amici's, and the court of appeals' approach that encourages the President to adopt broad, categorical, and inflexible classification criteria. For, under their

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[18] On November 19, 1999, the President made a minor amendment to the Executive Order that pertains to the timing of automatic declassification and a technical amendment that pertains to the Information Security Oversight Office. We have lodged a copy of that Order with the Clerk of this Court.

approach, as soon as an Executive Order permits any individualized evaluation of the need for classification of foreign government communications, the classification judgments of Executive Branch officials will suddenly become subject to judicial second-guessing across the country. The end result of respondent's and his amici's position would thus be a decrease in the disclosure of national security information, either because the erratic protection of confidences will deter foreign governments from sharing vital information with the United States government in the first place,[19] or because the President will be forced to adopt sweeping, automatic, and wooden classification rules.

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For the reasons stated in our motion dated November 23, 1999, the Court should vacate the judgment of the court of appeals and remand with directions that the case be dismissed as moot. If the Court does not dispose of this case on mootness grounds, then, for the foregoing reasons and for those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DECEMBER 1999

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[19] See *Sims*, 471 U.S. at 175 (if confidentiality is not protected, "many [sources] could well refuse to supply information to the Agency in the first place"); *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.").