No. 98-1904

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

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

Petitioners,

v.

LESLIE R. WEATHERHEAD,

Respondent.

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

BRIEF OF CENTER FOR NATIONAL SECURITY STUDIES, THE NATIONAL SECURITY ARCHIVE, THE FEDERATION OF AMERICAN SCIENTISTS, AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* SUPPORTING RESPONDENT

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INTEREST OF THE AMICI

The Center for National Security Studies is a nongovernmental, nonprofit civil liberties organization that works to ensure that government actions undertaken in genuine pursuit of national security interests do not have the effect of violating the rights of individuals or undermining constitutional government. Since 1975, the Center has worked to secure the public's right to know about foreign policy and national defense matters.[1]

The National Security Archive is an independent research institute and library located at the George Washington University. The Archive collects and publishes declassified documents obtained through the Freedom of Information Act concerning United States foreign policy and national security matters. Through litigation and public advocacy, it also works to defend and expand public access to government information.

The Federation of American Scientists (FAS), which was founded in 1945 by Manhattan Project scientists to promote nuclear arms control, is a national organization of 2,000 scientists and engineers including 57 Nobel laureates. FAS today conducts policy research and advocacy on a range of national security policy issues. In the course of its activities, FAS depends upon reliable access to government information and routinely utilizes the Freedom of Information Act.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles embodied in the Bill of Rights. The ACLU has been deeply involved, since its founding in 1920, in the clash between government claims of national security and the people's right to know what their government is doing. At times, that clash takes the form of direct government restraints on speech; in other cases, it centers on government efforts to restrict access to information that is presumptively public. The ACLU has appeared before this Court on numerous occasions to help resolve that conflict.

SUMMARY OF ARGUMENT

As demonstrated in Respondent's brief, the showing made by the government to justify its withholding of information under Exemption 1 to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, was in contravention of the plain terms of a controlling Executive Order. Because this ground is sufficient for affirmance of the court of appeals' decision, there is no reason for the Court to address either the proper standard of review in Exemption 1 cases or the government's sweeping claims concerning separation of powers in the realm of foreign affairs.

If the Court nevertheless chooses to address these issues, it should reject the government's claim that Congress intended to adopt an "utmost deference" standard of review under Exemption 1 of FOIA. The language of FOIA expressly requires "*de novo*" review and the legislative history of FOIA makes clear that Congress intended this review to be searching and independent.

FOIA's provision for *de novo* review creates no separation of powers problem. Congress' concurrent power over national security and foreign affairs information is well established and contradicts the government's sweeping claim

that the executive has plenary and exclusive control in this area. The Constitution also imposes no general disability on the judiciary in cases affecting the Nation's foreign relations. Rather, in such cases, courts retain their authority and responsibility independently to review the executive's "foreign affairs" and "national security" claims.

Finally, the Court should not overlook the fact that Congress in enacting FOIA and the President in issuing the current Executive Order set a standard of openness for the United States government. This standard exemplifies this Nation's most basic values and traditions and allows the United States to be a model of openness for the rest of the world. The position taken by the government in this case threatens both.

ARGUMENT

I. THE COURT SHOULD DECLINE THE GOVERNMENT'S INVITATION TO ADDRESS CONSTITUTIONAL ISSUES NOT CLEARLY PRESENTED.

Although the government devotes the majority of its brief to constitutional argument over the separation of powers, the court of appeals' decision simply does not pose a constitutional problem. As Respondent demonstrates in his brief, the showing made by the agency in this case was inadequate under the plain terms of the Executive Order issued by President Clinton, Exec. Order No. 12,958, 3 C.F.R. 333 (1996), Pet. App. 66a-111a ("Clinton Order"). Accordingly, there is no occasion for the Court to consider whether government affidavits are entitled to "utmost deference" under FOIA or to explore the constitutional implications of *de novo* review. The government's attempt to use the Constitution as a tool to twist the meaning of FOIA is directly contrary to this Court's policy of not "pronounc[ing] upon the relative constitutional authority of Congress and the

Executive Branch unless it finds it imperative to do so." *American Foreign Service Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989).

Indeed, as detailed in Part III.A below, any decision in this case addressing the separation of powers between Congress and the President in the area of foreign affairs will potentially affect a wide variety of congressional enactments that currently strike a balance between the political branches in the management of national security information. Rather than enter this thicket unnecessarily, the Court should decline to address the government's constitutional claims.

II. THE GOVERNMENT'S PROPOSED "UTMOST DEFERENCE" STANDARD CONTRADICTS THE LANGUAGE AND LEGISLATIVE HISTORY OF FOIA.

The government argues that when Congress amended the Freedom of Information Act in 1974, it adopted President Ford's position that courts should uphold a classification decision if there is any "reasonable basis to support it." Pet. Br. 46. This argument, unsupported by the text and legislative background to the amendments, is nothing less than an attempt to rewrite history.

The plain language of FOIA states that when reviewing an agency's non-disclosure determination, "the court shall determine the matter de novo" and "the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B). In *EPA v. Mink*, 410 U.S. 73 (1973), this Court interpreted Exemption 1 (as originally enacted) narrowly, ruling that FOIA did not permit *in camera* inspection of documents containing national security information and thus did not authorize the review of classified documents to separate non-secret material for disclosure. Congress reacted promptly, specifically amending FOIA to override the *Mink* decision. In addition to providing for *in camera* inspection, Congress

also amended the statute to specify that materials may be withheld only if they "are in fact properly classified pursuant to [an] Executive Order." 5 U.S.C. § 552(b)(1)(B).

In vetoing the 1974 FOIA amendments, President Ford wrote that under those amendments, if a judge found both the government's and the plaintiff's positions to be reasonable, the government would not have met its burden. His veto message proposed that Congress instead provide that an agency decision be upheld if there is any "reasonable basis to support it." Message from the President Vetoing H.R. 12,471, H.R. Doc. No. 93-383, 93d Cong., 2d Sess., at (III) (1974). Congress responded by overriding the President's veto by a supermajority vote. There is no way to characterize this legislative override as Congress accepting the President's proposed standard.[2]

As the government has noted, the House and Senate conferees on the 1974 FOIA amendments stated their expectation that courts would in practice accord "substantial weight" to an agency affidavit explaining why disclosure of a document might damage national security. On this snippet of legislative history rests the government's argument that

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[2] The government's out-of-context quotation from Representative Moorhead does not support their claim. Pet. Br. 45. It is clear from the full quote that Representative Moorhead was responding to the President's statement that "the courts would consider all attendant evidence" in assessing the classification, and was not addressing the substantive standard the President proposed. House Action and Vote on Presidential Veto, 93d Cong., 2d Sess. (1974), *reprinted in* Senate Committee on the Judiciary and House Committee on Government Operations, *Freedom of Information Act and Amendments of 1974 (P.L. 93-502): Source Book* 405 (1975) ("Source Book") ("[I]n the procedural handling of [FOIA] cases . . . this is exactly the way the courts would conduct their proceedings.") (Rep. Moorhead).

Congress required that judges accord "utmost deference" to the government in Exemption 1 cases.[3]

The conferees' expectation, however, was not a requirement, and no change was made to the standard of *de novo* review. It is fundamental that such legislative history cannot override the plain language of a statute.[4] The conferees were simply stating their belief that courts would give substantial weight, not deference, to detailed government affidavits in the same way that any finder of fact may give substantial weight to evidence that it finds persuasive from knowledgeable or expert witnesses. The proponents of *de novo* review in Congress stressed "the need for an objective, independent judicial determination, and insisted that judges could be trusted to approach the national security determinations with common sense, and without jeopardy to national security." *Ray v. Turner*, 587 F.2d 1187, 1194 nn.18-19 (D.C. Cir. 1978) (per curiam) (citing statements by Senators Muskie, Ervin, and Chiles).[5] The conference committee, by stating its expectation regarding substantial weight, "countered th[e] image [of judges making reckless disclosures] by registering its anticipation that rational judges conducting de novo reviews would naturally be impressed by any special knowledge, experience, and reasoning demonstrated by agencies with expertise and responsibility in matters of defense and foreign policy." *Id.* at 1213 (Wright, C.J., concurring). Congress therefore "soundly rejected" the contention that judges were unqualified to review classifications and "refused to create a presumption in favor of agency classifications or to retreat from full *de novo* review." *Id.* at 1210 (Wright, C.J., concurring).

The courts of appeals have repeatedly noted the importance of the *de novo* standard in properly applying the FOIA exemptions, including Exemption 1. "De novo review was deemed essential to prevent courts reviewing agency action from issuing a meaningless judicial imprimatur . . . ." *A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 141 (2d Cir. 1994); *see also Halpern v. FBI*, 181 F.3d 279, 288 (2d Cir.

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[3] With regard to Exemption 1 in particular, the Conference Report expressly stated that the 1974 Amendments were intended to override *Mink* by allowing *in camera* inspection of documents by the court "as part of their de novo determination." S. Rep. No. 1200, at 12. It then stated that:

> [T]he conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making de novo determinations in section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.

Id.

[4] *See, e.g., Conroy v. Aniskoff*, 507 U.S. 511, 518 (1993) (Scalia, J., concurring) ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators.").

[5] Indeed, Senator Muskie, in successfully arguing against the President's "reasonableness standard," stated that "by giving classified material a status unlike that of any other claimed Government secret, we foster the outworn myth that only those in possession of military and diplomatic confidences can have the expertise to decide with whom and when to share their knowledge." Source Book at 305. Similarly, in the House debate, Representative Moss, the primary author of the original 1966 FOIA, opined that the qualities needed to assess whether a classified document met the requirements of an executive order were "intelligence, sensitivity, commonsense and an appreciation for the right of the people to know what their Government is doing and why." *Id.* at 257. He was fully confident that the judiciary had these qualities, and could make those assessments. *Id.*

1999) (rejecting, in Exemption 1 context, more deferential standard and applying *de novo* review as more consistent with FOIA). The judicial role in reviewing the government's classification decision is crucial in Exemption 1 cases, in which the adversary process is necessarily diminished because the plaintiff lacks access to the classified materials at issue and often lacks the information necessary to challenge the government's decision. *See id.* at 290; *McDonnell v. United States*, 4 F.3d 1227, 1241 (3d Cir. 1993). Given the inherent limitations on advocacy in Exemption 1 cases, adopting the "utmost deference" standard would reduce judicial proceedings to little more than a formality, and thus contravene the clear intent of Congress.

III. THE CONSTITUTION DOES NOT MANDATE "UTMOST DEFERENCE" TO AN AGENCY'S INVOCATION OF EXEMPTION 1.

A. Congress Has The Constitutional Authority To Subject Agency Determinations Under FOIA Exemption 1 To *De Novo* Review.

In Exemption 1 and in FOIA more generally, Congress sought "to balance the public's needs for access to official information with the Government's need for confidentiality." *Weinberger v. Catholic Action*, 454 U.S. 139, 144 (1981). In striking that balance, Congress placed only modest restraints on the executive's management of national security information. FOIA Exemption 1 permits the President to determine in an Executive Order what criteria govern the classification and release of such information and requires only that executive agencies abide by that order. Nevertheless, the government seeks to undo even these limited measures by arguing that the President's constitutional authority over foreign affairs requires a standard of "utmost deference" that would, in effect, prevent a court from ever ordering the release of information that the

executive asserts should be withheld under Exemption 1.[6] Although the government warns of the constitutional implications of enforcing Exemption 1 as written, a holding that the executive branch is not bound by even the slight restrictions contained in Exemption 1 would present far graver constitutional difficulties.

1. Congress And The President Share Responsibility For Foreign Affairs.

The government grounds its theory of "plenary and exclusive" executive control over foreign affairs principally on Justice Sutherland's opinion in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). Despite *Curtiss-Wright's* sweeping rhetoric, that case did not hold that Congress was ousted from the realm of foreign policy. As Justice Jackson observed, *Curtiss-Wright* "intimated that the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636 n.2 (1952) (Jackson, J. concurring) ("*Steel Seizure Case*"). Indeed, that case focused not on the President's foreign affairs powers, but on an unsuccessful challenge to the delegation by Congress of some of *its* foreign affairs powers to the executive. "Much of [Justice Sutherland's opinion] is *dictum*." *Id.*

It is well settled that the President does not possess exclusive authority over matters touching on the Nation's foreign relations. Rather, this power is shared with

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[6] *See.* Pet. Br. 37 (asserting the "inappropriateness of courts superintending Executive Branch judgments about the need to preserve the confidentiality of communications bearing on national security"); *id.* at 38 (adverting to "President's *singular* authority to maintain secrecy") (emphasis added).

Congress. As Justice Jackson's much-quoted concurrence in the *Steel Seizure Case* instructs, the President's foreign affairs powers "are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." *Id.* at 635 (Jackson, J., concurring). In a famous passage, Justice Jackson described the interplay of executive and legislative power in this field:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Id. at 637-38 (footnote omitted) (Jackson, J., concurring). Justice Jackson concluded that President Truman's attempt to seize the steel mills was, in fact, incompatible with the congressional will and that neither the constitutional clause vesting the executive power in the President nor the clause making him Commander-in-Chief conferred on the President the authority to defeat this expression of congressional policy. *Id.* at 655 (Jackson, J., concurring).

The government's assertion that the courts must accord the President's classification decisions "utmost deference" despite FOIA's clear command to the contrary urges action that is undoubtedly "incompatible with the expressed or implied will of Congress." *Id.* at 637. The government's position therefore cannot be sustained unless (1) Congress is constitutionally disabled from acting in this important field, or (2) Exemption 1 "'impermissibly undermine[s]' the powers of the Executive Branch, . . . or 'disrupts the proper

balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions.'" *Morrison v. Olson*, 487 U.S. 654, 695 (1988) (citations omitted; alterations in *Morrison*).[7] Neither proposition is true.

Although the Constitution does not expressly allocate control over information pertaining to foreign affairs or national security to either the executive or legislative branch, it is clear that Congress possesses significant authority in this area. First, the Senate plays a key foreign policy role in advising on and consenting to treaties and in confirming the appointment of ambassadors. U.S. Const. art. II, § 2, cl. 2. Second, the Framers enumerated multiple powers that Congress enjoys in the realm of foreign relations, including broad authority to "regulate Commerce with foreign nations" (cl. 3) and the power "to make Rules for the Government and Regulation of the land and naval forces" (cl. 14), a grant broad enough to include authority to regulate the government's sensitive national security information. U.S. Const. art. I, § 8.[8] Third, Congress is the repository of all the federal government's legislative powers, including the power to "make all Laws" that are "necessary and proper" to carry

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[7] The government devotes several pages to the potential disclosure of intelligence sources and methods, but Congress has categorically exempted such information from disclosure under Exemption 3. *See Central Intelligence Agency v. Sims,* 471 U.S. 159, 181 (1985).

[8] Article I, section 8 of the Constitution also vests Congress with authority to "provide for the common Defence" (cl. 1), "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations" (cl. 10), "declare War" (cl. 11), "raise and support Armies" (cl. 12), and "provide and maintain a Navy" (cl. 13). Congress' appropriations power, *id.* art. I, § 9, cl. 7, also gives it substantial authority in the area of foreign policy.

out not only congressional powers but the powers of the United States government generally.[9]

Finally, the Court in *Mink* expressly recognized that Congress shares power over foreign affairs information when it stated that "Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures [governing the disclosure of national security information under FOIA Exemption 1] – subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering." 410 U.S. at 83; *see also Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977) ("[T]he regulation and mandatory disclosure of documents in the possession of the Executive Branch. . . . has never been considered invalid as an invasion of [executive] authority.").[10]

This Court has never held that the executive has plenary power over information pertaining to foreign affairs. In each of the cases on which the government relies, the executive action in question was taken either pursuant to, or in the absence of, congressional legislation.[11] The decisions neither

[9] This Court has long recognized that an indispensable adjunct to Congress' power to legislate is its power to investigate. *See Barenblatt v. United States*, 360 U.S. 109, 111 (1959); *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927). The government's argument that the executive has plenary control over national security information would, if accepted, eviscerate Congress' power of investigation in a constitutionally-recognized area of vital legislative concern.

[10] Executive privilege extends only to "high-level communications" between the President and "close advisors." *United States v. Nixon*, 418 U.S. 683, 703, 706 (1974).

[11] *See Sims*, 471 U.S. at 168-70 ("Congress intended to give the Director of Central Intelligence broad power to protect the secrecy and integrity of the intelligence process."); *Haig v. Agee*, 453 U.S. 280, 289, 306 (1981) ("The principal question before us is whether

hold nor intimate that the President can refuse to disclose foreign affairs information in the face of a contrary expression of congressional will. Typical in this regard is *Department of Navy v. Egan*, 484 U.S. 518 (1988), which held that the Merit Systems Protection Board, in reviewing the termination of a Navy employee, did not have the statutory authority to review an agency's revocation of a security clearance. Thus, not only was the conflict in *Egan* within the executive branch (between the Navy and the Board), the question was one of *statutory interpretation* rather than Executive prerogative.

The government relies on dicta in *Egan* for the "utmost deference" standard it now urges on the Court. *See* Pet. Br. 16. However, in language not quoted in the government's brief, the Court explicitly acknowledged that judicial deference gives way when Congress "specifically provides otherwise." *Egan*, 484 U.S. at 530. That is precisely what Congress did in Exemption 1.

This Court has never struck down on separation of powers grounds an Act of Congress that did not violate a specific provision of the Constitution.[12] The constitutional test in the absence of such an explicit textual commitment of authority to the executive is whether Congress has

[the Passport Act] authorizes" the Secretary of State to revoke a citizen's passport on national security grounds; concluding Congress had approved the Secretary's authority to do so); *Chicago & Southern Air Lines v. Waterman S.S. Corp*, 333 U.S. 103 (1948) (Congress did not intend to grant judicial review of orders of the Civil Aeronautics Board denying citizen carriers' applications to engage in overseas and foreign air transportation).

[12] *See, e.g., Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 946-59 (1983) (violating bicameralism and presentment); *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (appointments clause).

impermissibly intruded on the President's authority or prevented him from accomplishing his constitutionally assigned duties. The government cannot reasonably claim that Exemption 1 does either. Although Congress has broad authority to legislate requirements concerning national security information, the limitations it has placed on executive discretion in FOIA Exemption 1 are quite modest. Congress requires only that the President adhere to his own Executive Order. Put simply, Exemption 1's *de novo* standard of review falls well within the constitutional powers of Congress.[13]

2. Congress Has Repeatedly Exercised Its Constitutional Authority Over The Management And Disclosure Of National Security Information.

The government further argues that Congress has "acquiesced" in the President's exercise of plenary control over national security information. Pet. Br. 20-21. Contrary to the government's flawed historical account and as constitutional scholars have detailed, Congress has vigorously resisted the President's efforts to withhold information pertaining to foreign affairs since the very founding of the Nation.[14] The government's claim is most

[13] *See Morrison*, 487 U.S. 654 (upholding independent counsel statute because it was a modest restriction on executive authority); *Administrator of General Services*, 433 U.S. at 443; *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (Marshall, J.) (holding executive action subject to congressional regulation even during undeclared war).

[14] *See generally* Raoul Berger, *Executive Privilege: A Constitutional Myth* 163–208 (1974); Stephen W. Stathis, *Executive Cooperation: Presidential Recognition of the Investigative Authority of Congress and the Courts*, 3 J. L. & Pol. 183 (1986).

clearly rebutted by the 1974 Amendments to FOIA themselves, which were passed by a supermajority over President Ford's veto.

Far from being unique, Exemption 1 is but one of many instances in which Congress has required the executive branch to disclose national security information to either the legislature or the public. Congress has, for example, created an elaborate statutory structure for the oversight of intelligence agencies, a central element of which is the requirement that the President and the Director of Central Intelligence keep Congress, through its Intelligence Committees, fully and currently informed of all intelligence activities. *See* Intelligence Oversight Act, 50 U.S.C. § 413 (1991). Congress, moreover, has adopted rules whereby each House may, even over the President's objection, declassify and publicly release classified information originating in the executive branch. S. Res. 400, 94th Cong.; House Rule XLVIII, 106th Cong. Congress has passed several statutes limiting the restraints the executive branch may impose on employees granted access to national security information.[15] Congress also has legislated explicit declassification standards for certain categories of information narrower than those specified in the governing Executive Order.[16]

[15] *See* Continuing Resolution for Fiscal Year 1988, § 630, 101 Stat. 1329-432 (1987) (prohibiting the expenditure of funds for executive employee secrecy agreements that forbid employees from revealing "classifiable" information) (considered in *Garfinkel*, 490 U.S. 153 (1989)); Omnibus Consolidated Appropriations Act 1997, § 625, 110 Stat. 3009-59 (1996) (requiring that secrecy agreements signed by employees with access to classified information state on their face that the agreements do not supersede or alter the right of employees to furnish information to Congress).

[16] President John F. Kennedy Assassination Records Collection Act of 1992, 106 Stat. 3443 (1992) ("[L]egislation is necessary

In short, far from acquiescing in presidential control of national security information, Congress has asserted its constitutional authority in this area on countless occasions and in numerous ways. Acceptance of the government's view of exclusive executive authority would cast a long shadow over myriad congressional enactments and would severely disrupt the equilibrium between the political branches.

B. The Constitution Does Not Mandate That The Judiciary Afford "Utmost Deference" To Executive Branch Classification Decisions.

Lacking any textual basis in the Constitution for its "utmost deference" standard, the government resorts instead to arguments regarding institutional competence. Pet. Br. 21-27. Because judges are not "expert" in foreign affairs and because the field is complex, the government contends that, in "foreign affairs" cases, the courts' statutory and constitutional jurisdiction is trumped by executive power. Although the government concedes that the judiciary is not so incompetent as to be excluded from hearing Exemption 1

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because the Freedom of Information Act, as implemented by the executive branch, has prevented the timely public disclosure of records relating to the assassination of President John F. Kennedy"); *see also* Nazi War Crimes Disclosure Act, 112 Stat. 1859 (1998) (requiring release of Nazi war criminal records subject to statutorily prescribed exceptions); Foreign Relations of the United States Historical Series Act, 22 U.S.C. § 4351 (Supp. 1999) (requiring that "all records needed to provide a comprehensive documentation of the major foreign policy decisions and actions of United States Government" be declassified for inclusion in the State Department's public "Foreign Relations" series subject to statutorily prescribed exceptions).

cases entirely, *id.* 12, 46, it nevertheless advocates a standard that would, in practice, render judicial proceedings little more than a rubber stamp. As elaborated below, the Constitution permits – and indeed requires – that courts take on a much more meaningful role.

In *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221 (1986), the petitioners urged that certain decisions by the Secretary of Commerce deserved utmost deference – and indeed were "unsuitable for judicial review" – simply "because they involve[d] foreign relations." *Id.* at 229. The Court's holding rejecting this argument bears quoting at length:

> As *Baker* [*v. Carr*] plainly held, . . . the courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts. . . . *We are cognizant of the interplay between these Amendments and the conduct of this Nation's foreign relations, and we recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.*

Id. at 230 (emphasis added). *Japan Whaling* makes it clear that the mere fact that a case arises in the foreign affairs context does not change the court's basic chore or diminish its basic competence.

Courts routinely entertain cases that have far-reaching implications for the Nation's foreign relations without "transgress[ing] . . . the proper boundaries of judicial

review," Pet. Br. 29.[17] Indeed, the Constitution explicitly commits to the federal courts several categories of cases that inevitably have foreign affairs ramifications: "Cases . . . arising under . . . Treaties"; "all Cases affecting Ambassadors, other public Ministers and Consuls"; "all Cases of admiralty and maritime Jurisdiction"; and "Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. art. III, § 2, cl. 1.[18] As the Court has emphasized, despite "sweeping statements" in the case law about the courts' competence to address "questions touching foreign relations," "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, 369 U.S. 186, 211 (1962); *accord Goldwater v. Carter*, 444 U.S. 996, 999-1000 (1979) (Powell, J., concurring).

In arguing to the contrary, the government principally relies on dicta from *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948). *See* Pet. Br. 21-22. That case did not test the constitutional bounds of the judiciary's role in foreign affairs. Rather *Waterman* turned

[17] Even routine cases may implicate foreign relations. "[I]n our 'one world' in trade, finance and communication; in an age where every occurrence may be known elsewhere, instantly – any case in any court in the United States might become grist for transnational mills and become of interest to U.S. foreign relations." Louis Henkin, *Foreign Affairs and the United States Constitution* 133 (2d ed. 1996).

[18] Indeed, the Framers committed these cases to the jurisdiction of the federal courts in large part *because* these cases had the potential to affect the United States' external relations. *See The Federalist No. 80*, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.").

on the proper construction of the Civil Aeronautics Act. In that statute, Congress explicitly excepted from judicial review "any order in respect of any *foreign* air carrier subject to the approval of the President as provided in section 801 of this Act." *Waterman*, 333 U.S. at 106 (emphasis added). The statute also required presidential approval of orders relating to *domestic* air carriers engaged in "overseas or foreign air transportation," *id.*, but said nothing specific about judicial review of such orders. The Court found that Congress nevertheless intended to preclude judicial review for both types of orders primarily because the administrative process under the statute included no mechanism for the President to explain the reasons for his actions regarding either category of order. *Id.* at 110-11. It was in this context that the Court observed the *practical*, not necessarily constitutional, limits that underlay *Congress'* decision to preclude review.

FOIA could not present a more distinct case. First, there is absolutely no ambiguity in FOIA's judicial review provisions. Second, the *Waterman* Court worried that the judiciary would be asked to act on orders subject to presidential approval "without the relevant information," *i.e.* without any expression of the President's rationale. *Id.* at 111. FOIA allows for – and indeed requires – full communication between the executive and the court considering an Exemption 1 claim. Third, under the statute at issue in *Waterman* courts could not "sit *in camera* in order to be taken into executive confidences." *Id.* The 1974 Amendments to FOIA make such proceedings possible. Thus, the broad dicta in *Waterman* does not suggest that any problem of constitutional dimensions is present in this case.

The Court's approach to an analogous situation involving "foreign affairs" and "national security" claims is instructive. In considering executive claims of an evidentiary privilege for "national security" or "diplomatic" materials, the Court has refused to give the executive *carte blanche*. Rather, the

court has affirmed the competence and responsibility of the judiciary to scrutinize claims of a threatened national security harm – and if necessary to review the "secret" documents. In so holding, the Court has stressed that this review should be an independent judicial function. In the leading case regarding the state secrets privilege, this Court stressed that "*[t]he [district] court itself* must determine whether the circumstances are appropriate for the claim of privilege," "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers" even when that evidence relates to foreign affairs. *United States v. Reynolds*, 345 U.S. 1, 8-10 (1993) (emphasis added).

Nor has the Court accepted the government's contention that courts are somehow constitutionally or inherently incapable of grasping the executive's "foreign affairs" and "national security" positions. *See* Pet. Br. 24-25, 27. In *United States v. United States District Court (Keith)*, 407 U.S. 297 (1972), the Court confronted the issue of whether the government was required to obtain a warrant to perform so-called "national security" surveillance. In urging that a warrant was not required, the government, as in this case, "insist[ed] that courts 'as a practical matter would have neither the knowledge nor the techniques necessary . . . to protect national security.' These security problems, the Government contend[ed], involve 'a large number of complex and subtle factors' beyond the competence of courts to evaluate." *Id.* at 319 (quoting Reply Brief for the United States). The Court, however, pointedly rejected "the Government's argument that internal security matters are too subtle and complex for judicial evaluation." *Id.* at 320. As Justice Powell explained, "Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in [these] cases." *Id.* In fact, the Court has recognized that review of the executive's claims by "a 'neutral and detached magistrate'"

is particularly important in contexts implicating national security. *Id.* at 316 (citation omitted).

Congress evidently shares both Justice Powell's confidence in the competence of the courts to evaluate "foreign affairs" and "national security" evidence under FOIA and his recognition of the importance of neutral judicial review of the executive's decisions in these fields. Supporters of the 1974 FOIA Amendments "stressed the need for an objective, independent judicial determination, and insisted that judges could be trusted to approach the national security determinations with common sense, and without jeopardy to national security." *Ray*, 587 F.2d at 1194. Senator Chiles agreed, emphasizing not only the courts' competence, but their independence:

> We say that four-star generals or admirals will be reasonable but a Federal district judge is going to be unreasonable. I cannot buy that argument, especially when I see that general or that admiral has participated in covering up a mistake, and the Federal judge sits there without a bias one way or another. I want him to be able to decide without blinders or having to go in one direction.

120 Cong. Rec. 17028 (1974) (Sen. Chiles), cited in *Ray*, 587 F.2d at 1194.

These authorities illustrate that, far from challenging the Constitution's separation of powers, the Court's insistence on judicial competence to decide cases even if they touch on foreign affairs or national security reflects and upholds a key aspect of that system – the independence of courts from domination by the executive. *See* 10 *Works of Thomas Jefferson* 404, n. (P. Ford ed., 1905) (letter of June 20, 1807, from President Thomas Jefferson to United States Attorney George Hay) ("The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the

judiciary."), quoted in *Clinton v. Jones*, 520 U.S. 681, 716 (1997). Reading FOIA and the Constitution to require the courts to afford "utmost deference" to whatever "foreign affairs" justification the executive branch offers constitutes an assault on that independence in its most basic form, one that the court below properly resisted by seeking more from the executive than a "one-size-fits-all" justification for its action in this case. In requiring the State Department to identify and describe damage to the national security as defined in the Clinton Order, the court of appeals was properly cognizant of the executive branch's foreign policy assessments. But the court could not, consistent with its own constitutional responsibilities, allow the government to turn FOIA's judicial review process into "a meaningless judicial imprimatur" for the government's foreign affairs decisions. *A. Michael's Piano, Inc.*, 18 F.3d at 141.

IV. MEANINGFUL JUDICIAL REVIEW DOES NOT THREATEN UNITED STATES FOREIGN POLICY AND IS ESSENTIAL TO PROTECT OTHER VALUES.

The government argues that the judiciary cannot be trusted to review agency classifications *de novo* because foreign governments believe that government secrecy in the United States is ironclad, and the mere possibility of a court disclosing information deemed secret by the executive will seriously undermine foreign policy. This argument strains credibility on two levels. Our society places a premium on government openness, so foreign governments communicating with the United States cannot reasonably expect total secrecy. Moreover, government openness facilitated by meaningful judicial review both checks executive abuses of power and fosters an informed citizenry at home and has been an important U.S. foreign policy objective in its own right.

The notion that foreign governments realistically expect the executive branch to provide absolute secrecy for all inter-governmental communications is untenable. Since Congress amended FOIA in 1974, foreign governments have been on notice that United States courts might order the release of such information. Moreover, the Clinton Order makes clear that no presumption of secrecy attaches to foreign government communications, even when confidentiality is expected. *Compare* Clinton Order, §§ 1.2(a)(4), 1.5(b), *with* Exec. Order 12,356, 3 C.F.R. § 1.3(a)(3) (1983).

Foreign governments are also surely aware of the frequent leaks, both authorized and unauthorized, of foreign affairs information by executive branch officials. *See* Secrecy, Report of the Commission on Protecting and Reducing Government Secrecy, S. Rep. No. 103-105-2 at A-3. (1977) ("Classified documents are routinely passed out to support an administration; weaken an administration; advance a policy; undermine a policy."). Recent newspaper articles, for example, discuss in detail communications between President Clinton and Prime Minister Blair concerning the targeting of specific sites and military campaigns in Kosovo.[19] When national newspapers already have access to such high-level communications regarding military secrets, it is entirely unrealistic to suggest that

[19] *See, e. g.*, Dana Priest, *Bombing by Committee: France Balked at NATO Targets*, Wash. Post, Sept. 20, 1999 at A1 (detailing the contents of a target selection document from the air campaign in Kosovo circulated to President Clinton, Prime Minister Tony Blair of Great Britain, and President Jacques Chirac of France; the article also reports the contents of long conversations between the three leaders over target selection); Dana Priest, *The Battle Inside Headquarters: Tension Grew with Divide over Strategy*, Wash. Post, Sept. 21, 1999 at A1 (analyzing the conversations conducted over top-secret video-conference by the military leaders in the Kosovo war, including General Wesley Clark, chief of NATO forces).

foreign governments have any expectation of confidentiality that will be seriously undermined by the mere possibility of judicially-ordered disclosures of government-to-government communications.

In support of its claim that dire consequences will result from court-ordered disclosure, the government relies principally on a 1971 statement by then-Secretary of State William Rogers regarding comments by certain foreign diplomats with respect to publication of the Pentagon Papers at issue in *New York Times v. United States,* 403 U.S. 713 (1971). The example of the Pentagon Papers, however, demonstrates how unrealistic are the government's claims. Secretary Rogers' concerns were not borne out. The Solicitor General who argued that very case, with the benefit of nearly twenty years' hindsight, concluded those concerns were unjustified: "I have never seen any trace of a threat to the national security from the publication. I have never even seen it suggested that there was such an actual threat." Erwin N. Griswold, *Secrets Not Worth Keeping,* Wash. Post, Feb. 15, 1989, at A25.

The government's brief pays scant attention to the values furthered by promoting freedom of information.[20] Indeed, the government's suggestion that under the Clinton Order disclosure of government-to-government communications should generally be limited to "routine scheduling information or congratulatory/condolence messages from certain governments," Pet. Br. 34, stands in stark contrast to the government's recognition before other audiences that

[20] The Senate Report on the 1974 Amendments stated: "Since the First Amendment protects not only the right of citizens to speak and publish, but also the receive information, freedom of information legislation can be seen as an affirmative congressional effort to give meaningful content to constitutional freedom of expression." Source Book at 154.

FOIA implements a basic human right. In a 1994 report to the United Nations on the state of human rights and freedoms in this country required under the International Covenant on Civil and Political Rights, the U.S. Department of State reported that "Freedom of speech []encompasses certain rights to seek and receive information .... This constitutional right has been supplemented by a number of laws promoting access to government, such as the Freedom of Information Act."[21]

The United States has long recognized the value of openness in government. As James Madison famously pronounced, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. . . . And a people who mean to be their own Governors must arm themselves with the power which knowledge gives." *The Writings of James Madison* 103 (G. Hunt ed., 1910). Although accommodations to the concerns of foreign countries are no doubt appropriate in many instances – and the executive will have the opportunity to explain the reasons for such accommodation in any future FOIA case – there is no legal justification for presuming that United States information policy must automatically fall to the level of any country with which it deals.

[21] Civil and Political Rights in the United States, Initial Report of the United States of America to the United Nations Human Rights Committee under the International Covenant on Civil and Political Rights, July 1994, at 157.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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