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

PETITION FOR A WRIT OF CERTIORARI

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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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The Solicitor General, on behalf of the United States of America, the Department of State, and the Department of Justice, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-20a) is reported at 157 F.3d 735. The opinions of the district court (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 (App. 44a-45a). An amended order denying rehearing was entered on March 9, 1999 (App. 46a-47a).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION AND EXECUTIVE ORDER INVOLVED

1. Section 552(b)(1) of Title 5, U.S. Code, provides that the Freedom of Information Act's general provisions governing disclosure of government information do not apply to:

> [M]atters 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. Executive Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995) (3 C.F.R. 333 (1996)), governing the classification of government information, is set forth at App. 65a-111a.

STATEMENT

1. Through the Freedom of Information Act (FOIA), 5 U.S.C. 552 (1994 & Supp. III 1997), 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). To that end, FOIA exempts from the government's general duty of disclosure "matters" that an Executive Order "specifically authorize[s] * * * to be kept secret in the interest of national defense or foreign policy," if those matters are "in fact properly classified pursuant to such Executive order." 5 U.S.C. 552(b)(1).

Executive Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995) (3 C.F.R. 333 (1996)), is the currently

applicable order governing the classification of national defense and foreign affairs information. The Order establishes four prerequisites to classification: (1) the information must be classified by an original classification authority (*i.e.*, an Executive Branch official authorized to classify information under the Order); (2) the information must be under the control of the government; (3) the information must fall within an authorized withholding category; and (4) the classification authority must determine that "unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" and must be "able to identify or describe the damage." Exec. Order No. 12,958, § 1.2(a). "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 information, to include the sensitivity, value, and utility of that information." *Id.* § 1.1(*l*).

Eligible classification categories include "foreign government information" and information concerning the "foreign relations or foreign activities of the United States, including confidential sources." Exec. Order No. 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 classi-

[1] Section 1.1(d) 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 * * * [is] to be held in confidence."

fication authority is able to identify or describe." *Id.* § 1.3(a)(3).

2. 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 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 the commune's officers, including Croft and Hagan, conspired to murder the United States Attorney. *Id.* at 1113-1114. In 1994, Croft and Hagan were extradited from Great Britain to stand trial for that conspiracy. Shortly after their extradition, the British Home Office sent a letter to the Director of the Justice Department's Office of International Affairs concerning the extradition. Both Croft and Hagan were subsequently convicted. *Id.* at 1114. They have since completed their sentences and returned to Great Britain.

Respondent is a criminal defense attorney who represented Croft during her criminal trial. In 1994, respondent submitted a FOIA request to the Departments of Justice and State for a copy of the letter from the British government. App. 2a. 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. As it commonly does, the State Department requested the views of the British government on disclosure. *Id.* at 58a. The British government advised 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 requisi-

tioned by the defence." C.A. App. Tab 17, Ex. 2 (emphasis in original); 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. App. 3a. The British government 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." C.A. App. Tab 17, Ex. 2. 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. App. 3a-4a.

3. Respondent filed suit under FOIA and moved for summary judgment. 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. Mr. Sheils' declaration explained that the letter "was intended by the 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." App. 52a-53a. As a result of such a breach of confidentiality, Mr. Sheils continued, the British 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.

Notwithstanding the Sheils declaration, the district court granted respondent's motion for summary judgment. App. 21a-28a. The court reversed its ruling, however, on the government's motion to alter or amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure. App. 29a-42a.

In conjunction with its Rule 59(e) motion, the government 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 international relations to treat as confidential and not subject to public disclosure information and documents exchanged between governments and their officials." App. 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 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 imperil 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." 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.

The district court did not consider the Kennedy declaration adequate to support withholding either, but it did grant the government's request to 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." 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.

Ibid.[2]

4. a. A divided panel of the court of appeals reversed and ordered the letter disclosed. App. 1a-20a. On appeal, respondent abandoned his contention that the letter did not qualify as information concerning "foreign relations or foreign activities of the United States." *Id.* at 7a; Exec. Order No. 12,958 §§ 1.2(a)(1)-(3), 1.5 (d).[3] Thus, the only issue to be resolved by the court of appeals was whether the State Department

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[2] 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. The district court denied respondent's motion (C.A. App. Tab 35), and he did not appeal that decision.

The district court's grant of the government's Rule 59(e) motion had the effect of denying respondent's motion for summary judgment and rejecting respondent's request for an injunction ordering disclosure (see Compl., C.A. App. Tab 1, at 3). Although the district court did not enter a separate judgment (see Fed. R. Civ. P. 58) following its Rule 59(e) ruling, the parties and the district court treated the Rule 59 order denying disclosure as a final judgment in the government's favor. See Pl.'s Mot. to Set Aside J. FRCP 60(b)(6); Pl.'s Mem. in Supp. of Mot. to Set Aside J. Under FRCP 60(b)(6), at 2, 3, 5; Defs.' Opp'n to Pl.'s Mot. to Set Aside J. Under Fed. R. Civ. P. 60(B)(6), at 2; see also Order to Extend Time to File Appeal, C.A. App. Tab 31.

[3] In the district court and the court of appeals, the government argued that the letter also was properly regarded as "foreign government information." That continues to be our position in this Court. Neither the district court nor the court of appeals, however, resolved that issue.

properly determined "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"—and whether the Department was "able to identify or describe the damage." App. 7a-8a (citing Exec. Order No. 12,958, §§ 1.1(*l*), 1.2(a)(4)).

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." 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. The majority rejected that ground for withholding on the theory that not all information exchanged with foreign governments or all extradition communications are categorically deemed confidential. *Id.* at 14a. The court further declined to give deference to the Executive's classification decision based on the Sheils and Kennedy declarations describing the damage to foreign relations that would result from disclosure. The court explained that deference is not due until the government makes "an initial showing which would justify deference," and here, it concluded, the government's declarations "made no such showing." *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.*

The court of appeals then chose to conduct its own *in camera* review of the document. In doing so, the court stated that it gave deference to the "government's perspective of the document." App. 17a. After its *in camera* review, however, the majority labeled the letter

"innocuous," stating that it "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 summary judgment in favor of respondent. *Id.* at 18a.

b. Judge Silverman dissented, App. 18a-20a, finding "no basis in the record to conclude otherwise than that * * * release [of the letter] would cause damage to the national 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.[4] Judge Silverman then concluded (*id.* at 20a):

> [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.

c. Following the court's denial of the government's petition for rehearing with suggestion for rehearing en banc (App. 44a-47a), the government 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

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[4] During oral argument, counsel for the United States advised the court of appeals that the British government (which, during the pendency of the appeal, had transitioned from Conservative Party to Labor Party leadership) continued to consider disclosure of the letter to be "out of the question."

motion, the government submitted the declaration of the then Acting Secretary of State Strobe Talbott, who explained (*id.* at 61a) 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, 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 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.

The Acting Secretary further stated, with respect to the specific context of this case, that the extradition of the two women was "a matter of political sensitivity" to Great Britain. *Id.* at 62a.

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 and other matters." App. 63a. The Ninth Circuit granted the motion to stay the mandate.

REASONS FOR GRANTING THE PETITION

The judgment of the divided Ninth Circuit panel orders the release of a sensitive and classified diplomatic communication based solely on the majority's own conclusion that the document is "innocuous" and that its disclosure could not reasonably be expected to result in damage to the national security of the United States. In so holding, the court of appeals 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.

The Ninth Circuit's denial of deference conflicts with the decisions of numerous other courts of appeals, which have consistently given substantial deference to Executive Branch classification judgments and affidavits explaining those judgments. The court's approach also sharply conflicts with repeated rulings of this Court, which recognize that the separation of powers under the Constitution mandates that the Executive Branch's classification decisions be afforded the utmost deference. The court of appeals' decision, moreover, raises issues of significant and enduring importance regarding the protection traditionally accorded to information classified on national security grounds, the United States' ability to obtain confidential and candid communications from foreign governments and to demand equivalent confidentiality for its own communications, this Nation's conduct of highly sensitive international extradition and law enforcement matters, and our relations with a critical ally. Accordingly, this Court's review is warranted.

1. a. The court of appeals' refusal to give any deference to the sworn declarations of Executive officials regarding the basis for classification of the confidential letter from the British Home Office conflicts with the decisions of numerous other courts of appeals, which have consistently accorded such Executive Branch judgments and declarations "substantial weight." See, *e.g.*, *Jones* v. *FBI*, 41 F.3d 238, 244 (6th Cir. 1994) ("In determining the applicability of Exemption 1, a reviewing court should accord 'substantial weight' to the agency's affidavits regarding classified information."); *McDonnell* v. *United States*, 4 F.3d 1227, 1243 (3d Cir. 1993) ("[C]ourts are required to accord substantial weight to an agency's affidavit concerning the details of the classified status of a disputed record.") (internal quotation marks omitted); *Krikorian* v. *Department of State*, 984 F.2d 461, 464-465 (D.C. Cir. 1993) (according "*substantial weight* to an agency's affidavit" about the impact of disclosure on "reciprocal confidentiality"); *Bowers* v. *United States Dep't of Justice*, 930 F.2d 350, 357-358 (4th Cir.) ("It is imperative that the court consider and accord 'substantial weight to the expertise of the agencies charged with determining what information the government may properly release'" where the foreign government expressly requested secrecy and disclosure "would violate an understanding of confidentiality with the foreign government [and] would have a chilling effect on the free flow of information."), cert. denied, 502 U.S. 911 (1991); *Miller* v. *United States Dep't of State*, 779 F.2d 1378, 1387 (8th Cir. 1985) ("substantial weight"); *Doherty* v. *United States Dep't of Justice*, 775 F.2d 49, 52 (2d Cir. 1985) (same).[5] Those

[5] Cf. *Maynard* v. *CIA*, 986 F.2d 547, 555 (1st Cir. 1993) (in applying Exemption 3 to information regarding intelligence sources

decisions, unlike the court of appeals' decision here, demonstrate that no "initial showing" by Executive officials is needed in each particular case to "justify" deference; rather, deference is required by the constitutional separation of powers and due regard for the respective institutional roles of the Executive and Judicial Branches.

Resolution of this conflict is important because, in the absence of a single, uniform rule governing the standard of deference owed Executive Branch classification decisions under Exemption 1, FOIA plaintiffs will have an incentive to file suit within the circuit that accords classification judgments the least amount of deference. From a practical perspective, discord in the judicial standards governing review of classification decisions will deny Executive Branch officials and foreign governments a stable framework within which to engage in candid exchanges of diplomatic information, thereby creating a real danger of "restricting the flow of essential information to the Government." *FBI* v. *Abramson*, 456 U.S. 615, 628 n.12 (1982). It will be of little solace to United States diplomats whose representations of confidentiality are rendered empty promises—or to foreign governments whose secrets are exposed within the Ninth Circuit—that their expectation of confidentiality might have carried the day in another region of the United States.

b. The court of appeals' holding that no deference was owed to the Executive's reasons for maintaining

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and methods, the court "must 'accord substantial weight and due consideration to the CIA's affidavits,'" and, if it is "arguable" that the documents qualify for the exemption, the court's review ends); see also *Halperin* v. *CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980) (equating rule of substantial deference under Exemptions 1 and 3).

the confidentiality of information on national security grounds is also flatly inconsistent with numerous rulings of this Court. For example, in *Department of the Navy* v. *Egan*, 484 U.S. 518 (1988), the Court emphasized that 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 Commander in Chief] and exists quite apart from any explicit congressional grant." *Id.* at 527. The Court explained:

> 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.

Id. at 529 (internal quotation marks, citation, and ellipsis omitted).

Similarly, in *CIA* v. *Sims*, 471 U.S. 159 (1985), the Court sustained the government's refusal to disclose information on national security grounds, underscoring the inappropriateness of courts superintending Executive Branch judgments about the need to preserve the confidentiality of communications bearing on national security. If foreign governments in the present context, like the intelligence sources in *Sims*, "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." *Id.* at 175. Further, like this Court in *Sims*, we "seriously doubt" that foreign governments "will rest assured knowing that judges, who have little or no background in the delicate business of intelligence gathering" (or, here, 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. *Sims* thus confirms that the State Department's concerns, voiced repeatedly in the declarations of its officials, about the effect of disclosure on the future flow of information regarding extradition and a broad array of other matters are entirely reasonable, and that the court of appeals' refusal to defer to that judgment exceeds the proper bounds of the judicial function.

As the cited decisions indicate, the deference that Executive Branch classification decisions require at each stage of the judicial process derives directly from the separation of powers under the Constitution:

> [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 *Haig* v. *Agee*, 453 U.S. 280, 289 n.17 (1981). Moreover, as the Court recognized in *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), the President's authority to maintain secrecy is an essential component of conducting 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. * * * "The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch."

Id. at 319.[6]

Given that the rule of deference to Executive Branch classification decisions and foreign policy judgments is rooted in the Constitution itself, the Ninth Circuit's holding that no deference was owed to the explanation by Executive Branch officials of the basis for classification of the confidential letter at issue here—and that deference must be "justif[ied]" by an "initial showing" in each case—implements FOIA's national security exemption in a manner that raises serious separation-of-

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[6] See also 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) (chronicling history of presidential refusals to disclose foreign policy information if it was considered contrary to the national interest to do so); *The Federalist No. 64*, at 392-393 (John Jay) (C. Rossiter ed., 1961).

powers concerns. Congress intended no such result. To the contrary, the Conference Report on FOIA expressed Congress's intent that courts accord "substantial weight" to an agency's "unique insights" regarding the necessity of classification. See S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 11 (1974).[7] It is only by cleaving strictly to that standard of substantial deference, confirmed in the decisions of this Court and other courts of appeals, 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 *United States* v. *Nixon*, 418 U.S. 683, 710 (1974).

c. After declining to accord any deference to the Executive Branch declarations setting forth the basis for concluding that disclosure would result in damage to the Nation's foreign relations, the court of appeals reviewed the letter itself *in camera*. In doing so, the court purported to give deference to the "government's perspective of the document" (App. 17a). But that was too little too late.

With respect to timing, the rule of deference has long been regarded as applicable at the outset of any judicial

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[7] See also 120 Cong. Rec. 6808 (1974) (Rep. McCloskey) (FOIA is enacted "with the confidence" that courts "will * * * be very reluctant to override" an agency decision "relative to declassification of such information"); *id.* at 17,021 (Sen. Hruska) ("A judge can overrule the agency's decision to withhold the document only if he is convinced that there is not any reasonable basis for the classification. * * * But the Court cannot, and should not, be able to second-guess foreign policy and national defense experts."); *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").

proceeding implicating classified materials and, indeed, to limit strictly the appropriateness of a court's relying on *in camera* scrutiny before sustaining the confidentiality of information on national security grounds.[8]

With respect to substance, the separation of powers requires much more than the sort of deference the court of appeals recited here. The court stated that it gave deference to the bare "act of classification" (App. 17a)—but again, it appears, not to the underlying justification set forth in the State Department's formal declarations—and the court otherwise relied solely on its own reading of the letter. Based on that reading, the court declared the letter "innocuous," opining that its release "could not reasonably 'be expected to result in damage to the national security.'" *Ibid.* The court of appeals offered no explanation for its disagreement with both the Department of State and the district court on the consequences of disclosure. It seems clear, however, that the court focused only on the words appearing on the face of the letter and only on the damage to the United States' foreign relations that would result directly and specifically from the release of those words into the public domain. See *id.* at 11a-12a, 13a, 15a.

Thus, the court did not address the impact that the act of disclosure would have on the future ability of the

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[8] See *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953) (when state secrets privilege is invoked and there is a "reasonable danger" that confidential national security information will be exposed, "the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers"); *Nixon*, 418 U.S. at 713 (once the Executive invokes a claim of privilege, a court must treat the material "as presumptively privileged" before any decision regarding the propriety of *in camera* review is made).

United States to receive confidential and candid communications in various matters arising in the Nation's relations with Great Britain and other nations, even though the State Department declarations discussed that harm at length. Nor did the court consider that diplomatic exchanges are not isolated transactions and that the State Department's judgment that the letter should remain confidential reflected a sensitive contextual judgment about the effect disclosure would have within the broader framework of an ongoing, wide-ranging, and vitally important relationship with the British government (as well as relationships with other foreign governments). Rather, the expert views of State Department officials, who have the responsibility and experience to see the foreign relations "forest" and not just the particular "tree," were subordinated to the view of two judges that the words in a particular document, considered in isolation, seemed "innocuous." Practically speaking, that is no deference at all. Such minimizing and second-guessing of the State Department's expert judgment in this case cannot be reconciled with the measured and limited approach of other courts of appeals, which have recognized that judicial review in this area is narrow and is confined to assessing whether, in the absence of any evidence of bad faith, there is a plausible connection between the information and the claimed exemption.[9]

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[9] See *McDonnell*, 4 F.3d at 1243 ("logical connection"); *Maynard*, 986 F.2d at 556 (court "will uphold the agency's decision so long as the withheld information logically falls into the category of the exemption indicated") (internal quotation marks omitted); *Bowers*, 930 F.2d at 357 ("If there is no reason to question the credibility of the experts and the plaintiff makes no showing in response to that of the government, a court should hesitate to substitute its judgment of the sensitivity of the information for that of

2. In addition to deviating from the proper standard of deference consistently recognized by other courts of appeals and by this Court, the court below made a second fundamental error in its analysis. As the State Department declarations explained, the damage to the United States' foreign relations that the Executive Order seeks to prevent can derive not only from disclosure of the words written on a confidential piece of paper received from a foreign government, but also from the very act of disclosure and the attendant breach of a foreign government's trust. The court of appeals, however, refused to consider that form of harm on the ground that the government did not show that either all inter-governmental communications or all extradition communications are categorically exempted from disclosure. App. 14a-16a. The court's refusal to consider, let alone defer to, the State Department's assessment of the damage that would result from disclosing such foreign government information is contrary to the rulings of other circuits and of this Court and, in addition, lacks any basis in the text of the Executive Order.

a. 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 the decisions of other circuits. In *Bowers* v. *United States Department of Justice*, *supra*, for example, the Fourth Circuit upheld the agency's invocation of Exemption 1 where disclosure of

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the agency."); *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").

the information at issue would, among other things, "violate an understanding of confidentiality with the foreign government[and] would have a chilling effect on the free flow of information between the United States intelligence and law enforcement agencies and their foreign counterparts." 930 F.2d at 357-358; see also *Krikorian*, 984 F.2d at 465 (Exemption 1 applies where release of the document would "jeopardize reciprocal confidentiality") (internal quotation marks omitted); cf. *Miller* v. *Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984) ("agency determinations of whether the national security could be injured * * * depend[] less on the content of specific documents" than other FOIA exemptions do).

While those court of appeals decisions arose under a previous Executive Order, No. 12,356, 3 C.F.R. 166 (1983), rather than under Executive Order No. 12,958, that happenstance has no bearing on the conflict. Under both Executive Orders, "damage to the national security" is an essential criterion in classification decisions. See Exec. Order No. 12,958, § 1.2(a)(4); Exec. Order No. 12,356, § 1.3(b). Other than requiring officials to identify or describe the asserted damage to national security, Exec. Order No. 12,958, § 1.2(a)(4), the new Executive Order left fundamentally unchanged the specification of what *types* of injuries to the United States' foreign relations will constitute damage to the United States national security. It is on that point that the circuit conflict arises.

As the court of appeals noted (App. 14a), the new Executive Order also 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)). That alteration, however, in fact underscores the gap

between the decision below and the rulings of other circuits on the issue of deference. The court of appeals here did not simply fail to heed a generalized presumption; it refused to defer to the expert and individualized judgments of Executive Branch officials focused on the precise disclosure issue before the court.[10]

Moreover, and contrary to the court of appeals' apparent view (App. 14a), elimination of the across-the-board presumption that the disclosure of "foreign government information" will *always* harm national security because of the broader impact on diplomatic communications generally plainly does not mean that the disclosure of foreign government information will *never* harm the national security in that way. And, if there were any doubt about whether a document may properly be classified on that basis, the court of appeals was required to defer to the construction of the Executive Order by the Executive officials responsible for its implementation.[11] Thus, the revision of the Executive

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[10] 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"; the court did not consider its status as "foreign government information." See 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).

[11] See *Udall* v. *Tallman*, 380 U.S. 1, 4 (1965) ("The Secretary's interpretation [of an Executive Order] may not be the only one permitted by the language of the order[], but it is quite clearly a reasonable interpretation; courts must therefore respect it."). Congress intended for this deference to carry over into application of FOIA Exemption 1. See 120 Cong. Rec. 6811 (1974) (Rep. Erlenborn) ("[T]he court would not have the right to review the criteria" under the Executive Order; "[t]he description 'in the interest of the national defense or foreign policy' is descriptive of

Order in no way bars the Executive from showing that particular foreign government communications were made against an 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 a particular instance, the established norm of confidentiality in diplomatic relations either could be outweighed by other considerations or could be waived. The new Executive Order therefore requires Executive officials to 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 demonstrate that the responsible Executive officials did precisely that, and they explain that disclosure would result in damage to the Nation's foreign relations by undermining that confidentiality.

b. The court of appeals' judgment that the broader harm to national security from breaching the British government's expectation of confidentiality, by itself, was not a valid consideration is in substantial tension with numerous decisions of this Court. Those cases confirm that 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 security and foreign relations. See, *e.g.*, *Sims*, 471 U.S. at 175 (quoted at page 15-16, *supra*); *Haig*, 453 U.S. at 307 ("[T]he 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

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the area that the criteria have been established in but does not give the court the power to review the criteria.").

effective operation of our foreign intelligence service.") (emphasis added); *New York Times Co.* v. *United States*, 403 U.S. 713, 728 (1971) ("[I]t is elementary that * * * [o]ther nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept."); *Snepp* v. *United States*, 444 U.S. 507, 512 (1980) (per curiam) ("The continued availability of these foreign sources depends upon the CIA's ability to guarantee the security of information.").

Indeed, in *Curtiss-Wright*, *supra*, this Court recounted that President Washington withheld documents underlying the negotiation of the Jay Treaty from Congress — not on the basis of an identification of particular secrets in each document that would harm the United States if disclosed, but because

> [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.

299 U.S. at 320-321. If the "pernicious influence on future negotiations" was considered a sufficient threat to the public interest for President Washington to refuse to share foreign correspondence even with Congress, a fortiori it is a sufficient basis for withholding the British government's letter from the public under FOIA.

c. In the analogous context of intelligence information, courts of appeals have recognized that the collec-

tion 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). As a result,

> [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. 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).[12]

The same is true in the conduct of foreign relations. The court of appeals' constricted view of the harm to national security that may be taken into account, however, overlooks that the damage attending disclosure of one confidential communication in one extradition case cannot be assessed in isolation. Rather, the harm must be measured by taking "a broad view of the scene" of extradition and other relations between the United States and Great Britain (and other nations) and by keeping in mind that geopolitical developments can give a document a sensitivity that is not apparent to a non-expert from the face of the document. In addi-

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[12] See *The Federalist No. 64*, *supra*, at 393 ("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.").

tion, the analysis of harm to the United States' ability to conduct its relations with other nations must factor in the politically sensitive and volatile context in which a government extradites one of its own citizens to stand trial in a foreign land, and the adverse consequences that might ensue for a foreign government as a result if a confidential diplomatic communication with the United States were disclosed.

d. The court of appeals believed that consideration of the broader harm arising from disclosure was proper only if either *all* information exchanged between governments or *all* extradition information was exempted from disclosure. App. 14a-15a. That all-or-nothing approach lacks any basis in law or logic. It certainly finds no basis in FOIA. Exemption 1 applies to all "matters" that are authorized "under criteria established by an Executive order" to be kept secret "in the interest of national defense or foreign policy," without any suggestion that the exemption is limited to withholding based on the harm that would result if the contents of a document were in the public domain. See 5 U.S.C. 552(b).

Nor does the Executive Order contain any such artificial requirement of categorical treatment. The definition of "damage 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 either from the information itself or from the very act of disclosure. The fact that the definition goes on to "include the sensitivity, value, and utility of that information" as relevant considerations in assessing the degree of harm (*ibid.*) is beside the point. The ordinary meaning of the word "include" "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 envisions that other measures of harm may also be considered by classifying agencies, such as broader, institutional impacts on the overall conduct of foreign affairs and extradition matters.

Indeed, the Executive Order separately 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. See Exec. Order No. 12,958, § 1.6(d)(6). That special exception confirms that the damage to foreign relations resulting from release of a document is an independent and highly relevant component of the "[d]amage to the national security" covered by the Executive Order.

In short, the court of appeals erroneously transmogrified the requirement that Executive Branch officials' declarations "identify or describe the damage" to national security that would result from disclosure (Exec. Order No. 12,958, § 1.2(a)(4)) into a requirement of a showing of particularized damage to the national security that is traceable solely to placing the contents of the document at issue in the public domain.

3. The court of appeals' abandonment of traditional principles of deference to Executive Branch classification decisions and foreign policy judgments raises issues of great and enduring importance to the United States. The prospect that courts may 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—would have an immediate and deleterious impact on the Executive's conduct of diplomatic and other foreign relations. 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 reasonably 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, the United States will not be able to obtain the information it so critically needs for the conduct of its foreign relations. The protection accorded confidences of the United States government by other nations may well be eroded in turn. Given the "changeable and explosive nature of contemporary international relations," *Haig*, 453 U.S. at 292, and the breach of trust that disclosure of a foreign government's confidences would occasion in foreign relations generally and in the delicate arena of international law enforcement cooperation in particular, review by this Court is warranted.[13]

[13] We have lodged copies of the classified document under seal with the Clerk of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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