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,
Respondent.

BRIEF OF THE RESPONDENTS

Filed November 19, 1999

This is a replacement cover page for the above referenced brief filed at the U.S. Supreme Court. Original cover could not be legibly photocopied

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE MATERIALS

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER MATERIALS

TABLE OF AUTHORITIES – Continued

STATEMENT

1. The Freedom of Information Act ("FOIA"), 5 U.S.C. § 522, was originally enacted in 1966 as an amendment to Section 3 of the Administrative Procedure Act. *See* Pub. L. No. 89-487, § 3, 80 Stat. 250, 251 (1966). As this Court has recognized many times, FOIA's "basic purpose reflected 'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.' " *Department of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)). Because "disclosure, not secrecy, is the dominant objective of [FOIA]," *id.* at 361, the exemptions to disclosure contained in the statute are to be narrowly construed. *See Department of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) ("Consistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass.") (citations omitted). It is also common ground (except apparently for the government's opening brief in this case) that the government bears the burden of proof in justifying the invocation of any exemption. *See Department of State v. Ray*, 502 U.S. 164, 173 (1991) ("[T]he strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents.") (citations omitted). Courts do not accord any deference to agency decisions to withhold information from the public; rather, the statute specifically provides that "the court shall determine the matter de novo." 5 U.S.C. § 552(a)(4)(B); *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755-56 (1989).

2. FOIA contains nine specific exemptions from the general duty of disclosure it imposes. 5 U.S.C. § 522(b)(1)-(9). Section 552(b)(1), known as Exemption 1, allows for the withholding of matters whose secrecy is necessary in the interest of national security and foreign policy. Exemption 1 is unique among the nine exemptions in that authority to establish the criteria for withholding information is assigned to the unfettered discretion of the Executive. Under this scheme, neither Congress nor the federal courts

may intrude upon the Executive's decisions regarding what categories of material are, or more aptly in this case, are not, to be classified in the name of national security.

Various Administrations have, through executive order, struck differing balances between the need for government secrecy and for the free flow of information regarding government activities. The first executive order prescribing a classification system for government secrets was promulgated by President Franklin D. Roosevelt in 1940. Exec. Order No. 8381, 3 C.F.R. § 634 (1941). In 1951, President Truman promulgated a comprehensive and highly restrictive regime for the protection of state secrets. Exec. Order No. 10,290, 3 C.F.R. § 789 (1951). President Truman's order was roundly criticized as too restrictive, and a succession of executive orders from President Eisenhower through President Carter gradually relaxed the standards for classification. *See* Mary M Cheh, *Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information*, 69 Cornell L. Rev. 690, 690 n.3 (1984). This trend culminated in President Carter's 1978 executive order that required classifying officials to point to "identifiable damage" to the national security from disclosure. That order also provided that any uncertainty as to disclosure should be resolved in favor of public access. *See* Exec. Order No. 12,065, 3 C.F.R. § 190 (1979) (hereinafter "Carter Order").

On April 2, 1982, President Reagan issued executive order No. 12,356, superseding the prior order promulgated by President Carter. Exec. Order No. 12,356, 3 C.F.R. § 166 (1983) (hereinafter "Reagan Order").[1] The Reagan Order significantly broadened the power of executive agencies to classify information pursuant to national security and foreign policy concerns. For example, it reestablished the presumption in favor of classification in the case of doubt, Opp. Cert. App. 3a, and it eliminated the requirement that a classifying

[1] The Reagan Order is reprinted in the Appendix to Respondent's Brief in Opposition to Certiorari ("Opp. Cert. App.") 1a-25a.

official point to "identifiable damage" from disclosure. *Id.* 7a. Most important here, the Reagan Order contained the following presumption: "Unauthorized disclosure of foreign government information, the identity of a confidential foreign source, or intelligence sources or methods *is presumed to cause damage to the national security*." *Id.* (emphasis added). The term "foreign government information" was defined to include "information provided by a foreign government or governments, an international organization of governments, or any element thereof, with the expectation, expressed or implied, that the information, the source of the information, or both, are to be held in confidence." *Id.* 24a.[2]

On April 17, 1995, President Clinton issued an executive order which reversed President Reagan's protective approach to national security information and went beyond even President Carter's executive order in discouraging classification and promoting disclosure. Exec. Order No. 12,958, 3 C.F.R. § 333 (1996) (hereinafter "Clinton Order").[3] Designed specifically to "emphasize our commitment to open Government," the Clinton Order reinstated the Carter Order's presumption in favor of disclosure rather than classification in the case of any uncertainty. Pet. App. 65a, 68a. The Clinton Order specifically eliminated the presumption that the release of diplomatic communications between governments would cause harm to the national security. Instead, for *all* classification decisions, the Clinton Order requires the original classification authority to be "able to identify or describe the damage"

[2] President Reagan's Executive Order was roundly criticized as overly protective by academics, *see generally* Cheh, *supra*; Anthony R. Klein, *National Security Information: Its Proper Role and Scope in a Representative Democracy*, 42 Fed. Com. L.J. 433 (1990), by the press, *see* Floyd Abrams, *The New Effort to Control Information*, N.Y. Times, Sept. 25, 1983, § 6 (Magazine), at 22-23, and by some members of Congress who proposed legislative intervention to reestablish the more open Carter regime. *See* S. 1335, 98th Cong., 1st Sess. § 3 (1983) (bill sponsored by Sen. Durenberger to amend Exemption 1 to reverse Reagan Order).

[3] The Clinton Order is reprinted in the Appendix to the Petition for Certiorari ("Pet. App.") 65a-111a.

to national security that would flow from disclosure. *Id.* 68a. Moreover, unlike the Reagan or Carter Orders, the Clinton Order adopted a specific (and limiting) definition of the grounds for classification. Section 1.1(l) of the Clinton Order defines "[d]amage to the national security" to mean "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.* 67a-68a.

President Clinton's signing statement, issued in conjunction with the new executive order, declared the President's intention "to bring the system for classifying . . . national security information into line with our vision of American democracy in the post-Cold War world." 31 WEEKLY COMP. PRES. DOC. 633 (Apr. 17, 1995); Opp. Cert. App. 26a-28a. The President noted that "[t]his order establishes many firsts: Classifiers will have to justify what they classify." *Id.* 27a. The statement makes particularly clear that the Clinton Order eliminates any categorical presumptions in favor of classification, and instead requires a particularized showing under its new, more demanding standards:

> [W]e will no longer tolerate the excesses of the current system. For example, we will resolve doubtful calls about classification in favor of keeping the information unclassified. . . . And, *we will no longer presumptively classify certain categories of information, whether or not the specific information otherwise meets the strict standards for classification.*

Id. (emphasis added).[4] Implementation of the Clinton Order, the President stated, "will greatly reduce the amount of

[4] Evidently, this new policy favoring disclosure over classification was not supported by all the affected agencies within the Executive Branch. *See, e.g.*, R. Jeffrey Smith, *CIA, Others Opposing White House Move to Bare Decades-Old Secrets*, Washington Post, Mar. 30, 1994, at A14.

information that we classify in the first place and the amount that remains classified." *Id.* 28a.

Several federal courts have already taken note of the new, significantly less restrictive classification standards of the Clinton Order. *See, e.g., Summers v. Department of Justice*, 140 F.3d 1077, 1082 (D.C. Cir. 1998) ("newer order is less restrictive"); *Halpern v. FBI*, 181 F.3d 279, 289 (2d Cir. 1999) (noting "more liberal standards of executive order 12,958"); *McErlean v. Department of Justice*, No. 97 Civ. 7831, 1999 U.S. Dist. LEXIS 15544, at *14 n.5 (S.D.N.Y. Sept. 30, 1999) ("[N]ewer order is less restrictive, reflecting the dramatic changes in national security concerns in the late 1980s.") (citations omitted). Indeed, in this case, the Department of Justice actively litigated for application of the more restrictive standards of the Reagan Order. *See* Pet. App. 26a-27a. It is the interaction of the new, significantly more demanding standards for classification established by the Clinton Order with the disclosure requirements of FOIA that is at issue in this case.

3. Respondent Leslie R. Weatherhead is a lawyer in private practice in Spokane, Washington. Respondent represented Sally-Anne Croft, a British national, who was a member of the spiritual community in central Oregon led by Bhagwan Shree Rajneesh. In May 1990, Croft and another British citizen, Susan Hagan, were indicted by a federal grand jury in Oregon and charged with conspiracy to murder a federal officer and conspiracy to engage in the illegal interstate transportation of firearms. No attempt to carry out the conspiracy was ever made. Sometime after their indictment, the United States requested Croft's and Hagan's extradition from the British government. *See United States v. Croft*, 124 F.3d 1109, 1113-15 (9th Cir. 1997).

The United States' request for extradition was attended by considerable controversy in Great Britain. Many members of the House of Lords worried openly whether Croft and Hagan could receive a fair trial in Oregon in light of "the political scene within the State [of Oregon], and the prejudice (by no means confined to Oregon) against the cult of which the two ladies were members." H.L. Jour., June 6, 1994, at

1055 (Statement of Lord Pearson of Rannoch) (quoting letter of March 23, 1993 from Lord Scarman to the Secretary of State for Home Affairs, the Right Honorable Kenneth Clarke). In their affidavits in support of extradition, Department of Justice lawyers specifically reassured the British that any prejudice could be dealt with under American procedural law by a change of venue as well as other mechanisms to ensure an impartial petit jury. Pet. App. 2a-3a.

On or about July 28, 1994, Croft and Hagan were extradited from Great Britain to the United States. The British government extradited Croft and Hagan on the first count of the indictment, but did not authorize extradition on count two. As the Justice Department informed the court in its pleadings: "The Home Secretary did not, due to a lack of dual criminality, authorize the defendants' extradition for the crime charged in Count Two of the Indictment." United States' Response in Opposition to the Defendants' Motion to Dismiss at 9, *United States v. Croft, et al.*, Nos. CR 90-146-2 & CR 90-146-4 (D. Or.) (filed Oct. 31, 1994).[5] Thus, Croft and Hagan were tried only on the first count of the indictment.

Shortly after her first appearance, Croft requested a change of venue based on a widespread and pervasive prejudice against the Bhagwan Rajneesh and his "cult" throughout the District of Oregon. The government opposed Croft's request for a change of venue. In fact, despite the explicit assurances given to the British government, the federal prosecutors opposed even an evidentiary hearing to allow the defendants to present evidence of local prejudice against the Bhagwan's followers.

On November 16, 1994, respondent was informed in writing of the existence of a letter dated July 28, 1994, from the British Home Office to George Procter of the Department of Justice (hereinafter "Home Office letter"). *See* note 18, *infra*. Believing that the letter was relevant to the venue question, on November 29, 1994, respondent requested a copy

[5] We have lodged a copy of this government pleading in the criminal case with the Clerk of the Court.

of the letter under the authority of FOIA from both the Departments of Justice ("Justice") and the Department of State ("State"). Joint Appendix ("J.A.") 10-11. Despite repeated requests to both Justice and State, respondent received no definite response to his request for over one year. J.A. 12-28. In May 1995, Justice finally acknowledged its possession of the letter and referred respondent's request to State. *Id.* 26-27.

On August 4, 1995, State wrote to the British Embassy, asking for British concurrence to release the letter: "Before complying with this request, we would appreciate the concurrence of your government in the release of this document. Should your government wish to release only a part of this material, please indicate with brackets the portions you wish withheld." Opp. Cert. App. 29a. The British Government demurred because, in its view, "the normal line in cases like this is that all correspondence between governments is confidential unless papers have been formally requisitioned by the defence." *Id.* 30a. The British Government also indicated a more generic concern: "Our Library and Records Department would also be concerned about the precedent set by releasing even part of the letter since any such development would quickly become common knowledge amongst lawyers dealing with extradition matters." *Id.* 30a-31a.[6] Nothing in State's letter to the British or the British response identified anything about the content of this letter that justified classification.[7]

On November 17, 1995, respondent filed a complaint in federal district court for the Eastern District of Washington

[6] Apparently, this exchange of diplomatic communications between the United States and Great Britain, regarding respondent's FOIA request, was not subject to the same unswerving canon of diplomatic confidentiality that petitioners now claim clothes all government to government communications.

[7] The trial of Hagan and Croft began in the District of Oregon on June 27, 1995 and was concluded on July 28, 1995. Thus, the unexplained delays in responding to Weatherhead's FOIA request had the effect of precluding the possibility that the district court in the criminal case could consider the contents of the British letter in addressing the venue question.

under FOIA, seeking to compel Justice and/or State to produce the letter. J.A. 7-9. On December 11, 1995, over a year after respondent's initial FOIA request, State finally informed respondent that it had classified the letter. *Id.* 42-43. Again, nothing about the nature or content of the letter was cited to justify classification other than the British request that "it be protected as confidential information." *Id.* 43.

With this administrative background, on February 16, 1996, respondent moved for summary judgment. Petitioners produced a declaration from Mr. Peter M. Shiels, an administrative official in State's Office of Freedom of Information, Privacy and Classification Review. Pet. App. 48a-54a. The Shiels Declaration relied entirely upon diplomatic confidentiality as a grounds for classification. Thus, the declaration referenced "a general understanding among governments that confidentiality is normally to be accorded exchanges between governments." *Id.* 52a. The declaration also alluded to the subsequent British declination to authorize release of the document. *Id.* Mr. Sheils' Declaration concluded, "the Department of State classified the document Confidential to protect its confidential character as foreign government information." *Id.*

On March 29, 1996, the district court rejected the government's proffered justification for withholding the letter and granted summary judgment for respondent. *Id.* 29a-42a. The court noted that neither Justice nor State had treated the letter as confidential upon receipt and, in fact, "[n]either asserted an exemption until more than a year after [FOIA] request, and then only at the request of Great Britain." *Id.* 35a.

The court rejected the notion that general and conclusory representations regarding diplomatic confidentiality could satisfy the new standards of the Clinton Order. *Id.* 39a-40a. The court found that petitioners' rationale gave the foreign government a veto over FOIA disclosure, "thereby defeating the public policy of providing properly requested information." *Id.* 40a. Finally, the district court found that petitioners had not made an adequate showing of why certain portions of the letter were not segregable. *Id.* The court could not make

the required segregability findings because the Shiels Declaration did not provide adequate record facts to develop those findings. *Id.*

Petitioners filed a motion to alter or amend the judgment and to have the district court examine the letter in camera. The Kennedy Declaration, Pet. App. 55a-59a, was submitted as "new evidence" in support of that motion. *Id.* 22a-23a. The district court found that the Kennedy Declaration did little more than recite the same generalized concerns as the Sheils Declaration. *Id.*[8] Like the Sheils Declaration, the Kennedy Declaration relied upon "a 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." *Id.* 56a; *see also id.* 59a (citing "the expectation of the confidentiality of foreign government information and the explicit confirmation of that expectation by the British Embassy letter"). While not disputing that such a tradition existed, or that the British had invoked it here, the district court quite properly looked to the text of the Clinton Order itself:

> There may be historical practices and protocols in diplomatic circles supportive of defendants' position, and probably are. In recognition of that history, Congress could have shielded all materials either generated or held by [State] from FOIA disclosure, but chose instead to defer to the Executive Branch. The Executive Branch could have shielded all materials either generated or held by [State] from FOIA disclosure, and for all practical purposes did so in 1982 when EO 12356 [Reagan Order] was signed. In 1995, the current administration eliminated the presumption of harm found in former EO 12356 § 1.3(c) and now requires a showing of harm

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[8] In fact, as the district court noted, the Kennedy Declaration's references to State's letter of inquiry to the British government regarding Weatherhead's FOIA request cut against their claims of categorical confidentiality. State's letter strongly suggested that State intended to release the letter absent British protest. *See id.* 40a.

> on a case-by-case basis. EO 12958 § 1.2(a)(4) [Clinton Order]. This is a major shift in policy. Defendants might not view this evolution as prudent policy, but the answer is to direct their concerns to the President, not to ask courts to rewrite an executive order by inserting language the President pointedly deleted.

Id. 25a.

Despite the fact that the district court rejected petitioners' "new evidence" and further rejected their attempts to ignore or amend the text of the Clinton Order *pro tanto* through State Department declarations, the district court nonetheless granted reconsideration, inspected the letter in camera, and ordered the letter withheld. The district court was "unable to say why" the letter should be withheld, because, in its view, doing so would necessarily cause the harm sought to be avoided. *Id.* 27a. Nor did the district court cite any of the standards of the Clinton Order as a basis for reversing itself, *id.* 27a-28a, or make any specific findings as to segregability. *Id.*

The United States Court of Appeals for the Ninth Circuit reversed the district court's judgment and ordered the letter released under FOIA. Pet. App. 1a-20a. The court of appeals found, as the district court had, that both of the possible harms discussed in the Sheils and Kennedy Declarations – "damage caused by the act of disclosing a letter between foreign governments, regardless of its particular contents, and damage caused because the letter concerns international extradition proceedings," *id.* 10a – were insufficient as a matter of law under the standards established by the Clinton Order. The court of appeals reasoned that, under the Clinton Order, "it is clear that *all* information exchanged between foreign governments is not exempt from FOIA disclosure, not even all information that another government prefers to keep confidential." *Id.* 14a (emphasis in original). As the Ninth Circuit noted, the government was seeking essentially the same analysis as applied under the Reagan Order, arguing that harm to the national security should be presumed without any showing that disclosure of the specific information itself

could be injurious. Noting that the Clinton Order could have categorically shielded all diplomatic communication from disclosure under FOIA, the court of appeals emphasized that President Clinton specifically decided instead "to make it easier for the public to view material from foreign governments by eliminating the presumption of harm found in the prior Executive Order, Exec. Order 12356 § 1.3(c), and requiring the U.S. government to identify the particular damage that would result from releasing the information." *Id.*

Nor could the Ninth Circuit accept the proposition that extradition communications were categorically exempted from disclosure. The court noted that State had been willing to release the letter prior to British resistance and that the British Home Office itself had acknowledged a defense right to extradition letters upon proper request. *Id.* 15a. This record hardly supported a categorical exception to the Clinton Order for extradition letters.

The court of appeals conducted its own in camera review, and expressly accorded deference to the government's characterization of the letter and potential harms from release. *Id.* 17a. The court concluded:

> We have reviewed the letter *in camera*, and carefully considered its contents, including the "sensitivity, value and utility" of the information contained therein. Having done so, we fail to comprehend how disclosing the letter at this time could cause "harm to the national defense or foreign relations of the United States." The letter is, to use Mr. Kennedy's term, "innocuous." Even after giving the act of classification the deference to which it is entitled, we are compelled to conclude that disclosure of the letter pursuant to Weatherhead's FOIA request could not reasonably "be expected to result in damage to the national security."

Id. (citations omitted in original). Judge Silverman dissented. *Id.* 18a-20a. He found that the British insistence on confidentiality and the protocols recited by the Sheils and Kennedy declarations were sufficient to justify withholding the letter. *Id.* 18a-19a. Judge Silverman's dissent did not identify or

describe any specific harm flowing from the content of the letter, or dispute the majority's characterization of the letter itself as "innocuous."[9]

SUMMARY OF ARGUMENT

This is not, as petitioners would have it, a case about separation of powers. Rather, it is a case about the rule of law. Under Exemption 1 of FOIA, the Executive, in his sole discretion, establishes both the substantive and procedural criteria for classification. FOIA is completely indifferent to the balance struck by the Executive between open government and an informed citizenry on the one hand, and the secrecy necessary to effective management of the foreign relations and national security of the United States, on the other. The President retains plenary authority to provide that all diplomatic communications, or any category thereof, no matter how routine or innocuous, should be classified and remain so in perpetuity, thus maximizing fully candid diplomatic exchange. On the other hand, the President also remains free to adopt a document-specific approach, in which classifiers must point to and articulate certain specific harms threatened by disclosure of the specific information at issue – an approach that does not codify every diplomatic convention or foreign preference for secrecy. Under FOIA, the courts may not intrude upon the balance struck by the Executive. They are granted the more limited and quintessentially judicial task of ensuring that the Executive Branch follows its own, pre-established criteria for classification, thus vindicating a principle even older and more venerable than the separation of powers – the rule of law.

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[9] At oral argument in the court of appeals, Judge Silverman expressed the view that the content of the letter was innocuous. "I am not a diplomat, I don't know the intricacies of the geopolitical situation at the time, but I looked at the letter today and, honestly looking at it, I can't tell what it is that makes it top secret." Transcript of Oral Argument at 34, *Weatherhead v. United States*, No. 96-36260 (9th Cir. Apr. 8, 1998) (statement of Judge Silverman).

President Clinton has adopted a balance favoring disclosure over diplomatic secrecy in an executive order accompanied by representations of a new and unprecedented era of government openness permitted by the end of the Cold War. A presumption that disclosure of diplomatic communications would harm the national security, contained in both the Carter and Reagan Orders, was eliminated in favor of a requirement that the classifying authority identify and describe a particular harm threatened by disclosure of the specific information at issue. Under this new classification regime, neither the mere recitation of general canons of diplomatic confidentiality nor a particular preference for secrecy voiced by a foreign government can suffice. Such a result would simply resurrect the Reagan Order's presumption of harm in the guise of State Department affidavits. Such an approach also conflicts directly with the text and structure of the Clinton Order, which provides, by definition, that all "foreign government information" is exchanged in confidence, *but still requires that some additional showing of specific and identifiable harm to the national security be made.*

Neither Congress in FOIA nor the Ninth Circuit in this case arrogated to itself any of the Executive's primary constitutional authority in the areas of foreign relations and national security. The Ninth Circuit simply held the Executive to the terms of its own executive order, as FOIA requires. It did not dispute the Executive's representations that all diplomatic communications are exchanged in confidence, that the British government wished the letter kept confidential, that the United States' relationship with Britain is an important one, or even that the relationship might suffer if the letter is released despite British protest. It gave deference to the State Department's unique expertise in the field of foreign relations and accepted all of these representations. These factors simply do not satisfy the plain requirements of the new Clinton Order – which expressly makes sacrifices in the area of diplomatic secrecy in the name of open government. Some harm other than breach of a foreign government's implied or express expectation of confidentiality must be shown.

In order to induce this Court to save them from the text of their own executive order, petitioners are reduced to twisting both the Order itself and the text and history of FOIA. What was hailed by President Clinton in his signing statement as a sea change in government secrecy, this Court now is told only authorizes disclosure of such things as "routine scheduling information or congratulatory/condolence messages from certain governments." Pet'r Br. 34.

The Ninth Circuit correctly held that what petitioners call "act of disclosure" harm is, on these facts, nothing more than a claim that disclosure of any and all diplomatic communications harms the national security, which is precisely the presumption that the Clinton Order specifically abandoned. Since the government has never identified or described anything about the specific information contained in the letter that could cause any harm, the court of appeals properly concluded that the letter must be released.

Nor should this Court accept petitioners' invitation to rewrite the text and history of FOIA. The 1974 Amendments were expressly intended to overrule this Court's decision in *EPA v. Mink*, 410 U.S. 73 (1973), and give the courts authority to review de novo the ultimate issue of whether the Executive had properly applied the law, in this case his own executive order. Petitioners' suggestion that Congress, in resoundingly *overriding* President Ford's veto of the 1974 Amendments, somehow acceded to his request for highly deferential judicial review of classification decisions, elevates the misuse of "legislative history" to new heights. Even absent FOIA, federal courts are empowered to ensure that the Executive follows federal law – including his own executive orders. If petitioners have found that the real world consequences of an honest implementation of the new executive order are unacceptable, their remedy is to amend it, not to twist and bend both FOIA and the order to achieve the same protection of diplomatic confidentiality as the Reagan Order.

Finally, portions of this letter may have been disclosed to the district court in the related criminal action and are otherwise in the public domain. Discussion in the letter about the procedural aspects of a criminal case where the defendants

have been tried, convicted, and served their sentences cannot plausibly be classified as national security information. At a minimum, therefore, the case should be remanded for the district court to conduct a proper segregability review under any new interpretation of the executive order announced by this Court.

ARGUMENT

Petitioners devote the bulk of their opening brief to marshalling historical and judicial precedents in support of a proposition with which respondent has no quarrel: that "foreign policy [is] the province and responsibility of the Executive." Pet'r Br. 16 (quoting *Department of the Navy v. Egan*, 484 U.S. 518, 529-30 (1988)) (further citation omitted). This is simply not a case, however, that pits Congress or the courts against the Executive. As petitioners acknowledge elsewhere in their brief: "Congress did not attempt to restrict Executive Branch classification judgments to Congress' vision of harm to the national security or the standards articulated in FOIA itself." *Id.* 29. It is the Executive's adherence to his *own* policy judgment regarding diplomatic confidentiality that is at issue in this case. As we demonstrate below, the Executive's decision to withhold this letter is contrary to the plain language and structure of his own executive order, and his own contemporaneous pronouncements about what his executive order means. No separation of powers concerns are raised by the Court's holding the Executive to his own orders and regulations.

Not pleased with the practical effects of the new executive order, the government takes aim at FOIA itself. Two separate fallacies underlie petitioners' reinterpretation of FOIA, and the Court should firmly reject both of them. First, the 1974 Amendments to FOIA specifically empowered the courts to conduct a de novo review of the ultimate issue whether withheld documents were in fact properly classified pursuant to executive order. Petitioners' attempt to transform Congress' action in 1974 and the words "de novo" into a codification of deference to the Executive's classification

decisions turns the 1974 Amendments on their head. Second, FOIA does not present any separation of powers problem, let alone one that could justify a court reading the words "de novo" out of the statute pursuant to the doctrine of constitutional doubt. A federal court's authority to require the Executive to abide by his own prospective regulations is at least as old as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), itself.

I. The Plain Language of the Statute, the Decisions of this Court, and the Legislative History of FOIA All Require De Novo Judicial Determination of Whether Classification Is Proper Pursuant to the Executive Order.

A. The Plain Language of the Statute Precludes an "Utmost Deference" Standard.

Petitioners' claim that a reviewing court must pay "utmost deference" to an agency classification decision is founded on an Orwellian revision of the history surrounding the 1974 Amendments to FOIA. Pet'r Br. 43-50. Petitioners' assertion that Congress, in overriding President Ford's veto, actually meant to adopt and codify his objections to the legislation is ludicrous on its face. *Id.* Equally implausible is petitioners' argument that in requiring that matters be "specifically authorized" to be classified under an executive order and be "in fact properly classified," 5 U.S.C. § 552(b)(1), and further mandating that "the court shall determine the matter *de novo*," 5 U.S.C. § 552(a)(4)(B), Congress meant to signal its desire that courts "should defer to the Executive Branch unless its identification of harm to the national security is implausible." Pet'r Br. 12. Even petitioners' historical revisionism cannot transform statutory amendments specifically designed to overrule *EPA v. Mink* into its inadvertent codification.

In *Mink*, this Court effectively eliminated any judicial role under FOIA Exemption 1. *Mink* involved a request by numerous Members of Congress for pre-decisional memoranda provided to the President regarding plans for future

underground nuclear weapons testing. At the time, Exemption 1 shielded from disclosure matters "specifically required by executive order to be kept secret in the interest of the national defense or foreign policy." 5 U.S.C. § 552(b)(1) (1967). The Court rejected "any possible argument that Congress intended [FOIA] to subject executive security classifications to judicial review at the insistence of anyone who might seek to question them." *Mink*, 410 U.S. at 85. Rather, proof of the fact of classification under the executive order satisfied the government's burden under Exemption 1. *Id.* Given this limited scope of judicial inquiry, in camera review of contested documents was not authorized or needed under Exemption 1. *Id.*

Congress reacted swiftly. In 1974, Congress amended FOIA and specifically overruled this Court's decision in *Mink*. Pub. L. No. 93-502 §§ 1-3, 88 Stat. 1561 (1974). As amended, Exemption 1 allows the government to withhold only those materials that are "*(A)* specifically *authorized under criteria established* by *an* executive order to be kept secret in the interest of national defense or foreign policy *and (B) are in fact properly classified pursuant to such Executive order.*" 5 U.S.C. § 552(b)(1) (emphasis on material added by 1974 Amendments). Congress also amended the judicial review section as follows: "In such a case the court shall determine the matter de novo, *and may examine the contents of any such agency records in camera to determine whether any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section*, and the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B) (emphasis on material added by 1974 Amendments).

The plain language of these amendments, with no further exegesis, establishes that Congress overruled that portion of *Mink* that required courts to defer to the act of classification. The requirement that classification be "specifically authorized" by the order, the requirement that the order establish "criteria" governing classification, and the requirement that the withheld material be "in fact properly classified," leave no doubt that a federal court is obligated independently to interpret the executive order, apply its criteria, and determine if those criteria are applicable in the case before it. Likewise,

the requirements that the court "shall determine the matter *de novo*" and that the "burden is on the agency to sustain its action" leave no doubt that the court must determine the ultimate issue of proper classification for itself, without deferring to the withholding agency's own conclusion that the document is properly classified.[10] This Court need examine no further to reject the government's position. "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

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[10] The meaning of the words "de novo" has been fixed in this Court's decisions both before and after Congress chose them in 1966. *See, e.g., Choctaw Nation v. United States*, 119 U.S. 1, 30 (1886) (de novo review requires the court to consider the matter "from the beginning, and as if [the questions] were new and had freshly arisen"); *Irvine v. The Hesper*, 122 U.S. 256, 257 (1887) (de novo means "without any regard to what was done below"); *United States v. First City Nat'l Bank*, 386 U.S. 361, 368 (1967) ("de novo" means that "the court should make an independent determination of the issues"). The Court has also made clear that "de novo" review is incompatible with deference to the initial decisionmaker. *See, e.g., Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991) ("[W]hen de novo review is compelled, no form of appellate deference is acceptable."); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108-15 (1989) (contrasting de novo review with deferential standard generally applicable under the APA); *Chandler v. Roudebush*, 425 U.S. 840, 862 n.37 (1976) (same). Thus, petitioners' bold statement that "[t]he utmost deference standard comports with FOIA's provision for de novo district court review," Pet'r Br. 47 (citing 5 U.S.C. § 552(a)(4)(B)), contradicts more than a century of this Court's jurisprudence regarding standards of review. *See also* S. Childress & S. Davis, 2 FEDERAL STANDARDS OF REVIEW § 15.02 (6th ed. 1992) ("Under the standard called *de novo* review, the court is charged to affirm only if it agrees with the decision under review – that is, if it finds that the decision is the correct one. Where the court does not agree that the decision is the correct one, it is authorized to substitute its own judgment."); Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Parallels and Paybacks of Legislating Democratic Values*, 33 Emory L.J. 649, 655 (1984) ("Most important, the court decides the issue afresh, without deference to the agency's call.").

Petitioners' contrary position is legally and linguistically untenable. They argue that the 1974 Amendments actually codified an "utmost deference standard," Pet'r Br. 47, for review of the agency withholding of documents, at least under Exemption 1. Under this standard, a court may only order disclosure "where it concludes that the Executive's explanation of the harm to the national security is implausible (even after giving it utmost deference) or contrary to the plain terms of the Executive Order. . . ." *Id.* The text of the statute simply cannot absorb this blow. Under petitioners' approach, Exemption 1's provision permitting classification only if "specifically authorized" by the executive order is transformed into a provision permitting classification "unless specifically prohibited" by the order. It also creates a presumption of nondisclosure contrary to FOIA's express commands. It renders the words "determine the matter *de novo*" utterly meaningless by adopting a standard of review more lenient than even the arbitrary and capricious standard typically applied to agency action under the Administrative Procedure Act ("APA").[11] Finally, Congress' express authorization of in camera review is rendered well neigh meaningless where the court must give "utmost deference" to the decision to withhold and may reject only explanations that are "implausible" on their face. It is hard to see when in camera review would ever be appropriate under such a regime.

Not surprisingly, petitioners' position conflicts with other provisions of FOIA. In the same 1974 Amendments that produced the present language of Exemption 1, Congress provided that if a court ordered disclosure and assessed attorneys fees against the government "and the court additionally issues a written finding that the circumstances surrounding

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[11] *Compare* 5 U.S.C. § 706(2)(A) (agency action generally reviewed to assure that it is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). Congress codified this general standard of judicial review of agency action two months after it first adopted a de novo standard for FOIA cases. *See* Pub. L. No. 89-487, § 3(c), 80 Stat. 250, 251 (1966). *See also* Pub. L. No. 89-554, § 706(2)(A), 80 Stat. 378, 393 (1966).

the withholding raise questions whether agency personnel *acted arbitrarily or capriciously with respect to the withholding*," an investigation and possible discipline of the individual employees involved should follow. Pub. L. No. 93-502, § (a)(4)(F), 88 Stat. 1561, 1562 (1974) (codified as amended at 5 U.S.C. § 552(a)(4)(F) (1974)) (emphasis added). This provision obviously reflects the fact that a significantly more stringent standard than "arbitrary and capricious" applies to judicial review of agency withholding. Employee discipline was reserved for a small set of cases where the withholding was completely unjustified or plainly implausible. Yet, petitioners would have this Court adopt a standard at least as relaxed as this one for the primary determination of whether a document should be released.

The approach advocated by petitioners thus violates "the cardinal principle of statutory construction." That a court must "give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section." *Bennett v. Spear*, 520 U.S. 154, 173 (1997). It renders the words "determine the matter de novo" meaningless, by ensuring that the court determines *nothing* de novo. It gives no effect to the requirement that the agency bear the burden of sustaining its action, by instead erecting a presumption that the agency's explanation is legally sufficient, which presumption is rebutted only by a showing that the proffered explanation is, in fact, implausible. These factors preclude adoption of the government's position.

Petitioners' interpretation also necessarily entails the proposition that the words "the court shall determine the matter de novo" take on a different meaning depending upon which of the nine exemptions listed in Section 552(b) is invoked. Exemption 1 is governed by the "utmost deference standard," petitioners say, because Congress intended review "to be narrow and appropriately deferential, consistent with the separation of powers and the President's responsibilities under the Constitution for the conduct of national defense and foreign affairs." Pet'r Br. 46. Petitioners do not identify the proper standard of review for the other eight exemptions. Presumably, at least some exemptions must be governed by a

true de novo standard of review, because the concerns that, according to petitioners, led Congress to "intend" (without enacting) a lesser standard for Exemption 1 are not present. Thus, true de novo review must apply, for example, to FOIA litigation regarding trade secrets under Exemption 4 or financial institution data under Exemption 8. *See* 5 U.S.C. §§ 552(b)(1)(4) & (8). Yet, by its plain terms, the judicial review section applies one standard to all FOIA litigation. *See* 5 U.S.C. § 552(a)(4)(B). Under the government's approach, de novo review blinks on and off like a broken neon sign, depending upon which exemption is invoked. *See, e.g., Bank-America Corp. v. United States*, 462 U.S. 122, 129 (1983) ("[W]e reject as unreasonable the contention that Congress intended the phrase 'other than' to mean one thing when applied to 'banks' and another thing as applied to 'common carriers,' where the phrase 'other than' modifies both words in the same clause."). There is *no evidence* that Congress intended such a result and, contrary to petitioners' suggestion, the Constitution does not command it.

B. This Court's FOIA Decisions Require Rejection of the "Utmost Deference" Standard.

Nor can the statutory construction suggested by petitioners be squared with the decisions of this Court. In *Reporters Committee*, the Court explicitly recognized that Congress had chosen language in FOIA to *distinguish* it from the limited review function assigned to courts under other provisions of the APA: "Unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, FOIA expressly places the burden 'on the agency to sustain its action' and directs the district courts to 'determine the matter *de novo*.' " 489 U.S. at 755 (footnote omitted).

In *Reporters Committee*, the Court dealt with Exemption 7(C), which authorizes withholding of law enforcement records or information whose release "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). The Court noted that the

amendments to FOIA had actually reduced the government's substantive burden of proof, by replacing the words "would constitute" with "could reasonably be expected to constitute." *Reporters Committee*, 489 U.S. at 756 n.9 (citations omitted). The Court specifically held that the relaxation of the substantive standard did not affect the scope of a district court's review. "[T]here is no indication that the shift was intended to eliminate *de novo review in favor of agency deference* in Exemption 7(C) cases." *Id.* (emphasis added). Rather, this Court made clear that "district courts still operate under the general *de novo* standard of review." *Id. Reporters Committee* precludes acceptance of petitioners' argument that an amendment intended to *increase* the government's substantive burden under Exemption 1 at the same time did away with "the general *de novo* standard of review."

This Court has also rejected attempts to erect presumptions applicable to specific exemptions, even where core executive functions, such as law enforcement, are involved. Thus, in *Department of Justice v. Landano*, 508 U.S. 165 (1993), the Court unanimously rejected the government's argument that all persons who give information to the Federal Bureau of Investigation should be presumed to be "confidential sources" within the meaning of FOIA Exemption 7(D). The Court noted that such a presumption would be "rebuttable in theory" but "all but irrebuttable" in practice, because the government would have exclusive access to the actual facts. *Id.* at 176. The Court found the proposed presumption inconsistent with FOIA itself, in words directly applicable to this case:

> A prophylactic rule protecting the identities of all FBI criminal investigative sources undoubtedly would serve the government's objectives and would be simple for the Bureau and the courts to administer. But we are not free to engraft that policy choice onto the statute that Congress passed. For the reasons we have discussed, and consistent with our obligation to construe FOIA exemptions narrowly in favor of disclosure (citations omitted), we hold that the government is not entitled to a presumption that a source is confidential.

Id. at 180-81. The presumption that a document is properly classified, proposed by the government here, is equally unrebuttable in practice and equally contrary to the text and purpose of FOIA. *Reporters Committee* and *Landano* require rejection of the "utmost deference" standard for Exemption 1 cases.

Unable to find any FOIA case that supports the replacement of the "de novo" standard with the newly minted "utmost deference" standard, petitioners cite *United States v. Haggar Apparel Co.*, 119 S. Ct. 1392, 1399 (1999), for the proposition that deference akin to that recognized in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is consistent with a statutory provision requiring de novo review. Pet'r Br. 47 & n.44. The citation is extremely misleading. The provision at issue in *Haggar Apparel*, 28 U.S.C. § 2643(b), nowhere uses the words "de novo" and, unlike FOIA, does not place the burden of proof on the government to justify its actions. In *Haggar Apparel*, this Court explicitly distinguished a case like this one, where Congress has specifically chosen *not* to require deference to agency determinations of law: " '[I]f . . . Congress had specified that in all suits involving interpretation or application of [a statute] the courts were to give no deference to the agency's views, but were to determine the issue de novo,' Chevron deference would be inappropriate." 119 S. Ct. at 1399 (citing Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 515-16). FOIA is the archetypal example of a statute in which Congress chose not to require deference to the Executive's view of the law.

C. The Legislative History of the 1974 Amendments Directly and Definitively Contradicts the Notion that Congress Adopted President Ford's View of the Legislation While Overriding His Veto.

The legislative history of the 1974 Amendments completely contradicts petitioners' position that Congress meant to codify an "utmost deference" standard despite the language it chose. That history makes clear that Congress intended to overrule both *Mink*'s deference to Executive classification decisions and its related rejection of in camera review under Exemption 1. In fact, Congress expressly rejected a statutory rule of deference specific to Executive decisions under Exemption 1 during the debates on the 1974 Amendments.

The 1974 changes to Exemption 1 had their roots in the House in H.R. 12471, a compromise bill that was unanimously reported from the House Government Operations Committee on February 21, 1974. *See* H.R. Rep. No. 93-876, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267 (1974). Section 2 of H.R. 12471 would have amended Exemption 1 to sanction the withholding of matters "authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy." The Committee Report described this change as follows:

> The change from the language pertaining to information "required" to be classified by executive order to information which is "authorized" to be classified under the "criteria" of an executive order means that the court, if it chooses to undertake review of a classification determination, including examination of the records *in camera*, may look at the reasonableness or propriety of the determination to classify the records under the terms of the executive order.

H.R. Rep. No. 93-876, at 7. The Department of Justice opposed Section 2 of the bill, arguing that it "would, in effect, transfer the decision as to whether a document should be protected in the interests of foreign policy or national defense

from the Executive Branch to the courts." H.R. Rep. No. 93-876, at 19. The bill passed the House by a vote of 383 to 8. 120 Cong. Rec. 6804-20 (1974).

On October 8, 1973, Senator Kennedy introduced S. 2543, which became the Senate version of the 1974 Amendments. The Kennedy bill would have amended Exemption 1 to allow withholding of matters that were "specifically required by an executive order or statute to be kept secret in the interest of national defense or foreign policy and are in fact covered by such order or statute." S. 2543, 93d Cong. § 2 (1974). The accompanying report left no doubt as to the import of this amendment:

> The addition of the words "and are in fact covered by such order or statute" to the present language of section 552(b)(1) will necessitate a court to inquire during *de novo* review not only into the superficial evidence – a "Secret" stamp on a document or set of records – but also into the inherent justification for the use of such a stamp.

S. Rep. No. 93-854, 93d Cong., 2d Sess. 30 (1974). Senator Kennedy characterized the amendment to Exemption 1 as follows: "In its only amendment of a substantive exemption in FOIA, S. 2543 makes clear the duty of a court reviewing withholding of classified material to determine whether a claim based on national defense or foreign policy is in fact justified under the statute or executive order. Thus the court will not take an official's word for the propriety of the classification, but will look to the substance of the information to see if it had been properly classified." 120 Cong. Rec. 17,014, 17,017 (1974) (statement of Sen. Kennedy).

As originally presented to the Senate from committee, S. 2543 would have altered the judicial review section of FOIA to erect a specific rule of deference for determinations under Exemption 1. That provision provided:

> (ii) In determining whether a document is in fact specifically required by an executive order or statute to be kept secret in the interest of national defense or foreign policy, a court may review the contested document in camera if it is unable to

> resolve the matter on the basis of affidavits and other information submitted by the parties. In conjunction with its in camera examination, the court may consider further argument, or an *ex parte* showing by the government, in explanation of the withholding. *If there has been filed in the record an affidavit by the head of the agency certifying that he has personally examined the documents withheld and has determined after such examination that they should be withheld under the criteria established by a statute or Executive order referred to in subsection (b)(1) of this section, the court shall sustain such withholding unless, following its in camera examination, it finds the withholding is without a reasonable basis under such criteria.*

S. 2543, 93d Cong., 2d Sess. § 1 (1973) (emphasis added). During the Senate debates, Senator Muskie offered an amendment (No. 1356) to strike this provision, which was supported by the sponsor of the legislation, Senator Kennedy. Senator Muskie explained the need to strike this language as follows:

> If this provision is allowed to stand, it will make the independent judicial evaluation meaningless. This provision would, in fact, shift the burden of proof away from the Government and go against the express language in section (a) of the Freedom of Information Act, which states that in court review "the burden of proof shall be on the Government to sustain its action." Under the Amendment I propose, the court could still, if it wishes, make note of an affidavit submitted by the head of an agency, just as the court could request or accept any data, explanatory information or assistance it deems relevant when making its determination. However, to give express statutory authority to such an affidavit goes far to reduce the judicial role to that of a mere concurrence in Executive decisionmaking.

120 Cong. Rec. 17,014, 17,023 (1974) (statement of Sen. Muskie). Senator Stennis of Mississippi opposed the Muskie

Amendment. He argued that S. 2543 erected only "a mild presumption in favor," *id.* at 17025, of the agency head's justification for withholding. Senator Roman Hruska argued that without the presumption the bill was unconstitutional, citing many of the cases relied upon by the government in this case. Senator Ervin supported the Muskie amendment, stating: "The bill provides that a court cannot reverse an agency even though it finds it was wrong in classifying the document as being one affecting national security, unless it further finds that the agency was not only wrong, but also unreasonably wrong." *Id.* at 17,030. Senator Ervin thought judges should make the determination themselves rather than inquiring "whether or not the [Executive] reached the wrong decision in an unreasonable or reasonable manner." *Id.* In the end, the Muskie amendment was carried by a vote of 56 to 29, and a rule of "deference" applicable to Exemption 1 cases was stricken from the bill. As amended, the language of S. 2543 was substituted for the House bill, H.R. 12471, and was then passed by the Senate on May 30, 1974, by a vote of 64 to 17. 120 Cong. Rec. 17,014, 17,047 (1974).

A House-Senate Conference Committee, chaired by Representative Moorhead, met in August and September of 1974. On September 25, 1974, the Committee issued its report. H.R. Conf. Rep. No. 1380, 93d Cong., 2d Sess. (1974). The Conference Report's proposed amendment to Exemption 1 contains exactly the language that became law. Of that language the Report states:

> When linked with the authority conferred upon the Federal courts in this conference substitute for *in camera* examination of contested records as part of their *de novo* determination in Freedom of Information cases, this clarifies congressional intent to override the Supreme Court's holding in the case of *E.P.A. v. Mink, et al., supra*, with respect to *in camera* review of classified documents.

H.R. Conf. Rep. No. 93-1380, at 12 (1974).

The Report goes on to note that, given the Executive Branch's expertise in the area of national defense and foreign policy, courts should give "substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record" in making a de novo determination of whether classification is proper. *Id.* This reference makes clear that any deference is limited to affidavits containing factual matters in areas of Executive Branch expertise. It cannot be extended to interpretation of the executive order itself or the ultimate determination of whether classification is in fact proper. Such an extension would eviscerate both the 1974 Amendments to Exemption 1 and the de novo standard.[12]

Petitioners attempt to suggest that an exchange of letters between President Ford and Senator Kennedy and Representative Moorhead, during the Conference Committee, somehow "changed" the legislation that emerged. Pet'r Br. 44-45. Besides being contrary to the most rudimentary principles of bicameralism and presentment, this argument is also counterfactual. President Ford told Senator Kennedy in his letter: "I could accept a provision with an express presumption that the classification was proper and with *in camera* judicial review only after a review of the evidence did not indicate that the matter had been reasonably classified in the interests of our national security." Letter from President Gerald R. Ford to Senator Edward Kennedy (Aug. 20, 1974), *reprinted in* House

[12] Thus, cases like *Halperin v. CIA*, 629 F.2d 144 (D.C. Cir. 1980), and *Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984), are simply inapposite. *See* Pet'r Br. 47 & n.42. Respondent does not question the proposition that the Executive's affidavits containing factual representations about harm to the national security are entitled to deference from a federal court. Indeed, to the extent of Executive expertise, deference to statements under oath regarding probable harms under any exemption would be entitled to deference. The Ninth Circuit did not question the representations regarding potential harms from disclosure contained in the government affidavits filed in this case. Rather, it correctly held that those harms, standing alone, do not justify nondisclosure under the new Clinton Order. *See infra* pp. 36-48.

Comm. on Gov't Operations Senate Comm. on the Judiciary, *Freedom of Information Act and Amendments of 1974 Source Book*, 94th Cong., 1st Sess. 367, 369 (1975). As we know, such a provision was never included in the final legislation. Moreover, petitioners cannot reconcile their position that the Conference Committee (without changing a word of the legislation) satisfied President Ford's concerns with the fact that President Ford vetoed the legislation *precisely because* of his concerns about de novo judicial review of classification decisions under Exemption 1. See Pet'r Br. 45 (quoting H.R. Doc. No. 383, 93d Cong., 2d Sess. III (1974)). In his veto message, the President specifically noted his concern that the legislation he was vetoing "give[s] less weight before the courts to an executive determination involving the protection of our most vital national defense interests than *is accorded determinations involving routine regulatory matters*." President's Message to the House of Representatives Returning H.R. 12471 Without His Approval, 10 Weekly Comp. Pres. Doc. 1318 (Oct. 17, 1974) (emphasis added). President Ford renewed his proposal for express statutory deference:

> I propose, therefore, that where classified documents are requested the courts could review the classification, but would have to uphold the classification if there is a reasonable basis to support it. In considering the reasonableness of the classification, the courts would consider all the attendant evidence prior to resorting to an *in camera* examination of the document.

Id.

Congress did not accept President Ford's proposal, and his veto was overridden without any change to the legislation. Statements made in both Houses during the debate on the President's veto leave no doubt that Congress expressly rejected both President Ford's analogy to review of agency action and his proposed "reasonable basis" test. As Representative Erlenborn put it:

> The President asks that the classification be supported, and the court not have authority to overturn it if there is any reasonable basis to support the classification. He uses as argument a corollary of the decisions coming from regulatory agencies. *I do not believe that the corollary is apt. The decisions of regulatory agencies are reached ordinarily as a result of adversary proceedings, public proceedings, and the making of a record.*

120 Cong. Rec. 36,622, 36,627 (1974) (emphasis added). *See id.* at 36,629 (statement of Rep. Aspin) ("Why should the courts presume that an administrative classification is reasonable?").[13]

Similar statements were made during the debate on the veto in the Senate. Senator Kennedy, the Senate sponsor of the legislation, defended the de novo review provisions against President Ford's criticisms:

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[13] Petitioners attempt to bolster their position with carefully elided quotations from Representative Moorhead's remarks in the veto debate. Pet'r Br. 46. Representative Moorhead used the phrase "an obviously dangerous provision" in discussing a portion of the President's veto message suggesting that no deference *at all* would be paid to the representations of the Secretary of State versus those of a FOIA plaintiff. *See* 120 Cong. Rec. at 36,623. Moreover, Representative Moorhead did not, as the government disingenuously implies, endorse the "reasonable basis" test proposed in President Ford's veto message by stating that is "exactly the way" review would occur under the legislation. Representative Moorhead was in fact addressing the procedural point of whether the court must first exhaust all other possibilities before turning to in camera review. On this point, President Ford and the Congress agreed. Representative Moorhead's full statement is as follows: "Mr. Speaker, *in the procedural handling of such cases under the Freedom of Information Act*, this is exactly how the courts would handle their proceedings." *Id.* (emphasis added). Later in the same statement, Representative Moorhead confirmed that after all sources of information had been tapped, including in camera review, the court must "determine if the classification marking was properly authorized." *Id.*

> The President writes the classification rules in his Executive order. If those rules are inadequate to protect important information vital to our national defense, then let the President change the rules. But make the Government abide by them. Judicial review means executive accountability. *Judicial review will be effective only if a Federal judge is authorized to review classification decisions objectively, without any presumption in favor of secrecy.* That is what our systems of checks and balances is all about.

120 Cong. Rec. 36,865, 36,866 (1974) (emphasis added). Other Senators echoed this point during the debate. *See, e.g., id.* at 36,870 (statement of Sen. Muskie) ("And most importantly, the legislation will establish a mechanism for checking abuses by providing for review of classification by an impartial outside party."). At the same time, the President's allies spoke in support of his veto, and criticized the provision for de novo review of classification decisions. *Id.* at 36,873 (statement of Sen. Hruska) ("The courts review agency decisions to determine whether they are reasonably based or whether they are arbitrary or capricious. *This enrolled bill would establish a different type of review, however. It would empower a court to substitute its own decision for that of the agency.*") (emphasis added).

These statements by key players in the legislative process, on both sides of the veto debate, are flatly inconsistent with the facially counterintuitive proposition that Congress somehow adopted President Ford's view of the legislation in response to his veto.[14] On November 20, 1994, the House

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[14] Petitioners' contention that Congress somehow acquiesced in President Ford's view of the legislation is further contradicted by the fact that, two days after the President's veto, Republicans offered a competing bill consistent with the President's wishes regarding Exemption 1 in an attempt to forestall an override vote. This bill, S. 4172, offered by the Senate Minority Leader, Hugh Scott, contained the express statutory

overrode the President's veto by a vote of 371 to 31. 120 Cong. Rec. 36,622, 36,633 (1974). The next day, the Senate followed suit by a vote of 65 to 27, and the 1974 Amendments became law. 120 Cong. Rec. 36,865, 36,882 (1974).

What emerges from the legislative history is a clear picture of rejection of any deference to the Executive's interpretation of the executive order. The model of *Chevron* judicial deference to agency decisionmaking was expressly discussed and rejected. A rule of "reasonable basis" deference unique to Exemption 1 was struck from the legislation after heated debate. The President vetoed the legislation because it did not accord any deference to the agency's classification decision and specifically proposed a statutory amendment. Key sponsors of the legislation argued for overriding the President's veto to preserve independent judicial review of classification decisions. Key opponents of the legislation argued that independent judicial review of classification decisions was unwise and violated separation of powers. The supporters of independent judicial review won, and President Ford's veto was overridden.

While the legislative history is consistent with according substantial weight to agency affidavits containing *factual* representations about matters of foreign affairs or national security within the Executive's unique expertise, it makes clear that the ultimate question of compliance with the executive order is for the court alone, without any deference to the executive's decision to classify. Thus, the kind of deference recognized by this Court in *Chevron*, 467 U.S. 837, is exactly what President Ford wanted to write into the legislation and what the Muskie amendment and the congressional override

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deference provisions requested by President Ford in his veto message. *See* H.R. 4172, 93d Cong., 2d Sess. § 2(a) (1974) (specifically amending Exemption 1 to adopt a "reasonable basis to support the classification" test unique to that exemption). The bill did not attract substantial support, even among Republicans, and the House and Senate overrode the President's veto without any changes in the legislation.

of President Ford's veto flatly rejected. Petitioners are asking nothing less of this Court than to reverse the results of the Muskie amendment debate and the veto override debate and write President Ford's proposed amendment into the legislation.

D. The Doctrine of "Constitutional Doubt" Is Not Relevant to this Case.

Nor should this Court employ the doctrine of "constitutional doubt" to rewrite the provisions of FOIA that require de novo review and that place the burden on the government to sustain the withholding of information. *See* Pet'r Br. 47-48 & n.46 (citing *Public Citizen v. Department of Justice*, 481 U.S. 440, 466 (1989)). The thrust of the government's argument is that some form of deference, similar to *Chevron* deference, is constitutionally compelled in Exemption 1 litigation.

First, as we have demonstrated above, the language of FOIA is unambiguous and the intent of Congress is clear. Congress specifically intended to depart from the normal rules of deference to agency action and chose language to make its intention clear. The doctrine of "constitutional doubt" or "constitutional avoidance" only applies "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided." *United States ex rel. Attorney Gen. v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). Where statutory text is plain, as here, the doctrine is inapplicable. *See Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998).

Second, even if the text and history of FOIA admitted of petitioners' construction, there is no serious constitutional question to avoid in this case. In *EPA v. Mink*, 410 U.S. at 83, this Court suggested that Congress could, in fact, promulgate its own standards for classification of national security information. But Congress delegated to the Executive *absolute* and

unreviewable discretion under Exemption 1 to establish classification criteria for national security information. As even the government concedes, "Congress did not attempt to restrict Executive Branch classification judgments to Congress' vision of harm to the national security or standards articulated in FOIA itself. Rather, the exemption specifically accedes to the President's own formula for classifying national security information." Pet'r Br. 29. The President, accordingly, was free to preserve the Reagan Order's presumption of national security harm from the disclosure of diplomatic communications, and he is free now to restore it. He is also free to establish a standard calling for classification of diplomatic communications whenever the foreign government, upon inquiry, requests it. In short, the President can do whatever he wants, but he must abide by whatever he does. It is hard to see how such a rule encroaches upon his constitutional prerogatives.

If Congress can require the Executive to promulgate prospective standards in this area, it can certainly assign the federal courts the quintessentially judicial task of interpreting those rules and applying them in particular cases. While deference to factual details in areas that are within Executive Branch expertise is contemplated and appropriate under FOIA, it is clear that Congress wished to assign to the courts the traditional judicial task of interpreting the law and applying it in particular cases. There is simply no support in this Court's separation of powers jurisprudence for the proposition that a form of *Chevron* deference is constitutionally compelled in these circumstances. If review itself is constitutional, which we understand the government to concede, the Constitution cannot dictate deference to the Executive's legal judgments.

Even absent an express statutory command such as contained in FOIA, this Court has consistently held that the Executive must follow his own regulations, even in areas where his authority is plenary. In *Service v. Dulles*, 354 U.S. 363 (1957), this Court unanimously held that the Secretary of

State must follow his own regulations in removing a foreign service officer for alleged acts of disloyalty, despite statutory language granting the Secretary removal power "in his absolute discretion." *Id.* at 370 (citing Pub. L. No. 82-188, § 103, 60 Stat. 458 (1947)). The Court held that "regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and . . . this principle holds even when the administrative action under review is discretionary in nature." *Id.* at 372. *Accord United States v. Nixon*, 418 U.S. 683, 696 (1974).

Thus, FOIA's provisions allowing the courts to independently interpret and enforce the provisions of the Executive's own order do not raise any separation of powers concerns. Congress has simply commanded the Court to "say what the law is," without deferring to the viewpoint of the Executive Branch.

E. The 1996 Amendments to FOIA Did Not Alter or Repeal the De Novo Standard by Implication.

In a last ditch effort to avoid FOIA's plain language and the clear history of the 1974 Amendments, the government argues that the Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (1996), altered the standard of review applicable to Exemption 1 cases. Since nothing in Exemption 1 was altered, and neither the de novo standard nor the burden of proof provisions were explicitly removed, this argument is one of repeal by implication. Such arguments "are not favored," *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936), and "[t]he intention of the legislature to repeal 'must be clear and manifest.' " *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)).

The purpose of the 1996 Amendments was to impose new duties upon government agencies to search and provide records that they maintain in electronic format. In light of

these new disclosure duties, Section 6 of the 1996 Amendments added the following language to the judicial review section: "In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B)." Pub. L. No. 104-231, § 6, 110 Stat. 3048, 3050 (1996). This provision cannot be read to override the de novo standard of review or the burden of proof provision of the same section. It simply calls for deference to factual assertions contained in government affidavits in areas of Executive Branch expertise. The House Report accompanying the 1996 legislation makes absolutely clear that no change to the de novo standard of review was intended. Of the changes to the judicial review provisions, it states:

> This section does not affect the extent of judicial deference that a court may or may not extend to an agency on any other matter. There is no intent with this provision, either expressly or by implication, to affect the deference or weight which a court may extend to an agency determination or an agency affidavit on any other matter. The provision applies narrowly to agency determinations with regard to technical feasibility.

H R. Rep. No. 104-795, 104th Cong., 2d Sess. 22 (1996).

II. The Background, Text, and Structure of the Clinton Executive Order Leave No Doubt that Frustration of a Foreign Government's Expectation of Confidentiality Is Insufficient To Justify Classification.

A. The Clinton Order Does Not "Specifically Authorize" Classification Based Solely on a Foreign Government's Expectation of Confidentiality.

As the foregoing discussion makes clear, the burden rests upon the agency to sustain its action, "which of course includes establishing the availability of an exemption from

disclosure." *Shaw v. FBI*, 749 F.2d 58, 61 (D.C. Cir. 1984) (Scalia, J.) (citation omitted). The government must demonstrate – unaided by presumptions or *Chevron* deference – that the harm it has identified falls within the plain terms of the executive order, such that the withheld letter "is in fact properly classified pursuant" thereto. 5 U.S.C. § 552(b)(1)(B).[15]

The plain language of the Clinton Order, however, makes clear that the breach of the foreign government's expectation of confidentiality is not sufficient, standing alone, to justify classification.

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[15] Contrary to petitioners' contention, Pet'r Br. 31, the Court's decision in *Udall v. Tallman*, 380 U.S. 1, 4 (1965), is inapposite as that case merely involved standard deference to an agency's "consistent[ ]" interpretation in the absence of any indication that Congress foreclosed such deference. As noted above, *Chevron* deference is not appropriate because it is inconsistent with FOIA's command that the government bear the burden of proving that classification is "specifically authorized" under a de novo standard of review. Thus, FOIA is not a statute in which Congress intended the courts to defer to executive determinations. *Cf. Smiley v. Citibank*, 517 U.S. 735, 740-41 (1996) (doctrine of *Chevron* deference explained as an effort to give effect to congressional intent). Moreover, even if *Chevron* deference were applicable, petitioners' interpretation of the Clinton Order is inconsistent with its plain language and inconsistent with the President's statements made at the time of its promulgation. *See* note 21, *infra*. The President's contemporaneous interpretation of his own order is certainly entitled to greater weight than petitioners' contrary interpretation adopted for purposes of this litigation. *See Department of Commerce v. United States House of Representatives*, 119 S. Ct. 765, 777 (1999) (Department of Commerce not entitled to *Chevron* deference in light of prior statements inconsistent with litigation position). Petitioners also contend that their interpretation has a lineage predating this litigation, noting that their interpretation was "first manifested when the FOIA request was denied." Pet'r Reply Br. to Opp. Cert. Br. at 7 n.6. But the denial letter was authored after, and in response to, the filing of respondent's FOIA litigation, and its single conclusory paragraph contains no legal interpretation of the Clinton Order. *See* J.A. 42-43.

In all their myriad briefs and affidavits in this case, petitioners have never denied that the actual *information* at issue here – that is, the actual *content* of the Home Office letter – is harmless. Petitioners have never claimed that public disclosure of the letter would harm the national security because of the sensitivity, value, and utility of its contents.[16] Rather, petitioners argue only that the national security is inevitably harmed by "the act of disclosing any confidential communication from a foreign government," even if the content of the communication is wholly innocuous. Pet'r Br. 28. According to the State Department declarations filed in this case, disclosure of any portion of the letter, regardless of content,[17] would violate the British government's expectation

[16] For example, information relating to covert intelligence operations, nuclear weapons designs, war plans, and the like are obviously types of information whose sensitivity, value, and utility are such that disclosure would harm the national security. Indeed, some information is so sensitive or valuable that its very *existence* must be classified to prevent harm to the national security. FOIA itself recognizes this point with respect to Federal Bureau of Investigation records "pertaining to foreign intelligence or counter-intelligence, or international terrorism." *See* 5 U.S.C. § 552(c)(3). Petitioners similarly note that the disclosure of the existence of confidential intergovernmental settlement efforts derailed the United States' attempt to avert the Mexican War. Pet'r Br. 41 & n.38. Obviously, the type of harm that flows from the disclosure of the very existence of extremely sensitive information is not at issue in this case. Here, the date, sender, addressee, and general subject matter of the Home Office letter are in the public domain. The fact that the United States and Britain communicated over this extradition and that the British government expressed concerns about the fair treatment of its citizens in future criminal proceedings, are fully public.

[17] Petitioners make the extra-record and unsupported assertion that the State Department was advised by the Labor Party government that it, like the Conservative Party government before it, "considered disclosure of the letter at issue in this case to be 'out of the question.' " Pet'r Br. 10 n.6. Respondent is bound to point out to the Court that it was an official of the British government who first brought the existence and subject matter of the Home Secretary's letter to the attention of respondent. *See* Letter of November 16, 1994 from H.M. Consul Stephen Turner, Seattle, Washington to Mr. Leslie Weatherhead. In that official communication, Consul Turner told respondent that the letter at issue in this case, "stressed the Home Secretary's concern that questions of local prejudice were examined most carefully during the pretrial process." Thus, the British government did not view the disclosure of at least a portion of the Home Secretary's letter as "out of the question." We have lodged a copy of Consul Turner's letter to respondent with the Clerk of this Court. *See Morse v. Republican Party of Virginia*, 517 U.S. 186, 200 n.18 (1996).

of confidentiality and therefore "reasonably could be expected to damage the United States' foreign relations with Great Britain and other nations by impairing the United States' ability to engage in and obtain confidential diplomatic communications and by impeding international law enforcement cooperation." Pet'r Br. 14. As the Ninth Circuit correctly held, this "breach of confidentiality" harm, standing alone, is simply not a sufficient justification for classification under the Clinton Order.

Section 1.2(a) of the Clinton Order provides: "Information may be originally classified *under the terms of this order only if all of the following conditions are met.*" Clinton Order § 1.2(a) (Pet. App. at 68a) (emphasis added). One of the conditions is that the information must fall into one of seven categories of information eligible for classification. Clinton Order § 1.5(a)-(g) (Pet. App. at 71a). "Foreign government information" is one of the seven categories of information that may be "considered for classification." Clinton Order § 1.5(b) (Pet. App. at 71a). The Clinton Order, like the Reagan Order that it superceded, specifically restricts the category of "foreign government information" to diplomatic communications that are exchanged with an expectation of confidentiality. "Foreign government information" is defined under the Clinton Order, in relevant part, as "information provided to the United States Government by a foreign government or governments, an international organization of governments, or any element thereof, *with the expectation that the information, the source of the information, or both, are to*

be held in confidence." Clinton Order § 1.1(d) (Pet. App. 66a) (emphasis added).[18]

Under the Reagan Order, demonstrating that information fell into this category was alone sufficient to exempt it from disclosure. Any release of "Foreign government information" was "*presumed to cause damage to the national security.*" Reagan Order § 1.3(b)(c); Opp. Cert. App. 7a (emphasis added). In other words, under the Reagan Order a breach of a foreign government's expectation of confidentiality was deemed sufficient, in and of itself, to cause damage to the national security and thus to warrant classification of *all* foreign government information, regardless of its contents.

The Clinton Order, however, eliminates this presumption and explicitly requires a further, document-specific inquiry. Once the classifying authority has determined that the information is *eligible* for classification as "Foreign government information," the classifying authority also must "determine [ ] that the 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." Clinton Order § 1.2(4) (Pet. App. 68a). The plain language of the Clinton Order leaves no doubt that the specific information itself – the contents of the document – must be assessed in terms of its potential to harm the national

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[18] The Clinton Order further defines "foreign government information" as:

> (2) information produced by the United States pursuant to or as a result of a joint arrangement with a foreign government or governments, or an international association of governments, or any element thereof, *requiring that the information, the arrangement, or both, are to be held in confidence;* or (3) information received and treated as Foreign Government Information under the terms of a predecessor order.

Under the Reagan Order "Foreign government information" was, by definition, exchanged in confidence. Reagan Order § 6.1(d) (Opp. Cert. App. 24a). Thus, under the Clinton Order all "Foreign government information" is ipso facto exchanged in confidence.

security. Thus, the Clinton Order specifically defines "[d]amage to the national security" 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.*" Clinton Order § 1.1(l) (emphasis added) (Pet. App. 67a-68a).[19] Indeed, the President himself confirmed this reading of his executive order in his signing statement. Opp. Cert. App. 26a-28a.[20] Noting that the purpose of "reforming the Government's system of secrecy" was to "greatly reduce the amount of information that we classify," *id.* 26a, 28a, President Clinton singled out the Reagan Order's categorical presumption of harm as one of the "excesses of the current system." *Id.* Emphasizing that "[c]lassifiers will have to justify what they classify," the President made clear that "we will no longer presumptively classify certain categories of information, whether or not the *specific information* otherwise meets the strict standards for classification." *Id.* 27a (emphases added).

Thus, the Clinton Order requires that the disclosure of "specific information" at issue present a threat to the national security to justify its classification. The order does not allow either general canons of diplomatic confidentiality or a specific foreign government request for confidentiality, standing

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[19] "Information" is itself defined as "any *knowledge* that can be communicated or documentary material, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States Government." Clinton Order § 1.1(b) (Pet. App. 65a-66a) (emphasis added).

[20] As a statement of intent and purpose by the unitary and exclusive author of the Clinton Order itself, the President's signing statement is entitled to significantly more interpretive weight in this context than in the context of legislation. At a minimum, it should be accorded the same weight as a preamble to legislation. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 830 (1995); *Price v. Forrest*, 173 U.S. 410, 427 (1899). In addition to the signing statement, the preamble to the Clinton Order speaks in the same terms of increased access and more stringent criteria for classification. Pet. App. 26a-28a.

alone, to justify classification.[21] The Clinton Order expressly eliminated a presumption that harm to the national security flows from a breach of diplomatic confidentiality. The intergovernmental exchange of information in confidence, therefore, is now only a *necessary* condition for classification, but is no longer a *sufficient* condition for classification. As the Ninth Circuit correctly noted, under petitioners' reading of the executive order, any "foreign government information," regardless of its content, may be classified, for disclosure of any such information will cause, by definition, "breach of confidentiality" harm. The State Department declarations filed in this case, therefore, could be recycled to justify withholding any diplomatic communication in any case. Recitation of general canons of diplomatic confidentiality in State Department affidavits is simply a back-door way of resurrecting the Reagan Order's presumption and, by the same token, of effectively eliminating the Clinton Order's document-specific requirement that the classifying authority "identify or describe the damage" that disclosure of the specific information would cause.

Petitioners' initial response to this analysis focuses on the language of the provision of the Clinton Order defining "[d]amage to the national security" as harm "from the unauthorized disclosure of information, to include the sensitivity, value, and utility of that information." Clinton Order § 1.1(l) (Pet. App. 67a, 68a). Apparently recognizing that the terms "sensitivity, value, and utility" all relate to the content of the information, petitioners seize on the word

[21] The British government's refusal to concur in the State Department's decision to disclose the Home Office letter simply reaffirmed that the letter, like "all correspondence between Governments," was sent with an expectation of confidentiality. Opp. Cert. App. 30a. If the British government had instead concurred with the State Department and had authorized disclosure of the letter, the document would no longer be clothed with an expectation of confidentiality and thus would no longer qualify as "foreign government information" eligible for classification and withholding under Exemption 1.

" 'includ[es],' " arguing that the term " 'connotes simply an illustrative application of the general principle,' " and thus does not exclude types of harm that are unrelated to the actual content of the information disclosed. Pet'r Br. 30 (quoting *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941)). But the word "includes" does not appear in Section 1.1(l) of the Clinton Order. And the formulation that does appear in the provision – "to include the sensitivity, value, and utility of that information" – is *prescriptive*, not illustrative; that is, the text of the provision plainly prescribes that any assessment of national security harm from the unauthorized disclosure of information is "to include the sensitivity, value, and utility of that information."[22] Thus, contrary to petitioners' claim, the plain language of the Clinton Order requires consideration of the content of the information at issue in determining its potential to damage the national security.

Petitioners also look to the Clinton Order's provisions for declassification of documents to somehow expand the criteria for initial classification. Pet'r Br. 31 & n.27 (citing Clinton Order § 1.6(d) (Pet. App. 72a). The argument is completely circular. That provision provides that classifiers may exempt from automatic declassification after 10 years "*specific information*, the unauthorized disclosure of which could reasonably be expected to cause *damage to the national security* for a period of greater than [10 years]." Thus, the standards for initial classification must be met under the definitions of "information" and "harm to the national security" in the classification sections of the executive order. That release of

[22] While "sensitivity, value, and utility," are not exclusive, they nonetheless must be read in the context of the doctrine of *ejusdem generis*. *See, e.g., Arcadia v. Ohio Power Co.*, 498 U.S. 73, 84 (1990); *Cleveland v. United States*, 329 U.S. 14, 18 (1946). All three of these listed "sources" of harm relate exclusively to the content of the information. Moreover, "sensitivity" cannot be wrested from its context and pressed into service as a new textual home for the Reagan Order's presumption of harm. *See* Pet'r Br. 30.

some *properly* classified material may be delayed where it would "damage relations between the United States and a foreign government," Clinton Order § 1.6(6), cannot serve to amend the definitions of "information" and "damage to the national security" contained in Sections 1.1(b) & (l) of the Clinton Order. The Clinton Order quite simply contemplates that it is no longer proper for the Executive to classify every piece of information whose release would upset a foreign government.

Petitioners argue that it is "inconceivable" that the Clinton Order's elimination of the presumption of harm was "intended to mandate a wholesale abrogation of the long-standing practice of diplomatic confidentiality." Pet'r Br. 33. But neither the court of appeals below nor we have advanced such a sweeping claim. Rather, we have simply taken the President at his word. Presumptive classification of certain categories of information was eliminated, according to the President himself, because it is indifferent to "whether or not the *specific information* otherwise meets the strict standards for classification." Opp. Cert. App. 27a (emphasis added). Confidentiality *for its own sake* is simply an insufficient basis for classification under the Clinton Order. If the "specific information" at issue does not itself pose an articulable threat to the national security – if it is "innocuous" – it cannot be classified under the Clinton Order, although it is clothed in an expectation of confidentiality.

Thus, while it is true that the Clinton Order's elimination of the presumption of harm (as one of the "excesses of the current system") was not intended to mandate a wholesale abrogation of *all* expectations of diplomatic confidentiality, the plain fact is that it surely was intended to abrogate *some* such expectations in the name of open government. The whole purpose of the Clinton Order's "reforms," after all, was to "greatly reduce the amount of information that [the agencies]

classify in the first place and the amount that remains classified." Opp. Cert. App. 28a.[23]

Under petitioners' understanding of the Clinton Order, elimination of the presumption of harm literally changed nothing. Petitioners concede that eliminating the presumption of harm had the effect of requiring that a reasonable official make "an actual judgment" on whether "the confidentiality of diplomatic discourse should be invoked with respect to *each document*." Pet'r Br. 33-34 (emphasis added). But they reject any "content-based analysis" of each document as "unworkable in practice." *Id.* 34. Because such an analysis can be conducted only after the confidential communication has been sent, they argue, it "would fail to furnish an assurance of confidentiality [to the sender] *in advance*, which often is essential to candid communications." *Id.* (emphasis in original).

Petitioners' patently contrived understanding of the Clinton Order renders its "reforms" not only meaningless, but absurd. First, an interpretation of the Clinton Order rejecting any "content-based analysis" of foreign government information simply ignores the order's plain language requiring that an assessment of the information's potential for harm is "to include the sensitivity, value, and utility of that information" – all of which are content-based inquiries. Moreover, if a responsible officer is to make an "actual judgment . . . about each document," but is not to analyze the content of the

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[23] Under the government's view of the Clinton Order, a foreign government's preference for confidentiality, no matter how irrational or idiosyncratic, can, standing alone, justify classification. This position has no support in the text of the order itself or the President's statements in conjunction with its promulgation. Moreover, such a position reduces government openness in the United States to the least common denominator of all the countries in the world with which the United States has any diplomatic communication. This position cannot be reconciled with the "greater opportunity to emphasize our commitment to open Government" announced in the preamble of the Clinton Order. Pet. App. 65a.

document, then on what is his judgment to be based? Petitioners' prescription for a standardless, ad hoc, content-blind review of each document violates the central command of FOIA's Exemption 1 – that judgments to withhold information be "specifically authorized under criteria established by an Executive order." 5 U.S.C. § 552(b)(1)(A). And if the purpose of the responsible official's document-specific judgment is to determine whether the confidentiality of the document should be maintained, then the official is presumably authorized to determine that the document's confidentiality should not be maintained. But such a judgment, like a content-based analysis of the document, would have to be made after the document is sent and therefore would fail, also like a content-based analysis, "to furnish and assurance of confidentiality *in advance*." Pet'r Br. 34 (emphasis on original). Thus, petitioners' objection to review of each document based upon its content is no less applicable to petitioners' alternative regime requiring an actual judgment about each document based upon unknown, unstated criteria.[24]

Finally, petitioners assert that the elimination of the Reagan Order's presumption of harm "contemplated only that, in some cases – such as routine scheduling information or congratulatory/condolence messages from certain governments, and perhaps, on occasion, more substantive matters – the established norm of confidentiality in diplomatic relations might never attach, could be outweighed by other considerations, or could be waived." Pet'r Br. 34. But if a diplomatic

[24] Petitioners cite the Clinton Order's abrogation of the presumption applicable to "confidential foreign sources, or intelligence sources or intelligence methods" to raise the specter of wholesale release of these items. Pet'r Br. 33 n.32. This argument ignores the avenue left open to the government under the express terms of the Clinton Order: "identify and describe" the harm that would flow from disclosure of this "information." Petitioners also ignore the availability of withholding statutes under Exemption 3, which offer additional protections to confidential sources and intelligence methods. *See, e.g.*, 50 U.S.C. § 403-3(c)(6) (intelligence sources and methods); *CIA v. Sims*, 471 U.S. 159 (1985).

communication is not made in confidence, either because an expectation of confidentiality never attached in the first place or because such an expectation was waived by the foreign government, the communication does not, by definition, qualify as "foreign government information" and cannot properly be classified as such under Exemption 1. And the presumption of harm did not have to be eliminated to ensure that the general norm of diplomatic confidentiality could be overcome in certain circumstances. Indeed, the Reagan Order's presumption of harm was not an inflexible straightjacket, demanding classification even of "information that does not require protection in the interest of national security." Reagan Order § 1.6(a) (Opp. Cert. App. 10a). We are also constrained to note that the disclosure of "routine scheduling information or congratulatory/condolence messages" would not seem to be what President Clinton had in mind in proclaiming that the new executive order would "bring the system for classifying . . . national security information into line with our vision of American democracy in the post-Cold War world." Opp. Cert. App. 26a.[25]

At bottom, petitioners' position in this case is founded, we submit, on the government's conclusion that some of the "reforms" of the Clinton Order looked on paper better than they work in practice. We cannot deny that some of the policy and practical concerns voiced by petitioners have force. Perhaps the executive order should be amended, but that issue is not for this Court to decide. Petitioners should address their brief to the White House.

[25] *See also* Information Security Oversight Office, 1998 Report to the President (August 31, 1999) (Clinton Order "is a radical departure from the secrecy policies of the past. The first order to revise the security classification system since the end of the Cold War, E.O. 12958 includes major changes which should result in fewer new secrets and significantly more information being declassified.").

The "specific information" at issue in this case does not meet, in the President's words, "the strict criteria for classification" under his executive order. The withholding is based not on the content of the letter or any facts its disclosure would establish, but purely on the fact that it was sent, like all intergovernmental communications, with an expectation of confidentiality. This is confirmed by the fact that the United States was prepared to release the letter and did not classify it until the British requested that it not be disclosed. The Clinton Order simply does not allow a foreign government expectation of confidentiality, standing alone, to justify classification. Because the government has never "identified or described" any other harm that qualified as harm to the national security under the Clinton Order, the Ninth Circuit correctly concluded that the letter is not properly classified under the new executive order and must be released.[26]

B. Portions of the Letter Are Already in the Public Domain and Cannot Be Classified Under Any Standard.

As noted above, a substantial amount of information about this two-page letter is already in the public domain. Its date, sender, addressee, and general subject matter are matters of public record. The British Consul in Seattle has formally disclosed to respondent that a portion of the letter expresses

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[26] The government also suggests in passing that a lesser standard might somehow apply to information concerning the "foreign relations or foreign activities of the United States," under Section 1.5(d) of the Clinton Order. Pet'r Br. 34-35 n.33. It cannot be that a more general category of information, not confidential at the time of its exchange, is the subject of greater protection from disclosure under the Clinton Order. Such a rule would violate the well-settled canon of construction that the general cannot be read to trump the specific. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). It also ignores the fact that the Clinton Order made structural changes applicable to *all categories* of classifiable information by requiring that damage to the national security be identified and described and adopting a specific definition of that damage.

the British government's concerns relating to "questions of local prejudice." *See* note 18, *supra*. Given its nature and timing, it is quite likely the letter also discusses the doctrine of dual criminality and the British refusal to extradite Hagan and Croft on the second count of the indictment against them. The government's own affidavits in this case confirm certain other contents of the letter. Thus, the Shiels Declaration states:

> The letter comments on certain aspects of the extradition of two women, apparently British citizens, to face charges in the United States. The letter conveys certain concerns of the U.K. Government regarding the case which apparently was the subject of considerable attention in the British Parliament and otherwise in the U.K. with particular reference to the U.S.-U.K. extradition agreement.

Pet. App. 54a.

Under FOIA, respondent is entitled to "[a]ny reasonably segregable portion of a record" after deletion of any exempt portions. 5 U.S.C. § 552(b). "In determining segregability, 'courts must construe the exemptions narrowly with the emphasis on disclosure.' " *Church of Scientology Int'l v. Department of Justice*, 30 F.3d 224, 228 (1st Cir. 1994) (citing *Wightman v. Bureau of Alcohol Tobacco & Firearms*, 755 F.2d 979, 983 (1st Cir. 1985)). Clearly portions of this document contain information of public record or details about a long since concluded criminal case, information that cannot possibly pose a national security threat under any standard. Thus, at a minimum, respondent is entitled to a remand for a proper segregability determination under any new interpretation of the Clinton Order adopted by this Court.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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