

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.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS AND THE SOCIETY OF
PROFESSIONAL JOURNALISTS IN SUPPORT OF
RESPONDENT**

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INTEREST OF *AMICI CURIAE*¹

Respondent Leslie Weatherhead is not a journalist, but the plight of his Freedom of Information Act request will

¹ Pursuant to Sup. Ct. R. 37.6, counsel for *amici curiae* authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief. Written consent of all parties to the filing of the brief *amici curiae* has been filed with the Clerk pursuant to Sup. Ct. R. 37.3(a).

affect the ability of the media to inform the public about the federal government's actions.

The media have used FOIA for the last thirty-three years to access government information. The media have then reported on their findings to the public, a large percentage of which relies on them to expend time and resources uncovering information that would otherwise not be easily accessible. One essential area of reporting is in uncovering and explaining findings about foreign affairs.

The media have a strong interest in the proper resolution of this case. The government argues that executive agencies can unilaterally exempt categories of documents from FOIA and the declassification criteria promulgated in the current executive order on declassification. If the Court accepts the government's argument, it will have disregarded the plain language of a statute and an executive order and ignored the public policies underlying those enactments.

The Reporters Committee for Freedom of the Press serves as a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Society of Professional Journalists is a voluntary nonprofit journalism organization representing every branch and rank of print and broadcast journalism. SPJ is the largest membership organization for journalists in the world, and for more than 90 years, SPJ has been dedicated to encouraging a climate in which journalism can be practiced freely, fully, and in the public interest.

SUMMARY OF ARGUMENT

This case does not involve a private citizen or entity attempting to get information about other private citizens or entities. It does not involve an effort by someone to get hundreds of thousands of dollars worth of information from the government. Instead, this case involves the efforts of a defense attorney to get a single letter from the British government concerning his client's extradition from Great Britain.

But on a broader plane, this case raises the question of how much leeway Congress has given the executive branch to withhold information ostensibly to protect "national security." Congress undoubtedly has given the executive branch the ability to set the criteria under which agencies withhold information based on the national security exemption. But Congress has never set aside the government's mandate of openness as expressed in the Freedom of Information Act. Information can be withheld only if it meets predetermined criteria set out in an executive order.

Congress passed FOIA in 1966 to ensure that the American public would be informed about its federal government and substantially amended the Act in 1974 to make it stronger. FOIA starts with the assumption that federal government information is subject to disclosure and mandates *de novo* judicial review when a person or entity requesting information complains that a federal agency improperly denied the request. Congress set out only nine categories of information that can be exempted from disclosure. Information can fall within an exemption only if it meets specific, enumerated criteria.

FOIA's first exemption allows withholding to protect national security. Exemption 1 — as amended by Congress in

1974 — gives the responsibility to the President of the United States to determine the criteria under which information can be withheld to protect national security.

Therefore, under FOIA's statutory scheme, when a FOIA requestor seeks information, an agency can only claim the national security exemption after it reviews the currently-applicable executive order and determines that the requested information meets the criteria for nondisclosure as established by the President. And if the FOIA request is denied, the requesting party is entitled to *de novo* judicial review in federal court.

In 1995, President Clinton signed an executive order that dramatically changed the criteria under which Exemption 1 decisions can be made by federal agencies. Most importantly for this case, it requires the government to identify and describe the damage to national security that would result from the release of requested information before an agency can withhold it as classified. The executive order also left no room for an agency to withhold an entire category of information.

This is not a case where the executive branch seeks assistance from this Court in interpreting a congressional statute. Instead, it is a case where the executive branch seeks permission from the judicial branch to ignore the plain language of congressional legislation and an executive order signed by the sitting President.

ARGUMENT

I. FOIA gives the public a right to access federal government information with only narrow exceptions.

Congress enacted FOIA in 1966 after eleven years of investigation and deliberation.² In enacting FOIA, Congress intended to establish “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)). FOIA replaced a statute “plagued with vague phrases” that gave agencies essentially unlimited discretion to withhold information.³ The law mandates disclosure subject only to specific, delineated objections.⁴

²See Harold C. Relyea, *The Evolution of Government Information Security Classification Policy: A Brief Overview (1972-1992)* (Cong. Res. Serv., Washington, D.C.), Dec. 1, 1992, at 46-47; see also Daniel Patrick Moynihan, *Secrecy: A Brief Account of the American Experience*, in *SECRECY A-60* (Comm. on Protecting and Reducing Govt. Secrecy 1997).

³*EPA v. Mink*, 410 U.S. 73, 79 (1973) (discussing § 3 of the Administrative Procedure Act of 1946, 60 Stat. 237, 238, *codified at* 5 U.S.C. § 1002 (1964)); see also S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965).

⁴See *Rose*, 425 U.S. at 361 (“To make crystal clear the congressional objective . . . Congress provided . . . that nothing in the Act should be read to ‘authorize withholding of information . . . except
(continued...)”).

II. Congress gave the President the power to set Exemption 1 criteria.

Here, the government is attempting to subvert both the plain language and underlying policy objectives of the legislative scheme.

Exemption 1 states that FOIA does not apply to matters that are

(1)(A) specifically authorized *under criteria established by an Executive order* to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.

5 U.S.C. § 552(b)(1) (emphasis added). In drafting Exemption 1, Congress specifically gave the executive branch the power to set the *standards* for protecting information that could harm national security, but it did not cede its legislative mandate that only narrow, specific categories of information are exempt from the broad range of FOIA.

Congress created a statutory scheme under which the exemption to disclosure of documents for national defense or foreign policy must be made under guidelines established by the executive branch, and any complaints that federal agencies are not abiding by the criteria that the executive branch established must be considered *de novo* by the judicial branch.

Under this statutory scheme, Presidents Carter, Reagan,

⁴(...continued)
as specifically stated”) (citing Freedom of Information Act § (d), 5 U.S.C. § 552(d) (1994 & Supp. IV 1998).

and Clinton have all signed executive orders since the 1974 FOIA amendments concerning the criteria that agencies should use in determining whether they should classify information. *See* Exec. Order No. 12,065, 3 C.F.R. 190 (1979); Exec. Order No. 12,356, 3 C.F.R. 166 (1983); Exec. Order No. 12,958, 3 C.F.R. 333 (1995).

III. President Clinton's classification executive order dramatically changed the criteria for national security exemptions to FOIA.

From 1982 until 1995, President Reagan's Executive Order 12,356 allowed federal agencies to withhold enormous amounts of information under Exemption 1. *See* Exec. Order No. 12,356, 3 C.F.R. 166 (1983) (hereinafter "Reagan Order"). The outcry from the effect that the Reagan Order had on FOIA requests was a factor in leading President Clinton to dramatically alter the criteria in 1995.

The Reagan Order established a presumption in favor of classification when any doubt about the status of information existed. Reagan Order 1.1(c). It significantly eased the ability of agencies to classify information. Reagan Order 1.1(c). It provided that "[u]nauthorized disclosure of foreign government information . . . is presumed to cause damage to the national security," while broadly defining "foreign government information" as including "information provided by a foreign government . . . with the expectation, express or implied, that the information, the source of the information, or both, are to be held in confidence." Reagan Order 1.3(c), 6.1(d)(i). It also allowed an agency to classify documents without delineating any identifiable damage that would result from disclosure and allowed exemption whenever a classifier

determined that the information “either by itself or in the context of other information” could damage the national security. Reagan Order 1.3(b).

Under the criteria of the Reagan Order, it was easy to presume that correspondence sent from a foreign government to the United States government should not be disclosed if the foreign government had either expressly or impliedly indicated that the information or the source of the information should be held in confidence.

The Reagan order led to ringing complaints about the state of FOIA requests for national defense or foreign policy matters. For example, some reporters referred to the statute’s name of “Freedom of Information Act” as an “oxymoron” under the Reagan Order, and a 1992 panel of media experts listed the federal government’s refusal to disclose requested documents as one of the most important stories of the year. See Chris Norris and Peter Tira, *The Press Passes*, S.F. BAY GUAR., Jan. 22, 1992; Peter Montgomery and Peter Overby, *The Fight to Know*, COMMON CAUSE MAG., July/Aug. 1991.

Following the 1992 Presidential campaign, President Clinton issued a directive creating an interagency task force responsible for “drafting a new executive order that reflects the need to classify and safeguard national security information in the post Cold War period.” Presidential Review Directive 29 (April 26, 1993). He then disseminated an October 1993 memorandum calling upon federal agencies to reaffirm their commitment to the Freedom of Information Act: “Openness in government is essential to accountability and the Act has become an integral part of that process.” President’s Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act, 29

WEEKLY COMP. PRESS DOC. 1999 (Oct. 4, 1993), *quoted in* Office of Information and Privacy, U.S. Dept. of Justice, *Freedom of Information Act Guide & Privacy Act Overview* 3 (Sept. 1998 ed.).

In fact, the view that the government should classify fewer documents and should declassify documents that had been originally classified was not unique to the new administration. It had been expressed by people inside and outside of the government for years. Former solicitor general Edwin Griswold, who served during the Nixon administration, acknowledged the problem of over-classification:

It quickly becomes apparent to any person who has considerable experience with classified material that there is a massive over-classification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another. There may be some basis of short-term classification while plans are being made, or negotiations are going on, but apart from details of weapons systems, there is very rarely any real risk to current national security from the publication of facts relating to transactions in the past, even the fairly recent past. This is the lesson of the Pentagon Papers experience, and it may be relevant now.

Edwin N. Griswold, "Secrets Not Worth Keeping," *Washington Post*, Feb. 15, 1989, at A25; *see also* Daniel Patrick Moynihan, *Secrecy: A Brief Account of the American Experience*, in *SECRECY A-63* (Comm. on Protecting and Reducing Govt. Secrecy 1997).

By fiscal year 1993, federal agencies had conducted 6.3 million "classified actions" in one year, declassification

activity had decreased by 30 percent, and the National Archives and Records Administration alone had more than 325 million pages of classified documents. *See* Steven Aftergood, *SECRECY & GOVT. BULLETIN* (June 1994) (quoting the 1993 Information Security Oversight Office's Report to the President and Jeanne Schauble of the National Archives and Records Administration). The House Appropriations Defense Subcommittee wrote to President Clinton that his administration should "produce a comprehensive post-Cold War reform plan that addresses the current problem of overclassification, which exacts excessive costs both in dollars and in the ability of a democratic society to operate," and even the men and women doing the classification complained in a 1992 statement that the public "trust has been violated too many times" because classification decisions had not been made "in the best interest of the nation and the people." David C. Morrison, *For Whose Eyes Only?*, *NAT. JOUR.*, Feb. 26, 1994, at 473 (quoting the House Appropriations Defense Subcommittee and the National Classification Management Society). The task force held public hearings, gathering many views that too much information was too easily classified. For instance, Robert D. Steele, a former Marine intelligence officer, told the task force that "[a]ny executive order promulgated in the future should begin with the premise that information, including intelligence, is the most useful when widely disseminated." David C. Morrison, *For Whose Eyes Only?*, *NAT. JOUR.*, Feb. 26, 1994, at 474.

As the task force drafted the executive order, it stated that one of the "Major Changes" should be that the executive order "[e]liminates the presumption that any category of information is automatically classified." Presidential Review Directive 29 Task Force, Information Security Oversight

Office (documents pertaining to draft dated August 31, 1993).

In April 1995, President Clinton signed Executive Order 12,958, which fundamentally altered the classification landscape in favor of disclosure by making reliance on Exemption 1 much more difficult for federal agencies. *See* Exec. Order No. 12,958, 3 C.F.R. 333 (1995) (hereinafter “Clinton Order”). In signing the Order, President Clinton explained that one of his express motivations was to “keep a great many future documents from ever being classified”:

. . . [This order] will sharply reduce the permitted level of secrecy within our Government, making available to the American people and posterity most documents of permanent historical value that were maintained in secrecy until now.

. . . .

. . . [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 classification unclassified. We will not permit the reclassification of information after it has been declassified and disclosed under proper authority. We will authorize agency heads to balance the public interest in disclosure against the national security interest in making declassification decisions. And, *we will no longer presumptively classify certain categories of information, whether or not the specific information otherwise meets the strict standards for classification.*

Taken together, these reforms will greatly reduce the amount of information that we classify in the first place and the amount that remains classified.

Statement on Signing the Executive Order on Classified National Security Information, 31 WEEKLY COMP. PRESS DOC. 633 (April 17, 1995) (emphasis added). The accompanying Clinton Order laid out new criteria for classification:

Sec. 1.2. Classification Standards. (a) Information may be originally classified under the terms of this order only if *all* of the following conditions are met:

(1) an original classification authority is classifying the information;

(2) the information is owned by, produced by or for, or is under the control of the United States Government;

(3) the information falls within one or more of the categories of information listed in section 1.5 of this order; and

(4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security and the original classification authority is able to identify or describe the damage.

Clinton Order 1.2(a) (emphasis added). “Damage to the national security” was defined as “harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, to include the sensitivity, value, and utility of that information.” Clinton Order 1.1(l). The Executive Order also eliminated any presumption that categories of information are automatically exempt from disclosure and instead stated that agencies should presume that documents are subject to disclosure. *See* Clinton Order Preamble, 1.2(b). It provided that all doubts

about whether a document can be disclosed must be resolved in favor of disclosure. *See* Clinton Order 1.2(b).

Under the criteria in the Clinton Order, government-to-government correspondence must be disclosed to a requesting party unless (a) release of the information would damage the national defense or foreign relations of the United States and (b) the agency seeking not to disclose the information can identify and describe the harm resulting from the disclosure of that information.

The Clinton Order reversed the tide of continued over-classification. During the first three years of the Clinton Order's implementation, federal agencies declassified 131 percent more pages than during the previous sixteen years combined. *See* Information Security Oversight Office's 1998 Report to the President (August 31, 1999).

In sum, the Clinton Order was intended to remedy the growing problem of over-classification, and the plain language of the order makes that objective clear.

IV. The government's proposed reading of Exemption 1 allows it to ignore the plain language of FOIA and the Clinton Order.

In its brief, the government takes the extraordinary position that the Court should ignore the plain language of FOIA and the plain language of the Clinton Order and instead allow the executive branch of the government the unfettered ability to create new categories of exemptions for areas such as "exchanges between governments." Petitioner's Brief at 7-8 (citing Declaration of Peter M. Sheils, Acting Information and Privacy Coordinator and Acting Director of Office of

Freedom of Information, Privacy, and Classification Review for the Department of State, *Weatherhead v. U.S.A.*, No. 95-0519-FVS, E.D. Wash. (March 5, 1996) (arguing in favor of exempting “exchanges between governments” after the British Foreign and Commonwealth Office, through the British Embassy in Washington, stated about the letter withheld in this case that it was “unable to agree to its release”). The government points to neither FOIA nor the Clinton Order to justify its decision; instead, it makes conclusory statements about custom and practice:

It is a longstanding custom and accepted practice to treat as confidential and not subject to public disclosure information and documents exchanged between governments and their officials. . . . Diplomatic confidentiality obtains even between governments that are hostile to each other and even with respect to information that may appear to be innocuous.

Declaration of Patrick F. Kennedy, Assistant Secretary of Administration for the Department of State, *Weatherhead v. Department of Justice*, No. 95-0519-FVS, E.D. Wash. (April 11, 1996).

Three years after the initial determination, and only after the case was pending at the court of appeals, Acting Secretary of State Strobe Talbott filed a further declaration stating that the communication should be presumptively declared classified under a rationale that could exempt from disclosure all communications from all foreign governments. Declaration of Strobe Talbott, Acting Secretary of State, *Weatherhead v. U.S.A.*, No. 96-36260, 9th Cir. (March 2, 1999). The Clinton Order itself — drafted by members of the executive branch and signed by the chief executive — set the

criteria that the executive branch now seeks to avoid.

The government also complains in its brief that the judicial branch of the government should not interfere with the unilateral FOIA decisions of the executive branch. Petitioner's Brief at 17-35. But it is the executive branch that refuses to show any deference to the separation of powers. FOIA is a legislative act. It contains specific language mandating that the judicial branch must review FOIA complaints on a *de novo* basis. In essence, the executive branch is requesting that the judicial branch refuse to comply with a framework created by the legislative branch. It does so even though Congress deferred to the executive branch the task of setting criteria for classification, demanding only that it actually set those criteria out in an executive order.

Finally, the government also cites Exemption 1 cases that interpret executive orders that preceded the Clinton Order. Petitioner's Brief at 47-48 (citing, among other cases, *CIA v. Sims*, 471 U.S. 159 (1985), and *Haig v. Agee*, 453 U.S. 280 (1981)). Citation to those cases is inapposite. As explained above, the Clinton Order changed the criteria by which the classifying agency — and the federal district court in its *de novo* review — must evaluate the request.

The government's argument in this case that it should be allowed to exempt broad categories of information from FOIA is reminiscent of its similar argument that it made to the Court in *Department of Justice v. Landano*, 508 U.S. 165 (1993). There, the government requested that this Court make new law under FOIA Exemption 7(D) by endorsing an unwritten "universal" presumption that all sources supplying information to the FBI in the course of a criminal investigation are confidential sources under FOIA. This Court unani-

mously declined that request, using a rationale instructive for this case:

. . . Considerations of ‘fairness’ . . . counsel against the Government’s rule. The Government acknowledges that its proposed presumption, though rebuttable in theory, is in practice all but irrebuttable. Once the FBI asserts that information was provided by a confidential source during a criminal investigation, the requester — who has no knowledge about the particular source or the information being withheld — very rarely will be in a position to offer persuasive evidence that the source in fact had no interest in confidentiality.

. . . .

. . . Congress did not expressly create a blanket exemption for the FBI; the language that it adopted requires every agency to establish that a confidential source furnished the information sought to be withheld under Exemption 7(D). The Government cites testimony presented to Congress prior to passage of the 1986 amendment emphasizing that the threat of public exposure under FOIA deters potential sources from cooperating with the Bureau in criminal investigations. But none of the changes made to Exemption 7(D) in 1986 squarely addressed the question presented here. In short, the Government offers no persuasive evidence that Congress intended for the Bureau to be able to satisfy its burden in every instance simply by asserting that a source communicated with the Bureau during the course of a criminal

investigation. *Had Congress meant to create such a rule, it could have done so much more clearly.*

Department of Justice v. Landano, 508 U.S. 165, 176-79 (1993) (citations omitted) (emphasis added).

Here, for the government's arguments to succeed, Congress would have needed to amend the explicit language of FOIA and President Clinton would have needed to issue a new executive order. Neither of those events have taken place.

CONCLUSION

The plain language of Executive Order 12,958 sets out criteria that aid in the retrieval of information concerning United States foreign relations. But the Department of Justice's tortured reading of the Clinton Order would reinstitute the barriers to the disclosure of foreign relations information that existed before 1995. Such a dramatic change in policy can — according to the terms of FOIA — only be implemented via executive order, not judicial fiat. In other words, the government would need to persuade the President — and not this Court — to change the language of the executive order to apply to future requests for foreign government correspondence.

The government has requested that this Court contravene the public's interest in ensuring that the judiciary respect Congress's plain language contained in FOIA and the executive branch's plain language used in Executive Order 12,958. This Court should deny the government's request.

Respectfully submitted,

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